

IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH 'A', HYDERABAD

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER and
SMT. ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER

ITA No. 1184/Hyd/2013 – A.Y. 2005-06
ITA No. 1185/Hyd/2013 – A.Y. 2006-07
ITA No. 1186/Hyd/2013 – A.Y. 2007-08
ITA No. 1187/Hyd/2013 – A.Y. 2008-09
ITA No. 1188/Hyd/2013 – A.Y. 2009-10
ITA No. 1189/Hyd/2013 – A.Y. 2010-11

The DCIT
Circle-3(3)
Hyderabad
Appellant

vs. M/s. Swarna Tollway Pvt.
Ltd., Hyderabad
PAN: AAFCS5282E
Respondent

Appellant by: Sri P. Soma Sekhar Reddy
Respondent by: Sri I. Rama Rao

Date of hearing: 19.11.2013
Date of pronouncement: 16.01.2014

ORDER

PER CHANDRA POOJARI, AM:

The above six appeals by the Revenue are directed against the common order of the CIT(A)-IV, Hyderabad dated 28.5.2013 for assessment years 2005-06 to 2010-11. Since the issues involved in these appeals are common in nature, these appeals are clubbed together, heard together and are being disposed of by this common order for the sake of convenience.

2. The Revenue raised the following effective ground of appeal:

"2. The learned CIT(A) erred in holding that the assessee company is eligible for claiming depreciation u/s. 32 of the I.T. Act, 1961."

3. Brief facts of the issue are that the assessee is a private limited company incorporated as a Special Purpose Vehicle (SPV) promoted by CIDB Inventures Sdn Bhd. The assessee was

awarded the contract by the NHAI for widening, rehabilitation and maintenance of the existing two lane highway into a four lane one on the Tada-Nellore section of NH-5 and the existing two lane highway on the Nandigama-Ibrahimpatnam section of NH-9 on BOT basis. The entire cost of construction of Rs. 714,61,56,376 was borne by the assessee. The construction was completed during the F.Y. 2004-05 after which the highway was opened to traffic for use and the assessee started claiming depreciation from A.Y. 2005-06 onwards. The AO held that no ownership, leasehold or tenancy rights were ever vested with the assessee for the asset in question, i.e., roads, in respect of which it had claimed depreciation and, therefore, disallowed the depreciation claimed on the highways.

4. On appeal, the CIT(A) placed reliance on the following judgements:

- a) Nyse Infrastructure Pvt. Ltd. vs. DCIT (ITA No. 301/H/2009, dated 5.6.2009).
- b) ACIT vs. Navayuga Engineering Co. Ltd. (ITA Nos. 1050 to 1053/H/2009, dated 8.10.2010).
- c) Navayuga Engineering Co. Ltd. vs. ACIT (ITA No. 989/H/2011, dated 16.1.2013).
- d) ACIT vs. Navayuga Engineering Co. Ltd. (ITA No. 1283/H/2011, dated 8.6.2012).
- e) DCIT v. Navayuga Engineering Co. Ltd. (ITA No. 55/H/2013, dated 5.4.2013).
- f) CIT v. Noida Toll Bridge Co. Ltd. (2013) 30 taxmann.com 207 (All.).
- g) Tamil Nadu Road Development Co. Ltd. v. ACIT/ITO (OSD) (2009) 120 ITD 20 (Chennai).
- h) Ashoka Info (P.) Ltd. v. ACIT (2010) 35 SOT (Pune) (URO).
- i) Maharashtra State Road Development Corpn. Ltd. v. ACIT (2010) 126 ITD 279 (Mum.).
- j) Gujarat Road & Infrastructure Co. Ltd. v. CIT (2011) 15 taxmann.com 387 (Ahd).

- k) Moradabad Toll Road Company Ltd. v. Addl. CIT (2017) 7 TMI 437 (Delhi).
- l) CIT v. Mother Hospital (P) Ltd. (2005) 145 taxmann.com 444 (Ker.).
- m) Rajshree Roadways v. Union of India (2003) 129 Taxman 663 (Raj.).

5. The learned CIT(A) observed that though the NHAI remains legal owner of the site with full powers to hold, dispose of and deal with the site consistent with the provisions of the agreement, the assessee had been granted not merely possession but also right to enjoyment of the site and NHAI was obliged to defend this right and the assessee has the power to exclude others. Being so, the assessee is entitled for depreciation. Against this, the Revenue is in appeal before us.

6. We have heard both the parties and perused the material on record. In our opinion, this issue is squarely covered by the order of the Tribunal in the following cases:

- a) Reliance Ports and Terminals Ltd., in ITA Nos. 1743 to 1745/Mum/07, dated 26.11.2007 (Mum).
- b) Ashoka Buildcon Ltd., in ITA No. 1302/PN/09, dated 20.3.2012.
- c) Kalyan Toll Infrastructure Ltd., in ITA Nos. 201 & 247/Ind/2008, dated 14.12.2010.
- d) Dimension Construction (P.) Ltd., in ITA Nos. 222, 233 & 857/PN/2009, dated 18.3.2011.
- e) Ashoka Info (P.) Ltd. v. ACIT [2010] 35 SOT 50 (Pune).
- f) Gujarat Road & Infrastructure Co. Ltd. v. CIT (7 ITR(T) 730) (AHD)
- g) Maharashtra State Road Development Corpn. Ltd. v. ACIT [2010] 126 ITD 279 (MUM.)
- h) ACIT v. Ashoka Infraways (P.) Ltd. [2013] 33 taxmann.com 499 (Pune - Trib.)
- i) M/s. Moradahad Toll Road Company Limited v. ACIT 2012 (7) TMI 437 - ITAT, DELHI.

- j) Ashoka Infrastructure Ltd., Pune v. ITO (ITA No. 989/PN/2010 dated 18 July, 2013 (Pune Trib.).
- k) DCIT vs. Ashok Bridgeways, Nashik (ITA No. 686/PN/2012 - dated 29 April, 2013 (Pune Trib.),
- l) ACIT vs. Viva Highways Pvt. Ltd., Nashik (ITA No. 187/PN/2012 - dated 29 April, 2013 (Pune Trib.)
- m) Nyse Infrastructure (P) Ltd. v. Dy. CIT (ITA No. 301/Hyd/2009 - dated 05.06.2009 (Hyd. Trib.).
- n) ACT v. M/s. Navayuga Engineering Co. Ltd., Visakhapatnam (ITA Nos. 1050/Hyd/2009 to 1053/Hyd/2009, dated 08,10,2010 Hyd. Trib.).
- o) M/s. Navayuga Engg. Co. Ltd., Hyderabad v. ACIT (ITA No. 989/Hyd/2011 dated 16.01.2013 Hyd. Trib.)
- p) ACIT v. M/s. Navayuga Engg. Co. Ltd. (ITA No. 1283/Hyd/2011 dated 08.06.2012) (Hyd. Trib.)
- q) DCIT v. M/s. Navyua Engg. Co. Ltd. (ITA No. 55/Hyd/2013, dated 05.04.2013 (Hyd. Trib.)

7. Further, we find that the Hon'ble Apex Court in the case of Mysore Minerals Ltd. v. CIT (239 ITR 775) (SC) had considered the meaning of word "owner" after referring to R.B. Jodha Mal Kuthiala v. CIT (82 ITR 570); CIT v. Podar Cement Pvt. Ltd. (226 ITR 625); P.K. Badiyani v. CIT (105 ITR 642) and State of UP v. Renusagar Power Co., AIR 1988 SC 1737, it was held that :

"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 utilizing the capital asset and thereby losing 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."

8. 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 concerning

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.

9. The Hon'ble Apex Court in the case of R.B. Jodha Mal Kuthiala (supra) had also held as under:

"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."

10. Further, in the case of CIT v. Podar Cement (P.) Ltd. (supra) the Hon'ble Apex Court considered the meaning of the word "owner" in s. 22 of the Income-tax Act, 1961 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.

11. The Hon'ble Allahabad High Court in the case of CIT v. Noida Toll Bridge Co. Ltd. 213 Taxman 333, after considering

various precedents on the concept of ownership for the purpose of allowing depreciation under the provisions of s. 32 of Income Tax Act, 1961 finally held as under vide paras 22, 23, 24 and 25 of the judgment:-

"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 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 fully 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 land 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 motorized vehicles, bicycle and pedestrians, and to debar animal driven vehicles, cycle rickshaw and cattle.

23. In Mysore Minerals Ltd. (supra) 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 anyone 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 for 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."

12. It is also pertinent to mention herein the consolidated order of the Tribunal in ITA No. 1171/Hyd/07, 1175/Hyd/07, 1176/Hyd/08 and 1196/Hyd/08 in the case of M/s. PVR Industries Ltd. The Tribunal vide order dated 8.6.2011 held as follows:

"11. We have considered the rival submissions of the parties and perused the relevant material available on record. It is undisputed fact that the department allowed the similar amortization of BOT Project expenditure in the earlier assessment year under scrutiny assessment under section 143(3) of the Act. There is no dispute about the quantum of expenditure incurred by the assessee. It is the case of the assessee that the expenditure incurred on BOT Project is allowable as amortization and not as depreciation whereas it is the case of the department that neither the amortization nor the depreciation is allowable as deduction. The main argument of the department is that the assessee should have claimed deduction under section 80IA and not as deduction towards revenue expenditure. In our considered opinion, the assessee can claim deduction under section 80IA only if the assessee carries on eligible business as specified in section 80IA of the Act. However, the issue before us is relating to allowability of the expenditure incurred on BOT Project on its amortization and not about the eligibility of deduction under section 80IA of the Act. On similar and identical issue, the co-ordinate Bench of the Tribunal in the case of Nyse Infrastructure (supra) held that the assessee has to be given deduction either of depreciation, or cost of construction as revenue expenditure or in the form of

amortization of expenditure by following the judgment in the case of Madras Industrial Investment Corporation (supra). It is well settled that the Co-ordinate Bench's decision is binding and the same has to be followed in deciding the similar issues. In the case of Nyse Infrastructure (supra) the Tribunal allowed the deduction as depreciation as in that case, the assessee itself claimed depreciation. In the case under consideration, the assessee company claimed amortization of the BOT Project expenditure as revenue expenditure and as per the ratio of decision rendered by the Tribunal in the case of Nyse Infrastructure (supra) the amortization of expenditure is also one of the options and is being allowable as deduction. Hence, by following the decision of Co-ordinate Bench of the Tribunal in the case of Nyse Infrastructure (supra), amortization of BOT project expenditure claimed by the assessee is to be allowed. Moreover, we do not see any merit in the arguments of the learned departmental representative that the amortization of expenditure can be allowed under section 35D of the Act and not under any other provisions of the Act. In the case under consideration, the assessee never claimed any deduction under section 35D of the Act. We also do not see any merit in the arguments of the learned Departmental Representative that the assessee company itself classified the assets as capital assets in its balance-sheet. It is well settled law that the entries in the books of account and its treatment would not disentitle the assessee, in any way, to claim the expenditure to arrive its actual income for the purpose of taxation. It is case of the assessee that the expenditure incurred is in revenue nature and the same has to be allowed over a period 17/7 years as the case may be. In the case under consideration, the expenditure incurred by the assessee on BOT Project did bring some kind of an enduring benefit to the assessee; however, the said expenditure did not bring into existence any capital asset for the assessee. The asset which was created belongs to the Government and the assessee derived

only an enduring business advantage by spending the amount. The expenditure incurred by the assessee has to be looked upon as having been made for the purpose of conducting the business of the assessee. Since the asset created by the assessee by spending the said amounts did not belong to the assessee but the assessee got the business advantage by collecting the toll charges as revenue. Thus, the assessee got the benefit of revenue collection for the period of 17/7 years and hence, the expenditure incurred by the assessee towards BOT project should be looked upon as revenue expenditure. Our view is fortified by the decision of the Apex Court in the case of CIT vs. Madras Auto Services Limited (supra) relied on by the learned counsel for the assessee. Once we held that the said expenditure is to be treated as revenue expenditure, consequently, the assessee is eligible to amortize the expenditure relating to BOT Project for the period of 17/7 years. In view of the above, after considering the totality of facts and the circumstances of the case, we allow the claim of the assessee with regard to the amortization expenditure incurred on BOT Projects as revenue expenditure. Since we allowed the ground of the assessee with regard to the allowability of amortization of the expenditure, the ground raised by the revenue in challenging the findings of the CIT (A) in allowing the depreciation on the infrastructure facilities, stands rejected.

12. The other ground raised by the assessee remained to be adjudicated upon is with regard to the treatment of interest on deposits as income from 'other sources' and not as 'business income' and also with regard to the benefit of netting the interest income. On similar and identical issue, this Bench of the Tribunal in the assessee's own case for the assessment year 2000-01 vide order dated 30-11-2000 in ITA No.340/Hyd/2006 held against the assessee and in favor of the department. Following the reasoning given in the order of the Tribunal

mentioned above, we reject the ground raised by the assessee on this issue and hold that the interest received by the assessee represents income from other sources and the benefit of netting of interest also cannot be extended to the assessee by following the decision of the Tribunal in the assessee's own case for the assessment year 2000-01 dated 30-11-2007. Accordingly, the ground raised by the assessee stands rejected.

13. In the result, both the appeals of the assessee (ITA Nos. 1175/H/2007 & 1196/H/2008) are partly allowed while both the appeals of the revenue (ITA Nos. 1171 /H/07 & 1176/H/08) are dismissed."

13. Considering the all the facts and circumstances of the case and relying on the judgement Hon'ble Supreme Court in the case of CIT vs. Vegetable Products Ltd. (88 ITR 192) (SC), *wherein the Apex Court held that if the court finds that the language of a taxing provision is ambiguous or capable of more meanings than ne, then the court has to adopt that interpretation which favours the assessee, more particularly so where the provision relates to the imposition of penalty, we are inclined to hold that the CIT(A) has taken one possible view and we do not wish to interfere with the order of the CIT(A).*

14. In the result, all the Revenue appeals are dismissed.

Order pronounced in the open court on 16th January, 2014.

Sd/-
(ASHA VIJAYARAGHAVAN)
JUDICIAL MEMBER

Sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Hyderabad, dated 16th January, 2014
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Copy forwarded to:

1. The DCIT, Circle-3(3), 7th Floor, 'B' Block, IT Towers, AC Guards, Hyderabad.
2. M/s. Swarna Tollway Pvt. Ltd., H. No. 1-81/1, Plot Nos. 42 & 43, Kavuri Hills, Phase-I, Madhapur, Hyderabad-81.
3. The CIT(A)-IV, Hyderabad.
4. The CIT-III, Hyderabad
5. The DR – 'A' Bench, ITAT, Hyderabad