

आयकर अपीलीय अधिकरण, हैदराबाद पीठ में  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
HYDERABAD BENCHES "B", HYDERABAD**

**BEFORE**

**SHRI LALIET KUMAR, HON'BLE JUDICIAL MEMBER  
AND  
SHRI MADHUSUDAN SAWDIA, HON'BLE ACCOUNTANT MEMBER**

ITA No.182/Hyd/2024		
Assessment Year – 2017-18		
Patna Bakhtiyarpur Tollway Limited Hyderabad PAN : AAFCP9577K	Vs.	ACIT Circle-16(2) Hyderabad
(Appellant)		(Respondent)
Assessee by:	Shri S.Rama Rao, AR	
Revenue by:	Ms.K.Haritha, CIT-DR	
Date of hearing:		
		05.12.2024
Date of pronouncement:		
		31.12.2024

**ORDER**

**PER LALIET KUMAR, J.M.**

This appeal is filed by the assessee, feeling aggrieved by the order passed by the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi dated 17.06.2022 for the AY 2017-18.

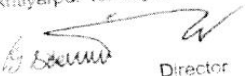
2. There is a delay of 537 days in filing the appeal before the Tribunal and learned AR filed an affidavit of the Director of the company which is to the following effect.

**AFFIDAVIT**

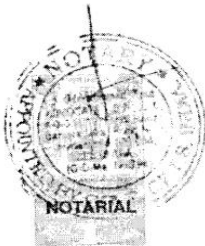
I, Seenaiah Bollineni S/o Ramanaiah Bollineni, Managing Director and Authorized Signatory of M/s Patna Bakhtiyarpur Tollway Ltd (PAN: AAFCP9577K), Hyderabad, do hereby solemnly affirm and declare that:


1. I have filed an appeal for the relevant Financial Year 2016-17 against the order of CIT(A) -National Faceless Appeal Centre (NFAC) in CIT (A), Hyderabad-4/10669/2019-20 for the AY 2017-18 on 04/11/2023 whereas the due date for filing the appeal was 16/08/2022 i.e., 60 days from the date of receipt U/s 253(3) of the Income Tax Act, 1961.
2. The delay in filing of appeal is purely on account of the reason that I have entrusted the task of appeal and hearings therein to my counsel which is evident from Page No.2 of Form No. 35 filed before CIT(A). However, while going through the e-proceedings tab in the Income Tax Portal for submission of reply to other notices, I observed that an order was already by the CIT(Appeals) on 17/06/2022. Thereafter upon enquiry into the factual matrix, I was given to understand that the appeal was disposed off on account of non-appearance of the counsel and also on merits without proper appreciation of facts of the case.
3. Immediately upon realizing that my counsel has not appeared and has not communicated any correspondence received from CIT(A) to me, I have approached another counsel and is now taking prompt steps by preferring an appeal before this Hon'ble tribunal after gathering relevant documents. It is well settled proposition that a liberal and pragmatic view has to be adopted in condonation of delay in the interests of natural justice when there no intentional delay in filing of appeal as held by Hon'ble Apex Court in [1987] 167 ITR 471 Collector, Land Acquisition vs MST. Katiji and Others, Hon'ble Karnataka High Court in [2013] 263 CTR (Kar) 549 CIT & Anr. Vs ISRO Satellite Centre and more recently by Hon'ble Jurisdictional ITAT in [2022] 217 TTJ (Hyd) 120 Srimaan Industries Private Limited vs ITO
4. The above facts are true and correct to the best of my knowledge and belief.

For Patna Bakhtiyarpur Tollway Limited

  
Director

(Seenaiah Bollineni)  
Deponent



# ATTESTED #  
  
ADVISED SIGNATORY  
(Appointed by Govt of T.S. INDIA)  
8-3-354/19, Nizami Nagar, Durgam Hills  
Sec: 42/1, Hyderabad-500 034, T.S. INDIA

23 FEB 2024

3. Ld.AR had drawn our attention to Form 35, column 17, where, the address and e-mail of the consultant has been given. It was submitted by the Ld.AR that on account of reasons submitted in the affidavit filed, the order has not been communicated to the assessee, as such there was delay in filing the appeal before the Tribunal. Affidavit, supporting and explaining the contention of the assessee is on record.

4. The Ld.DR on the other hand has opposed the contention for the delay and it was submitted that the delay in filing the appeal is not required to be condoned.

5. We have heard both the parties, gone through the affidavit filed and find there is a reasonable cause for the assessee to file the appeal belatedly, hence condone the delay and admit the appeal for hearing in the interest of justice.

6. The Ld.AR has submitted that the assessee is into development and construction of a project filed its return of income for A.Y.2017-18 on 31.10.2017, declaring loss of Rs.197,63,34,479/-. Later a revised return was filed on 21.01.2019, admitting the loss of Rs.197,66,10,848/-. The case

was selected for scrutiny and the Assessing Officer issued notices u/s 142(1) and 143(2) of the Act, calling for certain details. In response, the assessee filed the details and the Assessing Officer completed the assessment u/s 143(3) of the Act, determining the loss at Rs.93,28,65,450/-. The Assessing Officer disallowed the depreciation on the intangible asset amounting to Rs.162,48,67,242/-and has only restricted to the amortization of Rs.58,16,55,020/-. Relevant paragraphs of the order of the learned Assessing Officer are available at para 3 at page 4,5 and 6. The Ld.AR has submitted that the Ld.CIT(A) had examined this issue at page 31 of his order to the following effect :

*1. 1. Findings and Decision: I have carefully considered the facts of the case as well as submissions filed by the appellant. I find no force in the arguments taken. The AO has relied on circular no. 9 of 2014 dated 02-04-2014, which states in most unambiguous terms how the cost of assets is to be amortized evenly over the period of concessionaire agreement after excluded the time taken for creation of such facility. The appellant has relied upon three decisions of various ITATs. I am unable to agree with the views taken therein, because the clearcut decision of various High Courts were ignored by the Hon'ble ITATs. The first and foremost is the decision of HIGH COURT OF BOMBAY in the case of North Karnataka Expressway Ltd. v. Commissioner of Income-tax -10, [2014] 51 taxmann.com 214 (Bombay), wherein it was held as under:-*

*“Section 32, read with section 263, of the Income-tax Act, 1961 - Depreciation - Allowability/Rates of (Toll road) - Assessment year 2005-06 - Where assessee, engaged in business of infrastructure development, in execution of an agreement with National Highway*

*Authority, constructed a road on Build, Operate and Transfer (BOT) basis on land owned by Government, could not claim depreciation on toll road so constructed and operated - Held, yes [Paras 45 & 47] [In favour of revenue]"*

*This decision was re-affirmed by the Hon'ble Court in the case of Commissioner of Income Tax-10 v. West Gujarat Expressway Ltd. [2017] 82 taxmann.com 224 (Bombay) wherein it was held as under:-*

*"3. Mr. Pinto, the learned counsel for the Revenue urges only the following two questions of law for our consideration:—*

*"(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in directing the AO to grant depreciation on assets not owned by the Respondent that goes against provisions of Section 32 of the I.T. Act?"*

*(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 I of the I.T. Rules?"*

*4. In view of the fact that according to us the decision in North Karnataka Expressway Ltd. (supra) concludes the issue, we proceed to hear the Appeal finally. Mr. Dalal, the learned counsel for the Respondent sought to distinguish the decision of North Karnataka Expressway Ltd. (supra) by pointing out that in the present Appeal, there is a clause which provides that for the purpose of claiming tax depreciation, the property representing the capital investment made by the appellant shall be deemed to be acquired and owned by the Appellant. According to him such a clause was not present in the decision rendered by this Court in North Karnataka Expressway Ltd. (supra). This is not so. Paragraph 8 of the order passed in North Karnataka Expressway Ltd. (supra) specifically records that the appellant relied upon a clause which is identical to that pressed into service by Mr. Dalal. Thus, the aforesaid clause being relied upon by Mr. Dalal to distinguish the decision of this Court in North Karnataka Expressway Ltd. (supra) is not sustainable. This is so as the very clause was very much a subject matter of consideration by this Court in North Karnataka Expressway Ltd. (supra). We find that this Court had dealt with the issue arising herein on merits as is*

evident from paragraph 24 onwards of North Karnataka Expressway Ltd. (supra).

5. In the above view, following the decision of this Court in North Karnataka Expressway Ltd. (supra) we answer the two substantial questions of law in the negative i.e. in favour of the Appellant-Revenue and against the Respondent Assessee.” Further, now the facts of the case have to be analyzed. Depreciation is claimed on any asset, tangible or intangible, which is reflected in the ‘Assets’ of the balance Sheet. For something to be reflected in the Balance sheet, it must have some value. Value of an ‘Intangible Asset’ will be arrived at by following some method. So, for which ‘Intangible asset’ is the appellant asking for the depreciation to be allowed? The fundamental questions to be asked are as follows:-

1.	Is there any ‘Intangible asset’ which has been valued, reflected in the Balance sheet?	No
2.	What are the assets on which the Assessee has claimed the depreciation?	The assets are the ‘brick and mortar’ physical assets which have been created by the Assessee as a part of the BOT project.

Thus, the strange reasoning of ‘Intangible assets’ taken by the Hon’ble ITAT to ignore the decisions of Hon’ble Bombay high Court, does not apply to the instant case before me. The physical assets of the BOT project are squarely covered by the circular no. 9 of 2014 dated 02-04-2014. Respectfully following, the above decisions, the disallowance made by the AO amounting to Rs. 1,04,32,12,222/- is hereby confirmed. The ground of appeal no. 2 and 3, thus, fail.

1. In the result, the Appeal is dismissed.

7. Feeling aggrieved by the Ld.CIT(A) the assessee is in appeal before us. The assessee had filed written submissions in support of its case which is as follows :

### WRITTEN SUBMISSIONS

The appellant company filed its return of income for A.Y.2018-19 on 31.10.2017 declaring a loss of Rs.197,63,34,379/-. Later, a revised return was filed on 21.01.2019 admitting the loss at Rs.197,66,10,848/-.

2. The Assessing officer converted the case to scrutiny and issued notices u/s 142(1) and 143(2) of the I.T.Act. In response thereto, the appellant filed the required details. The Assessing Officer completed the assessment u/s 143(3) of the I.T. Act determining the loss to be Rs.93,28,65,450-. While doing so, the Assessing officer made the following additions.

- a) Disallowance of PF on the ground that the same was not remitted within the due date - Rs.5,33,179/-
- b) Disallowance of Depreciation claimed by treating the project developed by it as intangible asset.

3. Aggrieved with the order of assessment, the appellant filed an appeal before the learned CIT (Appeals) who dismissed the appeal. The appellant carried the matter further in appeal before the Hon'ble ITAT.

4. In so far as the disallowance of PF of Rs.5,33,179/- is concerned, the appellant submitted that the amount was remitted to the authorities before the due date for filing the return of income u/s 139(1) of the I.T. Act and, therefore, no disallowance can be made on this account.

5. The next addition made by the Assessing officer is on account of disallowance of depreciation claimed on the BOT project developed by the appellant. The appellant treated the same as intangible asset and claimed depreciation at 25% of the total cost or Rs.162,48,67,242/- The Assessing officer disallowed the depreciation and allowed amortisation of Rs.58,16,55,020/- and the difference of Rs.104,32,12,222/- (Rs.162,48,67,242 – Rs.58,16,55,020/- ) is added. The learned CIT (Appeals) is also of the view that the appellant is not entitled for depreciation but it is eligible for amortisation.

6. The appellant brings to the kind notice of the Hon'ble Tribunal the relevant clause of the concessionaire agreement to prove that the ownership of the BOT project that was treated as "Intangible Asset" for claiming depreciation u/s 32 as follows:

Clause No.47.4. Depreciation and Interest

47.4.1. For the purposes of depreciation under the Applicable Laws, the property representing the capital investment made by the Concessionaire in the Project shall be deemed to be acquired and owned by the Concessionaire. For the avoidance of doubt, the Authority shall not in any manner be liable in respect of any claims for depreciation to be made by the Concessionaire under the Applicable Laws.

7. The appellant therefore submits that the above clause of the Concessionaire Agreement clearly proves that the assessee being the Concessionaire shall be deemed to be the owner of the property representing the capital investment made by the assessee/concessionaire in the Project for the purposes of depreciation under the Applicable Laws i.e., under the Companies Act as well as Income Tax Act.

8. The appellant also capitalized such capital investment that was made by the assessee being concessionaire in the Project only as "Intangible Asset" for claiming depreciation and made the claim of depreciation u/s 32(1)(ii) of the Act in the return of income filed.

9. The appellant also draws the kind attention of the Hon'ble Tribunal towards some more clauses of the Concessionaire Agreement to prove that the assessee being the concessionaire is the owner of the infrastructure facility, as follows:

Clause No.3.1. The Concession

3.1.1. Subject to and in accordance with the provisions of this Agreement, the Applicable Laws and the Applicable Permits, the Authority hereby grants to the Concessionaire the concession set forth herein including the exclusive right, licence and authority to construct, operate and maintain the Project (the "Concession") for a period of 28 (Twenty Eight) years commencing from the Appointed Date, and the Concessionaire hereby accepts the Concession and agreed to implement the Project subject to and in accordance with the terms and conditions set forth herein.

3.1.2. Subject to and in accordance with the provisions of this Agreement, the Concession hereby granted shall oblige or entitle (as the case may be) the Concessionaire to:

- (a) Right of Way, access and licence to the Site for the purpose of and to the extent conferred by the provisions of this Agreement.
- (b) Finance and construct the Project Highway
- (c) Manage, Operate and Maintain the Project Highway and regulate the use thereof by third parties.

Clause No.4.1. Conditions Precedent

- 4.1.2. The Conditions Precedent required to be satisfied by the Authority shall be deemed to have been fulfilled when the Authority shall have –
- a) Procured for the Concessionaire the Right of Way to the Site in accordance with the provisions of Clause 10.3.1.

Clause No.10.1. The Site

- 10.1. The site of the Project Highway shall comprise the real estate described in in Schedule-A and in respect of which the Right of Way shall be provided and granted by the Authority to the Concessionaire as a licensee under and in accordance with this Agreement (the "Site"). For avoidance of doubt, it is hereby acknowledged and agreed that references to the Site shall be construed as references to the real estate required for Four-Laning of the Project Highway as set forth in Schedule-A.
- 10.2.4. It is expressly agreed that the licence granted hereunder shall terminate automatically and forthwith, without the need for any action to be taken by the Authority to terminate the licence, upon the Termination of this Agreement for any reason whatsoever. For the avoidance of doubt, the Parties expressly agree that notwithstanding any temporary or permanent structures erected on the Site by the Concessionaire or its sub-licensees, the licence in respect of the Site shall automatically terminate, without any further act of the Parties, upon Termination of this Agreement.

Clause No.15.1. Commercial Operation Date (COD)

- 15.1. Four-Laning shall be deemed to be complete when the Completion Certificate or the Provisional Certificate, as the case may be, is issued under the provisions of Article 14, and accordingly the commercial operation date of the Project shall be the date on which such Completion Certificate or the Provisional Certificate is issued (the "COD"). The Project Highway shall enter into commercial service on COD whereupon the Concessionaire shall be entitled to demand and collect Fee in accordance with the provisions of Article 27.

Clause No.17.1. O & M Obligations of the Concessionaire

- 17.1.1. During the Operation Period, the Concessionaire shall operate and maintain the Project Highway in accordance with this Agreement either by itself, or through the O&M Contractor and if required, modify, repair or otherwise make improvements to the Project Highway to comply with the provisions of this Agreement, Applicable

Laws and Applicable Permits, and confirm to Specifications and Standards and Good Industry Practice.

Clause No.27.1. Collection and appropriation of Fee

27.1.1. On and from the COD till date the Transfer Date, the Concessionaire shall have the sole and exclusive right to demand, collect and appropriate Fee from the Users subject to and in accordance with this Agreement and the National Highways Fee (Determination of Rates and Collection) Rules, 2008 read with National Highways Fee (Determination of Rates and Collection) Rules, 2008 (the "Fee Rules") provided that for ease of payment and collection, such Fee shall be rounded off to the nearest 5 (five) rupees in accordance with the Fee Rules; provided further that the Concessionaire may determine and collect Fee at such lower rates as it may, by public notice to the Users, specify in respect of all or any category of Users or vehicles.

Clause No.32.1. Insurance during Concession Period

32.1. The Concessionaire shall effect and maintain at its own cost, during the Construction Period and the Operation Period, such insurances for such maximum sums as may be required under the Financing Agreements, and the Applicable Laws, and such insurances as may be necessary or prudent in accordance with Good Industry Practice. The Concessionaire shall also effect and maintain such insurances as may be necessary for mitigating the risks that may devolve on the Authority as a consequence of any act or omission of the Concessionaire during the Construction Period. The Concessionaire shall procure that in each insurance policy, the Authority shall be a co-insured and that the insurer shall pay the proceeds of insurance into the Escrow Account. For the avoidance of doubt, the level of insurance to be maintained by the Concessionaire after repayment of Senior Lender's dues in full shall be determined on the same principles as applicable for determining the level of insurance prior to such repayment of Senior Lender's dues.

Clause No.37.3. Termination Payment

37.3.1. Upon Termination on account of a Concessionaire Default during the Operation Period, the Authority shall pay to the Concessionaire, by way of Termination Payment, an amount equal to 90% (Ninety per cent) of the Debt Due less Insurance Cover provided that if any insurance claims forming part of the Insurance Cover are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall be included in the computation of Debt Due. For the avoidance of doubt, the concessionaire hereby acknowledges that no Termination Payment shall be due or payable on account of Concessionaire Default occurring prior to COD.

Clause No.37.4. Other rights and obligations of the Authority

Upon Termination for any reasons whatsoever, the Authority shall:

- (a) Be deemed to have taken possession and control of the Project Highway forthwith.
- (b) Take possession and control of all materials, stores, implements, construction plants and equipment on or about the Site.
- (c) Be entitled to restrain the Concessionaire and any person claiming through or under the Concessionaire from entering upon the Site or any part of the Project.
- (d) Require the Concessionaire to comply with the Divestment Requirements set forth in Clause 38.1.

Clause No.38.1. Divestment Requirements

38.1.1. Upon Termination, the Concessionaire shall comply with and confirm to the following Divestment Requirements.

- (a) Notify to the Authority forthwith the location and particulars of all Project Assets.
- (b) Deliver forthwith.....
- (c) Cure all Project Assets.....
- (d) Deliver and transfer relevant records.....
- (e) Transfer and/or deliver all Applicable Permits.....
- (f) Execute such deeds of conveyance, documents and other.....
- (g) Comply with all other requirements as may be prescribed or required under Applicable Laws for completing the divestment and assignment of all rights, title and interest of the Concessionaire in the Project Highway, free from all Encumbrances, absolutely unto the Authority or to its nominee.

Clause No.38.6. Divestment Costs, etc

38.6.1. The Concessionaire shall bear and pay all costs incidental to divestment of all of the rights, title and interest of the Concessionaire in the Project Highway in favour of the Authority upon Termination, save and except that all stamp duties payable on any deeds or

Documents executed by the Concessionaire in connection with such divestment shall be borne by the Authority.

10. It can be seen from the above-extracted clauses of the Concession Agreement, there is a clear distinction between the Site of Project Highway and the Infrastructure Facility of the Project Highway in as much as the ownership of the Site of Project Highway was always with the Authority (NHAI) and the Concessionaire (the Assessee Company) was provided with the Right of Way to the Site only and it was never transferred by the Authority to the Concessionaire. Since the ownership of the Site was always with the Authority (NHAI), upon Termination, the Authority shall be deemed to have taken possession and control of the Site without requiring any conveyance deed for its transfer back to the Authority from the Concessionaire.

11. However, unlike the Site of Project Highway, the Concessionaire (the Assessee company) has to Design, Build, Finance and Operate the Infrastructure Facility i.e., Project Highway, on its own during the Concession Period until termination and upon Termination, the Concessionaire (the Assessee Company) has to transfer the Project Highway to the Authority (NHAI) by executing/conveyancing required deeds & documents. It is obvious that without having ownership rights and title over any capital asset, its transfer is not possible.

12.. It is further submitted that the Concessionaire (Assessee Company) has to effect and maintain Insurance of the Project Highway at its own cost during the Construction Period and the Operation Period and the Concessionaire shall make the Authority (NHAI) a co-insured in each insurance policy, which makes it clear that the Concessionaire (Assessee Company) has the ownership rights and title over the Infrastructure Facility i.e., Project Highway during the Construction Period and the Operation Period until its transfer to the Authority (NHAI).

13.. The appellant therefore submits that it has amply proved beyond any doubt about the ownership rights and title over the Infrastructure Facility i.e., Project Highway, which was build, developed and operated on its own funds & efforts until its transfer to the Authority (NHAI), which will be after completion of concession period and therefore, the assessee company is entitled to claim depreciation u/s 32 on the Cost of Infrastructure Facility i.e., Project Highway from the date of achieving COD till the date of transfer of Project Highway to the Authority on termination of Agreement.

14. Since the appellant company, being the Concessionaire, has the ownership rights and title over the Infrastructure Facility i.e., Project Highway during the construction and operation period until its transfer to the Authority (NHAI) upon termination of agreement, the CBDT Circular No.9/2014 dt.23.4.2014 prescribing the amortisation of project expenses is not applicable.

15. In an identical case, the Hon'ble ITAT Delhi Bench-C vide order dt.06.06.2024 in ITA No.9544/Del/2019 in the case of M/s Kurukshetra Expressway Pvt Ltd v. DCIT, held that the appellant/assessee is entitled to claim depreciation @ 25% on road construction as admissible on intangible assets. The Hon'ble Tribunal has considered the applicability of CBDT Circular No.9/2014 and various decisions viz., Techno Shares & Stocks Ltd v. CIT [2010] 327 ITR 323 (SC), CIT v. Smifs Securities Ltd [2012] 348 ITR 302 (SC), ACIT v. Progressive Constructions Ltd [2018] 63 ITR (T) 516 (Hyd) (Special Bench), UCO Bank v. CIT 237 ITR 889 (SC), Keshavi Ravji and Company v. CIT 183 ITR 1 (SC), CIT v. Indra Industries 248 ITR 338 (SC), CIT v. Honda Cycles Pvt Ltd & Ors 228 ITR 463 (SC), CCE v. Ratan Melting & Wire Industries [2008] 13 SCC 1 (SC) and CIT vs. West Gujarat Expressway Ltd. The Hon'ble Tribunal also considered coordinate benches (Delhi) decision in ITA.No.3801/Del/2018 in the case of DCIT v. M/s

Telecommunication Consultants India Ltd decided on 26.07.2023 and ITA.No.5555/Del/2018 M/s Gwalior-Bypass Project Ltd v. DCIT.

16. In view of the above, the assessee prays the Hon'ble ITAT to kindly direct the Assessing officer to treat the amount spent on development of the BOT project as intangible asset and allow depreciation at 25% as claimed by the appellant in the return of income filed.

  
COUNSEL FOR THE APPELLANT

8. Besides written submissions the assessee had also submitted Board Circular relied upon by the Ld.AO and the Ld.CIT(A), in fact operates in favour of the assessee and our attention was drawn to Clause 8 which is to the following effect :

*8. It is hereby clarified that this Circular is applicable only to those infrastructure projects for development of road/highways on BOT basis where ownership is not vested with the assessee under the concessionaire agreement*

9. Ld.AR had also drawn our attention to page 125 of the concessional agreement entered with the NHAI at para 47.4, 47.4.1 and 47.4.2, which provides as under :

#### **47.4 Depreciation and Interest**

*47.4.1. For the purpose of depreciation under the Applicable Laws, the property representing the capital investment made by the Concessionaire in the Project shall be deemed to be acquired and owned by the Concessionaire. For the avoidance of doubt, the*

*Authority shall not in any manner be liable in respect of any claims for depreciation to be made by the Concessionaire under the Applicable Laws.*

*47.4.2. Unless otherwise specified, any interest payable under this Agreement shall accrue on a daily outstanding basis and shall be compounded on the basis of quarterly rests.*

10. It was submitted by the Ld.AR that based on the above circular and the clause in the agreement for the purpose of claiming depreciation, NHAI has treated the assessee as owner and the assessee is entitled to depreciation on the intangible asset / tangible asset. The assessee had also relied upon the decisions which are referred to in the written submissions.

11. Per contra the Ld.DR on the other hand, submitted that the order passed by the Ld.AO and confirmed by the Ld.CIT(A) are in accordance with law. The Ld.DR had submitted that the concessional agreement between the NHAI and the assessee never transferred the ownership of the asset to the assessee and the assessee for all purposes was a licensee . Our attention was drawn to various clauses of the concessional agreement. Our attention was drawn to Right and Title over the Site, which is captured in Sl.43 in index in the form of 43.1 to 43.4, which are available at page 119 of the paper book. It was also submitted that the NHAI has a right to cancel the contract and take back the asset to its

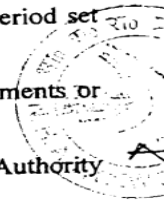
benefit to the exclusion of the assessee. The Ld.DR had drawn our attention to the termination clause in the agreement which states as under :

**ARTICLE 37**  
**TERMINATION**

**37.1 Termination for Concessionaire Default**

37.1.1 Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and the Concessionaire fails to cure the default within the Cure Period set forth below, or where no Cure Period is specified, then within a Cure Period of 60 (sixty) days, the Concessionaire shall be deemed to be in default of this Agreement (the "Concessionaire Default"), unless the default has occurred solely as a result of any breach of this Agreement by the Authority or due to Force Majeure. The defaults referred to herein shall include:

- (a) the Performance Security has been encashed and appropriated in accordance with Clause 9.2 and the Concessionaire fails to replenish or provide fresh Performance Security within a Cure Period of 30 (thirty) days;
- (b) subsequent to the replenishment or furnishing of fresh Performance Security in accordance with Clause 9.2, the Concessionaire fails to cure, within a Cure Period of 90 (ninety) days, the Concessionaire Default for which whole or part of the Performance Security was appropriated;
- (c) the Concessionaire does not achieve the latest outstanding Project Milestone due in accordance with the provisions of Schedule-G and continues to be in default for 120 (one hundred and twenty) days;
- (d) the Concessionaire abandons or manifests intention to abandon the construction or operation of the Project Highway without the prior written consent of the Authority;
- (e) Project Completion Date does not occur within the period specified in Clause 12.4.3;
- (f) the Punch List items have not been completed within the period set forth in Clause 14.4.1;
- (g) the Concessionaire is in breach of the Maintenance Requirements or the Safety Requirements, as the case may be;
- (h) the Concessionaire has failed to make any payment to the Authority within the period specified in this Agreement;
- (i) an Escrow Default has occurred and the Concessionaire fails to cure the default within a Cure Period of 15 (fifteen) days;
- (j) upon occurrence of a Financial Default, the Lenders' Representative has by notice required the Authority to undertake Suspension or



Termination, as the case may be, in accordance with the Substitution Agreement and the Concessionaire fails to cure the default within the Cure Period specified hereinabove;

- (k) a breach of any of the Project Agreements by the Concessionaire has caused a Material Adverse Effect;
- (l) the Concessionaire creates any Encumbrance in breach of this Agreement;
- (m) the Concessionaire repudiates this Agreement or otherwise takes any action or evidences or conveys an intention not to be bound by the Agreement;
- (n) a Change in Ownership has occurred in breach of the provisions of Clause 5.3;
- (o) there is a transfer, pursuant to law either of (i) the rights and/or obligations of the Concessionaire under any of the Project Agreements, or of (ii) all or part of the assets or undertaking of the Concessionaire, and such transfer causes a Material Adverse Effect;
- (p) an execution levied on any of the assets of the Concessionaire has caused a Material Adverse Effect;
- (q) the Concessionaire is adjudged bankrupt or insolvent, or if a trustee or receiver is appointed for the Concessionaire or for the whole or material part of its assets that has a material bearing on the Project;
- (r) the Concessionaire has been, or is in the process of being liquidated, dissolved, wound-up, amalgamated or reconstituted in a manner that would cause, in the reasonable opinion of the Authority, a Material Adverse Effect;
- (s) a resolution for winding up of the Concessionaire is passed, or any petition for winding up of the Concessionaire is admitted by a court of competent jurisdiction and a provisional liquidator or receiver is appointed and such order has not been set aside within 90 (ninety) days of the date thereof or the Concessionaire is ordered to be wound up by Court except for the purpose of amalgamation or reconstruction; provided that, as part of such amalgamation or reconstruction, the entire property, assets and undertaking of the Concessionaire are transferred to the amalgamated or reconstructed entity and that the amalgamated or reconstructed entity unconditionally assumed the obligations of the Concessionaire under this Agreement and the Project Agreements; and provided that:
  - (i) the amalgamated or reconstructed entity has the capability and operating experience necessary for the performance of its obligations under this Agreement and the Project Agreements;

- (ii) the amalgamated or reconstructed entity has the financial standing to perform its obligations under this Agreement and the Project Agreements and has a credit worthiness at least as good as that of the Concessionaire as at the Appointed Date; and
- (iii) each of the Project Agreements remains in full force and effect;
- (t) any representation or warranty of the Concessionaire herein contained which is, as of the date hereof, found to be materially false or the Concessionaire is at any time hereafter found to be in breach thereof;
- (u) the Concessionaire submits to the Authority any statement, notice or other document, in written or electronic form, which has a material effect on the Authority's rights, obligations or interests and which is false in material particulars;
- (v) the Concessionaire has failed to fulfil any obligation, for which failure Termination has been specified in this Agreement; or
- (w) the Concessionaire commits a default in complying with any other provision of this Agreement if such a default causes a Material Adverse Effect on the Authority.

37.1.2 Without prejudice to any other rights or remedies which the Authority may have under this Agreement, upon occurrence of a Concessionaire Default, the Authority shall be entitled to terminate this Agreement by issuing a Termination Notice to the Concessionaire; provided that before issuing the Termination Notice, the Authority shall by a notice inform the Concessionaire of its intention to issue such Termination Notice and grant 15 (fifteen) days to the Concessionaire to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice, subject to the provisions of clause 37.1.3.

37.1.3 The Authority shall, if there be Senior Lenders, send a copy of its notice of intention to issue a Termination Notice referred to in Clause 37.1.2 to inform the Lenders' Representative and grant 15 (fifteen) days to the Lenders' Representative, for making a representation on behalf of the Senior Lenders stating the intention to substitute the Concessionaire in accordance with the Substitution Agreement. In the event the Authority receives such representation on behalf of Senior Lenders, it shall, in its discretion, either withhold Termination for a period not exceeding 180 (one hundred and eighty) days from the date of such representation or exercise its right of Suspension, as the case may be, for enabling the Lenders' Representative to exercise the Senior Lenders' right of substitution in accordance with the Substitution Agreement:

Provided that the Lenders' Representative may, instead of exercising the

Senior Lenders' right of substitution, procure that the default specified in the notice is cured within the aforesaid period of 180 (one hundred and eighty) days, and upon such curing thereof, the Authority shall withdraw its notice referred to above and restore all the rights of the Concessionaire:

Provided further that upon written request from the Lenders' Representative and the Concessionaire, the Authority shall extend the aforesaid period of 180 (one hundred and eighty) days by such further period not exceeding 90 (ninety) days, as the Authority may deem appropriate.

### **37.2 Termination for Authority Default**

37.2.1 In the event that any of the defaults specified below shall have occurred, and the Authority fails to cure such default within a Cure Period of 90 (ninety) days or such longer period as has been expressly provided in this Agreement, the Authority shall be deemed to be in default of this Agreement (the "Authority Default") unless the default has occurred as a result of any breach of this Agreement by the Concessionaire or due to Force Majeure. The defaults referred to herein shall include:

- (a) The Authority commits a material default in complying with any of the provisions of this Agreement and such default has a Material Adverse Effect on the Concessionaire;
- (b) the Authority has failed to make any payment to the Concessionaire within the period specified in this Agreement;
- (c) the Authority repudiates this Agreement or otherwise takes any action that amounts to or manifests an irrevocable intention not to be bound by this Agreement; or
- (d) the State commits a material default in complying with the provisions of the State Support Agreement if such default has a Material Adverse Effect on the Concessionaire and the breach continues for a period of 90 (ninety) days from the date of notice given in this behalf by the Concessionaire to the Authority.

37.2.2 Without prejudice to any other right or remedy which the Concessionaire may have under this Agreement, upon occurrence of an Authority Default, the Concessionaire shall, subject to the provisions of the Substitution Agreement, be entitled to terminate this Agreement by issuing a Termination Notice to the Authority; provided that before issuing the Termination Notice, the Concessionaire shall by a notice inform the Authority of its intention to issue the Termination Notice and grant 15 (fifteen) days to the Authority to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice.

### **37.3 Termination Payment**

37.3.1 Upon Termination on account of a Concessionaire Default during the

Operation Period, the Authority shall pay to the Concessionaire, by way of Termination Payment, an amount equal to 90% (ninety per cent) of the Debt Due less Insurance Cover; provided that if any insurance claims forming part of the Insurance Cover are not admitted and paid, then 80% (eighty per cent) of such unpaid claims shall be included in the computation of Debt Due. For the avoidance of doubt, the Concessionaire hereby acknowledges that no Termination Payment shall be due or payable on account of a Concessionaire Default occurring prior to COD.

37.3.2 Upon Termination on account of an Authority Default, the Authority shall pay to the Concessionaire, by way of Termination Payment, an amount equal to:

- (a) Debt Due; and
- (b) 150% (one hundred and fifty per cent) of the Adjusted Equity.

37.3.3 Termination Payment shall become due and payable to the Concessionaire within 15 (fifteen) days of a demand being made by the Concessionaire to the Authority with the necessary particulars, and in the event of any delay, the Authority shall pay interest at a rate equal to 3% (three per cent) above the Bank Rate on the amount of Termination Payment remaining unpaid; provided that such delay shall not exceed 90 (ninety) days. For the avoidance of doubt, it is expressly agreed that Termination Payment shall constitute full discharge by the Authority of its payment obligations in respect thereof hereunder.

37.3.4 The Concessionaire expressly agrees that Termination Payment under this Article 37 shall constitute a full and final settlement of all claims of the Concessionaire on account of Termination of this Agreement for any reason whatsoever and that the Concessionaire or any shareholder thereof shall not have any further right or claim under any law, treaty, convention, contract or otherwise.

#### 37.4 Other rights and obligations of the Authority

Upon Termination for any reason whatsoever, the Authority shall:

- (a) be deemed to have taken possession and control of the Project Highway forthwith;
- (b) take possession and control of all materials, stores, implements, construction plants and equipment on or about the Site;
- (c) be entitled to restrain the Concessionaire and any person claiming through or under the Concessionaire from entering upon the Site or any part of the Project;
- (d) require the Concessionaire to comply with the Divestment Requirements set forth in Clause 38.1; and
- (e) succeed upon election by the Authority, without the necessity of any



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further action by the Concessionaire, to the interests of the Concessionaire under such of the Project Agreements as the Authority may in its discretion deem appropriate, and shall upon such election be liable to the Contractors only for compensation accruing and becoming due and payable to them under the terms of their respective Project Agreements from and after the date the Authority elects to succeed to the interests of the Concessionaire. For the avoidance of doubt, the Concessionaire acknowledges and agrees that all sums claimed by such Contractors as being due and owing for works and services performed or accruing on account of any act, omission or event prior to such date shall constitute debt between the Concessionaire and such Contractors, and the Authority shall not in any manner be liable for such sums. It is further agreed that in the event the Authority elects to cure any outstanding defaults under such Project Agreements, the amount expended by the Authority for this purpose shall be deducted from the Termination Payment.

### **37.5 Survival of rights**

Notwithstanding anything to the contrary contained in this Agreement, but subject to the provisions of Clause 37.3.4, any Termination pursuant to the provisions of this Agreement shall be without prejudice to the accrued rights of either Party including its right to claim and recover money damages, insurance proceeds, security deposits, and other rights and remedies, which it may have in law or contract. All rights and obligations of either Party under this Agreement, including Termination Payments and Divestment Requirements, shall survive the Termination to the extent such survival is necessary for giving effect to such rights and obligations.

12. Ld.DR had also referred to page 111 of the paper book which deals with the Assignment and Charges and Article 38, Divestment of Rights and Interest at page 106. On the basis of the above said clauses, the Ld.DR had submitted that there is no transfer of asset or ownership by NHAI to the assessee. Further more, it was the contention of the Ld.DR that the Article 47 at page 125 and 47.4.1 is required to be read in light of the fact that the

NHAI cannot decide the taxability or ownership in derogation of the other applicable laws. In other words, the Ld.DR submitted that two individuals cannot decide that assessee will be for the purpose of depreciation only and for the purpose of other purposes, ownership will not be passed on to the assessee and will vest with NHAI. It was submitted that there cannot be piecemeal transfer or assignment of road by the NHAI to the assessee. It was submitted that what has been invested by the assessee was in the form of material and labour, because the right over the land was all alone with the NHAI and at no point of time, either the land or the right over the land has been transferred by NHAI to the assessee. Further it was submitted that the NHAI is a Body which is required to develop infrastructure throughout India and it has a limited right and authority. NHAI cannot adjudicate or decide the fact of ownership. The land or infrastructure can only be transferred in the manner contemplated under the Transfer of Property Act. The Transfer of Property Act only determines the transfer of ownership and in the present case, there is no transfer of ownership by NHAI to the assessee. Furthermore, it was submitted that the assessee had merely laid down the roads on the land provided and therefore

the road which is forming part and parcel of the building is only entitled to depreciation @10% as per the definition in Income Tax Rules, 1962, which defines as under :

**New App. I**

INCOME-TAX RULES, 1962

1.634

**Notes:**

1. "Buildings" include roads<sup>43</sup>, bridges, culverts, wells and tubewells.
2. A building shall be deemed to be a building used mainly for residential purposes, if the built up floor area thereof used for residential purposes is not less than sixty-six and two-third per cent of its total built-up floor area and shall include any such building in the factory premises.
3. In respect of any structure or work by way of renovation or improvement in or in relation to a building referred to in *Explanation 1* of clause (ii) of sub-section (1) of section 32, the percentage to be applied will be the percentage specified against sub-item (1) or (2) of item 1 as may be appropriate to the class of building in or in relation to which the renovation or improvement is effected. Where the structure is constructed or the work is done by way of extension of any such building, the percentage to be applied would be such percentage as would be appropriate, as if the structure or work constituted a separate building<sup>44</sup>.

(Contd. from p. 1.637)

- be treated as an intangible asset (being a business or commercial right akin to a licence) which is eligible for claim of depreciation—*Circular No. 20/2019, dated 19-8-2019*. For details, see Taxmann's Master Guide to Income-tax Rules.
43. The roads laid within the factory premises as links or which provide approach to the buildings are necessary adjuncts to the factory buildings to carry on the business activities of the assessee and would be 'building'—*CIT v. Gwalior Rayon Silk Mfg. Co. Ltd.* [1992] 62 Taxman 471 (SC). "Buildings" are not restricted only to those roads which are adjacent to buildings—*CIT v. VGP Housing (P.) Ltd.* [2016] 66 taxmann.com 354 (Mad.). Where the assessee constructed roads to approach about 500 trenches meant for dumping waste and night soil the roads cannot be treated as 'building' for purposes of allowing depreciation, since the roads were not adjunct to any building and there was no other construction except the roads—*Indore Municipal Corporation v. CIT* [2002] 124 Taxman 128 (SC). Public roads are 'buildings'—*PCIT v. GVK Jaipur Expressway Ltd.* [2018] 100 taxmann.com 95 (Raj.), SLP dismissed in *PCIT v. GVK Jaipur Expressway Ltd.* [2018] 100 taxmann.com 96/259 Taxman 429 (SC). Toll roads are not plant and machinery—*CIT v. West Gujarat Expressway Ltd.* [2016] 73 taxmann.com 139/[2016] 242 Taxman 127 (Bom.), SLP granted in *West Gujarat Expressway Ltd. v. CIT* [2016] 73 taxmann.com 150/242 Taxman 115 (SC), and is to be considered as 'building'—*CIT v. Noida Toll Bridge Co. Ltd.* [2013] 40 taxmann.com 251/[2014] 220 Taxman 6 (Mag.) (All.).
  44. The words 'any capital expenditure' used in *Explanation 1* to section 32(1)(ii) indicate that the legal fiction has to be read when any capital expenditure is incurred. Thus, whether any capital expenditure has been incurred is a question which has to be decided on the basis of facts of each case and relevant test(s) applicable. *Explanation 1* cannot be read as to mean that when works mention therein are carried out by the assessee, it shall be treated as capital expenditure. *Explanation 1*, however, shall be attracted when expenditure is treated as capital expenditure—*Indus Motor Co. (P.) Ltd. v. DCIT* [2017] 80 taxmann.com 104 (Ker.). Where assessee had constructed a road and bridge connecting Delhi and Noida on leased land and control of land identified as constituting bridge site was incomplete and uninterrupted possession and use of assessee, depreciation on toll road/bridge was to be allowed—*CIT v. Noida Toll Bridge Co. Ltd.* [2013] 30 taxmann.com 207/213 Taxman 333 (All.). Expenses incurred on interior decoration and office equipment of premises taken on lease were capital in nature and eligible for depreciation—*CIT v. ETA Travel Agency (P.) Ltd.* [2019] 109 taxmann.com 66/266 Taxman 303 (Mad.); *CIT v. Viswams* [2019] 105 taxmann.com 289/263 Taxman 497 (Mad.). Assessee was not entitled to depreciation in respect of long-term leasehold properties including lease for perpetuity—*Peerless General Finance & Investment Co. Ltd. v. CIT* [2013] 35 taxmann.com 615/217 Taxman 251 (Cal.). Where construction is carried out by owner-lessor and expenditure is only reimbursed by assessee-lessee, *Explanation 1* would not come to aid of assessee—*Mother Hospital (P.) Ltd. v. CIT* [2017] 79 taxmann.com 375/247 Taxman 12 (SC). For details, see Taxmann's Master Guide to Income-tax Rules.

13. The primary contention of the Revenue is that the assessee is not entitled to depreciation as there is no ownership over the land, infrastructure etc. of the property. Lastly it was submitted by the Ld.DR that the decision relied upon by the assessee are of the Tribunal whereas, the Ld.CIT(A) after relying upon the decision of the Hon'ble High Court of Mumbai in the case of North Karnataka Expressway Ltd. Vs. CIT [2014] 51 taxmann.com 214 (Bombay) and others have decided the issue in favour of the assessee. It was also the contention of the Ld.DR that in both the cases the issue before the Hon'ble High Court was BOT (Build, Operate and Transfer) project, which does not mean that there was any transfer of ownership of infrastructure / land by NHAI to the licensed concessionaire merely the concessionaire after building the infrastructure is required to operate and maintain ownership always remains with NHAI and it can always cancel, assign or terminate the contract and take back the possession of the property.

14. We have heard the rival contentions and gone through the material available on record. The claim of depreciation under the

scheme of income tax as provided under section 32 of the Act which is 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, not being goodwill of a business or profession,*

*owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed—*

*(i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed;*

*(ii) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed:*

*Provided that no deduction shall be allowed under this clause in respect of—*

*(a) any motor car manufactured outside India, where such motor car is acquired by the assessee after the 28th day of February, 1975 but before the 1st day of April, 2001, unless it is used—*

*(i) in a business of running it on hire for tourists ; or*

*(ii) outside India in his business or profession in another country ; and*

*(b) any machinery or plant if the actual cost thereof is allowed as a deduction in one or more years under an agreement entered into by the Central Government under [section 42](#) :*

*Provided further that where an asset referred to in clause (i) or clause (ii) or clause (iia) or the first proviso to clause (iia), as the case may be, is acquired by the assessee during the previous year and is*

*put to use for the purposes of business or profession for a period of less than one hundred and eighty days in that previous year, the deduction under this sub-section in respect of such asset shall be restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under clause (i) or clause (ii) or clause (iia), as the case may be:*

*Provided also that where an asset referred to in clause (iia) or the first proviso to clause (iia), as the case may be, is acquired by the assessee during the previous year and is put to use for the purposes of business for a period of less than one hundred and eighty days in that previous year, and the deduction under this sub-section in respect of such asset is restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under clause (iia) for that previous year, then, the deduction for the balance fifty per cent of the amount calculated at the percentage prescribed for such asset under clause (iia) shall be allowed under this sub-section in the immediately succeeding previous year in respect of such asset:*

*Provided also that where an asset being commercial vehicle is acquired by the assessee on or after the 1st day of October, 1998 but before the 1st day of April, 1999 and is put to use before the 1st day of April, 1999 for the purposes of business or profession, the deduction in respect of such asset shall be allowed on such percentage on the written down value thereof as may be prescribed.*

*Explanation.—For the purposes of this proviso,—*

*(a) the expression "commercial vehicle" means "heavy goods vehicle", "heavy passenger motor vehicle", "light motor vehicle", "medium goods vehicle" and "medium passenger motor vehicle" but does not include "maxi-cab", "motor-cab", "tractor" and "road-roller";*

*(b) the expressions "heavy goods vehicle", "heavy passenger motor vehicle", "light motor vehicle", "medium goods vehicle", "medium passenger motor vehicle", "maxi-cab", "motor-cab", "tractor" and "road roller" shall have the meanings respectively as assigned to them in section 2 of the Motor Vehicles Act, 1988 (59 of 1988):*

*Provided also that, in respect of the previous year relevant to the assessment year commencing on the 1st day of April, 1991, the deduction in relation to any block of assets under this clause shall,*

*in the case of a company, be restricted to seventy-five per cent of the amount calculated at the percentage, on the written down value of such assets, prescribed under this Act immediately before the commencement of the Taxation Laws (Amendment) Act, 1991:*

*Provided also that the aggregate deduction, in respect of depreciation of buildings, machinery, plant or furniture, being tangible assets or know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets allowable to the predecessor and the successor in the case of succession referred to in clause (xiii), clause (xiib) and clause (xiv) of [section 47](#) or [section 170](#) or to the amalgamating company and the amalgamated company in the case of amalgamation, or to the demerged company and the resulting company in the case of demerger, as the case may be, shall not exceed in any previous year the deduction calculated at the prescribed rates as if the succession or the amalgamation or the demerger, as the case may be, had not taken place, and such deduction shall be apportioned between the predecessor and the successor, or the amalgamating company and the amalgamated company, or the demerged company and the resulting company, as the case may be, in the ratio of the number of days for which the assets were used by them.*

*Explanation 1.—Where the business or profession of the assessee is carried on in a building not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee for the purposes of the business or profession on the construction of any structure or doing of any work in or in relation to, and by way of renovation or extension of, or improvement to, the building, then, the provisions of this clause shall apply as if the said structure or work is a building owned by the assessee.*

*Explanation 2.—For the purposes of this sub-section "written down value of the block of assets" shall have the same meaning as in clause (c) of sub-section (6) of [section 43](#).*

*Explanation 3.—For the purposes of this sub-section, 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 nature, not being goodwill of a business or profession.*

*Explanation 4.—For the purposes of this sub-section, the expression "know-how" means any industrial information or technique likely to assist in the manufacture or processing of goods or in the working of a mine, oil-well or other sources of mineral deposits (including searching for discovery or testing of deposits for the winning of access thereto).*

*Explanation 5.—For the removal of doubts, it is hereby declared that the provisions of this sub-section shall apply whether or not the assessee has claimed the deduction in respect of depreciation in computing his total income;*

*(iia) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing or in the business of generation, transmission or distribution of power, a further sum equal to twenty per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii) :*

*Provided that where an assessee, sets up an undertaking or enterprise for manufacture or production of any article or thing, on or after the 1st day of April, 2015 in any backward area notified by the Central Government in this behalf, in the State of Andhra Pradesh or in the State of Bihar or in the State of Telangana or in the State of West Bengal, and acquires and installs any new machinery or plant (other than ships and aircraft) for the purposes of the said undertaking or enterprise during the period beginning on the 1st day of April, 2015 and ending before the 1st day of April, 2020 in the said backward area, then, the provisions of clause (iia) shall have effect, as if for the words "twenty per cent", the words "thirty-five per cent" had been substituted :*

*Provided further that no deduction shall be allowed in respect of—*

*(A) any machinery or plant which, before its installation by the assessee, was used either within or outside India by any other person; or*

*(B) any machinery or plant installed in any office premises or any residential accommodation, including accommodation in the nature of a guest-house; or*

*(C) any office appliances or road transport vehicles; or*

*(D) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any one previous year;*

*(iii) in the case of any building, machinery, plant or furniture in respect of which depreciation is claimed and allowed under clause (i) and which is sold, discarded, demolished or destroyed in the previous year (other than the previous year in which it is first brought into use), the amount by which the moneys payable in respect of such building, machinery, plant or furniture, together with the amount of scrap value, if any, fall short of the written down value thereof :*

*Provided that such deficiency is actually written off in the books of the assessee.*

*Explanation.—For the purposes of this clause,—*

*(1) "moneys payable" in respect of any building, machinery, plant or furniture includes—*

*(a) any insurance, salvage or compensation moneys payable in respect thereof;*

*(b) where the building, machinery, plant or furniture is sold, the price for which it is sold,*

*so, however, that where the actual cost of a motor car is, in accordance with the proviso to clause (1) of [section 43](#), taken to be twenty-five thousand rupees, the moneys payable in respect of such motor car shall be taken to be a sum which bears to the amount for which the motor car is sold or, as the case may be, the amount of any insurance, salvage or compensation moneys payable in respect thereof (including the amount of scrap value, if any) the same proportion as the amount of twenty-five thousand rupees bears to*

*the actual cost of the motor car to the assessee as it would have been computed before applying the said proviso;*

*(2) "sold" includes a transfer by way of exchange or a compulsory acquisition under any law for the time being in force but does not include a transfer, in a scheme of amalgamation, of any asset by the amalgamating company to the amalgamated company where the amalgamated company is an Indian company or in a scheme of amalgamation of a banking company, as referred to in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949) with a banking institution as referred to in sub-section (15) of section 45 of the said Act, sanctioned and brought into force by the Central Government under sub-section (7) of section 45 of that Act, of any asset by the banking company to the banking institution.*

*(iv) [\*\*\*]*

*(v) [\*\*\*]*

*(vi) [\*\*\*]*

*(1A) [\*\*\*]*

*(2) Where, in the assessment of the assessee, full effect cannot be given to any allowance under sub-section (1) in any previous year, owing to there being no profits or gains chargeable for that previous year, or owing to the profits or gains chargeable being less than the allowance, then, subject to the provisions of sub-section (2) of [section 72](#) and sub-section (3) of [section 73](#), the allowance or the part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance, or if there is no such allowance for that previous year, be deemed to be the allowance for that previous year, and so on for the succeeding previous years.*

15. From the bare perusal of the section 32 of the Act for the purpose of claiming depreciation over the immovable asset, it is necessary that the immovable asset tangible or intangible have to be owned by the assessee. In the present case as is clear from the

terms of the concessional agreement, the immovable asset belongs to the NHAI and the assessee was merely a licensee for the limited purpose of claiming depreciation. In our view, it is necessary that the assessee should be owner of the property and owner of the building machinery, plant or furniture, either wholly owned by it or partially owned by it and is used for business purpose. In the present case the infrastructure is not either owned wholly or partially by the assessee. Merely the assessee has raised some construction with the permission of the licensor as a licensee. As per section 52 of Indian Easements Act, 1882, if the construction is in the nature of permanent and is erected with the permission of the licensor then the assessee would not become owner of the structure. In view of the above, we are of the considered opinion that the assessee is not the owner of the structure and is not entitled to any depreciation within the meaning of section 32 of the Act. Furthermore, the issue is no more res-integra and this issue has already been adjudicated by the Hon'ble High Court of Mumbai in the case of North Karnataka Expressway Ltd. Vs. CIT(supra), wherein, relevant finding given by the Hon'ble High Court is extracted as under:

*“32. To our mind, a reading of these sections together and harmoniously so also the Act as a whole, the National Highways vest in the union and for the purposes of the Act, they include all appurtenant lands whether demarcated or not, all bridges, culverts, tunnels, causeways, carriageways and other structures constructed on or across such highways and all fences, trees, posts and boundary, furlong and mile stones appurtenant to such Highways are included in the term Highways. There is a exclusive responsibility of development and maintenance of National Highway and which is of the Central Government. It is in these circumstances that we find that by section 8-A the Central Government 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 affects the vesting of the National Highways in the Union. Section 8-A cannot be said to be overriding section 4 and section 5. It is only for purposes of development and maintenance of the whole or any part of the National Highway through private parties or by involving them that this provision has been inserted. Merely because the National Highway is built, maintained, managed and operated by private entities does not mean that the vesting of the National Highway in the Union is effected. That does not dilute the right conferred by section 4 or take away the ownership of this Highway, meaning thereby, its vesting in the union. It is thus, the union in which the National Highway vests and that is all pervasive.*

*39. It would not be proper, therefore, to read into section 32 of the Income Tax Act, 1961 something which is defeating and frustrating the mandate of these laws. It can never be intended by the legislature that the broad and wide definition of the term "owner" as appearing in the Income Tax Act, 1961 would interfere with or take away the absolute rights of the above nature conferred in the union of the National Highways. This is too well settled and to require a reference to any judgment. That a provision in one statute or a definition in one statute cannot be interpreted so as to defeat and frustrate another law or statute or any definition therein and when that another statute is a special legislation. The words and definitions in a general enactment can never be held to be contradicting, overriding the stipulations and provisions in a special statute. The National Highways Act and the National Highways Authority of India Act are, therefore, special statutes and when the concept of ownership and vesting therein is of absolute nature that cannot be said to be in any manner restricted or curtailed by a general definition or understanding of the term owner as appearing in the Income Tax Act, 1961. The term is defined widely and broadly in*

*the Income Tax Act, 1961 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 profits 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 Income Tax Act, 1961. However, as held above, that cannot control leave alone overreach The National Highways Act, 1956 or the National Highways Authority of India Act, 1988.*

*44. We are not in agreement with Mr. Irani because the reference to this judgment is not in the context of what was the essential controversy before the Hon'ble Supreme Court but with regard to the position of the Central Government and the State Government qua the National Highway. That position has been reiterated and it is to that extent that we have referred to this judgment. Pertinently, this judgment is neither overruled or distinguished by any further judgment rendered by the Hon'ble Supreme Court.”*

16. Similar view had been expressed by the Hon'ble Gujarat High Court, which has been referred by the Ld.CIT(A). In view of the above, we are of the considered opinion that the decision relied upon by the Ld.AR which are of the Tribunal, will not have overriding against the decision of Hon'ble High Court. The Tribunal being subordinate to the jurisdiction of the High Court is required to follow the decision of the superior namely, High Court accordingly, the decision of the Hon'ble High Court is binding. Accordingly, this issue is decided against the assessee.

17. In the result, the appeal of the assessee dismissed.

Order pronounced in the open court on 31<sup>st</sup> December,  
2024.

**Sd/-**

**(MADHUSUDAN SAWDIA)**

**ACCOUNTANT MEMBER**

Hyderabad, dated 31.12.2024

*L.Rama, SPS*

**Sd/-**

**(LALIET KUMAR)**

**JUDICIAL MEMBER**

Copy to:

S.No	Addresses
1	M/s Patna Bakhtiyarpur Tollway Limited, 6-2-502/1/A, Jivi Towers, Road No.7 Banjara Hills, Hyderabad
2	The Assistant Commissioner of Income Tax, Circle-16(2), IT Towers, Hyderabad
3	The Pr.CIT, Hyderabad
4	DR, ITAT Hyderabad Benches
5	Guard File