आयकर अपीलीय अधिकरण "B" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री राजेश कुमार लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI RAJESH KUMAR, AM

आयकर अपील सं./ ITA No. 3910/Mum/2017

(निर्धारण वर्ष / Assessment Year 2012-13)

Mumbai Nasik Expressway Limited 803, 8th Floor, A Wing, One BKC, G Block, Bandra Kurla Complex, Bandra _East, Mumbai-400 051	Vs.	The Pr. Commissioner of Income Tax, Central Circle-4, Room No. 663, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400 020
(अपीलार्थी / Appellant)	..	**(प्रत्यर्थी / Respondent)**
स्थायी लेखा सं./**PAN No. AAECM3349K**		

अपीलार्थी की ओर से / **Appellant by**	:	Shri JD Mistry, AR
प्रत्यर्थी की ओर से **/ Respondent by**	:	Smt. Lakshmi Vara Prasad Gode, DR

सुनवाई की तारीख **/ Date of hearing:**	15-04-2019
घोषणा की तारीख **/ Date of pronouncement :**	15-04-2019

आदेश / O R D E R

महावीर सिंह, न्यायिक सदस्य/
PER MAHAVIR SINGH, JM:

This appeal filed by the assessee is arising out of the revision order passed under section 263 of the Income Tax Act, 1961 (hereinafter 'the Act') of Pr. Commissioner of Income Tax-4, Mumbai [in short PCIT], vide order dated 22.03.2017. The order was framed by Dy. Commissioner of

Income Tax under section 143(3) of the Act, vide dated 30.03.2015 for AY 2012-13.

2. The only issue in this appeal of assessee is against the revision order passed under section 263 of the Act by PCIT revising the assessment order passed by AO under section 143(3) of the Act. For this assessee has raised the issue on jurisdiction by ground No. 1 and on merits vide ground No.2 which read as under: -

> *"Ground No.1*
>
> *On the facts and in the circumstances of the case and in law, the ld. Pr. CIT erred in revising the assessment order passed by the Learned Assessing Officer ('ld. AO') under Section 263 of the Act.*
>
> *The appellant prays that the order passed under section 263 of the Act is bad in law, and ought to be quashed.*
>
> *Ground No.2*
>
> *On the facts and in the circumstances of the case and in law, the ld. Pr. CIT has erred in initiating the revisionary proceedings without appreciating that the ld. AO had allowed the depreciation claimed by the appellant of Ps. 1,82,79,39,159 @ 25% on the appellant's 'right to collect toll' after proper appreciation of facts and hence the said order is not erroneous and prejudicial to the interest of the revenue."*

3. Briefly stated facts are that the assessment in this case was completed by the AO under section 143(3) of the Act dated 30.03.2015. The PCIT while going through the assessment records noticed that the AO has passed the assessment order without taking note of CBDT Circular No 9 of 2014 and wrongly allowed the claim of depreciation at the rate of 25% on the cost of infrastructure facility being toll road Built Owned and Transfer treating it as an asset in the nature of intangible right. Accordingly, the PCIT noted that the assessment order being erroneous and prejudicial to the interest of the Revenue in term of explanation to section 263 of the Act. The PCIT accordingly issued show cause notice under section 263 of the Act dated 24.02.2016 and the relevant show cause notice has been reproduced in the revision order is being again reproduced for the sake of clarity:-

> *"1.1] On examination of the records for A.Y. 2012-13, it is noticed that the assesse filed its original return of income for A.Y. 2012-13 an 27.09.2012 declaring total loss of Ps. 153,87.93,284/- and computed book profit at Rs.7,56,60,340/- u/s.115JB of the I.T.Act. The assessment was completed u/s. :43(3) vide order dated 30.032015 whereby the returned income was accepted*
>
> *1.2] It is further noted that assessee company had been awarded by NHAI a project on NH-3 on HOT basis and had capitalized the cost of project in its books of accounts and written off over the period of ROT contract of 19 years from the completion of construction of the same.*

However, while computing the taxable income it has claimed depreciation @ 25%. As evident from the annual accounts of the assesse for A.Y. 2012-13 that as per Annexure 2 to 3C1) (as per Form 3C13 to 3CD) in Block VIII pertaining to Concession Rights an amount of Rs.334,40,25,560/- has been added during the current year to the opening W.D.V. of Rs.415,29,22,175/- and depreciation has been claimed) 25% on the total amount of Rs.731,17,57,434/- amounting to Rs.182,79,39,359/-. The AO has allowed the same.

1.3] It is further noted that the CBDT vide circular Na9 of 2014 dated 23.04.2014 had clarified that in respect of HOT arrangements for development of roads/highways etc., the assessee undertaking the project of improvement, operation and maintenance etc., is not the owner of the property either wholly or partly, and therefore is not eligible for the allowability of depreciation u/s.32(I)(hi) of the Act. The CBDT vide that circular further clarified that the cost of construction on development of infrastructure facility of roads/ highways under ROT projects is to be amortized and claimed as allowable business expenditure tinder the Act. The amortization so allowable is to be computed

at the rate which ensures that the whole of the cost incurred in creation of infrastructural facility of road/highway is amortized evenly over the period of concessionaire agreement after excluding the time taken for creation of such facility. The total deduction claimed for the assessment years prior to the assessment year under consideration is to be deducted from the initial cost of infrastructure facility of roads/highways and the cost 'so reduced' is to be amortized equally over the remaining period of toll concessionaire agreement.

1.4] A perusal of the records and the assessment order shows that the AO has not made the disallowance in respect of the wrong claim of depreciation Ca', 25%. Under such circumstances, the order passed by the A.O. is found to be erroneous and prejudicial to the interest of revenue, as there has been an under assessment to the extent of the excess claim of depreciation allowed.

1.5] In view of the above, it is clear that there is a failure on the part of the assessing officer to examine the issue of claim of depreciation in terms of circular No.9 of 2014 issued by the CBDT, which has rendered the impugned assessment order passed u/s. 143(3) of the I.T. Act erroneous, in so far as it is prejudicial to the

interests of revenue, in terms of explanation 2 to section 263 of the I.T. Act.

1.6] In view of the above, you are requested to show cause as to why the said assessment order should not be revised u/s.263 of the I.T. Act, 1961. Your objections, if any, to the proposed revision of the assessment order may be filed before the undersigned on or before 02.03.2017."

4. The assessee explained the entire fact but PCIT after considering the CBDT Circular No. 9 of 2014 and the amendment to section 263 of the Act brought out by Finance Act, 2015 with effect from 01.06.2015 by insertion of an explanation 2. According to PCIT which is declaratory and clarificatory in nature and hence, the AO's order is erroneous and prejudicial to the interest of the Revenue. For this CIT(A) observed in paras 5.4 to 9 as under: -

"5.4 Thus, CBDT vide the above mentioned circular has clearly laid out the methodology of admissibility regarding the claim of expenditure incurred by the assessee with reference to the infrastructure cost incurred by it for the development of roads/highways on BOT basis. it is to be emphasized that the claims that have been allowed prior to the issue of the circular is not subject to revision and the circular is effective from the date of issue and therefore was required to be considered while passing the

assessment order in the pending proceedings, which has not been done by the AO. thereby resulting in the order being erroneous and prejudicial to the interests of revenue.

6. As regards the reliance paced by the assesse on the ruling of the Pune Tribunal in the case of ACIT vs. Ashok Infraways (P.) Ltd (2013) 58 SOT 17 as also the judgments in the case of Ashoka Buildcon Ltd. (ITA. No. 1302/PN/09, Ashoka Info (P.) Ltd. (2009] 123 TTJ 77 & Kalyan Toll Infrastructure Ltd. (ITA. Nos. 201 to 247/lnd/2008, these decisions pcna.in to the period prior to the issuance of the circular No.9 of 2014 dated 23.04.2014 by the CBDT.

7. As already mentioned above, the circular No.9 of 2014 dated 2304.2014 issued by the CBDT, is directional in nature and binding on all the assessing authorities.

8. It is to be noted that the amendment to section 263 of the Act, side Finance Act 2015 w.e.f 1st June 2015, by insertion of Explanation 2 to section 263 of the Act is declaratory & clarificatory in nature and inserted to provide clarity on the issue as to which orders passed by the AO shall constitute erroneous and prejudicial to the interest of Revenue. By the

said explanation, it is, inter-alia, provided that if the order is passed without making inquiries or verifications by AO which, should have been made or the order is passed allowing any relief without inquiring into the claim, or the order has not been made in accordance with any order, direction, circular or instruction issued by the Board, then the order shall be deemed to be erroneous and prejudicial to the interest of Revenue. Thus the scope of revisionary power of the Commissioner! Principal Commissioner is widened. For ready reference, this explanation (i.e explanation 2 to section 2631 is reproduced here under:

> *"(Explanation 2 —For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—*
>
> *(a) the order is passed without making inquiries or verification which should hove been made;*
>
> *(b) the order is passed ohlow!rlg any relief without inquiring into the claim;*

(c) the order has not been made in accordance with any order, direction or Instruction issued by the Board under sectionJ12; or

d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional high Court or Supreme Court in the case of the assessee or any other person.)

The clause (c) to the said explanation makes it very clear that if the order passed by the AO has not been made in accordance with an order, direction or instruction issue by the CBDT, then the order would he deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, in view of the said explanation 2 to section 263 of the Act.

8.1 in the present case, the AO has failed to make the necessary disallowance in respect of the claim of depreciation @ 25% of Rs.182,79,39,359/- made by the assessee, in terms of circular No.9 of 2014 issued by the CBDT dated 23.04.2014, with reference to the expenditure incurred for development of roads/highways in BOT agreements. This

makes the assessment order erroneous in so far as it is prejudicial to the interests of revenue.

9. After having considered the facts of the case and the assessee's submissions in reference to show cause notice as well as the Explanation 2 to section 263 inserted by the Finance Act 2015, which, is declaratory and clarificatory in nature and provide clarity on the issue, the assessment order under reference AY 20I2-I3 is set aside on the issue of the claim of depreciation u/s.32(1)(ii) @ 25% with reference to the expenditure incurred by the assessee, for development of roads/highways in BOT agreements, to the file of the AO to be made de-novo after taking note of the directions of the Board contained in circular No.9 of 2014 dated 2104.2014, and investigation and after ascertaining all the facts. Needless tom mention due opportunity should be given to the assessee while completing the assessment afresh."

Aggrieved, now assessee is in appeal before Tribunal.

5. Before us, the learned Counsel for the assessee stated facts that depreciation of Rs 182,79,39,359 on “Intangible assets” claimed by the Company in the year under consideration was sought to be disallowed by the PCIT in the revision proceedings. He stated that the PCIT issued a show cause notice stating that the disallowance ought to have been made by the AO at the time of assessment on the basis of Circular No. 9

of 2014 dated 23 April 2014. It was explained by the learned counsel that disallowing the claim of the assessee Company for depreciation on Intangible Assets under section 32(2) of the Act is without any basis because the cost incurred by the Company on construction and development of the project has been classified by the Auditors under the head "Intangible Assets' in the financial statements. The assessee has incurred huge expenditure on this project with an intention of availing an enduring benefit for its business. The agreement bestows upon the assessee an exclusive right, license and authority during the subsistence of the Concession Agreement to implement the project. The learned Counsel drew our attention to Section 32(1)(ii) of the Act, which defines the term 'Intangible Asset' to include any (1) know -how (ii) patents, (iii) copyrights, (iv) trademarks, (v) licences, (vi) franchises or any other business or commercial rights of similar nature. The right to collect toll is a valuable right which has a huge commercial value and is akin to a licence. Hence, it falls within the purview of 'Intangible Assets' under section 32(1)(ii) of the Act. Accordingly, the Company has claimed depreciation at the rate of 25% amounting to INR 282,79,39,359 on such intangible asset for the AY 2012-13 under section 32(1)(ii)of the Act.

6. It was explained by the learned counsel that having established that the expense incurred by the assessee has to be categorized as an Intangible asset in accordance with the companies Act and under the Act as well, the assessee now come to discuss the various aspects of the Circular. At para 3 of the Circular, the CBDT has pointed out that in such BOT arrangements, the assessee does not become the owner of the land but only has a right to develop and maintain such asset and enjoy the benefits arising from use of such asset through collection of toll for a specified period without actual ownership over such asset. Whilst the

assessee in the present case is not the owner of the land, it was explained that it is in possession of rights to collect toll in connection with the infrastructure facility developed by it for which it had incurred huge costs in the preceding years with the intention of availing an enduring benefit for its business. In the present case, the enduring benefit which is arising to the assessee is the collection from toll. Further, the Circular states that the assessee does not hold any rights in the project except recovery of toll fee to recoup the expense incurred and that it cannot be treated as owner of the property either wholly or partly for the purpose of allowability of depreciation under section 32()(ii) of the Act.

7. On the other hand the learned CIT DR Smt. Lakshmi Vara Prasad Gude vehemently supported the revision order passed by the PCIT and he relied on the ammendment to section 263 of the Act vide Finance Act, 2015 with effect from 01.06.2015, by virtue of which explanation 2 was inserted to section 263 of the Act, which is declaratory and clarificatory in nature and inserted to provide clarity on the issue as to which orders passed by the AO shall constitute erroneous and prejudicial to the interest of the Revenue. She argued that the Board Circulars not considered by the AO, the assessment order shall be deemed to be erroneous and prejudicial to the interest of the Revenue. Accordingly, she relied on the Revision order.

8. We have heard the rival contentions and gone through the facts and circumstances of the case. We have gone through the facts and noted from the decision relied on by the learned Counsel for assessee of Hon’ble Supreme Court in the case of Mysore Minerals Ltd. v. CIT (239 ITR 775), wherein it is held as under: -

"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 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 for-ma) deed of title may not have been executed and registered as contemplated by the Transfer of Property Act, the Registration Act, etc. "Building owned by the assessee" the expression asocurring 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 the Transfer of Property Act and the Registration Act, etc., but nevertheless is entitled to hold the property to the exclusion of all others."

9. Similarly, basing the above decision, it is very clear that an assessee need not be a legal owner of an asset to claim depreciation. In case where an assessee is entitled to hold the property to the exclusion of all others and exercise dominion over the property and have the right to use and occupy the property and/or to enjoy its usufruct in his own

right would be the owner. All of these conditions in our view is satisfied in the present case and thus the assessee is entitled to depreciation under section 32(1)(ii) of the Act on such intangible assets. We also noted that the Circular also does not dispute that the expense incurred by the assessee brings to it an enduring benefit in the form of right to collect toll during the period of the agreement. In the present case as mentioned earlier, and at the cost of repetition we reiterate that 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. Separately, we would like to refer a recent decision of the Co-ordinate Bench of Mumbai Tribunal in the case of ACIT v. West Gujarat Expressway Ltd. (2015) 154 lTD 103. The Tribunal in this case after considering the Circular has held that the expense incurred by the assessee for availing an enduring benefit is nothing but an intangible asset and that the assessee is entitled to depreciation on the same under section 32(1)(ii) of the Act. The extract of one of the important observations made by the Tribunal is reproduced below:

> *"It is not disputed that the assessee has been given license/commercial right over the project to receive the toll. The assessee may be not be the owner of the toll road, but he, certainly is owner in possession of the right to collect the toll- The said right has been given to the assessee for a specified period with enduring benefit. It is also not disputed that on the expiry of the time period of the agreement, the said right of the assessee will cease to have effect which means it slowly will depreciate to the nil*

value. As per the provisions of the Income Tax Act, especially under section 32(l)(ii), the assessee is entitled to claim of depreciation on such type of rights. Such rights have been described as intangible assets under the Act and are eligible for claim of depreciation.

In view of the express provisions of the Act, we have no doubt to hold that the assessee is entitled to collect tax being an intangible commercial right under section 32(1)(ii) at the rate as has been prescribed under the relevant rules."

10. Further, we noted that the Circular states that the assessee does not hold any right in the project except the recovery of toll fee to recoup the expense incurred. This view was also adopted by the Revenue in the aforesaid case wherein it stated that the assessee has not acquired any right of the nature referred to in section 32(1)(ii) of the Act and only allows the assessee to recover the costs incurred for the construction of road facility. The Tribunal has observed this to be factually and legally misplaced. The relevant extract of the decision is reproduced below:

"So however, the plea of the Ld. DR before us is to the effect that the impugned right is not of the nature referred to in section 32(1)(ii) of the Act for the reason that the agreement with the Government of Madhya Pradesh only allowed the assessee to recover the costs incurred for constructing the road facility whereas section

32(1)(ii) of the Act required that the assets mentioned therein should be acquired by the assessee after spending money. The said argument in our view is factually and legally misplaced. Factually speaking, it is wrong to say that impugned right acquired by the assessee was without incurrence of any cost. In fact, it is quite evident that assessee got the right to collect toll for the specified period only after incurring expenditure through its own resources on development, construction and maintenance of the infrastructure facility. Secondly, section 32(1)(i1) permits allowance of depreciation on assets specified therein being 'intangible assets' which are wholly or partly owned by the assessee and used for the purposes of its business. The aforesaid condition is fully satisfied by the assessee and therefore considered in the aforesaid perspective we find no justification for the plea raised by the Revenue before us."

11. Now the question arises before us whether in the above given facts the issue is debatable or not. We noted that this issue is again decided by the Special Bench of ITAT Hyderabad in the case of ACIT vs. Progressive Construction Ltd. (2018) 92 taxmann.com 104 (Hyderabad-Trib.) SB, wherein it is held that the expenditure incurred by the assessee for construction of road under BOT contract by Govt. of India have given rise to an intangible asset as defined under explanation 3(b) read with

section 32(1)(iii) of the Act, assessee would be eligible to claim depreciation on such asset at specified rates. The Special Bench has finally held that although the assessee is not the owner of the land but the right granted by the Govt. of India under the Concession Agreement (CA) has a license permitting the assessee to do certain acts and deeds which otherwise would have unlawful or not possible to do in the absence of CA. Thus, the right granted by the assessee under CA to operate the project/ project facility and collect toll charges is a lisence or akin to licence, hence, being an intangible asset eligible for depreciation under section 32(1)(ii) of the Act. Finally, the Tribunal decided the issue vide Para 14 to 17 as under: -

> *"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 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 any one 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 "any other business or commercial right of similar nature".

17. In the case of Techno Shares and Stocks Ltd. (supra), 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."

12. As the issue is highly debatable in the given facts of the case, revision under section 263 of the Act is not permissible. Hence, the revision order is quashed and the appeal of assessee is allowed.

13. **In the result, the appeal of assessee is allowed.**

Order pronounced in the open court on 15-04-2019.

Sd/-	Sd/-
(राजेश कुमार / RAJESH KUMAR)	(महावीर सिंह /MAHAVIR SINGH)
(लेखा सदस्य / ACCOUNTANT MEMBER)	(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 15-04-2019

सुदीप सरकार, व.निजी सचिव / *Sudip Sarkar, Sr.PS*

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**