

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'E', NEW DELHI**

**BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER  
AND  
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No.3169/Del/2010  
Assessment Year: 2013-14

ACIT, Central Circle-26, New Delhi	<b>Vs.</b>	M/s. Oriental Nagpur Bye Pass Construction Pvt. Ltd., 21/48, Commercial Complex, Malcha Marg, Diplomatic Enclave, New Delhi
<b>PAN :AABCO2017M</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

Appellant by	Shri K. Hauthang, Sr.DR
Respondent by	Shri K.V.S. Krishna, CA

Date of hearing	25.09.2019
Date of pronouncement	14.10.2019

**ORDER**

**PER O.P. KANT, AM:**

This appeal by the Revenue is directed against the order dated 23<sup>rd</sup> February, 2017 passed by the learned Commissioner of Income Tax (Appeals)-31, New Delhi [in short 'the CIT(A)'] pertaining to assessment year 2013-14, raising following grounds of appeal:

- 1. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in deleting the penalty u/s 271(l)(c), amounting to Rs.27,05,62,588/-, without appreciating the fact that the incorrect claim of depreciation on roads was withdrawn by the assessee on 14.03.2015,*

*i.e. after a lapse of around year since the issue of CBDT circular dated 23.04.2014, and after receiving specific show-cause notice dated 11/12.03.2015 from the AO.*

- 2. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in holding that the assessee has neither concealed its income nor furnished inaccurate particulars of its income whereas it was evidently a case of furnishing of inaccurate particulars of its income leading to concealment of income by the assessee as the assessee never bothered to revise its return of income filed u/s 139(1) and withdrew its claim only when there was no alternative.*
- 3. That the order of the CIT(A) is erroneous and is not tenable on facts and in law.*
- 4. That the grounds of appeal are without prejudice to each order.*
- 5. That the appellant craves leave to add, amend, alter or forgo any grounds of appeal either before or at the time of hearing of appeal.*

**2.** Briefly stated facts of the case are that the assessee is a company engaged in the business of development, construction and maintenance of the highway project in Maharashtra on Build, Operate and Transfer (BOT) basis. In the case of the assessee, a search and seizure action under Section 132 of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') was carried along with other cases associated with the assessee. For the year under consideration, the assessee filed return of income on 28.09.2013, declaring loss of Rs.1,78,57,89,136/-. The assessment was completed under Section 143(3) of the Act on 18.03.2016 at a loss of Rs.91,01,82,057/- whereby a disallowance of Rs.1.29,39,22,544/- on account of depreciation was made and an amount of Rs.41,83,15,465/- was allowed as write off of expenses. The Assessing Officer initiated penalty proceedings under Section 271(1)(c) of the Act in respect of disallowance of depreciation. After affording opportunity of being heard to the assessee and considering the submissions filed by the assessee, the Assessing

Officer levied penalty under Section 271(1)(c) of the Act on 30.09.2016 of Rs.27,05,62,588/-.

**2.1** On further appeal before the learned CIT(A), the assessee submitted that at the time of filing of the appeal, the assessee claimed depreciation treating the road constructed on BOT basis as asset and claimed depreciation @ 10% on the cost of construction on road, however, in the course of scrutiny proceedings in view of the CBDT Circular No. 09/2014, whereby it was clarified that cost of construction on development on infrastructure facilities of roads, highways under BOT projects may be amortized and claim is allowable for business expenditure under the Act. The assessee filed a revised computation by adding the deprecation claim of Rs.1,29,39,22,544/- to the loss declared by the assessee in the return of income and claimed write off of Rs.4183,15,465/- as prescribed in CBDT Circular (supra). In view of the submissions, the assessee submitted that no inaccurate particulars of income have been filed by the assessee and it was only due to difference of opinion on the claim, expenses were claimed as depreciation. The learned CIT(A) deleted the penalty holding that the claim of depreciation in the original return was made under bonafide belief. The relevant finding of the learned CIT(A) is reproduced as under:

*“6.2 It has been submitted that the claim of depreciation as per the original return was made under bonafide belief that the same is allowable on capitalized value of road. This has been stated to be the practice of the industry. The circular of CBDT, clarifying the issue was issued on 23.04.2014, i.e. after the filing of return by the appellant. After the matter was clarified by the aforesaid circular, the appellant opted to claim expenditure incurred on project for development, construction and other operative expenditure during construction period as per the said circular and accordingly, withdrew the claim of depreciation and instead claimed amortization of expenditure*

*incurred. The revised working was provided during the assessment proceedings and the same was accepted by the AO. The contention of the AO while levying penalty was that the appellant did not file a revised return subsequent to the issuance of the circular and instead merely filed a revised computation. However, in my considered opinion, this alone cannot be the basis for imposition of penalty. Since the revision in the claim of deduction was made by the appellant in the light of the circular, the original claim of depreciation cannot be called patently wrong. Hence, just because the claim was revised, it cannot be said that the appellant was guilty of furnishing inaccurate particulars of income.*

*6.3 The appellant has also pointed out that in similar facts and circumstances, Id. CIT (A) -29, New Delhi in the cases of group companies namely, M/s Oriental Pathways (Agra) Pvt. Ltd. and M/s Oriental Pathways (Indore) Pvt. Ltd. for Assessment Year 2012-13 has deleted the penalty levied u/s 271(1)(c). I have followed the aforesaid orders of Id. CIT (A) -29, New Delhi in the appeals for subsequent years filed by the said appellants.*

*6.4 In view of the above, I am of the considered opinion that there no case for levy of concealment penalty in the case under consideration. Accordingly, I direct for the deletion of the same. Thus, the ground no. 1 is allowed to the appellant.”*

**2.2** Aggrieved with the finding of the learned CIT(A), the Revenue is in appeal before the Tribunal.

**3.** Before us, the learned Departmental Representative submitted that the claim of depreciation filed by the assessee was patently wrong claim and, therefore, the learned Assessing Officer is justified in levying of penalty.

**3.1** On the other hand, learned counsel for the assessee reiterated the submission made before the learned CIT(A). He further submitted that the Tribunal in the case of M/s. Oriental Pathways (Agra) Pvt. Ltd. (ITA No. 2965/Del/2016, AY: 2012-13) and in the case of M/s Oriental Pathways (Indore) Pvt. Ltd. (ITA No.2966/Del/2016, for AY: 2012-13) deleted the penalty in identical circumstances. He further submitted that identical issue

of depreciation claimed on cost of construction is involved in the case of M/s. Oriental Pathways (supra). He further submitted that the appeal filed by the Revenue against the said order of the Tribunal has also been rejected by the Hon'ble Delhi High Court.

**3.2** We have heard the rival submissions and perused the relevant material on record. We find that in the case of M/s. Oriental Pathways (Nagpur) Pvt. Ltd. (supra) Tribunal has deleted the penalty levied on the identical grounds observing as under:

*“8. We have heard the rival submissions and perused the material available on record. Admittedly the nature of assessee's business which has been addressed in the earlier part of this order brings out the fact that the return of the assessee had been filed on 29.09.2009 and assessment order u/s 143(3) dated 29.12.2011 wherein depreciation as claimed stood allowed is a fact on record. Search took place upon the assessee on 10.12.2012 and notice u/s 153A was issued to the assessee on 10.10.2013 in response thereto the assessee as per its returned income filed on 03.02.2014 included the claim of depreciation which had been made and allowed originally. The CBDT circular dated 23.04,2014 clarifying the position in view of the judgement of Supreme Court in the case of Madras Industrial Investment Corporation Ltd. Vs CIT 225 ITR 802 (SC) admittedly held that “In the case where an assessee has claimed any deduction out of initial cost of development of infrastructure facility of roads/highway under BOT Projects in, earlier years, the total deduction so claimed may be deducted from the initial cost of infrastructure facility of roads/highways and the cost so reduced shall be amortized equally over the remaining period of the concessionaire agreement”.*

*8.1 A perusal of the record shows that the claim was accepted by the AO in the from the assessment stage has explained that its claim was made in the light of the decision of the Apex Court in the case of Mysore Minerals Ltd. Vs CIT[1999] 106 Taxman 166 (SC) and CIT vs Varanasi Auto Sales Pvt. Ltd. [2010] 190 Taxman 60 (All.). The rationale and the basis of the claim consistently has been explained, considering these facts, Ld. CIT(A) quashed the penalty holding as under:-*

*“7. The appellant submitted original return on 29.09.2009, declaring loss at Rs.34,58,88,959/-. The same was assessed under section 143(3) of the Act on 23.12.2011 at a loss of Rs.34,24,76,200/-, by making disallowance of Rs,34,12,759/-*

on account of preliminary expenditure. During the said assessment proceedings, no interference was made by the AO on other issues including depreciation, though the appellant has claimed depreciation on road @10% of the capitalized cost. A Search was carried out in Bakshi group of cases on 10.12.2012 and the case of appellant was also covered in search. Accordingly, notice under section 153A was issued and appellant submitted return of income in response to the said notice on 03.02.2014, declaring loss of Rs.34,24,25,559/- which included depreciation amounting to Rs.30,63,57,685/-, on roads.

7.1 The appellant is stated to have been mainly engaged in the business of development design, financing, procurement, engineering and construction, operation and maintenance of the project highway on NH-6, Maharashtra on build, operate and transfer basis and collecting toll. During assessment proceedings the appellant was asked to substantiate the claim of depreciation on road, @10%. The appellant-submitted that it has claimed depreciation in view of the provisions of section 32 of the Act as per its bona fide belief that depreciation is allowable to it as per law. However, it was submitted by the appellant before AO that in view of the circular no. 09/2014 dated 23.04.2014, it Has been clarified by the CBDT that the toll roads are intangible assets and, therefore, no depreciation can be allowed, however, the assessee can right off of capitalized expenditure, equally over the toll concession period. Based on. mentioned circular, appellant withdrew the claim of depreciation in various assessment years and claimed the writing off of expenditure as per the said circular. The revised working was provided by the appellant. Accordingly, considering the submission of the appellant, the claim of depreciation has been disallowed. It is observed from the assessment order that this addition is not based on any material or evidence found and seized during search as nothing has been brought out on record in this regard. The claim of the appellant with respect to the expenditure incurred has been allowed, in view of the clarification by the CBDT in the above mentioned circular. Thus, net addition worked out at Rs.15,88,50,397/-. The penalty for concealment of income/furnishing inaccurate particulars of income under section 271(i)(c) was initiated. The appellant did not dispute the issue of addition made in the assessment order and no further appeal was filed.

7.2 During penalty proceedings, the AO did not considered the submission by the appellant favourably. It was mentioned that the depreciation is allowable only on the assets which are owned wholly by any assessee and CBDT has only given its clarification

*and not made any amendment in the existing law. It was also stated that appellant has only revised its claim on depreciation on the query of the AO, after a span of 11 months which indicates that the appellant has made wrong claim willfully. After discussing in detail and relying upon various judgments, the AO held that it is concealment of income and levied minimum penalty @100% of tax sought to be evaded, which comes to Rs.4,90,84,745/-.*

*Before examining further, it is expedient to reproduce the circular no. 09/2014, issued by the CBDT on 23.04.2014 which is as follows:-*

*Sub: Clarification regarding treatment of expenditure incurred for development of roads/highways in BOT agreement under Income Tax Act, 1961 –regarding.*

*It has come to the notice of the Board that disputes have arisen as to whether the expenditure incurred on development and construction of infrastructural facilities like roads/ highways on build operate-transfer (BOT) basis with right to collect toll is entitled for depreciation under section 32(l)(ii) of the Act or the same can be amortized by treating it as an allowable business expenditure under the relevant provisions of the Income Tax Act, 1961.*

*2. In such projects, (hereinafter referred, as assessee) in terms of concessionaire agreement with government or its agencies is required to construct, develop and maintain the infrastructural facility of roads/highways which inter alia includes laying of road, bridges, highways, approach roads culverts, public amenities etc. at its own cost and its utilization thereof for a specified period. In lieu of consideration of the expenditure incurred on construction, operation and maintenance of the infrastructure facility covered by the period of the agreement, the assessee is accorded, a right to collect toll from users of such facility. The expenditure incurred by such assessee on development and construction of such infrastructural facility are capitalized in the accounts. It is seen that in return of income, assessee are generally claiming depreciation on such capitalized expenditure creating it as an 'intangible asset' in terms of section 32(l)(ii) of the Act while in assessments, such claims are being disallowed by the Assessing Officer on the grounds that such infrastructural facility is not owned, wholly or partly, by the taxpayer which is an essential condition for claiming depreciation and further right to collect toll does not fall in any of the categories of 'intangible*

*assets' specified in sub-clause(ii) of sub-section (1) of section 32 of the Act.*

*3. In BOT arrangements for development of roads/highways, as a matter of general practice, possession of land is handed over to the assessee by the Government/notified authority for the purposes of construction of the project without any actual transfer of ownership and such assessee has only a right to develop and maintain such asset. It also enjoys the benefits arising from use of asset through collection of Toll for a specified period without having actual ownership over such asset. Therefore, the rights in the land remain vested with the Government or its' agencies. Thus, as assessee does not hold any rights in the project except recovery of toll, fee to recoup the expenditure incurred, it cannot therefore be treated as an owner of the property, either wholly or partly, for purposes of allowability of depreciation under section 32(l)(ii) of the Act. Thus, present provisions of the Act do not allow claim of depreciation on Toll ways due to non-fulfillment of ownership criteria in such cases.*

*4. There is no doubt that where the assessee incurs expenditure on a project for development of roads/highways, he is entitled to recover cost incurred by him towards development of such facility (comprising of construction cost and other pre-operative expenses) during the construction period. Further, expenditure incurred by the assessee on such BOT projects brings to it an enduring benefit in the form of right to collect the toll during the period of the agreement. Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd. vs. GIT -in 22S TTR 802 allowed spreading over of liability over a number of years on the ground that there was continuing benefit to the company over a period. Therefore, analogously, expenditure incurred on an infrastructure project for development of roads/highways under BOT agreement may be treated as having been made/incurred for the purposes of business or profession of the assessee and same, may be allowed to be spread during the tenure of concessionaire agreement.*

*5. In view of above, Central Board of Direct Taxes, in exercise of the powers conferred under section 119 of the Act hereby clarifies that the cost of construction on development of infrastructure facility of roads/highways under BOT projects may be amortized and claimed as allowable business expenditure under the Act.*

6. *The amortization allowable may be computed at the rate which ensures that the whole of the cost incurred in creating of infrastructural facility of road/highway is amortized evenly over the period of concessionaire agreement after excluding the time taken for creation of such facility.*

7. *In the case where an assessee has claimed any deduction out of initial cost of development of infrastructure facility of roads highways Under BOT project in earlier year, the total deduction so claimed for the assessment years to the assessment year under consideration may be deducted from the initial cost of infrastructure facility of roads/ highways and the cost so reduced shall be amortized equally over the remaining period of toll concessionaire agreement.*

8. *It is hereby clarified that this circular is applicable only to those infrastructure projects for development of road/highways on BOT basis where ownership is not, vested with the assessee the concessionaire agreement.*

9. *This may be brought to the notice of all concerned."*

7.4 *It is observed from the above circular that the board was aware of the dispute regarding claim of depreciation with respect to the built operate transfer (BOT) agreement and this is squarely covered in the case of the appellant, which has also been accepted by the AO. In the said circular, it is clearly brought out that in return of income, assessee's are generally claiming depreciation on such capitalized expenditure, treating it as an intangible assets in terms of section 32(l)(ii) of the Act. Therefore, the original claim of the appellant to claim such depreciation was not a standalone case but seems to be the general practice Of that industry and the claim of depreciation by it was made under the bona fide belief that it is an allowable expenditure. Further-, it is also clarified by the circular that where the assessee incurs expenditure on a project^ he is entitled to recover cost incurred by him and „ accordingly allowed such expenditure incurred, spreading over this liability in different years.*

7.5 *It is also observed that in the first round of scrutiny assessment, no such addition was made, but allowed depreciation as claimed by the appellant. It is only with respect, to 'the assessment proceedings under section 153a of the Act that this issue has been raised by the AO and based on the circular by the CBDT, revision of the claim of the depreciation made before AO by the appellant. All the facts regarding claim of*

*depreciation was before the AO during first round of scrutiny assessment as well as later on.*

*7.6 Here, it is to be mentioned, that penalty proceedings are different from the assessment proceedings and simply because an addition has been made and not challenged by the assessee shall not make a case for imposition of automatic penalty for concealment. Any claim which, is found incorrect by the A.O and disallowed will not attract the penalty for concealment in a routine manner. Merely, because the appellant had claimed the depreciation, which was not accepted in full and disallowed, that itself would not attract the penalty, under section 271 (I)(c). In the preset case, all the facts were disclosed to the AO and in fact in the first round, of scrutiny assessment, the said depreciation was not disallowed and accepted. Therefore, in view of the ratio laid down by Hon'ble Supreme court in the case of CIT vs. Reliance Petroproducts P. Ltd. 322 ITR 158. (SC) and the decision of Hon'ble jurisdictional High Court of Delhi in the case of CIT. vs. Brahmaputra Consortium (Ltd.)(2012)348 ITR 339, the penalty is not leviable as the same is applicable in the case of appellant.*

*7.7 It is also to be mentioned that When the return was filed in response to notice under section 153A on 3.02.2014, the matter was debatable due to the difference in legal interpretation between the assessee and the revenue authorities and the claim was made under bonafide belief that depreciation is allowable on such capitalized value of road. This has also been acknowledged as the practice of industry. The circular of CBDT, clarifying the issue has been issued on 23.04.2014, which is after the submission of return by the appellant. Since, the matter was clarified, the appellant opted to claim expenditure incurred on project for development, construction and other operative expenditure during construction period as per the said circular by spreading over to the different accounting years and accordingly revised the claim of depreciation by not claiming on road. It is the appellant who brought this circular to the knowledge of AO, though during assessment proceedings it was asked by the AO to justify the same. Hence, during assessment proceedings, following the clarification of the CBDT, the appellant provided revised working and depreciation on road was withdrawn whereas the expenditure has been claimed. The same was accepted by the AO. The contention of the AO while levying penalty, that there was a delay in submission of revised working by the appellant is also not tenable because one cannot expect the appellant to act immediately suo-moto. This will also not form the substantial reason to imposed penalty for concealment because the appellant itself has brought this to the*

*knowledge of AO and without disputing, accepted the revised working. Since, it was accepted by the appellant rather offered by the appellant therefore, no appeal was preferred. Therefore, this alone cannot be the basis for imposition of penalty.*

*7.8 In the penalty order, the AO has relied upon various case laws. The case of CIT vs. Usha International Ltd. 212 Taxman 519, 2013 relied upon by the AO relates to the revision of return consequent upon survey proceedings, which was disclosed after being detected during the course of survey is not applicable as the facts are distinguishable. The case of appellant is not related to survey proceedings nor a disclosure of additional income but claim of depreciation, revised in view of the Board's circular. With respect to the ratio laid down in the case of KP Madhusudan vs. CIT 251 JTR 99, it is seen that the same is not applicable in the present case because the appellant itself offered the withdrawal of depreciation, which was even not detected by the then AO in the first round of scrutiny proceedings. All the facts regarding claim of depreciation on road was clearly mentioned in the details submitted by the appellant and also mentioned in the audited accounts. Therefore, the appellant has not concealed any fact nor furnished any wrong particulars of income and duly discharged its duty. Therefore, this is distinguishable. The AO has also relied upon the ratio in the case of CIT vs. Zoom Communication P. Ltd. in ITA No. 07/2010. The fact of the said case is not applicable to the case of appellant because in the said case it was found, that the assessee was not acting bona fide and there was a positive income and therefore lead to tax evasion. In the case of the appellant, it was subjected to scrutiny earlier and all the facts were on record with respect to the claim of depreciation under the bona fide belief. The matter was disputed as itself acknowledged in the circular by the CBDT and accordingly after clarification, the appellant has withdrawn its claim in the assessment proceedings. The case of CIT vs. Brahmaputra Consortium Ltd., relied upon by the appellant is subsequent to the decision of CTT vs. Zoom Communication P. Ltd. (supra) as mentioned by the AO.*

*7.9 It is also seen that the AO has not clearly brought out that whether it is a case furnishing inaccurate particulars of income or concealment of income as it is stated in para 5 that:-*

*"Consequentially, as the default of the assessee under section 271(l)(c) is established, penalty of Rs.4,90,84,745/- @100% of the tax sought to be evaded for furnishing inaccurate particulars of income and thereby concealment of income as discussed above, is imposed under section 271(1)(c) of the IT Act, 1961."*

*7.10 In view of the above facts and discussions in foregoing paragraphs regarding position of law, considering the submission by the appellant and looking to the circumstance in which the appellant revised its claim, based on the clarification by the CBDT, the concealment of income for imposition of penalty under section 271(l)(c) of the Act is not established. Therefore, relying upon the ratio laid down in the case of CIT vs. Brahmaputra Consortium Ltd. (supra) and CIT vs. Reliance Petroproducts P. Ltd. (Supra) and on the facts and circumstances of the case, it is held that penalty for concealment of income under section 271(l)(c) of the Ant is not attracted in the case and the same is deleted accordingly.”*

*8.2. We note that nothing has been placed by the Revenue before us to assail the fact that the position taken by the assessee was not bonafide in fact the AO himself in the original proceedings had accepted the claim in 143(3) proceedings. Thus, in the aforementioned peculiar facts and circumstances of the case being satisfied by the reasoning and conclusion on facts and position of law as considered by the CIT(A), we find no merit in the appeals of the Revenue, accordingly ITA No.2960/Del/2016 is dismissed.”*

**3.3** We further observed that the Hon’ble Delhi High Court in the case of Principal Commissioner of Income Tax & Ors. Vs. Oriental Pathways (Nagpur) Pvt. Ltd. (supra), upheld the finding of the Tribunal observing as under:

*“7.7 It is also to be mentioned that when the return was filed in response to notice under section 153A on 3.02.2014, the matter was debatable due to the difference in legal interpretation between the assessee and the revenue authorities and the claim was made under bonafide belief that depreciation is allowable on such capitalized value of road. This has also been acknowledged as the practice of industry. The circular of CBDT, clarifying the issue has been issued on 23.04.2014, which is after the submission of return by the appellant. Since, the matter was clarified, the appellant opted to claim expenditure incurred on project for development, construction and other operative expenditure during construction period as per the said circular by spreading over to the different accounting years and accordingly, revised the claim of depreciation by not claiming on road. It is the appellant who brought this circular to the knowledge of AO, though during assessment proceedings it was asked by the AO to justify the same. Hence, during assessment proceedings, following the clarification of the CBDT, the appellant provided revised working*

*and depreciation on road was withdrawn whereas the expenditure has been claimed. The same was accepted by the AO. The contention of the AO while levying penalty, that there was a delay in submission of revised working by the appellant is also not tenable because one cannot expect the appellant to act immediately suo-moto. This will also not form the substantial reason to imposed penalty for concealment because the appellant itself has brought this to the knowledge of AO and without disputing, accepted the revised working. Since, it was accepted by the appellant rather offered by the appellant therefore, no appeal was preferred. Therefore, this alone cannot be the basis for imposition of penalty.”*

**3.4** In view of the identical question of claim of depreciation on the cost of construction of road on BOT basis and consequently levy of penalty under section 271(1)(c) of the Act involved in the case of M/s. Oriental Pathways (Nagpur) Pvt. Ltd. (supra), respectfully following the finding of the Hon’ble High Court and Tribunal, we uphold the finding of the learned CIT(A) on the issue in dispute. The grounds of the appeal of the Revenue is accordingly dismissed.

**4.** In the result, the appeal of the Revenue is dismissed.

***Order is pronounced in the open court on 14<sup>th</sup> October, 2019.***

**Sd/-  
(BHAVNESH SAINI)  
JUDICIAL MEMBER**

**Sd/-  
(O.P. KANT)  
ACCOUNTANT MEMBER**

Dated: 14<sup>th</sup> October, 2019.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR