

**IN THE INCOME TAX APPELLATE TRIBUNAL
JODHPUR BENCH, JODHPUR.**

**BEFORE DR. M. L. MEENA, ACCOUNTANT MEMBER
AND SH. ANIKESH BANERJEE, JUDICIAL MEMBER**

**I.T.A. No.143/Jodh/2023
Assessment Year: 2014-15**

K. K. Enterprises 380, Shree Niketan Ashok Vihar, Udaipur. [PAN:AADFK9054B] (Appellant)	Vs.	Asstt. Commissioner of Income Tax, Circle-2, Udaipur. (Respondent)
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Appellant by	Sh. Amit Kothari, CA.
Respondent by	Ms. Nidhi Nair, JCIT DR

Date of Hearing	09.10.2023
Date of Pronouncement	12.10.2023

ORDER

Per:Anikesh Banerjee, JM:

The instant appeal of the assessee is directed against the order of the Id. Commissioner of Income Tax (Appeals), NFAC, Delhi, [in brevity the ‘CIT (A)’], order passed u/s 250 of the Income Tax Act 1961, [in brevity ‘the Act’] for A.Y. 2014-15. The impugned order was emanated from the order of the Id. ACIT, Circle-2, Udaipur,[in brevity ‘the AO’] order passed u/s 143(3)of the Act.

2. The assessee has taken the following ground:

“1. The ld.CIT(A) has erred in not sustaining disallowance out of depreciation on dumper amounting to Rs. 1,33,697/- by not granting higher depreciation which was allowed in past assessment.

2. The ld. CIT(A) has erred in sustaining disallowance of Rs.16,70,400/-claimed as development charges. The disallowance so sustained is bad in law and bad on facts.

3. The ld. CIT(A) has erred in not allowing deduction u/s 80IA claimed at Rs. 66,97,408/- for which application for admitting additional ground was raised before the ld.CIT(A). The Id. CIT(A) has erred in not considering such ground of appeal raised in appeal.

4. The ld. CIT(A) has erred in restricting the deduction u/s 80IA to Zero on the pretext that there was loss from business or profession for which application for admitting additional ground was raised before the ld.CIT(A). The ld. CIT(A) has erred in not considering such ground of appeal raised in appeal.

5. The appellant crave liberty to add, amend, alter, modify, delete any of the ground of appeal on or before its hearing before your honours.”

3. Brief fact of the case is that the assessment was framed u/s 143(3) of the Act with addition amount to Rs.1,33,697/- in relation to rejection of depreciation claimed @ 30% which is reduced to @15% for hiring charges

related to motor vehicle. The Id. AO added the excess depreciation amount of Rs.1,33,697/- with the total income of the assessee. Further the amount of Rs.16,70,400/- was added back for unpaid liability related payment to UIT (Udaipur Improvement Trust) for development charges. Aggrieved assessee filed an appeal before the Id. CIT(A). The Id. CIT(A) upheld the order of the Id. AO. Being aggrieved assessee filed an appeal before us and has agitated both the grounds.

4. The Id. AR filed written submission which are kept in the record. The Id. AR vehemently argued and mentioned the ground-wise submission which are as below.

Ground No. 1

4.1 The Id. AR argued that the excess depreciation on the lorry hire charges @ 30% was duly rejected by the Id. AO and restricted the depreciation @ 15% by considering the vehicles as plant and machinery related to assessee's business. The Id. AR invited our attention in the observation of the Id. CIT(A) in appeal order. Para 6.2 to 6.3 of the appeal order are duly reproduced as below:

“6.2 The case laws relied on by the AO are applicable to the facts of the appellant's case. The Hon'ble High Court of Gauhati in the case of - Construction & Co. [1997] 90 taxman 175 (GAU.) has held that 'dumper' being a mechanical device for picking up things from somewhere for dumping elsewhere would come within expression

'earthmoving machinery', and are not road transport vehicle -Held, yes. Further, the High Court of Rajasthan in the case of CIT vs Sardar Stones reported in [1995] 215 ITR 350 (Rajasthan) has held that 'whether business of running of vehicle on hire is different from giving vehicle on hire casually - Held, yes'. Similarly, the High Court of Rajasthan in the case of CIT vs AR Enterprises P. Ltd. has held that tippers &dumpers are not transport vehicle rather they are construction equipment under Plant &Machinery.

6.3 Therefore, respectfully following the above decisions of the Hon'ble High Court of Gauhati and the jurisdictional High Court of Rajasthan, the dumpers given on hire by the appellant to its sister concern is held as non-transport vehicle which falls under the category of plant & machinery, which is eligible for depreciation at 15%. Accordingly, the disallowance of higher depreciation claimed by the appellant of Rs.1,33,697/- is hereby confirmed. This ground of appeal is dismissed.”

4.2 The ld. AR placed that the Rajasthan High Court in recent judgment clarified that the depreciation on lorry hire charges is related to @30% and explained accordingly. The ld. AR further placed that the Coordinate Bench of ITAT Jodhpur also taken the view in favour of the assessee. In assessee's own case bearing **ITA No.195/Jodh/2016** order dated**06.09.2017**.

4.3 The Id. AR further argued and invited our attention in the order of Hon'ble **High Court of Rajasthan** in the case of **PCIT vs. Amar Singh Bhandari (2018) 258 taxman 227 (Raj.)**. The relevant paragraph is reproduced as below:

“9. It is not in dispute that the assessee has earned rental income from these vehicles. The requirement of the provision stands satisfied, in wake of such finding recorded by none other than the AO himself.

10. The CIT(A) has tried to non-suit the assessee on the ground that the subject dumper and Volvo do not fall within the expression of motor buses, motor lorries and motor taxies, as provided in Entry No. 111(3)(ii) of Part A of Appendix I. It is pertinent to note that the depreciation for motor buses, motor lorries and motor taxies has been provided under the Head-III machinery and plant, wherein cl. (ii) of Entry No. 111(3) deals with the motor buses, motor lorries and motor taxies, while cl. 3(iii) concerns with commercial vehicles. As such, if the vehicles in question are not held to be falling in sub-cl. (ii) of cl. (3), they would well fall in sub-cl. (iii) of the cl. 3 of Entry No. III of Appendix-1, entailing even higher rate of depreciation to the assessee.

11. The expression used in sub-cl. (ii), namely motor buses, motor lorries and motor taxies is having wide amplitude and the term motor lorries used therein, would take in its sweep the subject vehicles, i.e., dumper and Volvo.

12. In view of the above discussion and in view of the finding as recorded by the AO himself, that the vehicles in question were used for hire purposes, the assessee cannot be denied depreciation @ 30 per cent.

13. The appeal, therefore, fails.”

Ground No.2

4.4 The Id. AR further argued and placed that the assessee maintains the books of accounts in mercantile system. The assessee is bound to pay amount to Rs.16,70,400/- to UIT towards development cost, whereas, the development charges was not paid in view of the decision of the Hon'ble Rajasthan High Court. So, the entire amount is return as liability. The same amount is duly debited in P & L a/c. The Id. AO during assessment added back the amount for non payment of development charges.

4.5 The Id. AR further invited our attention in para 8 of the appeal order which is reproduced as below:

8. The appellant during the appeal proceedings has not responded and made any written submissions in support of this ground, It is evident from the assessment order that the assessee is bound to pay Rs.16,70,400/- to UIT Udaipur towards development cost; whereas the UIT had not taken the development charges in view of the decision of Rajasthan High Court. The appellant has also admitted before the AO that the

above payment has not been actually made to UIT, Udaipur. However, the appellant has claimed development charges as expenditure. The AO has observed that since the payment has not been actually made, the same cannot be claimed as deduction. The observation of the AO is categorically held to be proper and genuine. Any expenditure can be claimed as deduction only when it is actually paid. Since the appellant has paid the development cost to UIT, Udaipur during the year under consideration, the disallowance of the same by the AO is hereby confirmed. Accordingly, this ground of appeal is dismissed.”

4.6 The Id. AR further relied on the order of

Hon’ble High Court of Rajasthan, Jaipur Bench Udaipur Mineral Development Syndicate (P.) Ltd. v. Deputy Commissioner of Income-tax, [2003] 129 Taxman 728 (Rajasthan)

“6. It has also been brought to our notice that even in the year 1993-94 though the actual expenditure has been made, but that has been denied on the ground that CIT(A) has allowed this expenditure in the year 1991-92. Thus in both the years, the claim of the assessee has been disallowed.

7. Considering the clause in the agreement i.e. as far as possible the lessee shall restore the surface land so used to its original condition, the moment assessee digs pits, he is bound under the agreement to fill those pits and liability does accrue on the date when the pits are digged. Therefore, in our view, the Tribunal has committed error in

disallowing the claim of the assessee in the year in hand i.e. 1991-92.

We agree with the view taken by CIT(A) that the moment assessee digs the pits, liability does arise and he is entitled for deduction of the expenses which he is supposed to incur for filling those pits, as assessee is following the Mercantile System of Accounting. It can claim the expenses incurred as soon as it digs the pits.

8. In the result, we restore the view taken by CIT(A). The appeal stands allowed.”

Ground Nos. 3 and 4

4.7 The ld. AR placed that the same issue was placed during appeal as additional evidence, but the ld. CIT(A) had not considered the issue in appeal order. The ld. AR invited our attention in appeal submission page 12 where the assessee submitted on dated 08.03.2018 for permission for raising the addition ground of appeal before the ld. CIT(A). So, the ground nos. 3 and 4 are remained un-adjudicated by the ld. CIT(A) in the impugned order.

5. The ld. DR vehemently argued and relied on the order of revenue authorities. The ld. DR was unable to submit any contrary judgment against the submission of the assessee.

6. We heard the rival submission and consider the documents available in the record. The **ground no. 1** related to claim of depreciation @ 30% is duly covered by the **Coordinate Bench of ITAT Jodhpur** and the order of the

Hon'ble High Court in the case of **Amar Singh Bhandari** (supra). Accordingly, we set aside the order of the ld. CIT(A) and quash the addition amount of Rs.1,33,697/- related to rejection of depreciation by the ld. AO.

Ground No. 2

6.1 Related to **ground no. 2**, the assessee is maintaining the mercantile system. Assessee debited the development charge and also the contra entry was passed and treated the amount as the liability. The assessee is bound to pay the amount as per the agreement. After the settlement of dispute, the amount should be paid to the said authority. We respectfully relied on the order of **Udaipur Mineral Development Syndicate (P.) Ltd**(supra). The said expenses is allowable. The addition made by the ld. AO amount to Rs.16,70,400/- is quashed.

Ground Nos. 3 and 4

6.2 Related to **ground nos. 3 and 4**, the assessee placed that a request was made to the ld. CIT(A) related to submission of additional ground during appeal hearing. The ld. DR had not made any objection about the submission of the assessee. The matter was remained untouched by the ld. CIT(A). So, in our considered view, ground nos. 3 and 4 are remanded back to the file of the ld. CIT(A) for adjudicating the issue after allowing opportunity to the assessee in the set aside proceeding.

Accordingly, ground nos. 1 and 2 are allowed and ground nos. 3 and 4 are allowed for statistical purposes.

6.3 Ground No. 5 is general in nature.

7. In the result, the appeal of the assessee bearing **ITA No. 143/Jodh/2023** is allowed.

Order pronounced in the open court on 12.10.2023

Sd/-

(Dr. M. L. Meena)
Accountant Member

Sd/-

(ANIKESH BANERJEE)
Judicial Member

AKV

(On Tour)

Copy of the order forwarded to:

- (1) The Appellant
- (2) The Respondent
- (3) The CIT
- (4) The CIT (Appeals)
- (5) The DR, I.T.A.T.

True Copy
By order