

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“C”BENCH: BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT AND  
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

ITA Nos.1063, 1064 & 1079/Bang/2018
Assessment Year:2011-12, 2012-13& 2014-15

M/s. Nandi Economic Corridor Enterprises Ltd. #1, Midford House, Midford Gardens, Off. M.G. Road Bengaluru-560 001  <b>PAN NO :AABCN2061N</b>	<b>Vs.</b>	Assistant Commissioner of Income-tax Circle-5(1)(1) Bengaluru
<b>APPELLANT</b>		<b>RESPONDENT</b>

<b>Appellant by</b>	:	Shri Shiva Prasad Reddy, A.R.
<b>Respondent by</b>	:	Shri Pradeep Kumar, D.R.

Date of Hearing	:	30.07.2020
Date of Pronouncement	:	12.08.2020

**ORDER**

**PER B.R. BASKARAN, ACCOUNTANT MEMBER:**

All the 3 appeals filed by the assessee are directed against the orders passed by Ld. CIT(A)-5, Bengaluru and they relate to the assessment years 2011-12, 2012-13 & 2014-15.

2. At the time of hearing, the Ld. A.R. pressed the grounds relating to rejection of claim of depreciation on the land used for building roads. Accordingly, the remaining grounds are dismissed as not pressed.

3. The facts relating to the claim of depreciation are stated in brief. The assessee is engaged in the business of development, maintenance and operation of infrastructure corridor between Bengaluru city and Mysore city. The assessee has constructed infrastructure road on the land notified and allotted by Government of Karnataka through the Karnataka Industrial Area Development Board. The infrastructure road is transferable to the Govt. of Karnataka at the end of the concession period, which consisted of 10 years for construction of the roads and 30 years for operation and maintenance of the same. At the time of filing return of income, the assessee claimed depreciation on the land below the toll road in all these years. The A.O. disallowed the depreciation claimed on the land on the reasoning that no depreciation is allowable on the land. The Ld. CIT(A) also confirmed the same.

4. At the time of hearing, the Ld. A.R. invited our attention to the Circular no.9/2014 dated 23.4.2014 issued by CBDT, more particularly paragraph 5 & 6 of the circular. He submitted that the CBDT has, in exercise of powers conferred u/s 119 of the Act has clarified that the cost of construction on development of infrastructure facility of roads/highways under BOP purchase may be

amortized and claimed as allowable expenditure. Accordingly, the Ld. A.R. submitted that the assessee may be given an opportunity to claim deduction by way of amortization as mentioned in the Circular of CBDT. Accordingly he prayed that the matters may be restored to the file of the A.O. with a direction to allow amortization benefits as per the CBDT circular referred above.

5. The Ld D.R also submitted that the deduction should be allowed to the assessee as per the Circular issued by CBDT.

6. We heard the parties and perused the record. We notice that the assessee has claimed depreciation on the land beneath the toll road and the same has been disallowed by the A.O. on the reasoning that the land cannot depreciate. Now the assessee is making a fresh claim, by placing reliance on the following circular.

**CBDT CIRCULAR NO. 9/2014, Dated: April 23, 2014**

**Subject:- Clarification regarding treatment of expenditure incurred for development of roads/highways in BOT agreements 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(1)(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 ('Act').

2. In such projects, the developer (hereinafter referred to 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 roads, 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 returns-of- income, assesseees are generally claiming depreciation on such capitalized expenditure treating it as an 'intangible asset' in terms of section 32(1)(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(1)(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 Corp Ltd 225 ITR 802 (SC) 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 creation of infrastructural facility of road/highway is amortized evenly over the period of concessionaire agreement after excluding the time take 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 projects in earlier year, the total deduction so claimed for the Assessment Years prior to the Assessment Year under consideration maybe 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 under the concessionaire agreement.

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

10. Hindi version to follow.

7. We notice that the CBDT, by exercising its powers u/s 119 of the Act, has prescribed a methodology for allowing the claim of the assessee. We notice that the circular was available when the AO has passed the assessment orders for AY 2012-13 and 2014-15. It is a well known fact that the circular issued by CBDT is binding on the assessing officer. Now the assessee is also pleading for application of the circular in these three years. Accordingly, we are of the view that the claim of the assessee deserves to be admitted and the same would require examination at the end of the A.O. Accordingly, we restore this issue to the file of the A.O. for examining the same afresh by applying the CBDT circular referred above. The assessee should be provided with adequate opportunity of being heard.

8. In the result, all the appeals filed by the assessee are treated as allowed for statistical purposes.

Order pronounced in the open court on 12.08.2020.

**Sd/-**  
**(N.V. Vasudevan)**  
**Vice President**

**Sd/-**  
**(B.R. Baskaran)**  
**Accountant Member**

Bangalore,  
Dated 12<sup>th</sup> Aug, 2020.  
VG/SPS

**Copy to:**

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

By order

Asst. Registrar, ITAT, Bangalore.