

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E", MUMBAI**

**BEFORE SHRI KULDIP SINGH, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUH RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA.NO.1523/MUM/2022 (A.Y: 2015-16)

ACIT- Central Circle-4 Room No. 9, A-Wing 6 th Floor, Ashar I.T. Park, Road no. 16-Z Wagle Industrial Estate Thane (W)- 400604	v.	M/s. ECA Infrastructure India Pvt. Ltd Barrack No. 758, Room No. 16 Eagle Nest Building Behind Chopra Court Ulhasnagar - 421003 PAN: AACCE5487E
(Appellant)		(Respondent)

Assessee Represented by	:	Shri M. Subramanian
Department Represented by	:	Ms. Richa Gulati
Date of Hearing	:	22.11.2022
Date of Pronouncement	:	08.02.2023

ORDER

PER S. RIFAUH RAHMAN (AM)

1. This appeal is filed by the revenue against order of the Learned Commissioner of Income Tax (Appeals), Pune-11 [hereinafter in short "Ld.CIT(A)"] dated 23.03.2022 for the A.Y.2015-16.

2. Brief facts of the case are, Assessing Officer observed that assessee has debited provision for major repairs, whereas these expenses have not

been actually incurred and this provision belongs to expenses to be incurred in future years. The assessee was asked to show cause as to why the expenses should not be disallowed u/s. 37 of the Act.

3. In response, assessee submitted its submissions vide letter dated 08.12.2017. In the submissions assessee has submitted that major repairs are to be taken at the end of the seventh year which is not the year under consideration. Therefore, Assessing Officer observed that liability to incur the major repairs has not accrued to the assessee in the present assessment year. Further, he refused to entertain the submissions of the assessee that at the end of eighth year and when the assessee incurs the huge expenditure in that year of operation it will be shown as huge losses, and Assessing Officer has rejected the plea of the assessee with the following observations: -

"4.7. Further, it is noted that assessee has debited provision of 3 years in this year itself. Hence, this is not an accounting practice which has been followed by the assessee regularly. Also, it may be noted that the provision made by the assessee is also not applicable on the basis of Matching Principle. Assessee cannot take claim of expenditure of any year in any other year. Assessee has built a new Road and also incurring repairs and maintenance expenses each year. Major Repairs which are to be taken on 7th year will give him benefits for the coming years in terms of enhanced revenue collection from the better Roads. Hence, assessee is claiming Repairs expenses even before repairs are needed to be done. Hence, provision for Major Repairs cannot be allowed u/s 37 of the Act. Further, it cannot be denied that major repairs are capital in nature which will give enduring benefits for the next years to come. Repairing work done in 7th year will generate Toll collection for

future years. Hence, any expenditure of Capital nature cannot be claimed u/s 37 of the Act.

4.8. From the above discussion, it is clear that Provision made for major Repairs is not allowable in year under consideration on the basis of facts as well as on law. There is no ground for assessee to claim this as an allowable expenditure whereas there are various reasons as pointed out above which tells that Provision for Major repairs is not an accrued liability of the assessee and hence, cannot be allowed. Hence, Provision of major repairs of Rs. 7,47,00,000/- is being disallowed and added to the income of the assessee for A.Y. 2015-16."

4. Aggrieved assessee preferred an appeal before the Ld.CIT(A) and Ld.CIT(A) allowed the appeal of the assessee by relying on the decision of the ITAT, Hyderabad Bench in the case of M/s. Mokama Munger Highway Limited v. DCIT in ITA.Nos. 1729, 2145 and 2146 of 2018 dated 03.07.2019.

5. Aggrieved revenue is in appeal before us raising following grounds in its appeal: -

"1. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the fact that the assessee had claimed the expenses likely to be incurred in future years in current year which is not allowable under the Income Tax Act, 1961.

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition made on account of disallowance of the provisions for major repairs since the unascertained liability calculated on unscientific basis is unreasonable and contingent nature.

3. The order of the Ld. CIT(A) may be vacated and that of the Assessing Officer be restored.

4. The appellant craves leave to add, amend or alter any ground/grounds of appeal which may be necessary"

6. At the time of hearing, Ld. DR brought to our notice findings of the Assessing Officer in Assessment Order and findings of the Ld.CIT(A) in Para No. 7.1 of his order and submitted that assessee cannot claim provisions made during this year without incurring actual expenditure and cannot claim provision for the expenditure which assessee will incur in the future years.

7. On the other hand, Ld. AR submitted that this issue is squarely covered by the decision of the ITAT, Hyderabad bench in the case of M/s.Mokama MUnger Highway Limited (supra).

8. Considered the rival submissions and material placed on record, it is the settled position of law that in the case of special purpose vehicle for road construction on Build, Operate and Transfer basis and collection of tolls. In this kind of transactions, assessee is under obligation to incur or re-lay the whole road at the end of the eighth year. So there is a direct link with the toll collection and the expenditure to be incurred as per the agreement entered by the assessee. This issue is squarely covered in the various decisions of the ITAT in particular the decision of the ITAT, Hyderabad Bench, in the case of M/s. Mokama Munger Highway Ltd., (supra). The relevant findings of the ITAT are reproduced below: -

"13. The next ground raised by the assessee is against the disallowance of the provision made by the assessee towards "repairs and maintenance" of the Expressway built and operated by it after the initial period of 5 years. It is the case of the Revenue that the assessee has not incurred such expenditure and the provision is for the "repairs and maintenance" which may arise in future years and therefore, it cannot be considered as the expenditure relatable to the relevant A.Y before us i.e. A.Ys 201314. The learned Counsel for the assessee had relied upon the following decisions to argue that where the provision is made on a reasonable and scientific basis for meeting its future liabilities, then such provision is allowable as a deduction:

- a) *Bharat Earth Movers vs. CIT (2000) 245 ITR 428 (S.C)*
- b) *Rotork Controls India (P) Ltd vs. CIT (2009) 314 ITR 62 (S.C)*
- c) *CIT vs. Hewelett Packard India (P) Ltd 314 ITR 55 (Delhi)*
- d) *Aggarwal ad Modi Enterprises (Cinema Project) Co. (P) Ltd vs. CIT (2016) 381 ITR 469 (Del.)*
- e) *DCIT vs. Vs. First Solutions Ltd (2018) 168 DTR (Mumbai) (Trib.) 161*

14. The learned DR, on the other hand placed reliance upon the decision of the Hon'ble Supreme Court in the case of *Southern Technologies Ltd, reported in (2019) 187 Taxmann.com 346 (S.C).*

15. Having regard to the rival contentions and the material on record, we find that, as per clause 3.1.1 of the concessionaire agreement between the assessee and the NHAI, the assessee is required to construct, operate and maintain the project for a period of 15 years commencing from the appointed date. Therefore, it is clear that there is a liability on the assessee to maintain the roads for the period of the agreement. In the years in which the assessee is constructing the roads, there would not arise any expenditure towards repairs and maintenance but thereafter major at times. To meet such liability which is certain, but the quantum of the funds that would be required is uncertain, the assessee would have to be prepared and for this purpose it can create a provision from the current income to meet the likely future liability. This necessity has been recognized by the Hon'ble Supreme Court in the case of *Bharat Earth Movers (cited Supra)* as under:

"4. The law is settled: if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain

is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied the liability is not a contingent one. The liability is in praesenti though it will be discharged at a future date. It does not make any difference if the future date on which the liability shall have to be discharged is not certain.

5. In Metal Box Company of India Ltd. Vs. Their Workmen (1969) 73 ITR 53 the appellant company estimated its liability under two gratuity schemes framed by the company and the amount of liability was deducted from the gross receipts in the P&L account. The company had worked out on an actuarial valuation its estimated liability and made provision for such liability not all at once but spread over a number of years. The practice followed by the company was that every year the company worked out the additional liability incurred by it on the employees putting in every additional year of service. The gratuity was payable on the termination of an employees service either due to retirement, death or termination of service - the exact time of occurrence of the latter two events being not determinable with exactitude before hand. A few principles were laid down by this court, the relevant of which for our purpose are extracted and reproduced as under:

For an assessee maintaining his accounts on mercantile system, a liability already accrued, though to be discharged at a future date, would be a proper deduction while working out the profits and gains of his business, regard being had to the accepted principles of commercial practice and accountancy. It is not as if such deduction is permissible only in case of amounts actually expended or paid;

Just as receipts, though not actual receipts but accrued due are brought in for income-tax assessment, so also liabilities accrued due would be taken into account while working out the profits and gains of the business;

A condition subsequent, the fulfilment of which may result in the reduction or even extinction of the liability, would not have the effect of converting that liability into a contingent liability;

A trader computing his taxable profits for a particular year may properly deduct not only the payments actually made to his employees but also the present value of any payments in respect of their services in that year to be made in a subsequent year if it can be satisfactorily estimated.

So is the view taken in Calcutta Co. Ltd. Vs. Commissioner of IncomeTax, West Bengal (1959) 37 ITR 1 wherein this court has held that the liability on the assessee having been imported, the liability would be an accrued liability and would not convert into a conditional one merely because the liability was to be discharged at a future date. There may be some difficulty in the estimation thereof but that would not convert the accrued liability into a conditional one; it was always open to the tax authorities concerned to arrive at a proper estimate of the liability having regard to all the circumstances of the case”.

16. Further, in the case of Rotork Controls India (P) Ltd vs. CIT (Supra), the Hon'ble Supreme Court held as under:

"11. What is a provision? This is the question which needs to be answered. A provision is a liability which can be measured only by using a substantial degree of estimation. A provision is recognized when: (a) an enterprise has a present obligation as a result of a past event; (b) it is probable that an outflow of resources will be required to settle the obligation; and (c) a reliable estimate can be made of the amount of the obligation. If these conditions are not met, no provision can be recognized.

12. Liability is defined as a present obligation arising from past events, the settlement of which is expected to result in an outflow from the enterprise of resources embodying economic benefits.

13. A past event that leads to a present obligation is called as an obligating event. The obligating event is an event that creates an obligation which results in an outflow of resources. It is only those obligations arising from past events existing independently of the future conduct of the business of the enterprise that is recognized as provision. For a liability to qualify for recognition there must be not only present obligation but also the probability of an

outflow of resources to settle that obligation. Where there are a number of obligations (e.g. product warranties or similar contracts) the probability that an outflow will be required in settlement, is determined by considering the said obligations as a whole. In this connection, it may be noted that in the case of a manufacture and sale of one single item the provision for warranty could constitute a contingent liability not entitled to deduction under Section 37 of the said Act. However, when there is manufacture and sale of an army of items running into thousands of units of sophisticated goods, the past event of defects being detected in some of such items leads to a present obligation which results in an enterprise having no alternative to settling that obligation. In the present case, the appellant has been manufacturing and selling Valve Actuators. They are in the business from assessment years 1983-84 onwards. Valve Actuators are sophisticated goods. Over the years appellant has been manufacturing Valve Actuators in large numbers. The statistical data indicates that every year some of these manufactured Actuators are found to be defective. The statistical data over the years also indicates that being sophisticated item no customer is prepared to buy Valve Actuator without a warranty. Therefore, warranty became integral part of the sale price of the Valve Actuator(s). In other words, warranty stood attached to the sale price of the product. These aspects are important. As stated above, obligations arising from past events have to be recognized as provisions. These past events are known as obligating events. In the present case, therefore, warranty provision needs to be recognized because the appellant is an enterprise having a present obligation as a result of past events resulting in an outflow of resources. Lastly, a reliable estimate can be made of the amount of the obligation. In short, all three conditions for recognition of a provision are satisfied in this case”.

17. *In the case before us, the concessionaire agreement itself specifies the O&M obligations of the concessionaire under Article 17 of the Agreement and requires the assessee to prepare and maintain, a maintenance manual and to carry out the work of repairs and*

maintenance in accordance with the said manual. At page 59 of the paper book, the assessee has placed the copy of the letter dated 11.04.2018 of the Consultant to the Project Director of NHAI for the maintenance work to be carried out by the assessee as per the "Operation and Maintenance Manual". Further, as per Article 37 of the agreement, if the concessionaire, i.e. the assessee herein, if it defaults or acts in breach of the maintenance requirements or the safety requirements the agreement is liable to be terminated. Thus, it is clear that the obligation of repairs and maintenance has accrued on the assessee, but only the quantification and execution is to be on a future date. However, the basis of quantification of the fund and that the provision is made on a scientific basis has not been established by the assessee nor has it been looked into by the AO. Therefore, we deem it fit and proper to remit this issue to the file of the AO with a direction to examine the scientific method followed by the assessee in making the provisions. If it is found to be reasonable and on a scientific criteria, then the AO shall not disallow the same. Therefore, assessee's ground of appeal on this issue is treated as allowed for statistical purposes."

9. Respectfully following the above said decision, we are not inclined to interfere with the findings of the Ld.CIT(A), Accordingly, ground raised by the revenue is dismissed.

10. In the result, appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 08th February, 2023

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER
Mumbai / Dated 08/02/2023
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Assessee
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum