IN THE INCOME TAX APPELLATE TRIBUNAL

"E" BENCH, MUMBAI

BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.3787/Mum./2023
(Assessment Year : 2013–14)

&
ITA no.3788/Mum./2023
(Assessment Year : 2014–15)

Hazaribagh Ranchi Expressway Ltd
Plot No-C-22, G Block, The IL & FS,
Financial Centre, Bandra Kurla Complex,
Bandra (E), Mumbai-400051
PAN- AACCH2490J ……. Appellant

v/s

ACIT, Circle-14(1)(1)
Aayakar Bhawan, Maharishi Karve
Marg, Mumbai-400020 ……. Respondent

Assessee by :Shri Bhupal Rapelli
Shri Niranjan Govindekar

Revenue by :Shri Savya Sachi Kumar
Shri Biswanath Das

Date of Hearing –21/06/2024	Date of Order – 17/09/2024

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeals have been filed by the assessee challenging the separate impugned orders of even date 28/08/2023 passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by the learned Commissioner of Income Tax (Appeals) – 56, Mumbai, ["*learned CIT(A)*"], for the assessment years 2013-14 and 2014-15.

2. Since both appeals pertain to the same assessee and involve similar issues arising out of a similar factual matrix, these appeals were heard together and are being decided by way of this consolidated order. With the consent of the parties, the assessee's appeal for the assessment year 2013-14 is taken up as a lead case and the decision rendered therein shall be applicable *mutatis mutandis* to the appeal for the assessment year 2014-15. The assessee has raised similar grounds in both appeals, therefore the grounds raised in ITA no. 3787/Mum./2023 are reproduced as follows:–

> *"Disallowance of Depreciation:*
>
> *1.1) On the facts and circumstances of the case and in law, the Learned Commissioner of income Tax (Appeals)-56 ("CIT-A') erred by upholding the order of Learned AD by erroneously rejecting the claim of the appellant that the appellant is entitled to claim depreciation on Project Road u/s 12 of Act, treating the same as "Intangible assets".*
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> *The Appellant prays that the right to set up an "infrastructure facility' and collect annuity thereon being in the nature of a "license" or "business' or 'commercial right' be regarded as an "intangible asset in terms of the provision of Section 32(1)(ii) of the Income-tax Act, 1961 (the Act). The Appellant prays that they had constructed the road and have the right to earn revenue in the form of annuity from the use of such "intangible asset" being a 'license' or 'business' or 'commercial right' as contemplated in section 32(1)(ii) of the Act.*
>
> *The Appellant prays that the depreciation on the road amounting to Rs. 254,27,71,440/- may bel granted u/s 32, treating the Project Road as "Intangible assets". On the facts and circumstances of the case and in law, the Learned CIT(A) erred in not following the jurisdiction as well as other Tribunal decisions where it was held that licence to set up the infrastructure facility is an 'intangible asset' and thus granted depreciation at the rate of 25% on the project road considering the same under intangible asset under section 32(1)(li) of the Act.*
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> *1.2) Without prejudice to the Ground No.1.1 & 1.2, as an alternate claim, the Appellant prays that if depreciation is not allowed under the category of "intangible asset" then the depreciation may be granted treating the said Project Road under the category of "plant and machinery" @ 15%. The appellant prays that the depreciation may be allowed @ 15% at Rs. 1,52,56,83,533/-.*
>
> *1.3) Without prejudice to the Ground No. 1.1 & Ground No. 1.3, as an alternate claim, the Appellant prays that if the road is not treated under the*

category of "plant and machinery" or "intangible assets" for purpose of granting depreciation then the depreciation @ 10% may be granted treating the said road under the category of "building". The appellant prays that the depreciation may be allowed @10% at Rs. 101,71,08,576/-.

1.4) Without prejudice to Ground No.1.1 to Ground No. 1.4, on the facts and in the circumstances of the case and in law, the Appellant prays that if the "Project road" is not treated under the category of "Plant & Machinery" or "Building" or "Intangible assets" for the purpose of granting depreciation under section 32 then the entire cost incurred for construction of "Project Road" should be allowed as revenue expenditure.

The appellant prays that cost incurred to construct the "Project Road" of Rs 1017,10,85,761 /-may be allowed as revenue expenditure."

3. The sole grievance of the assessee is against disallowance of depreciation claimed under section 32(1)(ii) of the Act on toll roads.

4. The brief facts of the case pertaining to this issue, as emanating from the record, are: The assessee is the Special Purpose Vehicle promoted by IL and FS Transportation Networks Ltd and Punj Llyod Ltd. For the year under consideration, the assessee filed its return of income on 29/11/2011 declaring a total loss of ₹ 141,07,38,604 and book profit under section 115JB at ₹ (-)23,24,33,095. The National Highway Authority of India awarded the assessee the bid for four-laning of the Hazaribagh – Ranchi section on NH-33 in the State of Jharkhand on a Build, Operate and Transfer ("*BOT*") basis. The assessee constructed the Expressway toll road as per the agreement with the principal being a State Authority. The assessee capitalised the cost of the project during the year and as per the Concession Agreement, it maintained an escrow account for depositing the receipts. During the assessment proceedings, from the perusal of the record, it was found that the assessee claimed depreciation on roads and bridges amounting to ₹ 153,56,83,533. Accordingly, the assessee was asked to

furnish the details and explanation. In response thereto, the assessee submitted that it claimed depreciation at ₹ 152,56,62,864 treating the road as "*plant and machinery*" and depreciation @15% of the total cost of construction of the project facility amounting to ₹ 1017,10,85,761. By relying on various judicial precedents, the assessee submitted that any asset that helps an assessee to earnrevenue should be treated as a "*plant*". In the alternative, the assessee submitted that if the road is treated as a "*building*" then depreciation @10% be allowed, and if, in the alternative, it is treated as an intangible asset, then the depreciation @25% may be allowed.

5. The Assessing Officer ("*AO*") vide order dated 30/12/2016 passed under section 143(3) r/w section 92CA(4) of the Act disagreed with the submission of the assessee and held that the ownership of the asset is on a lease basis for a period of 18 years, therefore the assessee is not entitled to claim depreciation under section 32 of the Act. By referring to the terms of the agreement, the AO held that after the lease term of 18 years, the cost of the asset will stand recovered by the assessee and assets will be transferred to the State Government. Therefore, the AO held that the depreciation claimed by the assessee is not admissible under section 32 of the Act. Accordingly, the AO disallowed the depreciation claim of ₹ 152,56,62,864 made by the assessee during the assessment year 2013-14. Further, the AO held that once the ownership itself is held to be not available with the assessee, the alternative claim regarding the treatment of the toll roads as "*plant and machinery*" becomes infructuous. However, the AO allowed the benefit of amortisation for the period of the concession agreement and

allowed 1/18thportion of the cost to be deferred revenue expenditure which works out to ₹ 56,50,60,320.

6. The learned CIT(A), vide impugned order, dismissed the appeal filed by the assessee and following the decision of the Hon'ble Jurisdictional High Court in North Karnataka Expressway Ltd v/s CIT, reported in 372 ITR 145, and CIT v/s West Gujarat Expressway Ltd, reported in 82 taxmann.com 224, held that since the assessee is constructing a road on BOT basis on the government land, it is not the "*owner*" of the road and cannot claim depreciation on it. Further, by relying on the decision of the Hon'ble Madras High Court in L & T Infrastructure Development Projects Limited v/s ACIT, in TCA No. 868 to 870 of 2009, etc., the learned CIT(A) held that the toll road is also not an intangible asset. However, referring to the CBDT Circular No. 9 of 2014, the learned CIT(A) held that the cost is to be amortised evenly over the concession period. Being aggrieved, the assessee is in appeal before us.

7. During the hearing, the learned Authorised Representative ("*learned AR*") submitted that while deciding the issue against the taxpayer the Hon'ble Madras High Court inL & T Infrastructure Development Projects Limited (supra) interpreted the term "*any other business or commercial rights of similar nature*" in Explanation 3(b) to section 32(1)(ii) of the Act by applying the principle of *noscitur a sociis* instead of applying the principle of *ejusdem generis*. In support of the aforesaid submission, the learned AR relied upon the decisions of the Hon'ble Supreme Court in CIT v/s Smifs Securities Ltd, reported in [2012] 348 ITR 302(SC) and Techno Shares and Stocks Ltd v/s CIT, reported in [2010] 327 ITR 323 (SC). The learned AR

fairly agreed that the issue of whether depreciation is allowable on toll roads by considering the same as tangible assets has been decided against the taxpayer by the Hon'ble Jurisdictional High Court. The learned AR submitted that the depreciation on the toll road has been directed to be allowed by considering the same as an intangible asset by various decisions of the coordinate bench of the Tribunal including the decision of theSpecial Bench of the Tribunal in DCIT v/s Progressive Constructions Ltd, reported in [2018] 63 ITR(T) 516 (Hyderabad-Trib.) (SB). The learned AR further submitted that the Department's appeal in certain cases against the decisions of the coordinate bench of the Tribunal are currently pending before the Hon'ble Jurisdictional High Court, and thus there is no decision on the issue of whether depreciation is allowable on the right to collect toll on the roads constructed by the assessee by considering the same as an intangible asset by the Hon'ble Jurisdictional High Court.

8. On the other hand, the learned Departmental Representative ("*learned DR*") vehemently relied upon the orders passed by the lower authorities and submitted that the decision of the Hon'ble Jurisdictional High Court and Hon'ble Madras High Court cited supra aresquarely applicable to the present case.

9. We have considered the submissions and judgments/decisions relied on by both sides as well as perused the material available on record. In the present case, the assessee was incorporated as a Special Purpose Vehicle under the Companies Act, 1956 on 19/03/2009. The assessee entered into a Concession Agreement with the National Highway Authority of India

("*NHAI*") on 08/10/2009 and the appointed date was 01/08/2010. Under theConcession Agreement, which forms part of the paper book from pages 96-223, the project was awarded by NHAI on a design, build, finance, operate and transfer annuity basis to the assessee. Under the said agreement, NHAI granted the assessee the right to investigate, study, design, engineer, produce, finance, construct, operate and maintain the project facilities for a period of 18 years commencing from the appointed date. Under the agreement, the assessee was required to bear and pay all costs, expenses and charges in connection with or incidental to the performance of the assessee's obligations. As a consideration, NHAI agreed and undertook to pay the assessee through a fixed payment (Annuity) of Rs. 64.08 crore to be paid semi-annually during the operation period. There is no dispute regarding the aforementioned basic facts amongst the parties.

10. As per the assessee, in BOT arrangements for the development of roads/highways, as a matter of general practice, possession of land is handed over to the Concessionaire by the Government/notified authority for the purpose of a construction project without any actual transfer of ownership and such Concessionaire has only a right to develop and maintain such asset. The ownership of the land on which the road is constructed remains with the authority granting the development rights. The Concessionaire, doing development, enjoys the benefits arising from the use of assets through collection of toll/annuity (right) for a specified period without having actual ownership of land developed as a road.

11. The assessee capitalised the total costs of ₹ 1017,10,85,761 in its books of accounts. Accordingly, for the year under consideration, the assessee claimed depreciation amounting to ₹ 135,96,43,157 considering roads as "*plant and machinery*" which was disallowed by the AO. The assessee claimed aggregate depreciation of ₹ 135,96,43,157 on opening WDV as on April 2013 of ₹ 8,64,55,40,021 plus addition during the year of ₹ 39,05,57,529. The closing WDV as on 31/03/2014 is ₹ 767,64,54,397.

12. We find that in the case of North Karnataka Expressway Ltd (supra), the issue arose before the Hon'ble Jurisdictional High Court thatwhen a taxpayer who is in the business of infrastructure development in the execution of an agreement constructs a road and on Build, Operate and Transfer (BOT) basis on the land owned by the Government, can it claim depreciation on the toll road. While deciding the issue against the taxpayer, the Hon'ble Jurisdictional High Court held that merely because the taxpayer had laid down the road does not mean that he is the owner of the same, as it has been laid down ultimately for vesting in the public.Following the aforementioned decision, similar findings were rendered by the Hon'ble Jurisdictional High Court in West Gujarat Expressway Ltd. (supra). Thus, in view of the above, the learned AR rightly did not press the issue of whether depreciation is allowable on toll roads by considering the same as tangible assets, as this issue has been decided against the taxpayer by the Hon'ble Jurisdictional High Court.

13. However, in the alternative, it is the plea of the assessee that since it has acquired the right to operate the project and collect the toll charges,

such right acquired is a valuable business or commercial right through which it is going to recover the cost incurred and the said right is an intangible asset entitled to depreciation @25%.

14. Before proceeding further, it is pertinent to note the provisions of the Act which are relevant for deciding the issue at hand. Section 32 of the Act deals with the grant of depreciation in respect of tangible and intangible assets and the same reads as follows: –

> *"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—"*

15. Further, Explanation-3 to section 32 of the Act defines the term assets as follows: –

> *"Explanation 3.—For the purposes of this sub-section, 38[the expression "assets"] shall mean—*
>
> *(a) tangible assets, being buildings, machinery, plant or furniture;*
>
> *(b) intangible assets, being know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature."*

16. In support of the aforesaid plea, the learned AR placed reliance upon various decisions of the coordinate bench of the Tribunal, wherein this issue has been decided in favour of the taxpayer. Further, reliance was also placed upon the decision of the Special Bench of the Tribunal in DCIT v/s

Progressive Constructions Ltd (supra), wherein it was held that expenditure incurred by the taxpayer for construction of road under BOT contract by the Government of India gives rise to an intangible asset as defined under the Explanation-3(b) read with section 32(1)(ii) of the Act and the assessee would be eligible to claim depreciation on such asset at a specified rate. The relevant findings of the Special Bench of the Tribunal, in the decision cited supra, are reproduced as follows: –

> *"16. We have already held earlier in the order that by incurring the expenditure of Rs. 214 crore assessee has acquired the right to operate the project and collect toll charges. Therefore, such right acquired by the assessee is a valuable business or commercial right because through such means, the assessee is going to recoup not only the cost incurred in executing the project but also with some amount of profit. Therefore, there cannot be any dispute that the right to operate the project facility and collect toll charges therefrom in lieu of the expenditure incurred in executing the project is an intangible asset created for the enduring benefit of the assessee. Now, it has to be seen whether such intangible asset comes within the expression "any other business or commercial rights of similar nature". As could be seen from the definition of intangible asset, specifically identified items like knowhow, patents, copyrights, trademarks, licenses, franchises are not of the same category, but, distinct from each other. However, one thing common amongst these assets is, they all are part of the tool of the trade and facilitate smooth carrying on of business. Therefore, any other intangible asset which may not be identifiable with the specified items, but, is of similar nature would come within the expression "any other business or commercial rights of similar nature". The Hon'ble Supreme Court in Smifs Securities (supra) after interpreting the definition of intangible asset as provided in Explanation 3 to section 32(1), while opining that principle of ejusdem generis would strictly apply in interpreting the definition of intangible asset as provided by Explanation 3(b) of section 32, at the same time, held that even applying the said principle 'goodwill' would fall under the expression "any other business or commercial rights of similar nature". Thus, as could be seen, even though, 'goodwill' is not one of the specifically identifiable assets preceding the expressing "any other business or commercial rights of similar nature", however, the Hon'ble Supreme Court held that 'goodwill' will come within the expression "any other business or commercial rights of similar nature". Therefore, the contention of the learned Senior Standing Counsel that to come within the expression "any other business or commercial rights of similar nature" the intangible asset should be akin to any one of the specifically identifiable assets is not a correct interpretation of the statutory provisions. Had it been the case, then 'goodwill' would not have been treated as an intangible asset. The Hon'ble Delhi High Court in case of Areva T and D India Ltd. (supra), while interpreting the aforesaid expression by applying the principles of ejusdem*

generis observed, the right as finds place in the expression "business or commercial rights of similar nature" need not answer the description of knowhow, patents, trademarks, license or franchises, but must be of similar nature as the specified asset. The Court observed, looking at the meaning of categories of specified intangible assets referred to in section 32(1)(ii) of the Act preceding the term "business or commercial right of similar nature", it could be seen that the said intangible assets are not of the same line and are clearly distinct from one another. The Court observed, the use of words "business or commercial rights of similar nature", after the specified intangible assets clearly demonstrates that the legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets which were neither visible nor possible to exhaustively enumerate. The Hon'ble Court, therefore observed, in the circumstances the nature of business or commercial right cannot be restricted only to knowhow, patents, trademarks, copyrights, licence or franchise. The Court observed, any intangible assets which are invaluable and result in smoothly carrying on the business as part of the tool of the trade of the assessee would come within the expression "any other business or commercial right of similar nature".

17. In the case of Techno Shares and Stocks Ltd. (supra), the Hon'ble Supreme Court while examining the assessee's claim of depreciation on BSE Membership Card, after interpreting the provisions of section 32(1)(ii), held that as the membership card allows a member to participate in a trading session on the floor of the exchange, such membership is a business or commercial right, hence, similar to license or franchise, therefore, an intangible asset. In the present case, undisputedly by virtue of C.A. the assessee has acquired the right to operate the toll road/bridge and collect toll charges in lieu of investment made by it in implementing the project. Therefore, the right to operate the toll road/bridge and collect toll charges is a business or commercial right as envisaged under section 32(1)(ii) r/w Explanation 3(b) of the said provisions. Therefore, in our considered opinion, the assessee is eligible to claim depreciation on WDV as an intangible asset. Thus, we answer the question framed by the Special Bench as under:-

The expenditure incurred by the assessee for construction of road under BOT contract by the Government of India has given rise to an intangible asset as defined under Explanation 3(b) r/w section 32(1)(ii) of the Act. Hence, assessee is eligible to claim depreciation on such asset at the specified rate."

17. The learned AR also relied upon the decisions of the Hon'ble Supreme Court inSmifs Securities Ltd (supra) and Techno Shares and Stocks Ltd (supra) to support the submission that while interpreting the term "any *other business or commercial rights of similar nature*" principle of *ejusdem generis* should be applied and thus the rights as referred to in the term "*anyother business or commercial rights of similar nature*" should be of the

similar nature as the other specified assets in Explanation-3(b) to section 32(1)(ii) of the Act. We, at the outset, may note that inSmifs Securities Ltd (supra) the issue before the Hon'ble Supreme Court was whether the goodwill is an asset underExplanation-3(b) to section 32(1)(ii) of the Act and therefore is eligible for depreciation. While deciding this issue, the Hon'ble Supreme Court applied the principle of*ejusdem generis*and held in favour of the taxpayer. Further, in Techno Shares and Stocks Ltd (supra), the issue before the Hon'ble Supreme Court was whether the right of membership conferred upon a member under the BSE membership card was a "*business or commercial right*", and thus, is a depreciable asset. Therefore, it is evident that in none of the aforesaid decisions the issue before the Hon'ble Supreme Court was similar to the present case.

18. On the contrary, the Revenue has relied upon the decision of theHon'ble Madras High Court inL & T Infrastructure Development Projects Limited (supra). The basic facts of the case, as noted by the Hon'ble Madras High Court in the judgment, are as follows: -

> *"42. The these two assessee companies were conceived and incorporated as Special Purpose Vehicle (SPV) for the purpose of construction, operation and maintenance of the respective toll bridges and roads under Build Operate & Transfer (BOT) Scheme.*
>
> *43. Concessionaire Agreements were entered into between the respective assessee with the Government of India and Government of Gujarat as detailed under:-*

SI.No	*Name of the Assessee*	*Date of the Concession Agreement*	*Period*	*Name of the Bridge*
1	*i)L&T Infrastructure Development Projects Ltd.(Formally*	*21.11.1997*	*15 Years (including The*	*A toll bridge across*

	M/s.Narmada Infrastructure Construction Enterprises Limited)#		*construction period of 3 years)*	*the "Narmada" river (in Gujarat) on National Highway 8.*
2	*LTIDPL INDVIT SERVICES Ltd.# (Formerly, L& T Western India Toll Bridge Ltd.) Appellants/Respondents in rest of the appeals as in Table I.)*	*01.03.1999*	*10 Years & 8 Months (including the construction period of 2 Years)*	*Two lane toll bridge across river "Watrak" near Kheda Village on the Ahmedabad-Vadodara section of the National Highway 8*

44. The above Concessionaire Agreements under the Build-Operate-Transfer (BOT) Scheme were between the respective assessees and the Government of India and Government of Gujarat were for the above mentioned periods.

45. The concept of a BOT Agreement was introduced to increase private-public participation in road projects. The arrangements allowed such infrastructure companies to collect toll from the vehicles plying on the roads and bridges laid and developed by them under the BOT Scheme as consideration for developing the transport infrastructure.

46. The respective assessees appear to have capitalized the cost incurred in their books of accounts. The capitalized cost by was also amortized in theirBook of Account.

47. However, for the purpose of Income Tax, the respective assessees claimed depreciation at 25% as plants under Section 32 of the Income Tax Act, 1961 read with Rule 5 of the Income Tax Rules, 1962."

19. From the perusal of the aforesaid decision, we find that the Hon'ble Madras High Court, inter-alia, following the decision of the Hon'ble Bombay High Court inNorth Karnataka Expressway Ltd (supra) held that the toll

bridge and the toll roads are not tangible assets of the taxpayer in terms of Explanation-3(a) to section 32(1)(ii) of the Act. Further, the Hon'ble Madras High Court also rejected the plea that the taxpayer acquired intangible assets under the Concessionaire Agreement within the meaning ofExplanation-3(b) to section 32(1)(ii) of the Act. The relevant findings of the Hon'ble Madras High Court are reproduced as follows: –

> *"120. We are of the view that the second part of the 1" substantial question of law as to whether the respective assessees have any "Intangible Assets" under the respective Concessionaire Agreements as per the definition in Explanation 3(b) to Section 32 of the Income Tax Act, 1961 also requires to be answered against the assessee. The definition of the above expression has already been extracted above.*
>
> *121. The expression used in the last part of the definition of "Intangible Asset" is licenses, franchises or any other business or commercial rights of similar nature".*
>
> *122. The meaning of the above expression "licenses" and the phrase" any other business or commercial rights of similar nature" has to be inferred from the meaning of the words along with which they have been used. Their meaning has to be inferred from the meaning of the expression "know-how", "patents", "copy rights", "trademark", "franchises" by applying the principle of nocitur a sociis.*
>
> *123. In Maxwell's Interpretation of Statutes (12th Edition) at page 289, it has been stated as follows:-*
>
> > *"Where two or more words which are susceptible of analogous meaning are coupled together, nocitur a sociis, they are understood to be used in their cognate sense. They take, as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general."*
>
> *124. As per the above principle the words must take colour from words with which they are associated.*
>
> *125. In Skinner &Co.v.Shew and Co. (1893) 1 Ch 413 (D), it was observed:*
>
> > *"The rule of ejusdem generis is intended to be applied where general words have been used following particular and specific words of the same nature on the established rule of construction that the Legislature presumed to use the general words in a restricted sense, that is to say, asbelonging to the same genus as the particular and specific words. Such a restricted meaning has to be given to words of general import only where the context of the whole scheme of legislation requires it. But where the context and the object and mischief of the enactment do not require such restricted meaning to be attached to words of general import, it becomes the duty of the Courts to*

> *give these words their plain and ordinary meaning. In our opinion, in the context of the object and the-mischief of the enactment there is no room for the application of the rule of ejusdem generis. Hence it follows that the vacancy as declared by the order impugned in this case, even though it may not be covered by the specific words used, is certainly covered by the legal import of the words "or otherwise"."*
>
> *126. Therefore, it cannot be construed that the respective assessees had acquired "intangible assets" within the meaning of the definition in Explanation 3(b) to section 32 of the Income Tax Act, 1961 under the respective concessionaire agreement for the purpose of claiming depreciation.*
>
> *127. By no stretch of imagination can it be construed that the respective assessees have been conferred upon any "intangible assets" under the concessionaire agreements for the purpose of the aforesaid provision."*

20. From the perusal of the aforesaid findings of the Hon'ble Madras High Court, it is evident that the Hon'ble Court while deciding the issue against the taxpayer had applied the principle of *noscitur a sociis* instead of applying the principle of *ejusdem generis*, as applied by the Special Bench of the Tribunal in DCIT v/s Progressive Constructions Ltd (supra), while deciding the issue in favour of the taxpayer. Both the principle of *noscitur a sociis* and the principle of *ejusdem generis* are the tools forthe construction of general words as per the Principles of Interpretation of Statute. As noted by the Hon'ble Madras High Court, in the aforesaid decision, from Maxwell's Interpretation of Statutes (12th Edition), the meaning of the principle of *noscitur a sociis* is thatwhen two or more words which are susceptible of analogous meaning are coupled together, they are understood to be used in their cognate sense. It means associated words take their meaning from another under the principle of *noscitur a sociis*. It is also well-settled that the principle of *noscitur a sociis* is wider than the principle of *ejusdem generis*and it means that when particular words pertaining to a class, category or genus are followed by general words, the general words are

construed as limited to things of the same kind as those specified. Therefore, it is the plea of the assessee that while interpreting the term "*any other business or commercial rights of similar nature*" in Explanation 3(b) to section 32(1)(ii) of the Act, the principle of *ejusdem generis*be applied instead ofthe principle of *noscitur a sociis*.

21. In the present case, despite the grant of multiple opportunities, the assessee could not bring any decision of the Hon'ble Supreme Court or any other Hon'ble High Court which is contrary to the decision of the Hon'ble Madras High Court in L & T Infrastructure Development Projects Limited (supra) on the issue under consideration before us. We find that the decision of the Hon'ble Karnataka High Court in Bangalore International Airport Ltd. v/s DCIT, reported in [2023] 457 ITR 229 (Karn.), relied upon by the learned AR, has been rendered in a different factual matrix as in that case the depreciation was claimed on expenditure incurred towards legal, technical, and management fees for acquiring certain rights from the Ministry of Civil Aviation, Government of India. Therefore, we are of the considered view that the said decision is factually distinguishable and is not applicable to the present case. Thus, we are faced with a situation where the decision of the Hon'ble Madras High Court in L & T Infrastructure Development Projects Limited (supra) is the sole decision by any Hon'ble High Court in the country on the issue as to whether depreciation is allowable on the right to collect toll on the roads developed by the assessee on BOT basis by considering the same as an intangible asset. We find that the Hon'ble Jurisdictional High Court inCIT v. Smt. Godavaridevi Saraf,

reported in [1978] 113 ITR 589 (Bom.),held that an authority like an Income-tax Tribunal acting anywhere in the country has to respect the law laid down by the High Court, though of a different State, so long as there is no contrary decision of any other High Court on that question. It was further held that until a contrary decision is given by any other competent High Court, which is binding on a Tribunal in the State of Bombay, it has to proceed on the footing that the law declared by the High Court, though of another State, is the final law of the land.

22. During the hearing, the learned AR placed reliance upon the decision of the Third Member Bench of the Tribunal in Kenel Oil and Exports Industries Ltd v/s JCIT, reported in [2009] 121 ITD 596 (Ahd-ITAT) (TM) to support his submission that the judgment of the non-jurisdictional High Court, though only judgment on the point, is not a binding precedent. From the perusal of the aforementioned decision, we find that the Third Member Bench of the Tribunal held that the judgment of the non-jurisdictional High Court, though only judgment on the point, which has been rendered without being informed about the statutory provision that is directly relevant or without noticing a previous binding precedent was held to have been rendered *per incuriam*, and thus not binding. Accordingly,the Third Member Bench of the Tribunal held that the decision of the Special Bench on the issue should be given preference over the sole decision of the non-jurisdictional High Court on the issue. The relevant findings of theThird Member Bench of the Tribunal, in the decision cited supra, are as follows: –

"7. I have considered the rival arguments presented before me by both the sides. It all boils down to this, namely, whether the order of the Special Bench upholding the levy of interest in light of sub-section (4) of section 115JA should be followed or the judgment of the Bombay High Court in Snowcem India Ltd.'s case (supra), also rendered in the context of section 115JA, has to be applied. Both the decisions are under section 115JA with which we are concerned. One is of a Special Bench of the Tribunal, Ahmedabad and the other is of a High Court, though not the jurisdictional High Court. A simple answer would be that the judgment of a High Court, though not of the jurisdictional High Court, prevails over an order of the Special Bench even though it is from the jurisdictional Bench (of the Tribunal) on the basis of the view that the High Court is above the Tribunal in the judicial hierarchy. But this simple view is subject to some exceptions. It can work efficiently when there is only one judgment of a High Court on the issue and no contrary view has been expressed by any other High Court. But when there are several decisions of non-jurisdictional High Courts expressing contrary views, it has been recognised that the Tribunal is free to choose to adopt that view which appeals to it. In Rishiroop Chemicals Co. (P.) Ltd. v. ITO [1991] 36 ITD 35 (SB) (Delhi), it was held by the Special Bench, Delhi that "if there were conflicting decisions of the High Courts, other than the jurisdictional High Court, the Benches of the Tribunal were free to adopt the view which to the Benches appear to be better and that in certain circumstances the view which was favourable to the taxpayer should be adopted". Following this case the Ahmedabad Bench in ChandulalVenichand v. ITO [1991] 38 ITD 138, which was cited before me on behalf of the assessee, came to the conclusion that amongst the several decisions cited before it, the decision of the Patna High Court appeared to be better and followed it. The Bench also observed that incidentally it was also in favour of the assessee. The Tribunal did not apply the rule that if different views are expressed on an issue the view that is favourable to the assessee should be adopted. The view expressed by the Patna High Court appeared to the Tribunal to be the better of the different views expressed by different High Courts and was hence followed.

8. The other exception is where the judgment of the non-jurisdictional High Court, though the only judgment on the point, has been rendered without having been informed about certain statutory provisions that are directly relevant. A judgment rendered without noticing a previous binding precedent or a relevant statutory rule is considered to have been rendered 'per incuriam'. It is even said that such a judgment need not be given effect to by a lower court. In the present case, the attention of the Bombay High Court in Snowcem India Ltd. (supra) was not drawn to sub-section (4) of section 115JA, as has been pointed out by the learned AM in his dissent. The High Court therefore had no occasion to examine the question whether the decisions of the Karnataka High Court and the Supreme Court in Kwality Biscuits Ltd. (supra), rendered in the context of section 115J which did not have a sub-section similar to sub-section (4) of section 115JA would still be applicable as binding precedent in a case which arises under section 115JA. This aspect has also been highlighted by the learned AM. The argument on behalf of the assessee before me was that the section in its entirety was before the Bombay High Court in Snowcem India Ltd.'s case (supra), which includes sub-section (4). I am unable to accept this argument because the sub-section is considered crucial and it is the contention of the department that it has made all the differences between section 115J on the one hand

> *and sections 115JA and 115JB on the other, and therefore non-advertance to the same makes it impossible for the assessee to rely on the judgment as authority on the interpretation of the sub-section. It is futile to speculate what would have been the decision if sub-section (4) of section 115JA had been brought to the notice of the Hon'ble Bombay High Court, but suffice to say, for the present purpose, that the judgment cannot be relied upon by the assessee as being entirely in its favour on all the aspects of section 115JA or, more particularly, on the interpretation of sub-section (4) of that section and therefore it cannot be said that it should be followed in preference to the order of the Special Bench in Ashima Syntex's case (supra).*

23. Despite placing reliance upon thedecision of the Third Member Bench of the Tribunal in Kenel Oil and Exports Industries Ltd (supra), the learned AR could not bring any material on record to show as to which relevant statutory provision or rule was not considered or as to which previous binding precedent was not followed by the Hon'ble Madras High Court inL & T Infrastructure Development Projects Limited (supra). The mere submission of the learned AR was that the Hon'ble Madras High Court inL & T Infrastructure Development Projects Limited (supra) interpreted the term "*any other business or commercial rights of similar nature*" in Explanation 3(b) to section 32(1)(ii) of the Act by applying the principle of *noscitur a sociis* instead of applying the principle of *ejusdem generis* as directed to be followed by the Hon'ble Supreme Court inSmifs Securities Ltd (supra) and Techno Shares and Stocks Ltd (supra). As noted by us in the foregoing paragraph, in both the decisions the issue before the Hon'ble Supreme Court was not similar to the present case, which was considered by the Hon'ble Madras High Court inL & T Infrastructure Development Projects Limited (supra). Therefore, we are of the considered view that reliance placed by the learned AR on the decision of the Third Member Bench of the Tribunal in Kenel Oil and Exports Industries Ltd (supra) is completely misplaced.

24. Therefore, in light of the detailed analysis of case law relied upon by both sides in the forgoing paragraphs, we are of the considered view that the decision of the Hon'ble Madras High Court inL & T Infrastructure Development Projects Limited (supra), being the sole decision by any Hon'ble High Court on the issue under consideration before us, is binding on us in the absence of any contrary decision by any other Hon'ble High Court including the Hon'ble Jurisdictional High Court. Further, the decision in L & T Infrastructure Development Projects Limited (supra) has been rendered by a forum higher in the judicial hierarchy as compared to the decision in DCIT v/s Progressive Constructions Ltd (supra)rendered by the Special Bench of the Tribunal on this issue. Therefore, we are of the considered view that the learned CIT(A) correctly denied the claim of depreciation by the assessee on the right to collect toll on the roads developed by it on a BOT basis by following the decision of the Hon'ble Madras High Court inL & T Infrastructure Development Projects Limited (supra). At the cost of repetition, the other aspect, i.e. claim of depreciation by treating the road as a tangible asset, has already been found to be covered against the assessee by the decisions of the Hon'ble Jurisdictional High Court. Therefore, we find no infirmity in the findings of the learned CIT(A) vide impugned order and the same is upheld. Further, we find that the benefit of amortisation for the period of the Concession Agreement granted by the AO and upheld by the CIT(A) is in consonance with Circular No. 9 of 2014, dated 23/04/2014 issued by the CBDT. Accordingly, the grounds raised by the assessee in its appeal for the assessment year 2013-14 are dismissed.

25. Since similar grounds have been raised by the assessee in its appeal for the assessment year 2014-15, our findings/conclusions as rendered in the assessee's appeal for the assessment year 2013-14 shall apply *mutatis mutandis*. Accordingly, the grounds raised by the assessee in its appeal for the assessment year 2014-15 are dismissed.

26. In the result, the appeal by the assessee for the assessment years 2013-14 and 2014-15 are dismissed.

Order pronounced in the open Court on 17/09/2024

Sd/-	**Sd/-**
AMARJIT SINGH	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED:17/09/2024

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The PCIT / CIT (Judicial);
(4) The DR, ITAT, Mumbai; and
(5) Guard file.

By Order

Assistant Registrar
ITAT, Mumbai