

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'F' NEW DELHI**

**BEFORE SHRI R. K. PANDA ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

**I.T.A. No. 3187/DEL/2018 (A.Y 2012-13)
(THROUGH VIDEO CONFERENCING)**

ACIT Room No. 192, C. R. Building, I. P. Estate, New Delhi (APPELLANT)	Vs	Vishakhapatnam Port Road Company Ltd. G-5 &6, SEcor-10, Dwarka, New Delhi AABCV3781F (RESPONDENT)
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Appellant by	Sh. Shiv Swaroop Singh, Sr. DR
Respondent by	Sh. Nitesh Goel, CA

Date of Hearing	27.07.2021
Date of Pronouncement	09.09.2021

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the Revenue against order dated 29/1/2018 passed by CIT(A)-9, New Delhi for assessment year 2012-13.

2. The grounds of appeal are as under:-

1. *That Ld, Assistant Commissioner of Income Tax Ld. ACIT") has erred on disallowing the deprecation of Rs3,35,75,114 (Rs. 7,24,75,114 claimed by assessee minus Rs. 3,89,00,000/- allowed by the Id. ACIT) considering that the deduction shall be allowed on the basis of amortization over the concessionaire period,*
2. *The Ld, ACIT has erred in applying the Circular No 09/2014 in Assessee's case for the AY 2012-13 in spite of fact that circular is*

effective from 23.04.2014.

3. *That Ld. ACIT has erred In initiating penalty proceedings u/s 271(l)(c) of the Income Tax Act, 1961.”*

3. During the assessment year under consideration the assessee is carrying on the business of constructing, operating and maintaining of toll roads for adequate connectivity to Vishakhapatnam port trust. The assessee company is a Public Sector undertaking (PSU) Subsidiary Company of National Highways Authorities of India. The assessee company has entered into a concession agreement with National Highways Authorities of India under which the assessee Company was given granting of concession to undertake, design, engineering, procurement, construction, operating and maintenance if the sole and exclusive right to demand, collect and appropriate fee toll from the user of the project for a period of 30 years for implementing the activity under BOT Model. For A.Y 2012-13, it filed its return of income on 27.09.2012 declaring a loss of Rs. 4,80,44,786 /-. The Assessing Officer made disallowance of Rs. 3,35,75,114/- on account of excess depreciation by observing that the amount claimed by the assessee is excess depreciation.

4. Being aggrieved by the assessment order, the assessee filed appeal before the CIT(A). The CIT(A) allowed the appeal of the assessee.

5. The Ld. DR filed the written submissions as under:-

1. *“In this case Ld.CIT(A) AO has disallowed the depreciation on the basis that assessee is not the owner of the asset and it is the primary and foremost condition for allowing the depreciation.*

ii. *It is submitted as per section 32 of the Act in respect of the depreciation of buildings, machinery, plant or furniture being tangible assets, the deductions in sub-section(1) of section 32 shall be allowed*

provided these assets are owned wholly or partly by the Assessee and used for the purpose of his business or profession.

iii. In this case, land does not belong to the assessee. The Assessee is merely permitted to enter upon it for the purpose of construction and laying of a road. At best, the Assessee could be said to be an agent and for a limited purpose, namely, to build, operate and later on transfer the road. There is no question of the Assessee claiming any ownership rights. Therefore, the assessee is not eligible to claim and depreciation on the asset and depreciation was rightly disallowed by the AO. Reliance is placed on the decision of the Hon'ble Mumbai High Court in the case of North Karnataka Expressway Ltd ITA No 499 of 2012 (Date of order 14.10.2014) and in the case of West Gujrat Expressway Ltd ITA no 2357 of 2016 delivered on April 5, 2016. (Copy Enclosed).

Iv It is also submitted that Ld CIT (A) relied upon the decision of Hon'ble Allahabad High Court in the case of Noida Toll bridge Ltd. Hon'ble Mumbai High Court analysed the decision of Hon'ble Allahabad High Court in para 50 of the decision and held that Where assessee, infrastructure development company constructed a road on Build, Operate and Transfer (BOT) basis on land owned by Government, assessee could not claim depreciation on toll road so constructed operated.

v. It is also submitted that it is rightly observed by the AO that circular No 9 of 2014 is clarificatory in nature as it cannot override the express provisions of the Act and it provides the clarification to the existing provisions of the Act. Being clarificatory in nature, it has retrospective applicability.

vi. In view of the above it is humbly requested that appeal of the revenue may be allowed.

5. The Ld. DR submitted that the CIT(A) was not right in allowing the claim of excess depreciation to the assessee as the Circular No. 9/2014 is effective from 23/4/2014 as it is retrospective and will be applicable for Assessment Year 2012-13. Thus, the Ld. DR relied upon the assessment order and submitted that the disallowance may be confirmed.

6. The Ld. AR submitted that the Circular No. 9/2014 issued by the CBDT on 23/4/2014 in Para 7 categorically mentioned that in case where the assessee has claimed any deduction within the initial cost of development of infrastructure facility of roads/highways in earlier years, the total deduction so claimed for the Assessment Years prior to the Assessment Year under consideration may be deducted from the initial cost of infrastructure facility of roads/high ways and the cost so reduced shall be amortized equally over the remaining period of toll concession agreement. Thus, the Circular itself explains that it is applicable from the date of circular or for subsequent Assessment Years, assessee has to amortize the WDV of the asset over the remaining life of the asset as Circular has to be effective from the date it is notified. The Circular clearly mentioned that amortized over remaining period which means for balance period and not from the beginning of the toll concessionaire agreement. Therefore, the Circular was introduced prospectively. The intention of the Circular was not that it should be applied on retrospective basis otherwise it would have been specifically mentioned in the Circular. However, on simple reading of the Circular it is nowhere mentioned that such amendment takes place retrospectively. The Ld. AR relied upon the decision of the Tribunal in case of Associate Company of assessee M/s Paradip Port Road Company Ltd. subsidiary Company of NHAI for the Assessment Year 2012-13 order dated 4/9/2018 on same facts and grounds

wherein the Tribunal dismissed the appeal of the Revenue. The Ld. AR also relied upon the following decisions:-

- ❖ Madras Industrial Investment Corporation Ltd. Vs. CIT 91 Taxman 340 (S.C)
- ❖ Moadabad Toll Road Corporation Ltd. Vs. ACIT 52 Taxmann.com 21(Del)
- ❖ Indore Municipal Corporation Vs. CIT 124 Taxman 128(S.C)
- ❖ Noida Toll Bridge Corporation Ltd. Vs. Revenue.

7. We have heard both the parties and perused the material available on record. It is pertinent to note that the CIT(A) held as under:-

“ 4.3 I have carefully considered the impugned order and the submission furnished by the appellant including case laws relied on and also the CBDT Circular No. 09/2014 dated 23/04/2014. The undisputed fact is that depreciation is allowable to the appellant company on the toll road either by way of regular depreciation or amortization as the case may be.

4.4. The jurisdictional High Court in the case of Moradabad Toll Company Ltd. I/s ACIT has held that depreciation is allowable on the toll road/bridges under Build-Operate-Transfer (BOT) arrangement @10%.

The Hon’ble High Court of Allahabad in the of Noida Toll Bridge Co. Ltd. has also held that depreciation is allowable on road constructed by respondent assessee under the concession agreement at the same rate i.e. 10%. In any case, the eligibility of the appellant company for claim of depreciation is not disputed by the AO. He has allowed the same on the basis of amortization over the balance period of the concessional agreement relying on Board’s Circular referred above.

The critical question, therefore, is whether the Board’s Circular

which is dated 23.04.2014 could have been applied retrospectively in the case of the appellant.

4.5 *Per fact of the case, return of income was filed by the appellant on 28.09.2012 when the subject Circular was not available. The AR has stated that following the Circular, the appellant company has amortized WDV on 01.04.2014 over the remaining life of the asset. A close reading of the Circular also shows that deduction claimed out of initial cost of development of infrastructure, facility of road /highway under BOT projects in earlier year may be deducted from the initial cost of infrastructure facility of roads/bridge and the cost so reduced shall be amortized equally over remaining period of toll concessionaire agreement (refer para 7 of the CBDT circular no. 09/2014 dated 23.04.2014). This effectively means that the reduced cost is to be amortized equally over the remaining period. There is nothing in the circular to suggest and the same shall be applicable on retrospective basis.*

In view of above, the action of the Ld. AO in applying the circular retrospectively is not in order. Accordingly, the disallowance of Rs. 3,35,75,114/- made by the Ld. AO on account of difference between the depreciation claimed at Rs. 7,24,75,114 and the depreciation allowed on the basis of amortization for the remaining part of the concessionaire agreement of Rs. 3,89,00,000/- is directed to be deleted. The appellant succeeds on these grounds of appeal.”

Thus, the CIT(A) has given a detailed finding and there is no need to interfere with the same. In-fact, the assessee has rightly claimed the depreciation. The appeal of the Revenue is dismissed.

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

Order pronounced in the Open Court on this 09th Day of September, 2021.

Sd/-

**(R. K. PANDA)
ACCOUNTANT MEMBER**

Sd/-

**(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Dated : 09/09/2021

*R. Naheed **

Copy forwarded to:

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

ASSISTANT REGISTRAR

ITAT NEW DELHI

