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

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 3147/Mum/2019

(A.Y: 2013-14)

Sagar Damoh Toll Roads Ltd 513A, 5th Floor, Kohinoor City, Kirol Road, Off LBS Marg, Kurla, Mumbai – 400070	Vs.	ACIT, Circle – 8(1)(2) Room No. 651, 6th Floor, Aayakar Bhavan, MK Road, Mumbai – 400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCE2160Q		
Appellant	..	Respondent

Appellant by :	Shri. K. Shivaram.AR
Respondent by :	Shri Ajay K. Shrivastava.DR

Date of Hearing	22.03.2022
Date of Pronouncement	29.03.2022

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The assessee has filed the appeal against the order of the Commissioner of Income Tax (Appeals)-14, Mumbai passed 143(3) and 250 of the Act. The assessee has raised the following grounds of appeal:

1.0. GROUND NO. 1:

1.1. The learned Commissioner of Income Tax (Appeals)

- 14, Mumbai ('the learned CIT(A)') has erred in law and in facts and in circumstances of the case in determining the loss at Rs.16,30,45,948 as against loss of Rs.35,14,65,037 declared by the Appellant in the return of income filed for the assessment year under consideration.

2.0. GROUND NO. 2

2.1. The learned CIT(A) has erred in law and in facts and in circumstances of the case by disallowing depreciation on Intangible Assets (i.e. Concessionaire I Toll Collection Rights) and allowing amortization of construction cost of toll road over a period of toll collection rights i.e. 12 years, resulting in net disallowance of Rs.18,84,19,089 (depreciation claimed on intangible assets Rs.31 52,76,735!- and amortization allowed Rs.12,68,57,6461-).

2.2. The learned CIT(A) has erred in law and in facts and in circumstances of the case in not accepting the contention of the Appellant that Concessionaire I Toll Collection Rights falls within the definition of Intangible Assets as per section 32(1)(ii) of the Income tax Act, 1961 ('the Act') entitled for depreciation © 25%. The disallowance of depreciation made by the learned CIT(A) in the order passed under section 250 of the Act is required to be deleted.

2.3. The learned CIT(A) has erred in law and in facts and in circumstances of the case by not considering the CBDT Circular No. 9 of 2014 which itself clarifies that total deduction I depreciation claimed up to AY 2014-15 has to be reduced from the total cost and balance amount has to be amortized over the remaining period of toll concessionaire agreement. Thus, the said circular

is prospective in nature and nevertheless it was not in existence at the time of filing the return of income for the assessment year under consideration. In view of this, disallowance of depreciation made by the learned CIT(A) in the order passed under section 250 of the Act by retrospective application of circular is required to be deleted

2.4 The ld. CIT(A) has erred in relying on the decision of Hon'ble Bombay High Court in the case M/s West Gujarat Expressway ltd 82 taxmann.com 224.

The appellant craves leave to add and / or to amend and / or to delete any ground out of the foregoing grounds of appeal, at any time before the hearing or during the course of hearing.

2. The brief facts of the case are that the assessee company is engaged in the business of construction, maintenance and toll road collections on build operate and transfer(BOT) basis.The assessee has filed the return of income for the A.Y 2013-14 on 25.09.2013 disclosing a total loss of Rs. 35,14,65,037/-and the return of income was processed u/s 143(1) of the Act. Subsequently, the case was selected for scrutiny and notice u/s 143(2) and 142(1) of the Act are issued. In compliance, the Ld. AR of the assessee appeared from time to time and submitted the details and the case was discussed. The Assessing officer(A.O) on perusal of the financial

statements and the Profit and loss account found that the assessee has claimed depreciation @ 25% on the "concessional rights toll 1" treating as intangible asset and the assessee is going to operate two lane High way project for a period of 12 years. The A.O. has issued a show cause notice for disallowance of depreciation claim and alternatively allow the amortization as in earlier year. The assessee has filed a letter dated 02.03.2016 referred at 5.2 of the assessment order explaining the nature of works, claim of depreciation on toll right and the facts in respect of earlier assessement years and the provisions of Income Tax Act in support of claim and relied on the judicial decisions. Whereas the A.O was not satisfied with the submissions and explanations and disallowed the claim of depreciation and assessed the total loss of Rs. 16,28,33,990/- and passed order u/sec143(3) of the Act dated 28-03-2016.

3. Aggrieved by the order, the assessee has filed an appeal before the CIT(A).Whereas the CIT(A) has considered the grounds of appeal, submissions of the assessee and findings of the scrutiny assesseement and observed that the assessee is not entitled for

claim of depreciation on toll collection rights and confirmed the action of the A.O. Further the CIT(A) has directed the A.O to verify the correct disallowance and partly allowed the appeal of the assessee. Aggrieved by the CIT(A) order, the assessee has filed an appeal before the Hon'ble Tribunal.

4. At the time hearing, the Ld. AR submitted that the CIT(A) has erred in sustaining the disallowance of depreciation on toll collections rights, as it is an intangible asset u/s 32(1)(ii) of the Act. The Ld. AR explained the factual aspects of the case with the synopsis and mentioned that in the earlier assessment year the claim was allowed and supported with catena of judicial decisions and voluminous paper book and prayed for allowing the appeal.

5. Contra, the Ld.DR submitted that the assessee is not entitled for depreciation on toll rights and in earlier assessment year the ITAT has not considered the fact of intangible asset. The Ld.DR emphasized that the issue has not attained the finality and SLP is pending before the Hon'ble Supreme court. The Ld.DR relied on the decision of CIT Vs. Tamilnadu

Road Development Company Ltd 436 ITR 323 (Madras) and supported the order of the CIT(A).

6. We heard the rival submissions and perused the material available on record. The sole crux of the disputed issue envisaged by the Ld.AR that the assessee is entitled for depreciation on toll collection rights as it is an intangible asset as per the section 32(1)(ii) of the Act. The assessee company is engaged in the business of design, engineering procure, construction, maintenance, management and operation of toll collection and has entered into agreement with Madhya Pradesh Road Developemnt Corporation (MPRDC) for the purpose of maintaining the roads on the basis of build, operate and transfer(BOT) basis and the A.Y 2012-13 is the first year were the asset was put to use and the assessee has claimed the depreciation u/s 32(1)(ii) of the Act treating as the intangible asset and the A.O has made the disallowance of depreciation, and on appeal, the CIT(A) has allowed the claim of the assessee. On further appeal filed by the revenue before the Hon'ble Tribunal, the ITAT has dismissed the revenue appeal considering the decisions of jurisdictional Honble

High Court of Bombay in the case of North Karnataka Express Highway Ltd vs. CIT 372 ITR 145 (Bom, HC) and CIT Vs. West Gujarat Expressway Ltd, 390 ITR 398 (BOM HC). The Ld. AR has demonstrated the voluminous information in the paper book supporting the claim. The Ld.DR relied on the judicial decision were the roads developed and maintained by the asseessee are eligible for depreciation@10% by considering the roads as Buildings. Whereas, in the present case the depreciation@25% was claimed treating the toll rights as intangible Assets.

7. We find the Hon'ble Tribunal has dismissed the revenue appeal in ITA No. 7114/Mum/2016 & CO No. 84/Mum/2018 for the A.Y 2011-12 and observed at page 16 Para 7 to 14, which is read as under:

> *7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, and also the judicial pronouncements relied upon by them. Our indulgence in the present appeal has been sought by the revenue for adjudicating as to whether the CIT(A) is right in law and the facts of the case in concluding that the assesses claim for depreciation on "license to collect toll", being an intangible asset, falling within the scope of Sec. 32(1)(ii) of the Act, was as per the mandate of law. It is the claim of the revenue, that the issue is covered against the*

assessee by the judgments of the Hon"ble High Court of Bombay in the case of North Karnataka Expressway Ltd. Vs. CIT-10 (2015) 272 ITR 145 (Bom) and CIT Vs. West Gujarat Expressway Ltd. (2017) 390 ITR 398 (Bom). On the contrary, it is the claim of the assessee that the issue raised in the aforesaid cases was confined to the aspect, as to whether an Infrastructure Development Company which had constructed a "toll road" on BOT basis on land owned by the Central Government would be entitled for depreciation on the same, or not. It is the claim of the ld. A.R, that as the issue as to whether an Infrastructure Development Company which had constructed a "toll road" on BOT basis on land owned by the Central Government would be entitled towards claim of depreciation under Sec. 32(1)(ii) in respect of its intangible rights i.e. "right to collect toll", was neither raised before or adjudicated upon by the Hon"ble High Court in either of te aforesaid cases, therefore, the reliance placed by the revenue on the said judicial pronouncements which were distinguishable in the backdrop of the issue involved in the said matters, would thus not assist its case.

8. We have given a thoughtful consideration to the issue before us in the backdrop of the material available on record and the contentions advanced by the authorized representatives for both the parties. Admittedly, as the assessee which being an Infrastructure Development Company had constructed the "toll road" on build, operate and transfer (BOT) basis on the land owned by the Central Government, not being the owner of the said road would not be eligible for claim of depreciation on the same. Our aforesaid view is fortified by the judgment of the Hon'ble High Court of Bombay in the case of North Karnataka Expressway Ltd. Vs. CIT10(2015) 272 ITR 145 (Bom). A perusal of the order reveals, that the Hon"ble

High Court had after exhaustively deliberating on the provisions of the National Highway Act, 1956, had therein observed, that though the Central Government as per Sec. 8-A of the National Highway Act, 1956 is empowered to enter into an agreement with any person in relation to the development and maintenance of the whole or any part of a National Highway, but that in no way would affect the vesting of the National Highways in the Union. It was observed, that the ownership of the National Highway as stands vested with the Central Government under Sec.4 of the National Highway Act, 1956, would not be diluted for the reason that the Central Government as per Sec.8-A (supra) had entered into an agreement with any person for development and maintenance of the whole or any part of the National Highway. To sum up, the Hon"ble High Court had concluded that an Infrastructure Development Company which had constructed a „toll road" on build, operate and transfer (BOT) basis on the land owned by the Government, not being the owner of the said road would thus not be entitled for depreciation on the same. At this stage, we may herein observe, that the Hon"ble High Court while concluding as hereinabove, had also observed, that as the assessee had invested in the project of construction, development and maintenance of the National Highway, therefore, claim for depreciation on the assets in the form of building and plant & machinery etc. can be validly raised and granted. Also, the Hon"ble High Court in its order had referred to the observations recorded by the CIT in his under passed under Sec.263 of the Act, wherein he had while declining the assesses claim for depreciation on „toll road" had categorically stated, that it was not the case of the assessee that the claim of depreciation was being raised in respect of its intangible rights i.e right to use the asset without being the actual owner of the same.

9. As observed by us hereinabove, the view taken by the Hon"ble High Court of Bombay in its order passed in the case of North Karnataka Expressway Ltd.(supra), was thereafter once again reiterated by the Hon"ble Court in the case of CIT-10, Vs. M/s West Gujarat Expressway Ltd. (ITA No. 2357 of 2013, dated 05.04.2016). We find that both of the aforementioned judgements of the Hon"ble jurisdictional High Court were rendered in context of the issue, as to whether an Infrastructure Development Company which had constructed a „toll road" on BOT basis on the land owned by Central Government would be entitled for depreciation on such "toll road", or not. We find that the Hon"ble High Court had observed that in the absence of ownership of the „toll road", which belonged to the Central Government, the assessee would not be entitled to claim depreciation on the same. The issue as to whether an Infrastructure Development Company which had constructed a „toll road" on BOT basis on the land owned by Central Government would be entitled to claim depreciation under Sec.32(1)(ii) in respect of its "right to collect toll" i.e an intangible asset, was not raised in both of the aforesaid cases. Our aforesaid view stands fortified from a perusal of the order of the Hon"ble High Court in the case of North Karnataka Expressway Ltd. Vs. CIT-10(2015) 272 ITR 145 (Bom), wherein at Para 20 the Hon"ble High Court had observed, that the question before them was as to when a person who is in the business of Infrastructure Development constructs a road on build, operate and transfer (BOT) basis on the land owned by the Government, can it claim depreciation on such „toll road". We find that the Hon"ble High Court had observed that though an Infrastructure Development company which had constructed a road on BOT basis on land owned by the Central Government, was not entitled to claim

depreciation on the „"toll roads" as it was not owner of the same, however, it could definitely claim depreciation on its investments made in the project and such other asset in the form of building and plant and machinery etc. Accordingly, it was observed by the Hon"ble High Court at Para 47 of its order, that the claim for depreciation could be validly raised and granted to the extent stated hereinabove. Also, it was observed by the Hon"ble High Court that it was concerned only with the claim of the assessee as regards depreciation on the road itself. To sum up, the Hon"ble High Court in its aforesaid judgment, had confined its adjudication to the issue as to whether an Infrastructure Development Company which had constructed a road on BOT basis on land owned by the Central Government would be eligible to claim depreciation on such „toll road" so constructed and operated by it, or not. Accordingly, we are of the considered view, that the issue as to whether an Infrastructure Development company which had constructed a road on build, operate and transfer (BOT) basis on the land owned by the Central Government would be entitled to claim depreciation under Sec. 32(1)(ii) in respect of its intangible rights i.e "right to collect toll", had not been adjudicated by the Hon"ble High Court in its aforesaid order in the case of North Karnataka Expressway Ltd. (supra). We find that the Hon"ble High Court of Bombay had thereafter once again reiterated its aforesaid view, while disposing off the appeal of the revenue in the case of CIT-10 Vs. M/s West Gujarat Expressway Ltd. (ITA No. 2357 of 2013, dated 05.04.2016). As is discernible from the order, the only two issues which were raised by the revenue in its aforesaid appeal before the High Court, were viz. (i). Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in directing the A.O to

grant depreciation on assets not owned by the Respondent that goes against provisions of Section 32 of the I.T Act?; and (ii). Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in its decision of treating toll roads as plant and machinery, when this is not as per rule 5 of New Appendix of the I.T Rules?. As such, we find, that the revenue had only sought the adjudication of the issue as to whether the Tribunal was right in allowing depreciation to the assessee on "toll roads" by treating the same as plant and machinery. It is in the backdrop of the aforesaid issues which were raised by the revenue, that the Hon"ble High Court by relying on its earlier order in the case of North Karnataka Expressway Ltd. Vs. CIT-10 (2015) 372 ITR 145 (Bom), had concluded, that the issue therein involved was squarely covered by the said decision. Accordingly, the Hon"ble High Court by drawing support from the observations recorded in its earlier order in the case of North Karnataka Expressway Ltd., had therein answered the aforesaid two substantial questions of law in the negative i.e in favour of the appellant revenue and against the respondent assessee. In our considered view, the Hon"ble High Court in its aforesaid order i.e CIT-10, Vs. M/s West Gujarat Expressway Ltd. (ITA No. 2357 of 2013, dated 05.04.2016), had confined its adjudication to the aforesaid two substantial questions of law which were raised by the revenue before it. Our aforesaid view is fortified by the order of a coordinate bench of the Tribunal, Mumbai in the case of Thiruvanthapuram Road Development Company Ltd. Vs. DCIT-14(3)(1), Mumbai [ITA NO. 622/Mum/2015, dated 23.05.2018]. In the aforesaid case involving facts identical to those as in the case of the assessee before us, we find that the assessee had claimed that it was entitled for depreciation on "right to collect toll" u/s

32(1)(ii) of the Act. Relying on the judgment of the Hon"ble High Court of Bombay in the case of CIT-10, Vs. M/s West Gujarat Expressway Ltd. (ITA No. 2357 of 2013, dated 05.04.2016), it was the claim of the revenue that the issue was covered against the assessee. We find, that the Tribunal rejected the aforesaid claim of the revenue, for the reason, that the issue s regards the entitlement of an Infrastructure Development company which had constructed a road on build, operate and transfer (BOT) basis on the land owned by the Central Government, towards claim depreciation under Sec. 32(1)(ii) in respect of its intangible rights i.e "right to collect toll", had not been adjudicated by the Hon"ble High Court in its aforesaid order. In fact, it was observed by the Tribunal, that the Hon"ble High Court in the aforesaid case had adjudicated, that an Infrastructure Development company which had constructed a road on build, operate and transfer (BOT) basis on the land owned by the Central Government, would not be entitled to claim depreciation on such "toll road". The observations of the Tribunal, are as under: "The Mumbai bench of the Tribunal in the aforesaid decision in ACIT Vs. M/s Andhra Pradesh Expressway by a later decision dated 28/02/2018 duly considered various decisions including the decision reversed by the Hon"ble High Court in CIT Vs. West Gujarat Expressway Ltd. (2016) 73 taxmann.com 139; (2017) 390 ITR 400 (Bom)., order dated 05/04/2016. Before us also, the Ld. CITDR/Ld. D.R contended that in view of this decision from the Hon"ble High Court, the assessee is not entitled to depreciation. We have gone through this order and found that the issue before the Hon"ble High Court was with respect to treating toll road as plant and machinery and if that situation decided in favour of the revenue." In the backdrop of the aforesaid facts, we are of the considered

view that the reliance placed by the Ld. D.R on the aforesaid judgments of the Hon"ble High Court of Bombay i.e North Karnataka Expressway Ltd. Vs. CIT-10 (2015) 372 ITR 145 (Bom) and CIT-10, Vs. M/s West Gujarat Expressway Ltd. (ITA No. 2357 of 2013, dated 05.04.2016), would not assist the case of the revenue for rebutting the claim of the assessee towards deprecation u/s 32(1)(ii) in respect of its intangible rights i.e "right to collect toll" .

10. We find that the „Special bench" of the Tribunal in the case of ACIT, Circle 10(2), Hyderabad, Vs. Progressive Construction Ltd. (2018) 191 TTJ 549 (Hyd.) (SB), had concluded, that where an Infrastructure Development company which had constructed a road on build, operate and transfer (BOT) basis on the land owned by the Central Government, gets vested with a right to an intangible asset under Explanation 3(b) r.w. Sec.32(1)(ii), the assessee would be eligible to claim depreciation on such asset as per the specified rate. Apart there from, it was observed by the Tribunal, that where the assessee had never claimed expenditure incurred for construction of the road on build, operate and transfer (BOT) basis, as a deferred revenue expenditure, the same could not have been amortized in terms of CBDT Circular No. 9 of 2014, dated, 23.04.2014. The observations of the „Special bench" of the Tribunal, which seizes the issue under consideration before us, are as under:

11. Undisputedly, for executing the project, assessee has incurred expenses of Rs.214 crore. It is also not disputed that as per the terms of the C.A., the Government of India is not obliged / required to reimburse the cost incurred by the assessee to execute / implement the project facilities. The only right / benefit allowed to the assessee by the Government of India is to operate the project / project

facilities during the concession period of 11 years 7 months and to collect toll charges from vehicles / persons using the project / project facilities. Thus, as could be seen, the only manner in which the assessee can recoup the cost incurred by it in implementing the project / project facility is to operate the road during the concession period and collect the toll charges from user of the project facility by third parties. Admittedly, the assessee has taken up the project as a business venture with a profit motive and certainly not as a work of charity. Further, by investing huge some of Rs.214 crore, the assessee has obtained a valuable business / commercial right to operate the project facility and collect toll charges. Therefore, in our considered opinion, right acquired by the assessee for operating the project facility and collecting toll charges is an intangible asset created by the assessee by incurring the expenses of Rs.214 crore. The contention of the learned Senior Standing Counsel that expenditure of Rs.214 crore has brought into existence a tangible asset in the form of roads and bridges of which the assessee is not the owner but it is the Government of India is nobody's case. Further, the learned Senior Standing Counsel's apprehension that it will lead to a situation where both Government of India and the concessionaire will claim depreciation on the asset created with the very same expenditure, in our view, is not borne out from facts on record. At the cost of repetition we must observe, as per the terms of agreement the expenses incurred by the assessee towards construction of the roads, bridges, etc., were not going to be reimbursed by the Government of India. This fact was known to both the parties before the execution of the agreement as the tender itself has made it clear that the project is to be executed with private sector participation on BOT basis. Thus, from the very inception of the project,

assessee was aware of the fact, it has to recoup the cost incurred in implementing the project along with the profit from operating the road and collecting toll charges during the concession period. Therefore, assessee has capitalized the cost incurred on the BOT project on which it has claimed depreciation. Thus, in our view, the expenditure incurred by the assessee of Rs.214 crore for creating the project or project facilities has created an intangible asset in the form of right to operate the project facility and collect toll charges. Further, it is the contention of the learned Senior Standing Counsel that if at all any right is created under the C.A. for collecting toll, such right accrued to the assessee on the date of execution of agreement i.e., 22nd December 2005, therefore, the expenditure incurred by such date should be the value of intangible asset which can alone be considered for depreciation under section 32(1)(ii) of the Act. We are afraid, we cannot accept the above argument of the learned Senior Standing Counsel. When the C.A. confers a right on the assessee to operate the project facility and collect toll charges over the concession period of 11 years and 7 months, the assessee can start operating and collecting toll charges only when the project facility is ready for use. Therefore, until the project is completed and ready for use by vehicles or persons assessee cannot collect toll charges for user of the project facilities. Thus, the right to operate the project facility and collect toll charges is integrally connected to the completion of the project facility which cannot be done unless the assessee invests its fund for completing the project. Therefore, keeping in view the aforesaid fact, it cannot be said that the right to collect toll has accrued to the assessee on the date of execution of the agreement. If we accept the aforesaid argument of the learned Senior Standing Counsel, in other words, it would mean that

without even executing and completing the project facility, assessee would be collecting toll charges. Therefore, the contention of the learned Senior Standing Counsel that the expenditure incurred by the assessee till execution of the agreement can only be considered as an intangible asset, in our view, is illogical, hence, cannot be accepted. Thus, having held that the expenditure of Rs.214 crore incurred by the assessee has resulted in creation of an intangible asset of enduring nature for the assessee, it is necessary now to examine whether such intangible asset comes within the scope and ambit of section 32(1)(ii) of the Act. For this purpose, it is necessary to look into the said provision which is reproduced hereunder for the sake of convenience. Depreciation. 32(1)(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature67, being intangible assets acquired on or after the 1st day of April, 1998, owned67, wholly or partly, by the assessee67 and used for the purposes of the business67 or profession, the following deductions shall be allowed—] 12. Explanation 3 to section 32(1) defines intangible asset as under:- 85[Explanation 3.—For the purposes of this sub-section, 86[the expression "assets"] shall mean— (a) tangible assets, being buildings, machinery, plant or furniture; (b) intangible assets, being know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature87 . 13. A plain reading of the aforesaid provisions would indicate that certain kind of assets being knowhow, patents, copyrights, trademarks, license, franchise, or any other businesses or commercial rights of similar nature are to be treated as intangible asset and would be eligible for depreciation at the specified rate. It is the claim of the assessee that the right acquired under C.A. to operate the project facility and collect toll charges is in the nature of

license. However, the learned Senior Standing Counsel has strongly countered the aforesaid claim of the assessee by referring to the definition of license as provided under the Indian Easements Act, 1882. For better appreciation, we intend to reproduce herein below the definition of "license" as provided under section 52 of the Indian Easements Act, 1882: - "License" defined:- Where on person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful and such right does not amount to an easement or an interest in the property, the right is called a license.". 14. It has been the contention of the learned Senior Standing Counsel that as the term "license" has not been defined under the Income Tax Act, 1961, the definition of "license" under the Indian Easements Act, 1882, has to be looked into. Accepting the aforesaid contention of the learned Senior Standing Counsel, let us examine the definition of "license" extracted herein above. A plain reading of section 52 of the Act makes it clear, a right granted to a person to do or continue to do something in the immovable property of the grantor, which, in the absence of such right would be unlawful and such right does not amount to an easement or interest in the property, then such right is called a license. If we examine the facts of the present case, vis-a-vis, the definition of license under the Indian Easements Act, 1882, it would be clear that immovable property on which the project / project facility is executed / implemented is owned by the Government of India and it has full power to hold, dispose off and deal with the immovable property. By virtue of the C.A., assessee has only been granted a limited right to execute the project and operate the project facility during the concession

period, on expiry of which the project / project facility will revert back to the Government of India. What the Government of India has granted to the assessee is the right to use the project site during the concession period and in the absence of such right, it would have been unlawful on the part of the concessionaire to do or continue to do anything on such property. However, the right granted to the concessionaire has not created any right, title or interest over the property. The right granted by the Government of India to the assessee under the C.A. has a license permitting the assessee to do certain acts and deeds which otherwise would have been unlawful or not possible to do in the absence of the C.A. Thus, in our view, the right granted to the assessee under the C.A. to operate the project / project facility and collect toll charges is a license or akin to license, hence, being an intangible asset is eligible for depreciation under section 32(1)(ii) of the Act. 15. Even assuming that the right granted under the C.A. is not a license or akin to license, it requires examination whether it can still be considered as an intangible asset as described under section 32(1)(ii) of the Act. In this context, it has been the contention of the learned Senior Standing Counsel that the intangible asset mentioned under section 32(1)(ii) of the Act are specifically identified assets, except, the assets termed as "any other business or commercial rights of similarnature". He had submitted, applying the principle of ejusdem generis the rights referred to in the expression "any other business orcommercial rights of similar nature", should be similar to one or more of the specifically identified assets preceding such expression. The aforesaid contention of the learned Departmental Representative is unacceptable for the reasons enumerated hereinafter. 16. We have already held earlier in the order that by incurring the expenditure of 'Rs.214

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

ofsimilar 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 otherbusiness 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 "businessor 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 orcommercial 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. v/s CIT, [2010] 327 ITR 323 (SC), the Hon'ble Supreme Court while examining the assessee's claim of depreciation on BSE Membership Card, after interpreting the provisions of section 32(1)(ii), held that as the membership card allows a member to participate in a trading session on the floor of the exchange, such membership is a business or commercial right, hence, similar to license or franchise, therefore, an intangible asset. In the present case, undisputedly by virtue of C.A. the assessee has acquired the right to operate the toll road / bridge and collect toll charges in lieu of investment made by it in implementing the project. Therefore, the right to operate the toll road / bridge and collect toll charges is a business or commercial right as envisaged under section 32(1)(ii) r/w Explanation 3(b) of the said provisions. Therefore, in our considered opinion, the assessee is eligible to claim depreciation on WDV as an intangible asset. Thus, we answer the question framed by the SpecialBench 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.

18. In view of our aforesaid conclusion, there is no need to answer the second part of the question framed. This disposes of grounds no.2, 3, 5 and 6." We find that the aforesaid order of the „Special bench" of the Tribunal, had thereafter been followed by the ITAT "J" bench, Mumbai, in the case of DCIT, Circle-9(1)(2),Mumbai Vs. M/s Atlanta Ltd. Mumbai (ITA No. 3415/Mum/2015,

dated 24.01.2018). Also, a similar view had been taken by the ITAT, Chennai in the case of ACIT, cooperative circle 5(2), Chennai Vs. M/s PNG Toll Way Ltd (ITA No. 238/CHNNY/2019, dated 26.07.2019. In the backdrop of the aforesaid judicial pronouncements, we are of the considered view that the issue as to whether an Infrastructure Development company which had constructed a road on build, operate and transfer (BOT) basis on the land owned by the Central Government would be eligible for claim of depreciation in respect of its intangible rights i.e "right to collect toll" under Sec. 32(1)(ii), is squarely covered by the aforesaid order of the „Special bench" of the Tribunal in the case of ACIT, Circle 10(2), Hyderabad, Vs. Progressive Construction Ltd. (2018) 191 TTJ 549 (Hyd.) (SB), and also the orders of the coordinate benches of the Tribunal viz. (i) DCIT, Circle9(1)(2),Mumbai Vs. M/s Atlanta Ltd. Mumbai (ITA No. 3415/Mum/2015, dated 24.01.2018); and (ii) ACIT Vs. M/s PNG Tata Ltd. (ITA No. 238/CHNNY/2019, dated 26.07.2019. We thus finding ourselves to be in agreement with the view taken by the Tribunal in the aforesaid cases, respectfully follow the same. Accordingly, the claim of the assessee towards depreciation under Sec.32(1)(ii) in respect of its intangible rights i.e "right to collect toll", being in conformity with the mandate of law, is found to be in order. We thus concur with the view taken by the CIT(A), and not finding any infirmity in his order, uphold the same.

11. The appeal filed by the revenue is dismissed.

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12 As we have dismissed the appeal of the revenue, therefore, finding no reason to advert the cross objections filed by the assessee, which are admittedly stated by the

ld. A.R to be supportive in nature, we dismiss the same as having been rendered as academic in nature.

13. The Cross Objections filed by the assessee are dismissed in terms of our aforesaid observations.

14. The appeal filed by the revenue and the cross objections filed by the assessee, are both dismissed in terms of our aforesaid observations.

8. We find the present facts in respect of claim of depreciation on toll rights are similar to earlier assessment year. Accordingly we follow the judicial precedence and set aside the order of the CIT(A) and direct the assessing officer to allow the claim of depreciation and allow the grounds of appeal in favour of the assessee.

9. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 29.03.2022.

Sd/-	Sd/-
(PRASHANT MAHARISHI)	(PAVAN KUMAR GADALE)
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated 29.03.2022

KRK, PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.

3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, Mumbai / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

(Asst. Registrar)
ITAT, Mumbai