IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No.19 of 2019 (O&M)
Date of decision : 23.07.2019

Pr. Commissioner of Income Tax, Panchkula
...... Appellant

versus

M/s Himalayan Expressway Ltd., Kalka Sadan,
Shimla Road, Pinjore.
...... Respondent

CORAM : HON'BLE MR.JUSTICE AJAY TEWARI
HON'BLE MR.JUSTICE HARNARESH SINGH GILL

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Present : Mr. Yogesh Putney, Advocate and
Mr. Ajiteshwar Singh, Advocate
for the appellant.

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AJAY TEWARI, J. (Oral)

1. This appeal has been filed under Section 260A of the Income Tax Act, 1961 (for short 'the Act') against the concurrent orders of the Commissioner of Income Tax, Panchkula, Haryana and the Income Tax Appellate Tribunal Chandigarh setting aside the penalty proceedings.

2. The brief facts of the case are that the Assessee was awarded the contract for broadening of Zirakpur-Parwanoo Section of National Highway-22 including Pinjore-Kalka Parwanoo Bypass on Build-Operate-Transfer (BOT) basis. He filed a return claiming that he had spent a sum of Rs.723.00 crores odd on the construction and claiming depreciation of Rs.72.00 crores odd under Section 32 of the Act. The Assessing Officer held that since the road was not 'owned by the

Assessee' he could not claim depreciation. The Assessee accepted this finding and did not challenge the same in the appeal. Thereafter penalty proceedings were initiated against the Assessee, which have been set aside as mentioned above. It is the contention of the Revenue that the intention of the Assessee is reflected from the fact that it made this wrong claim and, but for the fact that the case was picked up for scrutiny it would have succeeded in its various design.

3. In this connection, both the Commissioner, Income Tax and the Tribunal have noticed Circular No.9 of 2014 dated 23.04.2014 which is quoted herein below :-

“Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes
North Block, New Delhi
Circular No.9/2014
Dated : April 23, 2014

Subject : Clarification regarding treatment of expenditure incurred for development of roads/highways in BOT agreements 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(1) (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 ('Act').

2. In such projects, the developer (hereinafter referred to 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 roads, 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, assessees are generally claiming depreciation on such capitalized expenditure treating it as an 'intangible asset' in terms of section 32(1)(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 no 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 Corp Ltd. 225 ITR 802 (SC) 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 take 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 projects in earlier year, the total deduction so claimed for the Assessment Years prior to the Assessment Year under consideration maybe deducted from the initial cost of infrastructure facility of roads/highways and the cost 'so reduced' shall be amortized equally over the remaining period of toll concessionaire agreement.*
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> *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 under the concessionaire agreement.*
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> *9. This may be brought to the notice of all concerned.*"

4. Both the authorities held that the Board had itself recognized that in many cases Assessees were claiming this depreciation while the Assessing Officers were disallowing it. The Board further noticed that in such projects the land was temporarily transferred to the Assessees who constructed the highway at their own cost and, were in lieu thereof, given the right to charge toll from the users for a fixed period. The Board clarified that in such cases the Assessee would be entitled to amortization under the relevant provisions of the Act. Interestingly, in para 7 of the circular the Board noticed that there may have been cases in the past where Assessees had obtained the depreciation and held that in those cases the depreciation claimed would be reduced and the amortization would be given only on the reduced amount. Both the Commissioner and the Tribunal held that this circular indicated that there was a genuine doubt not only in the case of the present Assessee but in the case of many Assessees in general who undertook these kinds of

projects. Ultimately, as mentioned above the claim of the Assessee was upheld.

5. The sole contention of the learned counsel for the appellant is that once the Assessee accepted the assessment order disallowing the depreciation, it is clear that it was attempted to avoid tax and that the claim of depreciation was wrongly made. As per learned counsel for the appellant, had it not been for the scrutiny, the Assessee would have gotten this benefit. He has relied upon a judgment of Delhi High Court passed in ITA No.1855 of 2010 titled as ***Commissioner of Income Tax Vs. Morgan Finvest Pvt. Ltd., decided on 06.12.2012***. In that case the Assessee was a company engaged mainly in the business of investment and to undertake and transact financial services. It filed its return of income declaring nil income for the assessment year 2005-2006 and the same was processed under Section 143 (1). However later, on scrutiny it was found that the Assessee had claimed depreciation of Rs.39,52,300/- in respect of a property at No.3, Eastern Avenue, Maharani Bagh, New Delhi. The property was purchased on 29.04.2004 for Rs.3.5 crores and the Assessee had raised a loan in order to acquire the property. On 18.09.2004 i.e. after about 5 months the property was sold to a Company viz. Hindustan Udyog Limited for a consideration of Rs.4.5 crores but only an agreement of sale was executed, possession was not given nor was any sale deed executed. The Assessing Officer found that the property was residential in nature and had not been put to use for the purpose of the assessing business. From these facts the Assessing Officer concluded that the Assessee had kept the property for four months or so and had entered into an agreement to dispose of the same which indicated

a motive to earn short term gain and not any intention to use the property for the purpose of the business. He also noticed that the building cost of which depreciation was claimed including the cost of land on which no depreciation was allowed and it was in those circumstances that he did not allowed the depreciation initiated the penalty proceedings. The Commissioner Income Tax appeals upheld the penalty but the Income Tax Appellate Tribunal allowed the appeal of the Assessee and that is how the Revenue was before the High Court. The main ground taken by the Tribunal was that since no sale deed was executed pursuant to the subsequent agreement to sell the property remained in the ownership of the Assessee. A Division Bench of the Delhi High Court accepted that the property remained in the ownership of the Assessee for the entire year but went on to hold that was not used for any business and was therefore exigible for penalty. It was during the course of this that the Court held as follows :-

> *"12. This is not a case where all the correct particulars relating to the claim were furnished and a claim for relief or allowance was made on that basis, which was not accepted by the assessing officer who did not question the particulars relating to the claim, but merely took a different view on the very same particulars. This is a case where questionable details and particulars relating to the claim were furnished by the assessee and such details were so fundamental to the genuineness and bona fide of the claim that the mere furnishing of those particulars made the claim vulnerable."*

6. In the present case, we find that the facts are starkly different. The Revenue had itself accepted that there was a doubt and that is why the clarification of 2014 was issued. Had it been so cut and dried there

was no occasion for the Board to have issued the clarification and infact, this is precisely what weighed with the Commissioner, Income Tax, Panchkula and Income Tax Appellate Tribunal, Chandigarh.

7. In the circumstances of the case we are not able to find any fault with the judgment and orders of the Courts below. No other question of law arises.

8. Appeal stands dismissed.

9. Since the main case has been decided, the pending C.M. Application, if any, also stands disposed of.

(AJAY TEWARI)
JUDGE

(HARNARESH SINGH GILL)
JUDGE

July 23, 2019
pooja sharma-I

Whether speaking/reasoned Yes/No

Whether Reportable : Yes/No