

**19<sup>th</sup> KTBA CASE LAW UPDATE  
(September 26, 2023)**

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**Dear Members,**

A brief update on a recent judgment by the Appellate Tribunal Inland Revenue, Islamabad Bench on **“Tax Depreciation on Concession Assets is Admissible ATIR specifies the theories of Legal Ownership Section 22 of Income Tax Ordinance, 2001”**, is being shared with you for your knowledge. The order has been attached herewith the update.

This update is in line with the efforts undertaken by our **“CASE LAW UPDATE COMMITTEE”** apprise our Bar members with important court decisions.

You are equally encouraged to share any important case law, which you feel that should be disseminated for the good of all members.

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**(Zafar Ahmed)**

President

September 26, 2023

**(M. Mehmood Bikiya)**

Hon. General Secretary

September 26, 2023

**19<sup>th</sup> KTBA CASE LAW UPDATE**  
**(September 26, 2023)**

**TAX DEPRECIATION ON CONCESSION ASSETS IS ADMISSIBLE  
ATIR SPECIFIES THE THEORIES OF LEGAL OWNERSHIP  
SECTION 22 OF INCOME TAX ORDINANCE, 2001**

**Appellate Authority:** APPELLATE TRIBUNAL INLAND  
REVENUE

**Appellant:** Punjab Ring Road Infrastructure Management &  
Engineering (Pvt) limited.

Section: 23 of ITO, 2001

Detailed Order issued 17th July 2023, ITA No.597-  
600/18/2023.

**Background:**

The taxpayer built a road under a BOT (Built, operate and transfer) arrangement. The Commissioner denied the claim of Tax depreciation based on non-ownership of the road by the company. The taxpayer appealed in the Appellate Tribunal, which ruled in its favour, stating that the possession, use, and management rights constituted ownership. The decision has clarified "ownership" for claim of depreciation expense under tax law.

**First Ruling of The Court:**

The Tribunal found that the appellant taxpayer met the criteria to be considered as "owner" of the "concession assets". This is decided based on the appellant's sole right to use, own, manage, enjoy, and dispose of the assets. Despite the lack of a clear definition of "ownership" under the Ordinance, the Tribunal delved into number of source materials for its legal guidance in other tax regimes outside Pakistan and extrapolated the necessary legal parlance of the term "owner". The appellant's status as the owner of the concession assets is, therefore, premised on number of dictionaries' meanings of the word "ownership" whereby since all customary ownership rights, such as those for use, possession, management, pleasure, and disposal, belonged to the appellant and that they had the power to levy tolls, maintain asset ownership, supervise administration, reap the rewards of revenue earned, and eventually sell the assets after the 25-year tenure, the Tribunal upheld the appellant's identification as none other than "owner" under Section 22(15) of the Ordinance.

**Second Ruling of the Court**

The Tribunal rejected the DR claim that the appellant's inability to transfer concession assets through inheritance or sale negated the ownership. They noted that these rights aren't inherent markers of ownership.

The Tribunal explained that lacking these rights doesn't necessarily void the appellant's ownership of the assets. They illustrated how passing assets through inheritance doesn't universally denote ownership, citing subletting by a tenant. Similarly, selling assets doesn't solely signify ownership; a licensee can sell a license without owning the underlying asset. The Tribunal confirmed that though these transfer rights matter, they're not crucial for ownership.

**Third Ruling of the Court**

The Tribunal also refuted the learned DR assertion that the appellant lacked the right to destroy concession assets. The Tribunal asserted that this right wasn't vital for ownership, and the appellant could still qualify as the owner without it. They highlighted that the right to destroy assets isn't always linked to ownership—tenants, for instance, can't destroy rented property. Similarly, licensees lack the right to destroy licensed assets. The Tribunal affirmed that the right to destroy isn't an intrinsic ownership aspect; it's significant but not essential. Hence, the appellant could still be seen as the owner of the concession assets despite not having this right. Considering these verdicts, the Tribunal upheld the appellant's appeal, allowing its depreciation claim.

**Conclusion and Comments**

The taxpayer is eligible to assert depreciation on the expenditure related to the concession assets pertaining to the Lahore Ring Road (Southern Loop) undertaking. Despite the obligation to return these assets to the government after the BOT period, the Appellate Tribunal affirmed the company ownership of the assets. The Tribunal's rationale lies in company's possession, utilization, and management rights over the concession assets throughout the BOT period, which adequately establish ownership for taxation purposes.

**DISCLAIMER:**

This update has been prepared for KTBA members and carries a brief narrative on a detailed Judgment and does not contain an opinion of the Bar, in any manner or sort. It is therefore, suggested that the judgment alone should be relied upon. Any reliance on the summary in any proceedings or project would not be binding on KTBA.

**Dear Members,**

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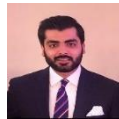
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Best regards

**(Zafar Ahmed)**  
President

**(M. Mehmood Bikiya)**  
Hon. General Secretary

**(Shams M. Ansari)**  
Convener: Case Law Update Committee

**APPELLATE TRIBUNAL INLAND REVENUE, DIVISION BENCH-I,  
ISLAMABAD**

**ITA No.597/IB/2023  
ITA No.598/IB/2023  
ITA No.599/IB/2023  
ITA No.600/IB/2023  
(Tax Years 2018 to 2021)  
\*\*\*\*\***

Punjab Ring Road Infrastructure  
Management & Engineering (Pvt)  
Limited. Gate No.13, National  
Hockey Stadium, Gulberg-III,  
Lahore, Gulberg Town.

Appellant

**VS**

Commissioner Inland Revenue  
Zone, LTO, Islamabad.

Respondent

Appellant by:

Barrister Dr. Mazhar Ilahi assisted by  
Mr. Muzzamil Rasheed, Advocate

Respondent by:

Ms. Sobia Mazhar, DR


Date of Hearing:

21.06.2023

Date of order:

17.07.2023

**ORDER**

 **M. M. AKRAM (JUDICIAL MEMBER):** The titled appeals have been filed by the appellant taxpayer against the Appellate Orders Nos.323, 324, 327 & 328/2023 all dated 01.02.2023 passed by the learned Commissioner Inland Revenue (Appeals-I), Islamabad for the tax years 2018 to 2021 respectively on the grounds as set forth in the memo of appeals. The facts of the case and the issues involved in all these appeals are similar, therefore, these appeals are being decided through this common order.

2. The brief facts culled out from the record are that the returns of income for tax years 2018 to 2021 were e-filed by declaring the following results;

	2018	2019	2020	Amounts in Rs 2021
Taxable Income/(Loss)	(5,424,006,766)	(2,186,728,053)	(2,337,417,078)	(1,398,027,884)

The case of the appellant taxpayer was selected for audit under section 177 of the Income Tax Ordinance, 2001 ("**the Ordinance**") for the tax year 2018. The audit proceedings culminated in the issuance of a show cause notice dated 02.04.2021



under section 122(1) read with section 122(9) of the Ordinance. In compliance, the appellant submitted its reply. In respect of tax years 2019, 2020, and 2021, notices dated 15.03.2022, 11.05.2022, and 11.05.2022 respectively under section 122(5A) were issued by the Additional Commissioner Inland Revenue (**Add CIR**). The order under section 122(1)/(9) for tax year 2018 was issued on 27.05.2021 by the DCIR, whereas Orders under section 122(5A) for tax years 2019, 2020, and 2021 were issued on 25.04.2022, 01.05.2022 and 01.05.2022 respectively (collectively referred to as the "impugned Orders"). According to these orders, an addition was made to total income on account of Tax Depreciation on concession assets for tax years 2018 to 2021. Addition on account of Operation & Maintenance cost and Management Fee was made only in the total income for tax year, 2018. A summary of these additions is tabulated below:-



	2018	2019	2020	2021
Additions				
Tax Depreciation	5,144,728,033	1,703,169,881	1,566,439,226	1,419,680,457
Operation & Maintenance Cost & Management Fee	319,003,093	-	-	-
Total Income/(Loss) assessed.	41,007,480	(481,097,657)	(831,123,777)	21,652,574

Feeling aggrieved, the appellant taxpayer filed appeals before the learned Commissioner Inland Revenue (Appeals-I), Islamabad who vide Appellate Orders Nos.323, 324, 327 & 328/2023 all dated 01.02.2023 upheld the addition on account of disallowance of Tax Depreciation in respect of Road, whereas addition in respect of Operation & Maintenance Cost and Management Fee was remanded back to assessing officer with certain directions. Still feeling aggrieved with these orders, the taxpayer has preferred appeals before this forum and assailed the impugned order on a number of grounds.

3. This case came up for a final hearing on 21.06.2023. The only pivotal issue involved in the instant appeal is the disallowance of depreciation on concession assets claimed by the appellant under section 22 of the Ordinance. This issue is

not a straightforward point; hence, we shall deal with the submission made by both sides by following a staggered approach, that is, we shall address each of the points of submissions, while giving our findings on the same, before moving on to the next submission on the point.

### **INTRODUCTION & BACKGROUND OF THE CASE**

3.1 The appellant taxpayer M/s Punjab Ring Road Infrastructure Management Engineering (Private) Limited ("**PRIME**") was incorporated on June 16, 2016, with the Securities & Exchange Commission of Pakistan (SECP). The main objective of the Company was to construct the Lahore Ring-Road Southern Loop (SL I & II) on **Build, Operate, and Transfer (BOT)** Mode for a period of 25 years. The formal Concession Agreement (CA) in this regard was signed by and between Lahore Ring Road Authority (**LRRA**) and PRIME on June 22, 2016. The worthy Chief Minister of Punjab inaugurated the Project on December 22, 2017.

### **Background of the Lahore Ring Road Project**

3.2. In March 2016, the Lahore Ring Road Authority ("LRRA") published a request for proposal for the construction of Lahore Ring Road (Southern Loop), a 6- Lane Road of 22.4 KM. The project was based on Build-Operate-Transfer (BOT) model and as per Punjab Public Private Partnership Act, 2014 ("Punjab PPP Act"). The estimated cost as per Engineer was Rs. 25,000 Mn.

3.3. LRRA is an autonomous body under the Communications and Works Department of the Government of Punjab. The Authority was established in 2011 under the Lahore Ring Road Authority Act, 2011, to overview the construction, operation, and maintenance of the Ring Road.

3.4. In response to RFP issued by LRRA, Frontier Works Organization submitted the lowest bid for the construction of the road at 23.476 Mn and was declared the successful bidder. Accordingly, FWO incorporated a special



purpose vehicle i.e., the taxpayer company namely PRIME, as required by the project model adopted by LRRRA. The SPV/PRIME is owned by both the LRRRA and FWO. A formal Concession Agreement was signed between LRRRA and PRIME on June 22, 2016. It is pertinent to note that the taxpayer is not a construction contractor rather it only collects toll revenue to recover its construction and operations costs. The Toll rate structure is derived from the financial model based on the bid Cost and is determined in accordance with the terms and conditions of LRRRA.

- 3.5. The construction of the road was completed in 2017. Since the completion of road construction, the taxpayer company continues to operate and maintain the road and derives revenue from Tolls paid by road users.

#### **SUBMISSIONS OF PARTIES**

4. The Appellant claimed that it was the owner of the "concession assets" and the entire cost incurred for construction thereof was capitalized by the Appellant in its books during which the construction of the toll road was completed. As the tax year 2018 under consideration was the first year when the road became operational, the Appellant claimed depreciation in the tax years under consideration on the capitalized cost of the concession assets under section 23 of the Ordinance. The Appellant also filed necessary details of the claim of depreciation and a note was appended to the depreciation schedule stating that though the Appellant was entitled to a claim of depreciation on concession assets but the right to claim depreciation is reserved by the revenue department. The Appellant relied upon the standard concession agreement and Clause 14.10.2 therein reads that 'subject to section 14.10.1, the Concessionaire shall retain all legal and beneficial rights and ownership on the Concession Assets (including the Construction Works) as and when the same are performed and/or completed until the transfer Date.' (Emphasis is supplied by us). However, the department

has disallowed the said deduction on the single ground that the said "concession assets" do not fall within the definition of the eligible "depreciable assets" as defined in subsection (15) of Section 22 of the Ordinance. In this respect, the sole premise of the department is that the said "**concession assets**" are not "**owned by**" the appellant, which admittedly is an essential feature of the term "depreciable assets". It is admitted position that there is no further impediment in granting the allowance on account of the above-said depreciation if the Appellant is declared as "owner" of the concession assets.

It is admitted that the terms "owned", "owner" or "ownership" are not defined in the Ordinance. We, therefore, shall have to have recourse to external aid for the purposes of interpretation of the term "owner". In this respect, the learned DR relies on definitions from different dictionaries to conclude that the Appellant cannot be termed as the "owner" of the "concession assets".

**I. Websters New World Dictionary, 2006 Edition**

**Ownership.** The total body of rights to use and enjoy property, to pass it onto someone else as an inheritance, or to convey it by sale. Ownership implies the right to possess property, regardless of whether or not the owner personally makes constructive use of it.

**II. Oxford Dictionary of Law, 5<sup>th</sup> Edition**

**Ownership.** The exclusive right to use, possess and dispose of property.

**III. Black's Law Dictionary, 8<sup>th</sup> Edition**

**Ownership.** The bundle of rights allows one to use, manage and enjoy the property, including the right to convey it to others. Ownership implies the right to possess a thing, regardless of any actual or constructive control. Ownership rights are general, permanent and heritable.

**IV. Sweet and Maxwell's A Concise Law Dictionary for Students and Practitioners, 1927 Edition**

**Ownership.** The right to the exclusive enjoyment and possession of a thing; a right in rem. It involves the right of the user, of taking produce,

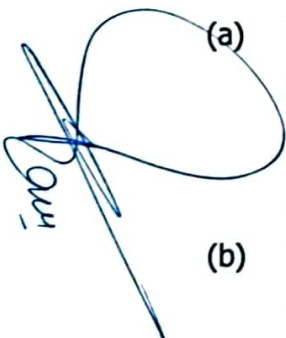


and of destruction. Ownership is absolute or restricted, i.e., it may be limited to a lesser or greater extent, either voluntarily or under compulsion of law, as, for example, where there are several joint owners, or where payment of a sum of money is charged on the land, or an easement is held to exist over it.

Based on the above definitions, she submitted that the Appellant does not have the following permanent and heritable ownership rights: -

- (a) To pass the concession assets/ancillary facilities onto someone else as an inheritance or to convey it by sales.
- (b) To dispose of the property.
- (c) To convey property to others.
- (d) To destroy owned assets.

In expanding on her submissions, the learned DR has made the following submissions: -

- 
- (a) The concession assets could not have been passed on in inheritance by the appellant and/or even sold/disposed of, which is a key component to claim "ownership" of the concession assets.
  - (b) Under clause 24.5 of the agreement the "concession assets" shall be transferred to the Lahore Ring Road Authority on the transfer date for a sum of Pakistani Rupees one only. Hence, the Appellant does not have any "permanent right" over the concession assets as the same have to be handed over to the Employer, the Lahore Ring Road Authority upon the conclusion of the concession period of 25 years along with all rights and amenities.
  - (c) In the case of a "complete ownership" of assets, there is no requirement/compulsion to hand over physical possession along with all rights and liabilities of an asset to another entity/party after the conclusion of a certain period.
  - (d) The appellant does not have the mandate to sell or otherwise dispose of the concession assets as it is obliged to hand over the same to the Lahore Ring Road Authority after 25 years.

- (e) The appellant does not have the right to destroy such property therefore, the Appellant is not the owner of the concession assets.

5. In response to the above submissions of the learned DR, the Appellant representative Dr. Ilahi submitted that the Appellant meets the requirements of each of the individual definitions as set out by the department in their distinct capacities. However, the department has followed an unfair approach by joining all the definitions and devising its own combined legal test.-He further submitted that he said definitions are borrowed from English Legal System, whereas in applying the said definitions, to jurisdiction in Pakistan, that has to be seen through the prism of our local legislation and precedents in Pakistan.

6. In response to the submissions made by Dr. Ilahi, she submitted that firstly, the Appellant could have been considered as owner, but for, the right to sell the property to any other person except the "Lahore Ring Road Authority". Secondly, the Appellant does not have the authority to "destroy" the "concession assets".

Thirdly, the Appellant cannot devolve the said assets to another person by way of inheritance. Fourthly, the right to transfer assets to the "Lahore Ring Road Authority" is bad in law, for the price of Rupees One is *malafide* and aimed at defeating the provisions of the law relating to stamp duty. We are grateful to the learned DR who helped us to narrow down the point of dispute with regards to the main issue of the Appellant meeting the requirement of the definition of "ownership" by the Appellant but for the above-quoted submissions of the learned DR. In response, Dr. Ilahi reiterated that the definition base submissions of the learned DR are to be looked at, through the lens of the statutory regime in Pakistan. In this respect, he candidly relied upon section 10 of the Transfer of Property Act, 1882. To quote: -



**"10. Condition restraining alienation.** Where property is transferred subject to a condition or limitation **absolutely restraining** the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him:

Provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muslim or Buddhist) so that she shall not have power during her marriage to transfer or change the same or her beneficial interest therein." [emphasis added by the learned AR]

7. In reading the above definition, Dr. Ilahi followed an "unless approach" and emphasized that a restriction on alienation "unless is absolute" is permissible under the legislative regime in Pakistan. Whereas, in the instant case, the restriction on alienation is not absolute, rather, under clause 24.5 of the concession agreement, the Appellant is allowed to transfer concession assets to the Lahore Ring Road Authority. Hence, it is unlawful and against Section 10 of the Transfer of Property Act to exclude the Appellant to be termed as "owner" of the "concession assets" for the reason that there is a restriction on the Appellant to sell the said "concession assets" to others except the Lahore Ring Road Authority. He further submitted that the definition from Websters New World Dictionary, 2006 Edition as relied upon by the learned DR, also defines the ownership as: -

"The total body of rights to use and enjoy a property, to pass it onto someone else as an inheritance or to convey it by sale."

[emphasis added by the learned AR]

In reading the above definition, the learned AR for the Appellant emphasized that the transferor has to have a right to transfer the property/assets to, at the very least, to only "someone" apart from itself. He further submitted that the above definition is squarely in line with the spirit of the above-quoted Section 10 of the Transfer of Property Act, 1882. On the same parlance, he also read from the



above-quoted definition of "ownership" from Sweet and Maxwell: A Concise Law Dictionary for Students and Practitioners, 1927 Edition, as relied upon by the learned DR. He submitted that the:

"Ownership is absolute or restricted, i.e., it may be limited to a lesser or greater extent, either voluntarily or under compulsion of law, as, for example, where there are several joint owners, or where payment of a sum of money is charged on the land, or an easement is held to exist over it."

The AR submitted that any restriction in relation to a property (or "concession assets" as set out in clause 24.5 of the concession agreement) does not disqualify the Appellant to be the "owner" of the property/concession assets. He further submitted that in Punjab, there is a statutory prohibition on the transfer of immovable property as defined in section 2(a) of the Punjab Pre-emption Act, 1991 to a person other than pre-emptor as defined under section 2(b) unless certain conditions as set out in the said law are not met with. Hence, the conditions or restrictions on the right of the transferor to transfer the said property to a buyer is not a concept alien to the legis-prudence of Pakistan in both, the secular (TPA, 1882) as well as the Islamic regimes (PPA, 1990). He, therefore, submitted that the argument put forward by the learned DR that a transferor cannot be held to be an owner of an immovable property unless the said transferor has the unrestricted and absolute right to transfer the said property to everybody does not fit in the statutory regime of Pakistan. Hence, he submitted, the submission made by the learned DR that the Appellant cannot be termed as the "owner" of the "concession assets" because there is only some restriction of further alienation is unlawful being violative of Section 10 of the Transfer of Property Act, 1882.

8. In respect of the second submission of the learned DR that the Appellant is not considered the owner of the "concession assets" because the Appellant does not have the right to "destroy" the "concession assets". In response, the learned

AR for the Appellant, Dr. Ilahi submitted that there is no prohibition under the "concession contract" implying such a restriction. However, had there been any such a clause in express terms, it would have been considered as an "objective against public policy" as envisaged under Section 23 of the Contract Act, 1872. He submitted invited us to consider the "public nature" of the "concession assets", the destruction of which involves serious criminal consequences. He submitted that the submission of the learned DR that the Appellant is not considered an "owner" of the "concession assets" which in their very nature are "public assets" because it does not have the right to destroy them, is wholly insane. Dr. Ilahi further argues that this submission is regardless of the fact that though there is no prohibition in the concession agreement restraining the Appellant to demolish and rebuild the concession assets for the benefit of the project. Hence, he submitted that the submission made by the DR that the Appellant cannot be termed as "owner" of the "concession assets" because he does not have the authority to destroy them is unreasonable as well as irrational.

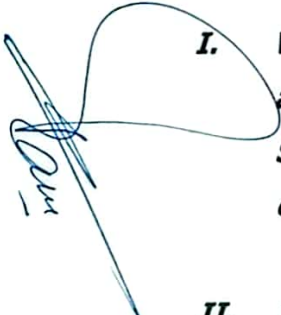
9. In respect of the third submission of the learned DR regarding the fact that the Appellant cannot devolve the said assets to another person by way of inheritance, Dr. Ilahi referred to page 1 of the concession agreement, where the Appellant is defined to include its "successor in interest". In this respect, he further submitted that, unlike the inheritance by a person having flesh and blood, whose inheritance is governed under Muslim Personal Law, the inheritance of a corporate entity such as the Appellant is regulated by the provisions of the legislation governing the dissolution of corporate entities in Pakistan. Hence, he submitted that the submission made by the DR that the Appellant cannot be termed as "owner" of the "concession assets" because it cannot inherit the "concession assets" is against the facts and the law.



10. In respect of the fourth submission of the learned DR regarding the inadequacy of consideration for the transfer of the "concession assets", the AR submitted that it is an established principle of the law that the inadequacy of the consideration does not, by itself render a sale or transfer invalid. He further submitted that such a transaction is regarded as one in which the doctrine of "lucky purchasers" squarely applies. Dr. Ilahi relied on the case titled **Official Receiver of Salem v Chinna Goundan and Another** reported in AIR 1957 Madras 630. Hence, he submitted that the submission made by the DR that the Appellant cannot be termed as "owner" of the "concession assets" because the consideration for its further transfer is inadequate and unlawful.

### **ISSUES/QUESTIONS**

11. Based on the grounds of appeal, the following questions emerge from the record and the arguments advanced by the parties for our determination: -



***I. Whether the Appellant is the owner of the "concession assets" within the meaning of sub-section (15) of Section 22 of the Income Tax Ordinance, 2001 and it is entitled to claim depreciation thereon?***

***II. If the answer to the above question is in the negative, against the appellant then whether the Appellant was entitled to amortize the expenses incurred for the "concession assets" within the meaning of section 21(n) read with section 24 of the Income Tax Ordinance, 2001?***

***III. Whether a plea not taken below by the appellant can be raised before this Tribunal?***

### **OUR FINDINGS**

12. We have heard the arguments of both sides, perused the record, and framed the issues involved in this case. Our issue-wise findings are as follows:-



**Question No. 1**

13. The principal controversy revolves around the eligibility of the Taxpayer to claim depreciation under section 22(15) of the Ordinance, reproduced below for ready reference:

**22. Depreciation.—** (1) Subject to this section, a person shall be allowed a deduction for the depreciation of the person's depreciable assets used in the person's business in the tax year.

....

(15) In this section, —

"depreciable asset" means any tangible movable property, immovable property (other than unimproved land), or structural improvement to immovable property, **owned** by a person that —

(a) has a normal useful life exceeding one year;

(b) is likely to lose value as a result of normal wear and tear, or obsolescence; and 70

(c) is used wholly or partly by the person in deriving income from business chargeable to tax,

but shall not include any tangible movable property, immovable property, or structural improvement to immovable property in relation to which a deduction has been allowed under another section of this Ordinance for the entire cost of the property or improvement in the tax year in which the property is acquired or improvement made by the person; and

"structural improvement" in relation to immovable property, includes any building, road, driveway, car park, railway line, pipeline, bridge, tunnel, airport runway, canal, dock, wharf, retaining wall, fence, power lines, water or sewerage pipes, drainage, landscaping or dam:

Provided that where a depreciable asset is jointly owned by a taxpayer and an Islamic financial institution licensed by the State Bank of Pakistan or Securities and Exchange Commission of Pakistan, as the case may be, pursuant to an arrangement of *Musharika* financing or diminishing *Musharika* financing, the depreciable asset shall be treated to be wholly owned by the taxpayer. **[Bold and underlined for emphasis]**


It can be seen from the underlined term "owned" that for a claim of depreciation to be valid, the pre-condition is that the Taxpayer must own a depreciable asset.

14. To answer the above question, we must peruse the terms of the Concession Agreement.

**14.10 TITLE TO PROJECT SITE, CONSTRUCTION WORKS AND CONCESSION ASSETS**

14.10.2 Subject to Section 14.10.1, the Concessionaire shall retain all legal and beneficial rights and ownership on the Concession Assets (including the Construction Works) as and when the same are performed and/or completed until the Transfer Date.

14.10.3 On the Transfer Date, the Concessionaire shall transfer the ownership rights to the Concession Assets to the LRRRA and transfer the Class B Shares (if any) to the LRRRA in accordance with the terms of this Agreement.

 15. Having perused the terms of the Concession Agreement, it becomes clear that the ownership of concession assets vests with the Appellant. However, we cannot stop here. It is necessary to see if the statutory test of ownership applied by courts is satisfied or not. To begin with, Revenue's reliance on the dictionary meaning of *ownership* is misplaced. There is a liberal test in place for the determination of ownership for the purposes of a valid depreciation claim under the Income Tax Laws. It requires, the fulfillment of 3 conditions:

- i. holding the property to the exclusion of others;
- ii. exercising dominion over the property; and
- iii. having the right to use and occupy the property.

16. This test was developed by Indian Supreme Court in the cases of **CIT v. Podar Cement**, (1997) 226 ITR 625 (SC); and **Mysore Mineral v. CIT**, (1999) 239 ITR 775 (SC).

16.1 In *Podar Cement (Supra)*, it was held:-

"64. We are conscious of the settled position that under the common law owner means a person who has no valid title legally conveyed to



him after complying with the requirements of law such as the Transfer of Property Act, Registration Act, etc. But in the context of Section 22 of the Income-tax Act having regard to the ground realities and further having regard to the object of the Income-tax Act, namely, 'to tax the income', we are of the view, the 'owner' is a person who is entitled to receive income from the property in his own right."

16.2 In *Mysore Mineral (Supra)*, it was held:-

"14. In our opinion, the term owned as occurring in Section 32(1) of the Income-tax Act, 1961 must be assigned a wider meaning. Anyone in possession of the property in his own title exercising such dominion over the property as would enable others being excluded therefrom and having the right to use and occupy the property and/or to enjoy its usufruct in his own right would be the owner of the buildings though a formal deed of title may not have been executed and registered as contemplated by Transfer of Property Act, Registration Act, etc. 'Building owned by the assessee' the expression as occurring in Section 32(1) of the Income-tax Act means the person who having acquired possession over the building in his own right uses the same for the purposes of the business or profession though a legal title has not been conveyed to him consistently with the requirements of laws such as Transfer of Property Act., and Registration Act, etc. but nevertheless is entitled to hold the property to the exclusion of all others."

16.3. This test was applied and relied upon by this Tribunal in the case of, ***Saudi Pak v. CIR***, 2016 PTD 1519 (Trib). A leasehold owner was allowed to claim depreciation under the Ordinance, even if its ownership was only symbolic.

"11.19 The corollary which follows on consideration of the (1997) 226 ITR 625 (SC) along with (1999) 239 ITR 775 (SC), is that for the purposes of section 32(1) the word "owner" is to be assigned a wider meaning so that anyone in possession of such property in his own title exercising such dominion over the property as would enable others as being excluded therefrom and having a right in his own right would be the owner of building for the purpose of section 32(1) notwithstanding



the fact that a formal deed of title may not have been executed and registered in his name."

17 Recently, in the case of **Principal Commissioner of Income Tax v. GVK Jaipur Expressway Ltd.** [2018] 100 Taxmann.com 96 (SC), the Indian Supreme Court upheld the decision of the Rajasthan High Court in favour of the taxpayer. The claim of depreciation on public roads was allowed. The test of ownership developed by the Indian Supreme Court in *Podar Cement (Supra)* and *Mysore Minerals (Supra)* in the above-quoted paras was applied. It was also held as follows: -

"19. It is well-settled that there cannot be two owners of the property simultaneously and in the same sense of the term. **The intention of the Legislature in enacting Section 32 of the Act would be best fulfilled by allowing deduction in respect of depreciation to the person in whom for the time-being vests the dominion over the building and who is entitled to use it in his own right and is using the same for the purposes of his business or profession.** Assigning any different meaning would not subserve the legislative intent. To take the case at hand it is the appellant-assessee who having paid part of the price, has been placed in possession of the houses as an owner and is using the buildings for the purpose of its business in its own right. Still, the assessee has been denied the benefit of Section 32. On the other hand, the Housing Board would be denied the benefit of Section 32 because, in spite of its being the legal owner, it was not using the building for its business or profession. We do not think such a benefit-to-none situation could have been intended by the Legislature. The finding of fact arrived at in the case at hand is that though a document of title was not executed by Housing Board in favour of the assessee, but the houses were allotted to the assessee by the Housing Board, the part payment received and possession delivered so as to confer dominion over the property on the assessee whereafter the assessee had in its own right allotted the quarters to the staff and they were being actually used by the staff of the assessee. It is common knowledge, under the various scheme floated

by bodies like housing boards, houses are constructed on a large scale and allotted on part payment to those who have booked. Possession is also delivered to the allottee so as to enable enjoyment of the property. Execution of the document transferring title necessarily follows if the schedule of payment is observed by the allottee. If only the allottee may default the property may revert back to the Board. That is a matter only between the Housing Board and the allottee. No third person intervenes. the part payment made by the allottee is with the intention of acquiring the title. the delivery of possession by the Housing Board to the allottee is also a step towards conferring ownership. Documentation is delayed only with the idea of compelling the allottee to observe the schedule of payment."

More recently, the Madras High Court also followed this well-settled dominion test in the case of **Commissioner of Income Tax-I v. L & T Transportation infrastructure**, 2021 SCC On Line Mad 2309, and by relying on the above precedent allowed the claim of depreciation on public roads.

18. Keeping in view the terms of the Concession Agreement and the judicial treatment of the term owned for the purposes of claiming depreciation, we find that the Appellant is the "owner" of the "concession assets" within the meaning of sub-section (15) of Section 22 of the Income Tax Ordinance, 2001, and hence, entitled to an allowance of depreciation as claimed. We appreciate that the learned DR has relied upon the definition of "owner" from various definitions from English Jurisdiction. We note that one of the points made by the learned DR is with respect to the fact that the Appellant does not have the authority to "destroy" the "concession assets". In this respect, besides appreciating and accepting all the submissions of Barrister Dr. Ilahi, the learned AR for the appellant as noted above, we find that in making her the above-said submission the learned DR has relied upon the definition of "Ownership" as quoted from Sweet and Maxwell's dictionary of the year 1927. However, in contrast to the said dictionary, we have the latest



version of a dictionary available to us, which is published in June 2023, by the same publisher (Stroud's Judicial Dictionary of Words and Phrases 11<sup>th</sup> Edition, Sweet & Maxwell). We specifically note that the said dictionary in its definition of the term "owner", does not refer to any such right to destroy its property as an essential ingredient to establish "ownership" of a property. This dictionary has defined the term "Owner" as under: -

**Stroud's Judicial Dictionary 11th Edition Revision Date: 26 June 2023**

"The "owner" or "proprietor" of a property is the person in whom (with his or her assent) it is for the time being beneficially vested, and who has the occupation, or control, or usufruct, of it; e.g. a lessee is, during the term, the owner of the property demised (see judgment of Bramwell LJ, *Eglinton v Norman*, 46 L.J.Q.B. 559;"

In view of the above definition, it is clear that a "lessee" is also considered an "owner" of a property. In this respect, it is important to point out that it was observed by the Hon'ble Supreme Court of Pakistan in the case titled **Abdullah**

**Bhai and Others v Ahmad Din**, (PLD 1964 SC 106) that: -

"..... Ownership of physical property consists of a number of rights and the owner of such property when he creates a lease, transfers to the lessee a part of the rights of ownership, i.e., the right of enjoyment of the property, for a period, for consideration. During the continuance of the lease, the right of enjoyment of the property belongs to the tenant and not to the landlord. **The right of ownership, as well as the rights of which it is composed, are rights in rem and not in personem, and by the lease, a right in rem is transferred to the lessee.**" (Emphasis supplied)

The above-quoted excerpt from the decision of the August Supreme Court is exactly in line with the definition of the owner as described in Stroud's Judicial Dictionary 11th Edition, that is, having the right to use and enjoy the property as against the whole world through the transfer of the right of occupation, control or usufruct it is not for an indefinite time. In this case, it is undisputed that the



Appellant does have a right to occupy, control, and usufruct for a period of 25 years, hence, in the above parlance the Appellant can be termed as "owner" of the "concession assets" for the term of the contract. For the foregoing reasons as well as for the submissions made by Barrister Dr. Ilahi, the learned AR for the appellant as discussed in the above paragraphs, we reject the submissions made by the learned DR appearing on behalf of the revenue department.

19. We have already pointed out in earlier paragraphs that it is admitted position that the only issue, in this case, is the question of declaration of the Appellant as the owner of the "concession assets" within the meaning of section 22(15) of the Ordinance. It is admitted position that if the Appellant is declared "owner", as such, then there is no impediment in allowing the depreciation allowance with regards to the "concession assets" as being the "depreciable assets." We have found that the Appellant comes within the definition of the "owner" of the "concession assets" within the meaning of section 22(15) of the Ordinance, hence, following the above-quoted precedents and based on submissions of the learned AR for the Appellant, we allow the depreciation allowance to the Appellant on the "concession assets" in computing its taxable income.

### **Question No. 2**

20. Notwithstanding the aforesaid and even otherwise looking at the matter from another angle. If it is considered that (though we have found it otherwise) since the appellant is not the owner of the land, therefore, the superstructure built/improvements thereon does not belong to the appellant taxpayer. Thus, it is not entitled to claim depreciation on concession assets. Factually speaking, there is no dispute to the fact that the costs capitalized by the taxpayer under the head 'License to collect Toll' have been incurred for the development and construction of the infrastructure facility, i.e. Road. It is also not in dispute that the taxpayer was to build, operate and transfer the said infrastructure facility in terms of an

agreement with the Government of Punjab. The expenditure on development, construction, and maintenance of the infrastructure facility for a specified period was to be incurred by the taxpayer out of its own funds. Moreover, after the end of the specified period, the taxpayer was to transfer the said infrastructure facility to the Government of Punjab free of charge. In consideration of developing, constructing, maintaining the facility for a specified period and thereafter transferring it to the Government of Punjab free of charge, the taxpayer was granted a 'Right to collect Toll' from the motorists using the said infrastructure facility during the specified period. The said "Right to collect the Toll" is emerging as a result of the costs incurred by the taxpayer on the development, construction, and maintenance of the infrastructure facility. Such a right granted by the Govt of Punjab under the Concession Agreement (CA) has even otherwise a license permitting the taxpayer to do certain acts and deeds which otherwise would have been unlawful or not possible to do in the absence of CA. Thus, the right granted by the appellant under CA to operate the project/ project facility and right to collect toll charges is a license or akin to a license, hence, being an intangible asset as defined in section 24(11) of the Ordinance eligible for amortization under section 21(n) read with section 24 of the Ordinance as the Company has incurred huge costs with an intention to avail an enduring benefit for the purposes of its business which is to collect toll as per the facts stated above. The term "license" has not been defined under the Ordinance, the definition of "license" under the Easement Act, 1882, has to be looked into. A plain reading of section 52 of the said 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 a license under the Easements Act, 1882, it would

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be clear that immovable property on which the project/project facility is executed/implemented is owned by the Government of Punjab and it has full power to hold, dispose of and deal with the immovable property. By virtue of the C.A., the appellant taxpayer 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 to the Government of Punjab. What the Government of Punjab has granted to the taxpayer 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 Punjab to the taxpayer under the C.A. has a license permitting the taxpayer 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 taxpayer 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 amortization under section 21(n) read with section 24 of the Ordinance. It is open to the taxpayer to claim a deduction before the appellate authority which could not have been claimed before the Assessing Officer. The present case is not a case where the taxpayer had not claimed any deduction on account of depreciation. The taxpayer has very much claimed (and rightly so) the deduction of depreciation. However, he has claimed the same treating himself to be the owner of the concession assets. The taxpayer was under the bonafide belief (and rightly so) that he has correctly claimed the deduction of depreciation. But it is not disputed that the taxpayer has made investments in the project and he is entitled to claim deductions in this respect either by claim for depreciation or by amortization. It may be said that the claim of deduction has been very much put



by the taxpayer in the return of income but allegedly wrongly treating itself as the owner of the road. Nevertheless, it is a fact that the taxpayer company has incurred huge expenditure on the said project which cannot be treated as revenue expenditure allowable in one year as the same has resulted in providing enduring benefit to the taxpayer company, hence, the said amount would be eligible for amortization for the period of ten years in accordance with the provision of subsection (4) of section 24 of the Ordinance applicable at the relevant time. It is pointed out that the said subsection was substituted by the Finance Act, 2019 the cap of amortization of ten years was extended to 25 years w.e.f tax year 2019 onwards.

21. It is pertinent to point out here that the learned DR has made a submission that in terms of definition of the intangible assets, the right granted to the taxpayer under the C.A. to operate the project/project facility and collect toll charges etc. neither amounts to a license nor a contractual rights which are covered with the definition of the "intangible assets". To quote from the said definition: -

*Cur* "intangible" means any patent, invention, design or model, secret formula or process, copyright, trademark, scientific or technical knowledge, computer software, motion picture film, export quotas, franchise, licence, intellectual property, or **other like property or right, contractual rights** and any expenditure that provides an advantage or benefit for a period of more than one year (other than expenditure incurred to acquire a depreciable asset or unimproved land, but shall not include self-generated goodwill or any adjustment arising on account of accounting treatment in the manner as may be prescribed." [Emphasis supplied by us]

The learned DR relied on the principle of *ejusdem generis* to submit that it is "only other like contractual rights" which are in relation to "patent, invention, design or model, secret formula or process, copyright, trademark, scientific or technical knowledge, computer software, motion picture film, export quotas, franchise,

licence, intellectual property, or **other like property or right**" which are covered as intangibles. Nevertheless, though she openly admitted that the "to operate the project/project facility and collect toll charges etc." are indeed "contractual rights" under the CA.

We find that the reliance of the learned DR on the principle of ejusdem generis is misplaced. In this respect, it is very pertinent to point out that the word "contractual rights" is independently used after a comma ('). Hence, we cannot lawfully restrict the meanings of the "contractual rights" by applying the rule of ejusdem generis as put forward by the learned DR. We therefore, reject the submission of the learned DR and find that the word "contractual rights" as used in the definition of intelligible is "independent" of the "patent, invention, design or model, secret formula or process, copyright, trade mark, scientific or technical knowledge, computer software, motion picture film, export quotas, franchise, licence, intellectual property, or **other like property or right**" and its interpretation does not entail application of the rule of ejusdem generis to limit the meaning of "contractual rights".

### **Question No. 3**

22. Now the question may arise as to whether the taxpayer at this stage can raise the alternative contention for a claim of the expense/whole cost incurred on the construction of concession assets. It is a well-entrenched rule that there can be no estoppel against the law. Reliance may be placed on the judgment titled **Pir Sabir Shah v. Shah Muhammad Khan**, (PLD 1995 SC 66) and **CIT v. Ghazi Brotha Construction**, (2004 PTD 1994). Further, it is the duty of the court to apply the correct law. Reliance may be placed on the judgment titled **Chairman, NAB Vs Muhammad Usman & others**, (PLD 2018 SC 28). We may further observe that the Bombay High Court in the case of **CIT vs. Pruthvi Brokers & Shareholders (Pvt) Ltd**, (349 ITR 336), while relying upon the various decisions



of the Indian Supreme Court and other High Courts, has held that even if a claim is not made before the Assessing Officer it can be made before the appellate authorities. The jurisdiction of the appellate authorities to entertain such a claim is not barred. The Bombay High Court while relying upon the decision of the Supreme Court in the case of **Jute Corporation of India Limited Vs CIT**, (1991) 187 ITR 688 has observed that the power of the Appellate Commissioner is coterminous with that of the Income Tax Officer and an appellate authority while hearing an appeal against the order of the subordinate authority, has all the powers which the original authority may have in deciding the questions before it, subject to the restrictions or limitations, if any, prescribed by statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. The taxpayer is entitled to raise not merely additional legal submissions before the appellate authorities but is also entitled to raise additional claims before them. The appellate authorities have the discretion of whether or not to permit such additional claims to be raised. It cannot, however, be said that they have no jurisdiction to consider the same. The appellate authorities have jurisdiction to deal not merely with additional grounds which became available on account of change of circumstances or law, but with additional grounds which were available when the return was filed but could not have been raised at that stage. The words "could not have been" raised must be construed liberally and not strictly. The Supreme Court of Pakistan in the case of **Squibb Pakistan v. C.I.T.**, 2017 SCMR 1006 also held that in tax matters, a question not raised below could be agitated before the appellate forum.

23. In view of the above facts, it is not disputed or contested by the Revenue Department that the taxpayer is not entitled to any deduction. The only issue in dispute is under what head/provision the deduction is to be allowed to the



taxpayer. The Jurisdiction High Court of Bombay in the case of **Balmukund Acharya Vs DCIT**, reported in (2009) 221 CTR 440 (Bom.) has held that the Apex Court and the various High Courts have ruled that the authorities under the Act are under obligation to act in accordance with law. Tax can be collected only as provided under the Act. If the taxpayer, under a mistake, misconception, or on not being properly instructed is over-assessed, the authorities under the Act are required to assist him and ensure that only legitimate tax dues are collected. While holding so, the Bombay High Court has relied upon the various decisions e.g. **Koshti Vs CIT**, (2005) 193 CTR (Guj) 518 : (2005) 276 ITR 165 (Guj), **C.P.A Yousuf Vs ITO**, (1970) 77 ITR 237 (Ker.), **CIT vs Bharat General Reinsurance Co. Ltd.** (1971) 81 ITR 303 (Del), **CIT Vs Archana R. Dhanwatey**, (1981) 24 CTR (Bom) 142 : (1982) 136 ITR 355 (Bom).

In view of the above-discussed factual and legal position, we have no hesitation to hold that the taxpayer is even otherwise entitled to put his alternate claim that the cost incurred for the project may be considered as an allowable expense under section 21(n) read with section 24 of the Ordinance treating it as a right/license to collect the toll tax as an intangible asset. Hence, the plea of amortization and finding thereon can be given by this forum, which as a statutory forum is under a duty to pass the factually and legally correct orders.

### **CONCLUSION**

24. For what has been discussed above, the appeals of the appellant are accepted and the orders passed by the lower authorities are annulled to the extent of subject matter in appeals.

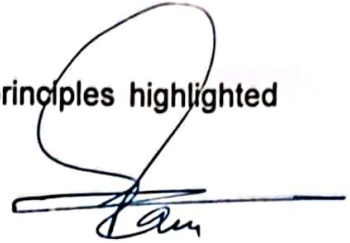
**Sd/-**  
**(M. M. AKRAM)**  
JUDICIAL MEMBER

**Sd/-**  
**(MUHAMMAD IMTIAZ)**  
ACCOUNTANT MEMBER

**CERTIFICATE U/S 5 OF THE LAW REPORT ACT**

above.

This case is fit for reporting as it settles the principles highlighted

A handwritten signature in black ink, appearing to read 'M. M. Akram', written over a horizontal line.

**(M. M. AKRAM)  
JUDICIAL MEMBER**