

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT
AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA Nos.53 to 55/PUN/2018
निर्धारण वर्ष / Assessment Years : 2006-07 to 2008-09

The Jt. Commissioner of Income Tax (OSD),
Circle – 5, Pune

.....अपीलार्थी / Appellant

बनाम / V/s.

Rohan and Rajdeep Infrastructure Pvt. Ltd.,
Level – 3, Business Bay, Plot No. 84,
Wellesley Road, Near RTO,
Pune – 411001

PAN : AACCR6201K

.....प्रत्यर्थी / Respondent

Assessee by : Shri Nikhil Pathak
Revenue by : Shri Mahadevan A.M. Krishnan

सुनवाई की तारीख / Date of Hearing : 22-12-2020

घोषणा की तारीख / Date of Pronouncement : 05-01-2021

आदेश / ORDER

PER S.S. VISWANETHRA RAVI, JM :

These three appeals by the Revenue against the common order dated 09-10-2017 passed by the Commissioner of Income Tax (Appeals)-13, Pune [‘CIT(A)'] for assessment years 2006-07, 2007-08 and 2008-09.

2. We find that the issues raised in all these appeals are similar, based same identical facts. Upon hearing both the parties, we proceed to hear these appeals together and to pass a consolidated order for the sake of convenience.

3. First we shall take up the appeal in ITA No. 53/PUN/2018, (A.Y. 2006-07).

ITA No. 53/PUN/2018, (A.Y. 2006-07)

4. The appellant-revenue raised three grounds amongst which the only issue emanates for our consideration is as to whether the CIT(A) is justified in allowing depreciation on the expenditure incurred by the assessee for construction of Amritsar Bus Terminal project on build, operate and transfer (BOT) basis in the facts and circumstances of the case.

5. The brief facts relating to the issue questioned by the appellant-revenue are thus, the assessee is a company and engaged in the business of as promoters, builders, developers and undertakes infrastructure projects on BOT, BOLT or turnkey basis. The assessee stood successful builder for construction of Amritsar Bus Terminal on the basis of BOT. The assessee formed as special purpose vehicle (SPV) for execution of said infrastructure project. The assessee entered into a concession agreement with the Government of Punjab for carrying the execution, operation and maintenance of the said project. The assessee has been given the right to collect adda fees from the buses and vehicles using the bus terminal which

enables the assessee to recoup the costs which has incurred for construction of the said bus terminal. According to the AO, the assessee claimed depreciation on project costs at Rs.2,50,16,203/- in the books of account but claimed depreciation @ 25% at Rs.4,66,91,811/- in the computation. The AO allowed amortization of whole expenses over the life of such asset and restricted the deprecation to Rs.2,50,16,203/- vide this order dated 24-12-2010 passed u/s. 143(3) r.w.s. 147 of the Act. The CIT(A) did not agree with the AO's view that the right to collect toll fees neither a physical asset nor an intangible asset. He placed reliance on the order of this Tribunal in the case of Ashoka Infrastructure Pvt. Ltd. and held right to collect toll from vehicles as user fees is depreciable intangible asset and deleted the disallowance of deprecation made by the AO.

6. Before us, ld. DR, Shri Mahadevan A.M. Krishnan submits that the Hon'ble High Court of Bombay admitted the substantial question of law raised by the revenue in the case of Ashoka Infracore Pvt. Ltd. in Income Tax Appeal No. 415 of 2014 and CIT(A) ought to have considered the order of Hon'ble High Court of Bombay in admitting the substantial question of law and he erred in holding the right of collection of toll is depreciable intangible asset. The ld. DR placed on record the order dated 30-08-2016 of Hon'ble High Court of Bombay and referred to the substantial question of law raised by the appellant-revenue. He submits that the appellant-revenue did not accept the decision of this Tribunal in the case of Ashoka Infrastructure Pvt. Ltd. in holding the right to collect toll is intangible asset and prayed to restore the order of AO, also to allow grounds raised by the revenue.

7. The ld. AR, Shri Nikhil Pathak submits that this Tribunal held the right to collect toll creates an intangible asset in terms of section 32(1)(ii) of the Act and such right is a depreciable and assessee is entitled to claim depreciation under the Act. He placed on record decision of special bench at page no.353 of the Paper Book and submitted that the Special Bench of Hyderabad Tribunal in the case of Progressive Constructions Ltd. held that the expenditure incurred by the assessee therein for construction of road under BOT contract by the Government of India has given right to an intangible asset as defined under Explanation 3(b) r.w.s. 32(1)(ii) of the Act and the assessee is eligible to claim depreciation on such intangible asset.

8. We note that this Tribunal in the case of Ashoka Infrastructure Ltd. Vs. Asst. Commissioner of Income Tax in ITA Nos. 1452 to 1457/PUN/2014 for A.Ys. 2006-07 to 2011-12 vide its order dated 30-06-2017 held that the right to collect toll is capital expenditure creating an intangible asset u/s. 32(1)(ii) of the Act making eligible for claiming depreciation on such intangible asset. This Tribunal while holding so placed reliance on the decision of Mumbai Bench of Tribunal in the case of ACIT Vs. West Gujarat Expressway Ltd. reported in (2015) 57 taxmann.com 384 (Mumbai-Trib.). We find that the CIT(A) while holding the assessee is entitled to claim depreciation placed reliance on the order of this Tribunal in the case of Ashoka Infrastructure Ltd. (supra).

9. Coming to the decision of Special Bench of Hyderabad Tribunal in the case of ACIT Vs. Progressive Construction Ltd. reported in 92 taxmann.com 104 (Hyderabad-Trib.), we note that the assessee therein had

entered into a Concession Agreement with Government of India for four laning of National Highway on BOT basis. The AO held the assessee had no right on road, except, for maintaining road and receiving toll collections during concession period. The AO was of the opinion the depreciation claimed was neither a building nor a plant and machinery, thereby denied depreciation. The CIT(A) basing on the order of Hyderabad Bench of the Tribunal in assessee's own case observed that the right to collect toll is creates intangible asset and while treating the same as intangible asset allowed the claim of depreciation to the assessee therein. The Special Bench considering the facts and circumstances of the case therein and also the order of Pune Bench of Tribunal in the case of Ashoka Info (P.) Ltd. Vs. Asst. CIT reported in (2010) 35 SOT 50 (URO) (Pune) observed that the assessee therein has acquired right to operate the toll/bridge and collect toll charges in lieu of investment made by it in implementing project is a business or commercial right as envisaged u/s. 32(1)(ii) of the Act r.w. Explanation 3(b) and held the assessee is eligible to claim depreciation.

The relevant paragraphs of the order are as under :

"16. We have already held earlier in the order that by incurring the expenditure of `Rs.214 crore assessee has acquired the right to operate the project and collect toll charges. Therefore, such right acquired by the assessee is a valuable business or commercial right because through such means, the assessee is going to recoup not only the cost incurred in executing the project but also with some amount of profit. Therefore, there cannot be any dispute that the right to operate the project facility and collect toll charges therefrom in lieu of the expenditure incurred in executing the project is an intangible asset created for the enduring benefit of the assessee. Now, it has to be seen whether such intangible asset comes within the expression "any other business or commercial rights of similar nature". As could be seen from the definition of intangible asset, specifically identified items like knowhow, patents, copyrights, trademarks, licenses, franchises are not of the same category, but, distinct from each other. However, one thing common amongst these assets is, they all are part of the tool of the trade and facilitate smooth carrying on of business. Therefore, any other intangible asset which may not be identifiable with the specified items, but, is of similar nature would come within the expression "any other business or commercial rights of similar nature". The Hon'ble Supreme Court in CIT v/s Smifs Securities (supra) after interpreting the definition of intangible asset as provided in Explanation 3 to section 32(1), while opining that principle of ejusdem generis would strictly apply in interpreting the definition of intangible asset as provided by Explanation 3(b) of section 32, at the same time, held that even applying the said principle 'goodwill' would fall under the expression "any other business or commercial rights of similar nature". Thus, as could be seen,

even though, 'goodwill' is not one of the specifically identifiable assets preceding the expressing "any other business or commercial rights of similar nature", however, the Hon'ble Supreme Court held that 'goodwill' will come within the expression "any other business or commercial rights of similar nature". Therefore, the contention of the learned Senior Standing Counsel that to come within the expression "any other business or commercial rights of similar nature" the intangible asset should be akin to any one of the specifically identifiable assets is not a correct interpretation of the statutory provisions. Had it been the case, then 'goodwill' would not have been treated as an intangible asset. The Hon'ble Delhi High Court in case of Areva T and D India Ltd. (supra), while interpreting the aforesaid expression by applying the principles of ejusdem generis observed, the right as finds place in the expression "business or commercial rights of similar nature" need not answer the description of knowhow, patents, trademarks, license or franchises, but must be of similar nature as the specified asset. The Court observed, looking at the meaning of categories of specified intangible assets referred to in section 32(1)(ii) of the Act preceding the term "business or commercial right of similar nature", it could be seen that the said intangible assets are not of the same line and are clearly distinct from one another. The Court observed, the use of words "business or commercial rights of similar nature", after the specified intangible assets clearly demonstrates that the legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets which were neither visible nor possible to exhaustively enumerate. The Hon'ble Court, therefore observed, in the circumstances the nature of business or commercial right cannot be restricted only to knowhow, patents, trademarks, copyrights, licence or franchise. The Court observed, any intangible assets which are invaluable and result in smoothly carrying on the business as part of the tool of the trade of the assessee would come within the expression "any other business or commercial right of similar nature".

17. In the case of Techno Shares and Stocks Ltd. v/s CIT, [2010] 327 ITR 323 (SC), the Hon'ble Supreme Court while examining the assessee's claim of depreciation on BSE Membership Card, after interpreting the provisions of section 32(1)(ii), held that as the membership card allows a member to participate in a trading session on the floor of the exchange, such membership is a business or commercial right, hence, similar to license or franchise, therefore, an intangible asset. In the present case, undisputedly by virtue of C.A. the assessee has acquired the right to operate the toll road / bridge and collect toll charges in lieu of investment made by it in implementing the project. Therefore, the right to operate the toll road / bridge and collect toll charges is a business or commercial right as envisaged under section 32(1)(ii) r/w Explanation 3(b) of the said provisions. Therefore, in our considered opinion, the assessee is eligible to claim depreciation on WDV as an intangible asset. Thus, we answer the question framed by the Special Bench as under:-

The expenditure incurred by the assessee for construction of road under BOT contract by the Government of India has given rise to an intangible asset as defined under Explanation 3(b) r/w section 32(1)(ii) of the Act. Hence, assessee is eligible to claim depreciation on such asset at the specified rate."

10. In the light of above, we note that the assessee also incurred expenditure in constructing Amritsar Bus Terminal on BOT basis and to recoup the said investment, the assessee was allowed to collect adda fees from the users of the said bus terminal. In our view, the said right is business or commercial right in terms of section 32(1)(ii) of the Act, is an

intangible asset, therefore, the assessee is entitled to claim depreciation. We find that the facts and circumstances of the case made out in the case of Progressive Construction Ltd. (supra) before the Hyderabad Bench of Tribunal are identical and the issue decided therein is similar to the issue on hand before us. Therefore, the assessee is eligible to get depreciation u/s. 32(1)(ii) of the Act.

11. Further, this Tribunal in the case of ITO Vs. M/s. Ashoka Highways (Durg) Limited in ITA No. 156/PUN/2017 for A.Y. 2013-14 vide its order dated 05-02-2019 by placing reliance on the decision of Special Bench of Hyderabad Tribunal in the case of Progressive Construction Ltd. (supra) held right to collect toll creates an intangible asset and allowed the assessee to claim benefit of deprecation at 25% on such intangible asset.

12. Likewise this Tribunal in another case in DCIT Vs. M/s. Mahakaleshwar Tollways Pvt. Ltd. in ITA No. 2641/PUN/2016 for A.Y. 2011-12 order dated 11-02-2019 by placing reliance on the decision of Special Bench of Hyderabad Tribunal in the case of Progressive Construction Ltd. (supra) held the assessee therein is eligible to claim depreciation on National Highway constructed on BOT basis.

13. As discussed above, the ld. DR placed reliance on the order of Hon'ble Jurisdictional High Court of Bombay in admitting the substantial question of law raised by the appellant-revenue. We note that the Hon'ble High Court of Bombay was pleased to admit the substantial question of law and there was no order modifying or staying the operation of order passed

in the case of Ashoka Infrastructure Ltd. (supra) by the Hon'ble High Court. The ld. DR could not place any order to that effect before us in support of his arguments that the assessee is not entitled to claim depreciation. Therefore, in our view in the facts and circumstances of the case and the discussion made here-in-above, we hold that the assessee is entitled to claim depreciation as per specified rate at 25% and the order of CIT(A) is justified. It is observed that the AO, while denying the claim of depreciation, allowed deduction towards amortization of expenses relatable to money spent for construction of infrastructure facilities, i.e. bus terminal. Once the claim of the assessee towards depreciation allowance is accepted, the deduction allowed by the AO towards allocated cost of project, naturally needs to be withdrawn. The AO is directed to recalculate the depreciation in terms indicated above and add back the allocated cost of project as allowed by him as deduction in the assessment order. Thus, the ground Nos. 1 to 3 raised by the Revenue fails and are dismissed.

14. In the result, the appeal of Revenue in ITA No. 53/PUN/2018 is dismissed.

ITA Nos. 54 & 55/PUN/2018, (A.Ys. 2007-08 & 2008-09)

15. Both the sides are unanimous in stating that the facts and the grounds of appeal raised in ITA Nos. 54 & 55/PUN/2018 are identical to the grounds raised in ITA No. 53/PUN/2018. Thus, in view of the fact that the issues in the appeal is identical and is arising from same set of facts the findings given by us while adjudicating the appeal in ITA No. 53/PUN/2018 would *mutatis mutandis* apply to the appeal in ITA Nos. 54

& 55/PUN/2018, as well. Accordingly, both the appeals of Revenue are dismissed.

16. To sum up, all the appeals of Revenue are dismissed.

Order pronounced in the open court on 05th January, 2021.

Sd/-
(R.S. Syal)
VICE PRESIDENT

Sd/-
(S.S. Viswanethra Ravi)
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 05th January, 2021.

RK

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-13, Pune
4. The Pr. CIT-3, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति// True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune