INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI
BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

ITA No.2921 & 3926/Del/2017
(Assessment Years: 2011-12& 2012-13)

M/s. Jalandhar Amritsar Tollways Ltd, Flat No. E-103, Nagarjuna Apartment, Mayur, Vihar Phase-1, Mayur Kunj, New Delhi	Vs.	DCIT, Circle-13(1), New Delhi
(Appellant)		(Respondent)
PAN: AABCJ6270F		

ITA Nos.4214 & 3927/Del/2017
(Assessment Years: 2012-13)

ACIT, Circle-13(1), New Delhi	Vs.	M/s. Jalandhar Amritsar Tollways Ltd, Flat No. E-103, Nagarjuna Apartment, Mayur, Vihar Phase-1, Mayur Kunj, New Delhi
(Appellant)		(Respondent)
		PAN: AABCJ6270F

Assessee by :	None
Revenue by:	Ms. Monika Singh, CIT-DR
Date of Hearing	11/03/2026
Date of pronouncement	27/03/2026

O R D E R

PER M. BALAGANESH, A. M.:

1. The appeal in ITA Nos. ITA No.2921 & 3926/Del/2017 filed by the assessee and ITA Nos.4214 & 3927/Del/2017 filed by the revenue, arises out of the order of the ld ld. Commissioner of Income Tax (Appeals)-5, New Delhi [hereinafter referred to as 'ld. CIT(A)', in short] dated 13.04.2017 for AY 2012-13 and 01.03.2016 for AY 2011-12 against the order of assessment passed u/s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 31.03.2015 for AY 2012-13 and 10.03.2025 by the Assessing Officer, DCIT,

Circle-13(1), Delhi and DCIT, Circle-4(1), Delhi (hereinafter referred to as 'ld. AO'). Identical issues are involved in all these appeals and hence they are taken up together and disposed of by this common order for the sake of convenience.

ITA No. 2921/Del/2016 – Asst Year 2011-12 – Assessee Appeal

2. None appeared on behalf of the assessee despite issuance of several notices. Since this is an old appeal, we proceed to dispose of this appeal on hearing the learned DR and based on materials available on record.

3. The only issue to be decided in this appeal is as to whether the assessee would be entitled for depreciation at the rate of 25% or 10% in respect of Right to Collect Toll.

4. We have heard the learned DR and perused the materials available on record. The return of income for the Asst Year 2011-12 was filed by the assessee company on 29.11.2011 declaring loss of Rs 112,75,07,887/-. The assessee company was incorporated with an object to undertake road projects on BOO / BOT / BOOT basis and during the year under consideration was engaged in the business of improvement / strengthening of existing two-lane road widening to four lanes, operation and maintenance of NH-1. The assessee claimed depreciation on right to collect toll at the rate of 25 percent which was restricted by the learned AO to 10 percent by considering the same as roads under the head building. We find that the issue in dispute is no longer res integra in view of the decision of Special Bench of Hyderabad Tribunal in the case of ACIT vs Progressive Construction reported in 92 taxmann.com 104 (Hyd Trib) (SB) dated 14-2-2017 wherein it was held that right to collect toll falls within the ambit of 'intangible assets' eligible for depreciation at the rate of 25%. Respectfully following the same, we hold that the assessee would be entitled for depreciation at the rate of 25% on right to collect toll. Consequently the assessee would be

entitled for additional depreciation also. Accordingly, the Ground No.2 raised by the assessee is allowed.

5. The Ground Nos. 1 & 5 raised by the assessee are general in nature and does not require any specific adjudication.

6. The Ground No. 3 raised by the assessee is challenging the adjustment of Rs 39.45 crores on account of subsidy from NHAI.

7. We have heard the learned DR and perused the materials available on record. During the year under consideration, the assessee company received a subsidy of Rs 39.45 crores from NHAI and credited the same to capital reserve in the balance sheet. Admittedly this subsidy was paid for meeting the capital cost of the project. The Learned AO observed that as per Explanation 10 of section 43(1) of the Act, where a portion of the cost of an assets acquired by the assessee have been met directly or indirectly by the Central Government or State Government or any authority established under any law or by any other person, in the form of subsidy or grant or reimbursement, then so much of the cost as is relatable to such subsidy or grant or reimbursement shall not be included in the actual cost of the assets of the assessee. Accordingly, since the assessee had directly transferred the subsidy amount of Rs 39.45 crores in the reserves and surplus under capital reserve, the Learned AO sought to reduce the same from the total project cost and reduced the claim of depreciation at the rate of 25 percent accordingly and made disallowance of Rs 9,86,25,000/-. This action of the Learned AO was upheld by the Learned CIT(A).

8. Admittedly, we find that the subsidy received from NHAI was only on account of the project cost to be met by the assessee and hence the same had to be reduced from the project cost as per Explanation 10 to section 43(1) of the Act. Since the same was not done by the assessee and excess depreciation claimed by the assessee at the rate of 25 percent there on in the

sum of Rs 9,86,25,000/- , the excess depreciation was rightly disallowed by the Learned AO. Hence, we do not find any infirmity in the order of the Learned CIT(A) in this regard. Accordingly, the Ground No. 3 raised by the assessee is dismissed.

9. The Ground No.4 raised by the assessee is challenging the disallowance of Rs 3,98,17,424/-.

10. We have heard the learned DR and perused the materials available on record. During the course of assessment proceedings, the learned AO noticed that assessee company had made provision for resurfacing expenses of Rs 3,98,17,424 and claimed the said expenses in the profit and loss account as deduction. The assessee company was asked to furnish the copy of the ledger account together with complete narration and explain as to why the same should not be disallowed vide show cause notice dated 18-02-2014. In response, the assessee company filed its reply on 28-02-2014. The assessee responded that the road maintenance activity is required at least once every fifth year and in the last year of concession period. Hence, as per Accounting Standard- 29 (AS-29) on Provisions, Contingent Liabilities and Contingent Assets issued by The Institute of Chartered Accountants of India (ICAI), the assessee has made provision for the same for the expenses to be incurred in future on a conservative basis and the same was made in accordance with the mandate provided in concession agreement between NHAI and the assessee company. The learned AO simply disallowed the said provision for resurfacing expenses on the ground that it is not actually incurred and it is merely a provision and completed the assessment.

11. The Learned CIT(A) noted that the project was constructed by the assessee over a period of five years that is 30-11-2005 to 28-04-2010 and revenue was recognized from the said project with effect from 29-04-2010 when the road became operational. The concession agreement entered with NHAI and assessee do provide for road maintenance activity to be carried out by the

assessee once in every five years and in the end of the concession period. The Learned CIT(A) noted that assessee had debited a sum of Rs 3,98,17,424 under the head operation and maintenance expenses on account of provision for resurfacing expenses. This was calculated by estimating the cost of resurfacing for 49 kilometres length of the road at a cost of Rs 0.30 per kilometre and applied a WPI factor of 5% starting from financial year 2006-07 and thus worked out a sum of Rs 21.72 crores as estimated cost of the resurfacing up to year 5. The fact of the matter is that the Learned CIT(A) noted that the road has been commissioned only on 29-04-2010 whereas the assessee has calculated the estimate with effect from 1-04-2006. Hence it cannot be said that it is a scientific and reasonable method adopted by the assessee and the liability is uncertain as it is dependent upon the actual usage of the road i.e. volume of traffic, amount of untoward incidents leading to damage of the road, vagaries of nature etc. The learned CIT(A) noted that the provision is therefore not in the nature of contingent liability recognizable under AS-29 issued by ICAI. The learned CIT(A) also noted that the Hon'ble Supreme Court in the case of Rotork Controls India P Ltd had held that the provision made for warranty expenditure to be incurred in future would be allowed as deduction in the year of making provision only if the said calculation is based on scientific and rational method of working. Since in the instant case, the workings of the assessee are not scientific and rational, even the decision of the Hon'ble Supreme Court would not come to the rescue of the assessee. Further the Learned CIT(A) noted that the liability has been estimated starting from the period of construction whereas, even as per the concession agreement with NHAI, the periodic maintenance is to be carried out once every 5th year from the commercial operation date of the project highway. In the instant case, the commercial operation date was 29-04-2010. Hence the liability would occur to the assessee only in the year 2015 and the calculation adopted by the assessee from 1-4-2006 is totally flawed. The Learned CIT(A) also relied on the decision of Hon'ble Delhi High Court in the case of Seagram Distilleries Pvt.

Ltd. reported in 62 taxmann.com 100 in support of his view wherein it was held that the provision made by a liquor company for breakages in transit of bottles while being transported to other states was held to be a contingent liability and it was held that the actual transit breakages as and when they occur would be allowable as revenue expenditure in the accounting year in which such breakages occur. The Learned CIT(A) applied the same analogy of the decision to the facts of the instant case and held that as and when the actual maintenance expenditure is incurred by the assessee, the same would become allowable in the year of incurrence and this provision made on estimated basis without any scientific backing would not be allowed as deduction. In view of the elaborate findings given by the Learned CIT(A) which were not controverted by the assessee before us, we do not deem it fit to interfere with the order of the Learned CIT(A) in this regard. Accordingly, the Ground No. 4 raised by the assessee is dismissed.

12. In the result, the appeal of the assessee in ITA No. 2921 /Del / 2016 for Asst year 2011-12 is partly allowed.

ITA No. 3926/Del/2017 – Asst Year 2012-13 – Assessee Appeal (Quantum)

13. The Ground No.11 raised by the assessee is general in nature and does not require any specific adjudication.

14. The Ground Nos. 1& 2 raised by the assessee for the Asst Year 2012-13 are identical to Ground No. 4 raised by the assessee in Asst Year 2011-12 and hence the decision rendered by us hereinabove thereon shall apply mutatis mutandis to this Asst Year also except with variance in figures.

15. The Ground Nos. 3 & 4 raised by the assessee for the Asst Year 2012-13 are identical to Ground No. 3 raised by the assessee in Asst Year 2011-12 and hence the decision rendered by us hereinabove thereon shall apply mutatis mutandis to this Asst Year also except with variance in figures. Actually these

grounds are consequential to Ground No. 3 raised by the assessee for Asst Year 2011-12.

16. The Ground No. 5 & 6 raised by the assessee are challenging the disallowance of Rs 32,38,75,000/- on account of depreciation on capitalization of carriageway.

17. We have heard the learned DR and perused the materials available on record. The assessee had capitalized the amount to be incurred on carriageway to the tune of Rs. 129.55 crores payable to NHAI. During the course of assessment proceedings, the Learned AO on perusal of Depreciation Chart found that assessee had claimed depreciation on carriageways at the rate of 25%. The assessee explained that it had to pay NHAI amounts aggregating to Rs. 129.55 crores during the 13th and 15th years of concession agreement on account of negative grant in terms of clause 23.2 of Chapter 5 of concession agreement dated 30-11-2005. The same was capitalized with carriageways in compliance of AS-29 issued by ICAI. The Learned AO confronted the assessee company and asked to explain why the depreciation claimed on the aforesaid amount should not be disallowed as the liability for acquisition had not been crystallized yet. The Learned AO noted that the explanation given by the assessee was not found satisfactory and accordingly held that the said liability on account of carriageways amount payable to NHAI was not an ascertained liability and consequentially the depreciation claimed thereon in the sum of Rs. 32,38,75,000 (25% of Rs. 129.55,00,000) was disallowed and added back to the total income.

18. The Learned CIT(A) noted that Part XXIII of Chapter V of concession agreement signed by NHAI and as per clauses 23.1 to 23.9, NHAI is to give cash support by way of grant to the assessee aggregating to Rs. 54.45 crores in year 1 to year 7 and the appellant is to make a cash payment i.e. a negative grant aggregating to Rs. 184 crores in years 13 to 15. The assessee claimed that the net amount or the negative grant of Rs 129.55 crores is a contingent liability

which needs to be amortized and provided as per AS-29 of ICAI. The learned CIT(A) noted on perusal of AS-29 issued by ICAI that the said accounting standard neither prohibits nor require the capitalization of costs recognized when a provision is made . Hence he noted that it is not as if the cost of recognition of the negative grant is 100% mandated under the accounting standard. Secondly, he noted that the said accounting standard is not applicable to an executory contract under which both parties have partially performed their obligation to an equal extent. The contract with NHAI would fall in the category of an executory contract as both NHAI and the assessee have partially performed their obligation in the current year of dispute. The learned CIT(A) also noted that it cannot be said that the contract with NHAI is an 'onerous contract', which would only then make AS-29 applicable. The learned CIT(A) observed that it is not understood as to why and how the entire negative grant of Rs. 129.55 crores has been capitalized in the block of assets by the assessee rather than the present value of the said liability which is a discounted value. In fact, he even noted that in the acceptance letter dated 31-05-2005 prior to signing the concession agreement, the net present value of negative grant was worked out at Rs. 6.875 crores. In any case, it was seen that para 17 and 18 of AS-29 clearly state and provide that any cost required to be incurred for future operations are not to be recognized. With these observations, the learned CIT(A) observed that the claim of depreciation on this capitalization of negative grants has been rightly rejected by the learned AO. We find that these factual observations could not be controverted by the assessee before us. Hence we do not find any infirmity in the order of the learned CIT(A) in this regard. Accordingly, the Ground Nos. 5 and 6 raised by the assessee are hereby dismissed.

19. The Ground Nos. 7 &8 raised by the assessee are challenging the action of the Learned CIT(A) in confirming the addition of Rs 46,19,71,390/- on account of alleged additional depreciation on opening WDV of carriage ways.

20. We have heard the learned DR and perused the materials available on record. It is not in dispute that the assessee claimed additional depreciation @25% by treating the carriageways as intangible assets . The learned AO granted additional depreciation @ 15% in the assessment. The Learned CIT(A) noted that the assessee had claimed depreciation at the rate of 25 percent on tollways / carriageways under the head intangible assets. On perusal of the Appendix-1 of Income Tax Rules 1962, building includes roads, bridges, culverts, well and tube wells, etc and therefore, the toll road come under the term 'building' and depreciation was allowed only at the rate of 10 percent instead of 25 percent as claimed by the assessee. The Learned CIT(A) also noted that similar addition was made in the assessment year 2011-12 and assessee submitted that Special Purpose Vehicle (SPV) was Built , Operate and Transfer (BOT) company incorporated to build and maintain the road up to concession period only. After that the SPV was to hand over the road to NHAI. Hence, the ownership of the road always lied with NHAI only. Accordingly, the Learned CIT(A) noted that assessee would be entitled for depreciation only at the rate of 10 percent and not 25 percent as intangible assets.

21. This issue is akin to Ground No. 2 raised by the assessee for assessment year 2011-12 and the decision rendered thereon shall apply mutatis mutandis for this year also except with variance in figures. Practically, this issue is consequential to decision rendered by us in assessment year 2011-12 on the impugned issue. Accordingly, the Ground Nos. 7 & 8 raised by the assessee are hereby allowed.

22. The Ground No. 9 raised by the assessee is alternative claim of the assessee that any disallowance or addition made in the assessment would only go to increase the claim of deduction under section 80IA of the Act as the entire issue emanates only out of the single infrastructure activity carried out by the assessee company. We find lot of force in this alternative argument advanced by

the assessee company vide Ground No. 9. We hold that all the disallowances / additions made in the assessment under the head 'income from business' would be consequentially eligible for increased claim of deduction under section 80IA of the Act. Reliance in this regard is placed on the CBDT Circular No. 37/2016 dated 2-11-2016. Hence Ground No. 9 is allowed.

23. The Learned AO is directed to verify the fact as to whether the return of income has been filed by the assessee company within the due date or such other extended due date prescribed under section 139(1) of the Act and decide the chargeability of interest under section 234A of the Act accordingly. The chargeability of interest under Section 234 B of the Act is consequential in nature. The law is very well settled that interest under Section 234C of the Act shall be charged only on the returned income and not on the assessed income. If assessee has been actually granted refund for the year under consideration while processing the return or otherwise or the said refund is adjusted actually with the arrears of some other assessment years of the assessee, then interest under Section 234D of the Act shall become chargeable on the assessee if there is a demand pursuant to the giving effect order to the tribunal. Accordingly, the learned AO is directed to determine the interest under Section 234D of the Act in the above mentioned terms.

24. In the result, the appeal of the assessee in ITA No. 3926/Del/2017 for Asst Year 2012-13 is partly allowed.

ITA No. 4214/Del/2017 – Asst Year 2012-13 – Revenue Appeal (Penalty)

ITA No. 3927/Del/2017 – Asst Year 2012-13 – Assessee Appeal (Quantum)

25. These two are cross appeals are against the levy of penalty under section 271(1)(c) of the Act for the Asst Year 2012-13.

26. We have heard the learned DR and perused the materials available on record. From the adjudication of disputes involved in the quantum appeal, we find

that certain disallowance of claims made by the assessee were confirmed. It is trite law that there could be no levy of penalty under section 271(1)(c) of the Act for disallowance of a claim made by the assessee. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of CIT vs Reliance Petroproducts Ltd reported in 322 ITR 158 (SC) wherein it was categorically held that merely because the claim made by an assessee was not accepted by the revenue, the same would not result in levy of penalty under section 271(1)(c) of the Act. Hence respectfully following the same, we direct the learned AO to delete the entire penalty levied under section 271(1)(c) of the Act in the facts and circumstances of the instant case. Accordingly, the appeal of the assessee in ITA No. 3927/Del/2017 for Asst Year 2012-13 is allowed and appeal of the revenue in ITA No. 4214/Del/2017 for Asst Year 2012-13 is dismissed.

27. To sum up,

Assessment Year	ITA No.	Appeal by	Particulars	Decision
2011-12	2921/Del/2016	Assessee	Quantum	Partly allowed
2012-13	3926/Del/2017	Assessee	Quantum	Partly allowed
2012-13	4214/Del/2017	Revenue	Penalty	Dismissed
2012-13	3927/Del/2017	Assessee	Penalty	Allowed

Order pronounced in the open court on 27/03/2026.

-Sd/-
(SATBEER SINGH GODARA)
JUDICIAL MEMBER

-Sd/-
(M BALAGANESH)
ACCOUNTANT MEMBER

Dated: 27/03/2026
A K Keot

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi