

आयकर अपीलीयअधिकरण, विशाखापटणम पीठ, विशाखापटणम

IN THE INCOME TAX APPELLATE TRIBUNAL,  
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री दुव्वूरु आर एल रेड्डी, न्यायिक सदस्य एवं श्री एस बालाकृष्णन, लेखा सदस्य के समक्ष

BEFORE SHRI DUVVURU RL REDDY, HON'BLE JUDICIAL MEMBER &  
SHRI S BALAKRISHNAN, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./ I.T.A. No.2400/Mum/2014

(निर्धारण वर्ष / Assessment Year : 2008-09)

Deputy Commissioner of Income  
Tax-7(3),  
Mumbai.  
(अपीलार्थी/ Appellant)

Vs. M/s. Vizag Seaport Pvt Ltd,  
Mumbai.  
PAN: AABCV 2484 K  
(प्रत्यर्थी/ Respondent)

आयकर अपील सं./ I.T.A. No.2401/Mum/2014

(निर्धारण वर्ष / Assessment Year :2009-10)

Deputy Commissioner of Income  
Tax-7(3),  
Mumbai.  
(अपीलार्थी/ Appellant)

Vs. M/s. Vizag Seaport Pvt Ltd,  
Mumbai.  
PAN: AABCV 2484 K  
(प्रत्यर्थी/ Respondent)

आयकर अपील सं./ I.T.A. No.2402/Mum/2014

(निर्धारण वर्ष / Assessment Year :2005-06)

Deputy Commissioner of Income  
Tax-7(3),  
Mumbai.  
(अपीलार्थी/ Appellant)

Vs. M/s. Vizag Seaport Pvt Ltd.,  
Mumbai – 400 025.  
PAN: AABCV 2484 K  
(प्रत्यर्थी/ Respondent)

आयकर अपील सं./ I.T.A. No.2478/Mum/2015  
(निर्धारण वर्ष / Assessment Year : 2007-08)

Vizag Seaport Pvt Ltd., Visakhapatnam. PAN: AABCV 2484 K (अपीलार्थी/ Appellant)	Vs.	DCIT, Circle-7(3), Mumbai. (प्रत्यर्थी/ Respondent)
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आयकर अपील सं./ I.T.A. No.2479/Mum/2015  
(निर्धारण वर्ष / Assessment Year :2010-11)

Vizag Seaport Pvt Ltd., Visakhapatnam. PAN: AABCV 2484 K (अपीलार्थी/ Appellant)	Vs.	DCIT, Circle-7(3), Mumbai. (प्रत्यर्थी/ Respondent)
अपीलार्थी की ओर से/ Appellant by	:	Sri PJ Pardiwalla, CA
प्रत्यर्थी की ओर से / Respondent by	:	Sri MN Murthy Naik, CIT-DR
सुनवाई की तारीख / Date of Hearing	:	29/06/2022
घोषणा की तारीख/Date of Pronouncement	:	23/08/2022

### ORDER

PER S. BALAKRISHNAN, Accountant Member :

There are five appeals under consideration out of which three appeals are filed by the Revenue (ITA Nos. 2400, 2401 & 2402/Mum/2014) for the AYs 2008-09, 2009-10 and 2005-06 respectively and two appeals are filed by the assessee (ITA Nos.

2478 & 2479/Mum/2015) for the AYs 2007-08 and 2010-11 respectively. Since issues involved in these appeals are interconnected, therefore for the sake of convenience and adjudication purpose these appeals are clubbed, heard together and disposed off in this consolidated order.

**ITA No. 2402/Mum/2014 (Revenue's appeal)**  
**(AY: 2005-06)**

2. This appeal is filed by the Revenue against the order of the Learned Commissioner of Income Tax (Appeals)-13, Mumbai [the Ld. CIT(A)] in appeal No. CIT(A)-13/IT/335/11-12, dated 20/01/2014 arising out of the order passed U/s. 143(3) r.w.s 147 of the Income Tax Act, 1961 [“the Act”] for the AY 2005-06.

3. Brief facts of the case are that the assessee is a special purpose vehicle incorporated for the purpose of implementing a project envisaging construction and license out of equipping operation, management and maintenance of two multi purpose berths EQ-8 and EQ-9 in the northern arm of inner harbor at Visakhapatnam Port. The assessee is a successful bidder and was awarded construction of project of berth. Assessee filed its return of income for the AY 2005-06 declaring a business loss of

Rs. 16,00,27,807/-. While the AO assessed the loss U/s. 143(3) vide order dated 24/12/2007 at Rs.13,19,98,520/-. The case was subsequently reopened u/s 147 and a notice U/s. 148 of the Act was issued and served on the assessee. The assessee in its reply dated 15/4/2010 requested the AO to treat the return of income filed originally as to have been filed in response to notice U/s. 148 of the Act. Subsequently, notices U/s. 142(1) and 143(2) were also issued and served on the assessee. The Ld. AO provided the reasons for reopening u/s. 148 to the assessee on 16/12/2010. In response the assessee furnished his reply on 21/12/2010 on the issue of allowance of depreciation on project berth. Based on the submissions made by the assessee's representative, Ld. AO disallowed the claim of depreciation amounting to Rs. 8,17,73,779/- and passed the order U/s. 143(3) r.w.s 147 of the Act assessing the loss at Rs. 5,02,24,741/- on 31/12/2010. Aggrieved by the order of the Ld. AO, the assessee filed an appeal before the Ld. CIT(A)-13, Mumbai. The assessee before the Ld. CIT(A) agitated against the assessment order passed U/s. 143(3) r.w.s 147 of the Act based on the fact that notice issued U/s. 148 is misconceived and bad in law. The assessee's representative also made submissions before the Ld. CIT(A) regarding the claiming of depreciation of Rs.8,17,73,779/-.

The Ld. CIT(A) partly allowed the appeal, by allowing the depreciation of Rs. 8,17,73,739/- while rejecting the plea with respect to reopening of the case U/s. 147 of the Act. Aggrieved by the order of the Ld. CIT(A), the Revenue is in appeal before us.

4. The Revenue has raised the following grounds of appeal:

- “1 (i) *The Ld. CIT(A) has erred on facts and in law in directing the Assessing Officer to allow depreciation of Rs. 8,17,73,779/- U/s. 32 of the Act without properly appreciating the factual and legal matrix of the case as clearly brought out by the Assessing Officer.*
- (ii) *The Ld. CIT(A) has erred on facts and in law in directing the Assessing Officer to allow depreciation of Rs. 8,17,73,779/- U/s. 32 of the Act without properly appreciating the fact that the assessee was not the owner of port and has only the right to earn income till the expiry of contract period.*
2. *The Ld. CIT(A)'s order is contrary in law and on facts and deserves to be set aside.*
3. *The Appellant craves leave to amend or alter any ground or add a new ground that may be necessary.*
4. *The appellant prays that the order of Ld. CIT(A) on the above grounds be set aside and that of the AO restored.”*

5. The Learned Departmental Representative [Ld. DR] referred to the decision of the Hon'ble Mumbai High Court in the case of North Karnataka Expressway Ltd vs. Commissioner of Income Tax reported in [2015] 372 ITR 145 (Bombay) and argued that the assessee is only a licensor and does not own the property and

hence depreciation cannot be allowed on the Berths constructed by the assessee. The Ld. DR supported the order of the Ld. AO.

*Per contra*, at the outset, the Learned Authorized Representative [Ld. AR] invoked the provisions of Rule 27 of the ITAT Rules, 1963 and argued that reopening of the assessment itself is bad in law. The Ld. AR also pointed out to page 43 of the paper book wherein the notice U/s. 142(1) of the Act dated 10/10/2007 was issued on the assessee requesting the details called for with respect to additions to fixed assets. The Ld. AR also referred to the notice U/s. 142(1) of the Act dated 15/11/2007 (which finds a place at page 66 of the paper book) wherein vide Q. No. 7, the details bills for addition to fixed assets, project berth/buildings Rs. 81.91 Crores were asked to be submitted. The Ld. AR further submitted that in response to the notice, the assessee vide its submissions dated 5/12/2007 (which finds a place at pages 70 to 144 of the paper book) has provided the details with respect to additions to fixed assets during the Financial Year 2004-05 relevant to the AY 2005-06 along with the supporting documents. The Ld. AR therefore pleaded that there is no any fresh material in the possession of the AO for invoking the provisions of section 147 of the Act. The

Ld. AR also submitted that the assessee has disclosed the facts fully and truly before the Ld. AO. The Ld. AR therefore argued that it is only based on the change of opinion the case was reopened by the Ld. AO. The Ld. AR further pleaded that the action of the AO in invoking the provisions of section 147 of the Act be quashed.

6. We have heard both the parties and perused the materials available on record and the orders of the Authorities below. The assessee has challenged the reopening of the assessment before the Ld. CIT(A). The Ld. CIT(A) rejected this ground of appeal and hence the assessee has moved an application under Rule 27 of the ITAT Rules, 1963. Rule 27 of the ITAT Rules, 1963 reads as under:

*“The respondent though he may not have appealed, may support the order appealed against on any of the ground decided against him.”*

Since the AR raised the issue of invoking the provisions of Rule 27 of the ITAT Rules, 1963 supporting the order of the Ld. CIT(A) it deserves consideration. It is seen from the submissions made by the Ld. AR even though the assessee has not agitated the reopening while responding to the notice U/s. 148, has strongly agitated before the Ld. CIT(A) that the reopening is

misconceived, bad in law, invalid and hence unsustainable in law. It is also seen from the submissions of the Ld. AR that the assessee has submitted various bills with regard to addition to fixed assets to the tune of Rs. 81.91 Crores before the Ld. AO. However, it is noticed from the order of the Ld. AO that there is no discussion on the same by the Ld. AO. We find from the reasons provided to the assessee with regard to reopening of the assessment U/s. 147 that the AO has merely changed his opinion and without any additional material available before him, the AO has sought to reopen the assessment U/s. 147 of the Act. No doubt this issue has been decided against the assessee by the Ld. CIT(A) and assessee has not challenged that order but it can take up this issue before the Tribunal with the aid of Rule 27 because Rule 27 provided that assessee can agitate any ground, which has been decided against it, but if those arguments are being accepted by the Tribunal then the order of the Ld. CIT(A) can be upheld even on other issues, because the issue regarding reopening is going to hit the root and the moment it is held that reopening is bad in law then all other consequent proceedings would become redundant. A bare perusal of the annexure to the Notice u/s 142(1) dated 10/10/2007 and 15/11/2007 which was issued in the original assessment proceedings u/s 143 makes it

clear that the point on which re-assessment proceedings were initiated, was well considered in the original proceedings.

7. The Hon'ble High Court of Madras in CIT Vs India Cements Ltd [2020] 118 taxmann.com 99 (Madras) held as follows:

*32. Even in this appeal, no such fact has been brought to our notice nor pleaded in the memorandum of grounds of appeal and presumably that is the reason why the Revenue had raised the substantial questions involving the interpretation of Rule 27 of the Rules and conveniently was not focusing on the issue as to whether the reopening of assessment was on account of change of opinion. A reading of the reassessment order dated 31-3-2004 will clearly reveal that all facts and figures were gathered by the Assessing Officer only from the original return of income filed by the assessee. There was no fresh or tangible material available with the Assessing Officer to reopen the proceedings. Therefore, we have no hesitation to conclude that the reopening of the assessment beyond four years was clearly a case of change of opinion. For all the above reasons, substantial questions of law Nos. 1 to 3 are liable to be answered against the Revenue and consequently, it is held that the reopening of the reassessment is bad in law and is liable to be set aside.*

8. The Hon'ble Supreme Court in the case of Commissioner Of Income Tax, Delhi v. Kelvinator Of India Limited reported in (2010) **320 ITR 561 (SC)** held as follows:

*.....where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post 1-4-1989 , power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1-4-1989 , Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief.*

9. Respectfully following the above judicial pronouncements, we are of the considered view that the Ld. AO has erred in reopening the assessment u/s. 147 of the Act merely by changing his opinion which is unsustainable in law and therefore deserves to be quashed. Therefore, the grounds raised by the Revenue against the order passed U/s. 143(3) r.w.s 147 do not have any legs to stand and hereby dismissed.

10. In the result, appeal of the Revenue is dismissed.

**ITA No. 2478/Mum/2015 (Assessee's appeal)**

**(AY: 2007-08)**

11. This appeal filed by the assessee is against the order of the Ld. CIT(A) in appeal No.CIT(A)-13/IT-51/13-14, dated 30/12/2014 arising out of the order passed U/s. 143(3) r.w.s 147 of the Act for the AY: 2007-08.

12. The assessee has raised the following grounds of appeal:

- “1. *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in upholding the issuance of Notice dated 28<sup>th</sup> March, 2012 U/s. 148 of the Act by the ld. DCIT, Circle-7(3), Mumbai as well as reopening of the assessment of the appellant for the assessment year 2007-08 by rejecting the contentions and objections raised by the appellant and passing of assessment order dated 30<sup>th</sup> January, 2013 by the AO U/s. 143(3) r.w.s 147 of the Act.*
2. *On the facts and circumstances of the case, the Ld. CIT(A) erred in upholding the disallowance of the appellant's claim for allowance of depreciation on project berth of Rs. 17,53,11,007/- by following the judgment of the Hon'ble Bombay High Court in North Karnataka Expressway Ltd vs. CIT.*
3. *On the facts and circumstances of the case, the Ld. CIT(A) erred in upholding that the appellant was not the legal owner of the project berth for an indefinite period of time, despite the fact that Article 6(1)(b) contained in the License Agreement dated 8<sup>th</sup> November, 2001 entered into between the appellant and Visakhapatnam Port Trust clearly expressly and unambiguously provided that the ownership of the project berth shall remain with the appellant during the license period of 30 years.*

4. *Without prejudice to grounds no. 1 to 3 above, on the facts and circumstances of the case, the Ld. CIT(A) erred in not directing the AO to allow amortization of the expenditure incurred on development of the Project Berth.*
5. *The appellant craves leave to add, alter, modify or vary one or more grounds.”*

**13. Ground No.1 pertains to reopening of assessment u/s. 147 of the Act.**

14. The Ld. AR argued that the reopening of assessment by the Ld. AO is misconceived and bad in law. Per contra, the Ld. DR relied on the order of the Ld. Revenue Authorities.

15. We have considered the rival submissions, material available on record and gone through the orders of the Authorities below. We find that the Ld. AO issued notice U/s. 148 of the Act to disallow the depreciation amounting to Rs.17,53,11,007/- stating that the assessee is not the owner of the Berth constructed by it. Since the issue was debatable due to conflicting decisions regarding the allowability of depreciation for the developer of the infrastructure facility it is found that the AO has reopened the case U/s. 147. This reopening by the Ld. AO cannot be said to be a change of opinion but based on the conflicting decisions on the same issue available at that point of time. Therefore we are of the considered view that the reopening

is in accordance with law for this AY and accordingly this ground raised by the assessee is dismissed.

**16. Ground No.2 is with respect to disallowance of depreciation on the Project Berth amounting to Rs. 17,53,11,007/-.**

17. The Ld. AR argued that as per the License Agreement entered into with Visakhapatnam Port Trust (VPT) by the assessee, the assessee is owner of the asset for a period of 30 years. The Ld AR referred to Article No. 6.1(b) of the License Agreement which states as follows:

*“The ownership of all infrastructure assets, buildings, structures, berths, wharves, equipment and other immovable and movable assets constructed, installed, located, created as provided by the Licensee in the Licensor’s Assets pursuant to this agreement shall, until transfer to the Licensor in accordance with this Agreement, be with the Licensee.”*

18. The Ld. AR also argued the Ld. CIT(A) by relying on the decision of the Hon’ble Bombay High Court in the case of North Karnataka Expressway Ltd vs. CIT in ITA No. 499 of 2012 wherein the High Court has decided the issue of depreciation U/s. 32 of the Act is not available to the tax payer. The Ld. AR stated that the facts of the case ie., North Karnataka Expressway

Ltd (supra) are distinguishable as it is construction of roads on the lands belonging to the Government and only the collection of toll fees was permitted to the assessee as per Government notified rates and hence it cannot be compared with the present case. Alternatively the Ld.AR relied on the judgement of Hon'ble Allahabad High Court in CIT Vs Noida Toll Bridge Co Ltd. [2013] 30 taxmann.com 207 (Allahabad).

*Per contra*, the Ld. DR heavily relied on the decision of the Bombay High Court in the case of North Karnataka Expressway Ltd (supra) and also on the Circular No.9/2014, dated 23/04/2014 issued by the Central Board of Direct Taxes [CBDT] with respect to treatment of expenditure incurred for development and infrastructure in Build Operate and Transfer (BOT) agreement. The Ld. DR supported the orders of the Ld. Revenue Authorities.

19. We have heard the rival contentions and gone through the material available on record and the orders of the Authorities below. A perusal of the License Agreement entered in to by the assessee with the Visakhapatnam Port Trust, states that the ownership of the assets, buildings, structures, berths, wharves, equipment and other immovable and movable assets constructed,

installed, located, created as provided by the Licensee (the assessee), shall, **until transfer** to the Licensor namely Visakhapatnam Port Trust will be with the assessee for a period of 30 years. Article 13 of the License Agreement states that, on the expiry of license period that i.e., after thirty years, the licensee shall transfer the assets to the licensor. Admittedly there is a transfer at a future date. It is also very clear from the agreement that the assessee is entitled for collecting the fees for the use of the Berths. The assessee can never become a legal owner of the Berth. Even though, the construction was made in leased assets, which are transferable after a certain period, the assessee cannot claim ownership of the same for the purpose of section 32 of the Act. In the instant case, the expenditure incurred by the assessee on BOT project brings some kind of enduring benefit to the assessee. However, the expenditure incurred by the assessee does not bring into existence any capital asset for the assessee. The asset which was created belongs to the Visakhapatnam Port Trust and the assessee derives only an enduring business advantage out of it. Thus, the expenditure incurred by the assessee should be looked upon for the purpose of conducting of business by the assessee. The assessee derives the benefit of collection of revenue for a period of 30 years from the License

Agreement and hence the expenditure incurred by the assessee towards BOT Project should be treated as a revenue expenditure to be recovered over the License period of 30 years. This view is fortified by the decision of the Hon'ble Supreme Court in the case of Madras Auto Services Limited reported in (233 ITR 468) (SC). Consequently, the assessee is eligible to amortize the expenditure relating to the BOT project over the period of the benefit derived by the assessee, i.e., for a period of 30 years. Reliance placed by the Ld.AR on Noida Toll Bridge Co Ltd (Supra) could not be accepted because it was rightly distinguished in North Karnataka Expressway Ltd (supra), with which we are in agreement. Undisputedly the assessee has incurred huge expenditure for the construction of the Berth EQ8 and EQ9. The VPT instead of reimbursing the cost of construction to the assessee has granted right/benefit of enduring business revenue to the assessee for a period of 30 years. As per the License agreement the assessee is entitled for the Terminal Value at the end of the License period, at the time of transfer to the Licensor. Therefore the assessee needs to recover the cost incurred in the construction of the Berths, which is out of the fees to be collected from users. The benefit of earning revenue from the berth constructed by the

assessee, but not legally owned by the assessee, arises from the license granted by the Licensor (VPT). Considering this peculiar situation to recover the cost of construction, where the assessee could not claim depreciation, CBDT Circular No. 09/2014 has clarified the treatment of such expenditure incurred in BOT agreements. Therefore, in our considered view the assessee is entitled for the amortization of the assets developed under BOT project over the lease period of the asset. The CBDT Circular No. 09/2014 being a clarificatory Circular this can be applied retrospectively for the AY 2007-08 also. We also refer para 7 of the said Circular which is reproduced below:

*“7. In the case where an assessee has claimed any deduction out of initial cost of development of infrastructure facility of roads/highways under BOT projects in earlier years, the total deduction so claimed for the Assessment Years prior to the Assessment Year under consideration may be deducted from the initial cost of infrastructure facility of roads/highways and the cost ‘so reduced’ shall be amortized equally over the remaining period of toll concessionaire agreement.”*

From the plain reading of the above para, we are of the considered view that the Circular can be applied retrospectively in respect of deductions claimed in previous assessment years. We therefore direct the Ld. AO to amortize the cost of buildings, structures, berths, wharves, equipment and other immovable and movable assets constructed, installed, located, created as

provided by the Licensee after deducting depreciation claimed by the assessee and allowed by the revenue in earlier years so that the amortization claimed for the year under consideration shall be the difference between the initial cost and the depreciation already claimed by the assessee which needs to be amortized over the remaining license period. It is ordered accordingly. Thus, this ground no.2 raised by the assessee is allowed for statistical purposes.

20. The other grounds (Grounds No.3,4 & 5) raised by the assessee are general in nature and therefore they need not be adjudicated.

21. In the result, this appeal of the assessee is partly allowed for statistical purposes.

**ITA No.2400/Mum/2014 (Revenue's Appeal)(AY: 2008-09)**

**ITA No.2401/Mum/2014 (Revenue's Appeal)(AY: 2009-10)**

22. Both these appeals are filed by the Revenue. ITA No.2400/Mum/2014 is filed against the order of the Ld. CIT(A)-13, Mumbai in appeal No.CIT(A)-13/IT/336/11-12, dated 20/01/2014 arising out of order passed U/s. 143(3) r.w.s 147 of

the Act for the AY 2008-09. ITA No. 2401/Mum/2014 is filed against the order of the Ld. CIT(A)-13, Mumbai in appeal No.CIT(A)-13/IT/303/11-12, dated 20/01/2014 arising out of the order passed U/s. 143(3) of the Act for the AY 2009-10.

23. Since the grounds raised by the revenue in both these appeals are identical, the only difference is in figures in the claim of depreciation, both these appeals are clubbed and adjudicated together. However, we take ITA No.2400/Mum/2014 as a lead appeal for the sake of convenience.

24. The Revenue has raised the following grounds of appeal:

- “1 (i) *The Ld. CIT(A) has erred on facts and in law in directing the Assessing Officer to allow depreciation of Rs. 16,55,47,631/- U/s. 32 of the Act without properly appreciating the factual and legal matrix of the case as clearly brought out by the Assessing Officer.*
- (ii) The Ld. CIT(A) has erred on facts and in law in directing the Assessing Officer to allow depreciation of Rs. 16,55,47,631/- U/s. 32 of the Act without properly appreciating the fact that the assessee was not the owner of port and has only the right to earn income till the expiry of contract period.*
2. *The Ld. CIT(A)’s order is contrary in law and on facts and deserves to be set aside.*
3. *The Appellant craves leave to amend or alter any ground or add a new ground that may be necessary.*
4. *The appellant prays that the order of Ld. CIT(A) on the above grounds be set aside and that of the AO restored.”*

25. Ground No.1 (i) & (ii) is with respect to allowance of depreciation on the Project Berth amounting to Rs. 16,55,47,631/-.

26. The Ld. DR heavily relied on the decision of the Bombay High Court in the case of North Karnataka Expressway Ltd (supra). The Ld. DR supported the orders of the Ld. Revenue Authorities.

27. The Ld. AR argued that as per the License Agreement entered into with Visakhapatnam Port Trust by the assessee, the assessee is owner of the asset for a period of 30 years. The Ld AR referred to Article No.6.1(b) of the License Agreement which states as follows:

*“The ownership of all infrastructure assets, buildings, structures, berths, wharves, equipment and other immovable and movable assets constructed, installed, located, created as provided by the Licensee in the Licensor’s Assets pursuant to this agreement shall, until transfer to the Licensor in accordance with this Agreement, be with the Licensee.”*

28. The Ld. AR relied on the decision in ACIT vs. Progressive Constructions Ltd reported in [2018] 92 taxmann.com 104 (Hyderabad – Trib.) (SB) and pleaded that the asset created by the assessee on BOT shall be treated as intangible asset and

accordingly the depreciation shall be allowed. Alternatively the Ld. AR also pleaded that the order of the Ld. CIT(A) be upheld.

29. We have heard the rival contentions and gone through the material available on record and the orders of the Authorities below. A perusal of the License Agreement by the assessee with the Visakhapatnam Port Trust states that the ownership of the assets, buildings, structures, berths, wharves, equipment and other immovable and movable assets constructed, installed, located, created as provided by the Licensee (the assessee), shall, **until transfer** to the Licensor namely Visakhapatnam Port Trust will be with the assessee for a period of 30 years. Article 13 of the License Agreement states that, on the expiry of license period that ie., after thirty years, the licensee shall transfer the assets to the licensor. Admittedly there is a transfer at a future date. It is also very clear from the agreement that the assessee is entitled for collecting the fees for the use of the Berths. The assessee can never become a legal owner of the Berth. Even though, the construction was made in leased assets, which are transferable after a certain period, the assessee cannot claim ownership of the same for the purpose of section 32 of the Act.

30. In the instant case, the expenditure incurred by the assessee on BOT project brings some kind of enduring benefit to the assessee. However, the expenditure incurred by the assessee does not bring into existence any capital asset for the assessee. The asset which was created belongs to the Visakhapatnam Port Trust and the assessee derives only an enduring business advantage out of it. Thus, the expenditure incurred by the assessee should be looked upon for the purpose of conducting of business by the assessee. The assessee derives the benefit of collection of revenue for a period of 30 years from the License Agreement and hence the expenditure incurred by the assessee towards BOT Project should be treated as a revenue expenditure to be recovered over the License period of 30 years. This view is fortified by the decision of the Hon'ble Supreme Court in the case of Madras Auto Services Limited reported in (233 ITR 468) (SC). Consequently, the assessee is eligible to amortize the expenditure relating to the BOT project over the period of the benefit derived by the assessee, i.e., for a period of 30 years. Reliance placed by the Ld.AR on Noida Toll Bridge Co Ltd (Supra) could not be accepted because it was rightly distinguished in North Karnataka Expressway Ltd (supra), with which we are in agreement.

Undisputedly the assessee has incurred huge expenditure for the construction of the Berth EQ8 and EQ9. The VPT instead of reimbursing the cost of construction to the assessee has granted right/benefit of enduring business revenue to the assessee for a period of 30 years. As per the License agreement the assessee is entitled for the Terminal Value at the end of the License period, at the time of transfer to the Licensor. Therefore the assessee needs to recover the cost incurred in the construction of the Berths, which is out of the fees to be collected from users. The benefit of earning revenue from the berth constructed by the assessee, but not legally owned by the assessee, arises from the license granted by the Licensor (VPT).

31. Considering this peculiar situation to recover the cost of construction, where the assessee could not claim depreciation, CBDT Circular No. 09/2014 has clarified the treatment of such expenditure incurred in BOT agreements. Therefore, in our considered view the assessee is entitled for the amortization of the assets developed under BOT project over the lease period of the asset. The CBDT Circular No. 09/2014 being a clarificatory Circular this can be applied retrospectively for the AY 2008-09

and 2009-10 also. We also refer para 7 of the said Circular which is reproduced below:

*“7. In the case where an assessee has claimed any deduction out of initial cost of development of infrastructure facility of roads/highways under BOT projects in earlier years, the total deduction so claimed for the Assessment Years prior to the Assessment Year under consideration may be deducted from the initial cost of infrastructure facility of roads/highways and the cost ‘so reduced’ shall be amortized equally over the remaining period of toll concessionaire agreement.”*

32. From the plain reading of the above para, we are of the considered view that the Circular can be applied retrospectively in respect of deductions claimed in previous assessment years. We therefore direct the Ld. AO to amortize the cost of buildings, structures, berths, wharves, equipment and other immovable and movable assets constructed, installed, located, created as provided by the Licensee after deducting depreciation claimed by the assessee and allowed by the revenue in earlier years so that the amortization claimed for the year under consideration shall be the difference between the initial cost and the depreciation already claimed by the assessee which needs to be amortized over the remaining license period. It is ordered accordingly. Thus, this ground no.(i) & (ii) raised by the Revenue is allowed for statistical purposes.

33. Grounds No.2, 3 and 4 raised by the Revenue are general in nature and therefore they need not be adjudicated.

34. Since the grounds raised by the Revenue are same in both the appeals, our decision given in ITA No.2400/Mum/2014 *mutatis mutandis* applies to the ITA No.2401/Mum/2014 also. It is ordered accordingly.

35. In the result, both appeals filed by the Revenue are partly allowed for statistical purposes.

**ITA No.2479/Mum/2015 (Assessee's appeal)**

**AY: 2010-11**

36. This appeal filed by the assessee against the order of the Ld. CIT(A)-14, Mumbai in appeal No. CIT(A)-13/IT-50/13-14, dated 22/12/2014 arising out of the order passed U/s. 143(3) of the Act for the AY 2010-11.

37. The assessee has raised the following grounds of appeal:

- “1. *On the facts and in the circumstances of the case, the Ld. CIT(A) erred in upholding the disallowance of the appellant's claim for allowance of depreciation on project berth of Rs. 14,30,76,151/- by following the judgment of the Hon'ble Bombay High Court in North Karnataka Expressway Ltd vs. CIT in the assessment*

order dated 5<sup>th</sup> March, 2013 passed U/s. 143(3) of the Act for the AY 2010-11.

2. *On the facts and circumstances of the case, the Ld. CIT(A) erred in upholding that the appellant was not the legal owner of the project berth for an indefinite period of time, despite the fact that Article 6(1)(b) contained in the License Agreement dated 28<sup>th</sup> November, 2001 entered into between the appellant and Visakhapatnam Port Trust clearly, expressly and unambiguously provided that the ownership of the Project Berth shall remain with the appellant during the License period of 30 years.*
3. *Without prejudice to Ground No.1 to 2 above, on the facts and circumstances of the case, the Ld. CIT(A) erred in not directing the AO to allow amortization of the expenditure incurred on development of project berth.*
4. *On the facts and circumstances of the case, the Ld. CIT(A) erred in upholding the disallowance of interest expenditure of Rs. 1,91,00,000/- on work-in-progress under section 36(1)(iii) of the Act.*
5. *On the facts and circumstances of the case, the CIT(A) erred in upholding the disallowance of deduction of provisions for doubtful debts of Rs. 10,54,813/-.*
6. *The appellant craves leave to add, alter, modify or vary one or more grounds.”*

**38. Grounds No.1, 2 and 3 raised by the assessee pertain to disallowance of depreciation of Rs 14,30,76,151/- on Project Berth.**

39. This issue is identical to that of the raised by the Revenue in its appeals for the AY 2008-09 and 2009-10 (ITA Nos. 2400 & 2401/Mum/2014). While adjudicating these Revenue appeals for

the AY 2008-09 and 2009-10, we have already dealt with this issue. Therefore, considering the identical nature of the issue, our decision given on this issue while dealing with the Revenue's appeals for the for the AY 2008-09 and 2009-10 (ITA Nos. 2400 & 2401/Mum/2014) *mutatis mutandis* applies to the issues involved in Grounds No.1, 2 and 3 of the instant appeal. Accordingly, these grounds raised by the assessee are allowed for statistical purposes.

40. With respect to ground no.4, the Ld. AR argued that the interest did not pertain to acquisition of any assets nor there any expansion of business. Therefore, he pleaded that the interest was incurred in the normal course of business. The assessee's representative before the Ld. CIT(A) has submitted that the effective disallowance shall be Rs. 69 lakhs against the disallowance made by the Ld. AO to the extent of Rs. 1,91,00,000/-. The Ld.AR further submitted that the Ld. CIT(A) in the assessee's own case for the AY 2009-10 deleted the additions made by the AO with respect to interest U/s. 36(1)(iii) of the Act. Per contra the Ld. DR relied on the orders of Revenue Authorities.

41. We have heard the rival contentions and gone through the material available on record and the orders of the Authorities below. We find that the assessee has submitted an effective disallowance of Rs. 69 lakhs and the Ld. CIT(A) had therefore allowed the balance of Rs. 1,22,00,000/-. We find from the submissions made by the assessee before CIT(A), that the assessee has voluntarily admitted an effective disallowance of Rs 69,00,000/-, where the LD.CIT(A) has rightly considered the same. Therefore, in view of such voluntary admission of Rs 69,00,000/- before the Ld.CIT(A), we are of the view that the assessee cannot now freshly contest before us. We therefore find that no interference in the order of LD.CIT(A), is required on this issue. Accordingly, this ground raised by the assessee is dismissed.

42. With respect to Ground no.5 regarding the disallowance of provision for doubtful debts of Rs. 10,54,813/- the Ld. AR submitted that since even though the amount was not written off in the books of accounts, certain provision has been made which was considered doubtful of recovery in the books of accounts. The Ld. AR also pleaded that this provision for doubtful debts has been directly deducted from the receivables from the balance

sheet. The Ld.AR relied on the decision of Hon'ble Supreme court in the case of Vijaya Bank vs CIT & Anr [323 ITR 166(SC)]. Per Contra the Ld. DR relied on the order of the Ld. Revenue Authorities.

43. We have heard the rival contentions and gone through the material available on record and the orders of the Authorities below. We find that the provision for doubtful debts is not a bad debt and which needs allowance under the Act. Section 36(1)(vii) of the Act which clearly states that the amount of any bad debts or part thereof which is written off as irrecoverable in the accounts for the previous year shall be allowed as a deduction. In the instant case, the assessee has merely made a provision for doubtful debts and has not written off as bad debts in the books of account. The Vijaya Bank (supra) case relied on by the Ld.AR cannot be applied in the instant case as it relates to provisions made by Banks. Therefore, we are of the view that a provision being contingent in nature shall not be an allowable deduction u/s 36(1) of the Act. Therefore, this ground raised by the assessee is dismissed.

44. Ground No.6 raised by the assessee is general in nature and need not be adjudicated.

45. In the result, appeal filed by the assessee is partly allowed for statistical purposes.

Pronounced in the open Court on the 23<sup>rd</sup> August, 2022.

Sd/-

(दुव्वूरु आर.एल रेड्डी)  
(DUVVURU RL REDDY)

न्यायिकसदस्य/JUDICIAL MEMBER

Sd/-

(एस बालाकृष्णन)  
(S.BALAKRISHNAN)

लेखा सदस्य/ACCOUNTANT MEMBER

Dated : 23.08.2022

OKK - SPS

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee – (i)M/s. Vizag Seaport Pvt Ltd., Gammon House, Veer Savarkar Marg, Prabhadevi, Mumbai-400 025.  
(ii) Vizag Seaport Pvt Ltd, Administrative Block, S4 Gallery, Near GFCL, Coal Jetty Area, Port Area, Visakhapatnam-530035.
2. राजस्व/The Revenue – Deputy Commissioner of Income Tax-7(3), R.No.615, 6<sup>th</sup> Floor, Aayakar Bhavan, MK Road, Mumbai-400 020.
3. (i) The Chief Commissioner of Income Tax-IV, Mumbai.  
(ii) The Commissioner of Income Tax-7, Mumbai.  
(iii) The Commissioner of Income Tax-8, Mumbai.
4. आयकर आयुक्त (अपील)/ The Commissioner of Income Tax (Appeals)-13, Mumbai.  
(ii) The Commissioner of Income Tax (Appeals)-14, Mumbai.

5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम/ DR, ITAT, Visakhapatnam
6. गार्ड फ़ाईल / Guard file

आदेशानुसार / BY ORDER

Sr. Private Secretary  
ITAT, Visakhapatnam