IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E' NEW DELHI

BEFORE SHRI I.C. SUDHIR, JUDICIAL MEMBER AND
SHRI B.P. JAIN, ACCOUNTANT MEMBER

ITAs No.5246, 5247, 5248 and 5249/Del/2012
Assessment Years 2006-07 to 2009-10

ACIT, Circle-1, G, Block Commercial Complex, Sector-20, NOIDA.	Vs.	**NOIDA Toll Bridge Co. Ltd., Toll Plaza, DND Flyway, Opp. Sec-15A, NOIDA PAN: AAACN 3498A**
(Appellant)		(Respondent)

ITA No.5286/Del/2012
Assessment Years 2006-07

NOIDA Toll Bridge Co. Ltd., Toll Plaza, DND Flyway, Opp. Sec-15A, NOIDA PAN: AAACN 3498A	Vs.	**ACIT, Circle-1, G, Block Commercial Complex, Sector-20, NOIDA.**
(Appellant)		(Respondent)

Revenue by :	Shri A.K. Saroha, CIT-D.R
Assessee(s) by :	S/Shri Vikas Srivastava, Sumit Mangal and Atul Mittal, Adv.

सुनवाई की तारीख/**Date of Hearing** : **06/04/2017**
घोषणा की तारीख /**Date of Pronouncement**: **10/04/2017**

ORDER

PER B.P. JAIN, ACCOUNTANT MEMBER

These four appeals of Revenue arise from four different orders of learned CIT(A) NOIDA each dated 06.07.2013 for the Assessment Years 2006-07 to 2009-10. Since the issues in all the appeals are identical,

Download Source- www.taxguru.in

therefore, all the appeals are being taken up by this consolidated order. The assessee has also filed the appeal for the Assessment Year 2006-07.

2. First of all we take up the appeal of the Revenue for the Assessment Year 2006-07 in ITA No.5246/Del/2012 and the grounds of appeal raised are reproduced as under:

> *"1. The CIT(A) has erred in law and on facts in deleting the amount of Rs.22,55,046/- without appreciating the facts put forth by the Assessing Officer who treated the expenditure as capital as nature.*
> *2. The CIT(A) has erred in law and on facts in allowing depreciation claimed by the appellant for Rs.15,84,60,192/- without appreciating the fact that the toll bridge is constructed on "Building Own Operate Transfer" basis and the assessee is not the owner, which is the first condition for allowing the depreciation u/s.32 of the IT Act, 1961.*
> *3. The CIT(A) has erred in law on facts in allowing depreciation claimed by the appellant by holding that the assets on which depreciation is claimed by the assessee are owned by it, whereas in the concession Agreement dated 12-11-1997 between NOIDA authority and the assessee, it is clearly mentioned that the land on which the toll bridge has been constructed is not the property of the assessee, but has been given on lease by the NOIDA authority for a certain period i.e. 30 years. As per the agreement, the lease can be terminated earlier also, subject to certain conditions. Therefore, the ownership of the asset in the hands of the assessee is not established.*
> *4. The CIT(A) has erred in law on facts in deleting addition of Rs. 91,21,413/- being 'Take Out Assistance Fee", which is the cost of agreement entered with IL&FS & IDFC for the issue of Deep Discount Bond having maturity value of 16 years without appreciating the fact that expense is related to the activities which spread over 16 years and in the nature of capital expenditure."*

2. Grounds No.5 and 6 are general in nature, therefore, do not require any adjudication.

3. As regards ground no.1, the brief facts of the case as emanating from the order of the AO are reproduced hereinbelow.

> *"During the assessment proceedings assessee also filed concession Agreement. Perusal of concession agreement entered between NEW OKHLA INDUSTRIAL DEVELOPMENT AUTHORITY AND INFRASTRUCTURE LEASING & FINANCIAL SERVICES LIMITED AND NOIDA TOLL BRIDGE PROJECT*

Download Source- www.taxguru.in

COMPANY LIMITED reveals that independent Engineer is sole Authority to determine whether to issue or not issue certificate of compliance or conditional certificate of compliance contingent upon satisfaction of conditions mentioned in the concession agreement within 365 days from the date of signing of this agreement on 12.11.1997. Independent Auditor is required to give a reasoned decision on the basis of various submission made to him by the concessionaire i.e. assessee and NOIDA on non fulfillment of conditions on the certificate. Hence the above clearly shows that the work of independent Auditor was related to setting up and commissioning of the Noida Toll Bridge. He would also take decisions related to the fact that the assessee has right to terminate the concession agreement or not. His work also involves revising terms and conditions of the concessioin agreement vide which assessee was given the Right to establish and operate DND flyway. There are several other duties of independent Engineers mentioned in the concession agreement which clearly establishes that the work of independent Engineer is related to establishment, construction and commissionf of the DND Fly over and after its establishment, construction and commissioning to see whether or Noida and concessionaire i.e. assessee follow terms and conditions of the agreement or not and to alter the same as and when required. As per concessiion agreeemnt independent Auditors are required to determine the total cost of project from time to time and recovery vis a vis the project cost and give the estimated results thereof. Both independent Engineer and indepent Auditor are also requird to review cost and recovery position form time to time and be instrumental in determining whether development rights of the land around the Toll Bridge should or should not be granted to the concessionaire i.e. assessee, depending upon the recovery position. If recovery is slow Noida is required to allow assessee developmental rights of land around the flyway whereas if the recovery is fast the same is not required. When the in the same way concession agreement also mentions about retainers. All these details related to works assigned to independent Engineer, independent Auditor and, retainer is related to establishment, construction and commissioning of the DND Fly over to oversee and review position of recovery for the fly over vis-à-vis the cost involved. Hence the expense of Rs.22,55,046/- pais as Agency fee and claimed as expenditure in P & L account is not allowable since it is a capital expenditure. The same is treated as capital expenditure and the same is added back, to the income of the assessee."

4. Learned CIT(A) deleted the additions so made by the AO for the reasons mentioned in his order at pages 53 and 54 of his order.

5. We have heard the rival contentions and perused the facts of the case.

6. Learned CIT-DR, at the outset relied upon the order of the AO and page 547 of the concession agreement.

Download Source- www.taxguru.in

7. Learned AR, on the other hand, relied upon the order of the learned CIT(A).

8. After perusing the record, we are of the view that learned CIT(A) has passed a reasoned order and has rightly observed that the Independent Auditor and the Independent Engineer were to be appointed by the Lenders, NOIDA and the assessee were required to be there for the entire concession period. The Concession Agreement clearly differentiated between the activities of these agents during the pre-construction, commissioning and post commissioning period. Since the project got commissioned in February, 2001, the activities of these agents during the post commissioning period is of relevance to determine their deductibility while computing the taxable income of the AY 2006-07. As per Section 85 of Article 8 of the Concession Agreement, the function of Independent Engineer, post commissioning of the project, was to monitor that the maintenance of the Noida Bridge was being carried on in conformity with the terms of the agreement and to certify the cost of such maintenance while the function of the Independent Auditor was to independently audit and certify the books of account of the assessee on a quarterly basis and also to certify the recovery position of the assessee. The reports of these agents were to be accessible to the Lenders, NOIDA and the other promoter shareholders only. Similarly, under the terms of the inter-se Agreement. the assessee was required to appoint Trust & Retention Agent. Security Agent, etc. for the purposes of administrating the secured loans and the secured property, to coordinate the enforcement of the respective rights, powers and remedies of the Lenders etc. While the Security Agent was required to ensure that all charges created were duly registered and secure and proper asset cover is maintained by the

Download Source- www.taxguru.in

assessee, the Trust & Retention Agent was required to create, maintain and operate a Trust and Retention Account and ensure that the funds were being utilized as per the terms on which the funding was done by the lenders and that no terms had not been violated and that the rights of the parties were protected. In view of the functions of these agents and contents of various clauses of the agreements, it is evident that the services of these agents were availed in order to ensure that the assessee has complied with the terms and conditions of the various agreements entered into by the assessee. The assessee was required to appoint these agents as a part of the agreements and in order to safeguard the interest of the stakeholders, was a business necessity for the assessee. The services were provided by these agents on a regular basis and thus were recurring in nature. The services of these agents helped the assessee in proper and efficient implementation of the agreements and thereby resulting in smooth functioning of the assessee's business. Further, the project got commissioned in February, 2001 and was fully operational during the FY 2005-06. The AO seems to have misread the Agreements to wrongly conclude that since the works assigned to independent Engineer, independent Auditor and, retainer is related to establishment, construction and commissioning of the DND Fly over and to oversee and review position of recovery for the fly over vis-a-vis the cost involved, the expenses incurred by the assesse in this regard is capital in nature. In this context it is also worthwhile to mention the fact that the Tax authorities never questioned the deductibility of above expense (i.e. Agency Fee) while dealing with assessee's case in respect of AY 2002-03 to 2005-06 which speaks for inconsistency in the approach and also go to support the claim of the assessee that the expenses in question were allowable revenue expenditure. In view of the above, we are of the considered view that the

Download Source- www.taxguru.in

services performed by these agents are revenue in nature and fulfills the conditions prescribed under section 37(1) of the Act. Therefore, the agency fees incurred by the assessee during the F.Y. 2005-06 are allowed as revenue expenditure and the addition made by the Assessing Officer has rightly been deleted by the ld. CIT(A) and we find no infirmity in his order. Accordingly, Ground No.1 of Revenue is dismissed.

9. Now we take up ground nos.2 and 3. The brief facts of the case in grounds no.2 and 3 of the Revenue as emanating from the order of the AO are reproduced hereinbelow.

> ***"The above contention of the assessee can only be accepted if the DND flyover was a part of a factory premise or any other premise of the assessee, in which there were other constructions being used for the purpose of the business of the assessee and if this DND flyover was by way of an approach road to these other constructions, then may be it could have been assumed that the flyover, in such circumstances would have been entitled to depreciation as building @ 10%. However, the case of the assessee is completely different as it is claiming depreciation on the DND flyover, which is in fact just a road which is running from one end to another, connecting Delhi and Noida. Considering these facts, the ratio of the judgment delivered by Hon'ble Supreme Court in the case of Indore Municipal Corporation Vs. CIT 247 ITR 803 is fully applicable in the case of the assessee wherein it was held that expenditure incurred by the assessee to construct metal road on trenching around was not a revenue expenditure and the assessee was not entitled to depreciation on the amount of the cost of construction of such roads. Thus, it has been held by the Hon'ble Supreme Court that roads by themselves would nat constitute building, and if there is' no canstruction except the rood, meaning thereby, if there are no other buildings or factory premises or any other commercial complexes associated with that road, then depreciation cannot be allowed to the assessee.***
>
> ***The DND Flyover is a product of the assessee company, which is now commercially exploited. Assessee itself in its submissions dated 19.11.2007 stated that principal business activityu of the assessee company is to construct toll bridges on build, own, operate and transfer (BOOT) basis. Thus, by no stretch of argument, the DND Toll bridge can be held as a depreciable capital asset. Keeping in view the above discussion and legal position, the assessee's claim of depreciation of Rs.15,84,60,192/- is disallowed and the same is added back to its total income."***

10. Learned CIT(A) allowed the claim of the assessee and accordingly allowed the grounds so raised.

Download Source- www.taxguru.in

11. We have heard the rival contentions and perused the facts of the case. The issue is directly covered by the decision of Hon'ble ITAT vide order dated 19.12.2008 for the Assessment Year 2002-03 and 2003-04 in assessee's own case where the decision of learned CIT(A) has been upheld by the ITAT, which is reproduced hereinbelow.

> ***"As far as the objection of learned DR with regard to ownership is concerned, the learned counsel for the assessee took us through clause 2.1 of the concession agreement. He pointed out that NOIDA has agreed to give exclusive rights and authority durina the concession period to development establish construct operate and maintain the NOIDA Bridge as an infrastructure facility. He took us through various clauses and pointed out that these clauses sufficiently enable the assessee to consider itself as owner of the assets. The lease period is for 30 years. Thus, it indicates that this capital asset is owned by the assessee for all the practical purposes. If the transporter refuses to pay the fees provided by the assessee for use of this, it has a right to confiscate the vehicle up to and only the fees is paid for the use of the road or realized. ……***
>
> ***We have duly considered the rival contentions and gone through the records carefully. The only objection of the Assessing Officer for denying the depreciation to the assessee is that road in isolation, does not constitute building. This road is not within the factory premises which can be considered as a part of the plant or building. We find that expression "building" has been given an extended meaning in the Appendix 1 of the IT Rules. Now the building includes roads, bridges, culverts well and tube wells. Thus, the judgment relied upon by the Assessing Officer is not applicable on the facts of the present case. There is a change of poistion of law. The learned Ist Appellate Authority has considered this issue elaborately in the findings supra and we do not find any error in this finding. Therefore, both the appeals are dismissed."***

12. Since there are no change in the facts and circumstances of the case, we find that learned CIT(A) has rightly allowed the depreciation on the toll bridge during the impugned year by following the decision of the Hon'ble ITAT Delhi Benches in assessee's own case for the Assessment Year 2002-03 to 2005-06.

13. Learned counsel for the assessee also relied upon the decision in the case of assessee where the Revenue went in appeal for the Assessment Year

Download Source- www.taxguru.in

2004-05 and 2005-06 before the Hon'ble High Court and the relevant decsion for the Assessment Year 2004-05 by the Hon'ble Allahabad High Court is reproduced hereinbelow.

"3. The department has preferred this appeal on the following substantial questions of law.

1. *Whether on the facts and circumstances of the case, the Hon'ble ITAT is justified in law in dismissing the appeal of the revenue and to hold that in isolation, road can be considered as a building for the purpose of granting depreciation?*
2. *Whether on the facts and circumstances of the case, the Hon'ble ITAT is justified in law in dismissing the appeal of the revenue and to hold that "Buildings" include roads, birdges, culvers, wells and tube wells etc. as per provisions of Appendix-I of the IT Rules, 1962, whereas Appendix-I is effective from assessment year 2006-07 onwards and not applicable for A.Y. 2004-05, which is the year under appeal?*
3. *Whether on the facts and circumstances of the case, the Hon'ble ITAT is justified in law in dismissing the appeal of the revenue and to hold that the assets on which depreciation is claimed by the assessee are owned by it, whereas in the concession Agreement dated 12.11.1997 between NOIDA authority and the assessee, it is clearly mentioned that the land on which the toll bridge has been constructed is not a property of the assessee, but has been given on lease by the NOIDA authority for a certain period (30 years) and as per the agreement, the lease can be terminated earlier also, subject to certain conditions. Therefore, the ownership of the asset in the hands of the assessee is not established.*

4. *The Assessing Officer vide order under Section 143(3) of the Act dated 29.09.2006 disallowed the claim of the assessee on depreciation on toll roads & bridge amounting to Rs.19,14,43,827/- after considering decision of the Supreme Court in the case of Indore Municipal Corporation (SC) 247 ITR 803. The CIT(A) deleted the disallowance following the orders of Income Tax Appellate Tribunal, for the assessment year 2003-04.*
5. *The Income Tax Appellate Tribunal confirmed the order of CIT(A), and dismissed the appel by relying on its own decision in the case of assessee for the assessment years 2002-03 and 2003-04.*
6. *The question nos.1, 2 and 3 in this apeal are the same as have been raised by the revenue in Income Tax Appeal No.316 of 2011 between the same parties for the assessment year 2005-06.*
7. *By a judgment delivered today between the parties, we have answered all the three questions for the assessment year 2005-06 in favour of the respondent-assessee, and against the revenue.*

Download Source- www.taxguru.in

8. *Following the judgment delivered today in Income Tax Appeal No.316 of 2011 between the same parties, all the three questions are decided in favour of the respondent-assessee, and against the revenue.*
9. *The Income Tax Appeal is dismissed."*

14. Also reproduced hereinbelow the decision of Hon'ble High Court of Allahabad in assessee's case for the assessment year 2005-06 as under:

> *"25. With the insertion of the Explanation-I to Section 32 w.e.f. 1.4.1998 there is no doubt that where the assessee is the lessee of the building in which he carries on business which is not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee of any structure or doing of any work in or in relation to by way of renovation, extension or for improvement to the building,l then the provisions of the Income Tax Act, will apply as if the said structure or work is a building owned by the assessee. Explanation-I may apply to renovation or extension or improvement to the building, the object is to extend the application of depreciation, if such buildingins which are not onwed by the assessee but in which the assessee holds a lease or other right of occupancy. Thepresent case stands on a better footing, in which the land is hled on lease and the road as capital asset has been built on it with exclusive ownership of the road, and the bridge in the assessee-company for the concessiion period, and which also includes the right to collect tolls and to regulate use of the bridge. Section 32 would, therefore, apply for the purpose of providing depreciation to be worked out in accordance with the law. For removal of doubts the legislature has provided that the building includes roads in Note(1) to Appendix-I providing for the table of rates at which the depreciation is admissible.*
>
> *26. The questions no.1, 2 and 3 are thus decided in favour of the respondent-assessee and aginst the revenue. So far as question no.1 is concerned, regarding the payment in connection of "take out assistance fee' for redemption of Deep Discount Bonds this Court has already decided the question in Income Tax Appeal No.44 of 2010 between the same parties relating to the assessment year 23002-03 in favour of the respondent-assessee and against the revenue."*

15. The decision relied upon by the learned DR in the case of CIT vs. West Gujarat Expressway Ltd. reported in (2016) 73 taxmann.com 139 (Bombay) and in the case of North Karnataka Expressway Ltd. reported in 2014-TIOL- 1931 HC-MUM-IT is distinguishable on the facts that in the cases decided by the Bombay High Court the model of the contract was BOT whereas in the present case it is BOOT. Secondly, the case decided by the Hon'ble Bombay High Court were with respect to National Highway whereas in the present case it is not a National Highway. In the facts and

Download Source- www.taxguru.in

circumstances of the case, we find no infirmity in the order of learned CIT(A) and accordinlgy both the grounds of the Revenue are dismissed.

16. As regards ground no.4, the brief facts of the case as emanating from the order of the AO are reproduced herein.

> *"I have carefully considered the submissions of the assessee and not found any force in the same as the nature of payment, which is being made under Take out assistance agreement is not revenue but capital in nature. It is a payment, which is to be made in connection with redemption of Deep discount bonds and hence cannot be claimed as a revenue expense.*
>
> *It has been held in the case of Gujarat Mineral Development Carp. Ltd., VS. elT (1983) reported at 143 ITR 822 (Gujarat) that where expenditure is incurred in the field of fixed capital, but is on capital account but if it is in the field of circulating capital, it is on revenue account. In the case of Indian Ginning and Pressing Co. Ltd. Vs. c/T (2002) reported at 25 STC 503 (Guj HC): (2001) 252 ITR 577 (Guj.) it was held that in relation to the test of enduring benefit, what is material is to consider the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advontoqe may endure for an indefinite future. Following the ratio of the judgment quoted above, it is clear that the nature of payment under consideration, is capital in nature, as it Is connected with the fixed capital of the assessee by way of fees being paid for the redemption of bonds. Here it is pertinent to mention that this issue was raised in earlier years and has duly been upheld oy Ld. CIT (Appeals) in those years. In view of the above, the amount of Rs. 91,21,413/- paid by the assessee as "Take out Assistance fee" is disallowed as an expenditure being capital in nature and added back to the total income of the assessee."*

17. Learned CIT(A) deleted the addition so made by the AO. The issue is covered against the Revenue by the decision of Hon'ble Allahabad High Court in assessee's own case for the assessment year 2002-03 in Income Tax Appeal No.44 of 2010 dated 24.08.2012 placed at paper book page no.899 to 908 and for the assessment year 2003-04 in ITA No.273 of 2011 dated 24.08.2012 placed at paper book page 887 to 896. In the facts and circumstances of the case, we find that there is no infirmity in the order of the learned CIT(A) who has rightly deleted the addition so made.

18. In the result, the appeal of the Revenue is dismissed.

Download Source- www.taxguru.in

19. Now we take up the appeal of the assessee in ITA No.5286/Del/2012. The grounds raised are as under:

> *1. The order passed by the Learned Commissioner of Income Tax (Appeals) ("Ld. CIT(A) under section 250 of the Income Tax Act, 1961 ("the Act") is bad in law and on facts and circumstances of the case.*
> *2. The Ld. CIT(A) as well as Learned Assessing Officer (hereinafter referred as 'Ld. AO') have erred in law and on facts and circumstances of the case by alleging that the performance related bonus paid by the appellant to its employees was in relation to the listing of GDR of the appellant at London Stock Exchange notwithstanding the provisions of section 36(1)(ii) of the Act.*
> *3. The Ld. CIT (A), as well as Ld. AO have erred in law and on the facts and circumstances of the case by disallowing the sum of Rs 1,40,00,000 paid by the appellant as performance related bonus to its employees by treating the same as capital in nature.*
> *4. All the aforesaid grounds are independent and without prejudice to one another."*

20. All the grounds are in fact related to one issue and the brief facts as emanating from the order of the AO are reproduced hereinbelow.

> *"Above mentioned persons are already receiving regular remuneration from the company for the services rendered by them. Since the payments under obove head are related* to *raising of additional capital for the company the same cannot be accepted as a revenue expenditure. Instead it is a capital-expenditure related to rising of additional capital of the company While remitting GDR proceeds into the country assessee has itself remitted GDR proceeds net of expenses related* to *floating of GDRs and has also not claimed it in the P& L account. Payment of Performance Related* Pay *is not different from expenses related to floating of GDRs i.e. Share capital of the company and hence is held as capital expense related to raising of capital for the company and is disallowoble as revenue expense and added In the hands of the assessee. I am also satisfied that the assessee company has furnished inaccurate particulars of its income thereby suppressed its taxable income, therefore, penalty proceedings u/s.271(1)(c) have been initiated separately."*

21. Learned CIT(A) has confirmed the action of the AO.

22. We have heard the rival contentions and perused the facts of the case. It was pointed out by the learned counsel for the assessee that the said expenditure is in fact covered specifically u/s.36(1)(ii) where any sum paid to an employee as bonus or commission for services rendered is allowed. When specific section is there for allowance or an expenditure, then the general provision of the section as contained in Section 37(1) shall not

Download Source- www.taxguru.in

apply. The learned counsel for the assessee relied upon the decision of Hon'ble Supreme Court in the case of Shahzada Nand & Sons vs. CIT reported in (1977) 108 ITR 358 (SC) and the relevant head notes are reproduced hereinbelow.

> ***"Section 36(1)(ii) of the Income-tax Act, 1961 - Bonus or commission - Assessment year 1963-64 - Whether it is not required that there should be any extra services rendered by an employee before payment of commission to him can be justified as an allowable expenditure - Held, yes – Assessee firm was carrying on business with help of two employees namely 'S' and 'G' - Business of assessee-firm consisted of sole seIling agency of one OCM in respect of yarn, cloth and blankets - Since assessee showed very satisfactory turnover, OCM started giving to assessee, in addition to usual commission, overriding commission at rate of two and a half percent on sales affected by assessee - Assessee in turn decided to give to 'S' and 'G' commission at rate of half percent out of two and a half percent overriding commission received from OCM - Assessee's claim for this amount of commission paid was rejected by revenue authorities – On reference, High Court affirmed decision of authorities below holding that there was no evidence to show that any extra services were rendered by'S' and 'G' and that they were responsible for increase in sales and enlargement of overriding commission - On instant appeal, it was seen that'S' and 'G' were infact persons attending to business of assessee - 'G' was an experienced and seasoned businessman it was and he was also advising OCM in regard to designs etc., and he and'S' were primarily responsible for flourishing state of business - Whether, on facts. and having regard to aforesaid legal position, ex-gratia commission paid to'S' and 'G' could not be regarded as unreasonable - Held, yes - Whether, therefore, amount of commission paid to them was to be allowed as deductible expenditure under section 36(l)(ii) - Held, yes.***

23. He also relied upon the decision of Hon'ble Bombay High Court in the case of Bombay Burmah Trading Corporation Ltd. vs. CIT reported in (1983) 12 Taxman 178 (Bom.) where he pointed out at page 8 of the judgment which is reproduced hereinbelow.

> *"Mr. Joshi, on behalf of the Revenue, had seriously objected to the production of this document. We, however, overrruled that objection and we have taken these grounds of appeal as annex. F to the statement of the case. Ground No.8 shows that the break up of Rs.31,899, i.e., Rs.22,699, are expenses under the head "Printing and Stationery" and Rs.9,200 are the expenses under the head "Postage & Telegrams". Now, obviously, these are expenses which are incurred consequent upon the issue of bonus shares. These are not expenses which can even be said to have been incurred for the purposes of raising any additional capital. These are expenses which have been incurred in the normal course of business and merely because the printing was done, in connection with bonus shares or the stationery was utilized probably for printing in connection withbonus shares and the p[ostage and telegrams are, in some way or other, related to the declaration of bonus shares, it is not necessary for us to treat these expenses as being of a capital nature. The Tribunal was justified in taking the view that this expenditure does not create any asset of an enduring nature."*

Download Source- www.taxguru.in

24. He also relied upon the letter no.F-No.10/67/05-IT(A)-1 issued by CBDT which is reproduced hereinbelow.

> *"* ***Letter F. No.10/67/65-IT(A-I)***
>
> *Listing fee paid annually to stock exchange – Whether admissible as business expenditure*
>
> *Attention is invited to the Board's Letter F. No.10/.44/64-IT(A-I), datred 14.1.1995 [Annex], on the above subject. The matter has been reconsidered by the Board. As the advantatges accruing to a company as a result of getting its hares listed on a stock exchange contain substantial advantages pertaining to its day to day business, it has been decided that such expenses should be considered as laid out wholly and exclusively for the purposes of the business and therefore, admissible as business expenditure under section 37(1). In view of the above, the instructions issued under the Board's earlier letter referred to above may be treated as withdrawn.*
> *Letter : F.No. 10/67/65-IT(A-I), dated 26.08.1965."*

25. Learned DR, on the other hand, mainly relied upon the decision of Hon'ble Supreme Court in the case of Punjab State Industrial Development Corp. Ltd. vs. CIT, reported in (1997) 93 Taxman 5 (SC) and relevant paragraph 7 of the said judgment is as under:

> *"7. We do not consider it necessary to examine all the decision in extenso because we are of the opinion that the fee paid to the Registrar for expansion of the capital base of the company was directly related to the capital expenditure incurred bythe company and although incidentally that would cerainly help in the business of the company and may also help in profit-making, it still retains the character of a capital expenditure since the expenditure was directly related to the expansiion of the capital base of the company. We are therefore of the opinion that the view taken by the different High Courts in favour of the revenue in this behalf is the preferable view as compared to the view based on the decision of the Madras High Courtin Kisenchand Chellaram (India) (P.) Ltd.'s case (supra). We therefore answer the question raised for our determination in the affirmative i.e. in favour of the revenue and against the assessee.*
> *8. The tax reference will stand answered accordingly with no order as to costs.".*

26. On perusal of the facts on record, we are of the view that bonus paid is exclusively has to be dealt by Section 36(1)(ii) of the Act and which does not distinguish between capital and Revenue and therefore has to be allowed. In view of the decisions cited by learned counsel for the assessee, it is evident extra services rendered by employee is justified to be an employee expenditure especially held by Hon'ble Supreme Court in the case of

Download Source- www.taxguru.in

Shahzadnad and Sons (supra). The position of Hon'ble Supreme Court in the case of Punjab State Industrial Development Corpn. Ltd. Vs. CIT reported in (1997) 93 Taxman 5 (SC) is distinguishable on the facts that the issue before the Hon'ble Supreme Court was with regard to the fee paid to the Registrar for expansion of capital which is not in the present case. Moreover, we have the benefit of the letter dated 26.08.1965 where expenses listing on stock exchange is mainly for the purpose of business wholly and exclusively allowable u/s.37(1) of the Act as well. Therefore, from all angles put before us by the parties, we are of the considered view that such an expenditure incurred is wholly and exclusively for the purpose of business and is allowed as Revenue expenditure. Accordingly all the grounds of the assessee are allowed and appeal of the assessee in ITA No.5286/Del/12 is allowed.

27. Now we take up the appeal of the assessee for the assessment year 2007-08, in ITA No.5286/Del/2012 where the issue with regard to the agency fees is identical as in Revenue's Appeal in ITA No.5246/Del/2012, and therefore, following our own order hereinabove. The Revenue's ground is dismissed.

28. As regards the ground no.2 of the Revenue, the brief facts of the case as emanating from the order of the AO are reproduced hereinbelow.

> *"12. On perusal of the balance sheet, it is seen that assessee has shown a sum of Rs.2,00,57,868/- as Advance Payment and unexpired discouns shown under the head current liability. Accordingly, assessee was asked to explain the nature of this unexpired discounst shown under the head liability. In response to the query, assessee has stated that this pertains to the toll receipts, which the customer has not used during the year under consideration. Assessee was further asked to explain as to why the reciepts received from the customer have been kept aside in the balance sheet. In response assessee stated that customer purchases card of tolls which is consumed on to and fro basis, and when the customer utilized full to and fro the receipts is taken into consideration. The assessee has also submitted the copy of refund being made by the company to the customer. The submission of the assessee is not tenable and convincing because the assessee received the tolls through electronic cards as revenue receipt and thereafter treatment thereoif as*

Download Source- www.taxguru.in

liability is clear deferment of tax incidence on the ground of unutilization of to and from and other submission of refund to be made to customer in case the customer intends to take refund. The other submission is not acceptable because if a customer intends to take refund, which can be adjusted against the concerned year's receipt and after adjusting refund, net revenue toll receipts will be taxable. Thus the entire submission of the assessee is not tenable, but is a clear cut avoidance of tax incidence. Accordingly, a sum of Rs.2,00,57,868/- is added to the income of assessee, for which penlaty proceedings u/s.271(1)(c) are being initiated separately."

29. Learned CIT(A) at page 45 deleted the addition and we find no infirmity in his order. We find that the assessee had disclosed the advance payments received on account of toll and advertisement revenue as Advance Payment/Unexpired Discounts under the head Current Liabilities in its books of accounts. Out of total amount ofRs.2,00,57,868/-, Rs.63,03,382/- represented advance received on accountof advertisement fees whereas the balance amounting to Rs 1,37,54,486 represented advance on account of toll fees. The Assessing Officer treated the entire amount as income of the appeal assessee, being a corporate entity, is required to maintain its books of accounts on accrual basis and in compliance with the Accounting Standards issued by the Institute of Chartered Accountants of India. In this regard Accounting Standard - AS·9 issued by the Institute of Chartered Accountants of India, is required to be mandatorily followed by all corporate entities. Reading of the aforesaid AS-9, makes it clear that the revenue should be recognized only when the services are rendered and in case where services are rendered partially, revenue should be recognised proportionate to the degree of completion of the services. In the instant case, the assessee recoqnised advertisement revenue proportionately on the basis of period falling under the particular financial year. So far as toll fee is concerned while issuing new cards (Silver and Gold cards) the assessee collects administration fees, security deposit and toll usage fees. While

Download Source- www.taxguru.in

administration fees was recognised as revenue immediately, amounts received on account of toll fees from issuance I recharge of Silveri Gold Card was recognised as revenue on the basis of actual number of passages availed by the card users during a particular financial year. We have also noticed that the assessee has been following the same practice consistently since the commencement of its operations and the same had never been questioned by income tax department. Even in the subsequent financial years, the assessee has followed the same practice and was allowed by the department. The Assessing Officer ought not to have disturbed the method of accounting adopted by the assessee in one assessment year when the same is accepted in the earlier as well as the subsequent assessment years as any change to the treatment would have a corresponding ripple impact on the other assessment years. Accordingly, the grounds of the Revenue are dismissed.

30. In the result, the appeal of the Revenue in ITA No.5247/Del/2012 is dismissed.

31. As regards appeal of the Revenue in ITA No.5248/Del/2012 and 5249/Del/2012 for the assessment years 2008-09 and 2009-10 which are dealing with the depreciation of toll bridge and agency fees the issues are identical to the issues raised by the Revenue in ITA No.5246/Del/2012 where the Revenue's grounds being dismissed by us hereinabove.

32. Following our order hereinabove, both the grounds in both the appeals are dismissed.

33. In the result, the appeals of the Revenue in both the years are dismissed.

Download Source- www.taxguru.in

34. To sum up, the appeal of the Revenue in ITAs No.5246 to 5249/Del/2012 are dismissed and appeal of the assessee in ITA No.5286/Del/2012 is allowed.

Order pronounced in the open court on this day 10th April, 2017

Sd/-	**Sd/-**
(I.C. SUDHIR)	**(B.P. JAIN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 10/04/2017

Prabhat Kumar Kesarwani, Sr.P.S.

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT(Appeals)
5.DR: ITAT

Asstt. Registrar, ITAT, New Delhi

Download Source- www.taxguru.in