IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' B ' Bench, Hyderabad

Before Smt. P. Madhavi Devi, Judicial Member
AND
Shri S.Rifaur Rahman, Accountant Member

ITA Nos.1729, 2145 & 2146/Hyd/2018
(Assessment Years: 2013-14 to 2015-16)

M/s. Mokama Munger Highway Ltd Hyderabad PAN: AAGCM5878F *(Appellant)*	Vs	Asstt. Commissioner of Income Tax, Circle 16(2) Hyderabad *(Respondent)*

For Assessee : Shri D.V. Anjaneyulu
For Revenue : Shri Y.V.S.T. Sai, (CIT) DR

Date of Hearing: 16.04.2019
Date of Pronouncement: 03.07.2019

O R D E R

Per Smt. P. Madhavi Devi, J.M.

These are assessee's appeals for the A.Ys 2013-14, 2014-15 & 2015-16 against the order of the CIT (A)-4, Hyderabad, dated 14.06.2018 & 17.9.2018 respectively.

2. Brief facts of the case are that the assessee company, a Special Purpose Vehicle, formed for construction of Highway awarded by NHAI on Build, Operate and Transfer basis (in short BOT), filed its return of income for the A.Y 2013-14 on 30.09.2018 declaring a loss of Rs.13,83,79,935/-. Initially, the return was processed u/s 143(1) of the Act and subsequently, on selection for scrutiny under CASS, notices were issued u/s 143(2) and

142(1) and duly served on the assessee company. In response to the said notices, the assessee filed the information called for and on perusal of the same and particularly the schedule of fixed assets, the AO observed that the assessee company claimed depreciation of Rs.18,16,15,643/- on BOT projects @ 5% (at half the rate as being put to use for less than 180 days) on WDV of Rs.368,27,61,649/-. The AO observed that there are several disputes on the allowability of depreciation on the expenditure incurred for development and construction of roads/highways on BOT basis and that to put an end to all the disputes, the CBDT has issued circular No.9/2014, dated 23.04.2014 clarifying on the issues regarding the allowability of the depreciation on projects developed under BOT. He observed that as per the CBDT circular, the expenditure has to be amortized evenly over the period of concessionaire agreement after excluding the time taken for creation of such facility from the date of commencement etc.

3. Further, from the information submitted by the assessee, the AO noted that the project has commenced its operation in the financial year 2012-13 only and the agreement period of the project is upto 14.05.2026. Therefore, the total period of the project from the commencement day (CDD) 20.1.2013 is 4863 days and during the relevant financial year, the assets were put to use only for 71 days. He therefore, worked out the proportionate expenditure to be amortized for the relevant financial year at Rs.5,37,68,472 and the balance of the amount claimed as depreciation i.e. (Rs.18,16,15,643 – Rs.5,37,68,472) Rs.12,78,47,171/- was disallowed and brought to tax.

4. Further, on verification of the P&L A/c, the AO noted that the assessee has debited an amount of Rs.1,11,47,486/- towards provision for major maintenance. On further verification, he noted that this expenditure was not actually incurred during the year but only a provision is being made for future maintenance of BOT projects. The assessee was therefore, required to substantiate its claim as per the provisions of the I.T. Act. In response to the same, the assessee produced the details of major maintenance reserve and the AO noted that the assessee has not actually incurred the said expenditure, but a mere provision is created. The assessee had submitted that as per the agreement with NHAI, a BOT project shall be maintained for a period of 5 years and subsequently, if any major repairs occurs, it has to be borne by the assessee company and so a provisions is being created for the expenditure to be incurred towards repair and maintenance of the project after the period of 5 years. The AO observed that as per the provisions of the I.T. Act, only the expenditure incurred during the year, relevant to impugned A.Y is allowable and that expenditure relatable to the other years and not to the financial year relevant to the impugned A.Y, is not allowable. Therefore, he disallowed the provision and brought it to tax. Aggrieved, the assessee preferred an appeal before the CIT (A), who confirmed the order of the AO and the assessee is in second appeal before us, by raising the following grounds of appeal:

> *"1. The order of Ld. CIT(A) confirming the AO's Order is erroneous in law, contrary to facts, probabilities of the case and against the principles of equity and natural justice.*
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> *2. The Ld. CIT(A) erred in law not considering the additional ground of appeal filed on 12/06/20 18*

though the same was admitted and was mentioned in the order and failed to appreciate the fact that company is having exclusive right, license and authority to Operate and Maintain the road under BOT contract for a period of 15 years and the same partakes the nature of intangible asset and is eligible to claim depreciation U/s 32(I)(ii) @ 25% on expenditure incurred for construction of road as held by Hon'ble jurisdictional Tribunal in ITA No.1845/Hyd/2014 dated 14.02.2017 Progressive Constructions Ltd vs ACIT and by Pune Bench of Hon'ble ITAT in ITA No. 1452/Pune/2014 dated 30.06.2017 in M/s Ashoka Infrastructure Ltd v ACIT.

3. Ld. CIT(A) erred in law in upholding the disallowance of the provision for periodic maintenance of Rs. 1,11,47,4861- by stating that appellant has not actually paid these expenses and it is only a provision and ignoring that reserve was created under mandate agreement in between the principal i.e., NHAI and concessionaire and also there is no power 1 right except to mandate the NHAI terms and therefore, it is a crystallized liability and is allowable u/s 37 of the Act as held in r20091 3 14 ITR 62 (SC) Rotork Controls India P Ltd vs CIT and r20161 381 ITR 469 (Delhi) Aggarwal and Modi Enterprises (Cinema Project) Co Pvt Ltd V CIT.

4. For these and other reasons that may be urged at the time of hearing, the appellant prays the Honorable Tribunal to kindly delete the addition made by AO and sustained by CIT(A)".

5. The learned Counsel for the assessee, Shri D.V. Anjaneyulu, reiterated the submissions made by the assessee before the authotities below and submitted that the issue of depreciation on the roads is covered by the decision of the Special Bench of the Tribunal in the case of Progressive Constructions Ltd, reported in (2018) 161 DTR 289, wherein it was held that the expenditure incurred by the assessee for construction of roads under BOT contract with the Govt. of India, has given rise to an intangible asset as defined under Explanation 3(b) r/w section

32(1)(ii) of the Act and hence the assessee is eligible to claim depreciation on such asset at the specified rate.

6. The learned Counsel further placed reliance upon the following other decisions in support of its claim:

i) Ashoka Infrastructure Ltd vs. ACIT reported in (2018) 163 DTR 321 (Pune Trib.);
ii) Dy. CIT vs. Godavari Toll Bridge (P) Ltd reported in (2018) 163 DTR (Visakha Trib.) 17.
iii) Pr.CIT vs. Tulip Hospitality Service Ltd reported in (2019) 411 ITR 595 (Bom.).

7. The learned DR, on the other hand, supported the orders of the authorities below and placed reliance upon the decision of the Hon'ble Bombay High Court in the case of (i) West Gujarat Expressway Ltd, reported in (2017) 82 Taxmann.com 224 (Bom.) and (ii) North Karnataka Expressway Ltd reported in 51 Taxmann.com 214.

8. Having regard to the rival contentions and the material on record including the written submissions of both the parties and caselaw relied upon by them, we find that the only issue in all of these three appeals is “whether the assessee has got a right over the toll road built by him and being maintained by him and the right to collect toll fees over the same in accordance with the concessionaire agreement is an intangible asset and whether depreciation thereon is allowable u/s 32 of the I.T. Act”?. The learned DR has relied upon the decision of the Hon'ble Bombay High Court in the case of North Karnataka Expressway Ltd and CIT vs. West Gujarat Expressway Ltd (Supra) whereas the learned

Counsel for the assessee has relied upon the decision of the Special Bench of the Tribunal in the case of Progressive Constructions Ltd (Supra) and also the decisions of the Coordinate Bench of the Tribunal at Pune in the case of Ashoka Infrastructure Ltd vs. ACIT and the decision of ITAT Visakhapatnam in the case of Dy. CIT vs. Godavari Toll Project (P) Ltd. Let us, therefore, find the applicability of these decisions to the facts of the case before us.

9. We find that the Hon'ble Bombay High Court, in the case of North Karnataka Expressway Ltd, was considering the case of an assessee who had claimed to be the owner of the roads constructed by it and has claimed depreciation thereon u/s 32 of the I.T. Act. The Hon'ble Bombay High Court has held that the assessee is not the owner of the roads and therefore, is not entitled to the claim of depreciation thereon. However, as to whether the assessee is eligible for depreciation on the 'intangible asset' has been left open by the Hon'ble High Court. For the sake of ready reference, the relevant portion is reproduced hereunder:

> *"**24**. Then, the Commissioner discussed the claim on merits. He found that the ownership of the road cannot be claimed by the Assessee. The claim of depreciation is not based on treating it as an intangible asset with a right to use the asset without being actual owner thereof. In that regard, the Commissioner referred to the orders passed by the Bombay Bench of the Income Tax Appellate Tribunal in the case of Reliance Port and Terminals Ltd. and that of the Delhi Bench of the Tribunal dated 19th December, 2008 in the case of Noida Toll Bridge Company and held that firstly, the Assessing Officer did not apply his mind at all and secondly, the toll roads are not owned by the Assessee and he cannot claim any depreciation thereon".*

10. This decision of the Hon'ble Bombay High Court was followed by the subsequent Bench of the Hon'ble High Court in the case of West Gujarat Expressway Ltd to hold that the assessee therein was not the owner of the roads and therefore, cannot claim depreciation u/s 32 of the Act. However, we find that these two cases were considered by the Coordinate Bench of the Tribunal at Pune in the case of Ashoka Infrastructure Ltd vs. ACIT reported in (2017) 189 TTJ Pune 749 and in the following paragraphs it was held as under:

> *"*19. We find that besides the order of Tribunal in assessee‟s own case in assessment year 2007-08, this issue further arose before the Mumbai Bench of Tribunal in ACIT Vs. West Gujarat Expressway Ltd. (supra), which in turn, had referred to the ratio laid down by the Hon‟ble Bombay High Court in Karnataka Expressway Ltd. Vs. CIT (supra) and it was decided the issue relating to the allowability of depreciation on toll road, had left open, the issue of allowing depreciation on intangible asset being license granted to the assessee to collect toll over the road for particular period and it was held as under:-
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> "*17. We have considered the rival contentions. So far as the reliance of the Ld. A.R. on the article/clause 38.4 of the concession agreement between the assessee and the NHAI is concerned, we find that the identical clause was also there and relied upon in the case of "North Karnataka Expressway Ltd. vs. CIT" which has also been reproduced in para 8 of the order of the Hon‟ble Bombay High Court (supra). The relevant part of the order for the sake of convenience is reproduced as under:*
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> *"8] The appellant claimed that it was the owner of the toll road and the entire cost incurred for construction thereof was capitalized by the Appellant in its books in the assessment year 2005-06 during which the construction of the toll road was completed. As the assessment year under consideration was the first year when the road became operational, the Appellant claimed Depreciation of Rs.59.92 crores at the rate of 10% on the capitalized cost of the toll road. The Appellant also filed necessary details of the claim of depreciation and a note was appended to the depreciation schedule stating that though the Appellant was entitled to higher claim of depreciation on toll road, the claim is made at the rate of 10%. The right to claim higher depreciation is reserved. The Appellant relied upon the standard concession document of the National Highway Authority of India and the clause therein that 'for the purpose of claiming tax depreciation, the property representing the capital investment made by the concessionaire shall be deemed to be acquired and owned by the concessionaire'."*
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> *(emphasis supplied by us)*

18. The Hon"ble Bombay High Court, however, after discussing the provisions of National Highway Act, 1956 and National Highway Authorities of India Act, 1988 and various case laws including that are strongly relied upon by the Ld.

A.R. e.g. "Mysore Minerals Ltd. vs. CIT" reported in (1999) 239 ITR 775 SC, "CIT vs Podar Cement Pvt. Ltd. & others" reported in (1997) 226 ITR 625 SC and "CIT vs. Noida Toll Bridge Company Ltd." (Allahabad HC) (supra), has held that the national highways vest in the Union of India and if the government for the purpose of development and maintenance of the whole or any part of the national highways enters into an agreement with private parties or that merely because the national highway is built, maintained, managed and operated by private entities, in no way affects the vesting of the national highway in the Union and that does not dilute or take away the ownership of the highway or its vesting in the Union. After discussing the various decisions of the Hon"ble Supreme Court and of the Hon"ble High Courts, the contention of the assessee in that case that it was the owner of the toll road has been rejected by the Hon"ble Supreme Court. Hence, the clause 38.4 relied upon by the assessee in the present case will not be of any help to the assessee in this regard.

19. However, so far as the alternative claim of the assessee that if the assessee is not found as owner of the toll road, his claim of depreciation be considered in relation to investments made as falling under the other categories of assets, is concerned, we would like to revert to the decision of the Hon"ble Bombay High Court in "North Karnataka Expressway Ltd. vs. CIT" (supra). in this respect. We find the Hon"ble Bombay High Court, in para 24 of the said decision, has categorically observed that the claim of depreciation in the said case was not based on treating it as an intangible asset with a right to use the asset without being actual owner thereof. The issue under consideration was that whether the toll roads are not owned by the assessee and that he cannot claim any depreciation thereupon. Hence, the Hon"ble Bombay High Court has not discussed the issue relating to the claim of depreciation on the license for right to collect the toll as intangible asset. Further, the Hon"ble Bombay High Court in para 39 of the decision (supra) has observed that as per the provisions of National Highway Act, 1956 and National Highway Authorities of India Act, 1988, the ownership of the toll road vests in Union , however, the term owner as appearing in the Income Tax Act, 1961 has been defined widely and broadly for the purpose of the provisions of the Income Tax Act 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 profit and gain from his business, then, that deduction can be availed by him. It is for that limited purpose that the term „onwer" is defined in this manner in Income Tax Act, 1961.

The above observations of the Hon"ble Bombay High Court reveal that for the purpose of claiming deduction under Income Tax Act, the term „owner" as defined under the Income Tax Act can be looked into. However, that cannot control, leave alone or overreach the National Highway Act, 1956 or the National Highway Authorities of India Act, 1988. The Hon"ble Bombay High Court further, in para 47 of the said order, has observed that the assessee can definitely claim depreciation on the investments. He has definitely invested in the projects of construction development and maintenance of the National

Highways and such of the assets in the form of building, plant & machinery etc. The claim for depreciation can be validly raised and granted. That the Hon"ble High Court in the said case was only concerned with the claim on the land or a road itself. Further, in concluding para 52 of the order, the Hon"ble Bombay High Court has categorically clarified that the assessee"s claim for depreciation in respect of the building, plant & machinery and falling within the purview of sub section (1) of section 32 of the Income Tax Act, 1961, if considered and granted, shall not be affected by the decision of the Hon"ble Bombay High Court.

20. A careful reading of the entire decision of the Hon"ble Bombay High Court and in the light of the various observations made in judgment as discussed above, it is very clear that the Hon"ble Bombay High Court was concerned about the issue as to whether the assessee can claim itself as the owner of the toll road and the Hon"ble Bombay High Court has held that in view of the express provisions of the National Highway Act, 1956 and National Highway Authorities of India Act, 1988 the Union is the absolute owner of the National Highways as well as the toll roads built upon the land/National Highways in agreement and through the private parties and such private parties cannot claim themselves to be the owner of the toll road. However, the Hon"ble Bombay High Court has left upon the issue relating to the claim of depreciation, if otherwise eligible under the other provisions of the Income Tax Act.

21. The Ld. A.R., before us, has put the alternative claim that in view of the observations of the Hon"ble Bombay High Court either the investments made by the assessee be treated under the asset building, plant & machinery and depreciation be granted accordingly or the same be treated as intangible asset on the ground that the assessee has been granted license for right to collect the toll tax for a fixed period. Now the question before us is whether the assessee at this stage the can raise the alternative contention for claim of allowance of depreciation on the license authorizing him to collect the toll being an intangible asset or treating the project as plant & machinery?".

22……..…….

The present case is not a case where the assessee had not claimed any deduction on account of depreciation. The assessee has very much claimed the deduction of depreciation. However, he has claimed the same treating itself to be the owner of the toll road. Such a claim of the assessee has been allowed in the previous assessment years. The assessee was under bonafide belief that he has correctly claimed the deduction of depreciation on the toll road in view of the consistent findings of the Tribunal on this issue. However, due to the change of legal position in view of the law laid down by the Hon"ble Bombay High Court (supra), the assessee cannot be treated as the owner of the toll road. But it is not disputed that the assessee has made investments on the project and he is entitled to claim deductions in this respect. The claim of deduction has been very much put by the assessee in the return of income but wrongly treating itself as owner of the road which claim as observed above was under bonafide belief and in view of the settled legal position as was there at the time of putting the claim. Even the AO has also observed in the assessment order that it is a fact that the assessee company has incurred huge expenditure on the said project

which cannot be treated as revenue expenditure allowable in one year as the same has resulted into providing enduring benefit to the assessee company, hence, the said amount would be eligible for amortizationfor the period of the concession agreement as it was allowed in the A.Y. 2007- 08 and 2008-09. It is also a fact that the said amortization of the expenses has not been accepted by the Tribunal and the assessee in the earlier assessment years has been granted deduction as depreciation treating the road as a capital asset.

23. In view of the above facts, it is not disputed or contested by the Revenue that the assessee is not entitled to any deduction. The only issue in dispute is as to under what head/provision the deduction is to be allowed to the assessee. The Hon"ble Jurisdiction High Court of Bombay in the case of "Balmukund Acharya vs. DCIT" reported in (2009) 221 CTR 440 (Bom.) has held that the Hon"ble Apex Court and the various High Courts have ruled that the authorities under the Act are under obligation to act in accordance with law. Tax can be collected only as provided under the Act. 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 taxes dues are collected. While holding so, the Hon"ble Bombay High Court has relied upon the various decisions e.g. Koshti vs. CIT (2005) 193 CTR (Guj) 518 : (2005) 276 ITR 165 (Guj), C.P.A. Yoosuf vs. ITO(1970) 77 ITR 237 (Ker.), CIT vs. Bharat General Reinsurance Co. Ltd. (1971) 81 ITR 303 (Del), CIT vs. Archana R. Dhanwatey (1981) 24 CTR (Bom) 142 : (1982) 136 ITR 355 (Bom)".

11. The Coordinate Bench at Pune also referred to the decision of the Mumbai Bench and also considered the CBDT circular No.9/2014 dated 23.4.2014 which has been considered by the Coordinate Bench of the Tribunal in the case of West Gujarat Expressway Ltd in the following paragraphs:

" 20. The Mumbai Bench of Tribunal then, referred to the circular issued by CBDT vide No.9/2014, dated 23.04.2014 and observed as under:-

24. Having held that the assessee is entitled to the deduction on the investments made by him, we now have to discuss as to under what head the said deductions can be claimed by the assessee. It is undisputed that in view of the agreement with the NHAI, the assessee has been given the right to develop and maintain the toll road and also the right to collect toll for a specified period without having actual ownership over the said toll road. The assessee has an express right/license for recovery of toll fee to recoup the expenditure. The said right brings to the assessee an enduring benefit during the period of agreement. This fact has also been discussed by the CBDT in circular No.09/2014 dated 23.04.14. The para 4 of which, for the sake of convenience, is reproduced as under:

"There is no doubt that where the assessee incurs expenditure on a project for development of roads/highways, he is entitled to recover cost incurred by him towards development of such facility (comprising of construction cost and other pre-operative

expenses) during the construction period. Further, expenditure incurred by the assessee on such BOT projects brings to it an enduring benefit in the form of right to collect the toll during the period of the agreement. Hon‟ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd. vs. CIT in 225 ITR 802 allowed spreading over of liability over a number of years on the ground that there was continuing benefit to the company over a period. Therefore, analogously, expenditure incurred on an infrastructure project for development of roads/highways under BOT agreement may be treated as having been made/incurred for the purposes of business or profession of the assessee and the same may be allowed to be spread during the tenure of concessionaire agreement."

25. Having discussed the above stated factual position, the CBDT has directed to treat the above expenditure as revenue expenditure and to amortize the same over the period of the agreement as allowable business expenditure. The assessee, however, has claimed that the same is a capital expenditure and it is entitled to deductions over the investments made as depreciation. A perusal of the above reproduced para 4 of the circular reveals that it is not disputed even by the Revenue Authorities that in lieu of the investments made in the project, the assessee has been given right/license to collect the toll. It has also been specifically mentioned that it brings an enduring benefit in the form of right to the assessee. Having admitted the above position by the Revenue, now the question to be considered is whether any depreciation is allowable on such a right?"

21. The Tribunal allowed the claim of assessee under section 32(1)(ii) of the Act i.e. depreciation on intangible assets holding 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)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 By- pass 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(I)(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(I)(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(I)(il) 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 incurrence 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(I)(il) 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(I)(il) of the Act following the aforesaid precedents."

13. 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(I)(ii) of the Act is liable to be upheld. We hold so.

14. 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."

22. The Tribunal in ACIT Vs. West Gujarat Expressway Ltd. (supra) further referring to the ratio laid down by the Hon"ble Bombay High Court held that since the assessee is not the owner of toll road, but has been given the right to develop, maintain and operate the toll road and to further collect the toll for the specified period, then this right is an intangible asset falling under section 32(1)(ii) of the Act and the alternate contention of assessee that the project be treated as plant & machinery and depreciation be allowed, was rejected vide para 30 of the order. Further, vide para 31, the Tribunal considered the contention of Revenue that investment made by the assessee be treated as revenue expenditure and be amortized for the period of agreement, was rejected holding that the investment made under the circumstances could not be said to be revenue in nature but was capital in nature, on which the assessee was entitled to claim the depreciation. Para 31 of the order reads as under:-

"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."

23. In the totality of the above said facts and circumstances before us, where the claim of assessee was depreciation on the right to collect toll being infrastructure and not on the toll road, where the cost incurred for development and construction of infrastructure facility was a right in the nature of intangible asset falling within purview of section 32(1)(ii) of the Act, the assessee was entitled to depreciation on such intangible asset. The assessee undoubtedly, had expended on development, construction and maintenance of infrastructure facility for a specified period out of its own funds and after the end of specified period, the assessee was to transfer the said infrastructure facility to the Government of Maharashtra free of charge. In consideration of developing, constructing and maintaining the facility for specified period and thereafter, transferring it to the State Government, the assessee was granted the right to collect toll from motorists whoever uses the said infrastructure facility during the specified period. The said right to collect toll was on account of assessee incurring the cost towards development, construction and maintenance of infrastructure facility, which was treated by the assessee as its intangible asset and on which, it claimed the depreciation under section 32(1)(ii) of the Act. Following the precedent referred to above, the assessee is entitled to claim the said deduction on intangible asset, in view of section 32(1)(ii) of the Act. The reason for which the said depreciation which was earlier allowed by the Tribunal in the case of assessee itself for assessment year 2007-08 and was allowed by the Assessing Officer in the order passed under section 143(3) of the Act relating to assessment year 2006-07, was denied by the Assessing Officer as the appeals were pending against the order of Tribunal is not correct approach. Further, the CIT(A) has relied on the CBDT circular dated 23.04.2014, wherein the CBDT has laid down that instead of depreciation on the cost incurred by the assessee, the said cost should be amortized over a specified period and allowed in the hands of assessee. However, the expenditure incurred by the assessee is not revenue in nature and the same cannot be amortized over the period for which the assessee can collect the toll; the right to collect toll is capital expenditure incurred by the assessee and consequently, the assessee is entitled to claim depreciation on such intangible assets as provided under section 32(1)(ii) of the Act. Accordingly, we hold s. The assessee is thus,

entitled to its claim. Thus, the second part of the order of Assessing Officer in amortizing the expenditure over the period of facility and allowing the same stands reversed. The Assessing Officer is directed to allow the claim of assessee of depreciation on such intangible asset under section 32(1)(ii) of the Act.

24. Now, coming to the second issue raised in the present appeal i.e. estimation of toll receipts in the hands of assessee. During the course of search proceedings carried out in the Ashoka Group of cases, a diary was found from the possession of assessee, wherein admittedly, unaccounted receipts were noted for the period 25.12.2009 to 19.04.2010. In this regard, statement of one employee Ms. Dipti Lokam was recorded, who was maintaining the said diary in the office premises. She admitted that the said diary was being written by her and was rough cash book for period 25.12.2009 to 19.04.2010. She also confirmed that the cash entries were not fully recorded in regular books of account of group. She further reiterated that the cash reflected in the said rough cash book was not part of official cash book. As regards toll collection, she stated that some portion of cash collected from Toll Nakas was not deposited in the bank which lead to generation of unaccounted cash. Further, on the date of search also, search team furnished SMSes relating to Toll Nakas from the mobile of Shri Jayesh Dungarwal to the mobile of the Director of the company Shri Sunil B. Raisoni. In the statement recorded on 20.04.2010 at the assessee"s Pune office, Shri Jayesh Dungarwal had confirmed that he was working with the assessee and he further stated that he was supervising work of collection of toll from Toll Nakas situated at various places and also confirmed that Ms. Dipti Lokam was receiving cash from various Toll Nakas. In the SMS No.43 and 44 received on the mobile of Shri Sunil B. Raisoni, which was dated 19.04.2010, the amount of toll collected was mentioned and Shri Jayesh Dungarwal stated that the said contents represent the toll collection from various places and were reported to Shri Sunil B. Raisoni by him. He was confronted with the cash receipt of Rs.8.64 lakhs shown as toll collection from Shirur Toll Naka on 19.04.2010 as against cash receipt of Rs.10.35 lakhs found from Ms. Dipti Lokam. On physical verification with regard to difference of Rs.1.71 lakhs, Shri Jayesh Dungarwal replied that the Director Shri Sunil B. Raisoni used to give instructions as to how much amount was to be accounted for in the books of account, the balance amount of cash remained with the cashier. He re-confirmed about the instructions of the Director to report less cash vis-à-vis actual cash received from Toll Nakas. The assessee during the course of assessment proceedings furnished the statement showing the difference in toll collection as per seized note and books and as per regular books of account for the period 25.12.2009 to 19.04.2010. As per the assessee"s own statement, total amount reflected in the seized Annexure was Rs.10.98 crores as against Rs.10.48 crores recorded in the regular books of account. The Assessing Officer noted that the ratio of unrecorded to recorded toll collection was about 4.79%. The assessee before the authorities below claimed that out of unrecorded toll collection, certain amount was utilized for unrecorded expenses and according to the assessee, about 3.39% of the total unrecorded collection of 4.79% was spent on the toll collection activities, thereby, excess unrecorded toll collection was 1.40%. The claim of assessee was rejected in the absence of any documentary evidence to establish the incurring of unrecorded cash for any expenditure. The CIT(A) further took note of expenditure variations in the seized documents which were incurred on illegal payments and he held that the same were in any case not allowable under the Income Tax Act.

25. Another related contention of assessee before the authorities below was that the seized documents related to limited period pertaining to assessment years 2010-11 and 2011-12 and hence, no addition was required to be made on this account for earlier years. The said contention of assessee was rejected since the assessee was collecting the toll from 06.07.2005 onwards and it was held that the assessee was adopting this practice of under-

reporting of toll collection since the beginning. The Assessing Officer and the CIT(A) had estimated the income @ 5% of total collection as unrecorded for assessment years 2006-07 to 2011-12. The Assessing Officer has included the said additional income as income from other sources. However, the CIT(A) allowed the claim of assessee that since the amounts were admittedly collected, was on account of toll collection and where the assessee has no other business activity, then the same is to be assessed under the head "Income from business". Further, directions were given by the CIT(A) to give set off of current/unabsorbed losses/unabsorbed depreciation.

26. The first contention of the assessee before us is that in the absence of any evidence found during the course of search in respect of receipts in the earlier years, no addition can be made in the hands of assessee. In this regard, he had placed reliance on series of decisions of Pune Bench of Tribunal. He further placed reliance on the ratio laid down by the Hon"ble Bombay High Court in the case of CIT Vs. M/s. Thakkar Popatlal Velji Sales Ltd. in Income Tax Appeal No.2266 of 2013, judgment dated 29.03.2016, which has confirmed the ratio laid down by the Pune Bench of Tribunal. The claim of Revenue in the said decision was that where the register evidencing the sales were found for certain period, the Revenue was entitled to extrapolate the sales recorded therein for the entire assessment year. The Hon"ble High Court vide para 9 held as under:-

"9. So far as the next submission on behalf of the Revenue viz. of extrapolation of evidence found during search is concerned, this Court in All Cargo Global Logistics Ltd. (supra) had negatived the revenue"s submission before it that the assessment under section 153A of the Act is not to be restricted only to the incriminating material found during the course of search but would extend to other material also. Therefore in the facts of present case this issue is covered by the decision of this Court in All Cargo Global Logistics Ltd. (supra) in favour of the respondent-assessee inasmuch as it restricts the assessment to be made only to the incriminating material found during the course of search. The reliance upon the decision of the Supreme Court in H.M. Esufali H.M. Abdulali (supra) is inappropriate. This is so as it was passed under the sales tax law and it proceeded the basis of best judgment assessment i.e. disregarding the assessee"s books of account. It is not so in this case."

27. On the other hand, the learned Departmental Representative for the Revenue has placed reliance on the ratio laid down by the Hon"ble High Court of Delhi in CIT Vs. Chetan Das Lachman Das (supra), wherein it has been held that seized material was found to show that the assessee had been indulging in off records transactions. In the facts of the case before the Hon"ble High Court certain documents were found and the partners of assessee firm had admitted to the practice of suppressing the profits. The seized papers also reflected different rates when compared with the sale bills issued and these findings were not denied by the assessee. The Hon"ble High Court observed that where on comparison of sale bills with the seized papers, corroborated the suppression of income and it was held that the inference could be drawn that similar transactions were throughout the period of six years covered by section 153A of the Act.

28. In the facts of the present case also, admittedly, the Director of the assessee company has admitted to the unaccounted toll receipts recorded in the diary seized from the premises of assessee. The case of assessee before us is that the addition, if any, is to be limited to the period for which the diary is found. The learned Authorized Representative for the assessee was confronted with the extrapolation application for financial year 2009-10, wherein it was admitted before the CIT(A) that such practice of recording cash receipts and suppressing part of it was from May, 2009. The learned Authorized Representative for

the assessee further contended that no extrapolation for earlier years could be made and even for the year of search, except for financial year 2009-10 and for the next year upto 19.04.2010. The learned Authorized Representative for the assessee further pointed out that Pune Bench of Tribunal in ITO Vs. Vikrant Happy Homes Pvt. Ltd. (supra) had referred to the ratio laid down by the Hon"ble High Court of Delhi in CIT Vs. Chetan Das Lachman Das (supra) and pointed out that in the said case, the issue that evidence of one year cannot be utilized for another year, was not raised and consequently, the estimation of income was made for search period. The Tribunal considering the said facts and arguments of the assessee before it, held that the said decision was not applicable to the facts of the said case observing as under:-

"4.6 We find in the case of CIT v. Chetan Das Lachman Das [211 Taxman 61 (Delhi) (H.C.)] wherein there was a search on the assessee and certain evidences were found which indicated that the assessee was suppressing its income. On the basis of the evidences found, the Assessing Officer estimated sales for the 6 years. The said addition was deleted by the Tribunal on the ground that no evidence was found in the course of search. Hon'ble Delhi High Court held that the decision of Tribunal that no seized material was found was not correct since evidences were clearly found indicating suppression of income. Accordingly, Hon'ble Delhi High Court held that the CIT(A) had noted in his order that one of the partners of the assessee firm had admitted the practice of suppressing income. Further, in the said case, the issue that evidence of one year cannot be utilised for another year was not raised. Accordingly, considering the above facts, the estimation of income made by the Assessing Officer was accepted. Considering the above facts, the said decision is not applicable to the facts of the present case. In the said case also, the assessee had accepted carrying out such practice and accordingly, Hon'ble High Court confirmed the action of the Assessing Officer. It is important to be noted that ITAT had deleted the addition on the ground that no seized material was found which was totally contrary to the evidence on record. Accordingly, the above ratio is not applicable to the facts of the present case. Regarding the learned Departmental Representative"s reliance on the ratio in the case of CIT v. Hotel Meriya [(2011) 332 ITR 537 (Ker)], we find that the assessee was running a restaurant. There was a search conducted on the assessee firm and in the course of search, statement of one of the partners was recorded. In the statement recorded, the partner of the assessee firm accepted that certain sales were suppressed and such suppression of sales was carried out from inception. Considering the said statement, Hon'ble High Court held that as the assessee had agreed of suppression of turnover, the estimation of income made by the Assessing Officer was justified. In the said case, there was a clear admission of the partner of the assessee that the sales were suppressed and considering the said admission, the extrapolation of sales for all the years was accepted by the Hon"ble High Court. In the case before us, there is no acceptance that the on-money is collected by the assessee firm for all the years and accordingly, the decision in the case of Hotel Meriya is not applicable to the facts of the present case. Regarding the learned Departmental Representative"s reliance on the ratio in the case of Rajnik & Co. vs. Asst. CIT [(2001) 251 ITR 561(AP)], we find that the assessee firm was engaged in the business of dealing in cycle spare parts. There was a search conducted on the assessee on 13 th November, 1996. In the course of search, incriminating material was seized for indicating suppression of sales for a period of 24 days in A.Y. 1996 - 97 and for a period of 15 days in A.Y. 1997 -

98. However, the partner of the assessee in the course of search admitted that such practice was adopted for all the years including the years for which no evidence was found. On the basis of the above facts, Assessing Officer estimated undisclosed income for the block period. The matter went up to High Court and the Hon"ble High Court held that as the evidence was found for certain years and considering the acceptance of the partner

that similar practice was followed in the earlier years, the estimation of income made by the Assessing Officer was correct. In the case before us, the facts are not identical as there was no acceptance by the assessee or its directors that such practice was followed in the earlier years as well. Accordingly, the ratio of Rajnik & Co. is not applicable to the facts of the present case. We further find in the case of Khopade Kisanrao Manikrao v. Asst. CIT [74 ITD 25 (Pune)(TM)], wherein the learned Departmental Representative has relied upon the said decision of ITAT, Third Member of Pune Bench. In the said case, the evidence was found that the assessee had taken on-money on sale of plots. The evidence was found for all the years falling within the block period. Thus the issue arose that on the basis of evidence found for sale of certain plots, can the Assessing Officer estimate the income in respect of other plots for which no evidence was found. The Third Member held that the evidence was found that the assessee was taking the on-money for sale of plots for the various years of the block period and hence, the Assessing Officer could estimate the on money in respect of sale of other plots even though the evidence was not found. Hence against the distinguishing factor, the evidence was found for all the years and not some of the years and therefore, the Assessing Officer was not justified in estimating the unaccounted income for the other years in this case. In the case of Khopade Kisanrao Manikrao (supra), the issue that whether evidence of one year could be used for making an addition in the other year was not raised simply because certain evidence was found for each of the years. Hence, the ratio of Khopade Kisanrao Manikrao (supra) is not applicable to the facts of the present case.

4.7 We further find in the case of Dr. Gurvinder Singh Randhawa v. CIT [(2013) 352 ITR 616 (P&H)] relied by the Revenue, the assessee was a medical practitioner. In the course of search, evidence was found that the assessee had suppressed his professional receipts. The Assessing Officer applied the rate of Rs.10,147/- for each surgery as against Rs.6,000/- offered by the assessee. The dispute in that case was regarding the rate to be adopted for each surgery and the issue that whether evidence of one year can be used for estimating income of another year was not involved before Hon'ble High Court. Accordingly, the ratio of Dr. Gurvinder Singh Randhawa is not applicable to the facts of the present case and the reliance placed by the learned DR is misplaced. We find in the case of CIT v. Dr. M.K.E. Memon [(2001) 248 ITR 310 (Bom)], the learned Departmental Representative placed reliance on the decision of Hon'ble Bombay High Court in the case of Dr. M.K.E. Memon. However, the facts of the said case are not identical and not applicable to the present case. In the said case, the assessee was a general physician. Search was conducted on the assessee on 11.12.1996. In the course of search, evidences were found that the assessee had generated unaccounted income for the period Nov, 1993 onwards. On the basis of the said evidence, the assessee offered to tax income for pre Nov, 1993 period and post Nov, 1993 period. The Assessing Officer estimated higher income for the pre Nov, 1993 period. ITAT deleted the addition made by the Assessing Officer and sustained the income declared by the assessee for the pre Nov, 1993 period. The issue before Hon'ble Bombay High Court was whether such deletion of addition made by the Assessing Officer was justified. Hon'ble High Court held that the Tribunal was justified in deleting the addition made because the income does not remain constant over the years. Moreover, evidence of one year cannot be used for other year as held by the ITAT, Pune „A" Bench in the case of DCIT, Central Circle 1 (2), Pune Vs. Venkateshwara Hatcheries Pvt. Ltd. in ITA Nos.746 & 747/PN/2012 & another. Accordingly, the facts of the said case are not identical and not applicable to the facts of the present case".

12. Thus, the Tribunal at Pune has not only considered the decision of the Hon'ble Mumbai High Court in the case of Northern Karnataka Expressway Ltd, but has also considered the decision of the Coordinate Bench at Mumbai in the case of West Gujarat Expressway Ltd to allow the alternate claim of the assessee to hold that the asset as an intangible asset and to allow depreciation thereon. However, we find that the decision of the Tribunal in the case of West Gujarat Expressway Ltd has been reversed by the Hon'ble Bombay High Court by holding that the decision in the case of North Karnataka Expressway Ltd was clearly applicable to the case before it. However, we find that the decision of the Coordinate Bench of the Tribunal in the case of Ashoka Infrastructure Ltd, the Bench had brought out the distinction between the claim made in both the case, i.e. the claim of depreciation u/s 32 in the case of North Karnataka Expressway as against the claim of depreciation u/s 32(1)(ii) as on intangible asset in the case of West Gujarat Expressway Ltd. From the copy of the decision of the Hon'ble Bombay High Court in the case of West Gujarat Expressway Ltd, we find this distinction was not brought to the notice of the Hon'ble High Court and therefore, the Hon'ble High Court was pleased to apply the ratio laid down by it in the case of North Karnataka Expressway Ltd. Therefore, the decision of the Hon'ble Bombay High Court cannot be applied to the case of the assessee straightway. The Special Bench of the Tribunal in the case of Progressive Constructions Ltd, has held 'the license to operate and collect the toll fee' as a commercial right falling within the definition of "intangible asset", whereas the Hon'ble Bombay High Court was considering whether the assessee be granted depreciation on tollway which are not owned

by it. Since the distinction between both the cases before the Bombay High Court has been clearly brought out by the Coordinate Bench of the Tribunal at Pune in the case of Ashoka Infrastructure Ltd, we are of the opinion that the decision of the Coordinate Bench is applicable to the facts of the case before us. There is no decision by the Hon'ble Bombay High Court that the right 'to collect toll fee over the roads built and operated by the assessee' is not an "intangible asset", particularly when it is held that the expenditure incurred by the assessee is not revenue in nature. Accordingly, the assessee's grounds of appeal on this issue are allowed.

13. The next ground raised by the assessee is against the disallowance of the provision made by the assessee towards "repairs and maintenance" of the Expressway built and operated by it after the initial period of 5 years. It is the case of the Revenue that the assessee has not incurred such expenditure and the provision is for the "repairs and maintenance" which may arise in future years and therefore, it cannot be considered as the expenditure relatable to the relevant A.Y before us i.e. A.Ys 2013-14. The learned Counsel for the assessee had relied upon the following decisions to argue that where the provision is made on a reasonable and scientific basis for meeting its future liabilities, then such provision is allowable as a deduction:

a) *Bharat Earth Movers vs. CIT (2000) 245 ITR 428 (S.C)*
b) *Rotork Controls India (P) Ltd vs. CIT (2009) 314 ITR 62 (S.C)*
c) *CIT vs. Hewelett Packard India (P) Ltd 314 ITR 55 (Delhi)*
d) *Aggarwal ad Modi Enterprises (Cinema Project) Co. (P) Ltd vs. CIT (2016) 381 ITR 469 (Del.)*

e) DCIT vs. Vs. First Solutions Ltd (2018) 168 DTR (Mumbai) (Trib.) 161

14. The learned DR, on the other hand placed reliance upon the decision of the Hon'ble Supreme Court in the case of Southern Technologies Ltd, reported in (2019) 187 Taxmann.com 346 (S.C).

15. Having regard to the rival contentions and the material on record, we find that, as per clause 3.1.1 of the concessionaire agreement between the assessee and the NHAI, the assessee is required to construct, operate and maintain the project for a period of 15 years commencing from the appointed date. Therefore, it is clear that there is a liability on the assessee to maintain the roads for the period of the agreement. In the years in which the assessee is constructing the roads, there would not arise any expenditure towards repairs and maintenance but thereafter major at times. To meet such liability which is certain, but the quantum of the funds that would be required is uncertain, the assessee would have to be prepared and for this purpose it can create a provision from the current income to meet the likely future liability. This necessity has been recognized by the Hon'ble Supreme Court in the case of Bharat Earth Movers (cited Supra) as under:

> *"4. The law is settled: if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied the liability is not a contingent one. The liability is in praesenti though it will be discharged at a future date. It does not make any difference if the*

future date on which the liability shall have to be discharged is not certain.

5. In Metal Box Company of India Ltd. Vs. Their Workmen (1969) 73 ITR 53 the appellant company estimated its liability under two gratuity schemes framed by the company and the amount of liability was deducted from the gross receipts in the P&L account. The company had worked out on an actuarial valuation its estimated liability and made provision for such liability not all at once but spread over a number of years. The practice followed by the company was that every year the company worked out the additional liability incurred by it on the employees putting in every additional year of service. The gratuity was payable on the termination of an employees service either due to retirement, death or termination of service - the exact time of occurrence of the latter two events being not determinable with exactitude before hand. A few principles were laid down by this court, the relevant of which for our purpose are extracted and reproduced as under:

(i) For an assessee maintaining his accounts on mercantile system, a liability already accrued, though to be discharged at a future date, would be a proper deduction while working out the profits and gains of his business, regard being had to the accepted principles of commercial practice and accountancy. It is not as if such deduction is permissible only in case of amounts actually expended or paid;

(ii) Just as receipts, though not actual receipts but accrued due are brought in for income-tax assessment, so also liabilities accrued due would be taken into account while working out the profits and gains of the business;

(iii) A condition subsequent, the fulfilment of which may result in the reduction or even extinction of the liability, would not have the effect of converting that liability into a contingent liability;

(iv) A trader computing his taxable profits for a particular year may properly deduct not only the payments actually made to his employees but also the present value of any payments in respect of their services in that year to be made in a subsequent year if it can be satisfactorily estimated.

So is the view taken in Calcutta Co. Ltd. Vs. Commissioner of Income-Tax, West Bengal (1959) 37 ITR 1 wherein this court has held that the liability on the assessee having been imported, the liability would be an accrued liability and would not convert into a conditional one merely because the liability was to be discharged at a future date. There may be some difficulty in the estimation thereof but that would not convert the accrued liability into a conditional one; it was always open to the tax authorities concerned to arrive at a proper estimate of the liability having regard to all the circumstances of the case".

16. Further, in the case of Rotork Controls India (P) Ltd vs. CIT (Supra), the Hon'ble Supreme Court held as under:

> *"11. What is a provision? This is the question which needs to be answered. A provision is a liability which can be measured only by using a substantial degree of estimation. A provision is recognized when: (a) an enterprise has a present obligation as a result of a past event; (b) it is probable that an outflow of resources will be required to settle the obligation; and (c) a reliable estimate can be made of the amount of the obligation. If these conditions are not met, no provision can be recognized.*
>
> *12. Liability is defined as a present obligation arising from past events, the settlement of which is expected to result in an outflow from the enterprise of resources embodying economic benefits.*
>
> *13. A past event that leads to a present obligation is called as an obligating event. The obligating event is an event that creates an obligation which results in an outflow of resources. It is only those obligations arising from past events existing independently of the future conduct of the business of the enterprise that is recognized as provision. For a liability to qualify for recognition there must be not only present obligation but also the probability of an outflow of resources to settle that obligation. Where there are a number of obligations (e.g. product warranties or similar contracts) the probability that an outflow will be required in settlement, is determined by considering the said obligations as a whole. In this connection, it may be noted that in the case of a manufacture and sale of one single item the provision for warranty could constitute a contingent liability not entitled to deduction under Section 37 of the said Act. However, when there is manufacture and sale of an army of items running into thousands of units of sophisticated goods, the past event of defects being detected in some of such items leads to a present obligation which results in an enterprise having no alternative to settling that obligation. In the present case, the appellant has been manufacturing and selling Valve Actuators. They are in the business from assessment years 1983- 84 onwards. Valve Actuators are sophisticated goods. Over the years appellant has been manufacturing Valve Actuators in large numbers. The statistical data indicates that every year some of these manufactured Actuators are found to be defective. The statistical data over the years also indicates that being sophisticated item no customer is prepared to buy Valve Actuator without a warranty. Therefore, warranty became integral part of the sale price of the Valve Actuator(s). In other words, warranty stood attached to the sale price of the product. These aspects are important. As stated above, obligations arising from past events have to be recognized as provisions. These past events are known as obligating events. In the present case, therefore, warranty provision needs to be recognized because the appellant is an*

enterprise having a present obligation as a result of past events resulting in an outflow of resources. Lastly, a reliable estimate can be made of the amount of the obligation. In short, all three conditions for recognition of a provision are satisfied in this case".

17. In the case before us, the concessionaire agreement itself specifies the O&M obligations of the concessionaire under Article 17 of the Agreement and requires the assessee to prepare and maintain, a maintenance manual and to carry out the work of repairs and maintenance in accordance with the said manual. At page 59 of the paper book, the assessee has placed the copy of the letter dated 11.04.2018 of the Consultant to the Project Director of NHAI for the maintenance work to be carried out by the assessee as per the "Operation and Maintenance Manual". Further, as per Article 37 of the agreement, if the concessionaire, i.e. the assessee herein, if it defaults or acts in breach of the maintenance requirements or the safety requirements the agreement is liable to be terminated. Thus, it is clear that the obligation of repairs and maintenance has accrued on the assessee, but only the quantification and execution is to be on a future date. However, the basis of quantification of the fund and that the provision is made on a scientific basis has not been established by the assessee nor has it been looked into by the AO. Therefore, we deem it fit and proper to remit this issue to the file of the AO with a direction to examine the scientific method followed by the assessee in making the provisions. If it is found to be reasonable and on a scientific criteria, then the AO shall not disallow the same. Therefore, assessee's ground of appeal on this issue is treated as allowed for statistical purposes.

18. Further, we find that these very same issues have arisen in the A.Ys 2014-15 and 2015-16 and therefore, the decision in the A.Y 2013-14 shall apply to the appeals of these two years as well.

19. In the result, all the three appeals of the assessee are partly allowed for statistical purposes.

Order pronounced in the Open Court on 3rd July, 2019.

Sd/-	Sd/-
(S.Rifaur Rahman)	**(P. Madhavi Devi)**
Accountant Member	**Judicial Member**

Hyderabad, dated 3rd July, 2019.
Vinodan/sps

Copy to:

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4 Pr. CIT – 4 Hyderabad
5 The DR, ITAT Hyderabad
6 Guard File

By Order