

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“B” BENCH, AHMEDABAD**

**BEFORE SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER &  
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. Nos. 484, 485 & 486/Ahd/2023

(निर्धारण वर्ष / Assessment Years : 2015-16, 2017-18 & 2018-19)

<b>Assistant Commissioner of Income Tax</b> Central Circle-1(4), Ahmedabad	<b>बनाम/ Vs.</b>	<b>Mahalaxmi Infracontract Private Limited</b> B-21, Corporate House, Opp-Pakwan-II, S. G. Highway, Bodakdev, Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAGCM4615E		
(Appellant)	..	(Respondent)

<b>Assessee by :</b>	Shri S. N. Divatia & Shri B. K. Patel, A.Rs.
<b>Revenue by :</b>	Shri Sudhendu Das, CIT. DR

<b>सुनवाई की तारीख / Date of Hearing</b>	22/01/2024 &
<b>घोषणा की तारीख /Date of Pronouncement</b>	31/05/2024

**ORDER**

**PER Ms. MADHUMITA ROY - JM:**

The instant three appeals filed by the Revenue are directed against the orders all dated 14.03.2023 passed by Ld. Commissioner of Income Tax (Appeals)-11, Ahmedabad (in short ‘CIT(A)’) arising out of the orders dated 27.12.2017, 21.12.2019 & 02.09.2021 passed by the Assessing Officer (AO), Ahmedabad under Section 143(3) (in A.Ys. 2015-16 & 2017-18) & under

Section 143(3) r.w.s. 144B (in A.Y. 2018-19) of the Income Tax Act, 1961, (hereinafter referred to as 'the Act') respectively.

2. Since all these appeals are relating to identical issues that too in respect of the same assessee, the entire bunch of appeals are heard analogously and are being disposed of by this common order for the sake of convenience.

ITA No. 484/Ahd/2023 for A.Y. 2015-16

3. Deletion of disallowance on higher depreciation of Rs. 8,71,10,768/- on plant and machinery, tippers are the subject matter before us.

4. The appellant, a Private Limited Company, engaged in the business of hiring of heavy earth moving machineries and mining services for mining and other contract works and having income from business, filed the return of income for the year under consideration on 30.09.2015 declaring total income at Rs.32,21,69,740/-. Upon selection of the case under scrutiny notice under Section 143(2) of the Act dated 21.03.2016 followed by different notices in terms of the provisions of law including 142(1) r.w.s. 129 of the Act dated 20.09.2016 etc. were issued. Such assessment was finalized upon restricting the disallowance @15% instead of higher rate @ 30% on depreciation of Dumper & Tripper to the tune of Rs.8,71,10,768/-.

5. The facts of the case is this that the assessee claimed higher rate of depreciation on dumpers and Trippers @30%. It is the further case made out by the assessee that their contract is for hire for motor vehicles, namely, dumpers & trippers which are being exclusively used for transportation of

excavated earth or minerals which belongs to Principal and not to the assessee. Thus, the same are used for transportation of goods of third party for hire. On this aspect, the assessee further relied upon the judgment passed by the Hon'ble Apex Court in the case of CIT vs. Gupta Global Exim (P.) Ltd., reported in (2008) 171 Taxmann 474, wherein it has been decided that the correct test to be applied by the lower authorities to this effect that whether the assessee was in the business of transportation and whether the vehicles were used in the said business is proved beyond doubt. It has further relied upon the judgment passed by the ITAT, Rajkot in case of PCIT, Rajkot-I vs. Durga Construction Co., reported in [2018] 93 taxmann.com 436 and judgment passed by CIT(A), Jamnagar and CIT(A)-3, Rajkot in the case of P. C. Patel and Co., Durga Construction Co. and in the matter of P C Patel having identical set of facts wherein the Ld. CIT (A) deleted the disallowance and allowed the depreciation at higher rate for A.Ys. 2011-12, 2012-13 & 2013-14. It was further brought to the notice of the Ld. AO that in assessee's own case the disallowance for depreciation was deleted and depreciation at higher rate was ultimately allowed for A.Ys. 2011-12, 2012-13 & 2013-14. The assessee submitted as follows before the Ld. AO:

*“2. Regarding depreciation on dumpers and tippers 30%*

*2.1 In the contracts for Hiring of Heavy Earth Moving Equipments and Vehicles, we are required to perform mainly all or any of the following operations.*

*2.1.1 Excavation of overburden*

*2.1.2 Mining of Minerals*

*2.1.3 Transportation of such excavated over burden material*

*2.1.4 Excavation of Minerals*

*2.1.5 Transportation of Minerals from Mines to Pit head*

2.1.6 *Transportation of Minerals from Pit head to Lignite handling system/power plant*

*Different types of equipments and vehicles are required for different operations excavation of OB and Minerals loading etc. operations are perform by running excavators*

*Transportation of over burden materials and extracted minerals are done by running motor vehicles such as tippers, dumpers.*

2.2 *Details of the nature and scope of work carried out by us are given hereunder:*

2.2.1 *Eastern Coalfields Ltd. (Rajmahel)*

*The nature of work is Loading of coal into tippers by excavators at quarry face of Rajmahal OCP and transportation to Main/Interim CHP within lead range of 6-7 km at Rajmahal Area.*

2.2.2 *Eastern Coalfields Ltd. (Sonepur) The nature of work is transportation of coal 41.701.Te.*

2.2.3 *Bharat Coking Coal Ltd. (Chaptaria)*

*The nature of work Transportation of coal from 1-11, 10, Salempur and katapur seams of Chaptoria OC Patch of Domaporia cottery of CV. Area.*

2.2.4 *Bharat Coking Cond (Katrass)*

*The nature of work a AXWM Collery of Kutres Arvo transportation of cool coal from Seams of Kumarijere Patch of*

2.2.5 *Bharat Coking Coal Ltd. (Lada)*

*The nature of work transportation of coal from LT) & I seams of patch T of NT-ST colliery of Ladna Area.*

2.2.6 *Bharat Coking Coal Ltd. (Old)*

*The nature of work is .....transportation of coal from Laikdih(Top) Laikdih (Middle), Laikdih(Bottom), L-10, Salanpur 'C' and Salanpur 'D' seoms of Borira OC Patch of Damagoria colliery of CV. Area.*

2.2.7 *Mahanadi Coalfields Limited:*

*The nature of work is transportation of materials in various strata including drilling, excavation, dumping, spreading, dozing and other allied works in specified areas for dumping as per*

*instructions of Project Officer/Management of Lakhanpur Project,  
Lakhanpur Area*

2.2.8 *The Singareni Collries Company Limited(Gk OCP)  
The scope of work is Transportation of 410 LBCM ILCM of  
Overburden with hired Conventional Equipment Goutham Khani  
Opencast Project, Kathagudem Area*

2.2.9 *The Singareni Collries Company Limited (Dorli 1-5419)*

*The scope of work is ..... Transportation of 507.41 LBCM  
ILCM of Overburden with Hired Conventional Equipment at Dorli  
OCP-I, BPA Area*

2.2.10 *The Singareni Collries Company Limited(Dorli old)*

*The scope of work is Transportation, of 335.652 LBCM ILCM of  
Overburden with Hired Conventional Equipment of Dorli  
Opencast-II, Bellampalli Area.*

2.2.11 *Neyveli Lignite Corporation Limited (Mine 1)*

*The nature of work is excavation of all types of over burden  
materials including buried materials like scraps, building  
materials, debris etc including forward preparation, drilling,  
excavation, loading, transportation, dumping, dozing, levelling at  
dumpsite at different levels by using machineries including storage  
facility for diesel facility for diesel etc at Mine-I of Neyveli Lignite  
Corporation Limited.*

2.2.12 *Neyveli Lignite Corporation Limited. (Mine 1A)*

*The nature of work is excavation of all types of OB materials  
including top soil, lateritic sandstone and sandy clay etc including  
forward preparation, drilling, excavation, loading, transportation  
dumping, dozing, leveling at dump site at different levels (at the  
places shown by NLC authorities) by using machineries, at mine 1A  
of Neyveli Lignite Corporation Limited, Neyveli, Cuddalore  
District, Tamilnadu.*

*Relevant abstract of work orders/LOI are attached herewith for  
your ready reference.*

*Almost all activities are with composite rate but for ECL Rajmahal  
rates of loading and transportation are different. During the year  
only in ECL Rajmahal we have transportation work of Rs.51.67  
crores. While in other works also we have to carry out  
transportation of OB and coal but rates are composite. Hence  
transportation Income not credited separately in other works.*

- 2.3 *Motor vehicles cannot be used for any other purpose except to transport or shifting of materials from one place to another. Now if they are not used for transportation of any materials belongs to us and same are used for transportation of goods of third party for hire than naturally such usage be defined as that they are used in the business of running them on hire.*
- 2.4 *Basically, the use of motor vehicles is need to be looked in to whether they have been used for own other business such as trading, manufacturing etc. or otherwise.*
- 2.5 *It may please be noted that in respect of all the contracts*
- *Mine is not owned by us.*
  - *Neither overburden nor extracted minerals belongs to us.*
- 2.6 *The operations are scheduled/controlled by the principal/principal contractor*
- 2.7 *In the contracts for earth work and mining work we are required to transport the over burden (earth) and extracted minerals from one place to another. We were paid the rates per unit or based on quantity extracted and transported at the specified location. But from this fact, it cannot be denied that the amount thus payable consists of the hire (use) of the tippers, excavators etc. in the process of excavation of and transportation of over burden (earth) and.. minerals. Although the rates may have been determined for a consolidated package for various activities and scope of work, the element of hire charges or charges for use of the assets like tippers are embedded therein as no separate charges therefore are payable.*
- 2.8 *In this connection, kind attention is invited to Circular No. 652 dated 14.06.1993 of CBDT referred wherein the Board has stated that higher rate of depreciation was admissible on motor lorries used in the assessee's business of transportation of goods on hire and that higher rate will not apply if the motor lorries etc. are used in non-hiring business of the assessee.*
- 2.9 *Also on perusal of the Board's Circular No. 609 dated 29th July, 1991, it is clear that the higher rate of depreciation is also admissible when the motor lorry is used by the assessee in his own business of transportation of goods on hire.*
- 2.10 *In the case of Hon'ble Mumbai High Court which has identical facts with our case. Also, according to our knowledge and belief no further appeal has been filed there against with Hon'ble Supreme Court.*

*In the case of [2009] 180 TAXMAN 348 (BOM.) HIGH COURT OF BOMBAY commissioner of Income Tax v. S.C. Thakur & Bros.*

*F.I REBELLO AND R.S. MOHITE, JJ. INCOME TAX APPEAL NO. 496 OF 2005 JANUARY 27, 2009*

*In the case the question before the Hon'ble court was  
Section 32 of the Income Tax Act, 1961 - Depreciation - Allowance/Rate of Assessment years 1991-92 and 1996-97-whether higher rate of depreciation is also admissible when motor lorry is used by assessee in his own business of transportation of goods on hire -  
In the judgement Hon'ble court Held- Yes'*

*In the said judgement reliance was placed on*

*Circulars-and Notifications - CBDT's Circular Nos. 609 and 652, dated 29-7-1991 and 14-6-1997 respectively.*

*CIT v, Gupta Global Exim (P.) Ltd. (2008) 171 Taxman 474 (SC) (Para 2). Vimal Gupta for the Appellant. Ms. Aasifa Khan for the Respondent.*

*We beg to submit analysis of the referred case law and its applicability as under:-*

*The Hon'ble high court has rightly dismissed departmental appeal on the following three reasoning:-*

*Goods transported must belongs to someone else, and use of motor vehicles for Transportation is a key to claim higher depreciation,*

*Circular No. 652. Motor Lorries must be hired out to some other person and whether the use of the same in the assessee's business of transportation of goods on hire would suffice.*

*Circular No. 609-It is further clarified that higher depreciation will also be admissible on motor lorries used in the our business of transportation of goods on hire*

*Before applying above principles, we request to draw your kind attention on brief fact of the case referred above vise a vise present case as under:-*

*In the instant case, the learned CIT for the assessment year 1996-97 recorded a finding that the appellant was required to transport the earth from one place to another for filling and the earth so transported did not belong to tile assessee and as such the appellants business receipts to a large extent, can be held to be price of the charges received for transporting the goods from one place to another.*

*This Fact of the case is totally and identically applicable to us as we are required to transport excavated earth as per instruction for filling etc purpase and the earth so transported does not belongs to us.*

*Our contract is for hiring for motor vehicles (Dumpers, Tippers) which are being exclusively used for transportation of excavated earth belongs to principal and not us. or Minerals which*

*It may please be noted that, considering the judgment of the Hon'ble Supreme Court in CIT v. Gupta Global Exim (P.) Ltd. (2008) 171 Taxmann 474 the correct test which the authorities below had to apply was whether the appellant was in the business of transportation and whether the vehicles were used in the said business is proved beyond doubt on above basis.*

2.11 We would also like to place reliance on the following judgements:

2.13.1 CIT vs. Madan & Co. 254 ITR 445 (MAD) 2002.

- 2.13.2 *C.V. Bhanumurthy Reddy vs. DCIT, Circle-10(1), Bangalore. (2015) 53 taxmann.com 110 (Bangalore-Trib.)*
- 2.13.3 *John Energy Ltd. vs. DCIT, CC-2(2), Ahmedabad [2015] 9 taxmann.com 75 (Ahmedabad Trib.)*
- 2.13.4 *H. D Enterprise vs JCIT order dated 16.01.2016 for the A.Y. 2011-12.*
- 2.12 *Hon'ble Commissioner of Income Tax-(Appeals), Jamnagar and also Hon'ble Commissioner of Income Tax (Appeals)-3, Rajkot in cases of P.C. Patel and Co., Bhuj and Durga Construction Co., Bhuj having identical facts of the case have deleted the disallowance and allowed depreciation at higher rate for A.Y. 2011-12, A.Y. 2012-13 and A.Y 2013-14 and also your honour in our case has deleted the disallowance for depreciation and allowed depreciation at higher rate for the A.Y 2011-12, A.Y. 2012-13 & A.Y 2013-14.*
- 2.13 *Hon'ble ITAT Rajkot recently confirmed the view taken by CIT(Appeal) and confirmed the view of depreciation at 30%(higher rate) in above referred cases of P.C. Patel & Co and National Construction company.”*

6. The contention made by the assessee in support of the claim was not found to be acceptable and the Ld. AO finalized the issue with the following observations:

*“7.2 The submission of the assessee is duly considered but not acceptable. As regards depreciation on dumper, tipper etc. 30%, all of decision given by the assessee point out two things that (a) dumpers, tippers etc. are registered under Motor Vehicle Act, and thus to be considered at motor lorries (b) assessee is entitled depreciation even if same is leased to other parties. The assessee is basically a mining contractor and it carries out the all allied activities for mining viz. blast hoe drilling, excavation, loading, transportation, dumping spreading and leveling of overburden. The nature of assessee work being carried out at different sites is similar. It is not the case that it was awarded separate and exclusive transportation contract.*

*7.3 The AR vide his submission has only mentioned above transportation work as the nature and scope of work enders received for different sites. Therefore the nature and scope of work carried out by the assessee is analyzed from these copies of work order/LOI submitted by the assessee for different sites as under*

*i) Eastern Coalfields Ltd. (Raimahel)-W.O date 25.02.2012*

*The nature of work is loading of coal into tippers by excavators at quarry face of Rajmahel OCP and transportation main/interim CHP within lead range of 4-5 km, 5-6 km and 6-7 km at Rajmahel area.*

*ii) Eastern Coalfields Ltd. (Sonepar)-W.O date 28/29.06.2012*

The scope of work envisages (i) excavation and removal of 0B 262.10 L.Cum (i) extraction and transportation of coal 41.70 LTe.

iii) Bharat Cooking Coal Ltd. (Chaptoria) - R.O date 28.01.2015

The nature of work is hiring of HEMM for removal of 0B and extraction and transportation of coal from L-11, L-10 Salanpur "C" and Salanpur 'D' seams of Chaptaria OC patch of Damagaria colliery of CV area.

iv) Bharat Cooking Coal Ltd. (Katras) W.O. date 30.09.2013

The nature of work is hiring of HEMM for removal of 0B, expaction and transportation of coal from VIIIA, VI(top), Vin(Bot), VII, V/VI and IV seams of Kumarijone Patch of AKWN colliery of Katras area.

v) Bharat Cooking Coal Ltd. [Lodhna] W.O date 27.01.2014

The nature of work is hiring of HEMM for removal of 0B extraction and transportation of coal from III, IV (T), (b) and I seams of patch "E" of NT. ST colliery of Lodhna area.

v) Bharat Cooking Coal Ltd. [Salanpur] W.O date 14.12.2012

Award of work for hiring of HEMM for removal of 08, extraction and transportation of coal from L11, L-10 Salanpur D' and Salanpur C

vii) Mahana Coal fields Ltd. (Late 07.11.2014,

The nature of work is hiring of HEMM (Shavel, drill, dozer etc) for transfer and transportation of materials in various state including drilling excavation, dumping, spreading dowing and other allied work in specified areas for dumping of Lakhanpur Project Area.

viii) The Singereni Coffries Company Ltd. (Goutham Khan W.O date 17.05.2014

The nature of work is drilling, excavation, loading, transportation, dumping, spreading and leveling etc of 410 LBCM/LCM of overburden with hired equipment at Goutham Khani open cash project, Kothagudem area.

ix) The Singareni Collieries Co., Ltd. (Droli) W.O. date 15.04.2014

The nature of work is drilling, excavation, leading transportation, dumping, spreading & leveling etc of 507,413 LBCM/LCM of overburden (490.729) LBCM of in-situ 08 with coal and 15.554 LCM of re-handling of Top soil) with hired conventional equipment and additional works like 2000 mtrs of drilling, 4000 hrs of dozer and 5000 hrs of shavel at Darli

x) The Singarenk Collieries Co. Ltd. (Dorli-CC)

Scope of work is blast hole drilling, excavation, loading, transportation, dumping, spreading & leveling of 03 at Dorli-OC-11

xi) Neywell Lignite Corp. Ltd. Minel W. O. Date 09.05.2014

Scope of work is excavation of all types of over burden material, drilling, excavation, loading, transportation, dumping, dozing, leveling at dump site at different levels at mine-

xii) Nevwel lignite Corp. Ltd. (Mine-(A) WO date 02.02.2012

Scope of work is excavation of all types of over burden material, drilling, excavation, leading transportation, dumping, dozing, leveling at dump site at different levels at mine-LA

7.4 In fact on analysis of scope of work awarded by different principals for various sites is found that the assessee has been awarded composite work which includes blast hole, drilling excavation, blasting, removal of overburden, dumping the overburden at dumping site and transporting the mined mineral from mines to stocking place and leveling of the same. The only difference in some work orders claimed by the assessee is that in some cases separate rates for lignite mining and lignite transportation has been mentioned. Whereas the nature of work for all the sites are similar. So in no way it is all the established that the assessee has been awarded exclusively transition work and its dippers and tippers were exclusively used for earning transportation income. However in the instant case issue is that "30% rate of depreciation is available only if motor lorries are used for running the one is the instant case there is no income from hire, assessee had received all the income from business of mining which includes blast hole, drilling, excavation, blasting, overburden removal & stacking dumping the over burdened material at dumping site transporting the mined material from mines to stacking place. For the same, the assessee got payment for these activities from person who has given them contract on basis of "MT" mined material (net) or of instances on basis of "MT" material including overburden mined material. Thus the assessee's business is basically mining for which it use the excavators, dumpers etc. which is different from vehicle running them on hire.

7.5 The assessee is not associated with transportation business, it does not have a business of running vehicles on hire and does not have own business of transportation of goods on hire. The assessee has shown its entre receipt from mining work contract, the assessee is engaged in the business of mining for which assessee is getting payment on 'per ton basis rather than on monthly basis or based on no of trips as a function of weight transported and distance covered as is the case for giving the lorries on hire thus revealing the contractual nature of work, it is important to mention here that with effect from 01.04.2009, by virtue of newly inserted proviso 194C(6) hiring & leasing of goods carriage is out of TDS net while hiring of motor lorries are subject to 194I rather than 1940, while in this case all the receipts are subject to 194C only. This also proves that assessee is not in business of running of motor Lorries on hire.

7.6 Now coming on judicial pronouncements, Hon'ble Rajasthan High Court in case of CIT vs. Sardar Stone 215 ITR 350, and in case of CIT vs. Manjeet stone company and Hon'ble Karnataka high Court in case of Veener Mills vs CIT 201 ITR 764, has held that just for mere reason that vehicles are occasionally hired, and hire amount is nominal (although assessee does not have any transportation) cannot be construed that vehicles were used for running them on hire. Assessee in its submission has stated as follows:

*"in the contracts for earth work and mining work we are required to transport the over burden (earth) and extracted minerals from one place to another. We were paid the rates per unit or based opportunity extracted and transported of the specified location. But from this fact, it cannot be denied that the amount thus payable consists of the hire (use) of the tippers, excavators etc. in the process of excavation of and transportation of over burden (earth) and minerals. Although the rates may have been determined for a consolidated package for various activities and scope of work, the element of hire charges or charges for use of the assets like tippers are embedded therein as no separate charges therefore are payable*

*Thus it can be seen that there is merely a presumptive element of hire charges and on such presumption assessee is claiming higher rates of depreciation which should be disallowed.*

7.7 *It is a matter of fact that Hon'ble Supreme Court in case of Gupta Global exim 305 ITR 132 laid down the real test for claiming depreciation at higher rates applicable for "motor lorry used in business of running them on hire. In this decision the Hon'ble Apex Court has decided that real test is the user of the same in the business of the assessee of transportation is the test". Hon'ble Supreme Court has also held that same has to be determined from constitution of return of income and Memorandum of association of company, etc. It is a matter of fact that assessee's income is from mining business, not from transportation. Although the assessee itself in year under consideration in audit report has written/mentioned its business as mining contractor and civil contractor as was mentioned in earlier year. Also its entire income in year under consideration and even in earlier were from mining contract only. In fact, assessee itself in audit report of AY 2014-15, 2015-26 has shown its business as mining and civil contractor, rather than transportation. It is further important to mention here that it has also been held by Hon'ble Andhra Pradesh High Court in case of CIT vs. Progressive Engg Co. that JCB, earth moving machines are although registered as Motor lorries in Motor Vehicle Act, same are not road transport vehicle, same fact applies to dumpers and tippers. Thus in both ways it is clear that assessee fails the test laid down by Hon'ble Supreme Court thus not eligible for depreciation at higher rate.*

7.8 *Thus in presence of these facts (a) no receipt for hire/ transportation of motor lorries (b) all tender has nature of work as defined above of mining (c) even the person who has given them contract has deducted 2% TDS for contracts, while transport receipt/hire receipts are subject to tax, which for hiring of machinery (which also include motor lorries) are charged to TDS u/s.194I rather than 194C*

7.9 *The assessee has NIL Income from transportation. The assessee has shown its entire receipt from mining work contract. The assessee firm is a mining contractor. The depreciation at higher rate of 30% was claimed on the ground that the assessee was hiring HEMM (Heavy Earth moving Machinery). It is revealed from the assessment record that the assessee is engaged in earth work for which 'dumper' is used. It is therefore clear that the assessee had purchased the dumpers "primarily for using the same in its business of contract for earth work and subsequent excavation and not for the purpose of hiring them. Further, as per the P & L Account no hire income' has been shown by the assessee. The main purpose of dumpers was to use them in earth work contracts. Thus the assessee is not eligible for depreciation @30%. By no stretch of imagination it can be said that assessee is in the business of transportation on hire.*

*Thus in presence of the facts and discussions made above it is clear that;*

*(a) The asset either should be Motor buses or motor lorries or motor taxis:  
Dumpers/tippers cannot be categorized as motor bus, taxis, lorry and hence not  
eligible for higher rate of depreciation,*

*(b) Such assets should be used in a business of running them on hire:*

*7.10 I hold that assessee is not in business of running motor lorries on hire and thus in view of the above, the claim of depreciation is restricted to Rs. 8,71,10,768/- as against the depreciation claimed by the assessee at Rs. 17,42,21,537/- on plant & machinery, tipper etc. Therefore excess depreciation claimed on plant & machinery, tipper etc. of Rs. 8,71,10,765/- is added back to the total income of the assessee. I am satisfied that the assessee has furnished inaccurate particulars of income and thereby concealed the income. Penalty proceedings u/s.274 r.w.s. 271(1)(c) are initiated for furnishing inaccurate particulars of Income and thereby concealing the Income.”*

7. The case of the assessee is this that the depreciation claimed @30% on the dumper & tipper is as per the provisions of law as the activities of the assessee includes excavation of over burden materials, mining of minerals, transportation of excavated over burden material, excavation of minerals, transportation of minerals from mines to pit head and transportation of minerals from Pit head to Lignite handling system/power plant. Therefore, such motor vehicles, namely, dumpers & tippers are used in transportation of over burden materials and excavated materials owned by the Principal i.e. mining owner and not by the assessee. This particular vehicles are only used for transport beyond the shifting of materials from one place to another Mines, on which, excavation, transportation and other activities are carried out does not belong to the assessee and thus excavated earth and minerals transported doesn't belong to the assessee but to the Principal who awarded this contract, whereas, the view of the Ld. AO is this that the assessee has been awarded with composite work including blast hole, drilling excavation, blasting, removal of overburden, dumping the overburden at dumping site and transporting the mined minerals from mines to stocking place and leveling of the same. It is found that in some cases separate rates for lignite mining and

lignite transportation has been mentioned whereas the nature of work for all the sites is similar. Therefore, the assessee is not exclusively awarded contract work for transportation work and its dippers and tippers were exclusively used for earning transportation income. According to the Ld. AO, the claim of the assessee at the rate of depreciation is only available if motor lorries are used for running without hire, the assessee's income is not from hire but from business of mining and other ancillary works as mentioned hereinabove, as the assessee got payment for these activities from the person who has awarded the contract on the basis of MT mined materials (net) or of instances on basis of "MT" material including overburden + mined materials. The assessee is basically having business of mining where excavators and dumpers are used which is entirely different income from vehicle running on hire. The Ld. AO relied upon certain judgments including judgment passed by Hon'ble Rajasthan High Court in case of CIT vs. Sardar Stone, reported in 215 ITR 350 and judgment passed by the Hon'ble Karnataka High Court in the case of Veener Mills vs. CIT, reported in 201 ITR 764. Finally, the Ld. AO attempted to distinguish the judgment passed by the Hon'ble Apex court in the case of Gupta Global Exim (supra) to this effect that as the Hon'ble Supreme Court has allowed depreciation at higher rates for motor lorry used in the business of running them on hire. The basic test would be whether the assessee is having the transportation business whereas the assessee is having mining business not from transportation as the year under consideration and even in earlier year wherein mining contract which is also reflecting from the audit report from A.Ys. 2014-15 & 2015-16 has shown being mining and civil contractor rather than transportation. The assessee fails the test laid down by the Hon'ble Supreme Court and found not eligible for depreciation at higher rate. Addition

thereon to the tune of Rs.8,71,10,768/- was made by the Ld. AO in the hands of the assessee.

8. In appeal, apart from all this explanation, the assessee further relied upon the Circular being No. 652 dated 14.06.1993 issued by the CBDT, wherein it has been categorically fixed that higher rate of depreciation was admissible on motor vehicle in the assessee's business of transportation of goods on hire and that higher rate will not apply if the motor lorries etc. are used in the non-hiring business of the assessee. Further Circular No. 609 dated 29<sup>th</sup> July, 1991, wherein the Board has clarified that the higher rate of depreciation is also admissible when the assessee is using motor lorry in his own business of transportation of goods on hire. The following facts and figures were also placed before the First Appellate Authority:

Sr. No.	Name of parties	Nature of work
1.	Eastern Coalfields Ltd.	Hiring of HEMM for Re-handling of 13.44 L Cum OB along fault near Kaveri sump of Rajmahal OCP of Rajmahal Area.
2.	South-West	Hiring of Heavy Earth Moving Equipment with

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No. CIT(A), Rajkot-3/10376/2017-18 A.Y.2015-16

	Mining Ltd.	Operator and Maintenance staff for Excavation of OB including all types of strata such as alluvium, different types of clay, Siderite, Silica Sand, Weathered Limestone and strata of materials including intercalated partings of the above materials between Lignite seams up to a depth of 135m from surface and <b>transportation</b> and stacking thereof at designated places.
3.	Bharat Coking Coal Ltd.	Hiring of HEMM for removal of OB, Extraction and <b>Transportation</b> of coal from Laikdih (Top), Laikdih(Middle),Laikdih(Bottom),L-10, Salanpur 'C' and Salanpur 'D' seams of Borira OC Patch of Damagoria Colliery of CV Area.
4.	Bharat Coking Coal Ltd.	Hiring of HEMM for removal of OB, and Extraction and <b>Transportation</b> of coal from L-11, L-10, Salanpur 'C' and Salanpur 'D' seams of Chaptoria OC Patch of Damagoria Colliery of C.V. Area.
5.	M IPL- NKAS(JV)	Hiring of HEMM for removal of 200.00 L. Cum. OB and extraction of Coal 70.00 L. Te at Dahernangi Patch at Rajmahal Area.
6.	The Singareni Collieries Co. Ltd.	Drilling, Excavation, Loading, <b>Transportation</b> , Dumping, Spreading & Leveling etc., of 369.151 LBCM/LCM of Overburden and additional works viz.,1000 MTS of Drilling and 1000 Dozer hours with Hired Conventional Equipment at Dorli OCP-I.
7.	The Singareni Collieries Co. Ltd.	Drilling, Excavation, Loading, <b>Transportation</b> , Dumping, Spreading, & Leveling etc., of 410 LBCM of Overburden with Hired Equipment at GK OCP Site.
8.	Mahalaxmi KLP (JV)	Hiring of HEMM for removal of 246.10 L. cum of OB and extraction and <b>Transportation</b> of 36.20L. Tone of Coal from Hansdiha Ph-III of Sonepur Bazaari Area.
9.	Eastern Coalfields Ltd.	Removal of OB (31.27m.cum.) by hiring of HEMM at Khottadih Ph-II OC Patch at Pandaveswar Area.
10.	Western Coalfield Ltd.	Removal of all type of materials in all kinds of strata by hiring of equipments such as HEMM , tippers, drills, dozers, graders, and water sprinklers including its drilling, excavation, loading, transportation, dumping, spreading, dozing, grading and water sprinkling at specified place as per instruction of Engineer in charge at New Majri OC-II (A) Expansion of Majri Area.

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11.	Neyveli Lignite Corporation	The scope of work covers Removal of Overburden/inter burden (consisting of all kinds of overburden strata) of 72 MM3 and includes forward preparation of excavation & dump sites, excavation, loading, transportation, dumping, dozing, grading, leveling at dump / excavation sites, formation & maintenance of multiple haul roads, dust suppression by sprinkling of water in haul roads, excavation & dump sites at any level in mine using HEMM at specified places as decided by NLC.
12.	Neyveli Lignite Corporation	Hiring of Crawler mounted Shovels/Hydraulic Excavators, Backhoes, Dumpers, Dozers, and other ancillary equipment for the removal of 80 Lakh Cum of all types of over burden materials like Top soil and Alluvial clayey soil including forward preparation, loading, transportation, dumping, dozing, leveling, at the corresponding dump sites at different level as selective mining at Mine-II of Neyveli Lignite Corporation, Neyveli, Cuddalore District Tamilnadu.
13.	Mahalaxmi Saakar (JV)	Hiring of HEMM (Shovel, Drill, Dozer etc.) for transfer & transportation of materials in various strata including drilling, excavation, dumping, spreading, dozing and other allied works in specified areas for dumping as per the instruction of Project officer/management of Lakhapur Project, Lakhapur Area.
14.	Mahalaxmi Nilkanth JV	Hiring of HEMM for removal of 1200.00 L. cum and extraction and transportation of coal from Sector - 2A Sonepur Bazari combined OCP.
15.	VPR Mining Infrastructure Pvt Ltd	Drilling, excavation, loading, transportation, dumping, spreading, etc. of 428L cum of In-situ OB and 4.00 LCM of rehandling of top soil with hired conventional equipment at Gouthamkhani Opencast, Kothagudem Area.
16.	Mahanadi Coalfields Ltd.	Hiring of HEMM and <b>transportation</b> of materials in various strata for exposing various coal seams in specified places as per instruction of Project officer/ management of Balram OCP, Hingula Area.
17.	Western Coalfield Ltd.	Removal of all type of materials in all kinds of strata by hiring of equipments including its drilling, excavation, loading, <b>transportation</b> , etc. at specified places as per instruction of Engineer- in-charge at Naigoan OCM of Wani.

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		Area.
18.	AMPL-MIPL GCL (JV)	Excavation and Transportation of OB at Amrapali OCP of Magadh & Amrapali Area
19.	The Singareni Collieries Co. Ltd.	Drilling, Excavation, Loading, Transportation, Dumping, Spreading, & Leveling etc., of 507.413 LBCM/LCM of Overburden with Hired Conventional Equipment and additional works like 20000 MTS. Of Drilling, 4000 Hours of Dozer and 5000 Hours Shovel at Dorli OCP-I
20.	The Singareni Collieries Co. Ltd.	Drilling, Excavation, Loading, Transportation, Dumping, Spreading, & Leveling etc., of 428.49 LBCM/LCM of Overburden with Hired Conventional Equipment at JVR OC-II, KGM Area
21.	Neyveli Lignite Corporation	Excavation and transportation of OB at 11.2 LM3 and lignite 15.2 LT from old S4 area & BBS North Flank area.

9. The assessee further relied upon the following judgments:

1. *DCIT vs. Jigar Transport Company* in ITA No. 351/Ahd/2011
2. *The CIT vs. S. C. Thakur & Bros.*, reported in 322 ITR 463 (Bom.)
3. *M/s. National Construction Co.* in ITA No. 09/Rjt/2016
4. *M/s. P. C. Patel & Co.* in ITA No. 10/Rjt/2016
5. *M/s. Durga Construction Co.* In ITA No. 11/Rjt/2016
6. *Commissioner of Income Tax Vs. H.M.T. Construction Co.*, reported in [2002] 124 Taxman 470(Guj.) decided by the Hon'ble Jurisdictional High Court of Gujarat.
7. *Hindustan Construction Co. Vs. Income Tax Officer*, reported in [1989] 30 ITD 174 (AHD) decided by the Hon'ble ITAT, Bench 'A', Ahmedabad.
8. *Principal commissioner of Income Tax, Ajmer Vs. Amar Singh Bhandari*, reported in [2018] 97 taxmann.com 569(Raj) decided by the Hon'ble Rajasthan High Court.

10. Further that, it was also placed on record that the judgment passed by the ITAT, Rajkot was challenged before the Hon'ble High Court in the case of PCIT, Rajkot-I vs. Durga Construction Co., reported in [2018] 93 taxmann.com 436, wherein the High Court came to the conclusion that the assessee therein was engaged in the business of mining and extractions. Needless to mention that the business carried out by the assessee before us is akin to the business carried out by the assessee therein, namely, Durga

Construction Company. It is also noted that judgment passed by the Hon'ble Gujarat High Court in case of PCIT, Rajkot-I vs. Durga Construction Co. (supra), the department filed SLP before the Hon'ble Court which stood dismissed. Thus, the ratio laid down by the Jurisdictional High Court still holds the field under which the assessee's claim could be considered with a positive note. As it is evident from the records before us and the orders passed by the authorities below which had not been able to be controverted by the Ld. DR that the assessee engaged in the activities of excavation of over burden, mining of minerals, transportation of such excavated over burden material, excavation of minerals, transportation of minerals from mines to Pit head and transportation of minerals from Pit head to Lignite handling system/power plant, where the motor lorries used for the transportation of goods on hire. The condition under the zone of consideration for claiming higher rate of depreciation at 30% on dumpers and tippers have been fulfilled by the assessee and, therefore, having regard to the entire aspect of the matter i.e. the business activities of the assessee qua the claim of the assessee, particularly, when the fact of composite contract awarded to the assessee of mining and transportation has not been able to be controverted by the Ld. DR. We do not find any reason to interfere with the order passed by the Ld. CIT(A) in granting relief by deleting the addition made by the Ld. AO by restricting the depreciation at 15% against the claim of depreciation at 30% on the dumpers and tippers used by the assessee. The same is found to be just and proper and therefore, upheld.

11. In the result, Revenue's appeal is dismissed.

12. The decision in ground relating to deletion of disallowance on higher depreciation in ITA No. 484/Ahd/2023 for A.Y. 2015-16 shall also apply mutatis mutandis in identical grounds of ITA Nos. 485/Ahd/2023 & 486/Ahd/2023.

ITA No. 486/Ahd/2023 for A.Y. 2018-19

13. Deleting the disallowance of Rs.4,31,63,343/- being the interest on service tax + VAT interest, GST interest and entry tax interest is the subject matter before us.

14. The Ld. AO made a disallowance of Rs.4,64,74,370/- being interest on delay in payment of statutory liabilities of TDS, service tax, VAT, GST and entry tax.

15. We have heard the rival submissions made by the respective parties and we have also perused the relevant materials available on record.

16. The assessee claimed an expense on account of interest on TDS of Rs.33,11,027/- and Rs.4,31,63,343/- as interest paid on service tax, VAT, GST and entry tax. A query was raised under Section 142(1) of the Act dated 23.12.2020 as to why interest paid on taxes should not be disallowed as it is not an expenditure incurred wholly and exclusively for the purpose of business or profession within the meaning, scope and exceptions provided by Section 37 of the Act, with the following contents:

*"It is seen that the assessee has claimed an expense in nature of interest on TDS of Rs.33,11,027/-, the same not being laid out wholly or exclusively for the purposes of*

*business. Besides this, the assessee has claimed expenditure on account of various interest paid for non compliance with laws of Indirect and Direct taxes amounting to Rs. 4,31,63,343/-. Hence, it is liable to be disallowed under the provisions of the Act. Kindly submit your explanation in this regard. In this regard, refer to the judgement in Govindam Clearing Agencies Pvt. Ltd Vs DCIT (ITAT Jaipur), where it was held as follows 'When interest is paid for committing a default in respect of statutory liabilities, the amount paid and the expenditure incurred in connection to this are in no way connected to preserving or promoting the business of the appellant.'*

17. The reply dated 17.01.2021 filed by the assessee is as follows:

*"A) Explanation Regarding Interest On TDS*

*As per section 37(1) Any expenditure laid out or expended wholly and exclusively for the purpose of the business or profession shall be allowed in computing the income chargeable under the head "Profit and gains of business or profession*

*Explanation 1: Any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited in law shall not be deemed to have been incurred for the purpose of business or no deduction of allowance shall be made in profession and no respect of such expenditure.*

*The assessee claims the specified expenses of certain amount in its profit & loss account and thereafter the assessee from the payment to the party deducts certain percentage as specified under the Act as TDS and pays to the Government Exchequer The amount of TDS represents the amount of income tax of the party on whose behalf the payment was deducted & paid to the Government Exchequer. Thus the TDS amount does not represent the tax of the assessee but it is the tax of the party which has been paid by the assessee. Thus any delay in the payment of TDS by the assessee cannot be linked to the income tax of the assessee and hence is allowable business expenditure*

*TDS/TCS are part of sum payable for business expenses. Deposit of TDS/ TCS results into payment to payee who get credit for TDS/ TCS deposited. In case of delay in deposit of TDS/ TCS, interest is payable for such late deposit. This is in relation to business expenditure. Therefore, interest paid for delay in deposit of TDS/TCS is also a business expenditure.*

*It is not on account of any offence or for any activity which is prohibited in law. The interest for the delay in making the payment of TDS is compensatory in nature. The interest on delayed payment of TDS is not in the nature of penalty. Interest on TDS was due to late payment of tax and not due to non-compliance of law.*

*Also in the judgement of Hon'ble ITAT Kolkata in the case of M/S NARAYANI ISPAT PVT LTD Dated 30th August, 2017 (ITA No. 2127/Kol/2014/AY 2010-11), it was decided that interest on late payment of TDS is an allowable expenditure u/s 37(1) of the Income Tax Act 1961. In case of M/s Emdee Digitronics Pvt. Ltd vs. Pr. CIT-4, Kolkata, Hon'ble ITAT Kolkata in its order dated 28.06.2019 (ITA No.*

361/Kol/2019), it was decided that interest on late deposit of VAT, service tax, TDS etc are allowable expenditure under section 37(1) of the Income Tax Act, 1961. Copy of said judgement is attached herewith for your reference.

Considering all of the above points, your honour is requested to allow Rs. 33,11,027/- towards interest on TDS.

B.) *Explanation Regarding Interest paid for delay in compliance of laws of Indirect Taxes*

*The payment of Interest as below are made during F.Y. 2019-20*

<i>Particulars</i>	<i>Amount Rs.</i>
<i>Interest on Service Tax</i>	<i>3,58,72,326</i>
<i>VAT Interest</i>	<i>21,719</i>
<i>GST Interest</i>	<i>72,10,068</i>
<i>Entry Tax Interest</i>	<i>59,230</i>
<i>Total</i>	<i>4,31,63,343</i>

*Section 37 of the act allows deduction of expenditure which are not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee and are expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head, Profits and Gains of Business or Profession.*

*The meaning of Offence in general terms is a breach of Law or Act or any illegal act and penalty is means the punishment for committing an offence.*

*The section provides that expense incurred for non-deduction for any offence or violation of law is not allowed as business expenditure u/s 37 of the act.*

*While interest is paid for delay in compliance of law and not for non compliance or violation of law. Interest is not paid for a purpose which is an offence or prohibited under any law of land. In fact, Interest are paid for the purpose of the compliance with the Act. Interest is paid for mitigating the time value of money of delay in deposit of original tax due to the respective department of government. Payment of Interest on tax dues is migratory and compensatory in nature. Hence, it is allowable under Section 37 as it is not an offence or prohibited under any law.*

*In case of M/s. Emdee Digitronics Pvt. Ltd vs. Pr. CIT-4, Kolkata, Hon'ble ITAT Kolkata in its order dated 28.06.2019 (ITA No 361/Kol/2019), it was decided that interest on late deposit of VAT, service tax, TDS etc. are allowable expenditure under section 37(1) of the Income Tax Act, 1961.*

*Copy of said judgement is attached herewith for your reference. Considering all of the above submissions, your honour is requested to allow Rs. 4,31,63,343/- towards interest on Service Tax, VAT, GST and Entry Tax*

7.3.3 After considering the reply of the assessee, another notice u/s 142(1) dated 25.01.2021 was issued, in reply to which the assessee reiterated its stand taken earlier.”

18. However, the Ld. AO was of the view that the interest paid in respect of statutory liability cannot be treated as business expenditure under Section 37(1) of the Act and, therefore, the said expense to the tune of Rs.4,64,74,370/- was disallowed. While dealing with this issue the Ld. CIT(A) observed as follows:

“9.2 During the course of appellate proceedings, the appellant regarding the disallowance of Interest on TDS of Rs. 33,11,027/- has stated that interest paid on account of late deposit is an allowable expenditure u/s.37 of the Act. However, the AO did not appreciate the submissions made in reply to the SCN and disallowed interest amounting Rs.33,11,027/- being interest on late payment of TDS u/s.37 of the Act. On plain reading of the section 37(1), it is seen that expenses which are not specifically allowed as deduction, can be claimed as deduction provided certain condition are fulfilled. In other words, as per section 37(1) of the Act, an expenditure can be claimed as a deduction while computing income from "business or profession" if the following condition are fulfilled.

- (i) Expenditure is not of the nature as described in sections 30 to 36 of the Act;
- (ii) Expenditure is of revenue in nature not of capital in nature;
- (iii) Expenditure is not personal expense of the assessee;
- (iv) Expenditure has been laid down or expended wholly and exclusively for the purposes of business or profession of the assessee;
- (v) Expenditure has not been incurred for any purpose which is an offence or which is prohibited by law.

9.2.1 The appellant has also contended that deducting Tax from the payments, is an administrative activity of an Assessee and any late deposition of it would be thus a business expenses and would qualify for deduction u/s 37 of the Act. The appellant has also relied on certain case laws in support of its claim and requested to delete the disallowance of interest on TDS amounting to Rs. 33,11,027/

9.2.2 Further, for the remaining addition of similar nature te disallowance of Rs 4.31,63.343/- (Interest on Service tax of Rs.3,58,72,326 VAT interest of Rs.21.179+ GST Interest of Rs. 72, 10,068 + Entry Tax Interest of Rs.59,230), the appellant has stated that provisions of S.37 of the Act allows deduction of expenditure which are not in the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee and are expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head, "Profits and Gains of Business or Profession The interest is paid for delay in payment of taxes collected on behalf of government and there is no violation of law. Interest is not paid for a purpose which is an offence or prohibited under any law of land. In fact, Interest is paid for the purpose of the compliance with the Act. Interest is paid for mitigating the time value of money of delay in deposit of original service tax, GST, VAT and

entry tax due to the respective department of government. Payment of Interest on service tax, GST, VAT and entry tax dues is migratory and compensatory in nature. Hence, these are allowable under Section 37 as it is not an offence or prohibited under any law. The appellant has also relied on the decision of the Hon'ble Supreme Court in case of Mahalaxmi Sugar Mills Co Ltd. Vs CIT (SC) 123 ITR 429 (SC), wherein the Hon'ble Supreme Court had pronounced that interest charged on late deposit of taxes, is compensatory in nature and hence allowable u/s 37.

9.2.3 The appellant has further relied on the following judicial pronouncement, which are as under: -

- (i) The decision of the Hon'ble ITAT, Kolkata in the case of DCIT vs. M/s. Narayani Ispat Pvt. Ltd. (ITA No. 2127/Kol/2014 for A.Y.2010-11).
- (ii) The decision of the Hon'ble ITAT, Kolkata in the case of M/s. Emdee Digitronics Pvt. Ltd vs. Pr. CIT-4, Kolkata (ITA No. 361/Kol/2019).
- (iii) The decision of the Hon'ble Supreme Court in the case of Lachmandas Mathuradas Vs. CIT (SC) reported in 254 ITR 799.

9.2.4 The appellant has further stated that the AD had pointed out in para no. 7.3.4 at pg. no. 38 of assessment order that considering case of M/s. Govindam Clearing Agencies Pvt. Ltd. vs DCIT (ITAT Jaipur), where it was held that interest paid in respect of statutory liabilities cannot be treated as business expenditure u/s.37(1), the position taken by the assessee is untenable. In this regard, the appellant has stated that the said referred case law relates to 'interest on late payment of TDS' and not 'interest on late payment of service tax, VAT, GST and entry tax, The appellant has also stated that in the said judgement, the Hon'ble ITAT, Jaipur has not considered the contentions/submission, and simply put forward that the interest on TDS is disallowed. Hence, the ratios of said case is not applicable to present case with regards to interest on late payment of service tax, VAT, GST and entry tax.

9.2.5 Further, the appellant has stated that in para 7.3.5 at pg. no. 38 of assessment order, the AO had stated that case law of Lachmandas Mathuradas Vs. CIT is not applicable in present case as question of Law in the said case was about the nature of interest, whether compensatory or penal in nature and in the present case question is about whether interest is in the nature of business expenditure u/s 37(1). In this regard, the appellant submits that any expenditure not of the nature as described in sections 30 to 36 of the Act, is revenue in nature, not been incurred for any purpose which is an offence or which is prohibited by law and incurred wholly and exclusively for the purpose of business then same shall be allowed u/s 37. In present case, as pointed above, interest expense is incurred for business purpose and is not incurred for any offence or prohibited by law, then it shall be allowed u/s. 37. Further, it is essential principle laid down in case of Lachmandas Mathuradas Vs, CIT for determining nature of expense being compensatory or penal, is essentially required to be considered so as to determine whether expense incurred for any purpose which is an offence or which is prohibited by law or not w.r.t. allowability u/s 37. Thus, the appellant has requested to delete the disallowance of interest on service tax, VAT, GST and entry tax amounting to Rs.4,31,63,343/-.

9.3 I have gone through the submission of the appellant as well as the assessment order. The issue here is that the appellant has paid interest on service tax of Rs 3,58,72,326/-, VAT interest of Rs.21,719/-, GST interest Rs 72,10,068/- and entry tax interest of Rs 59,230/-. The main contention of the appellant is that as the expenses of Service Tax, VAT, GST etc. are of compensatory in nature, therefore any interest paid on that sum is also

allowable as the tax amount is itself allowable. The appellant has further relied on the decision of the Hon'ble Supreme Court in the case of Mahalaxmi Sugar Mills Co. Ltd. v. Commissioner of Income-tax, wherein the Hon'ble Supreme Court had pronounced that interest charged on late deposit of taxes, is compensatory in nature and hence allowable u/s 37 (reproduced supra), The head note and facts of the judgement are as under-

"Section 10(2)(xv) of the Indian Income-Tax Act, 1922 [Corresponding to section 37(1) of the Income-tax Act, 1961] Business expenditure Whether interest paid on arrears of cess under section 3(3) of the U.P. sugarcane cess act, 1956 was a permissible deduction under section 10(2)(xv)-Held, yes"

#### FACTS

The assessee-company is engaged in the business of the manufacture and sale of sugar. Its previous year ended on 30th June. For the assessment years 1959-60, 1960-61 and 1961-62, its claim for deduction as revenue expenditure of interest paid on arrears of cess under the U.P. Sugarcane Cess Act, 1956 (hereinafter referred to as "the Cess Act") was disallowed by the ITO but allowed by the AAC and the Tribunal.

On reference by the revenue, the Delhi High Court upheld, the disallowance holding (i) that the impugned claim did not satisfy the provisions of section 10(2)(s) of the 1922 Act because it was not interest paid on borrowed capital, and (ii) that it did not fall within the scope of section 10(2)(xv) of the 1922 Act because it was paid by way of penalty for an infringement of the Act. On appeal:

#### HELD

1. The interest payable on arrears of cess under section 3(3) of the Cess Act is in reality part and parcel of the liability to pay cess. It is an accretion to the cess. The enlargement of the cess liability is automatic. The liability to pay interest is as certain as the liability to pay cess
2. The interest provided for under section 3(3) of the Cess Act is in the nature of compensation paid to the Government for delay in the payment of cess. It is not by way of penalty. The provision for penalty as a civil liability has been made under section 3(5) and for penalty as a criminal offence under section 4 of the Cess Act.
3. The High Court proceeded entirely on the basis that the interest bore the character of a penalty and it was "penal interest It failed to notice sections 3(5) and 4 and the other provisions of the Cess Act.
4. The interest paid under section 3(3) of the Cess Act cannot be described as a penalty paid for an infringement of the law and the same was accordingly admissible under section 10(2)(xv) of the 1922 Act

9.3.1 Similarly, reliance is placed on the decision of the Hon'ble Mumbai Tribunal in the case of Go Airlines (India) Ltd. v. Deputy Commissioner of Income Tax-5(1)(1), Mumbai. [2021] 126 taxmann.com 152 (Mumbai - Trib.)/[2021] 188 ITD 9...wherein it is held that

Section 37(1) of the Income-tax Act, 1961 Business expenditure Allowability of (Interest) Assessment year 2012-13 Whether interest paid by assessee on delayed payment of service tax is compensatory in nature and, if on verification it was found that assessee had actually paid interest in impugned assessment year, same was to be allowed as deduction to assessee-Held, yes

9.3.2 Further, reliance is place on the decision of the Hon'ble Bangalore Tribunal in the case of *Velankani Information Systems Ltd. v. Deputy Commissioner of Income-tax, Circle 7(1)(2), Bangalore [2018] 97 taxmann.com 599 (Bangalore - Trib.)* wherein it is held that :-

*II. Section 37(1) of the Income-tax Act, 1961-Business expenditure Allowability of (Penal interest) Assessment year 2012-13 Disallowance of interest paid on delayed remittances of service tax was made by Assessing Officer being of view that expenditure was in nature of penalty and was hit by Explanation to section 37(1) - Whether payment of interest was only compensatory in nature and would not be in nature of penalty which would be hit by Explanation to Section 37(1) Held Yes Whether thus, interest paid on delayed remittances of service tax was allowable as deduction under section 37(1)-Held, yes [Para 20] (in favour of assessee)*

9.4 I find from the above decisions that interest on Service Tax, VAT interest, GST Interest & Entry tax Interest paid by the appellant cannot be said to be penal in nature. These interest payments are compensatory in nature and cannot be disallowed. Further, it is also important to mention here that the interest on TDS is penal in nature because it comes under the category of default as after deducting the TDS amount from others, the same amount was not paid within the time limit prescribed. Therefore, disallowance on account of interest on TDS is confirmed as same is akin to interest on late payment of Income Tax.

9.5 In view of the above factual discussion and legal matrix of the case, it is held that interest on GST, VAT, Entry Tax and Service tax is an allowable expenditure as the same is compensatory in nature and the same cannot be said to be penal in nature. Therefore, the AO is directed to delete the disallowance of Rs.4,31,63,343/- (Interest on Service tax of Rs 3,58,72,326 + VAT interest of Rs.21,179+ GST Interest of Rs.72,10,068 + Entry Tax Interest of Rs.59,230) made, Further, balance disallowance on account of interest on TDS of Rs.33,11,027/-is found to be justified and hence confirmed as the same falls under the category of penalty in nature. Thus, the ground of appeal no. 4 is partly allowed.”

19. Upon perusal of the entire aspect of the matter, we find that the judgment relied upon by the Learned CIT(A) in the case of *Mahalaksmi Sugar Mill Company Ltd. vs CIT (supra)* passed by the Hon'ble Supreme Court decided the issue in favour of the assessee. However, whether interest on service tax, VAT interest, GST interest and entry tax interest paid by the assessee is compensatory in nature or in the nature of penalty has to be examined by Learned Assessing Officer in the case in hand. This issue has also been considered by the Mumbai Bench in the case of *Gini and Jony Ltd.* in ITA No.1892/Mum/2017 by order dated 21<sup>st</sup> August, 2018. In that view of

the matter, at the time of hearing of the instant appeal, we have expressed our mind for setting aside the issue to the file of the Learned AO for verification of the same which has been agreed by both the parties.

20. Thus having regard to the facts and circumstances of the case, we restore the issue to the file of Learned AO for examination of the same and to pass order strictly in accordance with law.

21. This ground of appeal preferred by Revenue is, thus, allowed for statistical purposes.

22. In the combined result, ITA Nos. 484 & 485/Ahd/2023 are dismissed and ITA No. 486/Ahd/2023 is partly allowed for statistical purposes.

**This Order pronounced on 31/05/2024**

Sd/-  
(RAMIT KOCHAR)  
**ACCOUNTANT MEMBER**      *True Copy*

Sd/-  
(MADHUMITA ROY)  
**JUDICIAL MEMBER**

Ahmedabad;      Dated 31/05/2024

S. K. SINHA

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad