

आयकर अपीलीय अधिकरण
मुंबई पीठ " एफ़ "

श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री अमरजीत सिंह, लेखा सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH " F", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH , ACCOUNTANT MEMBER

आअसं.849/मुं/2020 (नि.व. 2013-14)
ITA NO.849/MUM/2020(A.Y.2013-14)
आअसं.850/मुं/2020 (नि.व. 2014-15)
ITA NO.850/MUM/2020(A.Y.2014-15)
आअसं.851/मुं/2020 (नि.व. 2015-16)
ITA NO.851/MUM/2020(A.Y.2015-16)

Dy. Commissioner of Income Tax, CC-7(2), Mumbai,
Room No.655, 6th Floor,
Aaykar Bhavan, M.K.Road,
MUMBAI – 400 020

..... अपीलार्थी /Appellant

बनाम Vs.

M/s. Mumbai Nasik Expressway Ltd.
803, 8th Floor, A-Wing,
One BKC, Bandra Kurla Complex,
Bandra (E), Mumbai 400 051.
AAECM-3349-K .

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Achal Sharma

प्रतिवादी द्वारा/Respondent by : Shri Rakesh Joshi

सुनवाई की तिथि/ Date of hearing : 04/05/2022

घोषणा की तिथि/ Date of pronouncement : 02/08/2022

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

These three appeals by the Revenue are directed against the orders of
Commissioner of Income Tax (Appeals)-49 Mumbai [in short 'the CIT(A)] for

the Assessment Years 2013-14, 2014-15 and 2015-16, respectively. All the three impugned orders are of even date i.e. 05/11/2019. Since, the facts germane to the issues raised in all the appeals are identical, these appeals are taken up together for adjudication and are decided by this common order. For the sake of convenience, the appeals are decided in seriatim of Assessment Years.

ITA NO.849/MUM/2020-A.Y. 2013-14:

2. The Revenue in appeal has raised following grounds:

“ 1. Whether on the facts and circumstances of the case and in, the law, the Ld. CIT(A) erred in deleting the disallowance of depreciation on intangible assets u/s 32(1)(ii) of the Act without considering the fact that CBDT Circular No.9 of 2014 was issued by the Board precisely to remove any ambiguity as to how the instant issue needs to be dealt with by the AOs and the claim of depreciation on intangible assets is not allowable to the assessee.

2. Whether on the facts and circumstances of the case and in the law, the Ld. CIT(A) erred in deleting the disallowance of provisions for periodic maintenance charges without considering the fact that the liability for the periodic maintenance arises only in FY 2016-17 and not in the current year and therefore cannot be allowed to the assessee as per the provisions of section 37(1) of the Income-Tax Act.

3. Whether on the facts and circumstances of the case and in the law, the Ld. CIT(A) erred in deleting the disallowance of provisions for periodic maintenance charges from book profit without considering the fact that decision of the Mumbai Tribunal in the case of Anchor Electricals (P) Ltd vs. DCIT (2017) is not applicable to the case of the assessee.”

3. Shri Achal Sharma representing the Department vehemently supporting the findings of Assessing Officer submitted that the CIT(A) has erred in allowing depreciation on toll road. The assessee had claimed depreciation on Right to Collect Toll being an intangible asset. The assessee is not the owner of road. The assessee was awarded the project of constructing roads on Build, Operate and Transfer basis (BOT). Therefore, the Assessing Officer has rightly

disallowed assessee's claim of depreciation u/s.32(1)(i) of the Income Tax Act, 1961 [in short ' the Act']. The Id. Departmental Representative placed reliance on CBDT Circular No.9 of 2014 dated 23/04/2014 and the following decisions to support the findings of Assessing Officer :

(i) North Karnataka Expressway Ltd. vs. CIT, 372 ITR 145 (Bom)

(ii) CIT vs. West Gujarat Expressway Ltd., 390 ITR 398 (Bom).

4. In respect of ground No.2 relating to assessee's claim of Periodic Maintenance Charges (PMC), the Id. Departmental Representative submitted that assessee had made provision for PMC only on estimation without applying any scientific method to compute/calculate the provisions. The Id. Departmental Representative further pointed that the periodic maintenance of the roads/highways constructed under BOT Scheme had to be carried out by the assessee every 5th year. The assessee started its commercial operations partly from 29/05/2020 and partly from 29/08/2011. Therefore, the first periodic maintenance was to be done in F.Y.2016-17. The assessee has debited Rs.17,38,91,138/- during the relevant previous year towards provisions for PMC. Whereas, there was no ascertained liability during the period relevant to impugned assessment year The Assessing Officer disallowed assessee's claim. The assessee for the first time furnished technical report before the CIT(A). The Id. Departmental Representative pointed that a perusal of technical report would show that the same was sought during assessment proceedings i.e. much after making a claim in the books, hence, the report is merely a self-serving document. The CIT(A) erred in accepting the claim of assessee on the premise that the provision is based on scientific method.

5. In respect of ground No.3, the Id. Departmental Representative submitted that this ground is consequential to ground No.2. While computing profits under MAT Provisions, the CIT(A) has directed to delete disallowance on provision for PMC . The Id. Departmental Representative prayed for reversing the findings of CIT(A) and upholding the disallowance/additions made in the assessment order.

6. On the other hand, Shri Rakesh Joshi appearing on behalf of the assessee vehemently supported the findings of CIT(A). The Id. Authorized Representative for the assessee submitted that assessee has claimed depreciation on “right to collect toll” on the road build by the assessee on BOT basis. The assessee was allowed to collect toll in pursuance to the Concession Agreement dated 14/10/2005 entered into with National Highway Authority of India (NHAI). The said agreement is at pages 7 to 140 of the paper book. The Id. Authorized Representative for the assessee submitted that right to collect toll/user fee is an intangible asset on which the assessee is entitled to claim depreciation u/s. 32(1)(ii) of the Act. The Tribunal in various decisions including decision in the case of assessee’s sister concern, Andhra Expressway Pvt. Ltd. in ITA No.6508/Mum/2017 for Assessment Year 2005-06 decided vide order dated 16/10/2020 allowed assessee’s claim of depreciation on right to collect annuity by treating it as intangible asset. The Hyderabad Bench of the Tribunal in the case of assessee’s another sister concern, M/s. Rajahmundry Expressway Pvt. Ltd. while deciding the appeals for Assessment Year 2008-09 to 2011-12 vide order dated 04/03/2020 held that the assessee is eligible to claim depreciation for acquiring right which are in the form of intangible asset. The Id. Authorized Representative for the assessee submitted

that the Tribunal while deciding aforesaid appeals had considered CBDT Circular No.9 of 2014 (supra). The Id. Authorized Representative for the assessee submitted that the decision referred by the Id. Departmental Representative in the case of North Karnataka Expressway Ltd. and West Gujarat Expressway Ltd. are distinguishable as in the aforesaid cases the assessee had claimed depreciation on toll road constructed and operated by it.

6.1 In respect of ground No.2 the Id. Authorized Representative for the assessee submitted that the assessee has claimed PMC on scientific basis. The Assessing Officer has erred in holding that the liability crystallized in 5th year and thus, disallowed the provision made in the Assessment Year under appeal. The assessee had furnished working of the PMC before the Assessing Officer, the same is at pages 203 and 205 of the Paper Book. The assessee had made provision for PMC on the concept of matching principle of income and expenditure. The assessee made provision on similar lines from assessment year 2012-13 onwards. The Assessing Officer accepted the claim of assessee in assessment made u/s. 143(3) of the Act. However, in subsequent impugned assessment years the Assessing Officer rejected the claim. The assessee has created the provisions on scientific basis in line with Rotork Control India Pvt. Ltd. vs. CIT, 314 ITR 62 and Bharat Earth Movers Ltd. vs. CIT, 245 ITR 428. The issue is squarely covered by the decision rendered in the case of Kosi Bridge Infrastructure Co. Pvt. Ltd. in ITA No.581, 582 and 576/Mum/2020 for Assessment Year 2012-13, 2014-15 and 2015-16 decided on 08/10/2021 and also in the case of assessee's sister concern M/s. Gorakhpur Infrastructure Co.

Ltd. in ITA No.574/Mum/2020 for Assessment Year 2013-14 decided on 30/11/2021.

7. We have heard the submissions made by rival sides and examined the orders of authorities below. We have also considered the decisions on which rival sides have placed reliance in support of their respective contentions.

8. The first issue in appeal by the Revenue is assessee's claim of depreciation on intangible asset / right to collect toll/user fee. We find that this issue has been considered by Co-ordinate Bench in the case of M/s. Rajahmundry Expressway Pvt. Ltd. vs. DCIT (supra) a group concern of the assessee. The Tribunal while deciding the said appeal had also examined CBDT Circular No.9 of 2014 (supra) and considered the decision of Special Bench in the case of ACIT vs. Progressive Construction Ltd. in ITA No.1845/HYD/2014 decided on 14/02/2017. The Tribunal after examining the issue held that the assessee would be eligible to claim depreciation u/s. 32(1)(ii) on intangible asset in the form of right to collect annuity. For the sake of completeness, relevant extract of the findings of Tribunal are reproduced herein below:

"25. We have considered rival submissions in the light of the decisions relied upon and perused the material on record. The issue raised before us is now fairly well settled in view of the Special Bench decision of the Tribunal, Hyderabad Bench, referred to above. Undisputedly, the assessee was awarded the work of constructing a part of the National Highway no.5, under BOT basis. Therefore, entire investment/finance for developing the infrastructure facility was borne by the assessee. By making such investment what the assessee received in return was a right to collect annuity over the period of concession. Thus, the investment made by the assessee for acquiring such right certainly is an intangible asset coming within the purview of section 32(1)(ii) of the Act. Therefore, the assessee would be eligible to claim depreciation. The decision of the learned Commissioner (Appeals) on the issue is hereby reversed."

[Emphasized by us]

Following the decision rendered in the case of M/s. Rajahmundry Expressway Pvt. Ltd.(supra), the Tribunal in the case of Andhra Expressway Ltd.(supra) has taken a similar view.

9. The Id. Departmental Representative has placed reliance on the decision of Hon'ble Jurisdictional High Court in the case of North Karnataka Expressway Ltd. vs. CIT (supra). We find that in the said case assessee has claimed depreciation on toll road constructed by it on BOT basis. The Hon'ble High Court held that merely for the reason that assessee has constructed road would not mean that the assessee is the owner thereof. The road has been laid out for the purpose of Union and it ultimately vests in the public, hence, the assessee cannot claim depreciation on toll road constructed and operated. Similar were the facts in the case of CIT vs. West Gujarat Expressway Pvt. Ltd.

In the present case, the assessee has not claimed depreciation on toll road. The assessee has claimed depreciation on right to collect annuity/user fee, an intangible right vested in the assessee by way of agreement with NHAI. Thus, the case laws relied upon by the Id. Departmental Representative are distinguishable on facts. In the facts of case and the decisions referred above, ground No.1 in the appeal by Revenue is dismissed and the findings of CIT(A) on this issue are upheld.

10. In ground No.2 and 3 of appeal, the Revenue has assailed the findings of CIT(A) in allowing provision for PMC. The assessee has placed on record the manner of computation of provision for PMC at page 203 of the paper book. The primary objection of the Revenue is that the assessee has not computed provision on scientific basis and the calculation of provision is merely on estimation. The assessee in support of his claim has furnished

technical report, the same is at pages 251 to 259 of the Paper Book. The CIT(A) after examining the same held that the provision for PMC has been made by the assessee in accordance with the decision of Hon'ble Supreme Court in the case of Rotork Controls India Pvt. Ltd.(supra). The assessee has furnished a chart giving the details of utilization of Provision for PMC (at page 260 of paper book). The relevant extract of the same is reproduced herein below:

Particulars	F.Y. 12-13	F.Y 13-14	F.Y 14-15	F.Y. 15-16	F.Y. 16-17	F.Y 17-18
Opening Balance(A)	74,565,715	248,456,853	414,487,330	613,546,402	439,947,254	63,407,621
Provision created for first PM (for first 5 years)(B)	173,891,138	166,030,477	199,059,072	46,531,126	0	960,335
Utilization @/pm reversed	-	-	-	220,130,274	376,539,633	63,797,126
Closing balance of provisions(E)	248,456,853	414,487,330	613,546,402	439,947,254	63,407,621	570,830
% Utilization (out of 1 st provision) F=C/(A+B)*100				33.35%	85.59%	99.11%

A bare perusal of the above table would show that the provision created by assessee over a period of time has been substantially utilized from the 5th year of creating provision. In the 5th year 33-35% of provisions is utilized and in the 7th year of the project 99.11% of the provision is utilized. It is evident from the table that the provision made by the assessee is based on scientific calculation and in line with matching concept of income and expenditure.

We find that similar issue had come up before the Co-ordinate Bench in the case of assessee's group concern Gorakhpur Infrastructure Co. Ltd. (supra). The Assessing Officer had disallowed assessee's claim of provision for PMC for

similar reasons. The CIT(A) allowed assessee's claim after examining technical report furnished by the assessee and by following the decision of Hon'ble Apex Court in this regard. In appeal by the Revenue, the Tribunal upheld the findings of CIT(A) of the issue.

11. Considering the facts and documents on record we find no infirmity in the findings of the CIT(A) in allowing assessee's claim of provision for PMC. We concur with the same. Consequently, ground No.2 raised in the appeal by Revenue is dismissed.

12. The issue raised in ground No.3 of the appeal by Revenue is consequential to the issue raised in ground No.2 of appeal. Since, we have dismissed Ground No.2 of the appeal, the ground No.3 is also liable to be dismissed.

13. In the result appeal by Revenue is dismissed.

ITA NO.850 & 851/MUM/2020- A.Y. 2014-15 & 2015-16:

14. Identical grounds have been raised by the Revenue in appeal for Assessment Year 2014-15 and 2015-16. Both sides are unanimous in stating that the facts in both these Assessment Years are identical to the facts in Assessment Year 2013-14. Therefore, the submissions made for the grounds raised in Assessment Year 2013-14 would equally apply to the present Assessment Years.

Since, the facts germane to the issue raised in the present set of appeals is identical to the facts adjudicated by us in Assessment Year 2013-14, the findings given in Assessment Year 2013-14 would *mutatis mutandis* apply

to the present appeals. Both the appeals by the Revenue are thus, dismissed for parity of reasons.

15. To sum up, appeals by Revenue for Assessment Years 2013-14, 2014-15 and 2015-16 are dismissed.

Order pronounced in the open court on Tuesday the 02nd day of August, 2022.

Sd/-

(AMARJIT SINGH)

लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated 02/08/2022

Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड ङ इल/Guard file.

BY ORDER,

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(Dy./Asstt. Registrar)
ITAT, Mumbai