

Right to collect toll charges is an “intangible asset,” depreciable at the rate of 25%

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In brief

The Hyderabad Special Bench of the Income-tax Appellate Tribunal¹ (Tribunal), in a recent ruling held that the right to operate toll roads and collect toll charges is an “intangible asset.” Therefore, the taxpayer is eligible to claim depreciation at the rate of 25% on such intangible asset.

In detail

Facts

- The taxpayer had entered into a Concession Agreement (CA) for four-laning of the National Highway in the State of Andhra Pradesh on a Build Operate and Transfer (BOT) basis.
- As per the terms of the CA, the taxpayer was entitled to collect toll charges from the users of the road during the concession period.
- The taxpayer classified the cost incurred on the construction of the road as an intangible asset (i.e. right to collect toll charges), and claimed depreciation thereon, at the rate of 25%.
- The tax officer rejected the taxpayer’s claim of availing depreciation on the premise that it was not the owner of the road.

Issues before the Tribunal

- Does the expenditure incurred by the taxpayer in constructing the road under the BOT contract give rise to an asset?
- If the answer to the above question is in the affirmative, is it an “intangible asset” or a “tangible asset”?

Taxpayer’s contentions

- As per the terms of the CA, the taxpayer was not eligible for reimbursement of the huge costs it incurred in the construction of the road.
- The cost it incurred had created an “intangible asset” either in the form of license or “any other business or commercial right of similar nature”.
- Accordingly, such intangible asset was eligible for depreciation at the rate of 25%.

Revenue’s contentions

- The road was owned by the Government and not by the taxpayer. Hence, the taxpayer was not eligible for depreciation.
- Right to collect toll charges was neither a license nor akin to a license.
- It also did not fall within the category of any “other business or commercial right of similar nature,” as it was not akin to any specified intangible assets under the tax law.
- The right to collect toll charges as per the CA, if considered as an intangible asset, arose to the taxpayer on the date of execution of the CA. Hence, any expenditure incurred until the date of execution of the CA alone qualified for depreciation (and not the costs incurred in construction of the road).

¹ ITA No. 1845 (HYD) of 2014

- The claim as per the circular² issued by the Central Board of Direct Taxes (CBDT) ought to have been made by the taxpayer (i.e. to claim amortisation instead of depreciation).

Tribunal's ruling

- The Tribunal drew the following observations from the relevant clauses of the CA:
 - The Government was the sole owner of the road.
 - Only the physical possession of the project site was handed over to the taxpayer.
 - The taxpayer was vested with the right to levy and collect toll charges from the users of the road.
- It was clear that the taxpayer had to construct, operate and maintain the toll road and was entitled to collect toll charges to recoup its heavy investment.
- The right to operate the toll road and collect toll charges was a “license” or “akin to a license,” i.e., an intangible asset.
- Based on various judicial precedents,³ such right could also be considered a “business or a commercial right.”
- The right to operate and collect toll charges was integrally connected to the completion of the project, which could not be done unless the taxpayer made huge investments for constructing the road itself. Hence, the contention of the Revenue that the costs incurred until the execution of the CA was illogical.
- Hence, it was held that the right to collect toll charges was an intangible asset, on which the taxpayer was eligible to claim depreciation at the rate of 25%.
- The circular² was for the benefit of the taxpayer, and such benefit could not be forced upon the taxpayer, if it had not specifically claimed.

The takeaways

- The Tribunal's ruling considers the industry wide

issue of claim of depreciation on expenditure incurred on construction of roads and allows depreciation at the rate of 25%, considering such costs as “intangible assets.”

- The ruling is surely welcomed, as it deals with a significant tax issue faced by infrastructure companies as to whether the “right to collect toll charges” is an “intangible asset.”
- The ruling deviates from the clarification provided by the circular² issued by the CBDT by allowing the taxpayer to claim depreciation instead of amortisation of the cost incurred. However, the Tribunal did not discuss the circular² in detail. Nonetheless, the Tribunal's comment that the circular² cannot be imposed on a taxpayer is virtuous.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact your local PwC advisor

² Circular no. 9 of 2014 dated 23 April, 2014

³ CIT v. Smifs Securities [2012] 348 ITR 302 (SC)

Techno Shares & Stocks Limited v. CIT [2010] 327 ITR 323 (SC)
Areva T. & D India Limited v. Dy. CIT [2012] 345 ITR 421 (Delhi)

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