

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'H' BENCH,
NEW DELHI

BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER, AND
SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER

ITA No. 1839/DEL/2020 [A.Y 2015-16]

Vijayawada Gundugolanu Road Project Vs. The A.C.I.T
2nd Floor, Plot No. 360, Block -B Circle -26(2)
Sector - 19, Dwarka, Delhi New Delhi

PAN: AADCV 9622 M

(Applicant)

(Respondent)

Assessee By : None
Department By : Shri Amit Katoch, Sr. DR

Date of Hearing : 26.06.2024
Date of Pronouncement : 06.08.2024

ORDER

PER NAVEEN CHANDRA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order of the
ld. CIT(A), Delhi - 36 dated 26.08.2020 pertaining to A.Y 2015-16.

2. The grievances of the assessee read as under:

"1. a) On the facts and in the circumstances of the case, the Learned Commissioner of Income Tax (Appeals) - 36, Delhi ["CIT(A)"], erred in confirming the disallowance of the Appellant's claim for Depreciation of Rs. 976,14,23,859/- on Intangible Assets by way of "Rights to collect Toll" under Section 32(1)(ii) of the Income Tax Act, 1961 ("the Act"), by relying upon the decision of the Hon'ble Bombay High Court in the case of North Karnataka Expressway Ltd. Vs. CIT (2015) 372 ITR 145 (Born.) and the decision of the Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd. Vs. CIT 1997 225 ITR (SC) and following the CBDT Circular No. 09/2014 dat2d 3rd April, 2014, in the impugned order dated 26th August, 2020 passed d by the Learned CIT(A).

b) On the facts and in the circumstance of the case, the Learned CIT(A) erred in concluding and upholding that the Appellant was neither the owner of the Intangible Asset by way of "Rights to collect Toll" nor did the "Rights to collect Toll" fall in any of the categories of "intangible assets" as defined under the Act, so as to be eligible for Depreciation thereon under Section 32(1)(ii) of the Act.

c) On the facts and in the circumstances of the case, the Learned CIT(A) erred in confirming the disallowance of Depreciation on Intangible Assets by way of "Rights to collect Toll" under Section 32(1)(ii) of the Act on an unsustainable ground that the Appellant is not the owner of the toll road and the toll road belongs to the Government.

d) ignoring and disregarding the fact that the "Rights to collect Toll", acquired by the Appellant in consideration of the various obligations undertaken by it under the Concession Agreement entered into between the Appellant and National Highways Authority of India ("NHAI"), tantamount to grant of Licence or akin to Licence and such a Licence is an "Intangible Asset" falling within the scope of the expression "any other business or commercial rights of similar nature" as provided in Explanation 3(b) to Section 32(1)(ii) of the Act, which entitles the Appellant to claim and get Depreciation @ 25% on the said Intangible Assets.

2. Each of the above grounds and sub-grounds is without prejudice to one another.
3. The Appellant craves leave to add, alter, modify or vary anyone or more grounds."

3. The case was listed for hearing twelve times since July 2022 but none appeared from the assessee side. Several notices were issued at the address provided in the Form 36 but they were returned by the Postal Department with remarks as 'no such person' or 'person not found'. The notices sent on the email address as provided in the Form 36 also remained un-answered. In view of the non prosecution of the

appeal, we decided to hear the matter ex-parte. Case records have been carefully perused.

4. Briefly stated, the assessee electronically filed its Return of Income on 30.09.2015 declaring loss of Rs. 9,35,47,30,037/- under normal provisions of the Income-tax Act, 1961 [the Act, for short] and book profit of Rs. 5,66,10,769/- u/s 115JB of the Act.

5. The Return was selected for scrutiny assessment through CASS and accordingly, statutory notices were issued and served upon the assessee requiring the assessee to furnish certain specific details. In the course of assessment proceedings, the assessee filed necessary details in response to the said notices. Finally, the Assessing Officer assessed the income of the assessee at a loss of Rs. 89,35,27,836/- on account of disallowance of depreciation.

6. Aggrieved, the assessee went in appeal before the Id. CIT(A) who sustained the disallowance made by the AO.

7. Aggrieved, the assessee is in appeal before us.

8. Before us, in absence of the counsel for the assessee, the Id DR assisted the Bench and appraised the facts of the case. To decide the issue at hand, the Id DR referred to the decision of the Special Bench Hyderabad Tribunal in the case of *M/s Progressive Construction Limited, Hyderabad* (2018) 92 Taxmann.com 104(Hyd) dated 14th February 2017 which was in favour of the assessee. The Id DR also produced the decision of Hon'ble Madras High Court in the case of *M/s Narmada Infrastructure Construction Enterprise Ltd* which was in favour of the Revenue.

9. We have heard the submissions and have perused the relevant material on record. The factual matrix in the instant case is that the assessee company has entered into a Concession Agreement dated 21st March, 2012 with National Highway Authority of India (NHAI) to build six lane road on Vijayawada-Gundugolanu of NH-5. Under the Concession agreement, the assessee is required to build the 103.59 Km road on Built Operate and Transfer Toll (BOT-Toll) basis. Under the Concession Agreement, the assessee is empowered to collect toll for 30 years from the appointed date which is 21st September, 2014.

10. During the year under consideration, the assessee company has treated the cost of constructing six lane Vijayawada-Gundugolanu Section of National Highway-5 as a cost for obtaining the right to collect toll. The assessee has treated the right to collect toll as “intangible asset” and on this “intangible asset”, the assessee has claimed depreciation @ 25%.

11. The Assessing Officer held that the assessee is not the owner of the land which otherwise belongs to the State Government and therefore the assessee is not entitled to the claim of depreciation. Keeping in view the mandate of the CBDT Circular in light of Hon'ble Supreme Court decision in the case of Madras Industrial Investment Corporation Ltd, the cost of development of toll road is liable to be amortized over the concessionaire period. Accordingly, the Assessing Officer disallowed the depreciation and allowed amortization @ 3.33% of the total cost of the project over the corresponding period of 30 years of the project amounting to Rs 1,30,02,21,658/-. The AO finally added a sum of Rs. 9,76,14,23,859/- to the income of the assessee on account of disallowance of depreciation.

12. The Id. CIT(A) sustained the disallowance as under:

"Under the Build-Operate- Transfer (BOT) projects, the developer (taxpayer), in terms of concessionaire agreement with Government or its agencies is required to construct, develop and maintain the infrastructural facility of roads, highways, etc. at its own cost and its utilization thereof for a specified period:" As a consideration thereof, the taxpayer is accorded right to collect toll from users of such facility. In such BOT arrangements, as a matter of general practice, possession of land is handed over to the taxpayer by the Government/notified authority for project without any actual transfer of ownership and such taxpayer has only a right to develop and maintain such asset. The expenditure incurred by such taxpayer on development and construction of such infrastructural facility are capitalised in the accounts. The Central Board of Direct Taxes (the CBDT) in its Circular NO.9 to 2014 dated 23rd April, 2014 has observed that the taxpayers are claiming depreciation on such capitalised expenditure treating it as an 'intangible asset' in terms of section 32(1)(ii) of the Income-tax Act, 1961 (the Act). However, in assessments, such claims are being disallowed by the Assessing Officer (AO) 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' as required under the Act. The CBDT observed that the taxpayer thus does not hold any rights in the project except recovery of toll fee to recoup the expenditure incurred and therefore, it cannot 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. However, the project brings to the taxpayer an enduring benefit and he is entitled to recover cost incurred by him towards development of such facility. The Supreme Court in the case of Madras Industrial Investment Corporation Ltd. allowed spreading over of liability over a number of years on the ground that there was continuing benefit to the company over a period. In view of the CBDT, such expenditure incurred on the infrastructure project may be treated as having been incurred for the purposes of business of the taxpayer and same may be allowed to be spread during the tenure of concessionaire agreement.

In view of above, the CBDT clarified that the cost of construction on development of infrastructure facility of roads/highways under BOT projects may be amortised and claimed as allowable business expenditure under the Act. The amortisation 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 amortised evenly over the period of concessionaire agreement after excluding the time taken for creation of such facility. In the case where a taxpayer 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 may be deducted the initial cost of infrastructure facility of roads/highways and the cost so reduce amortized equally over the remaining period of toll

concessionaire agreement is applicable only to those infrastructure projects for develop basis where ownership is not vested with the assessee under concessionaire agreement.

There has been litigation over the years whether the right to collect toll on BOT projects was an 'intangible asset' eligible for depreciation under the Act, which has posed a dilemma to a taxpayer for claiming the capital expenditure. The Pune Tribunal in the case of Ashoka Infraways Pvt. Ltd. has held that cost incurred for the development and construction of the infrastructure facility on BOT basis capitalised under the head "License to collect Toll" as an intangible asset which shall be entitled for depreciation under Section 32 of the Act. Further, the Hyderabad Tribunal has however in the case of PVR Industries observed that since the expenditure incurred on BOT project did bring some kind of enduring benefit to the taxpayer, it did not bring into existence any capital asset for the taxpayer. The asset which was created belongs to the Government and the taxpayer derived only an enduring business advantage by spending the amount. The Tribunal thus held that the amortisation of BOT expenditure can be allowed as a deduction. The CBDT through this Circular has clarified that the cost of construction on development of Infrastructure facility of roads/highways under BOT basis may be amortised evenly over the period of the 'concessionaire agreement' after excluding the time taken for creation of such facility. Thus, the AO has rightly disallowed the claim of depreciation. The addition on this account is confirmed."

13. We have carefully considered the materials on record and the decision brought before us. We find that the Hyderabad Special Bench in the case of M/s Progressive Construction Limited, Hyderabad(supra) dated 14.02.2017 dealt with the question whether the expenditure incurred by the assessee for construction of Road gives rise to an intangible asset eligible for depreciation @ 25% and decided in favour of the assessee. The decision of Hon'ble Madras High Court dated 29.12.2022 in the case of M/s Narmada Infrastructure Construction Enterprises Limited Vs. ACIT order in TCA Nos. 868 to 870 of 2009 and others, on the other hand, decided this issue in favour of Revenue. It further held the CBDT Circular no 9 of 2014 as correctly clarifying the legal position.

14. On the question of whether expenditure incurred creates a tangible or intangible asset, the Hon'ble Madras High Court (supra) held as under:

"101. Under the BOT arrangement/scheme, it can never be impugned and conceived that the respective assessee were the owners of the respective "Toll Roads" and "Toll Bridges" In fact, these infrastructures on the National Highway or State Highway or public road can never be treated as "Assets" of a private individual.

102. Public properties such as "Toll Roads" and "Toll Bridges" on the State/National Highways are never intended to be transferred at any point of time to the person with whom a concessionaire agreement is signed.

103. Neither, the "Toll road" nor the "Toll bridge" laid and constructed by the respective assesseees are also owned by the respective assesseees.

104. Neither the "Toll Road" nor the "Toll Bridge" belong to the respective assesseees under the respective concessionaire agreements signed with the respective Governments.

105. The respective assesseees as agreement holders were merely given a privilege/a right to collect tolls from vehicles passing through them as a consideration for having developed them. The right to collect toll from vehicles was merely a deferred consideration for putting up the Road and for maintaining them during the term under the respective concessionaire agreements. No separate consideration was paid to the respective assesseees by the respective Governments.

106. The rights that were conferred under the respective concessionaire agreements signed between the respective government with the respective assesseees was in lieu of the consideration for completing the

aforesaid road infrastructure which would have otherwise not been made available to them.

107. It is a mechanism adopted to recuperate the expenses incurred by the respective assesseees as contractee's under the respective concessionaire agreement with a scope for making reasonable profit over a period of such agreement for having put up the aforesaid road infrastructure and for maintaining them during such period.

108. Therefore, even otherwise respective assesseees are not eligible to claim depreciation under the provisions of section 32 of the Income Tax Act, 1961 .

119. We are, therefore, inclined to hold that neither the "Toll Bridge" nor "Toll Roads" are "Tangible Assets" of the respective assesseees in terms of Explanation 3(a) to Section 32 of the Income Tax Act, 1961. Accordingly, we answer the first part of the substantial question formulated by us in para 82 against the respective assesseees.

"120. We are of the view that the second part of the 1st substantial question of law as to whether the respective assessee have any "Intangible Assets" under the respective Concessionaire Agreements as per the definition in Explanation 3(b) to [Section 32](#) of the Income Tax Act, 1961 also requires to be answered against the assessee. The definition of the above expression has already been extracted above.

121. The expression used in the last part of the definition of "Intangible Asset" is licenses, franchises or any other business or commercial rights of similar nature".

122. The meaning of the above expression "licenses" and the phrase "any other business or commercial rights of similar nature" has to be inferred from the meaning of the words along with which they have been used. Their meaning has to be inferred from the meaning of the expression "know-how", "patents", "copy rights", "trademark", "franchises" by applying the principle of *nocitur a sociis*.

123. In Maxwell's Interpretation of Statutes (12 th Edition) at page 289, it has been stated as follows:— "Where two or more words which are susceptible of analogous meaning are coupled together, *nocitur a sociis*, they are understood to be used in their cognate sense. They take, as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general."

124. As per the above principle the words must take colour from words with which they are associated.

125. In *Skinner & Co.v.Shew and Co.* (1893) 1 Ch 413 (D), it was observed:

"The rule of *eiusdem generis* is intended to be applied where general words have been used following particular and specific words of the same nature on the established rule of construction that the

Legislature presumed to use the general words in a restricted sense, that is to say, as belonging to the same genus as the particular and specific words. Such a restricted meaning has to be given to words of general import only where the context of the whole scheme of legislation requires it. But where the context and the object and mischief of the enactment do not require such restricted meaning to be attached to words of general import, it becomes the duty of the Courts to give these words their plain and ordinary meaning. In our opinion, in the context of the object and the mischief of the enactment there is no room for the application of the rule of *ejusdem generis*. Hence it follows that the vacancy as declared by the order impugned in this case, even though it may not be covered by the specific words used, is certainly covered by the legal import of the words "or otherwise".

126. Therefore, it cannot be construed that the respective assesseees had acquired "intangible assets" within the meaning of the definition in Explanation 3(b) to [section 32](#) of the Income Tax Act, 1961 under the respective concessionaire agreement for the purpose of claiming depreciation.

127. By no stretch of imagination can it be construed that the respective assesseees have been conferred upon any "intangible assets" under the concessionaire agreements for the purpose of the aforesaid provision.

128. In the light of the above discussion we are constrained to answer the second part of the first substantial question of law also against the assessee and in favour of the revenue.

129. In view of the above answer, the 2nd substantial question of law is also to be answered against the assesseees and in favor of the revenue.

135. In the light of the above discussion, T.C.A.Nos.868 to 870 of 2009 and 206 of 2014 are liable to be dismissed by affirming the impugned order of the Tribunal dated 13.02.2009 in ITA.Nos.617 to619/Mds/2008.

15. While deliberating on the issue of depreciation, the Hon'ble Madras High Court (supra) referred to a decision of Hon'ble Delhi High Court in the case of Moradabad Toll Road Co Ltd V ACIT 2014 SCC Online Del 2286. While dealing with the question whether the "Toll Roads" were 'plant' eligible for 15% depreciation or 'building' eligible for 10% depreciation, the Hon'ble Delhi High Court in the case of Moradabad Toll Road Co Ltd (supra) has held that the "Toll Road" are "Building" and allowed the benefit of depreciation @10%. It is pertinent to note that the Hon'ble Delhi High Court was not dealing with question whether "Rights to collect Toll" is an Intangible Assets under Explanation 3(b) of Section 32(1)(ii) of the Income Tax Act, 1961. The issue of ownership of Toll Road, making the assessee eligible for claim of Depreciation @ 25%, was also not before the Hon'ble Delhi High Court.

16. The factual matrix of the Moradabad Toll Road (supra) case is also distinguishable from the facts of the instant case. In Moradabad Toll Road case, the assessee had claimed depreciation @ 15% by treating the “toll roads” as ‘Plant’ while the AO had allowed depreciation @ 10% by holding that the “toll roads” are “building’ and not ‘plant. In the instant case, the assessee’s claim before the AO is that by constructing the Roads, it has acquired the “Right to collect Tolls” which is an “Intangible Asset” eligible for depreciation @25%. The AO has denied this claim but allowed amortization allowed by the CBDT’s Circular.

17. The Hon’ble Madras High Court, however, dealing with the exact question as raised by the assessee in its grounds of appeal, has held that the ‘right to collect toll’ is not an ‘intangible asset’ under explanation 3(b) of Section 32(1)(ii) of the Income Tax Act, 1961 and therefore no depreciation is allowable to the assessee. As there is no contrary decision brought to our notice, we respectfully follow the decision of the Madras High Court and hold that the decision of the CIT(A) needs no interference. Accordingly, the grounds no 1 (a) to 1(d) is dismissed.

18. In the result, the appeal of the assessee in ITA No. 1839/DEL/2020 is dismissed.

The order is pronounced in the open court on 06.08.2024

Sd/-

**[CHALLA NAGENDRA PRASAD]
JUDICIAL MEMBER**

Sd/-

**[NAVEEN CHANDRA]
ACCOUNTANT MEMBER**

Dated: 06th August, 2024.

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
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