

आयकर अपीलिय अधीकरण, न्यायपीठ – “B” कोलकाता,
*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “B” KOLKATA*

Before **Shri S.S.Godara, Judicial Member** and
Shri, M. Balaganesh, Accountant Member

ITA No.19/Kol/2017
Assessment Year :2012-13

Second Vivekananda Bridge Tollway Co. Pvt. Ltd., Block GP, Sector-V, Salt Lake Electronics Complex, Kolkata-91 [PAN No.AAHCS 8573 Q]	V/s.	DCIT, Circle-2(2), Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-69
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri S. Rudra, Advocate
प्रत्यर्थी की ओर से/By Respondent	Shri G. Hangshing, CIT-DR
सुनवाई की तारीख/Date of Hearing	21-06-2018
घोषणा की तारीख/Date of Pronouncement	11-07-2018

आदेश /ORDER

PER S.S.Godara, Judicial Member:-

This assessee's appeal for assessment year 2012-13 calls into question the Commissioner of Income Tax (Appeals)-1, Kolkata's order dated 04.11.2016 passed in case No.1221/CIT(A)-1/C-2(2)/2015-16 upholding Assessing Officer's action disallowing its depreciation claimed of ₹41,99,22,054 in respect of licence to collect the toll revenue of the Second Vivekananda Bridge (treated as the relevant intangible asset) and disallowing leave encashment provision of ₹1,84,562/- u/s 43B(f) in assessment order dated 11.05.2015, involving proceeding u/s 143(3) of the Income Tax Act, 1961; in short as 'the Act'.

2. We come to former issue of depreciation disallowance in respect of assessee's licence to collect toll charges on the Second Vivekananda Bridge.

The assessee's claim in question was raised u/s 32(1)(ii) of the Act. It sought to treat its right to collect toll to be an intangible asset. The Assessing Officer quoted the Board's Circular No. 9/2014 dated 23.04.2014 to observe that impugned claim was not allowable since it did not pertain to an infrastructure facility itself but it was regarding a licence granted by National Highway Authority to collect tollway charges. He further was of the view that assessee was also not the owner of infrastructure facilities in question. All this resulted in the impugned disallowance amounting to ₹41,9,22,54/- being made in assessee's hand in assessment order dated 11.05.2015.

3. The CIT(A) confirms Assessing Officer's action as follows:-

"I have carefully considered the material before me. The appellant company had developed the Second Vivekananda Bridge under the Build, Operate and Transfer (BOT) basis and it obtained from National Highways Authority of India (NHAI), the License to collect the Tollway Charges in relation to the said Bridge. A copy of the concerned Concessionaire Agreement (Extracts) is enclosed for ready reference. The License to collect the Tollway Charges, was claimed to be in the nature of an Intangible Asset. The A.O found that the appellant had claimed Depreciation of Rs.41,99,22,054 u/s 32(1)(ii) @25% on the Total Cost incurred for developing the Infrastructure facility. The Assessing Officer in his Assessment Order held that the appellant was not the owner of the Infrastructure facility and also does not hold any rights in the project except recovery of toll fee to recoup the expenditure incurred, it cannot therefore be treated as an owner of the property, either wholly or partly, for purposes of allowability of depreciation under section 32(1)(ii) of the Act. The A.O held that it was not be eligible for claiming Depreciation on the WDV of the intangible assets, and disallowed the appellant's claim for Depreciation of Rs.41,99,22,054. The Assessing Officer in his Order, also made referred to the CBDT's Circular No.09/2014 dated 23/04/2014 and held that the appellant was not entitled to claim depreciation on the Infrastructure facility.

The appellant's A. R has contended through the written submissions that firstly, in earlier Assessment Years, i.e. A.Y: 2009-10, its claim for depreciation on the Intangible Asset, i.e. the appellant's right to collect the Tollway Charges as per the Concessionaire Agreement, had been examined in details by the then Assessing Officer and allowed vide Order u/s 143(3) dated 15/12/2011 the A.O had referred to the Pune ITAT's Order dated 31/12/2008 in the case of Ashoka Info Pvt. Ltd. [(2008) 123 TTJ 77 (Pune ITAT)] on similar facts to that of the case of the appellant. For the next Assessment Year, viz., 2010-11, also, the A.O after due examination of relevant details had accepted the appellant's claim for deduction of depreciation on Intangible Asset as made in the Return vide order u/s 143(3) dated 22/03/2013. Secondly, it was argued that the A.O erred by not following the principle of consistency, there being no change in facts as compared to these Assmt.Years. For this proposition, reliance was placed on the following decisions: Radhasoamy Satsang v. CIT [(1991) 193 ITR 221(SC)]; and CIT v. Lagan Kala Upvan [(2003) 259 ITR 489 (Del)] . Thirdly, it was averred that CBDT Circular dated 23/04/2014, relied upon by the A.O could only be considered effective prospectively and not in relation to any earlier Assessment year, wherein the appellant had acquired a vested right for claim of depreciation on intangible assets in the form of right to collect Tollway Charges. The

A.O had referred to CBDT's Circular issued in April, 2014, whereas the appellant had claimed deductions in years prior to the Assessment Year 2015-16 (relevant for the Financial Year 2014-15), in accordance with the CBDT Circular the procedure for amortisation could be made in relation to the total value as reduced by the claims of depreciation made by the appellant for and up to the Assessment Year 2014-15 which included the year under Appeal, viz., Assessment Year 2012-13. The A.R also stated that subsequently the A.O vide his Order dated 16/12/2015 u/s 154 allowed deduction towards amortization. However, while allowing the amortization, the A.O took into account only the deemed reduced cost at the end of the A.Y: 2008-09,

It is found that the dispute relates to the appellant's claim for depreciation on the Intangible Assets, i.e. the appellant's right to collect the Tollway Charges of Rs.41,99,22,054 u/s 32(1)(ii) @25% on the Total Cost incurred for developing the Infrastructure facility. The A.O had disallowed the appellant's claim by holding that the infrastructure facility was not owned by the assessee and also relying on CBOT's Circular dated 23/04/2014, but ignoring the CBDT's clarification that where because of not owning the concerned developed asset an assessee could not be entitled to depreciation on the cost of the asset, it would be eligible for deduction by way of Amortisation of the entire cost incurred by it for the development of the concerned asset. From perusal of Balance Sheet as on 31.03.2012, it is observed from details of Fixed Assets vide point No.2.6 of "Notes to Financial Statements..", that as per the '**Particulars**' of the impugned "**Intangible Assets**" as , 'depreciation and amortized cost - intangible assets' - Rs. 65.21 crore, which, comprises of (i) SVB Project Bridge & Tollway - Rs. 65.084 crore (H) Office Equipment - Rs. 0.18 Crore (iii) Computers/Data Processing Equipment - Rs. 0.46 crore (iv) Furniture & Fixture-Rs. 0.23 crore (v) Vehicles/Motor Car Rs. 0.203 crore, Hence, it is inferred that contrary to the appellants claim the nature of the 'intangible assets' was not in the form of amortization of expenses for licence for Tollway as claimed by the appellant, which is contrary to the conditions for allowing depreciation as stipulated by provisions of section 32(1)(ii) of the IT Act, i.e. " know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, as the block of '**intangible assets**' of the appellant is found to be in the nature of fixed assets and not on acquisition of intangible assets acquired on or after the 1st day of April, 19981 as stipulated by provisions of section 32(1)(ii) of the IT Act. In view of the above discussion, it is found that the A.O. was correct in holding that the appellant was not entitled to claim of depreciation on the various assets included in the category of "**intangible assets**", whereby the appellant was not the owner either wholly or partly, for the purposes of allowability of depreciation. In addition, the appellant's claim for depreciation on '**intangible assets**' claimed in respect of license obtained to collect tollway charges, was contrary to the facts on record nor was any supporting evidence to substantiate this claim was produced by the appellant either during the assessment or appellant proceedings. Accordingly, it is also found that there is no substance in the appellants claim for following the principle of consistency, regarding its claim for depreciation was stated to have been allowed by the AO in assessment orders for the proceeding AY 2009-10 & 2010-11. This is because the factual matrix of the appellant's case are found to be different from the findings of the A.O in the earlier A.Ys, wherein the appellant's claim for depreciation on intangible assets was accepted by the A.O without examining the nature of fixed assets in question. In this regard, it is well settled that the principle of res judicata, is not applicable to Income Tax proceedings, as issues for each assessment year are to be decided on the facts and circumstances of the case for that year only. Moreover, considering the fact that although the appellants claim was in respect of depreciation on license fee as intangible assets which was held to be not allowable on law and facts. Thus, the ratio of the decision in the case of Asoka Info Pvt. Ltd. - vs - ACIT (2009) 123 TTJ 77(Pune), dated 31.12.2008 of ITAT, Pune, relied upon by

the A.O is found to be distinguishable as it is not applicable to the facts on the instant case, as the facts of the appellant's case did not relate to the claim of depreciation on licence fee, but on amortization of expenditure on fixed assets. Therefore, it is held that there is no infirmity in the finding of A.O. disallowing the appellant's claim for depreciation amounting to Rs.41,99,22,054 u/s 32(1)(ii), which is confirmed. These grounds are not allowed."

4. We have given our thoughtful consideration to rival submissions. The first question that arises for our apt adjudication in the instant appeal is as whether or not the assessee's depreciation claim pertaining to its licence to collect tollway on the Second Vivekanand Bridge is eligible for section 32(1)(ii) depreciation in the nature of an intangible asset. We find this question to be no more *res integra* as per tribunal's Special Bench's decision in M/s Progressive Construction Ltd. case has on rejected Revenue's similar arguments based on Board's circular (supra) as well as all the relevant legal or factual aspect as followed:-

7. Shri V. Raghavendra Rao, learned Authorised Representative, appearing for the assessee submitted, though, in the first year of claim of depreciation in assessment year 2009-10 the assessee had treated it as building, however, in assessment year 2010-11 as well as 2011-12, assessee had claimed depreciation by treating the right acquired for operating the BOT-bridge and collecting toll for user of such bridge by vehicles as intangible asset. He submitted, the assessee for constructing the road and bridge has invested huge amount of RS.214 crore. And under the terms of C.A. assessee was not going to be reimbursed the cost of construction. The only way the assessee can recover the cost of investment along with profit is by way of operating the bridge and collecting toll charges for user of the bridge by vehicles during the concession period of 11 years and seven months. Accepting the fact that assessee is not the owner of the road and bridge learned Authorised Representative submitted, the investment made by the assessee in constructing the road and bridge had created an intangible asset in the form of right to operate the road and collect toll charges. The learned Authorised Representative taking us through different clauses of the C.A. submitted, the concession granted by the Government of India in allowing the assessee to operate the road and collect toll charges during the concession period amounts to grant of license, hence is an intangible asset. He submitted, even assuming that the right acquired by the assessee to operate the road and collect toll charges is not in the nature of license, however, it certainly falls within the category of any other business or commercial right of similar nature as provided under section 32(1)(ii) of the act. He submitted, apart from the right to operate the road and collect toll charges the assessee was not given any other benefit under the C.A. Therefore, the right given for operating BOT-bridge and collecting toll charges for user of the road and bridge is a valuable commercial right acquired by the assessee by investing in the construction of the road and bridge. In support of his contention learned Authorised Representative relied upon the decision of the Tribunal, Pune Bench, in Ashoka Info Pvt. Ltd. vis ACIT, [2009] 123 TT 77 (Pune).

8. We have patiently and carefully considered the rival submissions, perused the materials on record as well as the decision cited at the Bar.

9. The core issue arising for consideration in this appeal is in relation to assessee's claim of depreciation on the asset created by investing an amount of Rs.214 crore in construction of Pune Hyderabad section of National Highway no.9, on build, operate and transfer (BOT) basis with a right to collect toll charges from the user of road by vehicles over the concession period of 11 years and 7 month. It is a fact on record that the assessee completed the construction of the project in the financial year 2008-09 and had started operating the same. It is also evident, in the assessment year 2009-10, the assessee had claimed depreciation @ 10% by treating the asset as building. However, from the assessment year 2010-11, the assessee had started claiming depreciation by treating the asset created as an intangible asset in terms of section 32(1)(ii) of the Act. We have also been informed that assessee's claim of depreciation in assessment year 2009-10 and 2010-11, were disallowed by the Assessing Officer. However, the learned Commissioner (Appeals) allowed assessee's claim of depreciation as building in assessment year 2009-10 and as intangible asset in assessment year 2010-11. The aforesaid orders of the learned Commissioner (Appeals) were also upheld by the Tribunal while dismissing Department's appeals on the issue. It is stated that the Department has challenged the decisions of the Tribunal in assessment year 2009-10 and 2010-11 in further appeal before the High Court of Andhra Pradesh and Telangana and the matters are still pending. Be that as it may, the aforesaid facts clearly indicate that the impugned assessment year is not the first year of claim of depreciation on the BOT road / bridge. Rather, in the impugned assessment year, depreciation has been claimed on the opening WDV which has also been accepted by the learned Departmental Representative in the written submissions filed by him. Therefore, the nature of expenditure, whether capital or revenue, is not a subject matter of dispute arising in the present appeal. Bearing this in mind, we have to examine the validity of assessee's claim of depreciation qua the asset created. The learned Departmental Representative has opposed assessee's claim of depreciation on the following propositions:-

- i) Whether the expenditure claim of the assessee brings into being an asset which is owned and used by the assessee in its business;**
- ii) What is the nature of the asset that has come into being on account of the expenditure incurred by the assessee and what is the nature of such expenditure;**
- iii) If an asset is created, whether it is a tangible asset or an intangible asset;**
- iv) Whether the Concessionaire Agreement (CA) held by the assessee can be regarded as a commercial or business right akin to a license;**
- v) If such CA. is akin to a license, what intangible asset has been created for the assessee and what is the expenditure incurred by the assessee for acquiring such intangible asset.**

10. Before dealing with the issue, it is necessary to reiterate that the Government of India being desirous of implementing a project involving, construction, operation and maintenance of four lane Pune Hyderabad section of N. H. no. 9, with private sector participation of BOT invited tender from interested parties. The assessee being successful in the tender, the Government of India entered into a Concession Agreement (CA) with the assessee on 22nd December 2005. At this stage, it is necessary to look into some of the relevant clauses of C.A., which in our opinion, will have a crucial bearing in deciding the issue. As per clause 2.1 of the C.A., the Government of

India grants and authorises the concessionaire i.e., the assessee to investigate, study, design, engineer, procure, finance, construct, operate and maintain the project and to exercise and/or enjoy the rights, powers, privileges, authorizations and entitlements in terms of the agreement including the right to levy demand, collect and appropriate fee from vehicle and persons for using the project / project facilities or any part thereof. As per clause 2.2 of the C.A., the assessee is granted concession for a period of 11 years 7 months from the commencement date. As per clause 2.4, the Government of India was obliged to hand over to the assessee physical possession of the project site free from encumbrances within 30 days from the date of the agreement. It further provides, once the project site is handed over to the concessionaire, it shall have exclusive right to enter upon, occupy and use the project site and to make at its costs, charges and expenses such development and improvement in the project site as may be necessary or appropriate to implement the project and to provide project facility in terms of the agreement. Clause- 2.5 of the agreement provides that the concessionaire without prior written consent or approval of the Government of India cannot use the project site for any purpose, other than, for the purpose of the project / project facilities as permitted under the C.A. Clause 2.7 of the C.A. makes it clear that the project site belongs to and has vested in Government of India and the Government of India has full power to hold, dispose off and deal with the same consistent with the provisions of the C.A. However, it also makes it clear that the concessionaire, subject to complying with the terms / conditions of the agreement remains in peaceful possession and enjoyment of the project site during the concession period. It further provides, in the event the concessionaire is obstructed by any person claiming any right, title or interest over the project site or any part thereof or in the event of any enforceable action including any attachment, distraint, appointment of receiver or liquidator being initiated by any person claiming interest over the project sites. Government of India not only will defend such claims or proceedings but also keep the concessionaire indemnified against any direct or consequential loss or damage which it may suffer on account of any such right, title, interest or charge. As per clause 2.8 of the C.A., though, the concessionaire shall have exclusive right to use of the project site in accordance with the provisions of the agreement and for this purpose, it may regulate the entry and use of the same by the third parties, however, it shall not part with or create any encumbrance on the whole or any part of the project site save and except, as set forth and permitted under the agreement. Clause 4.1 of the C.A. entitles the concessionaire to levy, demand and collect fee for user of the roads by vehicles and persons in accordance with the fee notification to be issued by the Government of India. However, concessionaire cannot levy and collect any fee until it has received completion certificate. Clause 5.1 and 5.2 of the C.A. lays down the obligation of the concessionaire for execution and implementation of the project / project facility during the concession period. From the reading of the aforesaid clauses of the contract, following facts emerge:-

- i) The right, title and ownership of the project site vests absolutely with the Government of India and it has full powers to hold, dispose off and deal with the same;
- ii) The Government of India has handed over physical possession of the project site to the concessionaire for executing / implementing the project and operating the same during the concession period;
- iii) Concessionaire shall have exclusive right to use the project site for executing / implementing the project in terms of C.A;

- iv) Concessionaire shall, at its own costs and expenses, execute / implement the entire project and operate and maintain the same during the concession period; and
- v) The concessionaire shall have the right to levy / demand and collect fee as approved by the Government of India towards user of the project facilities by vehicles and persons.

11. Undisputedly, for executing the project, assessee has incurred expenses of RS.214 crore. It is also not disputed that as per the terms of the C.A., the Government of India is not obliged / required to reimburse the cost incurred by the assessee to execute / implement the project facilities. The only right / benefit allowed to the assessee by the Government of India is to operate the project / project facilities during the concession period of 11 years 7 months and to collect toll charges from vehicles / persons using the project / project facilities. Thus, as could be seen, the only manner in which the assessee can recoup the cost incurred by it in implementing the project / project facility is to operate the road during the concession period and collect the toll charges from user of the project facility by third parties. Admittedly, the assessee has taken up the project as a business venture with a profit motive and certainly not as a work of charity. Further, by investing huge some of Rs.214 crore, the assessee has obtained a valuable business / commercial right to operate the project facility and collect toll charges. Therefore, in our considered opinion, right acquired by the assessee for operating the project facility and collecting toll charges is an intangible asset created by the assessee by incurring the expenses of RS.214 crore. The contention of the learned Senior Standing Counsel that expenditure of Rs.214 crore has brought into existence a tangible asset in the form of roads and bridges of which the assessee is not the owner but it is the Government of India is nobody's case. Further, the learned Senior Standing Counsel's apprehension that it will lead to a situation where both Government of India and the concessionaire will claim depreciation on the asset created with the very same expenditure, in our view, is not borne out from facts on record. At the cost of repetition we must observe, as per the terms of agreement the expenses incurred by the assessee towards construction of the roads, bridges, etc., were not going to be reimbursed by the Government of India. This fact was known to both the parties before the execution of the agreement as the tender itself has made it clear that the project is to be executed with private sector participation on BOT basis. Thus, from the very inception of the project, assessee was aware of the fact, it has to recoup the cost incurred in implementing the project along with the profit from operating the road and collecting toll charges during the concession period. Therefore, assessee has capitalized the cost incurred on the BOT project on which it has claimed depreciation. Thus, in our view, the expenditure incurred by the assessee of Rs.214 crore for creating the project or project facilities has created an intangible asset in the form of right to operate the project facility and collect toll charges. Further, it is the contention of the learned Senior Standing Counsel that if at all any right is created under the C.A. for collecting toll, such right accrued to the , assessee on the date of execution of agreement i.e., 22nd December 2005, therefore, the expenditure incurred by such date should be the value of intangible asset which can alone be considered for depreciation under section 32(1)(ii) of the Act. We are afraid, we cannot accept the above argument of the learned Senior Standing Counsel. When the C.A. confers a right on the assessee to operate the project facility and collect toll charges over the concession period of 11 years and 7 months, the assessee can start operating and collecting toll charges only when the project facility is ready for use. Therefore, until the project is completed and ready for

use by vehicles or persons assessee cannot collect toll charges for user of the project facilities. Thus, the right to operate the project facility and collect toll charges is integrally connected to the completion of the project facility which cannot be done unless the assessee invests its fund for completing the project. Therefore, keeping in view the aforesaid 'fact, it cannot be said that the right to collect toll has accrued to the assessee on the date of execution of the agreement. If we accept the aforesaid argument of the learned Senior Standing Counsel, in other words, it would mean that without even executing and completing the project facility, assessee would be collecting toll charges. Therefore, the contention of the learned Senior Standing Counsel that the expenditure incurred by the assessee till execution of the agreement can only be considered as an intangible asset, in our view, is illogical, hence, cannot be accepted. Thus, having held that the expenditure of Rs.214 crore incurred by the assessee has resulted in creation of an intangible asset of enduring nature for the assessee, it is necessary now to examine whether such intangible asset comes within the scope and ambit of section 32(1)(ii) of the Act. For this purpose, it is necessary to look into the said provision which is reproduced hereunder for the sake of convenience.

Depreciation.

32(1)(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, owned'«, wholly or partly, by the assessee and used for the purposes of the business⁶⁷ or profession, the following deductions shall be a
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12. Explanation 3 to section 32(1) defines intangible asset as under:-

[Explanation 3. -For the purposes of this sub-section, 86[the expression "assets"] shall mean-

- (a) tangible assets, being buildings, machinery, plant or furniture;
- (b) intangible assets, being know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature⁸⁷.

13. A plain reading of the aforesaid provisions would indicate that certain kind of assets being knowhow, patents, copyrights, trademarks, license, franchise, or any other businesses or commercial rights of similar nature are to be treated as intangible asset and would be eligible for depreciation at the specified rate. It is the claim of the assessee that the right acquired under C.A. to operate the project facility and collect toll charges is in the nature of license. However, the learned Senior Standing Counsel has strongly countered the aforesaid claim of the assessee by referring to the definition of license as provided under the Indian Easements Act, 1882. For better appreciation, we intend to reproduce herein below the definition of "license" as provided under section 52 of the Indian Easements Act, 1882:-

"License" defined:- Where on person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful and such right does not amount to an easement or an interest in the property, the right is called a license. “

14. It has been the contention of the learned Senior Standing Counsel that as the term "license" has not been defined under the Income Tax Act, 1961, the definition of "license" under the Indian Easements Act, 1882, has to be looked into. Accepting the aforesaid contention of the learned Senior Standing

Counsel, let us examine the definition of "license" extracted herein above. A plain reading of section 52 of the 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 license under the Indian Easements Act, 1882, it would be clear that immovable property on which the project / project facility is executed / implemented is owned by the Government of India and it has full power to hold, dispose off and deal with the immovable property. By virtue of the C.A., assessee 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 back to the Government of India. What the Government of India has granted to the assessee 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 India to the assessee under the C.A. has a license permitting the assessee 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 assessee 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 depreciation under section 32(1)(ii) of the Act.

15. Even assuming that the right granted under the C.A. is not a license or akin to license, it requires examination whether it can still be considered as an intangible asset as described under section 32(1)(ii) of the Act. In this context, it has been the contention of the learned Senior Standing Counsel that the intangible asset mentioned under section 32(1)(ii) of the Act are specifically identified assets, except, the assets termed as "any other business or commercial rights of similar nature". He had submitted, applying the principle of ejusdem generis the rights referred to in the expression "any other business or commercial rights of similar nature", should be similar to one or more of the specifically identified assets preceding such expression. The aforesaid contention of the learned Departmental Representative is unacceptable for the reasons enumerated hereinafter.

16. We have already held earlier in the order that by incurring the expenditure of 'Rs.214 crore assessee has acquired the right to operate the project and collect toll charges. Therefore, such right acquired by the assessee is a valuable business or commercial right because through such means, the assessee is going to recoup not only the cost incurred in executing the project but also with some amount of profit. Therefore, there cannot be any dispute that the right to operate the project facility and collect toll charges therefrom in lieu of the expenditure incurred in executing the project is an intangible asset created for the enduring benefit of the assessee. Now, it has to be seen whether such intangible asset comes within the expression "any other business or commercial rights of similar nature". As could be seen from the definition of intangible asset, specifically identified items like knowhow, patents, copyrights, trademarks, licenses, franchises are not of the same category, but, distinct from each other. However, one thing common amongst these assets is, they all are part of the tool of the trade and facilitate smooth carrying on of business, Therefore, any other intangible asset which may not be identifiable with the specified items, but, is of similar nature would come

within the expression "any other business or commercial rights of similar nature", The Hon'ble Supreme Court in CIT vis Smifs Securities (supra) after interpreting the definition of intangible asset as provided in Explanation 3 to section 32(1), while opining that principle of ejusdem generis would strictly apply in interpreting the definition of intangible asset as provided by Explanation 3(b) of section 32, at the same time, held that even applying the said principle 'goodwill' would fall under the expression "any other business or commercial rights of similar nature", Thus, as could be seen, even though, 'goodwill' is not one of the specifically identifiable assets preceding the expressing "any other business or commercial rights of similar nature", however, the Hon'ble Supreme Court held that 'goodwill' will come within the expression "any other business or commercial rights of similar nature", Therefore, the contention of the learned Senior Standing Counsel that to come within the expression "any other business or commercial rights of similar nature" the intangible asset should be akin to anyone of the specifically identifiable assets is not a correct interpretation of the statutory provisions, Had it been the case, then 'goodwill' would not have been treated as an intangible asset, The Hon'ble Delhi High Court in case of Areva T and D India Ltd. (supra), while interpreting the aforesaid expression by applying the principles of ejusdem generis observed, the right as finds place in the expression "business or commercial rights of similar nature" need not answer the description of knowhow, patents, trademarks, license or franchises, but must be of similar nature as the specified asset. The Court observed, looking at the meaning of categories of specified intangible assets referred to in section 32(1)(ii) of the Act preceding the term "business or commercial right of similar nature", it could be seen that the said intangible assets are not of the same line and are clearly distinct from one another. The Court observed, the use of words "business or commercial rights of similar nature", after the specified intangible assets clearly demonstrates that the legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets which were neither visible nor possible to exhaustively enumerate. The Hon'ble Court, therefore observed, in the circumstances the nature of business or commercial right cannot be restricted only to knowhow, patents, trademarks, copyrights, licence or franchise. The Court observed, any intangible assets which are invaluable and result in smoothly carrying on the business as part of the tool of the trade of the assessee would come within the expression "en» other business or commercial right of similar nature". Therefore, the contention of the learned Senior Standing Counsel that to come within the expression "any other business or commercial rights of similar nature" the intangible asset should be akin to any one of the specifically identifiable assets is not a correct interpretation of the statutory pros. Had it been the case, then 'goodwill' would not have been treated as an intangible asset. The Hon'ble Delhi High Court in the case of Areva T and D India Ltd. Sup, while interpreting the aforesaid expression by applying the principles of ejusdem generis observed, the right as finds place in the expression "business or commercial rights of similar nature" need not answer the description of knowhow, patents, trademarks, license or franchises, but must be of similar nature as the specified asset. The Court observed, looking at the meaning of categories of specified intangible assets referred to in section 32(1)(ii) of the Act preceding the term "business or commercial right of similar nature", it could be seen that the said intangible assets are not of the same line and are clearly distinct from one another. The Court observed, the use of words "business or commercial rights of similar nature", after the specified intangible assets clearly demonstrates that the legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets

which were neither visible nor possible to exhaustively enumerate. The Hon'ble Court, therefore observed, in the circumstances the nature of business or commercial right cannot be restricted only to knowhow, patents, trademarks, copyrights, licence or franchise. The Court observed, any intangible assets which are invaluable and result in smoothly carrying on the business as part of the tool of the trade of the assessee would come within the expression "any other business or commercial right of similar nature". 25 M/s. Progressive Constructions Ltd.

17. In the case of Techno Shares and Stocks Ltd. v/s CIT, [2010] 327 ITR 323 (SC), the Hon'ble Supreme Court while examining the assessee's claim of depreciation on BSE Membership Card, after interpreting the provisions of section 32(1)(ii), held that as the membership card allows a member to participate in a trading session on the floor of the exchange, such membership is a business or commercial right, hence, similar to license or franchise, therefore, an intangible asset. In the present case, undisputedly by virtue of C.A. the assessee has acquired the right to operate the toll road / bridge and collect toll charges in lieu of investment made by it in implementing the project. Therefore, the right to operate the toll road / bridge and collect toll charges is a business or commercial right as envisaged under section 32(1)(ii) r/w Explanation 3(b) of the said provisions. Therefore, in our considered opinion, the assessee is eligible to claim depreciation on WDV as an intangible asset. Thus, we answer the question framed by the Special Bench as under:- The expenditure incurred by the assessee for construction of road under BOT contract by the Government of India has given rise to an intangible asset as defined under Explanation 3(b) r/w section 32(1)(ii) of the Act. Hence, assessee is eligible to claim depreciation on such asset at the specified rate. 26 M/s. Progressive Constructions Ltd. "

It is therefore sufficiently clear that the learned Special Bench has settled the issue treating a similar licence to collect tollway to be an intangible asset under the relevant statutory provision. We therefore adopt the above detailed reasoning mutatis mutandis to accept assessee's instant former substantive ground. The impugned depreciation disallowance of ₹41,99,22,054/- stands deleted accordingly.

5. Next comes leave encashment provision of ₹1,84,562/- made by both the lower authorities u/s 43B(f) of the Act.

6. Both parties are *ad idem* during the course of hearing that hon'ble jurisdictional high court's decision on *Exide Industries Ltd. vs. Union of India* (207) 292 ITR 470 (Cal) is both deleting the impugned disallowance as well as declaring the statutory provision itself as unconstitutional stands stayed in Revenue's appeal preferred in hon'ble apex court. We therefore direct the

assessing authority to keep the instant issue in abeyance till hon'ble apex court's final verdict. This substantive ground is accepted for statistical purposes.

7. This assessee's appeal is partly allowed accordingly.

Order pronounced in the open court 11/07/2018

Sd/-

(लेखा सदस्य)

(M.Balaganesh)

(Accountant Member)

Kolkata,

*Dkp, Sr.P.S

दिनांक:-11/07/2018

कोलकाता ।

Sd/-

(न्यायिक सदस्य)

(S.S.Godara)

(Judicial Member)

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-Second Vivekananda Bridge Tollway Co. Pvt. Ltd. Block GP, Sector V, Salt Lake Electronics Complex, Kolkata-91
2. प्रत्यर्थी/Respondent-DCIT, Circle-2(2), P-7, Chowringhee Square, Kolkata-69
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata (sent through e-mail)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata (sent e-mail)
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

Sr. Private Secretary, Head of
Office/DDO

आयकर अपीलीय अधिकरण,

कोलकाता ।