IN THE INCOME-TAX APPELLATE TRIBUNAL "F" BENCH MUMBAI

BEFORE SHRI G.S. PANNU, VICE-PRESIDENT AND
SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 2848/Mum/2018 (Assessment Year 2013-14)

Valecha Badwani Sendhwa Tollways Ltd. 4th Floor, Valecha Chambers, Andheri New Link Road, Andheri (W), Mumbai-400053. **PAN: AADCV6105B**	Vs.	PCIT-11 R.No. 417, Aayakar Bhavan, M.K. Road, Mumbai-400020.
Appellant		Respondent

ITA No. 2849/Mum/2018 (Assessment Year 2013-14)

Valecha LM Tools Pvt. Ltd. 4th Floor, Valecha Chambers, Andheri New Link Road, Andheri (W), Mumbai-400053. **PAN: AADCV2787M**	Vs.	PCIT-11 R.No. 417, Aayakar Bhavan, M.K. Road, Mumbai-400020.
Appellant		Respondent

Appellant by : Shri Sumant Chadha with
Mr. Jitendra Trivedi (AR)

Respondent by : Shri S.K. Poddar (CIT-DR)

Date of Hearing : 01.04.2019

Date of Pronouncement : 23.04.2019

ORDER UNDER SECTION 254(1)OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. These two appeal by two different assessee are directed against the order of ld. Principle Commissioner of Income-tax-(11) dated 21.02.2018 and 27.03.2018 passed under section 263 of Income-Tax Act. Both the appeal relates to assessment year 2013-14. In both the appeals relate to

same group, though different assessee. In both the appeal the assessee(s) have raised certain identical grounds of appeal. Therefore, both the appeals were clubbed and are decided by consolidated order. With the consent of parties, the appeal in ITA No.2848/Mum/2018 was treated as lead case. The assessee has raised the following grounds of appeal:

1. Validity of Order passed under section 263 of the Income Tax Act, 1961 ('The Act')

That on facts and under the circumstances of the case, learned Principal Commissioner of Income Tax - 11, Mumbai, [Ld, Pro CIT'], erred in setting aside the assessment order dated 10.03.2016 passed by the learned Assessing officer ['Ld. AO] under section 143(3) of the Act, treating the same as erroneous and prejudicial to the interest of revenue.

1.1. Ld. Pro CIT has erred in holding the order passed by Ld. AO as erroneous and prejudicial to the revenue while seeking to amortize cost of project over the project life (concessionaire period) as against depreciation claimed and allowed under section 32 of the Act by Ld. AO. on 'Concessionaire Rights' received under 'Concessionaire Agreement' entered with Madhya Pradesh Government (MPROC) to construct the road on Build Operate Transfer (BOT) basis.

1.2. Ld. Pr. CIT has erred in holding the order passed by ld. AO as erroneous and prejudicial to revenue by failing to appreciate that depreciation charged by Appellant on 'Concessionaire Rights' was fully in compliance with the applicable provisions of section 32 of the Act applicable till the due date for filing return of income by Appellant for AY 2013-14.

1.3. Ld. Pr. CIT has erred has erred in holding the order passed by ld, AO as erroneous and prejudicial to revenue while mentioning that Id. AO had prima-facie failed to carry out proper investigation and failed to comply with CBOT Circular No.9 /2014 dated 23.04.2014 and also not considering decision of Hon'ble Bombay High Court in the case of North Karnataka Expressway Ltd. vs CIT-10 - 51 taxmann.com 214 -2014.

1.4. Ld. Pr.CIT has erred in holding that the order passed by ld. AO as erroneous and prejudicial to the revenue while forcing the applicability of Circular No.09/2014 dated 23.04.2014, which was not in existence at the time of filing ITR for AY 2013-14.

1.5. Ld. Pr. CIT has erred has erred in holding the order passed by ld. AO as erroneous and prejudicial to revenue while applying the ratio of judgment of North Karnataka Expressway Ltd. (supra) to the Appellant's case, without establishing the similarity of fats of both cases.

1.6. Ld. Pr. CIT has erred has erred in holding the order passed by ld. AO as erroneous and prejudicial to revenue in not considering the submission filed and judicial decisions relied upon by the Appellant in support of its contention for claim of depreciation on 'Concessionaire Rights'.

1.7. Ld. Pr. CIT has erred has erred in holding the order passed by ld. AO as erroneous and prejudicial to revenue while directing / mentioning in the order that ld. AO has failed to calculate the exact eligible project cost for the Appellant.

Hence, Appeal.

2. Without prejudice to Ground No.1, ld. Pr. CIT erred in issuing the notice under section 263 of the Act around 01 (one) month before the time limit for completion of revision proceedings under section 263 of the Act.

2. Brief facts of the case are that the assessee is a subsidiary company of M/s Valecha Infrastructure Company and was set-up to design, engineering, construction, development, finance, operation and maintenance, construction of intermediate two lane road of Badwani Palsood Sendhwa Road section in the State of Madhya Pradesh. The assessee entered into concessionary agreement with Madhya Pradesh Government to construction the road on Build Operate Transfer (BOT) basis. The said agreement was made for 15 years over the period of which, the assessee has right to collect the Toll and recover its project cost. The assessee filed its return of income for Assessment Year 2014-13 on 27.09.2013 declaring loss of Rs. 21,43,72,235/-. The return was selected for scrutiny and assessment order was passed under section 143(3) on 10.03.2016 accepting the loss declared by assessee. Subsequently, the assessment was revised by ld. PCIT by invoking his power under section 263 of the Act.

3. The ld. PCIT issued show-cause notice under section 263 dated 30.01.2018. In the show-cause notice, the ld. PCIT contended that assessee claimed a loss of Rs. 21.43 Crore. The assessee has considered the expenditure incurred on completion of the project as concessionary right and for Income-tax purpose claimed depreciation @ 25% as intangible asset. The Assessing Officer completed the assessment under section 143(3) and failed to carry out proper investigation of the matter and the order passed by Assessing Officer is erroneous and prejudicial to the interest of revenue. The ld. PCIT further mentioned that that Assessing Officer failed to follow the CBDT Circular No. 19/2014. As per said Circular No.9/2014, the expenditure incurred on construction of Toll Road is to be amortized equally during the life of concession. Failure to amortize the expenditure on the project over the period of concession has resulted excess computation of loss for the year by Rs. 18.04 Crore leading to potential short levy of tax of Rs. 5.41 Crore. The ld. PCIT further observed that as per the CBDT Circular, the cost of project is to be amortized over the period of life span of the project. The assessee has himself reported in the annual report, filed during the course of assessment proceeding that the cost of project to the assessee is Rs. 86.73 Crore. The said project was handed over as a sub-contract to its sister concern of the assessee. The assessee had received early completion bonus of Rs. 12.35 Crore as reported in the annual report,

therefore, effectively, the cost of construction of the project was not Rs. 98.45 Crore as claimed by assessee. The ld. PCIT worked out the cost of construction/project of Rs. 73.48 Crore and concluded that assessee wrongly claimed the depreciation on Rs. 98.45 Crore. The Assessing Officer failed to calculate the exact amount which was eligible for assessee to claim as cost.

4. In response to the show cause notice under section 263, the assessee filed its reply on 21.02.2018. In the reply the assessee contended that that Circular No. 9/2014 was issued on 23.04.2014 and was not available at the time of finalizing the accounts and on filing return of income for Assessment Year 2013-14, filed on 27.09.2013. The said Circular shall be considered to be applicable from Assessment Year 2014-15 onward. The assessee further contended that during the scrutiny assessment notice under section 142(1) dated 30.10.2015 was issued by Assessing officer. The Assessing Officer called various details including Tax Audit Report (TAR), Balance-sheet, Profit & Loss Account, and Computation of Income along with details of additions to be fixed assets along with copies of bills and the source of investment. The assessee also annexed the copy of notice dated 30.10.2015. The assessee further contended that details to be Assessing Officer on 22.12.2015 and on 08.01.2016. The Assessing Officer after verifying the details and explanation provided by the assessee passed the assessment order on 10.03.2016 under section

143(3) of the Act. The treatment of "concessionary right" capitalized as 'intangible asset' by assessee and submitted during the assessment proceeding was available in the audited financial statement. For non-compliance of CBDT Circular, the assessee contended that under concessionary agreement, the assessee was given right to develop and maintain Toll Road and also right to collect the Toll for specific period. The assessee has an express right for recovery of Toll fees to recoup the expenditure. The said right brings to the assessee an enduring benefit during the period of agreement. The assessee may not be owner of the Toll Road, but certainly has right to collect the Toll which has given for specific period with enduring benefit. On the expiry of time limit of period of the contract, the right of the assessee will seize to have effect thereby it will slowly depreciate to Nil value. The assessee further contended that as per provisions of section 32(1)(ii) of the Act , the assessee is entitled to claim deprecation on such right, which have been described as 'intangible asset' under the Act and are eligible for claim of depreciation.

5. In support of its contention, the assessee relied upon the decision of Tribunal in ACIT vs. West Gujarat Expressway Ltd. [2015] 57 taxmann.com 384, ACIT vs. Ashoka Infraways (P.) Ltd. [2013] 33 taxmann.com 499 (ITAT Pune), Ashoka Info (P.)Ltd. V. ACIT [2010]

SOT 50 (ITAT Pune) and Dimension Construction Pvt. Ltd. vs. DCIT [2011] ITA No. 222, 223, 233 & 857/PN/2009 (ITAT Pune).

6. The assessee also contended that it is not a case that the claim of assessee is factually incorrect or not in accordance with law. When the two views are possible on the matter, the view which is sustainable in law, supported by judicial decision, verified by Assessing Officer cannot be considered as erroneous and prejudicial to the revenue. The assessee has been granted the right to collect Toll and recover its cost awarded on BOT basis, the said right gives assessee a benefit of enduring nature and accordingly in the nature of 'commercial business right' covered within the definition of Intangible assets under section 32(1)(ii) of the Act. The assessee requested to drop the revision proceeding.

7. The contention of assessee was not accepted by ld. PCIT. The ld. PCIT concluded that the assessment order passed by assessing officer is erroneous and prejudicial to the interest if justice and set- aside the assessment order. The ld. PCIT directed the Assessing Officer to pass fresh assessment order in respect of depreciation claim of assessee with special emphasis on cost of project as claimed by the assessee in the light of CBDT Circular No.9/2014 dated 23.04.2014 and the order passed by the Hon'ble Bombay High Court in North-Karnataka Expressway vs. CIT. Therefore, aggrieved by the order of ld. PCIT, the assessee has filed the present appeal before us.

8. We have heard the submissions of the ld. Authorized Representative (AR) of the assessee and ld. Departmental Representative (DR) for the revenue and perused the material available on record. The ld. AR of the assessee submits that the assessment order passed by Assessing Officer is not erroneous. During the assessment, the Assessing Officer issued detailed notices calling for the various details pertaining to the addition to the fixed assets. Copy of notices under section 143(2) and 142(1) dated 30.10.2015 along with the questionnaires raised by Assessing Officer is placed on record vides page no. 26 to 30 of the Paper Book. The assessee before Assessing Officer filed its detailed reply along with the details of addition of fixed assets, copy of audit report etc. vide reply dated 22.12.2015 and 08.01.2016. The Assessing Officer after verifying the details allowed the claim of assessee, thus, the contention of ld. PCIT that the Assessing Officer has not applied his mind is without any merit. In support of his submission, the ld. AR relied upon the decision of Hon'ble Bombay High Court in CIT vs. Gabriel India Ltd. (203 ITR 108). The ld. AR further submits that it is not a case where the claim of assessee is factually incorrect or not in accordance with law. It was submitted that where two views are possible on the matter, the view which is sustainable in law and supported by judicial decision and verified by Assessing Officer cannot be considered as erroneous or prejudicial to the interest of revenue. For invoking provision under

section 263, the twin condition mentioned in section 263 must be satisfied, that the order of Assessing Officer sought to be revised is erroneous and the order is prejudicial to the interest of revenue. The ld. AR submits that the Hon'ble Supreme Court in Malabar Industrial Company Ltd. vs. CIT [243 ITR 83 (SC)] that the Commissioner has to be satisfied of the twin condition of section 263. If one of them is absent i.e. if the order is erroneous but not prejudicial to the interest of revenue or if not erroneous but prejudicial to the revenue, recourse cannot be had to section 263 of the Act.

9. The ld. AR further submits that the assessee is entitled for depreciation @ 25% on the Toll rights, being Intangible rights. The assessee had entered into concession agreement with the Government of Madhya Pradesh, wherein the assessee has been granted right to collect Toll. The right to collect Toll is a form of Intangible asset and is therefore, eligible for depreciation. The assessee considered the Toll rights and claimed deprecation on it. The ld. AR submits that on similar facts, the Mumbai Tribunal in ACIT vs. West Gujarat Expressway Ltd. (supra), the Pune Tribunal in M/s Rohan & Rajdeep Infrastructure vs. PCIT in ITA No. 633/PUN/2017 dated 23.02.2018 allowed the claim of depreciation on such Toll road. Further, the special bench of Hyderabad Tribunal after considering the CBDT Circular No.9/2014 concluded that where the assessee had never claimed expenditure incurred for construction of

BOT as revenue expenditure, it could not have been amortized in term of CBDT Circular No. 9/2014 dated 23.04.2014. In support of his submission, the ld. AR also relied upon the decision of ACIT vs. Ashoka Infraways (P.) Ltd. [2013] 33 taxmann.com 499 (Pune-Trib.), M/s Rohan & Rajdeep Infrastructure vs. PCIT (supra), ACIT vs. West Gujarat Expressway Ltd. (supra), ACIT vs. Progressive Construction Ltd. [2018] taxmann.com 104 (Hyderabad- Trib.) (SB), PCIT vs. Delhi Airport Metro Express Pvt. Ltd. in ITA No. 705/2017 (Del. HC) and Dimension Construction Pvt. Ltd. vs. DCIT in ITA No. 222, 223, 233 & 857/PN/2009.

10. The ld. AR further submits that the Hon'ble Bombay High Court in North-Karnataka Expressway Ltd. vs. CIT reported in 372 ITR 145 (Bom.) after considering the CBDT Circular No. 9/2014 also held that right to collect the Toll is a capital expenditure and assessee is entitled to claim depreciation on such Intangible asset as provided under section 32(1)(ii) of the Act. On the decision of Madras Industrial Investment Corporation vs. CIT [225 ITR 802] referred by ld. PCIT in the show-cause notice, the ld. AR submits that the said judgment dealt with the treatment of amortization of discount on the issue of debenture, whereas in case of assessee, it is regarding treatment of capitalization of cost incurred on BOT project, hence, the judgment is not applicable on the fact of the assessee's case. The cost of project worked out by ld. PCIT at

Rs. 73.48 Crore against Rs. 98.45 Crore claimed by assessee. The ld. AR submits that the assessee vide agreement dated 18.05.2011 given the work to Valecha Engineering Ltd. (VEL) for a lump-sum price of Rs. 86.73 Crore. The assessee had entered expenses of Rs. 11.72 Crore. During the year, the assessee received bonus of Rs. 12.25 Crore from Madhya Pradesh Government for early competition of project, in accordance with term of agreement. The said bonus was given to VEL. The said bonus was included in operational income and the amount paid to VEL of Rs. 12.25 Crore was debited to the Profit & Loss Account under the head "Other Expenses". Accordingly, there was no impact on the Profit & Loss Account of the assessee, being business receipt relating to carrying on business. The details of operational income and early project completion bonus paid to VEL were submitted before the Assessing Officer along with reply dated 22.12.2015, therefore, the contention for reducing the early completion bonus from project cost under revision proceeding is not justified. The ld. AR prayed for quashing the order passed by ld. PCIT.

11. On the other hand the ld. DR For the revenue supported the order of ld. PCIT. The ld. DR for the revenue further submits that the order passed by Assessing Officer is not only erroneous but prejudicial to the interest of Revenue. The Assessing Officer has not examined the issue during the assessment proceedings. No detail was called nor was the claim of

depreciation examined by Assessing Officer. If the assessee has merit, it can be examined by the Assessing Officer. In the rejoinder submission, the ld. AR submits that it could be set-aside for limited purpose.

12. We have considered the submissions of the ld. AR for the assessee and ld. DR for revenue and perused the record. We have also deliberated on the case laws relied ld. representative before us. There is no dispute on the fact that the assessee entered into concessionary agreement with Madhya Pradesh Government to construction the road on Build Operate Transfer (BOT) basis. The said agreement was made for 15 years over the period of which, the assessee has right to collect the Toll and recover its project cost. In the return of income the assessee claimed that the expenditure incurred on the project as 'concessionary right' and claimed depreciation @25% as intangible asset. The claim of the assessee was accepted by assessing officer while passing assessment order passed under section 143(3) on 10.03.2016. The ld. PCIT invoked the provision of section 263 and held that the assessment order passed by Assessing Officer under section 143(3) dated 10.03.2016 and issued show-cause notice under section 263 as erroneous and prejudicial to the interest of revenue for four reasons i.e. (i) non-compliance of CBDT Circular No. 9/2014 (ii) not following decision of Hon'ble Supreme Court in Madras Industrial Development Corporation vs. CIT (supra) (iii) failure to calculate exact amount that was eligible for assessee to be

cost of project and (iv) failure to amortize the expenditure on project over the period of concession has resulted excess computation of loss. However, while passing the final order on 21.03.2008, the PCIT set-aside the assessment order dated 10.03.2016 passed under section 143(3) by taking his view that order is erroneous and prejudicial to the interest of revenue and directed the Assessing Officer to examine the claim of depreciation with special emphasis in the light of CBDT Circular No. 9/2014 and the judgment of Hon'ble Bombay High Court in North-Karnataka Expressway Ltd. (supra).

13. The co-ordinate bench of Mumbai Tribunal in ACIT vs. West Gujarat Expressway Ltd. (supra) while considering the alternative claim of assessee that the investment made by assessee under the asset building plant and machinery and depreciation be granted accordingly or the same may be treated as "Intangible asset" on the ground that assessee has been granted licence to collect the Toll tax for a fixed period, in view of the observation of Hon'ble Bombay High Court in North-Karnataka Expressway Ltd. (supra) passed the following order:

> **"17.** We have considered the rival contentions. So far as the reliance of the Ld. A.R. on the article/clause 38.4 of the concession agreement between the assessee and the NHAI is concerned, we find that the identical clause was also there and relied upon in the case of *North Karnataka Expressway Ltd.* (*supra*) which has also been reproduced in para 8 of the order of the Hon'ble Bombay High Court (supra). The relevant part of the order for the sake of convenience is reproduced as under:
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> "8. The appellant claimed that it was the owner of the toll road and the entire cost incurred for construction thereof was capitalized by the

Appellant in its books in the assessment year 2005-06 during which the construction of the toll road was completed. As the assessment year under consideration was the first year when the road became operational, the Appellant claimed Depreciation of Rs.59.92 crores at the rate of 10% on the capitalized cost of the toll road. 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 higher claim of depreciation on toll road, the claim is made at the rate of 10%. The right to claim higher depreciation is reserved. The Appellant relied upon the standard concession document of the National Highway Authority of India and the clause therein that 'for the purpose of claiming tax depreciation, the property representing the capital investment made by the concessionaire shall be deemed to be acquired and owned by the concessionaire'." (Emphasis supplied by us)

18. The Hon'ble Bombay High Court, however, after discussing the provisions of National Highway Act, 1956 and National Highway Authorities of India Act, 1988 and various case laws including that are strongly relied upon by the Ld. A.R. e.g. *Mysore Minerals Ltd.* v. *CIT* [1999] 239 ITR 775/106 Taxman 166 (SC), *CIT* v. *Podar Cement (P.) Ltd.* [1997] 226 ITR 625/92 Taxman 541 (SC) and *Noida Toll Bridge Co. Ltd.* (*supra*), has held that the national highways vest in the Union of India and if the government for the purpose of development and maintenance of the whole or any part of the national highways enters into an agreement with private parties or that merely because the national highway is built, maintained, managed and operated by private entities, in no way affects the vesting of the national highway in the Union and that does not dilute or take away the ownership of the highway or its vesting in the Union. After discussing the various decisions of the Hon'ble Supreme Court and of the Hon'ble High Courts, the contention of the assessee in that case that it was the owner of the toll road has been rejected by the Hon'ble Supreme Court. Hence, the clause 38.4 relied upon by the assessee in the present case will not be of any help to the assessee in this regard.

19. However, so far as the alternative claim of the assessee that if the assessee is not found as owner of the toll road, his claim of depreciation be considered in relation to investments made as falling under the other categories of assets, is concerned, we would like to revert to the decision of the Hon'ble Bombay High Court in *North Karnataka Expressway Ltd.* (*supra*). in this respect. We find the Hon'ble Bombay High Court, in para 24 of the said decision, has categorically observed that the claim of depreciation in the said case was not based on treating it as an intangible asset with a right to use the asset without being actual owner thereof. The issue under consideration was that whether the toll roads are not owned by the assessee and that he cannot claim any depreciation thereupon. Hence, the Hon'ble Bombay High Court has not discussed the issue relating to the claim of depreciation on the license for right

to collect the toll as intangible asset. Further, the Hon'ble Bombay High Court in para 39 of the decision (supra) has observed that as per the provisions of National Highway Act, 1956 and National Highway Authorities of India Act, 1988, the ownership of the toll road vests in Union , however, the term owner as appearing in the Income Tax Act, 1961 has been defined widely and broadly for the purpose of the provisions of the Income Tax Act so as not to allow anybody to escape the provisions thereof by urging that he has a limited right or which is not akin to ownership, therefore his income should not be brought to tax; Similarly, if he can claim any deductions from his income which is comprising of profit and gain from his business, then, that deduction can be availed by him. It is for that limited purpose that the term 'owner' is defined in this manner in Income Tax Act, 1961.

The above observations of the Hon'ble Bombay High Court reveal that for the purpose of claiming deduction under Income Tax Act, the term 'owner' as defined under the Income Tax Act can be looked into. However, that cannot control, leave alone or overreach the National Highway Act, 1956 or the National Highway Authorities of India Act, 1988. The Hon'ble Bombay High Court further, in para 47 of the said order, has observed that the assessee can definitely claim depreciation on the investments. He has definitely invested in the projects of construction development and maintenance of the National Highways and such of the assets in the form of building, plant & machinery etc. The claim for depreciation can be validly raised and granted. That the Hon'ble High Court in the said case was only concerned with the claim on the land or a road itself. Further, in concluding para 52 of the order, the Hon'ble Bombay High Court has categorically clarified that the assessee's claim for depreciation in respect of the building, plant & machinery and falling within the purview of sub section (1) of section 32 of the Income Tax Act, 1961, if considered and granted, shall not be affected by the decision of the Hon'ble Bombay High Court.

20. A careful reading of the entire decision of the Hon'ble Bombay High Court and in the light of the various observations made in judgment as discussed above, it is very clear that the Hon'ble Bombay High Court was concerned about the issue as to whether the assessee can claim itself as the owner of the toll road and the Hon'ble Bombay High Court has held that in view of the express provisions of the National Highway Act, 1956 and National Highway Authorities of India Act, 1988 the Union is the absolute owner of the National Highways as well as the toll roads built upon the land/National Highways in agreement and through the private parties and such private parties cannot claim themselves to be the owner of the toll road. However, the Hon'ble Bombay High Court has left upon the issue relating to the claim of depreciation, if otherwise eligible under the other provisions of the Income Tax Act.

21. The Ld. A.R., before us, has put the alternative claim that in view of the observations of the Hon'ble Bombay High Court either the investments made

by the assessee be treated under the asset building, plant & machinery and depreciation be granted accordingly or the same be treated as intangible asset on the ground that the assessee has been granted license for right to collect the toll tax for a fixed period. Now the question before us is whether the assessee at this stage the can raise the alternative contention for claim of allowance of depreciation on the license authorizing him to collect the toll being an intangible asset or treating the project as plant & machinery?

22. We may observe that the Hon'ble Bombay High Court in the case of *CIT* v. *Pruthvi Brokers & Shareholders (P.) Ltd.* [2012] 349 ITR 336/208 Taxman 498/23 taxmann.com 23, while relying upon the various decisions of the Hon'ble Supreme Court and other Hon'ble High Courts, has held that even if a claim is not made before the AO it can be made before the appellate authorities. The jurisdiction of the appellate authorities to entertain such a claim is not barred. The Hon'ble Bombay High Court while relying upon the decision of the Hon'ble Supreme Court in the case of *Jute Corpn. of India Ltd.* v. *CIT* [1991] 187 ITR 688/[1990] 53 Taxman 85 has observed that the power of the Appellate Commissioner is coterminous with that of the Income Tax Officer and an appellate authority while hearing 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. An assessee 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 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. It is open to the assessee to claim a deduction before the appellate authority which could not have been claimed before the AO. The Hon'ble Bombay High Court has further observed that the decision of Hon'ble Supreme Court in the case of '*Goetze (India) Ltd.* v. *CIT*' [2006] 284 ITR 323/157 Taxman 1 regarding the restriction of making the claim through a revised return was limited to the powers of the Assessing Authority and the said judgment does not impinge on the power or negate the powers of the appellate authorities to entertain such claim by way of additional ground. Reliance can also be placed in this regard on the decisions of the Tribunal in the case of *PV. Ananthkrishnan* v. *ACIT* [IT Appeal No.1820/M/2011 dated 05.05.2014] and in the case of *Presidency Co-operative Housing Society Ltd.* v. *ACIT* [IT Appeal No.4051/M/2011, dated 16.05.2014].

The present case is not a case where the assessee had not claimed any deduction on account of depreciation. The assessee has very much claimed the deduction of depreciation. However, he has claimed the same treating itself to be the owner of the toll road. Such a claim of the assessee has been allowed in the previous assessment years. The assessee was under bonafide belief that he has correctly claimed the deduction of depreciation on the toll road in view of the consistent findings of the Tribunal on this issue. However, due to the change of legal position in view of the law laid down by the Hon'ble Bombay High Court (supra), the assessee cannot be treated as the owner of the toll road. But it is not disputed that the assessee has made investments on the project and he is entitled to claim deductions in this respect. The claim of deduction has been very much put by the assessee in the return of income but wrongly treating itself as owner of the road which claim as observed above was under bonafide belief and in view of the settled legal position as was there at the time of putting the claim. Even the AO has also observed in the assessment order that it is a fact that the assessee 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 into providing enduring benefit to the assessee company, hence, the said amount would be eligible for amortization for the period of the concession agreement as it was allowed in the A.Y. 2007-08 and 2008-09. It is also a fact that the said amortization of the expenses has not been accepted by the Tribunal and the assessee in the earlier assessment years has been granted deduction as depreciation treating the road as a capital asset.

23. In view of the above facts, it is not disputed or contested by the Revenue that the assessee is not entitled to any deduction. The only issue in dispute is as to under what head/provision the deduction is to be allowed to the assessee. The Hon'ble Jurisdiction High Court of Bombay in the case of *Balmukund Acharya* v. *Dy. CIT* [2009] 310 ITR 310/176 Taxman 316 has held that the Hon'ble 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 assessee, 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 taxes dues are collected. While holding so, the Hon'ble Bombay High Court has relied upon the various decisions e.g. *S.R. Koshti* v. *CIT* [2005] 276 ITR 165/146 Taxman 335 (Guj), *C.P.A. Yoosuf* v. *ITO* [1970] 77 ITR 237 (Ker.), *CIT* v. *Bharat General Reinsurance Co. Ltd.* [1971] 81 ITR 303 (Delhi), *CIT* v. *Smt. Archana R. Dhanwatey* [1982] 136 ITR 355/[1981] 7 Taxman 121 (Bom.).

In view of the above discussed factual and legal position, we have no hesitation to hold that the assessee is entitled to put his alternate claim that the deduction allowable to him may be considered as allowable as depreciation treating the

project/investments made under the head "Plant & machinery" or treating it as a right/license to collect the toll tax as intangible asset.

24. Having held that the assessee is entitled to the deduction on the investments made by him, we now have to discuss as to under what head the said deductions can be claimed by the assessee. It is undisputed that in view of the agreement with the NHAI, the assessee has been given the right to develop and maintain the toll road and also the right to collect toll for a specified period without having actual ownership over the said toll road. The assessee has an express right/license for recovery of toll fee to recoup the expenditure. The said right brings to the assessee an enduring benefit during the period of agreement. This fact has also been discussed by the CBDT in circular No.09/2014 dated 23.04.14. The para 4 of which, for the sake of convenience, is reproduced as under:

> "There is no doubt that where the assessee incurs expenditure on a project for development of roads/highways, he is entitled to recover cost incurred by him towards development of such facility (comprising of construction cost and other pre-operative expenses) during the construction period. Further, expenditure incurred by the assessee on such BOT projects brings to it an enduring benefit in the form of right to collect the toll during the period of the agreement. Hon'ble Supreme Court in the case of *Madras Industrial Investment Corporation Ltd.* v. *CIT* in 225 ITR 802 allowed spreading over of liability over a number of years on the ground that there was continuing benefit to the company over a period. Therefore, analogously, expenditure incurred on an infrastructure project for development of roads/highways under BOT agreement may be treated as having been made/incurred for the purposes of business or profession of the assessee and the same may be allowed to be spread during the tenure of concessionaire agreement."

25. Having discussed the above stated factual position, the CBDT has directed to treat the above expenditure as revenue expenditure and to amortize the same over the period of the agreement as allowable business expenditure. The assessee, however, has claimed that the same is a capital expenditure and it is entitled to deductions over the investments made as depreciation. A perusal of the above reproduced para 4 of the circular reveals that it is not disputed even by the Revenue Authorities that in lieu of the investments made in the project, the assessee has been given right/license to collect the toll. It has also been specifically mentioned that it brings an enduring benefit in the form of right to the assessee. Having admitted the above position by the Revenue, now the question to be considered is whether any depreciation is allowable on such a right?

26. As per section 32(1)(ii) depreciation is allowable on intangible assets like licenses, franchises or any other business or similar commercial rights of

similar nature. The relevant part of the section for the sake of convenience is reproduced as under:

"32. *Depreciation*.— (1) In respect of depreciation of —

(*i*) buildings, machinery, plant or furniture, being tangible assets; (ii) know-how, patents, copyrights, trademarks, 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 business or profession, the following deductions shall be allowed - ……." (Emphasis Supplied by us)

27. It is not disputed that the assessee has been given license/commercial right over the project to receive the toll. The assessee may 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(1)(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.

28. 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. Our above view is further supported by the decision of the co-ordinate Pune bench of the Tribunal in the case of *Ashoka Infrastructure Ltd.* v. *ITO* [IT Appeal Nos. 989 & 1105/(PN) of 2010], wherein, the Tribunal while further relying upon another decision of the Co-ordinate Bench of the Tribunal in the case of *Asstt. CIT* v. *Ashoka Infraways (P.) Ltd.* [2013] 58 SOT 147/33 taxmann.com 499 (Pune - Trib.) has held in clear terms that the claim of the assessee for depreciation on "licence to collect toll" being an 'intangible asset' falling within the scope of section 32(1)(ii) of the Act is liable to be upheld. The relevant part of findings of the Tribunal for the sake of convenience is reproduced as under:

> "6. At the time of hearing, it was a common point between the parties that an identical issue has been considered by the Pune Bench of the Tribunal in the case of *Ashoka Infraways Pvt. Ltd.* v. *ACIT* vide ITA Nos. 185 & 186/PN/2012 dated 29.04.2013. As per the Tribunal following the precedents by way of various decisions of different Benches of the Tribunal mentioned therein, the claim of the assessee for treating the 'License to collect Toll' as an intangible asset eligible for the claim of

depreciation @ 25% as per Section 32(1)(ii) of the Act was justified. The following discussion in the order of the Tribunal dated 29.04.2013 (supra) is relevant :—

"7. Before us, it was a common point between the parties that the impugned issue has been adjudicated in favour of the assessee in the following decisions of the Tribunal:—

(*i*) *Ashoka Buildcon Ltd.* in ITA.No.1302/PN/09 dated 20.03.2012.

(*ii*) M/s. *Kalyan Toll Infrastructure Ltd.* in ITA.Nos.201 & 247/Ind/2008 dated 14.12.2010.

(*iii*) *Dimension Construction Pvt. Ltd.* in 1TA.No.222, 223, 233 & 857/PN/2009 dated 18.03.2011.

(*iv*) *Ashoka Info (P.) Ltd.* (*supra*)

(*v*) *Reliance Ports and Terminals Ltd.* (*supra*).

8. The Ld. CIT(DR) appearing for the Revenue, has submitted that the 'intangible assets' eligible for depreciation in section 32(1)(ii) of the Act, are only those which are owned by the assessee and have been acquired after spending money. In the case of the assessee, by way of an agreement, assessee was awarded a work to construct a road by using own funds and the expenditure incurred was allowed to be reimbursed by permitting the assessee a concession to collect toll/fees from the motorists using the road. Therefore, it could not be said that such a right was within the purview of section 32(1)(ii) of the Act. However, the Ld. CIT(DR) has not contested the factual matrix that identical issue has been considered by our coordinate Benches in the case of *Ashoka Buildcon Ltd*. (*supra*), *Kalyan Toll Infrastructure Ltd*. (*supra*), *Dimension Construction Pvt. Ltd*. (*supra*) and *Ashoka Info (P) Ltd*. (*supra*).

9. On the other hand, the Ld. Representative for the respondent assessee pointed out that the aforesaid argument set up by the Revenue has also been considered in the aforesaid precedents before concluding that the impugned 'Right to collect Toll' was an 'intangible asset' eligible for claim of depreciation @ 25% as per sec. 32(1)01) of the Act.

10. We have carefully considered the rival submissions. Factually speaking, there is no dispute to the fact that the costs capitalised by the assessee under the head 'License to collect Toll' have been incurred for development and construction of the infrastructure facility, i.e., Dewas By-pass Road. It is also not in dispute that the assessee was to build, operate and transfer the said infrastructure facility in terms of an agreement with the Government of Madhya Pradesh. The expenditure on development, construction and

maintenance of the infrastructure facility for a specified period was to be incurred by the assessee out of its own funds. Moreover, after the end of the specified period, assessee was to transfer the said infrastructure facility to the Government of Madhya Pradesh free of charge. In consideration of developing, constructing, maintaining the facility for a specified period and thereafter transferring it to the Government of Madhya Pradesh free of charge, assessee 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 assessee on development, construction and maintenance of the infrastructure facility. Such a right has been adjudicated by the Tribunal in the aforesaid precedents to be in the nature of 'intangible asset' falling within the purview of section 32(1)(i/) of the Act and has been found eligible for claim of depreciation. No decision to the contrary has been cited by the Ld. DR before us and, therefore, we find no reasons to depart from the accepted position based on the aforesaid decisions.

11. 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.

12. In the result, we affirm the order of the CIT(A) in holding that the assessee was eligible for depreciation on the 'Right to collect Toll', being an 'intangible asset' falling within the purview of section 32(1)(i1) of the Act following the aforesaid precedents."

7. In terms of the aforesaid precedent, the claim of the assessee in the present case for depreciation on 'License to collect Toll', being an 'intangible asset' falling with the scope of Section 32(1)(ii) of the Act is liable to be upheld. We hold so.

8. In so far as the reliance placed by the CIT(A) on the judgement of the Hon'ble Bombay High Court in the case of Techno Shares And Stocks Ltd. (supra) is concerned it may only be noted that the said judgement has since been altered by the Hon'ble Supreme Court vide its order reported at (2010) 327 ITR 323 (SC). Accordingly, in view of the aforesaid discussion, we hereby allow the Ground of Appeal No. 1.1 raised by the assessee.'

29. In view of our observations made in the preceding paras and also agreeing with the above reproduced findings of the Tribunal, we hold that the assessee is entitled to the claim of depreciation on the road to collect toll being an intangible asset falling within the purview of section 32(1) (ii) of the Act.

30. So far as the other alternative contention of the assessee that the project be treated as plant & machinery and the depreciation be accordingly allowed to it, we do not find that the said license of right to collect toll in any way falls in the definition of plant & machinery. As held by the Hon'ble Bombay High Court, even the assessee is not the owner of the toll road. The assessee has been given only the right to develop, maintain and operate the toll road and further to collect the toll for the specified period. This right as discussed above is an intangible asset falling under section 32(1)(ii) of the Act.

31. So far as the contention of the Revenue that the investment made by the assessee be treated as a revenue expenditure and be amortized for the period of the agreement, is concerned, we do not find any force in the same on the ground that not only the AO but also the CBDT in the circular (supra) as discussed above has admitted that the license of right to collect toll free has been given to the assessee in lieu of the investments made and that such a right brings to the assessee an enduring benefit. The investments made under such circumstances cannot be said to be of revenue in nature but, as discussed above, are of capital in nature. The assessee, thus, is entitled to claim depreciation on such type of capital asset.

32. In view of our above findings, this ground of the Revenue is hereby dismissed but on a different footing as discussed above and in terms of our observations made above.

14. Further, Special Bench of Hyderabad Tribunal in ACIT vs. Progressive Construction Ltd. (supra) also held that expenditure incurred by assessee for construction of road under BOT contract by Government of India had given rise to an intangible asset as defined under Explanation 3(b) read with section 32(1)(ii), assessee would be eligible to claim depreciation

on such asset at specified rate. The Special Bench also held that where the assessee never claimed expenditure incurred for construction of BOT as referred revenue expenditure, it could not have been amortized in terms of CBDT Circular No. 9 of 2014 dated 23.03.2014.

15. We have noted that on almost similar fact, the co-ordinate bench of Pune Tribunal while hearing appeal against the order passed by PCIT –2, Pune under section 263 passed the following order:

> "10. We have heard the rival submissions and perused the material on record. The issue in the present case is about the invoking of provisions of Section 263 by Ld PCIT. Sec. 263(1) of the Act, the powers under which Ld PCIT has assumed power for revision reads as under:
>
> > *"The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the ITO is erroneous in so far as it is prejudicial to the interests of the Revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."*
>
> 11. The reading of the above provision makes it very clear that the power of suo motu revision u/s 263(1) is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the Commissioner to exercise power of revision u/s 263, namely (i) the order is erroneous (ii) by virtue of being erroneous, prejudice has been caused to the interests of the Revenue.
>
> 12. Hon'ble Apex Court in the case of Malabar Industrial Co., Ltd., Vs CIT reported in (2000) 243 ITR 83 (SC) has held that CIT has to be satisfied of

twin conditions, namely, (i) the order of the AO sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent--if the order of the ITO is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue--recourse cannot be had to Sec.263(1). It was further held that the provision cannot be invoked to correct each and every type of mistake or error committed by the AO; when an ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the ITO is unsustainable in law.

13. In the case of CIT Vs. Gabriel India Ltd reported in (1993) 203 ITR 108 (Bom), the Hon'ble Bombay High Court has held as under:

"An order cannot be termed as erroneous unless it is not in accordance with law. If an ITO acting in accordance with law makes certain assessment, the same cannot be branded as erroneous by the Commissioner simply because according to him the order should have been written more elaborately. This section does not visualise a case of substitution of judgment of the Commissioner for that of the ITO, who passed the order, unless the decision is held to be erroneous. Cases may be visualised where ITO while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimates himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and, left to the Commissioner, he would have estimated the income at a higher figure than the one determined by the ITO. That would not vest the Commissioner with power to re- examine the accounts and determine the income himself at a higher figure. It is because the ITO has exercised the quasi- judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not

feel satisfied with the conclusion. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interest of the Revenue. But that by itself will not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, namely, the order is erroneous, is absent. Similarly if an order is erroneous but not prejudicial to the interest of the Revenue, then also the power of suo motu revision cannot be exercised. Any and every erroneous order cannot be subject-matter of revision because the second requirement also must be fulfilled."

14. In the present case, the Ld PCIT invoked provisions of Sec.263 and held that the assessment order passed by the AO u/s 143(3) to be erroneous and prejudicial to the interest of the Revenue for two reasons firstly that since the assessee is a partnership firm, cannot be considered to be a consortium so as to be eligible for claiming deduction u/s 80IA(4) of the Act. According to Ld. PCIT, AO has ignored the aforesaid fact and had allowed the deduction and secondly for the reason that assessee had claimed depreciation @ 25% on the project cost on WDV basis and the claim of depreciation was allowed by the AO whereas as per CBDT Circular No.9/2014, the entire cost of construction and development had to be amortised evenly over the period of concession.

15. On the issue of depreciation @ 25% claimed by assessee and allowed by AO, it is an undisputed fact that assessee had entered into different concession agreements with Public Works Department of Maharashtra for construction of certain roads and its operation and maintenance for an agreed period on Build Operate and Transfer (BOT) basis. By virtue of the concession agreement, assessee was granted right to collect and retain toll for the defined concession period. The right to collect toll was considered by assessee to be a form of licence and thus an intangible right as per provisions of Sec.32(1)(ii) of the Act and therefore being eligible for depreciation at 25%. We find that on identical facts namely the issue of depreciation on intangible rights, was before the Co-ordinate Bench of Pune Tribunal in the case of Ashoka Infrastructure Pvt. Ltd (supra). The Co-ordinate Bench of the Tribunal, after considering the decision rendered by Mumbai Tribunal in the case of ACIT Vs. West Gujarat Expressway Ltd., reported in (2015) 57 taxmann.com 384, which in turn had

relied upon the ratio laid down by Hon'ble Bombay High Court in the case of North Karnataka Expressway Ltd., Vs CIT reported in (2015) 372 ITR 145 (Bom) and after considering the CBDT Circular No.9/2014 dated 23.04.2014 (which has also been relied upon by Ld PCIT in the present case) has held that the right to collect toll is capital expenditure and consequently the assessee is entitled to claim depreciation on such intangible assets as provided u/s 32(1)(ii) of the Act. Before us no material has been placed by the Revenue to demonstrate that the aforesaid decision of Pune Tribunal in the case of Ashoka Infrastructure (supra) has been set aside / overturned by higher judicial forum. Further, in view of the aforesaid facts, we are of the view that the view /opinion of the AO of holding the right to collect toll as an intangible asset, and therefore eligible for depreciation and allowing the claim of depreciation to the assessee was a possible view. It is a settled law that so long as the view taken by the Assessing Officer is a possible view then the same ought not to be interfered with by the Commissioner under Section 263 of the Act merely on the ground that there is another possible view on the matter. As far as the contention of the Revenue that on the issue of depreciation, there was no whisper of having being examined by the AO in the assessment proceedings, it has been held by various authorities that the mere fact that the issue did not fall for discussion in the assessment order would not ipso facto lead to the conclusion that the Assessing Officer did not apply his mind to the issue.

16. On the issue of assessee not being eligible for deduction u/s 80IA(4) as it being a partnership firm is concerned, it is an undisputed fact that the assessee is a partnership firm consisting of 3 companies namely Rohan Builders (India) Pvt. Ltd, Rajdeep Buildcon Pvt., Ltd and Rajdeep Road Developers Pvt., Ltd with a profit sharing ratio of 50:40:10 respectively. It is also a fact that in the case of assessee apart from the aforesaid 3 partners, there are no other non-corporate entities, who are partners. It is also a fact that the partnership firm came into existence on 11.04.2001 and the same partners continued in the year under consideration without any change in the constitution. It is a fact that according to provisions of Sec.80IA(4)(i)(a), the section applies to an enterprise which is a company registered in India or a consortium of companies or by an authority or a board or a corporation or any other body established or

constituted under any Central or State Act. It is also a fact that the word "consortium" used in the provision has not been defined in the Income Tax Act. As per the Merriam Webster dictionary, the word "consortium" means "an agreement, combination, or group (as of companies) formed to undertake an enterprise beyond the resources of any one member". As per the Collins English Dictionary, a "Consortium" is a group of people or firms who have agreed to co-operate with each other". We find that the Hon'ble Madhya Pradesh High Court in the case of Org Informatics (supra) has observed that a consortium is akin to a partnership where each partner is liable for action of other partners. In the present case it is not the case of the Revenue that in the partnership firm, there are other non corporates, who are partners or the firm is not for the purpose of business. It is seen that the assessee has been granted the benefit of deduction u/s 80IA(4) in earlier years and in 2 assessment years i.e., A.Y. 2006-07 and A.Y. 2010-11, the benefit of Sec.80IA(4) was denied to the assessee by the AO for a different reason and not for the reason that the assessee was a firm and not a consortium of companies. The claim of deduction was subsequently allowed by the Co- ordinate Bench of Tribunal vide order dt.05.04.2013 in ITA No.1214/PUN/2010 for A.Y. 2006-07 and vide order dt.10.03.2017 in ITA No.1920/PUN/2014 for A.Y. 2010-11. Thus, the claim of deduction u/s 80IA(4) of the Act has been allowed to the assessee in past from A.Y. 2004-05 onwards. Further, Revenue has not brought on record any new facts in the year under consideration due to which the claim of deduction u/s 80IA(4) could be denied to the assessee. Before us, Revenue has not brought any material on record to demonstrate that the view taken by the AO was an impermissible view or was contrary to law or was upon erroneous application of legal principles necessitating the exercising of Revisionary powers u/s 263 of the Act. Further, the case laws relied upon by the Revenue are distinguishable on facts and therefore cannot be applied to the facts of the present case. Considering the totality of the aforesaid facts, we are of the view that in the present case the condition precedent for assuming the jurisdiction u/s 263 of the Act did not exist and therefore the Ld. PCIT was not justified in resorting to the revisionary powers u/s 263 of the Act. We therefore set aside the orders of Ld. PCIT whereby he has set aside the assessment order passed

by the AO u/s 143(3) of the Act. Thus, the grounds the of assessee are allowed."

16. The Hon'ble Delhi High Court in PCIT vs. Delhi Airport Metro Express Pvt. Ltd. (supra) held if the PCIT is of the view that Assessing Officer did not undertake any enquiry, it became incumbent on the PCIT to conduct such enquiry. All that PCIT has done in the impugned order is to refer to the Circular of CBDT and conclude "in case of assessee-company, the AO was duty bound to calculate and allow depreciation on the BOT in conformity of the CBDT Circular 9/2014 but the AO failed to do so. Therefore, the order of the AO is erroneous insofar as prejudicial to the interest of revenue". The Hon'ble High Court took the view that this can hardly constitute the reasons required to be given by the PCIT to justify the exercise of jurisdiction under section 263 of the Act. If the assessee has wrongly claimed depreciation on asset like land and building, it was incumbent upon the PCIT to undertake an enquiry as regards which of the assets were purchased and installed by assessee out of his own fund during the A.Y. in question and, which were those that were handed over to DMRC. That basic exercise of determining to what extent, the deprecation was claimed in excess has not been undertaken by ld. PCIT and the Hon'ble High Court upheld the decision of Tribunal in setting-aside the order passed under section 263 of the Act.

17. In view of the above discussion, we are of the view that during the assessment, the Assessing Officer has taken a possible view in allowing depreciation on intangible asset. Therefore, in our view, the order passed by Assessing Officer is not erroneous. Thus, the twin condition as provided under section 263 of the Act was not fulfilled.

18. Even otherwise, we are of the view that the issues on which the assessment order was set-aside has already been decided by Mumbai Tribunal in West Gujarat Expressway Ltd. (supra), Pune Tribunal in Rohan & Rajdeep Infrastructure (supra) and Special Bench of Hyderabad in Progressive Construction Ltd. (supra). The Special Bench of Hyderabad Tribunal and coordinate benches of Pune and Mumbai after considering the decision of Hon'ble Bombay High Court in North Karnataka Expressway Ltd (supra) and CBDT Circular No. 9/2014 allowed depreciation on intangible asset. Therefore, we are of the considered view that the ld. PCIT was not justified in revising the assessment order dated 10.03.2016.

19. In the result, the grounds of appeal raised by assessee are allowed.

ITA No. 2849/Mum/2018

20. The assessee has raised identical grounds of appeal as raised in ITA No. 2848/Mum/2018. The facts of the case are also identical except variation of figure. Considering the principal of consistency this appeal is also allowed with similar observation.

21. In the result, both the appeals of the assesses are allowed.

Order pronounced in the open court on 23/04/2019.

Sd/-	**Sd/-**
G.S. PANNU	**PAWAN SINGH**
VICE-PRESIDENT	**JUDICIAL MEMBER**

Mumbai, Date: 23.04.2019
SK

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "F" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai