

आयकर अपीलीय अधिकरण  
मुंबई पीठ "बी"  
श्री विकास अवस्थी, न्यायिक सदस्य एवं  
श्री एम. बालगणेश, लेखा सदस्य के समक्ष  
IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "B", MUMBAI  
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &  
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

आअसं. 442/मुं/2020 (नि. व. 2014-15 )  
ITA NO.442/MUM/2020(A.Y.2014-15)

Narmada Bridge Tollway Ltd.  
Hincon House, LBS Marg, Vikhroli West,  
Mumbai 400 083.

PAN: AAECN-0349-N

..... अपीलार्थी /Appellant

बनाम Vs.

The ACIT 15(2)(1),  
Room No.357, 3<sup>rd</sup> Floor,  
Aaykar Bhavan, M.K.Road,  
Mumbai 400 020 .

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri H.P.Mahajani

प्रतिवादी द्वारा/Respondent by : Shri Tejinder Pal Singh

सुनवाई की तिथि/ Date of hearing : 11/02/2022

घोषणा की तिथि/ Date of pronouncement : 09/05/2022

**आदेश/ ORDER**

**PER VIKAS AWASTHY, JM:**

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-24, Mumbai [n short ' the CIT(A) ] dated 31/10/2019 for the assessment year 2014-15.

2. Shri H.P.Mahajani appearing on behalf of the assessee narrating the facts of the case submitted that the assessee is engaged in the business of operation and maintenance of six laning of road Kms 192 to Km 198 between

Vadodara – Surat section of National Highway -8 including construction of a new four lane Extra Dose Bridge across river Narmada in the State of Gujarat on Design, Build, Finance Operate and Transfer basis . During the period relevant to assessment year under appeal, the assessee has written off intangible asset amounting to Rs.29,87,16,776/-. The Id.Authorized Representative for the assessee submitted that the assessee had entered into Memorandum of Understanding (MOU) with National Highway Authority of India (NHAI) for six laning of road between Vadodara and Surat section on toll basis. The assessee had incurred Rs.10394632/- towards the expenditure on construction of the aforesaid road in F.Y. 2012-13. The said amount was capitalized and was shown as work-in-progress. In Financial Year 2013-14, the assessee incurred expenditure of Rs.28,83,22,144/- as capital work-in-progress. However, due to unavoidable reason the project had to be abandoned and the assessee claimed the entire aforesaid expenditure i.e. Rs.29,87,16,776/- ( Rs.28,83,22,144 + Rs.1,03,94,632) as business loss. The Assessing Officer rejected assessee's claim holding that the expenditure is on capital account and hence, cannot be allowed as revenue expenditure. The assessee carried the issue before the CIT(A) but was unsuccessful. Hence, the present appeal.

2.1 The Id.Authorized Representative for the assessee submitted that the MOU and the construction agreement was foreclosed with the mutual consent of both sides i.e. NHAI and the assessee. The letter of foreclosure of agreement issued by NHAI dated 7/2/2014 is at page 61 of the paper book. The Id.Authorized Representative for the assessee further submitted that a perusal of MOU dated 17/07/2013 at page 62 of the paper book would show that the assessee had no ownership right on the bridge or the road. The

project- rehabilitation of existing Narmada Bridge was assigned to the assessee on Design, Build, Finance, Operate and Transfer (toll basis). The Id.Authorized Representative for the assessee further referred to the notes to the financial statement for the year ended on 31/03/2014 to contend that the intangible asset under development that was capitalized was the right to collect toll. It was the right of collecting toll that would have arisen if the project would have completed. Since, the project was foreclosed the assessee had to claim expenditure incurred during financial year 2012-13 and 2013-14 as business loss. In support of his contention the Id.Authorized Representative for the assessee placed reliance on the decisions in the case of PCIT vs. Nila Baurat Engineering Ltd. reported as 2017 TIOL 2401 HC AHM. The Id.Authorized Representative for the assessee further placed reliance on CBDT Circular No.9/2014 dated 23/04/2014 to contend that the expenditure incurred on development of roads, highways under BOT Agreement entails assessee to the right to collect toll during the period of agreement. The land is not transferred only possession of land is handed over to the assessee for the purpose of construction of the project. Since, the assessee does not hold any right in the project except recovery of toll, fee the assessee cannot be treated as owner of the property either wholly or partly for the purpose of allowability of depreciation u/s. 32(1)(ii) of the Income Tax Act, 1961 [ in short 'the Act' ]. The Id.Authorized Representative for the assessee to further emphasise his argument that the assessee was not owner of any capital asset placed reliance on the decision in the case of North Karnataka Expressway Ltd. vs. CIT reported as 51 taxmann.com 214. The Id.Authorized Representative for the assessee finally submitted that the assessee had received Rs.30.00 crores under final settlement agreement dated 04/03/2020. The assessee had offered the same

to tax in the year of receipt i.e. in the return of income for the assessment year 2020-21, therefore, the Revenue is not at loss. The Id. Authorized Representative for the assessee fairly admitted that final settlement agreement with NHAI was not available before the Assessing Officer and CIT(A) as the same was executed on 04/03/2020 i.e. after the order by First Appellate Authority.

3. Shri Tejinder Pal Singh representing the Department vehemently defended the impugned order and prayed for dismissing appeal of the assessee. The Id. Departmental Representative submitted that the assessee had capitalized expenditure incurred on rehabilitation of Narmada Bridge and subsequently, on foreclosure of agreement claimed the expenditure and revenue. The assessee cannot be allowed to change nature of expenditure to suit his convenience.

4. We have heard the submissions made by rival sides and have examined the orders of authorities below. In so far as the activities carried out by the assessee there is no dispute. The solitary issue in dispute is, whether the expenditure incurred on a project which was capitalized – work in progress should be allowed as business loss on foreclosure of project.

5. Undisputedly, the assessee had incurred expenditure of Rs.1,03,94,632/- in Financial Year 2012-13 towards various expenditure on rehabilitation of Narmada Bridge under agreement with NHAI. The assessee capitalized the expenditure and reflected the same as work-in-progress. In Financial Year 2013-14, the assessee incurred further expenditure of Rs.28.83 crores in respect of same project. Thus, the total expenditure incurred on the project was Rs29.87 crores. The project was foreclosed with the mutual

consent of both the sides as is evident from letter dated 07/02/2014 at page 61 of the paper book. As per the terms of agreement/MOU the assessee was to carry out construction of new four lane bridge and repair/rehabilitation of the existing bridge across river Narmada on a Design, Build, Finance Operate and Transfer on Toll basis. The ownership of land and the bridge at no point of time passed on to the assessee. The only right that could accrue to the assessee was right to collect toll. Since, the project was abandoned/foreclosed no valuable right in any manner whatsoever accrued to the assessee. Therefore, considering factual matrix of the case, the entire expenditure incurred so far on the project is allowable as business loss to the assessee.

6. The Hon'ble Gujarat High Court in the case of PCIT vs. Nila Baurat Engineering Ltd. (supra) had occasion to deal with similar issue. One of the questions for consideration before the Hon'ble High Court was:

*“ Whether on the facts and circumstances of the case, the ITAT erred in directing the Assessing Officer to allow capital loss on Jhalawar Project in A.Y 2005-06, in which the assessee had relinquished his business right? ”.*

The Hon'ble High Court answered the question against the Department and in favour of the assessee by observing as under:-

*“3. The last surviving question pertains to the assessee's claim of loss suffered by the assessee in connection with one Jhalawar road project in the return for the assessment year 2005-06. Brief facts were that the assessee had entered into an agreement with the Rajasthan Government under which the assessee would undertake improvement of the Jhalawar - Indore road project on BOT basis. In lieu thereof, the assessee was given right to collect toll for a specified period to recover its investment and profit. Eventually, the assessee found that the project was not viable and was terminated sometime in September 2004. According to the assessee, in the meantime, the assessee had incurred certain expenditure and claimed the same as revenue loss. The Assessing Officer did not accept the claim holding that the project was abandoned by the assessee and treated the expenditure as capital expenditure*

*not allowable The assessee continued to agitate this question arguing that the amount of Rs.45.29 lakhs was a business loss. The said project undertaken by the assessee was not a new business. The assessee was already in the same line of business.*

*4. The Tribunal held that the assessee was entitled to claim the expenditure as a revenue loss but not during the year under consideration and consequently, directed that it would be open for the assessee to claim such loss in the assessment year 2005-06.”*

7. Thus, in the facts of the case and aforesaid decision of the Hon’ble High Court, we are of considered view that the expenditure incurred on construction of bridge/repair and rehabilitation of an existing bridge though capitalized in anticipation of intangible asset( right to collect toll) occurring to the assessee on completion of project. However, on abandoning of project the assessee had rightly claimed the expenditure as business loss in the year of foreclosure of the project. We find merit in the ground raised in the appeal by the assessee. Accordingly, the same is allowed.

8. In the result, appeal by assessee is allowed.

Order pronounced in the open court on Monday the 09<sup>th</sup> day of May, 2022.

Sd/-

( M. BALAGANESH )

लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated 09/05/2022

Vm, Sr. PS(O/S)

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

**प्रतिलिपि अग्रेषितCopy of the Order forwarded to :**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,  
Mumbai
6. गार्ड फाइल/Guard file.

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BY ORDER,

(Dy./Asstt. Registrar)  
**ITAT, Mumbai**