IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'B' : NEW DELHI)
BEFORE SH. N.K.BILLAIYA, ACCOUNTANT MEMBER
AND
SH.ANUBHAV SHARMA, JUDICIAL MEMBER
ITA No. 3801/Del/2018, A.Y. 2013-14

DCIT, Circle-25(1), New Delhi	Vs.	M/s.Telecommunication Consultants India Ltd. 106, Plot No. 4, Vishwadeep Tower, District Centre, Janakpuri, New Delhi-110058 PAN : AAACT0061H
Appellant		Respondent

Assessee by	Sh. Rahul Yadav and Sh. Suyash Sinha, Adv's
Revenue by	Sh. Vivek Kumar Upadhyay, Sr. DR

Date of hearing:	20.07.2023
Date of pronouncement:	26.07.2023

ORDER

Per Anubhav Sharma, JM :

The appeal has been preferred by the Revenue against the order dated 23.01.2018 of CIT(A)-9, New Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in appeal no. 146/16-17 arising out of an appeal before it against the order dated 18.03.2016 passed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the ACIT/ DCIT, Circle-25(1), New Delhi (hereinafter referred as the Ld. AO).

2. The brief facts of the case are that during the assessment year under consideration the assessee is engaged in the business of Prime multi disciplinary organization providing full range of consultancy, design & engineering services in various fields of telecommunications, IT and civil construction in India as well as abroad. Return of income declaring income of Rs. nil was filed and Ld. AO had made various additions which were challenged by assessee before Ld. CIT(A) and appeal of assessee was partly allowed against which the Revenue is in appeal raising following grounds :-

> *"1. The impugned order of the CIT(A) is bad in law as well as on facts of the case."*
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> *"2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 5,11,37,177/- made on account of disallowance of Depreciation on rights to build and operate Toll Road by ignoring the fact that in this case, 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 cannot therefore be treated as an owner of the property, either wholly or partly, for purpose's of allowability of depreciation under section 32(l)(ii) of the Act.*
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> *"3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 1,68,70,284/- made on account of disallowing the provisions made for warranty period expenses by ignoring the fact that the assessee has not been able to produce documentary evidence to quantify the liability crystallized during the year under consideration for which the provision have been made"*
>
> *"4. The Appellant craves, leave or reserving the right to amend, modify, alter, add or forego any of the Ground(s) of Appeal at any time before or during the hearing of this appeal."*

3. Heard and perused the record. The Ground no 1 and 2 are general and ground wise findings are as follows ;

4. **Ground no 1.** The ground no. 1 arises out of the fact that assessee has been granted right the right to collect the toll from the user of the road and this right arises out of investment made by the assessee towards construction of the road. The assessee had claimed depreciation at the rate of 25% on its right to build and operate in transfer arrangement by treating the same is intangible asset. However, Ld. AO restricted depreciation to 7.41%.

4.1 Ld. DR submitted that Ld. CIT(A) has failed to appreciate the fact that Ld. AO has duly taken into consideration the Circular no. 9 of 2014 dated 23.04.2014 which clarifies that construction cost of any project under BOT is to be amortized over its concessionaire period. It was submitted that Ld. AO has rightly concluded that assessee is not owner of the land which otherwise belongs to the State Government. Ld. AR however relied the findings of Ld. CIT(A).

5. Giving thoughtful consideration to the matter on record, it can be appreciated from the orders of ld. CIT(A) that the fact that rights under BOT projects have been considered to be intangible assets in the light of judgment of Hyderabad Bench in **DCIT Hyderabad M/s. Progressive Construction limited, Hyderabad, ITA no. 214/Hyd./2014** and Ld. CIT(A) has also appreciated the fact that the Circular dated 23.04.2014 as relied by Ld. AO would not be applicable to the relevant assessment year 2013-14.

5.1 A coordinate bench in **ITA No. 5555/DEL/2018 M/S. Gwalior Bypass Project Ltd. Vs DCIT,** has dealt with the issue as follows;

> *"5. We have heard the Ld. Representative of the parties and perused the material available in the records. We observe that identical disallowance of depreciation was made by the Ld. AO in the case of the assessee in the immediately succeeding AY 2015-16 which was confirmed by the Ld. CIT(A) against which the assessee came in appeal before the Tribunal.*

The Tribunal vide its order in ITA No. 1297/Del/2019 dated 26.07.2022 held that the assessee is entitled for depreciation as admissible on intangible assets. In arriving at this conclusion the Tribunal followed the decision of ***Special Bench of the Tribunal in ACIT, Circle –16(2), Hyderbad vs. M/s. Progressive Constructions Ltd.*** *in ITA No. 1845/Hyd./2014 pertaining to AY 2011-12 decided on 14.02.2017 wherein the Special Bench held in favour of the assessee by observing in para 10 to 20 as under:-*

"10. Before dealing with the issue, it is necessary to reiterate that the Government of India being desirous of implementing a project involving, construction, operation and maintenance of four lane Pune Hyderabad section of N.H. no.9, with private sector participation of BOT invited tender from interested parties. The assessee being successful in the tender, the Government of India entered into a Concession Agreement (C.A) with the assessee on 22nd December 2005. At this stage, it is necessary to look into some of the relevant clauses of C.A., which in our opinion, will have a crucial bearing in deciding the issue. As per clause 2.1 of the C.A., the Government of India grants and authorises the concessionaire i.e., the assessee to investigate, study, design, engineer, procure, finance, construct, operate and maintain the project and to exercise and/or enjoy the rights, powers, privileges, authorizations and entitlements in terms of the agreement including the right to levy demand, collect and appropriate fee from vehicle and persons for using the project / project facilities or any part thereof. As per clause 2.2 of the C.A., the assessee is granted concession for a period of 11 years 7 months from the commencement date. As per clause 2.4, the Government of India was obliged to hand over to the assessee physical possession of the project site free from encumbrances within 30 days from the date of the

agreement. It further provides, once the project site is handed over to the concessionaire, it shall have exclusive right to enter upon, occupy and use the project site and to make at its costs, charges and expenses such development and improvement in the project site as may be necessary or appropriate to implement the project and to provide project facility in terms of the agreement. Clause–2.5 of the agreement provides that the concessionaire without prior written consent or approval of the Government of India cannot use the project site for any purpose, other than, for the purpose of the project / project facilities as permitted under the C.A. Clause 2.7 of the C.A. makes it clear that the project site belongs to and has vested in Government of India and the Government of India has full power to hold, dispose off and deal with the same consistent with the provisions of the C.A. However, it also makes it clear that the concessionaire, subject to complying with the terms / conditions of the agreement remains in peaceful possession and enjoyment of the project site during the concession period. It further provides, in the event the concessionaire is obstructed by any person claiming any right, title or interest over the project site or any part thereof or in the event of any enforceable action including any attachment, distraint, appointment of receiver or liquidator being initiated by any person claiming interest over the project sites. Government of India not only will defend such claims or proceedings but also keep the concessionaire indemnified against any direct or consequential loss or damage which it may suffer on account of any such right, title, interest or charge. As per clause 2.8 of the C.A., though, the concessionaire shall have exclusive right to use of the project site in accordance with the provisions of the agreement and for this purpose, it may regulate the entry and use of the same by the third parties, however, it shall not part with or create any encumbrance on the whole or any part of the project site save and except, as set forth and

permitted under the agreement. Clause 4.1 of the C.A. entitles the concessionaire to levy, demand and collect fee for user of the roads by vehicles and persons in accordance with the fee notification to be issued by the Government of India. However, concessionaire cannot levy and collect any fee until it has received completion certificate. Clause 5.1 and 5.2 of the C.A. lays down the obligation of the concessionaire for execution and implementation of the project / project facility during the concession period. From the reading of the aforesaid clauses of the contract, following facts emerge:–

i) The right, title and ownership of the project site vests absolutely with the Government of India and it has full powers to hold, dispose off and deal with the same;

ii) The Government of India has handed over physical possession of the project site to the concessionaire for executing / implementing the project and operating the same during the concession period;

iii) Concessionaire shall have exclusive right to use the project site for executing / implementing the project in terms of C.A;

iv) Concessionaire shall, at its own costs and expenses, execute / implement the entire project and operate and maintain the same during the concession period; and

v) The concessionaire shall have the right to levy / demand and collect fee as approved by the Government of India towards user of the project facilities by vehicles and persons.

11. Undisputedly, for executing the project, assessee has incurred expenses of Rs.214 crore. It is also not disputed that as per the terms of the C.A., the Government of India is not obliged / required to reimburse

the cost incurred by the assessee to execute / implement the project facilities. The only right / benefit allowed to the assessee by the Government of India is to operate the project / project facilities during the concession period of 11 years 7 months and to collect toll charges from vehicles / persons using the project / project facilities. Thus, as could be seen, the only manner in which the assessee can recoup the cost incurred by it in implementing the project / project facility is to operate the road during the concession period and collect the toll charges from user of the project facility by third parties. Admittedly, the assessee has taken up the project as a business venture with a profit motive and certainly not as a work of charity. Further, by investing huge some of Rs.214 crore, the assessee has obtained a valuable business / commercial right to operate the project facility and collect toll charges. Therefore, in our considered opinion, right acquired by the assessee for operating the project facility and collecting toll charges is an intangible asset created by the assessee by incurring the expenses of Rs.214 crore. The contention of the learned Senior Standing Counsel that expenditure of Rs.214 crore has brought into existence a tangible asset in the form of roads and bridges of which the assessee is not the owner but it is the Government of India is nobody's case. Further, the learned Senior Standing Counsel's apprehension that it will lead to a situation where both Government of India and the concessionaire will claim depreciation on the asset created with the very same expenditure, in our view, is not borne out from facts on record. At the cost of repetition we must observe, as per the terms of agreement the expenses incurred by the assessee towards construction of the roads, bridges, etc., were not going to be reimbursed by the Government of India. This fact was known to both the parties before the execution of the agreement as the tender itself has made it clear that the project is to be executed with private sector participation on BOT basis.

Thus, from the very inception of the project, assessee was aware of the fact, it has to recoup the cost incurred in implementing the project along with the profit from operating the road and collecting toll charges during the concession period. Therefore, assessee has capitalized the cost incurred on the BOT project on which it has claimed depreciation. Thus, in our view, the expenditure incurred by the assessee of Rs.214 crore for creating the project or project facilities has created an intangible asset in the form of right to operate the project facility and collect toll charges. Further, it is the contention of the learned Senior Standing Counsel that if at all any right is created under the C.A. for collecting toll, such right accrued to the assessee on the date of execution of agreement i.e., 22nd December 2005, therefore, the expenditure incurred by such date should be the value of intangible asset which can alone be considered for depreciation under section 32(1)(ii) of the Act. We are afraid, we cannot accept the above argument of the learned Senior Standing Counsel. When the C.A. confers a right on the assessee to operate the project facility and collect toll charges over the concession period of 11 years and 7 months, the assessee can start operating and collecting toll charges only when the project facility is ready for use. Therefore, until the project is completed and ready for use by vehicles or persons assessee cannot collect toll charges for user of the project facilities. Thus, the right to operate the project facility and collect toll charges is integrally connected to the completion of the project facility which cannot be done unless the assessee invests its fund for completing the project. Therefore, keeping in view the aforesaid fact, it cannot be said that the right to collect toll has accrued to the assessee on the date of execution of the agreement. If we accept the aforesaid argument of the learned Senior Standing Counsel, in other words, it would mean that without even executing and completing the project facility, assessee would be collecting toll charges. Therefore,

the contention of the learned Senior Standing Counsel that the expenditure incurred by the assessee till execution of the agreement can only be considered as an intangible asset, in our view, is illogical, hence, cannot be accepted. Thus, having held that the expenditure of Rs.214 crore incurred by the assessee has resulted in creation of an intangible asset of enduring nature for the assessee, it is necessary now to examine whether such intangible asset comes within the scope and ambit of section 32(1)(ii) of the Act. For this purpose, it is necessary to look into the said provision which is reproduced hereunder for the sake of convenience. Depreciation. 32(1)(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, owned, wholly or partly, by the assessee and used for the purposes of the business67 or profession, the following deductions shall be allowed—]

12. Explanation 3 to section 32(1) defines intangible asset as under:–

[Explanation 3.—For the purposes of this sub-section, [the expression "assets"] shall mean—

(a) tangible assets, being buildings, machinery, plant or furniture;

(b) intangible assets, being know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature.

13. A plain reading of the aforesaid provisions would indicate that certain kind of assets being knowhow, patents, copyrights, trademarks, license, franchise, or any other businesses or commercial rights of similar nature are to be treated as intangible asset and would be eligible

for depreciation at the specified rate. It is the claim of the assessee that the right acquired under C.A. to operate the project facility and collect toll charges is in the nature of license. However, the learned Senior Standing Counsel has strongly countered the aforesaid claim of the assessee by referring to the definition of license as provided under the Indian Easements Act, 1882. For better appreciation, we intend to reproduce herein below the definition of "license" as provided under section 52 of the Indian Easements Act, 1882 :–

"License" defined:– Where on person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful and Page | 14 such right does not amount to an easement or an interest in the property, the right is called a license."

14. It has been the contention of the learned Senior Standing Counsel that as the term "license" has not been defined under the Income Tax Act, 1961, the definition of "license" under the Indian Easements Act, 1882, has to be looked into. Accepting the aforesaid contention of the learned Senior Standing Counsel, let us examine the definition of "license" extracted herein above. A plain reading of section 52 of the Act makes it clear, a right granted to a person to do or continue to do something in the immovable property of the grantor, which, in the absence of such right would be unlawful and such right does not amount to an easement or interest in the property, then such right is called a license. If we examine the facts of the present case, vis–a–vis, the definition of license under the Indian Easements Act, 1882, it would be clear that immovable property on which the project / project facility is executed / implemented is owned by the Government of India and it has full power to hold, dispose off and

deal with the immovable property. By virtue of the C.A., assessee has only been granted a limited right to execute the project and operate the project facility during the concession period, on expiry of which the project / project facility will revert back to the Government of India. What the Government of India has granted to the assessee is the right to use the project site during the concession period and in the absence of such right, it would have been unlawful on the part of the concessionaire to do or continue to do anything on such property. However, the right granted to the concessionaire has not created any right, title or interest over the property. The right granted by the Government of India to the assessee under the C.A. has a license permitting the assessee to do certain acts and deeds which otherwise would have been unlawful or not possible to do in the absence of the C.A. Thus, in our view, the right granted to the assessee under the C.A. to operate the project / project facility and collect toll charges is a license or akin to license, hence, being an intangible asset is eligible for depreciation under section 32(1)(ii) of the Act.

15. Even assuming that the right granted under the C.A. is not a license or akin to license, it requires examination whether it can still be considered as an intangible asset as described under section 32(1)(ii) of the Act. In this context, it has been the contention of the learned Senior Standing Counsel that the intangible asset mentioned under section 32(1)(ii) of the Act are specifically identified assets, except, the assets termed as "any other business or commercial rights of similar nature". He had submitted, applying the principle of ejusdem generis the rights referred to in the expression "any other business or commercial rights of similar nature", should be similar to one or more of the specifically identified assets preceding such expression. The aforesaid contention of

the learned Departmental Representative is unacceptable for the reasons enumerated hereinafter.

16. We have already held earlier in the order that by incurring the expenditure of `Rs.214 crore assessee has acquired the right to operate the project and collect toll charges. Therefore, such right acquired by the assessee is a valuable business or commercial right because through such means, the assessee is going to recoup not only the cost incurred in executing the project but also with some amount of profit. Therefore, there cannot be any dispute that the right to operate the project facility and collect toll charges therefrom in lieu of the expenditure incurred in executing the project is an intangible asset created for the enduring benefit of the assessee. Now, it has to be seen whether such intangible asset comes within the expression "any other business or commercial rights of similar nature". As could be seen from the definition of intangible asset, specifically identified items like knowhow, patents, copyrights, trademarks, licenses, franchises are not of the same category, but, distinct from each other. However, one thing common amongst these assets is, they all are part of the tool of the trade and facilitate smooth carrying on of business. Therefore, any other intangible asset which may not be identifiable with the specified items, but, is of similar nature would come within the expression "any other business or commercial rights of similar nature". The Hon'ble Supreme Court in CIT v/s Smifs Securities (supra) after interpreting the definition of intangible asset as provided in Explanation 3 to section 32(1), while opining that principle of ejusdem generis would strictly apply in interpreting the definition of intangible asset as provided by Explanation 3(b) of section 32, at the same time, held that even applying the said principle 'goodwill' would fall under the expression "any other business or commercial rights of similar nature".

Thus, as could be seen, even though, 'goodwill' is not one of the specifically identifiable assets preceding the expressing "any other business or commercial rights of similar nature", however, the Hon'ble Supreme Court held that 'goodwill' will come within the expression "any other business or commercial rights of similar nature". Therefore, the contention of the learned Senior Standing Counsel that to come within the expression "any other business or commercial rights of similar nature" the intangible asset should be akin to any one of the specifically identifiable assets is not a correct interpretation of the statutory provisions. Had it been the case, then 'goodwill' would not have been treated as an intangible asset. The Hon'ble Delhi High Court in case of Areva T and D India Ltd. (supra), while interpreting the aforesaid expression by applying the principles of ejusdem generis observed, the right as finds place in the expression "business or commercial rights of similar nature" need not answer the description of knowhow, patents, trademarks, license or franchises, but must be of similar nature as the specified asset. The Court observed, looking at the meaning of categories of specified intangible assets referred to in section 32(1)(ii) of the Act preceding the term "business or commercial right of similar nature", it could be seen that the said intangible assets are not of the same line and are clearly distinct from one another. The Court observed, the use of words "business or commercial rights of similar nature", after the specified intangible assets clearly demonstrates that the legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets which were neither visible nor possible to exhaustively enumerate. The Hon'ble Court, therefore observed, in the circumstances the nature of business or commercial right cannot be restricted only to knowhow, patents, trademarks, copyrights, licence or franchise. The Court observed, any

intangible assets which are invaluable and result in smoothly carrying on the business as part of the tool of the trade of the assessee would come within the expression "any other business or commercial right of similar nature".

17. In the case of Techno Shares and Stocks Ltd. v/s CIT, [2010] 327 ITR 323 (SC), the Hon'ble Supreme Court while examining the assessee's claim of depreciation on BSE Membership Card, after interpreting the provisions of section 32(1)(ii), held that as the membership card allows a member to participate in a trading session on the floor of the exchange, such membership is a business or commercial right, hence, similar to license or franchise, therefore, an intangible asset. In the present case, undisputedly by virtue of C.A. the assessee has acquired the right to operate the toll road / bridge and collect toll charges in lieu of investment made by it in implementing the project. Therefore, the right to operate the toll road / bridge and collect toll charges is a business or commercial right as envisaged under section 32(1)(ii) r/w Explanation 3(b) of the said provisions. Therefore, in our considered opinion, the assessee is eligible to claim depreciation on WDV as an intangible asset. Thus, we answer the question framed by the Special Bench as under:–

The expenditure incurred by the assessee for construction of road under BOT contract by the Government of India has given rise to an intangible asset as defined under Explanation 3(b) r/w section 32(1)(ii) of the Act. Hence, assessee is eligible to claim depreciation on such asset at the specified rate.

18. In view of our aforesaid conclusion, there is no need to answer the second part of the question framed. This disposes of grounds no.2, 3, 5 and 6.

19. Insofar as ground no.4 is concerned, it is the contention of the Department that the learned Commissioner (Appeals) should have directed for amortization of the expenses incurred for construction of BOT road in terms of CBDT Circular no.9 of 2014 dated 23rd April 2014.

20. As already discussed in the earlier part of the order and dealt in detail in order dated 4th April 2016, in M.A. no.96/Hyd./2015, the nature of expenses whether capital or revenue is not the subject matter of dispute in the present appeal, as the expenditure incurred has already been considered as capital expenditure in the preceding assessment years and assessee's claim of depreciation have been allowed. Therefore, in the impugned assessment year, the claim is limited to depreciation on the WDV on block of assets only. The issue whether the expenditure incurred is a deferred revenue expenses or not was not the subject matter of consideration either by the Assessing Officer or by the learned Commissioner (Appeals). Taking into consideration the aforesaid fact, the Tribunal had re–framed the question by limiting the issue only to the determination of nature of asset, whether tangible or intangible. In fact, the learned Departmental Representative has also accepted the aforesaid factual position. In any case of the matter, the assessee neither in the preceding assessment years nor in the impugned assessment year has claimed it as deferred revenue expenditure, hence, there is no scope to examine whether the expenditure could have been amortized over the concession period in terms of CBDT circular no.9. Moreover, the aforesaid CBDT circular is for the benefit of the assessee. Therefore, the benefit in terms of the circular can be granted, provided, assessee makes a claim in terms of it. The benefit of the circular cannot be thrust upon

the assessee if it is not claimed. Therefore, since the issue, as raised in ground no.4, does not arise out of the orders of the Departmental Authorities, it cannot be the subject matter of adjudication in the present appeal. Accordingly, we dismiss ground no.4 raised by the Department."

There is no error in the findings of Ld. CIT(A). The ground is decided against the revenue.

6. **Ground no. 2.** In regard to this ground Ld. DR submitted that Ld. AO has rightly observed that the expenses neither accrued nor crystallized and it is only dependent on future event which may or may not happen so the liability was clearly to arise. Ld. AR however, relied the findings of Ld. CIT(A).

7. Appreciating the matter on record, it can be observed that the issue arises from the fact the company undertakes turnkey projects in the field of telecommunications, IT and civil. As per the terms of the agreements for the turnkey projects, the company has to ensure satisfactory performance of the projects during warranty period which extend from one to three years. During warranty period, all costs for maintaining establishment at the project sites, deployment of manpower, bank guarantee charges for retention / performance are to be incurred which are calculated based on contractual warranty period. Further, clients also withhold retention money for warranty period.

7.1 Therefore assessee claims that Warranty Period Expenses are ascertained liability. Further as the total income of the project is recognized and hence all corresponding expenses of the project including warranty period expenses are to be booked in accounts in the same year to arrive at the true and fair view of the accounts.

8. So, from the facts it comes up that the company undertakes turnkey projects in the field of telecommunications etc. and company has to ensure

satisfactory performance of the projects during the warranty period. The clients withhold retention money for warranty periods. Thus, liability to maintain the project during its execution and maintenance is a contractual liability as rightly appreciated by Ld. CIT(A). It is also rightly appreciated by Ld. CIT(A) that since appellant shows 100% of the contractual receipts, as income it is imperative that provision has to be made for the corresponding liability including warranty period expenses which can be booked in accounts on matching principle by way of its provision only. As the matter of fact the expenditure was allowed to the assessee in the A.Y. 2011-12 and deleted by ld. CIT(A) in A.Y. 2012-13. The findings of Ld. CIT(A) require no interference. Ground is decided against the Revenue. **The appeal of Revenue is dismissed.**

Order pronounced in the open court on 26th July, 2023.

Sd/-	**Sd/-**
(N.K.BILLAIYA)	**(ANUBHAV SHARMA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Date:- 26 .07.2023
Binita, SR.P.S
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI