Judgment reserved on 17.09.2012
Judgment delivered on 08.11.2012

INCOME TAX APPEAL NO. 316 OF 2011

Commissioner of Income Tax v. M/s Noida Toll Bridge Co Ltd

Hon'ble Sunil Ambwani, J.
Hon'ble Aditya Nath Mittal, J.

1. This Income Tax Appeal filed by the Commissioner of Income Tax under 260-A of the Income Tax Act, 1961 (in short, the Act) arises out of order dated 4.4.2011 passed by the Income-Tax Appellate Tribunal, Delhi Bench 'E', New Delhi in ITA No. 4765/Del/2010 for the assessment year 2005-06.

2. We have heard Shri Shambhu Chopra, learned counsel appearing for the Income Tax Department. Shri S.R. Patnaik, Ms. Akansha Agarwal and Shri Ashish Agarwal appeared for the respondent-assessee.

3. The assessee-company is engaged in the business to develop, establish, finance, design, construct, operate and maintain a bridge (NOIDA-Bridge), across the river 'Yamuna' connecting Delhi and Noida (DND Flyover) under the Build, Own, Operate & Transfer (BOOT) basis. The Delhi Noida link bridge comprises and includes adjoining roads and other related facilities, and to enter into the Ashram flyover construction agreement with Noida, which is constructed at the landfall of the Delhi Noida Link Bridge.

4. For the assessment year 2005-06 the assessee filed a return showing a loss of Rs.30,90,02,565/- on 30.10.2005. The return was revised by the assessee declaring a loss of Rs. 29,25,38,781/- on 13.9.2006. The return was processed under Section 143 (1) of the Act on 19.9.2006, on which the case was selected for scrutiny. A

notice under Section 143 (2) of the Act was issued and duly served on the assessee. Thereafter a questionnaire was issued under Section 142 (1) on 25.1.2007 in response to which the representative of the assessee appeared before the Income Tax authority. The Assessing Officer disallowed the depreciation on toll road/bridge amounting to Rs. 17,62,66,283/- under the Block-"Building" @ 10%, and the take out assistance fee claimed at 1,48,54,608/-. The business loss was accordingly reduced by adding the depreciation on roads and bridges; and take out assistance fee at Rs.10,14,17,890/-. The AO reduced the business loss by a short term capital gain as shown at Rs.58,64,907/-, and long term capital gains as shown at Rs. 4,02,822/- and accordingly calculated the net loss at Rs. 9,51,50,161/-. By the assessment order dated 28.12.2007 the AO also directed the charging of interest under Section 234-B, 234-C and 234-D and to draw penalty proceedings separately under Section 271 (1) (c) of the Act. Aggrieved with the assessment order the assessee filed appeal before the Commissioner of Income Tax (Appeals), Ghaziabad. The CIT (A) by his order dated 4.8.2010 allowed the appeal observing that since the issue involved in the assessment order is identical to that of the assessment years 2002-03 and 2003-04, hence following the orders of ITAT and CIT (A), the assessee was entitled for depreciation on toll road/bridge. On the take out assistance fee also the CIT (A) found that the AO was not justified in treating the expenses as expenditure to be capital in nature and deleted the additions.

5. The Income-tax department filed a second appeal before the Income Tax Appellate Tribunal (ITAT). The ITAT has confirmed the order of CIT (A) and dismissed the appeal relying upon its own decision in the case of the assessee for the assessment years 2002-03 and 2003-04.

6. The CIT 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, bridges, culverts, wells and tubewells etc. as per provisions of Appendix-I of the I.T. Rules, 1962, whereas Appendix-I is effective from assessment year 2006-07 onwards and not applicable for AY 2005-06, 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. Whether on the facts and circumstances of the case, the Hon'ble ITAT is justified in law in holding that payment made in connection with redemption of deep discount bonds can be claimed as revenue expenditure?

7. Shri Shambhu Chopra, appearing for the Income Tax Department submits that the assessee had constructed a road and a bridge across the river Yamuna connecting Delhi and NOIDA under the Build-Own-Operate-Transfer (BOOT) basis. The bridge and the adjoining roads in isolation do not come within the meaning of 'building', to claim depreciation. The road is not within the factory premises, which can be considered as a part of the plant or building. The building may include roads, bridges, culverts, wells and tube wells within the extended meaning given in Appendix-I of the

Income Tax Rules; the road by itself is not included within the meaning of the word “building” and thus it is submitted that the ITAT committed an error of law in allowing depreciation on the building.

8. Shri Shambhu Chopra submits that the “Concession Agreement” entered into between respondent-assessee; Infrastructure Leasing & Financial Services Limited and New Okhla Industrial Development Authority, confers the right to the respondent-assessee to implement the project, and to recover the project cost through the levy of fees/toll revenue over the period of 30 years beginning from 30.12.1998. The respondent-assessee, therefore, is not owner of the road to claim depreciation under Section 32 of the Act. The depreciation can be claimed in respect of a building, machinery, plant or furniture, being tangible assets owned wholly or partly by the assessee and used for the purposes of the business or profession. The road constructed by the respondent-assessee is not owned by it as the land has been provided on lease by the Government of UP and that the road along with the land has to be returned to the concessionaire-assessee after a period of 30 years. He submits that the road alone, unless it is included within the premises of the factory and leads to or adjoins any building, is not covered under Note-I to Appendix-I of the Income Tax Rules, 1962 which provides; 'Note:-1. Building includes roads, bridges, culverts, wells and tube wells'.

9. Shri Shambhu Chopra has relied upon **R.B. Jodha Mal Kuthiala v. Commissioner of Income-Tax, Punjab (1971) 82 ITR 570; Commissioner of Income Tax v. Gwalior Rayon Silk Manufacturing Co. Ltd (1992) 196 ITR 149; Commissioner of Income-tax v. Podar Cement Pvt. Ltd and others (1997) 226 ITR 225; Commissioner of Income-Tax v. Anand Theatres (2000) 244 ITR 192; Indore Municipal Corporation v. Commissioner of**

Income-Tax (2001) 247 ITR 803 and **Commissioner of Income-Tax v. Gujarat Gas Co. Ltd (2009) 308 ITR 243 (Guj)** in support of his submission**.**

10. In **R.B. Jodha Mal Kuthiala v. Commissioner of Income-Tax, Punjab** (supra) the Supreme Court referred to the observations in "Pollock on Jurisprudence, 6th edition (1920), at pages 178-80"

> "Ownership may be described as the entirety of the powers of use and disposal allowed by law....The owner of a thing is not necessarily the person who at a given time has the whole power of use and disposal ; very often there is no such person. We must look for the person having the residue of all such power when we have accounted for every detached and limited portion of it ; and he will be the owner even if the immediate power of control and use is elsewhere. "

11. In **Commissioner of Income-tax v. Podar Cement Pvt. Ltd and others** (supra) the Supreme Court considered the meaning of word "owner" in Section 22, and held that the owner is a person, who is entitled to receive income from the property in his own right. The Supreme Court held that though under the common law "owner" means a person, who has got valid title legally conveyed to him after complying with the requirements of law, such as the Transfer of Property Act, the Registration Act etc, in the context of section 22 of the Income Tax Act, 1961, having regard to the ground realities and further having regard to the object of the Income Tax Act namely to tax the income, "owner" is a person, who is entitled to receive income from the property in his own right. The requirement of registration of the sale deed in the context of Section 22 is not warranted.

12. In **Indore Municipal Corporation v. Commissioner of Income-Tax** (supra) a local body on the construction of metal roads on its trenching grounds for transport of night soil and compost income expenditure, it was held that the expenditure was incurred to

gain an enduring benefit and was capital in nature and not deductible as revenue expenditure, and further that the construction of metal roads for hauling compost could not be considered as an expenditure on plant and machinery and that the assessee was not entitled to depreciation on the cost of construction of the metal roads on its trenching grounds. Such an expenditure was not a revenue expenditure. The Supreme Court further held that the roads were not buildings as there was no other constructions except the roads. The roads by themselves would not constitute buildings and the assessee was not entitled to depreciation on the cost of construction of roads. The Supreme Court in its earlier decision in **CIT v. Gwalior Rayon Silk Manufacturing Co. Ltd (1992) 196 ITR 149 (SC)** in which construing the expression "building" in Section 32 of the Act it was observed that the roads and roadways are adjuncts of the building lying within the factory area linking them together and are being used for carrying on its business by the assessee. Since there was no other construction except the roads, it could not be said that the roads by themselves would constitute buildings.

13. In **Commissioner of Income-tax v. Gwalior Rayon Silk Manufacturing Co. Ltd** (supra) the Supreme Court, considering the meaning of the word "building" and whether roads would be included within the meaning of the word "building", held:-

> "The question emerges, therefore, whether roads and drains include building under s. 32 of the Act. Section 32 provides depreciation of capital assets in respect of buildings, machinery, plant or furniture. This Court in C.I.T. v. Ram Gopal Mills Ltd. (41 I.T.R. 280), held that "the basic and normal scheme of depreciation under the Act is that it decreases every year being a percentage of the written down value which in the first year is the actual cost and in succeeding years the actual cost less all depreciations actually allowed under the act or any act repealed thereby". The depreciation allowance, therefore, is in respect of such assets as are used in the business and each to be calculated on the written down value. The allowance

towards depreciation is for the continuation of the use of the assets wholly or in part during the accounting year and its contribution to the earning of the income. The object is to determine net income liable to tax. In C.I.T. v. Alps Theatre, [1967] 65 ITR 377, heavily relied on by the revenue this Court considering s. 10(2) of the Income-tax Act, 1922 held that s. 10(2) provides that such profits or gains shall be computed after making certain allowances. The object of giving these allowances is to determine the assessible income. Therein the question was whether the land on which the theatre was constructed is a building within the meaning of s. 10(2) of the Income-tax Act, 1922. This court held that land is not a building and, therefore, depreciation allowance for land separately is not admissible. The ratio therein has no application but the principle laid would be considered in the light of the purpose of the Act. In C.I.T. v. Taj Mahal Hotel, [1971] 82 ITR 44, this court adopting purposive approach held that sanitary and pipeline fittings fell within the definition of plant. 1922 Act intended to give wide meaning to the word "plant". The rules are meant only to carry out the provisions of the Act and cannot take away what is conferred by the Act or whittle down its effect. In the Municipal Corporation of Greater Bombay & Ors. v. Indian Oil Corporation Ltd., JT (1990) 4 SC 533, the oil tanks for storage of petrol were held to be buildings exigible to property tax.

The question whether the roads would include within the meaning of the word buildings was considered by various High Courts. The leading decision is of the Bombay High Court in C.I.T. v. Colour Chem Ltd., [1977] 106 ITR 323. While negativing the contention that roads are part of the plant, the Bombay High Court held that the roads within the factory premises are used for the purpose of carrying raw materials, finished products and workers. Therefore, it must be regarded as building or buildings within the meaning of sub- clause (iv) of s.10(2) of 1992 Act. It was also held that dictionary meaning of the word "building" cannot be confined to a structure or superstructure having walls and roof over it. The roads and roadways are adjuncts of the buildings lying within the factory area linking them together and are being used for carrying on its business by the assessee. Therefore, they must be regarded as forming part of the factory building. The expenditure incurred, therefore, will have to be regarded as expenditure on buildings and the depreciation must be allowed. The appeal filed against the judgment in Colour Chem Ltd. case the leave was refused on the grounds of delay. More or less though for different reasons on "common sense principle" same is the ration in C.I.T. v. Locas-TVS Ltd., [1977] 110 ITR 346 (Mad.). When the appeal was filed, this court dismissed the Special Leave Petition on the ground of delay. Same is the view in Panyem Cement and Chemical Industries Ltd. v. Addl. C.I.T., [1979] 117 ITR 770 (A.P.); C.I.T. v. Kalyani Spinning Mills Ltd., [1981] 128 ITR 279 (Cal.); C.I.T. v. Mec. Gaw Laboratories India (Ltd.), [1981] 132 ITR 401 (Guj.). In C.I.T v. Bangalore Turf Club Ltd., 150 ITR 23, when the appeal was filed

this court dismissed the same in Special Leave petition Nos. 5198-99/85 dated December 16, 1987.

In Permanent Words and Phrases, Vol. 5A `building' was defined that every thing that is necessary to perfect a manufacturing establishment and fit for use designed as a part of it is a building. The roads would serve as necessary links between the raw material and finished products in the business activity. The roads are liable to wear and tear and need constant repairs or relaying the road afresh.

While amending Income-tax 4th Amendment Rules 1983, the rule making authority accepted this interpretation consistently laid by various High Courts that building includes roads and also alongated bridges, culverts, wells and tubewells as building but prescribed fixed rates of depreciation setting at rest the variable rates claimed by the assessee. Rules validly made have the same force as the sections in the Act. The contention of the respondents that unless the Act itself is amended, the rules would not cut down the meaning of the word `building' is without substance. The inclusive definition of the building to include roads etc. enlarges the scope of s. 32 and does not whittle down its effect. It is true that in C.I.T. v. Coromandel Fertilisers Ltd., [1985] 156 ITR 283, (A.P.), the High Court of Andhra Pradesh interpreted that roads fell within the meaning of "Plant" and granted depreciation at the rates admissible to plant. In C.I.T. v. Sanavik Asia Ltd., [1983] 144 ITR 585 (Bom.), took opposite view and held to be building. In view of the consistent view of the other High Courts and in our view which is the correct one, the view of the High Court of A.P. is not correct in law.

It is true, as contended for the Revenue that the Income-tax 4th Amendment Rules 1983 were given effect from 2nd April, 1983 thereby manifested that the rates enumerated in the rules would be applicable prospectively from the later assessment years. It by no means be construed that the legislature expressed its intention that for the earlier period building does not include roads. If it were to be so it was open to the Parliament to expressly brought out an amendment to the Act to that effect. On the other hand we are of the view that the subordinate legislature accepted the interpretation given by the High Courts and included roads as integral part of the building. In Bangalore Turf Club Ltd. case 150 ITR 23, the Karnataka High Court held that the amendment was by way of clarification in confirmity with the law laid by the High Courts. It is also equally settled law that an interpretation consistently given over years and accepted and acted upon by the department may not normally be upset even though a different view of law may reasonably be possible unless the new perceptions and circumstances warrant fresh look. The ratio in Saharanpur Electric Supply Co. Ltd. v. C.I.T., [1992] 194 ITR 294, is not in conflict with the above view. It is also settled law that, unless it is expressly

> stated or by necessary implication arises, a statute should always be read as prospective. The ratio therein is also in consonance with the view we are taking.
>
> Accordingly we have no hesitation to hold that the roads laid within the factory premises as links or provided approach to the buildings are necessary adjuncts to the factory buildings to carry on the business activity of the assessee would be building within the meaning of s. 32 of the Act. The capital expenditure incurred thereon is admissible to depreciation of written down value. It has to be worked out for the purpose of depreciation as per the provision of the Act read with the Rules in appendix. Equally the drains also would be an integral part of building for the convenient enjoyment of the factory. The expenditure incurred in laying the drains or written down value of the cost of its construction would equally be entitled to depreciation. It is to be worked out in terms of s. 32 of the Act read with the rules in the Appendix. In view of the settled position the reference sought for in CA No. 2916/80 and CA No. 1194/77 is unnecessary. The appeals are accordingly dismissed. No costs."

14. In **Commissioner of Income-Tax v. Gujarat Gas Co. Ltd** (supra) the Gujarat High Court held that where the assessee had entered into lease agreement with the State Electricity Board for generation and distribution of electricity in which the assessee leased out the electrical equipments to the Board, lease rentals paid by the board were not allowable deduction. The lease rentals were taxed as business income in the hands of the assessee. The High Court dismissed the appeal against the order of the Tribunal, which held that transaction was genuine and thus a direction to Assessing Officer to allow depreciation did not suffer from any error of law.

15. In **Commissioner of Income Tax v. Anand Theatres** (supra) the Supreme Court held that the meanings of the words "buildings" and "plant" have to be gathered in the context of the scheme of Section 32 and it is not necessary to adopt a judge-made sense, which is artificial and imprecise in application. There is a distinction between the premises in which the business is carried on and the

plant with which the business is carried on. The fact, that the building in which a business is carried on is, by itself construction particularly well-suited to the business, or indeed was specially built for that business, does not make it a plant. Its suitability is simply the reason why the business is carried on there. But it remains the place in which the business is carried on and is not something with which the business is carried on, except in some rare cases where it plays an essential part in the operations which take place. The hotel premises are not considered to be an apparatus or tool for running the hotel business but are merely a shelter or home or setting to a theatre in which cinema business is carried on. The same would be the position with regard to a theatre in which cinema business is carried on.

16. Shri S.R. Patnaik, on the other hand, appearing for the assessee submits that under the Concession Agreement, the concessionaire has been given rights to develop, establish, finance, design, construct, own, operate and maintain the Noida bridge. He relies on the Section 2.1 of the Concession Agreement, which reads as follows:-

> "Section 2.1 **Grant of Concession**
>
> (a) NOIDA hereby irrevocably grants to the Concessionaire the exclusive right and authority during the Concession Period to develop, establish, finance, design, construct, operate and maintain the Noida Bridge as an Infrastructure Facility for the benefit of the residents, and industries, and for the development of commerce in Noida and permits it to enter into the Ashram Flyover Construction Agreement and the Concessionaire hereby accepts the Concession granted to it by NOIDA and further agrees to implement the Project, in accordance with the terms and conditions of this Agreement.
>
> (b) NOIDA further grants to the Concessionaire the exclusive right and authority during the Concession Period to in accordance with the terms and conditions of this Agreement:-
>
> (i) develop, establish, finance, design, construct, own, operate, maintain use and regulate the use by third parties of the Noida Bridge;

(ii) enjoy complete and uninterrupted possession and control of the lands identified as constructing the Bridge Site;

(iii) own all or any part of the Project Assets;

(iv) determine, demand collect, retain and appropriate a Fee from the Users of the Noida Bridge and apply the same in order to recover the Total Cost of Project and the Returns thereon;

(v) Restrict the use of the Noida Bridge to motorized vehicles, bicycles and pedestrians and to debar animal drawn vehicles, cycle rickshaws and cattle from the Noida Bridge;

(vi) enforce the collection of Fee from delinquent Users of the Noida Bridge and imposed on vehicles and goods of any such delinquent user for the purpose of enforcing collection;

(vii) develop, establish, finance, design, construct, operate, maintain and use any facilities to generate Development Income arising out of the Development Rights that may be granted in accordance with the provisions of Article 4 herein;

(viii) enter into private contracts with the Users for any use or any special use of Noida Bridge and to sell, distribute or issue at various outlets as may be determined by the Concessionaire, coupons or tokens against payment of Fee in advance, thus providing the Users with ready access to Noida Bridge without the necessity of paying Fee on each incidental use of the Noida Bridge; and

(ix) appoint subcontractors or agents on its behalf to assist it in fulfilling its obligations under this Agreement."

17. Shri Patnaik submits that the concession period under clause 2.1 of the agreement commences from the effective date and extends for a period of 30 years, after which the concessionaire shall transfer the project asset to Noida in accordance with the terms of Article 19, which provides for details of the transfer of project on termination of the concession period. Clause 19.9 of the agreement provides for effect of transfer and which reads as follows:-

"19.9 **Effect of Transfer**

(a) The transfer of immovable property comprising the Project Assets shall be deemed to be a termination of all leasehold

> arrangements or licenses in relation to the Project Site and title to all such immovable property shall automatically revert to NOIDA. The movable property comprising the Project Assets shall be deemed to be transferred by delivery and possession."

18. Shri Patnaik submits that the respondent-company with exclusive rights and authority during the concession period, owns the Noida Bridge which is the infrastructure facility for the development of the residents and industries. The road is not just a road but is a part of the project which includes the Noida bridge and all other project assets. There are various constructions appended to the road and which supplement the road. The road has been built under the public-private partnership, with the lease of land on which the constructions have to be made by the concessionaire of which it is absolute owner for the period under concession. The project is a capital asset of the respondent assessee of which it is the owner and uses the asset for business fulfilling the necessary conditions of claiming depreciation under Section 32 of the Act. He relies upon Explanation-I inserted by Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986 w.e.f. 1.4.1988, which provides that where the business or profession of the assessee is carried in a building 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 for the purposes of the business or profession on the construction of any structure or doing of any work in or in relation to, and by way of renovation or extension of, or improvement to, the building, then the provisions of this clause shall apply as if the said structure or work is a building owned by the assessee. At least for a period of 30 years the respondent-assessee as a lessee of the land and owner of the road and bridge built over it has exclusive rights and if there was any doubt the same has been

removed by Explanation-I. The assessee-company is a special purpose vehicle. Its business is to build, operate the roads and to generate revenue by collecting tolls to meet the cost of constructions and earns profits. The CIT (A) and ITAT thus did not commit any error in allowing the depreciation on the road.

19. Shri Patnaik has relies on the new Appendix-I under Rule-5 of the Income Tax Rules, 1962, which provides for the table of rates on which depreciation is admissible. Part-I 'Class of assets' includes building in Item-I, which refers to notes (1) to (4) under the table and on which note (1) provides 'buildings' which includes roads, bridges, culverts, wells and tube wells. The note has remained unchanged since it was added in Appendix-I w.e.f. 2.4.1997. In **Mysore Mineral Ltd vs. CIT (1999) 239 ITR 775** the Supreme Court considered the meaning of the word 'owner' and after referring to **R.B. Jodha Mal Kuthiala v. CIT** (supra); **CIT v. Podar Cement Pvt Ltd and others** (supra); **Badiyani P.K. v. CIT (1976) 105 ITR 642** and **State of UP v. Renusagar Power Company,** held "*an overall view of the above said authorities shows that the very concept of depreciation suggests that the tax benefit on account of depreciation belongs to one who has invested in the capital asset, is utilising the capital asset and thereby loosing gradually investment cost by wear and tear and would need to replace the same by having lost its value fully over a period of time.*". In this case the housing board had allotted the house for which part payment was received and the possession was delivered so as to conceive depreciation over the properties. The title deeds were not executed. The delivery of possession by the housing board was held to be a step towards conferring ownership. The documentation was delayed only with the idea of compelling the allottee to observe the schedule of payment. The Supreme Court allowed the appeal and set aside the judgment of

the High Court and allowed the depreciation on the property.

20. Shri Patnaik has also submitted relying on **C & C Construction (P) Ltd v. CIT 2004 Taxman 363 (Del HC); CIT v. Indocount Finance Ltd 271 ITR 215 (Del HC); CIT v. Chand Ratan Bagri 329 ITR 356 (Del HC); Davangere Maganur Bassappa and Sons v. ITO 325 ITR 139 (Kar HC) and Anjuga Chit Fund (P) Ltd v. DCIT 318 IIT 121 (Mad HC)** that the issue not raised before and examined by the Tribunal cannot be raised before the High Court. He submits that the department did not raise the issues as canvassed in this appeal in the Tribunal, and thus the question of non-allowing the depreciation to the respondent-assessee under the concession agreement should not be allowed to be raised in the High Court in this appeal.

21. Having heard learned counsels appearing for the parties, we are of the view that the Tribunal did not commit any error of law in confirming the orders of CIT (A), and in dismissing the appeal on the question that the respondent-assessee was entitled to depreciation on the road constructed by it under the concession agreement. Although the points canvassed before us were not raised in detail before the CIT (A) and in the Tribunal, there was sufficient material on record to record the findings on the questions, which are questions of law.

22. The depreciation represents the diminution in value of a capital asset when applied to the parties of making profit or gain. The object is to get the true picture of the real income of the business. The respondent-assessee is engaged in the business of constructing roads and bridges. Under the concession-agreement the land is provided on lease initially for a period of 30 years which can be extended. The respondent-assessee company is a special purpose vehicle, engaged in the business of building, infrastructure/roads to generate revenues by collecting tolls to meet the cost of

constructions and to earn profits. The construction of road on the leased land is the capital asset of the company, which remains under its ownership for the concession period. The respondent-assessee exercises its full ownership rights on the road which include charging of tolls which is ordinarily a sovereign function. The operation, maintenance and use of the road during the concession period is with the respondent-assessee. It has been given exclusive rights to regulate the use of the Noida-Bridge. The road is not simply a road laid out on the land. It includes all allied constructions, which includes the bridge site. The control of the land identified as constituting the bridge site is in complete and uninterrupted possession and use of the respondent-company. It has powers to determine, demand, collect, retain and appropriate fees from the users of the bridge and also has the power to restrict the use of the bridge to motorised vehicles, bicycle and pedestrians, and to debar animal driven vehicles, cycle rickshaw and cattle.

23. In **Mysore Mineral Limited v. CIT (1999) 239 ITR 775 (SC),** after considering all the previous cases decided by it, the Supreme Court considered the term "owned" as occurring in Section 32 (1) of the Act and held that it must be assigned a wider meaning. The Supreme Court held that any one in possession of property in his own title exercising such dominion over the property as would enable others being excluded there from and having the right to use and occupy the property and/or to enjoy its usufruct in his own right would be the owner of the buildings, though a formal deed of title may not have been executed and registered as contemplated by the Transfer of Property Act, the Registration Act etc. The person, who having acquired possession over the building in his own right, uses the same for the purposes of the business or profession though a legal title has not been conveyed to him, but nevertheless is entitled

to hold the property to the exclusion of all others.

24. The Supreme Court further held that depreciation generally speaking is an allowance for the diminution in the value due to wear and tear of the capital asset employed by the assessee in his business. As for building, depreciation is the measurement of wearing out through consumption or use by effluxion of time. The depreciation charge is merely the periodic operating aspect of fixed asset costs.

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, 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 buildings which are not owned by the assessee but in which the assessee holds a lease or other right of occupancy. The present case stands on a better footing, in which the land is held 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 concession 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 against 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 2002-03 in favour of the respondent-assessee and against the revenue.

27. All the four questions are thus decided in favour of the respondent-assessee and against the revenue. The Income Tax Appeal is **dismissed.**

Dt.08.11.2012

RKP/