

\$~36, 39, 40, 41, 47, 49

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA 929/2018 & CM No.34866/2018**

Date of decision: 28th August, 2018

THE PR. COMMISSIONER OF INCOME TAX - CENTRAL -3

..... Appellant

Through: Mr. Ruchir Bhatia, Advocate

versus

ORIENTAL PATHWAYS (NAGPUR) PVT. LTD..... Respondent

Through

WITH

ITA 932/2018 & CM No.34867/2018

THE PR. COMMISSIONER OF INCOME TAX - CENTRAL -3

..... Appellant

Through: Mr. Ruchir Bhatia, Advocate

versus

ORIENTAL PATHWAYS (NAGPUR) PVT. LTD..... Respondent

Through

WITH

ITA 933/2018 & CM No.34868/2018

THE COMMISSIONER OF INCOME TAX - CENTRAL -3

..... Appellant

Through: Mr. Ruchir Bhatia, Advocate

versus

ORIENTAL PATHWAYS (NAGPUR) PVT. LTD..... Respondent

Through

WITH

ITA 934/2018

THE COMMISSIONER OF INCOME TAX - CENTRAL -3

..... Appellant

Through: Mr. Ruchir Bhatia, Advocate

versus

ORIENTAL PATHWAYS (NAGPUR) PVT. LTD.... Respondent

Through

WITH

ITA 941/2018 & CM No.34879/2018

THE PR. COMMISSIONER OF INCOME TAX - CENTRAL-3

..... Appellant

Through: Mr. Ruchir Bhatia, Advocate

versus

ORIENTAL PATHWAYS (INDORE) PVT. LTD..... Respondent

Through

WITH

ITA 940/2018 & CM No.34878/2018

THE COMMISSIONER OF INCOME TAX - CENTRAL -3

..... Appellant

Through: Mr. Ruchir Bhatia, Advocate

versus

ORIENTAL PATHWAYS (NAGPUR) PVT. LTD.... Respondent

Through

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL)

Afore-captioned appeals by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act' for short) in the case of Oriental Pathways (Nagpur) Pvt. Ltd. relate to Assessment Years 2009-2010 to 2013-2014 and arise from a common order of the Income Tax Appellate Tribunal dated 28.2.2018. The impugned order upholds the order passed by the Commissioner of Income Tax (Appeals) ('CIT(Appeals)' for short), deleting the penalty imposed by the Assessing Officer under Section 271(1)(c) of the Act.

2. The respondent/assessee, during the relevant period, was mainly engaged in the business of development, design, financing, procurement, engineering, construction, operation and maintenance of the project highway of NH-6 in Maharashtra on build, operate and transfer basis. They were entitled to collect toll from the users to recoup the cost of reconstruction, maintenance and operations. The respondent/assessee had claimed depreciation on roads @ 10% under Section 32 of the Act. This claim of the assessee for depreciation was accepted by the Assessing Officer in the regular assessment under Section 143(3) of the Act for the assessment year 2009-2010.

3. Subsequently, there was a search and seizure operation under Section 132 of the Act on 10.12.2012 in case of Bakshi Group, wherein the premises of the respondent/assessee were also covered. Consequent to the said search, notice under Section 153A was issued. In response to the said notice, the respondent/assessee had filed their

return of income, in which again depreciation @ 10% under Section 32 of the Act was claimed.

4. In the present appeal, we are not concerned with the assessment proceedings and whether or not the respondent-assessee was entitled to claim depreciation on the NH-6 constructed by them on built, operate and transfer basis. In the present case, we are concerned with whether or not the Tribunal was right in upholding the order passed by the CIT (Appeals) deleting penalty under Section 271 (1)(c) of the Act imposed by the Assessing Officer.

5. The relevant portion of the order passed by the CIT (Appeals) reads as under:-

“7.The appellant submitted original return on 29.09.2009, declaring loss at Rs.34,58,88,959/-. The same was assessed under section 143(3) of the Act on 23.12.2011 at a loss of Rs.34,24,76,200/-, by making disallowance of Rs.34,12,759/- on account of preliminary expenditure. During the said assessment proceedings, no interference was made by the AD on other issues including depreciation, though the appellant has claimed depreciation on road @ 10% of the capitalized cost. A Search was carried out in Bakshi group of cases on 10.12.2012 and the case of appellant was also covered in search. Accordingly, notice under section 153A was issued and appellant submitted return of income in response to the said notice on 03.02.2014, declaring loss of Rs.34,24,25,559/- which included depreciation amounting to Rs.30,63,57, 685/-, on roads.

7.1 The appellant is stated to have been mainly engaged in the business of development, design, financing, procurement, engineering and construction, operation and maintenance of the project highway on NH-6, Maharashtra on build, operate and transfer basis and collecting toll. During assessment proceedings the appellant was asked to substantiate the claim of depreciation on road @10%. The appellant submitted that it has claimed depreciation in view of the provisions of section 32 of the Act as per its bona fide belief that depreciation is allowable to it as per law. However, it was submitted by the appellant before AO that in view of the circular no. 09/2014 dated 23.04.2014, it has been clarified by the CBDT that the toll roads are intangible assets and therefore no depreciation can be allowed however, the assessee can claim right off of capitalized expenditure equally over the toll concession period. Based on mentioned circular, appellant withdrew the claim of depreciation in various assessment years and claimed the writing off of expenditure as per the said circular. The revised working was provided by the appellant. Accordingly, considering the submission of the appellant, the claim of depreciation has been disallowed. It is observed from the assessment order that this addition is not based on any material or evidence found and seized during search as nothing has been brought out on record in this regard. The claim of the appellant with respect to the expenditure incurred has been allowed in view of the clarification by the CBDT in the above mentioned circular. Thus, net addition worked out at Rs.15,88,50,307/- . The penalty for concealment of income/furnishing inaccurate particulars of income under section 271(l)(c) was initiated. The appellant did not dispute the issue of addition made in the assessment order and no further appeal was filed.

7.2 During penalty proceedings, the AO did not considered the submission by the appellant favourably. It was mentioned that the depreciation is allowable only on the assets which are owned wholly by any assessee and CBDT has only given its further clarification and not made any amendment in the existing law. It was also stated that appellant has only revised its claim on depreciation on the query of the AO, after a span of 11 months which indicates that appellant has made wrong claim willfully. After discussing in detail and relying upon various judgments the AO held that it is concealment of income and levied minimum penalty @100% of tax sought to be evaded, which comes to Rs.4,90,84,745/-.

7.3 Before examining further, it is expedient to reproduce the circular no.09/2014 issued by the CBDT on 23.04.2014 which is as follows:-

“.....Sub: Clarification regarding treatment of expenditure incurred for development of roads/highways in BOT agreement under Income Tax Act, 1961-regarding.

It has come to the notice of the Board that disputes have arisen as to whether the expenditure incurred on development and construction of infrastructural facilities like roads/ highways on build operate-transfer (BOT) basis with right to collect toll is entitled for depreciation under section 32(I)(ii) of the Act or the same can be amortized by treating it as an allowable business expenditure under the relevant provisions of the Income Tax Act, 1961.

2. In such projects, (hereinafter referred as assessee) in terms of concessionaire agreement with government or its agencies is required to construct, develop and maintain the infrastructural facility of roads/highways which inter alia includes laying of road, bridges, highways, approach roads culverts, public amenities etc. at its own cost and its utilization thereof for a specified period. In lieu of consideration of the expenditure incurred on construction, operation and maintenance of the infrastructure facility covered by the period of the agreement, the assessee is accorded a right to collect toll from users of such facility. The expenditure incurred by such assessee on development and construction of such infrastructural facility are capitalized in the accounts. It is seen that in returns-of-income, assesseees are generally claiming depreciation on such capitalized expenditure creating it as an 'intangible asset' in terms of section 32(I)(ii) of the Act while in assessments, such claims are being disallowed by the Assessing Officer on the grounds that such infrastructural facility is not owned, wholly or partly, by the taxpayer which is an essential condition for claiming depreciation and further right to collect toll does not fall in any of the categories of 'intangible assets' specified in sub-clause(ii) of sub-section (1) of section 32 of the Act.

3. In BOT arrangements for development of roads/ highways, as a matter of general practice, possession of land is handed over to the assessee by the Government/notified

authority for the purposes of construction of the project without any actual transfer of ownership and such assessee has only a right to develop and maintain such asset. It also enjoys the benefits arising from use of asset through collection of Toll for a specified period without having actual ownership over such asset. Therefore, the rights in the land remain vested with the Government or its agencies. Thus, as assessee does not hold any rights in the project except recovery of toll fee to recoup the expenditure incurred, it cannot therefore be treated as an owner of the property, either wholly or partly, for purposes of allowability of depreciation under section 32(1)(ii) of the Act. Thus, present provisions of the Act do not allow claim of depreciation on Toll ways due to non fulfillment of ownership criteria in such cases.

4. There is no doubt that where the assessee incurs expenditure on a project for development of roads/highways, he is entitled to recover cost incurred by him towards development of such facility (comprising of construction cost and other pre-operative expenses) during the construction period. Further, expenditure incurred by the assessee on such BOT projects brings to it an enduring benefit in the form of right to collect the toll during the period of the agreement. Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd. vs. CIT in 225 ITR 802 allowed spreading over of liability over a number of years on the ground that there was continuing benefit to the company over a

period. Therefore, analogously, expenditure incurred on an infrastructure project for development of roads/ highways under BOT agreement may be treated as having been made/incurred for the purposes of business or profession of the assessee and same may be allowed to be spread during the tenure of concessionaire agreement.

5. In view of above, Central Board of Direct Taxes, in exercise of the powers conferred under section 119 of the Act hereby clarifies that the cost of construction on development of infrastructure facility of roads/highways under BOT projects may be amortized and claimed as allowable business expenditure under the Act.

6. The amortization allowable may be computed at the rate which ensures that the whole of the cost incurred in creation of infrastructural facility of road/highway is amortized evenly over the period of concessionaire agreement after excluding the time taken for creation of such facility.

7. In the case where an assessee has claimed any deduction out of initial cost of development of infrastructure facility of roads/highways under BOT project in earlier year, the total deduction so claimed for the assessment year to the assessment year under consideration may be deducted from the infrastructure facility of roads/highways and the cost so reduced shall be amortized equally over the remaining period of toll concessionaire agreement.

8. *It is hereby clarified that this circular is applicable only to those infrastructure projects for development of road/ highways on BOT basis where ownership is not vested with the assessee the concessionaire agreement.*

9. *This may be brought to the notice of all concerned.”*

7.4 *It is observed from the above circular that the board was aware of the dispute regarding claim of depreciation with respect to the built operate transfer (BOT) agreement and this is squarely covered in the case of the appellant, which has also been accepted by the AO. In the said circular, it is clearly brought out that in return of income, assessee's are generally claiming depreciation on such capitalized expenditure, treating it as an intangible assets in terms of section 32(I)(ii) of the Act. Therefore, the original claim of the appellant to claim such depreciation was not a standalone case but seems to be the general practice of that industry and the claim of depreciation by it was made under the bona fide belief that it is an allowable expenditure. Further, it is also clarified by the circular that where the assessee incurs expenditure on a project, he is entitled to recover cost incurred by him and accordingly allowed such expenditure incurred, spreading over this liability in different years.*

7.5 *It is also observed that in the first round of scrutiny assessment, no such addition was made, but allowed depreciation as claimed by the appellant. It is only with respect to the assessment proceedings under section 153A of the Act that this issue has been raised by the AO and based on the circular by the CBDT, revision of the claim of the depreciation made before AO by the appellant. All*

the facts regarding claim of depreciation was before the AO during first round of scrutiny assessment as well as later on.

7.6 Here it is to be mentioned that penalty proceedings are different from the assessment proceedings and simply because an addition has been made and not challenged by the assessee shall not make a case for imposition of automatic penalty for concealment. Any claim which is found incorrect by the AO and disallowed will not attract the penalty for concealment in a routine manner. Merely, because the appellant had claimed the depreciation, which was not accepted in full and disallowed, that itself would not attract the penalty under section 271(l)(c). In the present case, all the facts were disclosed to the AO and in fact in the first round of scrutiny assessment, the said depreciation was not disallowed and accepted. Therefore, in view of the ratio laid down by Hon'ble Supreme Court in the case of CIT vs. Reliance Petroproducts P. Ltd. 322 ITR 158 (SC) and the decision of Hon'ble jurisdictional High Court of Delhi in the case of CIT us. Brahmaputra Consortium Ltd. (2012) 348 ITR 339, the penalty is not leviable as the same is applicable in the case of appellant.

7.7 It is also to be mentioned that when the return was filed in response to notice under section 153A on 3.02.2014, the matter was debatable due to the difference in legal interpretation between the assessee and the revenue authorities and the claim was made under bonafide belief that depreciation is allowable on such capitalized value of road. This has also been acknowledged as the practice of industry. The circular of CBDT, clarifying the issue has been issued on 23.04.2014, which is after the submission of return by the appellant. Since, the matter was clarified, the appellant

opted to claim expenditure incurred on project for development, construction and other operative expenditure during construction period as per the said circular by spreading over to the different accounting years and accordingly, revised the claim of depreciation by not claiming on road. It is the appellant who brought this circular to the knowledge of AO, though during assessment proceedings it was asked by the AO to justify the same. Hence, during assessment proceedings, following the clarification of the CBDT, the appellant provided revised working and depreciation on road was withdrawn whereas the expenditure has been claimed. The same was accepted by the AO. The contention of the AO while levying penalty, that there was a delay in submission of revised working by the appellant is also not tenable because one cannot expect the appellant to act immediately suo-moto. This will also not form the substantial reason to imposed penalty for concealment because the appellant itself has brought this to the knowledge of AO and without disputing, accepted the revised working. Since, it was accepted by the appellant rather offered by the appellant therefore, no appeal was preferred. Therefore, this alone cannot be the basis for imposition of penalty.

7.8 In the penalty order, the AO has relied upon various case laws. The case of CIT vs. Usha International Ltd. 212 Taxman 519, 2013 relied upon by the AO relates to the revision of return consequent upon survey proceedings, which was disclosed after being detected during the course of survey is not applicable as the facts are distinguishable. The case of appellant is not related to survey proceedings nor a disclosure of additional income but claim of depreciation, revised in view of the Board's circular. With respect to the ratio laid down in

the case of KP Madhusudan vs. CIT 251 ITR 99, it is seen that the same is not applicable in the present case because the appellant itself offered the withdrawal of depreciation, which was even not detected by the then AO in the first round of scrutiny proceedings. All the facts regarding claim of depreciation on road was clearly mentioned in the details submitted by the appellant and also mentioned in the audited accounts. Therefore, the appellant has not concealed any fact nor furnished any wrong particulars of income and duly discharged its duty. Therefore, this is distinguishable. The AO has also relied upon the ratio in the case of CIT vs. Zoom Communication P. Ltd. in ITA No.07/2010. The fact of the said case is not applicable to the case of appellant because in the said case it was found that the assessee was not acting bona fide and there was a positive income and therefore lead to tax evasion. In the case of the appellant, it was subjected to scrutiny earlier and all the facts were on record with respect to the claim of depreciation under the bona fide belief. The matter was disputed as itself acknowledged in the circular by the CBDT and accordingly after clarification, the appellant has withdrawn its claim in the assessment proceedings. The case of CIT vs. Brahmaputra Consortium Ltd., relied upon by the appellant is subsequent to the decision of CIT vs. Zoom Communication P. Ltd. (supra) as mentioned by the AO.

7.9 It is also seen that the AO has not clearly brought out that whether it is a case of furnishing inaccurate particulars of income or concealment of income as it is stated in para 5 that:

"Consequently, as the default of the assessee under section 271(1)(c) is established, penalty of Rs.4,90,84,745/- @100% of the tax sought to be

evaded for furnishing inaccurate particulars of income and thereby concealment of income as discussed above, is imposed under section 271(1)(c) of the IT Act, 1961."

7.10. In view of the above facts and discussions in foregoing paragraphs regarding position of law, considering the submission by the appellant and looking to the circumstance in which the appellant revised its claim, based on the clarification by the CBDT, the concealment of income for imposition of penalty under section 271 (1)(c) of the Act is not established. Therefore, relying upon the ratio laid down in the case of CIT vs. Brahmaputra Consortium Ltd. (Supra) and CIT vs. Reliance Petroproducts P. Ltd. (Supra) and on the facts and circumstances of the case, it is held that penalty for concealment of income under section 271(1)(c) of the Act is not attracted in the case and the same is deleted accordingly."

6. The aforesaid order in our opinion clearly and correctly elucidates on the difference between assessment proceedings and penalty proceedings and applies explanation (1) to Section 271 (1) (c) of the Act. It refers to divergence of legal opinion on the question whether an assessee, who has constructed an infrastructure project such as roads or highways on build, operate and transfer basis could claim depreciation or was entitled to treat the entire cost as amortized expenditure, an expression not used in the Act. These were highly debateable and contentious issues. Noticeably, the Assessing officer had allowed the claim for depreciation on roads @ 10% under Section 32 of the Act in the original assessment proceedings.

7. Learned counsel for the Revenue has drawn our attention to Circular No.9 of 2012 dated 23rd April, 2014, issued by the Central Board of Direct Taxes. This circular has been reproduced in the reasoning given by the CIT (Appeals) and hence, is not being referred to and quoted separately. Circular refers to disputes that had arisen on the question of depreciation or amortization/revenue expenditure. The Board felt that the infrastructure facility was not owned partly or wholly by the tax payer and hence would not satisfy the essential condition of "ownership" required for claiming depreciation. At the same time, it was observed that the assessee had incurred expenditure, which had to be recovered and accounted for to compute taxable income. The Board felt that amortization should be allowed at the rate which ensures that the entire expenditure incurred for creation of infrastructure facility would be amortized evenly over the period of concessionaire agreement after excluding the time taken for creation of facility.

8. No doubt, this circular supports the case of the Revenue but we would notice and record that circular merely is an opinion and the assessee can contest and submit to the contrary. The issue in question was not covered by a decided judgment of the jurisdictional High Court or the Supreme Court. Pertinently, paragraph 7 of the circular states that assessee could have claimed deduction in an earlier year. This deduction would necessarily imply depreciation. In such cases, the assessee could deduct the amount of "depreciation" to compute the reduced cost of infrastructure facility for road/highway and amortized the reduced amount equally over the remaining period of the concessionaire agreement. In the present case, the respondent-assessee

had already filed return for the year in question claiming depreciation, which had been allowed by the Assessing Officer. In the aforesaid position the respondent-assessee did not consider it appropriate to modify the claim that had been allowed and accepted in the regular assessment in the return filed pursuant to notice under Section 153A of the Act. The conduct of the respondent-assessee or examination of facts has been found and held to be bonafide. Facts of the case cannot and would not justify levy of penalty under Section 271(1)(c).

9. Findings of the CIT (Appeals) and the Tribunal deleting penalty are reasonable and justified and primarily predicated on facts. No ground or reason to interfere with the order of the Tribunal, affirming the order of the CIT (Appeals), is made out.

10. The appeal and pending applications are dismissed without any order as to costs.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

AUGUST 28, 2018

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