

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

BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.2496/Mum./2021
(Assessment Year : 2012-13)

Asstt. Commissioner of Income Tax Appellant
Circle-14(1)(2), Mumbai

v/s

West Gujarat Express Way Ltd. Respondent
C-22, G-Block, The IL And FS
Financial Centre, BKC, Bandra (East)
Mumbai 400 051 PAN – AAACW5862D

ITA No.483/Mum./2021
(Assessment Year : 2012-13)

West Gujarat Express Way Ltd. Appellant
C-22, G-Block, The IL And FS
Financial Centre, BKC, Bandra (East)
Mumbai 400 051 PAN – AAACW5862D

v/s

Dy. Commissioner of Income Tax Respondent
Circle-14(3)(1), Mumbai

Assessee by : Shri Niranjan Govindekar a/w
Shri Bhupal Rapelli
Revenue by : Shri Ashok Kumar Kardam

Date of Hearing – 20/07/2022

Date of Order – 26/09/2022

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present cross appeals have been filed by the assessee and the Revenue challenging the impugned order dated 13/08/2020, passed under section 250 of the Income Tax Act, 1961 (*'the Act'*) by the learned Commissioner of Income Tax (Appeals)-22, Mumbai, [*'learned CIT(A)'*], for the assessment year 2012-13.

2. The present cross appeals by the assessee and the Revenue, filed before us, are delayed by 170 and 444 days, respectively. In the present case, the impugned order dated 13/08/2020, was received by the assessee and the Revenue on the very same date. Thus, as per the provisions of section 253(3) of the Act, the assessee was required to file appeal within 60 days from the date of receipt of order. However, the assessee filed appeal, for the year under consideration, on 31/03/2021, while the Revenue filed the appeal on 30/12/2021. We find that the Hon'ble Supreme Court, vide order dated 10/01/2022, passed in M.A. no.21 of 2022, in M.A. no.665 of 2021, in Suo-Motu Writ Petition (Civil) no.3 of 2020, directed that the period from 15/03/2020 till 28/02/2022, shall stand excluded for the purpose of limitation as may be prescribed under any general or special laws in respect of all judicial and quasi judicial proceedings. As the due date for filing present cross appeals was falling within the aforesaid time-period, in view of the order passed by the Hon'ble Supreme Court, there is no delay in filing the present cross appeals and we proceed to decide the same on merits.

ITA No. 483/Mum/2021
Assessee's Appeal – A.Y. 2012-13

3. In this appeal, the assessee has raised following grounds:

"The following grounds of appeal are distinct and separate and without prejudice to each other:

1. On the facts and in the circumstances of the case and in law, the Learned Commissioner of Income-tax (Appeals)-22 ('CIT-A') had erred in directing the AO to restrict the depreciation allowed to the amount actually claimed by the appellant in the return of income.

2. On the facts and in the circumstances of the case and in law, the Learned CIT (A) erred in not accepting the claim of appellant to allow full relief of depreciation on "Toll Road" Rs. 28,18,53,651 as against Rs. 24,99,95,453."

4. The brief facts of the case pertaining to this issue, as emanating from the record, are: The assessee is a public limited company, which is engaged in the business of developing, operation and maintenance of road infrastructure. For the year under consideration, assessee e-filed its return of income on 25/09/2009, declaring total loss at appeal Rs. 24,99,54,460. During the course of assessment proceedings, upon perusal of depreciation chart, it was noticed that assessee has claimed depreciation on toll roads amounting to Rs. 24,92,05,344. Accordingly, the assessee was asked to explain as to why the depreciation claim in respect of the toll road should not be disallowed, as the assessee was not the owner of said roads. In reply, assessee submitted that that it has entered into an agreement with National Highway Authority of India ('NHAI') for construction of Jetpur-Godal-Rajkot road project on 22/03/2005, for a period of 20 years commencing from 22/09/2005. Thus, the concession is for 20 years. The project was awarded by NHAI to build, operate and transfer (BOT) basis with toll collection rights.

The total cost incurred by the assessee for construction of the infrastructure facility being toll road is Rs. 275,90,19,670, which have been capitalised in the books of accounts as fixed asset and the assessee has claimed depreciation on the capitalised cost of the project facility at the rate of 15% treating the 'toll road' as plant and machinery. The Assessing Officer ('AO') vide order dated 23/03/2015, passed under section 143(3) of the Act did not agree with the submissions of the assessee and held that the ownership of the road has always been vested with Government of India/NHAI and it was never transfer to the assessee under any pretext. Under the BOT basis, the assessee has to just operate and maintain the said road for a specific period after which, the said road had to be handed over to the government/NHAI. Thus, assessee had no ownership rights or entitlement in the said road to become entitled for any claims vested with the owners only. It was further held that once the ownership itself is held to be not available with the assessee, the alternative claim regarding treatment of the toll roads as plant and machinery becomes infructuous. However, the AO allowed the amortisation of expenses for the period of concession agreement as was done in the assessment years 2007-08 to 2012-13 and accordingly, allowed deduction on account of amortisation at INR 16,23,69,017. Further, the claim of assessee of depreciation at INR 24,92,05,344 on toll road was disallowed.

5. In appeal, learned CIT(A) vide impugned order dated 13/08/2020, upheld the conclusion of the AO in disallowing depreciation on roads by treating the same as 'plant and machinery' or 'building'. However, the learned CIT(A) accepted the alternative plea of the assessee and allowed the

depreciation on roads treating the assessee as owner of the 'right to collect toll', which is an 'intangible asset' on which depreciation is allowable under section 32 of the Act, by following the decision of coordinate bench of Tribunal in assessee's own case for assessment years 2009-10 to 2011-12. Further, as regards the quantum of depreciation, the learned CIT(A) denied the claim of the assessee of allowing depreciation at the rate of 25% applicable in case of intangible assets and restricted the same to 15% as claimed by the assessee in its return of income, by observing as under:

"4.34 As regards the quantum of depreciation allowable, the appellant had claimed depreciation @ 15% the return of income/treating the same as Plant & Machinery and now vide the directions contained in the above para, depreciation is being allowed treating the same as an intangible asset on which depreciation is allowable @ 25%. This therefore leads to a situation wherein the relief being allowed to the appellant is in excess of what was claimed by it in the return of income. There have been various decisions of different Courts wherein this issue of excess claim or relief from what was claimed by the appellant has been discussed, the latest being the decision of Hon'ble Bombay High court in the case of Pruthvi Brokers in which the Court has allowed the same. The Court has held that the Appellate Authority have a discretion as to such excess claim other than claimed by the appellant in the return of income is allowable or not. Perusal of this decision also lays down that the excess relief is applicable in special situation wherein the claim of the appellant is clearly admissible and the appellant is entitled to such a deduction even otherwise which was omitted due to inadvertence. In the instant case, the appellant has itself claimed depreciation @ 15% in the return of income on the basis of audited accounts and hence the excess relief is definitely not in the nature of an inadvertent error Further the issue as to whether depreciation is allowable @ 25% treating the same as Intangible asset is not yet final and is pending for adjudication before the High Court. Thus, it is premature to say that the claim of the appellant that depreciation on road is allowable @ 25% is obvious and even otherwise allowable In my opinion, therefore, the instant case does not fall in a special category wherein the Appellate Authority may allow relief which is more than what was claimed by the appellant in the return of income. Accordingly, the AO is directed to allow depreciation @ 25% treating the same as Intangible asset as per the decision of the ITAT, Mumbai in the appellants own case but restrict the depreciation so allowed to the amount actually claimed by the appellant in the return of income. This ground of appeal of the appellant to allow depreciation on road under the asset category "Intangible asset" is allowed subject to the direction as above:

Being aggrieved, the assessee is in appeal before us.

6. During the course of hearing, learned Authorised Representative (*'learned AR'*) submitted that depreciation is allowable on block of assets at the rate applicable and tax can be collected only as provided under the Act.

7. On the other hand, learned Departmental Representative (*'learned DR'*) vehemently relied upon the orders passed by the lower authorities and submitted that relief more than what was claimed by the assessee in the return of income cannot be allowed.

8. We have considered the rival submissions and perused the material available on record. The only grievance of the assessee is against restricting the rate of depreciation to 15%, as claimed in the return of income, against 25% allowable in case of intangible assets. In the present case, the assessee entered into an agreement on 22/03/2005, with NHAI for construction of road project for a period of 20 years commencing from 22/09/2005. Following the approach adopted in preceding assessment years, which has also been accepted by coordinate bench of the Tribunal in assessee's own case for assessment year 2007-08 and 2008-09, the assessee claimed depreciation on the road at 15% by treating the same as *'plant and machinery'* in its return of income. It is also undisputed that even in assessment year 2010-11, the learned CIT(A) in assessee's own case has allowed depreciation at 15% on the road by treating the same as *'plant and machinery'*. Thus, it is evident that such a claim of the assessee has been allowed in the previous assessment years and therefore, it cannot be denied that the assessee was

under a bona fide belief that it has correctly claimed deduction of depreciation on toll road by treating the same as '*plant and machinery*' at 15%, in view of the consistent findings in its own case. However, subsequently, due to change in legal position, the claim of deduction of depreciation by treating the road as '*plant and machinery*' was disallowed on the basis that assessee cannot be treated as owner of the toll road. The coordinate bench of the Tribunal in assessee's own case in ACIT vs M/s West Gujarat Expressway Ltd., in ITA No. 5904 and 6244/M/2012, vide order dated 15/04/2015, for assessment year 2009-10, accepted the alternative plea of the assessee and in Para 28 of its order held that assessee is entitled to collect toll tax, which is an intangible commercial right under section 32(1)(ii) of the Act, at the rate as has been prescribed under the relevant rules.

9. It is the golden rule of tax, as laid down in Article 265 of the Constitution of India that no tax can be collected except by authority of law. It is also well established that 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 tax dues are collected. The Hon'ble Jurisdictional High Court in Balmukand Acharya vs DCIT: [2009] 221 CTR 440 (Bom.) has held that authorities under the Act are under obligation to act in accordance with law. Thus, the mere fact that the assessee has claimed depreciation at 15% by treating the road as '*plant and machinery*' by following the consistent stand of the appellate authorities in its own case, which as noted above was subsequently modified following the change in legal position, cannot be held

to be the basis for denying the deduction of depreciation at the rate of 25%, i.e. the rate of depreciation applicable in case of intangible assets. From the record, it is evident that it is not the case where the Revenue is alleging that rate of depreciation in case of intangible assets is 15% instead of 25% as claim by the assessee. Thus, once the right to collect the toll tax has been held to be intangible asset by the learned CIT(A), by following the judicial precedents in assessee's own case, we are of the considered view that the learned CIT(A) erred in denying deduction of depreciation at the rate of 25% and restricting the same to 15% by referring to the claim made under the return of income. We are further of the view that once asset has been characterised under the particular head i.e., '*intangible asset*' in the present case, all the other consequences including the rate at which depreciation is allowable under the law follows. Therefore, in view of the above, we direct the AO to grant depreciation on toll road at the rate applicable in case of intangible assets i.e. at 25%. As a result, grounds raised by the assessee are allowed.

10. In the result, appeal by the assessee is allowed.

ITA No. 2496/Mum./2021
Revenue's appeal – A.Y. 2012-13

11. In this appeal, Revenue has raised following grounds:

"1. *Whether on the facts and in the circumstances of the case, the order of the Ld. CIT (A) is justified in holding that the expenditure incurred by the assessee for construction of a road under BOT contract with the Government has given rise to an intangible asset as defined under Explanation 3(b) r.w.s. 32(1)(ii) and hence, the assessee is eligible to claim depreciation on such asset as the specified rate?"*

2. *Whether on the facts and under the circumstances of the case and in law, the Tribunal was justified in holding that the interest income of Rs. 1,56,61,845/- was taxable under the head Business Income and not under the head Income from other Sources without appreciating the fact that the income was not derived from the assessee?*

3. *The Appellant prays that the order of the CIT (Appeals) on the above ground be set aside and that of the AO be restored."*

12. The issue arising in ground No. 1, raised in Revenue's appeal, is pertaining to grant of depreciation on toll road by treating the same as 'intangible asset'.

13. The basic facts pertaining to this issue have already been discussed above, while dealing with assessee's appeal. As noted above, the coordinate bench of the Tribunal in assessee's own case in ACIT vs M/s West Gujarat Expressway Ltd. (supra), for assessment year 2009-10 has held that 'right to collect toll' is an 'intangible asset' under section 32(1)(ii) of the Act and therefore assessee is entitled to claim depreciation. The relevant findings of the coordinate Bench of the Tribunal are as under:

"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:

"Depreciation.

32. (1) [In respect of depreciation of –

(i) buildings, machinery, plant or furniture, being tangible assets;

(ii) know-how, patents, copyrights, trade marks, **licences**, franchises or **any other business or commercial rights of similar nature**, being intangible assets acquired on or after the 1st day of April, 1998, owned, wholly or partly, by the assessee and used for the purposes of the 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 M/s. Ashoka Infrastructure Ltd. Vs. ITO in ITA No.989/PN/2010 & ITA No.1105/PN/2010, wherein, the Tribunal while further relying upon another decision of the Co-ordinate Bench of the Tribunal in the case of 'Ashoka Infraways Pvt. Ltd. Vs. ACIT' in ITA No.185 & 186/PN/2012 dated 29.04.2013, 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. vs. 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) 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 Bypass 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)(i1) 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 incurrance 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."

14. We further find that the coordinate bench of the Tribunal in assessee's own case in DCIT v. West Gujarat Expressway Ltd., in ITAs No. 634 and 664/Mum./2015, for assessment year 2010-11, vide order dated 26/05/2017, rendered similar findings following the aforesaid decision in immediately preceding year. Similarly was held in assessment year 2011-12 by the coordinate bench of the Tribunal in assessee's own case in M/s West Gujarat

Expressway Ltd. v/s DCIT, in ITAs No. 3668 and 4327/Mum./2016, vide order dated 24/09/2018. The learned DR could not show us any reason to deviate from the aforesaid decisions and no change in facts and law was alleged in the relevant assessment year. The issue arising in the present case is recurring in nature and has been decided by the coordinate bench of the Tribunal in assessee's own case for preceding assessment years. Thus, respectfully following the aforesaid judicial precedents, we find no infirmity in the impugned order passed by the learned CIT(A) on this issue. As a result, ground No. 1 raised in Revenue's appeal is dismissed.

15. The issue arising in ground No. 2, raised in Revenue's appeal, is pertaining to taxability of interest income.

16. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the year under consideration, the assessee earned interest of Rs.1,56,61,845, on fixed deposit, which was made out of the toll revenues earned and offered the same to tax under the head '*business income*'. The AO vide order passed under section 143(3) of the Act, without giving any specific findings, treated the interest income as '*income from other sources*', while computing the total income of the assessee.

17. The learned CIT(A) vide impugned order, by following the decisions rendered in assessee's own case by its predecessor as well as by the coordinate bench of the Tribunal in preceding assessment years, allowed the appeal filed by the assessee on this issue and directed the AO to treat the

interest income as 'business income'. Being aggrieved, Revenue is in appeal before us.

18. During the course of hearing, learned DR vehemently relied upon the order passed by the AO. On the other hand, learned AR placed reliance upon the decisions of the coordinate bench of Tribunal in assessee's own case.

19. We have considered the rival submissions and perused the material available on record. We find that while deciding similar issue in assessee's own case for assessment year 2009-10, the Co-ordinate Bench of the Tribunal in ACIT vs M/s West Gujarat Expressway Ltd. (supra) held that interest income from fixed deposit is business income. The relevant findings of the coordinate bench of the Tribunal are as under:

"7. The Id. AR of the assessee has further submitted that the assessee has entered into an agreement dated 22.3.2005 with 'National Highways Authority of India (in short NHAI) vide which the assessee has been granted rights/license to collect toll for the period of 20 years for up gradation, operation, maintenance and implementation of Jetpur- Rajkot Road Project. The said project has been assigned to the assessee as a concessionaire on 'Built-Operate-Transfer (BOT) basis. The Ld. AR of the assessee has further brought our attention to the 'Common Loan Agreement' dated 20th June, 2005, entered between the assessee and the lender banks namely 1. Punjab National Bank, 2. Corporation Bank, 3. Indian Overseas Bank, 4. Oriental bank of Commerce, 5. Union bank of India, 6. United Bank of India, 7. Indian Bank and 8. Uco bank, vide which the above stated banks have agreed to provide loan to the assessee to part finance the said Project. As per 'clause 7.13' of the said loan agreement, it has been agreed that out of the net revenue generations of the said project, the borrower (assessee) would open with the Lead bank a Debit Service Reserve Account equivalent to 12 months of Debt Service or Rs. 1800 lakh. The Ld. AR of the assessee has further relied upon the copy of the letter dated 31.12.2011 of the Relationship Manager of the Punjab National Bank certifying that all the original FD receipts were physically lying with the said Bank (PNB) and there was lien on the same under the Debt Service Reserve Account'. The Id. AR has further submitted that interest income from the FDRs kept with the bank as required under the 'Common Loan Agreement' upon which the bank has lien has been accepted as 'business income' in the earlier assessment years 2007-08 & 2008-09 by the Ld. CIT(A) which findings have been further upheld by the Tribunal vide orders dated

27.2.2013 for A.Y. 2007-08 (supra) and order dated 5.4.2013 for A.Y. 2008-09. From the above submissions of the assessee, it is apparent on the record that the interest income has been earned by the assessee on the security deposits with the bank as per the Common Loan Agreement as discussed above. The said interest income had been earned by the assessee out of business compulsions of deposits in the 'Debit Service Reserve Account', hence the said interest income is linked to the business activities of the assessee. The issue is covered with the decisions of the Tribunal in the own case of the assessee for earlier assessment years. Hence, the interest income of the assessee is ordered to be assessed as Business Income. Ground No.1 of the Revenue's appeal is therefore dismissed."

20. We find that the aforesaid decision was challenged by the Revenue before the Hon'ble jurisdictional High Court in PCIT vs M/s West Gujarat Expressway Ltd., in ITA No. 610 of 2016. However, vide order dated 19/03/2019, Hon'ble jurisdictional High Court affirmed the findings of the coordinate bench of the Tribunal and did not admit the appeal of the Revenue on this issue. We further find that the coordinate bench of the Tribunal in assessee's own case in DCIT vs West Gujarat Expressway Ltd. (supra), for assessment year 2010-11, vide order dated 26/05/2017, rendered similar findings following the aforesaid decision in immediately preceding year. Similarly was held in assessment year 2011-12 by the coordinate bench of the Tribunal in assessee's own case in M/s West Gujarat Expressway Ltd. vs DCIT (supra), vide order dated 24/09/2018. The learned DR could not show us any reason to deviate from the aforesaid decisions and no change in facts and law was alleged in the relevant assessment year. The issue arising in the present case is recurring in nature and has been decided by the coordinate bench of the Tribunal in assessee's own case for preceding assessment years. Thus, respectfully following the aforesaid judicial precedents, we find no

infirmary in the impugned order passed by the learned CIT(A) on this issue.

As a result, ground No. 2, raised in Revenue's appeal is dismissed.

21. Ground no.3 is general in nature and need no separate adjudication.

22. In the result, appeal by the Revenue is dismissed.

23. To sum up, appeal by the assessee is allowed, while the appeal by the Revenue is dismissed.

Order pronounced in the open Court on 26/09/2022

Sd/-
OM PRAKASH KANT
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 26/09/2022

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai