

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "B", HYDERABAD**

**BEFORE SMT P. MADHAVI DEVI, JUDICIAL MEMBER
AND SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER**

**ITA No. 289/Hyd/2018
Assessment Year: 2014-15**

Dy. Commissioner of Income-
tax, Circle – 16(2), Hyderabad.

vs. Progressive Constructions
Ltd., Hyderabad

PAN – AABCP 2274 M

(Appellant)

(Respondent)

Revenue by : Shri Sunku Srinivas
Assessee by : Smt. Geetha Chellappa

Date of hearing : 01/08/2018
Date of pronouncement : 03/08/2018

ORDER

PER S. RIFAUR RAHMAN, A.M.:

This appeal filed by the revenue is directed against the order dated 13/11/2017 of CIT(A) – 4, Hyderabad for AY 2014-15.

2. Brief facts of the case are, the assessee company, engaged in the civil contract works, filed its return of income for the AY 2014-15 declaring total income at Rs. Nil after setting off of the carried forward losses Rs. 48,72,67,996/-. The case was selected for scrutiny and accordingly notices were issued by the AO. In response to the notices, the AR of the assessee filed the information. After going through the information filed, the AO completed the assessment by making the following additions:

1. Rs. 78,01,926/- towards disallowance of depreciation
2. Rs. 28,31,250/- towards disallowance of expenditure u/s 14A
3. Rs. 21,027/- towards disallowance of employee's contribution towards PF u/s 36(1)(v)

3. On appeal, the CIT(A) deleted the disallowance of Rs. 78,01,926/- and confirmed the disallowance of Rs. 28,31,250/- u/s 14A. As regards disallowance towards PF, the assessee was not appealed the same before the CIT(A).

4. The revenue is in appeal before us against the order of CIT(A) in deleting the disallowance of Rs. 78,01,926/-

5. The facts relating to this ground are, during the course of assessment proceedings, the AO observed that on verification of the depreciation of fixed assets, the assessee claimed depreciation of Rs. 17,01,00,116/- on BOT Project @ 25% on the opening WDV of Rs. 68,40,00,465/-.

5.1 In order to amortize the expenditure incurred as per the CBDT Circular No. 09/2014, dt. 23/04/2014, the AO called for the information, namely, the cost of construction on development of infrastructure facility, copy of concession agreement, time taken for creation of such facility and date of commencement. On perusal of the information submitted by the assessee, the AO noticed that the period of the project was up to 31/10/2017 i.e. the remaining period of the project from 01/04/2012 is 2040 days. As per the said Circular of CBDT, the opening WDV of the project i.e. Rs. 74,49,02,430/- is required to be amortized over the remaining period of project i.e. 2040 days. He accordingly, computed the allowable amortization of BOT project for the FY relevant to AY 2013-14 as under:

Opening WDV of the BOT project as on 01/04/12	Rs. 90,72,00,620
Remaining period of the BOT agreement as on 01/04/12	2040 days
Period	365 days
Amortization for the year	Rs. 16,22,98,190/-

AO noted that the said amount needs to be allowed for the AY under consideration i.e. 2014-15. Further, he noted that from the ITR filed, the assessee had claimed depreciation on BOT project @ 25% considering the asset as intangible asset. He, therefore, disallowed the excess claim of depreciation of Rs. 78,01,926/- (Rs. 17,01,00,116 – Rs. 16,22,98,190).

6. Before the CIT(A), the assessee submitted that the issue is covered by the decision of the Special bench of ITAT, Hyderabad in assessee's own case for AY 2011-12 in ITA No. 1845/Hyd/2014, dated 14/02/2017.

7. The CIT(A) following the special bench decision, directed the AO to follow the directions of the ITAT and allow the depreciation accordingly.

8. Aggrieved by the order of CIT(A), the revenue is in appeal before us contending that the CIT(A) erred in allowing depreciation on BOT project instead of amortization of expenditure over the period of concessionaire agreement.

9. Considered the rival submissions and perused the material on record. The special bench in assessee's own case for AY 2011-12 (supra) held as under:

"8. We have patiently and carefully considered the rival submissions, perused the materials on record as well as the decision cited at the Bar. 9. The core issue arising for consideration in this appeal is in relation to assessee's claim of depreciation on the asset created by investing an amount of Rs.214 crore in construction of Pune Hyderabad section of National Highway no.9, on build, operate and transfer (BOT) basis with a right to collect toll charges from the user of road by vehicles over the concession period of 11 years and 7 month. It is a fact on record that the assessee completed the construction of the project in the financial year 2008-09 and had started operating the same. It is also evident, in the assessment year 2009-10, the assessee had claimed depreciation @ 10% by treating the asset as building. However, from 11 M/s. Progressive Constructions Ltd. the assessment year 2010-11, the assessee had started claiming depreciation by treating the asset created as an intangible asset in terms of section 32(1)(ii) of the Act. We have also been informed that assessee's claim of depreciation in assessment year 2009-10 and 2010-11, were

disallowed by the Assessing Officer. However, the learned Commissioner (Appeals) allowed assessee's claim of depreciation as building in assessment year 2009–10 and as intangible asset in assessment year 2010–11. The aforesaid orders of the learned Commissioner (Appeals) were also upheld by the Tribunal while dismissing Department's appeals on the issue. It is stated that the Department has challenged the decisions of the Tribunal in assessment year 2009–10 and 2010–11 in further appeal before the High Court of Andhra Pradesh and Telangana and the matters are still pending. Be that as it may, the aforesaid facts clearly indicate that the impugned assessment year is not the first year of claim of depreciation on the BOT road / bridge. Rather, in the impugned assessment year, depreciation has been claimed on the opening WDV which has also been accepted by the learned Departmental Representative in the written submissions filed by him. Therefore, the nature of expenditure, whether capital or revenue, is not a subject matter of dispute arising in the present appeal. Bearing this in mind, we have to examine the validity of assessee's claim of depreciation qua the asset created. The learned Departmental 12 M/s. Progressive Constructions Ltd. Representative has opposed assessee's claim of depreciation on the following propositions:–

- i) Whether the expenditure claim of the assessee brings into being an asset which is owned and used by the assessee in its business;
- ii) What is the nature of the asset that has come into being on account of the expenditure incurred by the assessee and what is the nature of such expenditure;
- iii) If an asset is created, whether it is a tangible asset or an intangible asset;
- iv) Whether the Concessionaire Agreement (C.A) held by the assessee can be regarded as a commercial or business right akin to a license;
- v) If such C.A. is akin to a license, what intangible asset has been created for the assessee and what is the expenditure incurred by the assessee for acquiring such intangible asset.

10. Before dealing with the issue, it is necessary to reiterate that the Government of India being desirous of implementing a project involving, construction, operation and maintenance of four lane Pune Hyderabad section of N.H. no.9, with private sector participation of BOT invited tender from interested parties. The assessee being successful in the tender, the Government of India entered into a Concession Agreement (C.A) with the assessee on 22nd December 2005. At this stage, it is necessary to look into some of the relevant clauses of C.A., which in our 13 M/s. Progressive Constructions Ltd. opinion, will have a crucial bearing in deciding the issue. As per clause 2.1 of the C.A., the Government of India grants and authorises the concessionaire i.e., the assessee to investigate, study, design, engineer, procure, finance, construct, operate and maintain the project and to exercise and/or enjoy the rights, powers, privileges, authorizations and entitlements in terms of the agreement including the right to levy demand, collect and appropriate fee from vehicle and persons for using the project / project facilities or any part thereof. As per clause 2.2 of the C.A., the assessee is granted concession for a period of 11 years 7 months from the commencement date. As per clause 2.4, the Government of India was obliged to hand over to the assessee physical possession of the project site free from encumbrances within 30 days from the date of the agreement. It further provides, once the project site is handed over to the concessionaire, it shall have exclusive right to enter upon, occupy and use the project site and to make at its costs, charges and expenses such

development and improvement in the project site as may be necessary or appropriate to implement the project and to provide project facility in terms of the agreement. Clause- 2.5 of the agreement provides that the concessionaire without prior written consent or approval of the Government of India cannot use the project site for any purpose, other than, for the purpose of the project / project facilities as permitted under the C.A. Clause 2.7 of the C.A. makes it clear that the project site belongs to and has vested in 14 M/s. Progressive Constructions Ltd. Government of India and the Government of India has full power to hold, dispose off and deal with the same consistent with the provisions of the C.A. However, it also makes it clear that the concessionaire, subject to complying with the terms / conditions of the agreement remains in peaceful possession and enjoyment of the project site during the concession period. It further provides, in the event the concessionaire is obstructed by any person claiming any right, title or interest over the project site or any part thereof or in the event of any enforceable action including any attachment, distraint, appointment of receiver or liquidator being initiated by any person claiming interest over the project sites. Government of India not only will defend such claims or proceedings but also keep the concessionaire indemnified against any direct or consequential loss or damage which it may suffer on account of any such right, title, interest or charge. As per clause 2.8 of the C.A., though, the concessionaire shall have exclusive right to use of the project site in accordance with the provisions of the agreement and for this purpose, it may regulate the entry and use of the same by the third parties, however, it shall not part with or create any encumbrance on the whole or any part of the project site save and except, as set forth and permitted under the agreement. Clause 4.1 of the C.A. entitles the concessionaire to levy, demand and collect fee for user of the roads by vehicles and persons in accordance with the fee notification to be issued by the Government of India. However, concessionaire cannot levy and 15 M/s. Progressive Constructions Ltd. collect any fee until it has received completion certificate. Clause 5.1 and 5.2 of the C.A. lays down the obligation of the concessionaire for execution and implementation of the project / project facility during the concession period. From the reading of the aforesaid clauses of the contract, following facts emerge:—

- i) The right, title and ownership of the project site vests absolutely with the Government of India and it has full powers to hold, dispose off and deal with the same;
- ii) The Government of India has handed over physical possession of the project site to the concessionaire for executing / implementing the project and operating the same during the concession period;
- iii) Concessionaire shall have exclusive right to use the project site for executing / implementing the project in terms of C.A.;
- iv) Concessionaire shall, at its own costs and expenses, execute / implement the entire project and operate and maintain the same during the concession period; and
- v) The concessionaire shall have the right to levy / demand and collect fee as approved by the Government of India towards user of the project facilities by vehicles and persons.

11. Undisputedly, for executing the project, assessee has incurred expenses of Rs.214 crore. It is also not disputed that as per the terms of the C.A., the Government of India is not obliged / required to reimburse the cost incurred by the assessee to execute / implement the project facilities. The only right / benefit allowed to the assessee by the

Government of India is to operate the project / project facilities during the concession period of 11 years 7 months and to collect toll charges from vehicles / persons using the project / project facilities. Thus, as could be seen, the only manner in which the assessee can recoup the cost incurred by it in implementing the project / project facility is to operate the road during the concession period and collect the toll charges from user of the project facility by third parties. Admittedly, the assessee has taken up the project as a business venture with a profit motive and certainly not as a work of charity. Further, by investing huge some of Rs.214 crore, the assessee has obtained a valuable business / commercial right to operate the project facility and collect toll charges. Therefore, in our considered opinion, right acquired by the assessee for operating the project facility and collecting toll charges is an intangible asset created by the assessee by incurring the expenses of Rs.214 crore. The contention of the learned Senior Standing Counsel that expenditure of Rs.214 crore has brought into existence a tangible asset in the form of roads and bridges of which the assessee is not the owner but it is the Government of India is nobody's case. Further, the learned Senior Standing Counsel's apprehension that it will lead to a situation where both Government of India and the concessionaire will claim depreciation on the asset created with the very same expenditure, in our view, is not borne out from facts on record. At the cost of repetition we must observe, as per the terms of agreement the expenses incurred by the assessee towards construction of the roads, bridges, etc., were not going to be reimbursed by the Government of India. This fact was known to both the parties before the execution of the agreement as the tender itself has made it clear that the project is to be executed with private sector participation on BOT basis. Thus, from the very inception of the project, assessee was aware of the fact, it has to recoup the cost incurred in implementing the project along with the profit from operating the road and collecting toll charges during the concession period. Therefore, assessee has capitalized the cost incurred on the BOT project on which it has claimed depreciation. Thus, in our view, the expenditure incurred by the assessee of Rs.214 crore for creating the project or project facilities has created an intangible asset in the form of right to operate the project facility and collect toll charges. Further, it is the contention of the learned Senior Standing Counsel that if at all any right is created under the C.A. for collecting toll, such right accrued to the assessee on the date of execution of agreement i.e., 22nd December 2005, therefore, the expenditure incurred by such date should be the value of intangible asset which can alone be considered for depreciation under section 32(1)(ii) of the Act. We are afraid, we cannot accept the 18 M/s. Progressive Constructions Ltd. above argument of the learned Senior Standing Counsel. When the C.A. confers a right on the assessee to operate the project facility and collect toll charges over the concession period of 11 years and 7 months, the assessee can start operating and collecting toll charges only when the project facility is ready for use. Therefore, until the project is completed and ready for use by vehicles or persons assessee cannot collect toll charges for user of the project facilities. Thus, the right to operate the project facility and collect toll charges is integrally connected to the completion of the project facility which cannot be done unless the assessee invests its fund for completing the project. Therefore, keeping in view the aforesaid fact, it cannot be said that the right to collect toll has accrued to the assessee on the date of execution of the agreement. If we accept the aforesaid argument of the learned Senior Standing Counsel, in other words, it would mean that without even executing and completing the project facility, assessee would be collecting toll charges. Therefore, the contention of the learned Senior Standing Counsel that the expenditure incurred by the assessee till execution of the agreement can only be considered as an intangible asset, in our view, is illogical, hence, cannot be accepted. Thus, having held that the

expenditure of Rs.214 crore incurred by the assessee has resulted in creation of an intangible asset of enduring nature for the assessee, it is necessary now to examine whether such intangible asset comes within the scope and ambit of section 32(1)(ii) of the Act. For this purpose, it is necessary to look into the said provision which is reproduced hereunder for the sake of convenience.

Depreciation. 32(1)(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed—]

12. Explanation 3 to section 32(1) defines intangible asset as under:— 85[Explanation 3.—For the purposes of this sub-section, 86[the expression “assets”] shall mean—
(a) tangible assets, being buildings, machinery, plant or furniture;
(b) intangible assets, being know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature .

13. A plain reading of the aforesaid provisions would indicate that certain kind of assets being knowhow, patents, copyrights, trademarks, license, franchise, or any other businesses or commercial rights of similar nature are to be treated as intangible asset and would be eligible for depreciation at the specified rate. It is the claim of the assessee that the right acquired under C.A. to operate the project facility and collect toll charges is in the nature of license. However, the learned Senior Standing Counsel has strongly countered the aforesaid claim of the assessee by referring to the definition of license as provided under the Indian Easements Act, 1882. For better appreciation, we intend to reproduce herein below the definition of “license” as provided under section 52 of the Indian Easements Act, 1882:—

“License” defined:— Where on person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful and such right does not amount to an easement or an interest in the property, the right is called a license.”

14. It has been the contention of the learned Senior Standing Counsel that as the term “license” has not been defined under the Income Tax Act, 1961, the definition of “license” under the Indian Easements Act, 1882, has to be looked into. Accepting the aforesaid contention of the learned Senior Standing Counsel, let us examine the definition of “license” extracted herein above. A plain reading of section 52 of the Act makes it clear, a right granted to a person to do or continue to do something in the immovable property of the grantor, which, in the absence of such right would be unlawful and such right does not amount to an easement or interest in the property, then such right is called a license. If we examine the facts of the present case, vis-a-vis, the definition of license under the Indian Easements Act, 1882, it would be clear that immovable property on which the project / project facility is executed / implemented is owned by the Government of India and it has full power to hold, dispose off and deal with the immovable property. By virtue of the C.A., assessee has only been granted a limited right to execute the project and operate the project facility during the concession period, on expiry of which the project / project facility will revert back to the Government of India. What the Government of India has granted to the

assessee is the right to use the project site during the concession period and in the absence of such right, it would have been unlawful on the part of the concessionaire to do or continue to do anything on such property. However, the right granted to the concessionaire has not created any right, title or interest over the property. The right granted by the Government of India to the assessee under the C.A. has a license permitting the assessee to do certain acts and deeds which otherwise would have been unlawful or not possible to do in the absence of the C.A. Thus, in our view, the right granted to the assessee under the C.A. to operate the project / project facility and collect toll charges is a license or akin to license, hence, being an intangible asset is eligible for depreciation under section 32(1)(ii) of the Act.

15. Even assuming that the right granted under the C.A. is not a license or akin to license, it requires examination whether it can still be considered as an intangible asset as described under section 32(1)(ii) of the Act. In this context, it has been the contention of the learned Senior Standing Counsel that the intangible asset mentioned under section 32(1)(ii) of the Act are specifically identified assets, except, the assets termed as “any other business or commercial rights of similar nature”. He had submitted, applying the principle of ejusdem generis the rights referred to in the expression “any other business or commercial rights of similar nature”, should be similar to one or more of the specifically identified assets preceding such expression. The aforesaid contention of the learned Departmental Representative is unacceptable for the reasons enumerated hereinafter.

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. 26 M/s. Progressive Constructions Ltd.

18. In view of our aforesaid conclusion, there is no need to answer the second part of the question framed. This disposes of grounds no.2, 3, 5 and 6. 19. Insofar as ground no.4 is concerned, it is the contention of the Department that the learned Commissioner (Appeals) should have directed for amortization of the expenses incurred for construction of BOT road in terms of CBDT Circular no.9 of 2014 dated 23rd April 2014. 20. As already discussed in the earlier part of the order and dealt in detail in order dated 4th April 2016, in M.A. no.96/Hyd./2015, the nature of expenses whether capital or revenue is not the subject matter of dispute in the present appeal, as the expenditure incurred has already been considered as capital expenditure in the preceding assessment years and assessee's claim of depreciation have been allowed. Therefore, in the impugned assessment year, the claim is limited to depreciation on the

WDV on block of assets only. The issue whether the expenditure incurred is a deferred revenue expenses or not was not the subject matter of consideration either by the Assessing Officer or by the learned Commissioner (Appeals). Taking into consideration the aforesaid fact, the Tribunal had re-framed the question by limiting the issue only to the determination of nature of asset, whether tangible or intangible. In fact, the learned Departmental Representative has also accepted the aforesaid factual position. In any case of the matter, the assessee neither in the preceding assessment years nor in the impugned assessment year has claimed it as deferred revenue expenditure, hence, there is no scope to examine whether the expenditure could have been amortized over the concession period in terms of CBDT circular no.9. Moreover, the aforesaid CBDT circular is for the benefit of the assessee. Therefore, the benefit in terms of the circular can be granted, provided, assessee makes a claim in terms of it. The benefit of the circular cannot be thrust upon the assessee if it is not claimed. Therefore, since the issue, as raised in ground no.4, does not arise out of the orders of the Departmental Authorities, it cannot be the subject matter of adjudication in the present appeal. Accordingly, we dismiss ground no.4 raised by the Department."

As the CIT(A) deleted the disallowance of depreciation following the said special bench decision, we uphold the order of CIT(A) and dismiss the grounds raised by the revenue in this regard.

10. In the result, appeal of the revenue is dismissed.

Pronounced in the open Court on 3rd August, 2018.

Sd/-
(P. MADHAVI DEVI)
JUDICIAL MEMBER

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Hyderabad, Dated: 3rd August, 2018

kv

Copy to:-

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- 2) M/s Progressive Constructions Ltd., 7th Floor, Raghava Ratna Towers, Chirag Ali Lane, Hyderabad – 500 001
- 3) CIT(A) – 4, Hyderabad.
- 4) Pr. CIT – 4, Hyd.
- 5) The Departmental Representative, I.T.A.T., Hyderabad.
- 6) Guard File