

**IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH 'B' BANGALORE
ITA No.818/Bang/2010
Assessment Year: 2006-2007
M/s MAGTRON EARTH MOVERS
MRUTYUNJAYA NAGAR
RANEBENNUR, HAVERI DIST
Vs
INCOME TAX OFFICER
WARD-1, HAVERI**

P Madhavi Devi, JM and A Mohan Alankamony, AM

Dated: December 23, 2010

Appellant Rep by: Atul K Alur, Adv.

Respondent Rep by: Shri D Prabhakar Reddy, Addl.CIT(DR)

Per: A Mohan Alankamony:

This appeal of the assessee firm – Magtron Earth Movers – is directed against the appellate order of Ld. CIT, Hubli, in ITA NO: 112/ CIT (A) HBL/08-09 dated: 26.3.2010 for the assessment year 2006-07.

2. The assessee firm ('the assessee') has raised five grounds in its grounds of appeal. However, on a perusal, the crux of substance of the issue is that –

“the authorities below erred in restricting the depreciation at 15% as against 30% claimed on JCB Earth Movers.”

3. Briefly, the assessee was the owner (and operating of) of JCB Earth Moving Machines. During the period under dispute, it had claimed depreciation @ 30% on such machines which was restricted to 15% by the AO on the perception that the actual depreciation allowable in respect of JCB Machines was only at 15%.

4. Aggrieved, the assessee took up the issue with the Ld. CIT(A) for solace. After due consideration of the assessee's contentions and also elaborately analyzing the case laws on which the assessee had placed its strong reliance, the Ld. CIT (A) had observed thus –

“4.....The preposition (sic) proposition laid down in the decision of Hon'ble Gujarat High Court [Gujco Carriers v. CIT – 256 ITR 50 (Guj)] relied upon by the appellant is that in that case the mobile crane of the assessee was admittedly registered as a 'heavy motor vehicle' like 'motor trucks' and 'motor lorries' as provided in Entry-IIIIE (1A) of the table in Appendix-I under Rule 5 of the I.T. Rules 1962. the function of the JCB machine is excavation of the land which is categorized as earth moving equipment and construction machine which falls in the category of Plant and Machinery.

Looking at the operations and the functions of the JCB machine, it cannot be equated with the 'motor lorry' or 'motor trucks' which are registered as 'heavy motor vehicle'. The motor trucks and motor lorries transport the goods and passengers from one place to the other place and are registered with the RTO for this purpose as 'heavy motor vehicle'. However, unlike 'motor lorries' and motor trucks, the JCB machine is not registered as a heavy motor vehicle and registered as a 'excavator and loader machine' with the RTO. The JCB machine thus, falls in the category of a particular type of machinery for the purpose of excavation of land which falls under the plant and machinery and the applicable rate of depreciation in respect of JCB machine, it being a part of plant and machinery is 15% as against 30% claimed by the appellant. The functions and operations of JCB machines are entirely different than the functions and operations of 'motor lorries' and 'motor trucks' and the purpose of use is also different. In the light of these facts coupled with the fact that the JCB machine is neither registered with RTO as a 'heavy motor vehicle' nor its functions and operations are similar to that of a motor trucks and motor lorries, therefore, it does not fall within the ambit of definition of 'heavy motor vehicle' like motor lorry/motor truck, as provided in Entry-III (IA) of the table in appendix-I under Rule 5 of I.T Rules, 1962, hence, is not eligible for higher depreciation of 30%. In view thereof, the ratio of the decisions relied upon by the appellant is not applicable.....”

5. Disappointed with the stand of the Ld. CIT (A) on the issue, the assessee has come up with the present appeal before us. The arguments put-forth by the Ld. A R are summarized as under:

- *JCB Earth Movers were also registered under the Motor Vehicle Act before the RTO and the relevant documents were produced before the CIT (A) for perusal;*
- *That JCB Earth Mover is an excavator and its main function is removing the soil or earth through which it has been categorized as yet, at the same time, JCB Earth Movers another function is to carry or transport the removed soil and dump it at another site and thus discharging the function like transshipment and loading in to another vehicle; that for the purpose of rates of depreciation, JCB Earth Movers can be treated as a motor lorry and, hence, it is eligible for higher rate of depreciation at 30%*

- *Relies on the case laws:*

(a) Gaylord Constructions vs. ITO (2008) 175 Tax (Coch) (Mag)

(b) Bose Abraham vs. State of Kerala (2001) KTR 366 (SC)

- *JCB Earth Mover was an excavator and held by the Supreme Court that the excavators and road rollers were motor vehicles for the purpose of registration under Motor Vehicles Act, that they were suitable for use on roads and merely because a motor vehicle was put to a specific use such as being continued to an enclosed premises will not render the same to a different kind of vehicle [AIR 2001 SC 835;*

- CIT(A) erred in coming to a conclusion that JCB Earth Mover was neither registered with RTO as a 'heavy motor vehicle' nor its functions and operations were similar to that of a motor trucks/motor lorries and, hence, was not eligible for higher rate of depreciation at 30%

5.1. During the course of hearing, the Ld. A R had furnished an affidavit and also sought permission of this Bench to adduce evidence in the shape of RC records of the JCB Earth Movers registered with jurisdictional RTO, Notification of State Government, case laws etc. to drive home his point in favour of his client.

5.2. On the other hand, the forceful arguments put-forth by the Ld. DR are summed up as under:

- the definition of the term 'motor vehicle' as per the MV Act was that 'motor vehicle or vehicle means any mechanically propelled vehicle adopted for use upon roads....but does not include... a vehicle of a special type adopted for use only in a factory or in any other enclosed premises...'; that the above definition fulfils the twin objectives of ensuring the safety and regulation of the road users as also the collection of road tax by making registration compulsory;

- earth moving machinery was primarily used in the infrastructure sector and, hence, the same had always been accorded preferential treatment by the Governments, whereas the motor vehicles were fully finished products and, hence, invariably charged to higher rate of sales-tax and earth-moving machines were critical for the infrastructure sector and were given preferential treatment;

- that the Government had clarified that earthmoving machines would be classified as machinery under the Industrial (D & R) Act, 1951 and, accordingly, had exempted these machines from cess under the Automobiles Cess Rules, 1984

- Under Central Excise Tariff Act, 1985 [CETA], earth-moving machines were classified under the broad category of machines which attract basic excise duty of 16 per cent whereas motor vehicles like cars were classified under CETA and attract basic excise duty of 16% + excise duty of 8%;

- The I.T.Act also makes a distinction between earthmoving machinery and motor vehicles. The Companies Act 1956 also recognizes the term earthmoving machinery and specifies a higher rate of depreciation for such machinery employed in heavy construction works and, thus, earthmoving machines cannot be equated with or classified as motor vehicles and charged to depreciation as applicable to motor vehicles;

- the question as to whether earthmoving machinery should be classified as motor vehicle and subjected to higher depreciation needs to be viewed from a broader perspective.

5.3. Also furnished copies of Table of rates at which depreciation is admissible and rates of depreciation under Companies Act.

6. We have carefully considered the rival submissions, meticulously perused the relevant records and also the evidences produced by either party during the course of hearing in the shapes of case laws, table of rates of depreciation admissible etc.,

6.1. The assessee has been operating JCB Earth Moving Machines for which it had claimed depreciation at the rate of 30% which was scaled down to 15% by the AO on the ground that the actual depreciation allowable in respect of those machines was only at 15%. It was valiantly put-forth before the CIT (A) that JCB machines fall within the category of motor trucks and motor lorries and, therefore, the assessee was entitled to depreciation at 30% at par with the motor lorries etc., However, the Ld. CIT (A), for the reasons recorded in his impugned order which is under dispute, shot down the assessee's claim especially on the ground that “..... unlike ‘motor lorries’ and motor trucks, the JCB machine is not registered as a heavy motor vehicle and registered as a ‘excavator and loader machine’ with the RTO. The JCB machine thus, falls in the category of a particular type of machinery for the purpose of excavation of land which falls under the plant and machinery and the applicable rate of depreciation in respect of JCB machine, it being a part of plant and machinery is 15% as against 30% claimed by the appellant. The functions and operations of JCB machines are entirely different than the functions and operations of ‘motor lorries’ and ‘motor trucks’ and the purpose of use is also different.”

6.2. We have scrupulously perused the evidences produced by the assessee such as (i) Motor Vehicles Taxation Card; (ii) Form of application for registration of motor vehicles; (iii) Form of Certificate of Registration wherein it has been unambiguously mentioned against the column 10. Type of vehicle as “Hydraulic Excavator London ” [Source: P 5 of PB AR], again against the Column 7. Class of vehicle (if motor cycle, whether with or without gear): ‘ Earth Moving machinery’ and glaringly in the Form of Certificate of Registration under the caption Detailed description 1. Class of vehicle – Hydraulic Excavator London (JCB) which has been authenticated by none other than the Regional Transport Officer, Haveri dt: 24.3.2005 [source: P 13 of PB AR]. This has clearly vindicated the finding of the Ld. CIT (A) that the vehicles have not been registered as *heavy motor vehicles* as portrayed by the assessee.

6.3. We have respectfully perused the finding of the Hon'ble Gujarat High Court in the case of *Gujco Carriers v. CIT reported in 256 ITR 50 (Guj)* on which the assessee had placed its strong reliance. The issue before the Hon'ble Court was, in brief, that the assessee had purchased a mobile crane and claimed depreciation at 40% thereon stating that it was use in the business of running it on hire and so, it will fall under entry No. IIIIE(1A) of Part I of Appendix I to the Income-tax Rules, 1962. After deliberating the issue, the Hon'ble Court had reasoned that – “The mobile crane of the assessee which admittedly was registered as a heavy motor vehicle , would clearly fall within the expression "motor lorries" in entry No. IIIIE(1A) of the Table in Appendix I under rule 5 of the said rules, since it was used by the assessee in its business of running the crane on hire. Therefore, assessee was entitled to depreciation at the rate of 40 per cent on crane mounted on motor truck.

6.4. With due regards, we would like to point out that the Mobile crane was registered as a heavy motor vehicle which was, therefore, enlisted to claim depreciation at a higher rate whereas in the present case even the JCB Earth Movers have not been registered as a heavy motor vehicles with the Regional Transport Authorities, leave alone the functioning of a JCB machine was only to excavate the soil, quarry etc., which, in any stretch of imagination, can not be equated either with a mobile crane or a motor truck or motor vehicle, as the case may be and, thus, in our considered view, the ruling of the Hon'ble Court cannot be roped in to come to the rescue of the present assessee.

6.5. In the case of *Gaylord Constructions v. ITO* reported in (2008) 175 Taxman 0099 (Coch)(Mag.), the Hon'ble Tribunal had observed that -

“12.3. It will, thus, be clear that motor vehicles like fire trucks, fork-lift trucks and crane trucks which are designed for special services, fall within the category of ‘motor trucks’ (also called ‘motor lorries’).

As far as JCBs are concerned, JCB is coming in the category of excavator and its main function is removing the soil or earth at the same time, JCB's another function is to carry or transport the removed soil and dump it at another site to discharge the function like transshipment and loading into another vehicle. In our opinion, for the purpose of rates of depreciation JCB can be treated as a motor lorry and, hence, eligible for higher rate of depreciation at 40%. We, therefore, direct the assessing officer to allow depreciation at 40 per cent on JCB in place of 25 per cent.”

6.5.1. With due respects, we have perused the finding of the Hon'ble Tribunal cited supra. It is pertinent to mention here that the Hon'ble Bench while considering the application of s.44AE of the Act had observed thus –

“12. On careful perusal of the Circular issue by the CBDT explaining the provisions of the Finance Act, 1994, more particularly at the time of introduction of section 44AE of the Act, it is seen that presumptive scheme of income, more particularly in respect of trucks which principle function is as a goods carriage. In the case of JCB, the principal function is not carriage of goods. In our opinion, by no stretch of imagination, JCB can be termed as ‘good carriage’. We, therefore, hold that the income from JCB cannot be computed by applying section 44AE of the Act.....”

6.5.2. However, when the applicability of rate of depreciation for JCB Machines came to fore, the Hon'ble Bench had applied a contrast view that JCB can be treated as a motor lorry and, thus, eligible for higher rate of depreciation on the presumption that JCB's another function was to carry or transport the removed soil and dump it another site etc.

6.5.3. With due regards, we beg to differ with the observation of the Hon'ble Bench on this issue. Normally JCB machines are designed in such a way to excavate the soil and dump it on either side of it, the heap of which will be carried away by a truck or a lorry or else the JCB while digging the earth, the soil so collected by its front portion will be dumped in a truck which will be parked by its side. The prime functioning of a JCB

machine, as we have seen elsewhere, was confined to excavate the soil/earth and not to carry the removed soil and dump it at another place. Such an exercise may be an isolated one [if the removed soil was so negligible in quantity], but, cannot be a regular feature. As already narrated, JCB Machines are designed in such a way to excavate the soil and not to carry the removed soil to transport etc., Hypothetically, if a JCB machine were to be employed to excavate the soil as well as to remove the same to transport to another site, the cost involved in such an exercise would definitely be fantastic than engaging a truck/lorry to remove the heap of soil which, in our considered view, no prudent person would venture to indulge.

6.5.4. Moreover, the present assessee had not produced any tangible documentary evidence either before the authorities below or before this Bench to assert that the JCB machines of the assessee had indulged not only in excavate the soil, but, transported the removed soil to another place as well so as to take sanctuary under the finding of the Hon'ble Tribunal cited supra.

6.5.5. As rightly highlighted by the Ld. CIT (A) in an elaborate manner, the functioning and operation of a JCB machine, as described supra, cannot be equated either with a motor lorry or a motor truck which will be registered as a heavy motor vehicle as they will be assigned to carry/transport materials from one place to another place on the roads whereas JCB machine will be put into operation for a specific purpose - dig out soil/quarry in a factory premises or in any other enclosed premises. The JCB machine invariably falls within the scope of a particular type of a machinery for the sole purpose of excavation of soil/earth which comes under the purview of 'plant and machinery' and so the applicable rate of depreciation in respect of JCB machines being 'plant and machinery' is only at 15% and not 30% as claimed by the assessee.

7. Let us now have a glance at the Entry Tax Notification issued by the Government of Karnataka [Reference: P 17 of PB AR] wherein motor cars including motor taxicabs, motor cycles, motor lorries, omni buses, auto- rickshaws etc., will be levied entry taxes at the rate of 12% whereas earth movers such as dumpers, dippers, bulldozers have been relegated to a separate category wherein the entry tax has been fixed at 8% which amply proves that earth movers doesn't come under the purview of motor vehicles like lorries, trucks etc.,

8. In the case of *Bose Abraham v. State of Kerala* [AIR 2001 Supreme Court 835], primarily the issue before the Hon'ble Apex Court was with regard to the levy of entry tax on motor vehicles. After analyzing the issue, the Hon'ble Court of view that 'the excavators and road rollers are motor vehicles for the purpose of Motor Vehicles Act and they are registered under that Act and are exigible to tax under Entry Tax Act. They are suitable for use on roads. Merely because a motor vehicle is put to a specific use such as being confined to an enclosed premises, will not render the same to be a different kind of vehicle.'

8.1. With respects, we would like to record our reasoning that the above ruling of the Hon'ble Supreme Court was rendered with regard to the applicability of entry tax to different types of vehicles which in our view cannot be equated with the issue on hand.

8.2 On perusing section 32 of the Act, we do not find any mention of the word 'motor vehicle'. Words referred to are motor cars, motor buses, motor lorries, motor taxies, commercial vehicles etc. The rate adopted by the assessee for claiming depreciation on JCB is 30%. The Act prescribes 30% depreciation for motor buses, motor lorries and motor taxies used in a business of running them on hire as provided in (rule 5) - New Appendix-I (effective from A.Y. 2006-07 onwards). Nowhere in the Act or the Rules, JCB is mentioned. Part-III sub-item No.1 of the Table specifies that machinery and plant other than those covered by sub-items (2), (3) and (8) shall be entitled to claim depreciation @ 15%. Since JCB does not fall under sub-item (2), (3) & (8) of Part-III, it has to be necessarily included in sub-item (1) for which the permissible rate of depreciation is 15%. The assessee's contention that JCBs are registered under the Motor Vehicles Act before the RTO, and therefore it has got the characteristics as that of motor buses, motor lorries etc. is not appreciable. Under section 2 of the Motor Vehicles Act, there are distinct definitions for motor car, contract carriage, goods carriage, heavy goods vehicle, heavy passenger motor vehicle, light motor vehicle, motor cycle etc. and last but not the least 'Motor vehicle. The general definition of motor vehicle as per section 2(28) of the Motor Vehicles Act, 1988, cannot be fitted into the Income-tax Act. This definition is an extensive definition which includes all kinds of mechanically propelled vehicles including a trailer. The scope of the Motor Vehicles Act is to bring into its fold all kinds of moving objects plying on the roads under its ambit so as to provide safety measures and regulate traffic. Therefore, any objects which moves on the road by itself such as harvesting combines, road layers, cranes on wheels, etc. requires registration under the Motor Vehicles Act. However, while claiming depreciation under the Income-tax Act, only the relevant provisions of the Income-tax Act has to be applied.

9. In an overall consideration of the facts and circumstances of the issue and also the relevant facts which have been deliberated upon in the fore-going paragraphs, we are of the considered view that the authorities below were justified in restricting the allow-ability of depreciation at 15% in respect of JCB Earth Movers. It is ordered accordingly.

10. In the result, the assessee's appeal is dismissed.

(Pronounced in the open court on this 23.12.2010.)