* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on September 09, 2014
Judgment delivered on November 05, 2014

\+ ITA 51/2013 & CM 1558/2013
MORADABAD TOLL ROAD CO. LTD.
..... Appellant

Through: Mr.Ramesh Singh, Ms.Swati Sumbly and Mr.Ashish Goel, Advocates

Versus

ASSISTANT COMMISSINER OF INCOME TAX
..... Respondent

Through: Mr.Sanjeev Sabharwal, Sr. Standing Counsel with Ms.Swati Thapa, Advocate

\+ ITA Nos. 65/2014 with CM 2740/2014 & 81/2014 with CM 3796/2014
MORADABAD TOLL ROAD CO. LTD.
..... Appellant

Through: Mr.Ramesh Singh, Ms.Swati Sumbly & Mr.Ashish Goel, Advocates

Versus

DEPUTY COMMISSIONER OF INCOME TAX
..... Respondent

Through: Mr.Balbir Singh, Sr. Standing Counsel with Mr.Abhishek Singh Baghel and Mr.Arjun Harkauli, Advocates

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

These three appeals involve a common substantial question of law, which is reproduced as under:-

> *"Whether the Income Tax Appellate Tribunal was correct in law in holding that Moradabad Bypass Toll Road (Highway) was a building and not a plant?"*

2. The appeals relate to assessment years 2007-08 (ITA 51/2013), 2003-04 (ITA 65/2014) and 2004-05 (ITA 81/2014).

3. **ITA No.51/2013**

The appellant is a 100% subsidiary of National Highways Authority of India (NHAI) and was formed with the sole object of constructing the highway and bypass at Moradabad, covering a total stretch of 18.2 kms, which was ultimately executed on Build, Operate and Transfer (BOT) basis. The appellant filed an income tax return in electronic form declaring a loss of Rs.10,02,63,570/- for the assessment year 2007-08. The case was selected for scrutiny and notice under Section 143(2) of the Income Tax Act, 1961 ('Act' for short) was issued to the appellant. The Assessing Officer held that the assessee could claim depreciation @ 10% on roads and not @ 25%, as claimed by the

appellant assessee and accordingly allowed the amount of depreciation as Rs. 3,70,92,664/- calculated on the amount of Written Down Value. The Commissioner of Income Tax (Appeals) partially upheld the order insofar as the aforesaid aspect is concerned. On further appeal, the Tribunal confirmed the order of CIT (Appeals).

4. **ITA No.65/2014**

The appellant on November 27, 2003 filed an income tax return declaring loss of Rs.25,94,56,570/-. The case was selected for scrutiny and notice under Section 143(2) was issued to the appellant on October 15, 2004. The Assessing Officer vide assessment order dated July 28, 2005 allowed depreciation on toll road @ 10%, instead of 25% as claimed by the appellant assessee. The balance 15% was directed to be added to the income of the appellant assessee. The appellant assessee has filed an appeal before the CIT (Appeals), who in his order dated October 11, 2006 held that the road cannot be said to be '*plant*' but would fall under the head *'building'* for the purpose of allowing depreciation and accordingly rejected the appeal. On further appeal, the Tribunal upheld the order of CIT (Appeals), inter-alia, stating that depreciation with respect to the roads had to be allowed only @ 10%.

5. **ITA No.81/2014**

The appellant on October 27, 2004 filed an income tax return

declaring loss of Rs.20,83,84,640/-. The Assessing Officer vide assessment order dated November 30, 2005 held that depreciation on toll road should be allowed @ 10%, and not @ 25% as claimed by the appellant assessee. The appellant assessee filed an appeal before the CIT (Appeals), who in his order dated January 08, 2007 held that the road cannot be said to be '*plant*' and was a *'building'* for the purpose of allowing depreciation and accordingly rejected the appeal. On further appeal, the Tribunal upheld the order of CIT (Appeals), inter-alia, observing that depreciation with respect to the roads had to be allowed only @ 10%.

6. Mr.Ramesh Singh, learned counsel appearing for the appellant assessee would submit that the Tribunal has erred in not appreciating the facts in proper perspective. According to him, the appellant assessee had rightly claimed depreciation on toll road @ 25%. He would state that the appellant assessee was constituted for the sole object of construction of highway, a toll road and was authorized to collect toll tax from the vehicles passing on the toll road, which is not a *'building'*, which being road by itself is not a part of *'building'* or within the confines of a *'building'* or an approach *road* to the *'building'*. He would state that toll road is a structure which constitutes an apparatus or tool by means of which business activities are carried on and it would amount to *'plant'*.

He would rely upon the following judgments in support of his contentions:

(a) Indore Municipal Corporation vs. CIT [2001] 247 ITR 803 (SC)
(b) Scientific Engineering House Pvt. Ltd. vs. CIT [1986] 157 ITR 86(SC)
(c) Nowrangroy Metals Pvt. Ltd. vs. JCIT [2003] 262 ITR 231 (Gau. HC).
(d) CIT vs. Karnataka Power Corporation [2001] 247 ITR 268 (SC)
(e) CIT vs. Kamala Selvaraj [2005] 273 ITR 154 (Mad. HC)
(f) CIT vs. Gwalior Rayon Silk Manufacturing Co. Ltd. [1992] 196 ITR 149 (SC)
(g) Maharashtra State Road Development Corporation Ltd. vs. ACIT, Mumbai [2010] 126 ITD 279 (ITAT, Mumbai)
(h) Tamil Nadu Road Development Company Ltd. vs. ACIT [2009] 120 ITD 20 (ITAT, Chennai)
(i) SK Tulsi And Sons vs. CIT [1991] 187 ITR 685 (All. HC)
(j) RC Chemical Industries vs. CIT [1982] 134 ITR 330 (Del. HC)
(k) DCIT vs. ASTRA IDL [2001] 247 ITR 654 (Kar. HC)
(l) ACIT Mumbai vs. M/s West Gujarat Expressway Limited, ITA No.6841/Mum/2011 (ITAT, Mumbai)
(m) CIT vs. Noida Toll Bridge Co. Ltd. [2013] 213 Taxman 333 (All. HC)
(n) CIT vs. Anand Theatres [2000] 244 ITR 192 (SC)

7. On the other hand, Mr.Balbir Singh, learned counsel for the respondent-revenue would support the order of the authorities inasmuch as the *'toll road'* cannot be construed as a '*plant'* as sought to be contended by the learned counsel for the appellant. He would refer to 'Note' under the table to Appendix 1 to the Rules, which relates to rate at

which depreciation is admissible, wherein *'buildings'* have been defined/referred to include roads, bridges, culverts, wells and tube-wells, to contend that the road being a *'building'* for the purpose of rate of depreciation, cannot be held a '*plant'*. He has also drawn our attention to clause 3 to Section 43 under which certain terms have been defined relevant to income from profits and gains of business or profession, wherein the term *'plant'* has been defined in the following manner:-

> *"Plant includes ships, vehicles, books, scientific apparatus and surgical equipment used for the purposes of the business or profession [but does not include tea bushes or livestock] [or buildings or furniture and fittings]."*
> *(The underlined portion was inserted w.e.f. 01.04.2004)*

According to him, a reading of the definition of *'plant'* and *'building'* as given in clause 3 to Section 43 and in note in Appendix 1 to the Income Tax Rules, it is clear that a road is not a *'plant'*.

8. Having heard the learned counsel for the parties, the only question which arises for consideration is whether the toll road can be said to be a *'plant'* so as to entitle the assessee a higher rate of depreciation.

9. Before we deal with the respective submissions of the counsel for the parties, we refer to some of the relevant provisions of the Income Tax Act, 1961 ('Act' in short) and the Income Tax Rules, 1962 ('Rules' in short). Chapter IV of the Act deals with computation of total income. Sections 28 to Section 44DB deal with profits and gains of business or

profession. Section 32 deals with depreciation. Section 32(1)(i) refers to depreciation with regard to buildings, plant etc. and such depreciation shall be allowed, if the asset is used for the purpose of business. The Rules framed in exercise of power conferred by Section 295 of the Act, Rule 15 of Part A, Rule 11 of Part B, Rule 9 of Part C of the Fourth Schedule, stipulates through Rule 5(1) that depreciation of any block of assets shall be calculated at the percentage specified in second column to the table in Appendix I to the Rules. Amendment was effected to Appendix I from the assessment year 2006-07. We note that the pre-amended Appendix I was applicable for the assessment years 2003-04 to 2005-06. By way of amendment to Appendix I made effective from the year 2006-07, the depreciation allowance was reduced to 15% with regard to 'plant' and 'machinery' as against 25% for the assessment years 2003-04 to 2005-06. Insofar as 'buildings' other than those used mainly for residential purposes and not covered by sub items 1 and 3 of the Part A dealing with tangible assets remained as 10%. One more provision which is of relevance is Section 43 of the Act, wherein the term '*plant*' has been defined. The same has been reproduced above.

10. Part A of Appendix I which relates to tangible assets refers to *'buildings'* also. The types of buildings contemplated are as under:-

(1) Buildings which are used mainly for residential purposes

except hotels and boarding houses.

(2) Buildings other than those used mainly for residential purposes and not covered by sub-items (1) above and (3) below.

(3) Buildings acquired on or after the 1st day of September, 2002 for installing machinery and plant forming part of water supply project or water treatment system and which is put to use for the purpose of business of providing infrastructure facilities under clause (i) of sub-section (4) of section 80-IA.

(4) Purely temporary erections such as wooden structures.

Note 1 below the table stipulates '*buildings'* include roads, bridges, culverts, wells, and tubewells. (emphasis supplied)

It is a settled law that depreciation generally speaking is an allowance for diminution in the value due to wear and tear of capital asset employed by the assessee in his business. Section 32 of the Act provides for depreciation of capital assets in respect of machinery, plant or furniture etc. It does not include roads per se.

11. The issue whether roads would be included within the meaning of *'buildings'* had come up for interpretation before the Supreme Court in *Gwalior Rayon Silk Manufacturing Co. Ltd.* (supra). The Supreme Court in that case was considering facts wherein roads laid within the factory

premises were links or provided approach to the *'buildings'* as necessary adjuncts to the factory building to carry on the business activity of the assessee, held that the *'roads'* would be *'buildings'* within the meaning of Section 32 of the Act.

12. It was the submission of learned counsel for the appellant that the judgment of the Supreme Court in *Gwalior Rayon Silk Manufacturing Co. Ltd.* (supra) was peculiar to the facts of that case wherein the Supreme Court was concerned with roads built in the factory premises. According to him, the case of independent roads outside such premises has not been looked in detail.

13. It is true that the Supreme Court in *Gwalior Rayon Silk Manufacturing Co. Ltd.* (supra) was concerned with the roads within the factory premises and not the roads in general like the one with which we are concerned in this case. However, it is noticeable that *'roads'* were treated and regarded as *'buildings'*, in the given fact situation.

14. We may note here that the Supreme Court in *Indore Municipal Corporation* (supra) by distinguishing *Gwalior Rayon Silk Manufacturing Co. Ltd.* (supra) has held that roads by themselves would not constitute *'buildings'*. The Allahabad High Court also in *Noida Toll Bridge* (supra) wherein the issue primarily was whether the road in isolation can be considered as *'building'* for the purpose of granting

depreciation. The High Court after referring extensively the judgment of the Supreme Court in *Gwalior Rayon Silk Manufacturing Co. Ltd.* (supra) and also Appendix I under Rule 5 of the Rules held that the assessee company is entitled to the depreciation which was disallowed by the Assessing Officer. The depreciation was allowed on road per se i.e. toll road but at the rate prescribed and applicable to the head *'building'*.

15. On a careful consideration of the aforesaid position of law, it is noted that a perusal of the note in Appendix I as existed during the relevant assessment year so also clause 3 to Section 43, it is clear that roads referred to are roads per se without any qualification attached therewith. Had it been road adjunct to building/factory, the rule making authority would have said so or suggested so in Note (1) itself. Thus all roads whether adjunct and within a factory, or a toll road, would get covered under the said heading. There is no dispute, for a toll road operator, road is an asset used for business purposes and can claim depreciation as a *'building'*. Even otherwise, the respondent revenue does not dispute that the appellant assessee is entitled to depreciation on the toll road as a *'building'*. Rightly so, as *'buildings'* include *'roads'*. On the other hand in terms of Section 43(3), *'plant'* does not include *'buildings'*. What follows is *'plant'* does not include *'road'*. It must be

held so as the legislative intent was to include *'roads'* as *'buildings'* and not as a *'plant'*. That being the intent of the legislature, it must be held that *'road'* is a *'building'* and cannot be construed or held as a *'plant'* in any circumstance, even if the tests laid down to decide what is a *'plant'* in various judgments are fulfilled. Otherwise an anomalous situation would arise when even though *'road'* is a *'building'* which is not a *'plant'*, still the appellant is calling upon this Court to hold a *'road'* is a *'plant'*. In other words, *'building'* is not a *'plant'* and to hold to the contrary is being against the legislative intent. A special provision, will override and have pre-eminence, over a more general provision. *'Road'*, by specific stipulation would necessary allowed depreciation at rates applicable to *'building'* and cannot be treated as a *'plant'*. This is plain meaning which must be given effect. Further, inconsistency and repugnancy is to be avoided. It would be incongruous to hold that *'roads'* are *'buildings'* but under the general definition, it would satisfy the test of being a *'plant'*, then would be entitled to depreciation as a *'plant'*, in spite of being covered under the heading *'building'*.

16. The Supreme Court in *Commissioner of Income Tax-III vs. Calcutta Knitwears, Ludhiana* [2014] 6 SCC 444 has while considering an issue regarding Section 158BD which relates to *'undisclosed income'* has reiterated that when the words of the statue are clear, plain and

unambiguous, the legislative intent must be given effect to, without any hypothetical construction, so as to re-write the provision. The relevant para is reproduced hereunder:-

> *"23. Section 158BD of the Act provides for "undisclosed income" of any other person. Before we proceed to explain the said provision, we intend to remind ourselves of the first or the basic principles of interpretation of a fiscal legislation. It is time and again reiterated that the courts, while interpreting the provisions of a fiscal legislation should neither add nor subtract a word from the provisions of instant meaning of the sections. It may be mentioned that the foremost principle of interpretation of fiscal statutes in every system of interpretation is the rule of strict interpretation which provides that where the words of the statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule."*

We are conscious of the fact that, the definition of the term *'plant'* excluding *'building'* inserted with effect from 01.4.2004. One of the appeals in the batch pertains to the assessment year 2003-2004. It can be said that the said amendment in the definition of *'plant'* would not be applicable to the assessment year 2003-2004. We are of the view that the same would not make any difference as in terms of *"Note"* under the Table in Appendix I of the Rules, *'Road'* has been included to be a

'*building'* for the purpose of depreciation and the said position was in vogue much before the assessment years with which we are concerned. The amendment of 2004 was a reiteration/clarification of the position, existing in Section 32(1)(i) of the Act wherein *'buildings'* and *'plant'* have been separately referred to, so also in explanation 3(a) of the said Section. In other words, it was the intent of the legislature to construe *'buildings'* and *'plant'* separately or not to construe a *'buildings'* as a *'plant'* and vice-versa. Further the object of prescribing a lower rate of depreciation in case of *'buildings'* as compared to *'plant'* as they have higher durability. On this ground also, a *'road'* cannot be construed as a *'plant'*.

Even assuming that it is for the first time clarified/prescribed that the *'plant'* does not include *'buildings'* with effect from 01.4.2004 in cases earlier to it, a *'building'* (road in the case) can still be construed as a *'plant'*, if it satisfies the functional test as propounded in various judgments and which is the submission of Mr.Singh that the road is a Tool/Apparatus in the business of the assessee and must be construed as a *'plant'*. We note that the word '*plant'* as defined by Section 43(3) as including ships, vehicles, books, scientific apparatus and surgical equipments. The Supreme Court in *Scientific Engineering House* (supra) has held that *'plant'* would include any article or object fixed or moving,

live or dead used by a businessman for carrying on his business and it is not necessarily confined to an apparatus which is used for mechanical operations or processes or is employed in mechanical or industrial business. According to the Court, in order to qualify as *'plant'*, the article must have some degree of durability, as for instance in *Hinton vs. Maden & Ireland Ltd.* [1960] 39 ITR 357 (HL), knives and lasts having an average life of three years used in manufacturing shoes were held to be *'plant'*. The Court also referred to *CIT vs. Taj Mahal Hotel* [1971] 82 ITR 44 (SC). The respondent therein ran a hotel, and had installed sanitary and pipeline fittings in respect whereof it claimed development rebate and the question was whether the sanitary and pipeline fittings installed fell within the definition of *'plant'* given in section 10(5) of the 1922 Act which was similar to the definition given in section 43(3) of the 1961 Act. The Supreme Court approved and applied the definition of *'plant'* given by *Lindley L.J.* in *Yarmouth vs. France* [1887] 19 QBD 647, as expounded in *Jarrold vs. John Good and Sons Ltd.* [1962] 40 TC 681 (CA), to hold that sanitary and pipeline fittings fell within the definition of *'plant'*. The Supreme Court observed that the House of Lords had held a dry dock fulfilled the function of a *'plant'*, posed itself a question, does the article fulfil the function of a *'plant'* in the assesse's trading activity? Is it a tool of his trade with which he carries on his

business. If the answer is in the affirmative, it will be a *'plant'*. Applying the aforesaid test to the drawings, designs, charts, plans, processing data and other literature comprised in the "documentation service" as specified in clause 3 of the agreement, the Supreme Court held that it will be difficult to resist the conclusion that these documents as constituting a book would fall within the definition of *'plant'*. It cannot be disputed that these documents regarded collectively would have to be treated as a "book", for, the dictionary meaning of that word is nothing but "a number of sheets of paper, parchment, etc., with writing or printing on them, fastened together along one edge, usually between protective covers; literary or scientific work, anthology, etc. distinguished by length and form from a magazine, tract, etc." (vide Webster's New World Dictionary). The Supreme Court further held that from its physical form, the question was whether these documents satisfy the functional test indicated above. Obviously, the purpose of rendering such documentation service by supplying these documents to the assessee was to enable it to undertake its trading activity of manufacturing theodolites and microscopes and there could be no doubt that these documents had a vital function to perform in the manufacture of these instruments; in fact it was with the aid of these complete and up-to-date sets of documents that the assessee was able to commence its

manufacturing activity and these documents really formed the basis of the business of manufacturing the instruments in question. True, by themselves, these documents did not perform any mechanical operations or processes but that cannot militate against their being a *'plant'* since they were in a sense that the basic tools of the assessee's trade having a fairly enduring utility, though owning to technological advances, they might or would in course of time become obsolete. The Supreme Court, therefore, clearly of the view that the capital asset acquired by the assessee, namely, the technical know-how in the shape of drawings, designs, charts, plans, processing data and other literature falls within the definition of *'plant'* and is, therefore, a depreciable asset.

17. The Supreme Court in *Anand Theatre* (supra) considered the question whether *'building'* which was used as a hotel or a cinema theatre could be considered to be an apparatus or a tool for running the business so that it could be termed as a *'plant'* and depreciation could be allowed accordingly or whether it remains a *'building'* wherein either hotel business or business for cinema could be conducted? The Supreme Court after considering various judgments held that *'building'* used for running hotel or carrying on cinema theatre cannot be held to be a *'plant'* inter-alia for the following reasons:-

(a) The scheme of Section 32 as discussed above clearly

envisages separate depreciation for a building, machinery and plant, furniture and fittings, etc. The word "plant" is given inclusive meaning under Section 43(3) which nowhere includes buildings. The rules prescribing the rate of depreciation specifically provide grant of depreciation on buildings, furniture and fittings machinery and plant and ships. Machinery and plant include cinematograph films and other items and the building is further given a meaning to include roads, bridges, culverts, wells and tubewells.

(b) *In the case of Taj Mahal Hotel [1971] 82 ITR 44, this Court has observed that the business of a hotelier is carried on by adapting building or premises in suitable way, meaning thereby building for a hotel is not apparatus or adjunct for running of a hotel. The Court did not proceed to hold that a building in which the hotel was run was itself a plant, otherwise the Court would not have gone into the question whether the sanitary fittings used in bathroom was plant.*

(c) *To differentiate a building for grant of additional depreciation by holding it to be a "plant" in one case where the building is specially designed and constructed with some special features to attract the customers and a building not so constructed but used for the same purpose, namely, as a hotel or theatre would be unreasonable.*

18. In *CIT vs. Dr. B.Venkata Rao* [2000] 243 ITR 81, the Supreme

Court held that if it was found that the *'building'* or structure constituted an apparatus or a tool of the taxpayer by means of which business activities were carried on, amounted to a *'plant'* but where the structure played no part in the carrying on these activities but merely constituted a place where they were carried on, *'building'* could not be regarded as a *'plant'*.

19. In *Karnataka Power* case, the Supreme Court while considering the appeal filed by the revenue whereby the authorities below has held the generating station to be a *'plant'* was of the view that its judgment in *Anand Theatre* (supra) cannot be read so broadly and held as under:-

> *"It is difficult to read the judgment in the case of Anand Theatres [2000] 244 ITR 192 (SC) so broadly. The question before the Court was whether a building that was used as a hotel or a cinema theatre could be given deprecation on the basis that it was a 'plant' and it was in relation to that question that the court considered a host of authorities of this country and England and came to the conclusion that a building which was used as a hotel or a cinema theatre could not be given depreciation on the basis that it was a plant. We must add that the court said: "To differentiate a building for grant of additional depreciation by holding it to be a 'plant' in one case where a building is specially designed and constructed with some special features to attract the customers and the building not so constructed*

but used for the same purpose, namely, as a hotel or theatre would be unreasonable." This observation is, in our view, limited to buildings that are used for the purposes of hotels or cinema theatres and will not always apply otherwise. The question, basically, is a question of fact, and where it is found as a fact that a building has been so planned and constructed as to serve an assessee's special technical requirements, it will qualify to be treated as a plant for the purposes of investment allowance. In the instant case, there is a finding by the fact-finding authority that the assessee's generating station building is so constructed as to be an integral part of its generating system. It must, therefore, be held that it is a "plant" and entitled to investment allowance accordingly. The third question is answered in the affirmative and in favour of the assessee. The civil appeal is dismissed. No order as to costs."

(emphasis supplied)

20. Thus a structure constructed for special technical needs and requirement was *'plant'* or *'machinery'* like a generator station building, could be treated as a *'plant'*. We note that in some of the judgments relied upon by the appellant assessee, various High Courts have considered this aspect. In *Nowrangroy Metals Pvt. Ltd.* case (supra), the Gauhati High Court has held as under:-

"In the present case, applying the tests we have to ascertain whether the building in question is a plant or not for the

assessee to claim the higher rate of depreciation. The report of the architect engineer specifically mentions that the mill building is designed in such a manner that it holds the entire plant and machinery and beams and columns are erected to hold the entire load of plant and machinery on each floor. The report also states that all the floors are constructed with specifically reinforced RCC materials as per technical requirements and the structure is made with heavy reinforced steel and concrete to hold the weight of heavy machines installed in each floor with a load bearing capacity of one ton per square meter and that all the four walls of the structure and ceiling are fitted with flow pipes and other electrical fittings and that the plant cannot be held and run without the said specially designed structure. It can be said that the structure holds the entire plant and machinery and therefore is a integral part of the plant. From this report, it is clear that the building has been constructed specifically for carrying out the manufacturing of atta and flour. The manufacture activities cannot be carried out in any other building except in a building specifically designed for that purpose."

21. Similarly in *Kamla Selvaraj* (supra) the Madras High Court considering the case of a doctor who claimed extra shift allowance of depreciation treating the business of her nursing home as a *'plant'* for the assessment year 1983-84, the Assessing Officer disallowed the claim on

the ground that it is not a *'plant'*, which order was upheld by CIT (Appeals) but the Tribunal concluded that the assessee is entitled to extra shift allowance by holding nursing home as a *'plant'*. The High Court by holding that the Tribunal had not considered based on evidence what was the area available in the assessee's nursing home which should be construed as a *'plant'* and what was the remaining area which would come within the meaning of the word *'building'* not attracting the definition of word *plant*', remanded the matter to the Tribunal for fresh consideration.

22. This Court in *R.C. Chemicals* (supra) has evolved the following principles:-

> *"(a) The definition of 'plant' in section 43(3) should be given a wide meaning as it is an inclusive definition.*
>
> *(b) All buildings are not 'plant' despite the dictionary meaning which includes buildings; but a building or structure is not per se to be excluded from the ambit of the expression 'plant'.*
>
> *(c) If the concrete construction or building is used as the premises or setting in which the business is carried on in contradistinction to the fulfilling of the function of a plant, the building or construction or part thereof is not considered a plant. The true test is whether it is the means of 'carrying on the business' or the location for so doing.*

(d) In order, for a building or concrete structure, to qualify for inclusion in the term 'plant', it must be established that it is impossible for the equipment to function without the particular type of structure.

(e) The particular apparatus or item must be used for carrying on the assessee's business and must not be his stock-in-trade. The matter has to be considered in the context of the particular business of the assessee, e.g., books are a lawyer's plant but a bookseller's stock-in-trade."

23. We may only state here that the judgment of this Court in R.C Chemicals case (supra) must be read in the light of the judgment of the Supreme Court in *Anand Theatre* (supra) and *Karnataka Power* (supra). The Court applied the aforesaid principles to the facts, wherein the assessee was involved in the business of manufacturing saccharine in a *'building'* which according to the assessee would come within the expression *'plant'*. Rejecting the stand, this Court was of the view that mere setting, albeit a convenient one where the business of manufacturing is carried on, it has not been established that the manufacture of saccharine was not possible without the particular features said to have been incorporated in the *'building'* nor is there any finding to this effect. A *'building'* free from atmospheric vagaries might have certain advantages as compared with a normal construction but in

the facts of the present case remained the space or shelter where the business of manufacturing saccharine was carried on as opposed to the means. It is noted that the counsel for the assessee conceded that there are other companies and concerns which were carrying on the business of manufacturing saccharine in normal buildings. The Court held that the correct query in the present context appears to be whether the particular features incorporated in the *'building'* in question were essential to the manufacturing process and the functioning of the equipment making it an integral part of the *'plant'*. According to this Court, the answer being in the negative it is apparent that the *'building'* in question remained the location and was not converted into the means for carrying on the business.

24. In *Astra IDL Ltd.* (supra), wherein the Karnataka High Court on a finding of the Tribunal that the *'building'* was used only for manufacturing and supplying medicine and no other business has held the *'building'* to be a *'plant'*. According to the High Court, it constituted an apparatus and a tool for the assessee by means of which business activities were being carried out.

25. The Allahabad High Court in *Tulsi (SK) & Sons* case (supra) has held a cinema *'building'* to be a *'plant'* by holding that in order to find out whether a *'building'* or structure or part thereof constitutes a *'plant'*,

the functional test must be applied. If it is found that *'building'* or structure constitute an apparatus or a tool of the taxpayer by means of which the business activities are carried on, it would amount to *'plant'* but where the structure plays no part in the carrying on those activities but merely constitute a place within which they are carried on the *'building'* cannot be regarded as a *'plant'*.

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'*.

27. To sum up it is clarified that 'plant' as defined and understood for tax purposes means tool or equipment used for purposes of business or profession. Toll road would not be a plant in that sense, for, it is a capital asset which when used by any person, who makes payment for the said use, generates and results in accrual of income. It is a capital asset which is the very business of the assessee and not a implement or a tool used by the assessee for his business. In the facts of the case, we are of the view that the toll road would not qualify as a *'plant'* so as to entitle the assessee a higher rate of depreciation. We answer the question in favour

of the revenue and against the appellant. The appeals are dismissed.

28. No costs.

(V.KAMESWAR RAO)
JUDGE

(SANJIV KHANNA)
JUDGE

NOVEMBER 05, 2014
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