

Pr. Commissioner Of Income Tax vs Paradip Port on 10 February, 2025

Author: Yashwant Varma

Bench: Yashwant Varma

\$~17

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ ITA 452/2019

PR. COMMISSIONER OF INCOME TAX

.....Appel

Through: Mr. Sanjay Kumar, SSC with

Ms. Monica Benjamin, JSC.

versus

PARADIP PORT

Through:

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE HARISH VAIDYANATHAN
SHANKAR

ORDER

% 10.02.2025

1. On hearing learned counsels for parties, we find that there is no dispute insofar as the principal facts are concerned and which stand encapsulated in Para 2 of the order of the Income Tax Appellate Tribunal ["Tribunal"] and which reads as follows:

"2. The brief facts of the case are that the assessee filed return on 28.09.2012 declaring loss of Rs.60,87,73,453/-. Subsequently, the case was selected for scrutiny and statutory notices were issued to the assessee. The assessee company has been set up to develop, establish, construct, operate and maintain a project relating to construction operation and maintenance of Paradip Port connectivity project under the Build Operate Transfer (BOT) basis. For this purpose a concession agreement was entered into between the assessee company and National Highways Authority of India (NHAI) on 24.02.2004. By this agreement, NHAI conferred the right to the assessee company to implement the project and levy toll/user charges over the long concession period after completion of construction. The project was completed on 15.06.2009. The toll This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/02/2025 at 21:16:29 collection started w.e.f. 04.07.2009. Subsequently, the assessee company entered into another agreement with M/s. AJ Tolls Pvt. Ltd. on 15.04.2011 for collection of user fee at Srirampur Toll Plaza located at Kilometer 4 for the section from Km 0.000 to Km 76.588 of National Highway No. 5A in the State of Orissa. The contract was for a period of 1 year from 27.01.2011 to 26.01.2012. The assessee company has shown revenue from operation in the form of toll revenue at Rs.20,42,35,715/-. Against the said Revenue, the assessee has debited expenses of Rs.60,91,76,754/- in the profit and loss account. The huge amount debited to profit and loss account relate to finance cost of Rs.37.35 crores and depreciation of Rs.21.73 crores including depreciation towards toll road which alone was Rs.21.47 crores. In the computation of income, total depreciation was claimed of Rs.42,49,01,720/- which contained Rs.4,24,84,205 being the depreciation in respect of toll road. Regarding charging of depreciation on toll road, the assessee submitted the details. The AO followed the circular No. 09/2014 dated 23.04.2014 of CBDT, wherein the Board observed as under :

"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 lime 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."

Accordingly, the AO disallowed the depreciation claimed of Rs.23,85,71,095/-. Aggrieved by the order of the AO, the assessee appealed before the Id. CIT(A) and made written submissions also and relied on some case laws. The Id. CIT(A), after considering the submissions of the assessee allowed the appeal of the assessee. Aggrieved from the order of the Id. CIT(A), the Revenue is in appeal before ITAT."

2. The issue which is, however, sought to be canvassed before us flows from Circular No. 9/2014 dated 23 April 2014 and where while dealing with Build-Operate-Transfer ["BOT"] contracts for development of roads and highways, the Central Board of Direct This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/02/2025 at 21:16:29 Taxes ["Board"] had issued the following directives:

"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-fulfilment of ownership criteria in such cases."

3. Basis the aforesaid understanding of ownership in relation to such contracts, it had provided for amortization of depreciation spread over the entire period of the concession. This becomes apparent from a reading to Paras 5 to 8 which are reproduced hereinbelow:

"5. In view of the 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 projects in earlier year, the total deduction so claimed for the Assessment Year prior to the Assessment Year under consideration may be 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.

8. It is hereby clarified that this Circular is applicable only to those This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/02/2025 at 21:16:29 infrastructure projects for development of road/ highways on BOT basis where ownership is not vested with the assessee under the concessionaire agreement."

4. We, however, note that in Commissioner of Income Tax vs Noida Toll Bridge Co. Ltd.¹, the Allahabad High Court, while construing such contracts had observed as follows:

"21. The depreciation represents the diminution in value of a capital asset when applied to the parties of making profit or gain. The object is to get the true picture of

the real income of the business. The respondent-assessee is engaged in the business of constructing roads and bridges. Under the concession-agreement the land is provided on lease initially for a period of 30 years which can be extended. The respondent-assessee company is a special purpose vehicle, engaged in the business of building, infrastructure/roads to generate revenues by collecting tolls to meet the cost of constructions and to earn profits. The construction of road on the leased land is the capital asset of the company, which remains under its ownership for the concession period. The respondent-assessee exercises its full ownership rights on the road which include charging of tolls which is ordinarily a sovereign function. The operation, maintenance and use of the road during the concession period is with the respondent-assessee. It has been given exclusive rights to regulate the use of the Noida-Bridge. The road is not simply a road laid out on the land. It includes all allied constructions, which includes the bridge site. The control of the land identified as constituting the bridge site is in complete and uninterrupted possession and use of the respondent-company. It has powers to determine, demand, collect, retain and appropriate fees from the users of the bridge and also has the power to restrict the use of the bridge to motorised vehicles, bicycle and pedestrians, and to debar animal driven vehicles, cycle rickshaw and cattle.

5. Learned counsel appearing for the appellant has additionally drawn our attention to the following passage as appearing in *Moradabad Toll Road Co. Ltd. vs. Assistant Commissioner of Income Tax*²:

"12. In *CIT v. Gwalior Rayon Silk Manufacturing Co. Ltd.* (supra), [2012 SCC OnLine All 4468] [2014 SCC OnLine Del 2286] This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/02/2025 at 21:16:29 the Supreme Court, considering the meaning of the word "building" and whether roads would be included within the meaning of the word "building", held:

"The question emerges, therefore, whether roads and drains include building under s. 32 of the Act. Sec. 32 provides depreciation of capital assets in respect of buildings, machinery, plant or furniture. This Court in *CIT v. Dewan Bahadur Ramgopal Mills Ltd.*, (1961) 41 ITR 280 (SC), held that „the basic and normal scheme of depreciation under the Act is that it decreases every year, being a percentage of the WDV which in the first year is the actual cost and in succeeding years, the actual cost less all depreciations actually allowed under the Act or any Act repealed thereby . The depreciation allowance, therefore, is in respect of such assets as are used in the business and each to be calculated on the WDV. The allowance towards depreciation is for the continuation of the use of the assets wholly or in part during the accounting year and its contribution to the earning of the income. The object is to determine net income liable to tax. In *CIT v. Alps Theatre*, (1967) 65 ITR 377 (SC), heavily relied on by the Revenue, this Court considering s. 10(2) of the Indian IT Act, 1922 held that s.

10(2) provides that such profits or gains shall be computed after making certain allowances. The object of giving these allowances is to determine the assessable income. Therein the question was whether the land on which the theatre was constructed is a building within the meaning of s. 10(2) of the Indian IT Act, 1922. This Court held that land is not a building and, therefore, depreciation allowance for land separately is not admissible. The ratio therein has no application but the principle laid would be considered in the light of the purpose of the Act. In CITv. Taj Mahal Hotel, 1973 CTR (SC) 480 : (1971) 82 ITR 44 (SC), this Court adopting purposive approach held that sanitary and pipeline fittings fell within the definition of plant. 1922 Act intended to give wide meaning to the word „plant . The rules are meant only to carry out the provisions of the Act and cannot take away what is conferred by the Act or whittle down its effect. In the Municipal Corporation of Greater Bombay v. Indian Oil Corporation Ltd., 1991 Supp (2) SCC 18 : JT 1990 (4) SC 533, the oil tanks for storage of petrol were held to be buildings exigible to property tax.

The question whether the roads would be included within the meaning of the word „buildings was considered by This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/02/2025 at 21:16:29 various High Courts. The leading decision is of the Bombay High Court in CIT v. Colour Chem Ltd., (1977) 106 ITR 323 (Bom). While negating the contention that roads are part of the plant, the Bombay High Court held that the roads within the factory premises are used for the purpose of carrying raw materials, finished products and workers. Therefore, it must be regarded as building or buildings within the meaning of sub-cl. (iv) of s. 10(2) of 1992 Act. It was also held that dictionary meaning of the word „building cannot be confined to a structure or superstructure having walls and roof over it. The roads and roadways are adjuncts of the buildings lying within the factory area linking them together and are being used for carrying on its business by the assessee. Therefore, they must be regarded as forming part of the factory building. The expenditure incurred, therefore, will have to be regarded as expenditure on buildings and the depreciation must be allowed. The appeal filed against the judgment in Colour Chem Ltd. case (supra) the leave was refused on the grounds of delay. More or less though for different reasons on „common sense principle same is the ratio in CIT v. Lucas TVS Ltd., (1977) 110 ITR 346 (Mad). When the appeal was filed, this Court dismissed the Special Leave Petition on the ground of delay. Same is the view in Panyam Cement & Mineral Industries Ltd. v. Addl CIT, 1977 CTR (AP) 255 : (1979) 117 ITR 770 (AP), CIT v. Kalyani Spinning Mills Ltd., (1981) 128 ITR 279 (Cal), CIT v. McGaw Ravindra Laboratories (India) Ltd., (1981) 132 ITR 401 (Guj).

In CIT v. Bangalore Turf Club Ltd., (1984) 38 CTR (Kor) 162 : (1984) 150 ITR 23 (Kar), when the appeal was filed this Court dismissed the same in Special Leave Petn. Nos. 5198-5199 of 1985, dt. 16th Dec., 1987. In Permanent Words and Phrases, Vol. 5A „building was defined that everything that is necessary to perfect a manufacturing establishment and fit for use designed as a part of it is a building. The roads would serve as necessary links between the raw material and finished products

in the business activity. The roads are liable to wear and tear and need constant repairs or relaying the road afresh.

While amending Income-tax (Fourth Amendment) Rules, 1983, the rule making authority accepted this interpretation consistently laid by various High Courts that building includes roads and also alongated bridges, culverts, wells and tube wells as building but prescribed This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/02/2025 at 21:16:29 fixed rates of depreciation setting at rest the variable rates claimed by the assessee. Rules validly made have the same force as the sections in the Act. The contention of the respondents that unless the Act itself is amended, the rules would not cut down the meaning of the word „building is without substance. The inclusive definition of the building to include roads etc. enlarges the scope of s. 32 and does not whittle down its effect. It is true that in CIT v. Coromandel Fertilisers Ltd., (1985) 156 ITR 283 (AP), the High Court of Andhra Pradesh interpreted that roads fell within the meaning of „plant and granted depreciation at the rates admissible to plant. In CIT v. Sandvik Asia Ltd., (1983) 33 CTR (Bom) 128 :

(1983) 144 ITR 585 (Bom), took opposite view and held to be building. In view of the consistent view of the other High Courts and in our view which is the correct one, the view of the High Court of Andhra Pradesh is not correct in law.

It is true, as contended for the Revenue that the Income- tax (Fourth Amendment) Rules, 1983 were given effect from 2nd April, 1983 thereby manifested that the rates enumerated in the rules would be applicable prospectively from the later assessment years. It by no means be construed that the legislature expressed its intention that for the earlier period building does not include roads. If it were to be so it was open to the Parliament to expressly brought out an amendment, to the Act to that effect. On the other hand we are of the view that the subordinate legislature accepted the interpretation given by the High Courts and included roads as integral part of the building. In Bangalore Turf Club Ltd. case (supra), the Karnataka High Court held that the amendment was by way of clarification in conformity with the law laid by the High Courts. It is also equally settled law that an interpretation consistently given over years and accepted and acted upon by the Department may not normally be upset even though a different view of law may reasonably be possible unless the new perceptions and circumstances warrant fresh look. The ratio in Saharanpur Electric Supply Co. Ltd. v. CIT, (1992) 101 CTR (SC) 452 : (1992) 194 ITR 294 (SC), is not in conflict with the above view. It is also settled law that, unless it is expressly stated or by necessary implication arises, a statute should always be read as prospective. The ratio therein is also in consonance with the view we are taking.

Accordingly we have no hesitation to hold that the roads This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/02/2025 at 21:16:29

laid within the factory premises as links or provided approach to the buildings are necessary adjuncts to the factory buildings to carry on the business activity of the assessee would be building within the meaning of s. 32 of the Act. The capital expenditure incurred thereon is admissible to depreciation of WDV. It has to be worked out for the purpose of depreciation as per the provision of the Act read with the rules in Appendix. Equally the drains also would be an integral part of building for the convenient enjoyment of the factory. The expenditure incurred in laying the drains or WDV of the cost of its construction would equally be entitled to depreciation. It is to be worked out in terms of s. 32 of the Act read with the rules in the Appendix. In view of the settled position the reference sought for in Civil Appeal No. 2916 of 1980 and Civil Appeal No. 1194 of 1977 is unnecessary. The appeals are accordingly dismissed. No costs.

13. In CIT v. Gujarat Gas Co. Ltd. (supra), the Gujarat High Court held that where the assessee had entered into lease agreement with the State Electricity Board for generation and distribution of electricity in which the assessee leased out the electrical equipments to the Board, lease rentals paid by the Board were not allowable deduction. The lease rentals were taxed as business income in the hands of the assessee. The High Court dismissed the appeal against the order of the Tribunal, which held that transaction was genuine and thus a direction to AO to allow depreciation did not suffer from any error of law.

14. In CIT v. Anand Theatres (supra) the Supreme Court held that the meanings of the words "buildings" and "plant" have to be gathered in the context of the scheme of s. 32 and it is not necessary to adopt a Judge-made sense, which is artificial and imprecise in application. There is a distinction between the premises in which the business is carried on and the plant with which the business is carried on. The fact, that the building in which a business is carried on is, by itself construction particularly well-suited to the business, or indeed was specially built for that business, does not make it a plant. Its suitability is simply the reason why the business is carried on there. But it remains the place in which the business is carried on and is not something with which the business is carried on, except in some rare cases where it plays an essential part in the operations which take place. The hotel premises are not considered to be an apparatus or tool for running the hotel business but are merely a shelter or home or setting to a theatre in which cinema business is carried on. The same would be the position with regard to a theatre in which cinema business is carried on.

xxxx xxxx xxxx This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/02/2025 at 21:16:29

26. From the above, it is clear that the real test to construe a structure as a „plant , it is to be seen that the structure is used as a tool or apparatus in the business of the assessee. In other words, the structure is so constructed so as to serve the assessee s special technical requirements which in normal parlance is called the functional test. As has been noted above, the toll road has been executed by the assessee on built, operate and transfer basis (BOT). BOT is a form of project financing wherein a private entity receives a concession from the public sector or for that matter

private sector to finance, design, construct and operate a facility stated in the concession contract. This enables the project proponent to recover its investment, operating and maintenance expenses in the project. The facility shall be transferred to the public sector at the end of the concession period. The word „build“ signifies construction of a road, whereby the tax payer brings into existence a structure/surface and nothing more. The word „operate“ signifies the understanding between the assessee and the public authority to collect charges for the usage of the road. The road is a surface on which the vehicles ply. No special features have been pointed out which serves as tool or apparatus while operating the road. No doubt in some roads toll plazas are erected for collecting the usage charges. These are small booths which are manned at some places and unmanned at some, where the user deposits the money in a machine which opens the gate. To cut costs and minimize the time delay, the usage charges are collected by some form of automatic or electronic toll collection equipment. In any case, the manned toll booths/toll plazas are primarily a facility/convenience for collecting the usage charges of the road and nothing more. That would not change the characteristic of „road“.

6. The said decision, however, prima facie, appears to principally deal with and be more concerned with the issue whether a toll road was liable to be classified as a building or a plant.

7. In order to enable learned counsels appearing for respective sides to examine and apprise the Court of instances where the judgment in Noida Toll Bridge Co. Ltd. may have been followed or dissented from, let the appeal be called again on 25.02.2025.

8. We also accord liberty to learned counsels for respective sides to place a Brief Synopsis of Submissions as well as a compilation of This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/02/2025 at 21:16:29 judgments which are proposed to be relied upon on the record, at least 48 hours prior to the next date fixed. Those submissions shall refer to the PDF page numbers of the digital record of the Court wherever so required.

YASHWANT VARMA, J HARISH VAIDYANATHAN SHANKAR, J FEBRUARY 10, 2025/kk This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/02/2025 at 21:16:29