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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ ITA 139/2024. CM APPL. 11720/2024 & CM APPL.
11721/2024
PRINCIPAL COMMISSIONER OF INCOME
TAX-1 Appellant

Through: Mr. Prashant Meharchandani,
Sr.SC with Mr. Akshat Singh,
Jr.SC along with Ms. Ritika
Vohara and Mr. Utkarsh
Kandpal, Advs.

versus

M/S ETAWAH-CHAKERI (KANPUR) HIGHWAY PRIVATE
LIMITED Respondent

Through: None.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDR KUMAR
KAURAV

ORDER
12.03.2024

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1. The instant appeal impugns the order of the Income Tax Appellate Tribunal [“ITAT”] dated 25 May 2023 and has proposed the following questions of law for our consideration: -

“A) Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT is justified in holding that the toll charges collection amounting to Rs. 108,74,52,438/- is capital in nature and ignored the fact that the AO has clearly held in the assessment order that toll charges collections have been made on day to day basis and it is revenue in nature?

B) Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in accepting the contention of the Assessee that the day to day toll charges collection is grant in aid and it is capital in nature, however, ignored that the toll charges collection is governed by Concession Agreement between the Assessee and the NHAI wherein no such clause is found that the toll charges collections are grant in aid from the NHAI?



- C) Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in dismissing the appeal filed by revenue holding that the toll charges collection are grant in aid without appreciating the fact that the toll charges collection has been done on day to day basis against which certain expenses has also been incurred which are in the nature of revenue expenditure.
- D) Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in holding that the toll charges collection are capital in nature by ignoring that the Assessee had failed to submit any documentary evidence except CA certificate, which prove that the toll charges collection are in the nature of assistance/grant/subsidy towards the construction expenses.
- E) Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT has erred in treating the interest on FD amounting to Rs. 7,88,480/- is capital receipt and allowed it as deduction from capital cost of construction by ignoring the fact that the interest on FD has no relation with capital cost of construction and it is in revenue nature?"

2. Mr. Meharchandani, learned counsel appearing for the appellant, could not dispute that insofar as proposed question E is concerned, the same would be liable to be answered against the appellant bearing in mind the judgment rendered by the Court in **CIT v. Jaypee DSC Ventures Ltd.** [2011 SCC OnLine Del 1298].

3. He has, however, sought to address submissions on questions A to D. We note that insofar as the aforesaid questions are concerned, the Commissioner of Income Tax Appeals ["CIT(A)"] has in paragraph no.6.4.7 observed as follows: -

"6.4.7 In view of the above facts and the legal position as discussed in detail and based on the various decisions of Hon'ble Supreme Court and High Court, I am of the opinion that the toll receipts received during the period of project construction are inextricably linked to the project because the same are mandatorily required to be used for the construction of the project and the appellant does not have any right to use the receipts in any manner it may like but all the receipts are first required to be deposited in the Escrow account and can only be utilized for the purposes of the project only. Accordingly, these receipts are nothing but capital receipts and the appellant has rightly reduced the same from the cost of project. Therefore, the addition made by the AO is deleted and the grounds of appeal are allowed."



4. It is the aforementioned view of the CIT(A) that was upheld by the ITAT, observing as follows:

“11. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the treatment to the amount of toll collection charges received by the assessee. It is the contention of the assessee that the toll receipts are capital receipt as against the claim of the Revenue to be revenue receipts. We find that CIT(A) by detailed and well reasoned order which have been reproduced hereinabove has given a finding that during the construction of the 6 lane toll road, assessee was not free to utilize the toll receipts but was obliged to use the toll receipts in construction of the project as per the overriding obligation under the Concession Agreement and Escrow Agreement and assessee had in fact utilized the toll receipts in the project construction. He has further given a finding that toll receipts received during the period of project construction were inextricably linked to the project because it was mandatorily required to be used for the construction of the project. He accordingly concluded the receipts to be capital receipts and held that assessee had rightly reduced the same from the cost of project. Before us, Revenue has not pointed to any fallacy in the findings of CIT(A) nor has placed any material on record to demonstrate that the ratio of various decisions relied upon by the CIT(A) were not applicable to the facts of the present case. In such a situation, we find no reason to interfere with the order of CIT(A) and thus the ground of Revenue is dismissed”

5. However, we could not proceed further today since although the respondent - assessee has been placed on advance notice, none has appeared on its behalf when the matter was called. Consequently, let learned counsel appearing for the appellant take steps for service upon the respondent through all permissible modes including via approved courier service.

6. Let the matter be called again on 24.05.2024.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MARCH 12, 2024/p