

आयकर अपीलीय अधिकरण, हैदराबाद पीठ
IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' B ' Bench, Hyderabad

Before Shri R.K. Panda, Vice-President
AND
Shri Laliet Kumar, Judicial Member

Appeal in ITA No	Assessee	Revenue	A.Y
2083/Hyd/2017	Athang Devanhalli Toll way Pvt Ltd PAN:AADCN2001N	Income Tax Officer Ward 16(1) Hyderabad	2012-13
1981/Hyd/2017	Dy. CIT Circle 8(1) Hyderabad	Athang Devanhalli Toll way Pvt Ltd PAN:AADCN2001N	2013-14
2084/Hyd/2017	Athang Devanhalli Toll way Pvt Ltd PAN:AADCN2001N	Income Tax Officer Ward 16(1) Hyderabad	2013-14
1982/Hyd/2017	Dy. CIT Circle 8(1) Hyderabad	Athang Devanhalli Toll way Pvt Ltd PAN:AADCN2001N	2014-15
2085/Hyd/2017	Athang Devanhalli Toll way Pvt Ltd PAN:AADCN2001N	Income Tax Officer Ward 16(1) Hyderabad	2014-15

Assessee by:	Adv. Tejveer Singh and Shri Nikky Jhamtani, C.A
Revenue by:	Shri CH V. Gopinath, CIT (DR)
Date of hearing:	07/11/2023
Date of pronouncement:	09/11/2023

ORDER

Per Bench:

The above appeals are cross appeals filed both by the assessee as well as the Revenue are directed against the separate orders dated 18.09.2017 of the learned CIT (A)-4, Hyderabad relating to A.Ys.2012-13 to 2014-15 respectively. Since common issues are involved in all these appeals, for the sake of

convenience, these were heard together and are being disposed of by this common order.

2. We take ITA No.2083/Hyd/2017 for the A.Y 2012-13 as the lead case. The grounds raised by the assessee reads as under:

1. Learned Commissioner of Income-tax (Appeals) 4 has erred on facts and in law.

2. Learned CIT(A) has grossly erred in not considering and dealing with the elaborate submissions made in the course of the appeal proceedings, though noticed in the assessment order.

3. In the facts and circumstances of the case, Learned CIT(A) has grossly erred in treating the toll revenues of Rs.53,63,930/- from existing two lanes as revenue receipt.

4. Basis of disallowance made by the AO is on the basis of wrong presumption that there was existing operator prior to the assessee and to avoid disputes the assessee was granted the right to collect toll. The CIT(A) has failed to consider the incorrectness of the basis of an disallowance.

5. Learned CIT(A) failed to appreciate the terms and conditions of the Concession Agreement in correct perspective. Right to collect toll on the existing lanes without assessee having incurred any expenditure for their construction is in the nature of grant / subsidy on capital account by NHAI.

6. Learned CIT(A) failed to notice that the toll receipts have to be deposited in escrow account where in periodical cash support receipts also have to be deposited.

7. Alternatively, having held that toll receipts are revenue in nature, Learned CIT(A), ought to have allowed proportionate expenses incurred during the year in terms of Concession Agreement by spreading it over period of construction till COD (Commercial Operation Date), 01-05-2014 or alternatively over the period of 20 years of Concessions Agreement.

8. Alternatively, the Learned CIT(A) ought to have treated the expenditure incurred as expenditure for creating an intangible asset viz right to collect toll and accordingly reduced the amount of Rs. 53,63,930/- from the 'Intangible Asset under Development'.

9. For these and any other grounds that may be raised at/before the time of hearing it is prayed that the addition of Rs. 53,63,930/- be deleted."

3. Facts of the case, in brief, are that the assessee is a company, filed its return of income electronically for the A.Y 2012-13 on 29.09.2012 admitting total income of Rs.51,24,280/- under the normal provisions and book profit at Rs.54,50,858/- u/s 115JB of the Act. Thereafter the assessee filed revised return on 4.12.2012 and again on 29.03.2014 admitting Rs.14,22,628/- under normal provisions and book profit u/s 115JB was admitted at Rs.8,47,112/-. The same was processed u/s 143(1) 29.03.2014. Later, the case was converted into scrutiny and statutory notices u/s 143(2) & 142(1) of the I.T. Act were issued to the assessee to which the A.R of the assessee appeared before the Assessing Officer and furnished the requisite information called for.

4. In the revised return filed by the assessee on 29.03.2014, the assessee claimed the toll collection of Rs.4,09,06,108/- as exempt income and reflected an amount of Rs.3,55,42,178/- as expenditure relating to exempt income and in the revised computation of total income of the said return, the assessee deducted an amount of Rs.56,63,930/- being the capital receipt of net toll collection received under the development stage of intangible assets credited to the P&L Account. During the course of assesment proceedings, the assessee was asked to furnish the explanation in support of the claim made, the assessee vide its reply dated 16.02.2015 stated as under:

“The company has been granted a Concession by National Highway Authority of India (under the Ministry of Road Transport & Highways, Government of India) for upgradation, Operation and maintenance of Km 534.720 to Km 556.840 of Hyderabad-Bangalore section of NH-7 in the State of Karnataka under NHDP Phase-VII on "Design, Build, Finance, Operate and Transfer (DBFOT)" Toll Basis. During the period under consideration the said intangible was under development stage. While awarding the Concession, NHAI has allowed the assessee company to collect toll from the operation

of the existing lanes. However, while finalizing the accounts for the year 2011-12, the company has erroneously treated the amounts received from the operation of the existing lanes as revenue receipt. The same has been rectified during the F.Y. 2011-12 the company had shown the Net internal Accruals of Toll Collection received during the period of development of intangible asset as capital receipt and credited the same to Capital Reserve Account. The assessee company had revised its return of income by claiming the Net Internal Accruals from collection amounting 53,63,930/- received during the period of development of intangible asset as capital receipt and the corresponding adjustment was made in the Books of account of the F.Y. 2012-13 and shown the same in the Audited Balance Sheet of F.Y. 2012-13 as Prior Period Adjustment and credited the same to Capital Reserve account”.

5. The Assessing Officer rejected the claim of the assessee being an afterthought to claim the net toll collection from toll operations as capital receipt and rejected the net toll collections of Rs.53,63,930/- and treated as revenue receipts.

6. Being aggrieved by the order of the Assessing Officer, the assessee preferred an appeal before the learned CIT (A) who partly allowed the appeal of the assessee by observing as under:

“7. I have carefully considered the assessment order, facts of the case and submissions of the appellant. The Assessing Officer mainly treated the net toll collections as revenue receipts and disallowed certain expenditure and assessed the income at Rs. 58,63,930/-. On verification of the submissions and bills, it is found that the gross toll receipts during this year was of Rs.4,09,06,108/-. Out of this, the expenditure claimed by the appellant was of Rs.3,55,42,148/- and the net amount of Rs. 53,63,930/- was shown as net internal accruals and the same was added by Assessing Officer as income. The appellant's submissions is that since the business was not yet started so, this amount was taken as capital and by mistakenly shown as net profit in the P&L account and therefore, to be treated as capital and not to be treated as revenue receipts.

7.1 During the course of appeal proceedings, the details including the contractor agreement with National Highway Authority of India, etc., verified. As per this agreement, it is noticed that the appellant is allowed to collect the toll under the head equity support to mobilize his finance under the head internal accruals quality, facility and equity support to his capital for the contract work. Therefore, from this agreement, the National Highway Authority allowed the appellant company

to collect the toll on the existing road itself. Because of this, the appellant also started collecting the toll from this A.Y. i.e., 2012-13 and continued for the A.Y. 2013-14 and 2014-15 also. Therefore, as per my opinion once the operation started and the appellant has started collecting the toll Amounts then it should be treated as business of the appellant started. The Assessing Officer without verifying the expenses also allowed the total expenses of the toll and only net was treated as revenue which is not correct. This fact was brought to the knowledge of the appellant's AR and discussed. Therefore, the business started and since the books of account are not maintained by the appellant properly and no vouchers were available for the expenditure also therefore, I am of the opinion that the entire collection of the toll to be treated as contract receipts for all the assessment years and the income to be assessed @ 8% relying on the majority of the case laws viz., Hon'ble ITAT A' Bench, Hyderabad decision in the case of M/s Teja Constructions vs. ACIT, in ITA No.308/Hyd/2009. Therefore, the Assessing Officer is directed to adopt gross toll receipts as contract receipts of Rs. 4,09,06,108/- and assess at 8% as taxable income for this A.Y. i.e, 2012-13.

7.2 At the same time, for this assessment year i.e., 2012-13, the appellant has done the work of sub-contract of Rs. 5,73,34,602/- and Labour contract receipts of Rs. 95,01,524/-, therefore the Assessing Officer is directed to assess these receipts at 4% as income.”

7. Aggrieved with such order of the learned CIT (A) the assessee as well as the Revenue are in appeal before the Tribunal.

8. The learned Counsel for the assessee drew the attention of the Bench to the order passed by the Assessing Officer more particularly at Para No.5.2 of the assessment order and it was submitted that the two main objections were raised by the Assessing Officer, (a) the Revenue collected from the operation of the existing lanes cannot partake the character of the capital receipt and (b) once the assessee claimed the receipt from the operation of the existing lanes (user charges) as revenue receipt in the P&L account for the financial year 2011-12, then the assessee cannot change the character of receipts as “capital receipts” while

modifying the return of income u/s 139(5) of the Act. Further the learned AR submitted that the learned CIT (A) in Para 7.1 of the order had decided the issue partly in favour of the assessee and partly against the Revenue. The learned AR drew our attention to the various provisions of the concession agreement more particularly the “project equity capital” at page 283, Schedule-II at page 366 and clause 3.1.1, 3.1.2, 12.2, clause 26.1, 27.1.1, clause 31.2, 31.3, definition of fee, definition of taxes and other terms of the loan agreement, defining fee under clause 3.2 available in paper book. It was the submission of the learned Counsel for the assessee before us, that as per various terms/clause in concession agreement, the assessee was precluded from utilizing the user charge/fee for any other purpose except of development and creation of infrastructure facility mentioned in the concession agreement. In other words, the learned AR submitted that the assessee was only required to utilize the amount collected from user of six lanes Highway during the period of construction for the purpose of widening the road/strengthening and enlarging of the roads of the highway. It was submitted that once the amount has been mandatorily required to be deposited in the escrow account and also required to be applied for construction of road hence there was overriding obligation of the assessee to utilize the revenue so collected for the purposes of strengthening/widening of the existing six lanes, then the amount received by the assessee have been rightly treated by the assessee as “capital receipt” and not as revenue receipt. The learned Counsel for the assessee further drew our attention to the order passed by the Delhi Bench of the Tribunal in ITA No.9200/Del/2019 in the case of ACIT v Etawah Chakeri (Kanpur) dated 25.5.2023, the Hon'ble Madras High Court in the case of CIT vs. New Horizon Sugar Mills (P) Ltd reported in (2003)

128 Taxman 300 (Mad.), the Hon'ble Kerala High Court in the case of CIT vs. Ruby Rubber Works Ltd reported in (1989) 46 Taxman 1 (Ker.) and the Coordinate Bench of the Tribunal in the case of Teja Construction vs. ACIT in ITA No.308/Hyd/2009 dated 23rd October, 2009 and submitted that the appeal of the assessee is required to be allowed and the appeal of the Revenue is required to be dismissed.

9. Per contra, the learned DR submitted that the argument now raised by the assessee have never been raised before the Assessing Officer and the learned CIT (A) and none of the clauses now relied upon were examined by the lower authorities. It was submitted that once the six lanes were in existence prior to the grant of the of the concession agreement, then the assessee was not required to treat the same as capital expenditure. It was submitted that at most it is the application of the income by the assessee after it was received from the existing roads. The learned DR submitted that the application of the revenue receipt cannot partake the character of the capital receipt. He relied upon the decision of the Bangalore Bench of the ITAT in the case of GMR Tambalam Tindavanam Expressways Ltd vs. DCIT in ITA Nos.545, 546, 1130 & 1131/Bang/2018.

10. We have heard the rival arguments made by both the sides, perused the orders of the AO and the learned CIT (A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us by both sides. We find the CIT (A) in para 7 and 7.1 of his order has decided the issue partly in favour of the assessee and partly against the revenue. A perusal of the order passed by the learned CIT (A)

clearly shows that the learned CIT (A) has not examined the issue in terms and conditions of the concession agreement entered into between the assessee and the NHAI for widening, expanding and cementing the roads and has not recorded any finding in that regard. In view of the above, we are of the considered opinion that the examination of the terms & conditions and obligations of the assessee under the agreement are essential for the purpose of coming to the conclusion as to whether the amount received by the assessee from the users of highway from the existing six lanes highway were in the nature of revenue receipt or in the nature of capital receipt. As no finding has been recorded by the learned CIT (A) on the above said aspects, therefore, we deem it proper to remand back the matter to the file of the learned CIT (A) with a direction to examine the concession agreement and other agreements dated 30.04.2010, common loan agreement between the assessee and the NHAI dated 6.11.2010 and record a finding of fact and giving detailed reasonings as to under which head the amount received by the assessee from the existing six lanes highway, would fall i.e. revenue receipt or capital receipt. For the above said purposes, the learned CIT (A) shall also consider the judgments relied upon by both the sides mentioned herein above and other judgments as may be available on the subject. The above said exercise shall be carried out by the learned CIT (A) after affording due opportunity of being heard to the assessee and to the Assessing Officer. We hold and direct accordingly.

11. Since we have already remanded back the appeal in ITA No. 2083/Hyd/2017 for the A.Y 2012-13 to the learned CIT (A) for fresh adjudication of the issues, following similar reasonings the remaining 4 appeals filed by the assessee as well

as the revenue are remanded back to the file of the learned CIT (A) with similar directions.

12. In the result, the appeals filed by the assessee and the revenue are allowed for statistical purposes.

Order pronounced in the Open Court on 9th November, 2023.

Sd/- (R.K. PANDA) VICE-PRESIDENT	Sd/- (LALIET KUMAR) JUDICIAL MEMBER
---	--

Hyderabad, dated 9th November, 2023.

Vinodan/SPS

Copy to:

S.No	Addresses
1	Athang Devanahalli Tollway P :Ltd NH44@KM 349.950 Opp: Sai Baba Temple, Indalwai Village, Nizamabad 503164
2	Income Tax Officer Ward 16(1) IT Towers, Hyderabad
3	Dy.CIT Circle 8(1) 9 th Floor, Room No.914, Signature Tower, Hyderabad
4	Pr. CIT – 4, Hyderabad
5	DR, ITAT Hyderabad Benches
6	Guard File

By Order