

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'G' BENCH
MUMBAI**

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&**

SHRI AMARJIT SINGH, JUDICIAL MEMBER

**ITA No.574/Mum/2020
(Assessment Year :2013-14)**

**ITA No.846/Mum/2020
(Assessment Year :2014-15)**

&

**ITA No.847/Mum/2020
(Assessment Year :2015-16)**

Deputy Commissioner of Income Tax, CC-7(2) Mumbai Room No.655, Aayakar Bhavan, M.K.Road Mumbai – 400 020	Vs.	M/s. Gorakhpur Infrastructure Co. Ltd., 703, 7 th Floor, Tower-3 Quinox Business Park Bandra Kurla Complex, LBS Marg, Mumbai – 400 070
PAN/GIR No.AACCG6417G		
(Appellant)	..	(Respondent)

Assessee by	Dr. Yogesh Kamat
Revenue by	Shri Rakesh Joshi
Date of Hearing	27/10/2021
Date of Pronouncement	30/11/2021

आदेश / O R D E R

PER M. BALAGANESH (A.M):

These appeals in ITA No.574/Mum/2020, 846/Mum/2020 & 847/Mum2020 for A.Yrs.2013-14, 2014-15 & 2015-16 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-49, Mumbai in

appeal No.CIT(A)-49/IT-175/2016-17, CIT(A)-49/IT-179/2016-17 & CIT(A)-49/IT-109/2017-18 dated 06/11/2019 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 21/03/2016, 08/11/2017 respectively by the Id. Dy. Commissioner of Income Tax, Central Circle-7(2), Mumbai (hereinafter referred to as Id. AO).

Identical issues are involved in all these appeals, hence, they are taken up together and disposed of by this common order for the sake of convenience.

2. The first identical issue to be decided in this appeal is as to whether the Id. CIT(A) was justified in deleting the disallowance made on account of depreciation on the right to collect annuity on toll roads.

2.1. We have heard rival submissions and perused the materials available on record. We find that the assessee is engaged in the business of executing the project for design, construction, finance and maintenance of Gorakhpur By-pass on NH-28(Project Highway) in the state of Uttar Pradesh on Build, Operate and Transfer (BOT) basis under the annuity scheme. The assessee entered into concession agreement with National Highway Authority of India (NHAI) and as per concession agreement, NHAI had granted exclusive right, license and authority during the subsistence of the concession agreement to implement the project and the concession in respect of the Project Highway for a period of 20 years. The assessee had incurred total cost amounting to Rs.721,28,78,487/- on construction and development of the Project Highway, pursuant to which the assessee was able to receive annuity from NHAI under the concession agreement. The assessee classified such cost incurred and right to receive

annuity on the toll road as an intangible asset eligible for depreciation u/s.32(1)(ii) of the Act. This depreciation was denied by the Id. AO. The Id. AO held that assessee is not entitled for depreciation at all on the cost incurred on the project. The Id. CIT(A) however, granted depreciation by observing as under:

6.2 *I have carefully considered the facts of the case, the assessment order and the written submission of the assessee. The assessee company is engaged in the construction and maintenance of bridges on a contractual arrangement for the NHAI. The AO had made the disallowance of the depreciation claimed by the assessee on the ground that the assessee does not hold any rights in the project and assessee company cannot be treated as the "Owner" of the property and can not be allowed depreciation u/s 32(1)(ii) of the Act. During the course of the appellate proceedings, the assessee submitted that it had entered into an agreement with the NHAI to construct the bridge on Build Operate and Transfer the annuity scheme. The appellant submitted that as per the concessionaire agreement it was to receive annuity for a fixed period of time in order to recoup the end of the project. Thus, the annuity being an intangible commercial right, falls within the purview of section 32(1)(ii) of the Act. Further, the said right has been given to the appellant for a specified period with enduring benefit. It is also not expiry of the time period of the agreement, the said right of the assessee will come 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.*

6.3 *Further, the aforementioned issue is now squarely covered by the decision of the Special Bench of Hyderabad Tribunal in the case of ACIT v. Progressive Constructions Ltd [2018] 92 taxmann.com 104 (Hyderabad - Trib.) wherein the Tribunal held that the only manner in which the assessee could recoup the cost incurred by it in implementing the project/project facility was to operate the road during the concession period, and collect the toll charges from user of the project facility. By investing huge cost, the assessee had obtained a valuable business/commercial right to operate the project facility and collect toll charges. Therefore, right required by the assessee for operating the project facility and collecting toll charges was an intangible asset created by the assessee by incurring the expenses. The Special Bench of the Hyderabad Tribunal accepted the fact that huge costs were incurred by the assessee in constructing, implementing and maintaining such projects. Considering that these costs do not get reimbursed, and the fact that the*

assessee was allowed to recover such costs by way of collecting toll charges is nothing but a valuable right for an assessee.

6.4 Further, similar view has been taken by **the Hon'ble Mumbai Tribunal** in the case of **DCIT (9(1)(2), Mumbai vs. Atlanta Ltd., Mumbai (ITA No.3415/M/2015)**. Since, the facts of the appellant's case are similar to the aforesaid case laws, I am of the considered opinion that the disallowance made u/s.32(1)(ii) of the Act amounting to Rs.1,80,32,19,622/- is liable to be deleted. In view of the aforesaid facts, this ground of appeal is Allowed.

2.2. The facts stated hereinabove remain undisputed and hence, the same are not reiterated herein for the sake of brevity. We find that the Id. CIT(A) had placed reliance on the Special Bench decision of Hyderabad Tribunal in the case of Progressive Construction reported in 92 Taxmann.com 104 and had granted relief to the assessee. We also find that the similar issue had come up before this Tribunal in the case of DCIT.Cent.Cir-7(2), Mumbai vs. Rajahmundry Expressway Ltd., in ITA No.6518/Mum/2017 for A.Y.2008-09 dated 04/03/2020 wherein it was held as under:-

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

2.3. Respectfully following the aforesaid judicial precedents, we do not find any infirmity in the order of the Id. CIT(A) granting relief to the

assessee. Accordingly, the ground No.1 raised by the Revenue for all the years is dismissed.

3. The ground Nos. 2 & 3 raised by the assessee are challenging the action of the Id. CIT(A) in deleting the disallowance made on account of provision for periodic maintenance charges both under normal provisions of the Act as well as in the computation of book profits u/s.115JB of the Act.

3.1. We have heard rival submissions and perused the materials available on record. We find that assessee is engaged in the business of executing the project for design, construction, finance and maintenance of Project Highway in the State of Uttar Pradesh on BOT basis under the annuity scheme. The operations and maintenance of the Project Highway is a key obligation of the assessee throughout the period of 20 years as per the concession agreement. The assessee is thus obliged to incur maintenance expenses on a periodic basis. The assessee's obligation for operations and maintenance are specified in Article XVIII of the concession agreement which are reproduced hereinabove:-

- *The assessee in consultation with an Independent Consultant is required to prepare repairs and maintenance manual during the period of operations and to ensure that the Project Highway complies with the standards specified in the Concession Agreement.*
- *The assessee in consultation with an Independent Consultant is required to prepare and provide NHAI its preventive and scheduled maintenance subject to standards specified in the Concession Agreement.*
- *The assessee is responsible for maintenance of approach roads to and underpasses and overpasses upto 100 meters from the Project Highway in accordance with good industry practices.*

- *In case, if the assessee fails to maintain Project Highway in accordance with the standards specified in the Concession Agreement and maintenance manual, NHAI has right to take up the repairs and maintenance of the Project Highway and shall recover the cost from the Appellant.*
- *The assessee is obliged to carry out periodic maintenance every five years from the date of commencement of operations according to Schedule L of the Concession Agreement*

3.2. The assessee submitted that the contractual obligation to carryout periodic maintenance is an integral part of the concession agreement granted to the assessee and is similar to the provision for warranty. The concession agreement provides for periodic maintenance and as per schedule-L of the concession agreement under clause 2.6.1. thereon, it is specified that renewal of wearing surface of the road pavement need to be carried once in every four years and strengthening course to be provided as and when required. The periodic maintenance of the Project Highway needs to be carried out once in five years i.e. March 2017. The periodic maintenance activities shall be as under :-

- a) *Profile corrective courses on the existing overlay if any*
- b) *Rectification of damaged pavement with DBM/BC*
- c) *Overlay with BC of appropriate thickness for the entire project*
- d) *Thermoplastic pavement Marking*
- e) *Kerb Painting & painting to parapets of the bridges*
- f) *Provision of studs.*
- g) *Construction of shoulders*
- h) *Repairs and Rehabilitation of road side furniture, such as Metal Beam **Crash** Beam Cautionary, Mandatory and Informative signages*
- i) *Replacement of damaged 5th kilometer, kilometer and Hectometer stones painting of these stones*

3.3. The assessee furnished the technical report for provision made on account of periodic maintenance costs before the Id. AO which are enclosed in pages 168 and 175 of the paper book filed before us. The said technical report is made on scientific basis based on proper technical

valuation thereon with great detailing. The assessee also submitted the utilisation of provision made for periodic maintenance from F.Y.2011-12 to F.Y.2017-18 in a tabular form. The provision made for the maintenance expenses has been amortised by the assessee for a period of five years and claimed as deduction u/s.37(1) of the Act under normal provisions of the Act and the same was also claimed as deduction while computing the books profit u/s.115JB of the Act. The Id. AO however, sought to disallow the same on the ground that the said provision has been made by the assessee on an estimated basis for future cost to be incurred and hence, the provision made thereon is not an allowable deduction u/s. 37(1) of the Act under normal provisions of the Act. The Id. AO also treated the same as the provision made for unascertained liability and accordingly, sought to add the same while computing book profit u/s.115JB of the Act. The assessee placed reliance on the decision of the Hon'ble Supreme Court in the case of Rotork Control India Pvt. Ltd., vs. CIT reported in 314 ITR 62 and Bharat Earth Movers Ltd., vs. CIT reported in 245 ITR 428, among other decisions, in support of its contention. The Id. CIT(A) duly appreciated the entire contentions of the assessee and deleted the disallowance made by the Id. AO by observing as under:-

8.2 I have carefully considered the facts of the case, the assessment order and the written submission of the appellant. The AO has made an addition on account provision for periodic maintenance amounting to Rs. 6,24,00,000/- to the income of the appellant on the ground that the method adopted by the assessee for determining the provision of periodic maintenance expenses was not scientific or reasonable. During the course of the appellate proceedings, the assessee submitted that such a provision for periodic maintenance is in the nature of an ascertained liability though the liability had not actually crystallized during the current year. The said provision had been determined based on a scientific method and is incurred wholly and exclusively for the purpose of business. In order to substantiate the methodology adopted, the appellant placed on record the copy of the technical evaluation on the basis of which the provision for the periodic maintenance charges was determined. Further, the amount of

provision has been determined on the basis of a reasonable scientific method and on the basis of a historical experience. Thus, on perusal of the details submitted and the submission made it can be concluded that the provision was determined on the basis of scientific method and was reasonable.

*8.3 Further, the appellant submitted that it follows mercantile system of accounting as otherwise referred to as accrual basis of accounting. **The contractual obligation to carry out Periodic Maintenance is an integral part of the Concession granted to the appellant and is similar to the provisions for warranty.** Further, the Hon'ble Apex Court in the case of Rotork Controls India Pvt. Ltd.(314 ITR 62 (SC) wherein the Hon'ble SC has treated the provision for contingent liabilities as allowable expense only on the fulfillment of certain conditions. It mentioned that the provision for a contingent liability can be allowed as an expense only if it is ascertained according to a reasonable scientific method which uses historical experience and statistical analysis of previous years data. Since, in the case of the appellant there was a present obligation as a result of a past event alongwith an outflow of resources and a reliable estimate of the obligation was also possible. Further, the foreseeable loss on account of provision for maintenance expense was not a contingent liability but it was liable to be considered while determining the income of the assessee for the period under consideration. Such losses were ascertained losses on the maintenance portion of the contract though it was an estimation made in the light of the available information. Therefore, the appellant has incurred a liability, on the facts and circumstances of this case, during the relevant assessment year which was entitled to deduction under Section 37 of the 1961 Act.It is further seen that the identical issue had come up for consideration before the **Hon'ble Pune Tribunal in the case of ACIT Vs. Ashoka Buildcon Ltd. [2015] 61 taxmann.com 330** wherein the Hon'ble ITAT has held that the foreseeable losses of future years could be recognized following rationale of AS-7 and hence such provision was an allowable deduction. Therefore, following the judicial precedents, I am of the opinion that the provision for periodic maintenance charges is to be allowed to the appellant and accordingly, the addition made amounting to Rs. 6,24,00,000/- is deleted. In view of the aforesaid facts, this ground of appeal is Allowed.*

Further, with regard to the disallowance made by the Ld. AO while computing the book profits u/s. 115JB of the Act:

8.4 I have carefully considered the facts of the case, the assessment order and the written submission of the appellant. The AO has made an addition of the provision for periodic maintenance charges while computing the book profits of the appellant u/s. 115JB on the grounds that the said expense was not arrived at by scientific methods. However, it has been

decided in the above para that the provision calculated by the appellant was on scientific basis and accurately determined. Further, the appellant had relied on a plethora of decisions wherein it was submitted in terms of clause (c) of Explanation 1 to Section 115JB, provision for warranty cannot be regarded as provision made for liabilities other than ascertained liabilities.

*In the present case, as mentioned in the aforesaid ground that the provision for periodic maintenance was similar to that of provision for warranty made by the appellant. It has now been held that the provision for warranty was not an unascertained liability and hence the same cannot be added to the book profits of the appellant in the case of the Hon'ble Mumbai Tribunal in the case of Anchor Electricals (P.) Ltd. vs. DCIT [2017] 58 ITR(T) 401 (Mumbai - Trib.). Since, in the present case, the provision for periodic maintenance has been derived on the basis of scientific method as explained supra, the ratio of the decision of the Mumbai Tribunal squarely applies in the current case. Therefore, in view of the above, addition made to the book profits of the appellant company are **deleted**. In view of the aforesaid facts, this ground of appeal is **Allowed**.*

3.4. It is not in dispute that pursuant to the concession agreement, the assessee is entitled to receive annuity income every year. It is not in dispute that as per the concession agreement, assessee is obliged to carry out the periodic maintenance cost on road pavement every five years and to address the strengthening course of the roads as and when required. For this purpose, it has to incur periodic maintenance cost once in five years and assessee has chosen to apportion the expenses over a period of five years. We find that assessee has made provision for periodic maintenance cost based on technical valuation report which is enclosed in pages 168-175 of the paper book filed before us. The said document was duly placed on record before the lower authorities. We also find from page No.176 of the paper book that assessee has also provided the calculation on utilisation of periodic maintenance cost, from A.Y.2012-13 to A.Y.2018-19 in tabular form as under:-

Gorakhpur Infrastructure Company Private Limited
Calculation of utilisation of provision made for periodic maintenance

Particulars	FY11-12	FY12-13	FY 13-14	FY14-15	FY15-16	FY16-17	FY 17-18
Opening Balance (A)			6,24,00,000	14,53,00,000	22,67,75,000	30,69,65,207	35,25,48,764
Provision created for first PM (for first 5 years) (8)		6,24,00,000	8,29,00,000	8,14,75,000	8,01,90,207	8,01,90,207	96,95,301
Utilisation © / pm reversed						3,46,06,650	35,36,75,881
Provision created for second PM (for next 5 years) (D)							6,07,56,667
Closing Balance of provision (E)		6,24,00,000	14,53,00,000	22,67,75,000	30,69,65,207	35,25,48,764	6,93,24,851
% Utilisation (out of 1st provision) F=C/(A+B)*100						8.94%	97.63%

3.5. From the said table, it is evident that during A.Y.2017-18 (which is the end of first phase of five years for periodic maintenance) assessee had actually incurred Rs.35,25,48,764/- as the expenditure and in A.Y.2017-18, a sum of Rs.3,46,06,650/- was even sought to be reversed by the assessee as provision no longer required. Since the provision for periodic maintenance cost on year to year basis has been made based on technical valuation report on a scientific basis by the assessee and in view of the fact that annuity income has been derived by the assessee year on year basis, in view of the matching concept of income and expenditure, we hold that assessee had merely discharged its contractual obligation by making provision for periodic maintenance cost and since accounts are

maintained by the assessee on a mercantile basis, the said provision needs to be made by the assessee in its books and accordingly, the same become an allowable expenditure u/s.37(1) under the normal provisions of the Act. We also find that the said provision has been made on a scientific basis by the assessee. This categorical finding recorded by the Id. CIT(A) has not been controverted by the Id. DR before us. We find that only argument advanced by the Id. DR before us was that the liability to incur periodic maintenance cost would arise to the assessee only in A.Y.2017-18 and the entire expenditure would get liable to be incurred only in A.Y.2017-18. We find that the same would not be in accordance with the matching principle of income and expenditure and would not be in line with the mercantile system of accounting followed by the assessee. It is a fact that periodic maintenance cost is an integral part of the concession agreement and assessee is under a contractual obligation to incur the same and provision has been made by it on a scientific basis. Accordingly, the expenditure attributable to each year has been claimed as deduction both under normal provisions of the Act as well as in the computation of book profits u/s.115JB of the Act. Hence, it would not fall under the category of provision made for contingent liability or unascertained liability. We find that the Id. CIT(A) had rightly appreciated these contentions of the assessee and had rightly placed reliance on the decision of the Hon'ble Supreme Court in the case of Rotork Controls India Pvt. Ltd., reported in 314 ITR 62 and on the Co-ordinate Bench decision of Pune Tribunal in the case of ACIT vs. Ashoka Buildcon Ltd., reported in 61 Taxmann.com 330. We hold that the Id. CIT(A) had passed a detailed order in this regard. Hence the order of Id. CIT(A) granting relief to the assessee does not warrant any interference. Accordingly, the ground Nos. 2 & 3 of the Revenue for all the years are dismissed.

4. In the result, all the appeals of the Revenue are dismissed.

Order pronounced on 30/11/2021 by way of proper mentioning in
the notice board.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 30/11/2021
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai