

आयकर अपीलिय अधिकरण पुणे न्यायपीठ "ए" पुणे में  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCH "A", PUNE**

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष  
**BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM**

**आयकर अपील सं. / ITA No.1299/PUN/2015**

**निर्धारण वर्ष / Assessment Year : 2011-12**

The Income Tax Officer,  
Ward 1(1), Nashik

.... अपीलार्थी/Appellant

Vs.

M/s. Ashoka Highways (Bhandara) Ltd.,  
S No.861, Ashoka House,  
Ashoka Marg, Wadala,  
Nashik – 422011

.... प्रत्यर्थी / Respondent

PAN: AAGCA2213A

अपीलार्थी की ओर से / Appellant by : Shri Rajeev Kumar, CIT

प्रत्यर्थी की ओर से / Respondent by : Shri Pravin R. Rathi

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| सुनवाई की तारीख /<br><b>Date of Hearing : 17.08.2017</b> | घोषणा की तारीख /<br><b>Date of Pronouncement: 30.08.2017</b> |
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**आदेश / ORDER**

**PER SUSHMA CHOWLA, JM:**

The appeal filed by the Revenue is against the order of CIT(A)-1, Nashik, dated 24.07.2015 relating to assessment year 2011-12 against the order passed under section 143(3) of the Income-tax Act, 1961 (in short 'the Act').

2. The Revenue has raised the following grounds of appeal:-

1. *Whether on the facts and in the circumstances of the case, and in law, the Ld. CIT(A)-I, Nashik was justified in allowing the depreciation of Rs.63,05,34,911/- claimed on the asset "Right to collect Toll".*

2. *Whether on the facts and in the circumstances of the case, and in law, the Ld. CIT(A)-I, Nashik was justified in holding that the assessee is eligible for depreciation on asset "Right to Collect Toll".*
3. *The appellant prays the order of the Assessing Officer may be restored.*
4. *The appellant prays to adduce such further evidence to substantiate his case.*

3. The learned Authorized Representative for the assessee at the outset pointed out that the issue raised in the present appeal is squarely covered by the order of Tribunal in sister concern's case i.e. Ashoka Infrastructure Ltd. Vs. ACIT in ITA Nos.1452 to 1457/PUN/2014, relating to assessment years 2006-07 to 2011-12, order dated 30.06.2017.

4. The learned Departmental Representative for the Revenue placed reliance on the order of Assessing Officer.

5. We have heard the rival contentions and perused the record. Briefly, in the facts of the case, the assessee was engaged in the business of development operations and maintenance of infrastructure facilities. For the year under consideration, the assessee had filed the return of income declaring total income at Nil. The case of assessee was selected for scrutiny and during the course of assessment proceedings, the Assessing Officer noted that the assessee had claimed depreciation on 'Right to Collect Toll' at Rs.63,09,15,059/-. The Assessing Officer held that the said depreciation was not allowable to the assessee being claimed on an intangible asset i.e. 'Right to Collect Toll'; Concurrently amortization of expenses at Rs.14,63,16,551/- was allowed to the assessee.

6. The CIT(A) allowed the claim of assessee in turn, relying on the decision of the Pune Bench of Tribunal in the case of Ashoka Bridgeways in

ITA No.686/PN/2012, relating to assessment year 2007-08, order dated 29.04.2013.

7. The Revenue is in appeal against the order of CIT(A) since twin conditions set forth in section 32(1) of the Act are not satisfied i.e. in the case of assessee, road is neither owned wholly or partly by the assessee nor its business. On the other hand, the assessee was claiming depreciation on the cost incurred for construction of road, which was not allowable in the hands of assessee.

8. We find that the issue raised in the present appeal is squarely covered by the subsequent order of the Tribunal in Ashoka Infrastructure Ltd. Vs. ACIT (supra), wherein it was held as under:-

*“17. We have heard the rival contentions and perused the record. Search under section 132 of the Act was conducted at the premises of assessee on 20.04.2010. The assessee was incorporated for executing infrastructure project of laying down four lanes and for strengthening of Pune-Ahmednagar road with private finance on toll rights under Built-Operate-Transfer basis. On completion of the project, the operations started on 06.07.2005. The assessee for the year under consideration had collected toll to the extent of Rs.17.16 crores and had claimed depreciation to the extent of Rs.10,61,88,185/-. The said claim of depreciation on license to collect toll being an intangible asset, in view of Government notification granting such rights was claimed in the original return of income by the assessee. The assessment in the case of assessee for assessment year 2006-07 was completed under section 143(3) of the Act and the said claim was allowed. Further, in assessment year 2007-08, similar claim of depreciation on intangible asset was denied to the assessee. However, the Tribunal in ITA No.989/PN/2010, relating to assessment year 2007-08 vide order dated 18.07.2013 had allowed the claim of depreciation on license to collect toll @ 25% being intangible asset within the scope of section 32(1)(ii) of the Act.*

*18. The assessee made a similar claim in the return of income filed under section 143(3) r.w.s 153A of the Act. However, the Assessing Officer denied the said claim of assessee in all the years under consideration holding that the assessee was not the owner of road attached to the said right and the asset road was not used in the business of assessee. The Assessing Officer also held that the right to collect toll was not a license. The CIT(A) on the other hand, relied on the circular issued by the CBDT giving clarification on treatment of expenditure incurred for development of roads / highways in Built-Operate-Transfer agreement. The CBDT vide circular No.9/2014, dated 23.04.2014 gave clarification on claim of depreciation under section 32(1)(ii) of the Act and clarified that since the assessee does not hold any rights in the project except recovery of toll fees to recoup the expenditure incurred, it thus, cannot be treated as owner of property either wholly or partly for the purpose of allowability of depreciation under section 32(1)(ii) of the Act. The CBDT denied the claim of depreciation but held the persons to be eligible for*

deduction on account of amortized cost incurred in creation of infrastructure facility of roads / highways over the period of concessional agreement (AIR) after excluding the time taken for creation of such facilities. In view of the said clarification of the CBDT, the assessee's claim for depreciation on right / license to collect toll under section 32(1)(ii) of the Act, treating the same as intangible asset, was rejected and the order of Assessing Officer in amortizing the expenditure incurred on development of roads/highways on BOT basis, over the period of time involved was upheld, by the CIT(A). The assessee is in appeal against the order of CIT(A) in this regard.

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:-

"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:

"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'.**" (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 'owner' 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. We may observe that the Hon'ble Bombay High Court in the case of 'Pruthvi Brokers & Shareholders Pvt. Ltd.' (supra), while relying upon the various decisions of the Hon'ble Supreme Court and other Hon'ble High Courts, has held that even if a claim is not made before the AO it can be made before the appellate authorities. The jurisdiction of the appellate authorities to entertain such a claim is not barred. The Hon'ble Bombay High Court while relying upon the decision of the Hon'ble Supreme Court in the case of 'Jute Corporation of India Limited vs. CIT' 1991 Supp (2) SCC 744 = (1991) 187 ITR 688 has observed that the power of the Appellate Commissioner is coterminous with that of the Income Tax Officer and an appellate authority while hearing appeal against the order of the subordinate authority, has all the powers which the original authority may have in deciding the questions before it, subject to the restrictions or limitations, if any, prescribed by statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. An assessee is entitled to raise not merely additional legal submissions before the appellate authorities but is also entitled to raise additional claims before them. The appellate authorities have the discretion whether or not to permit such additional claims to be raised. It cannot, however, be said that they have no jurisdiction to consider the same. The appellate authorities have jurisdiction to deal not merely with additional grounds which became available on account of change of circumstances or law, but with additional grounds which were available when the return was filed but could not have been raised at that stage. The words 'could not have been' raised must be construed liberally and not strictly. It is open to the assessee to claim a deduction before the appellate authority which could not have been claimed before the AO. The Hon'ble Bombay High Court has further observed that the decision of Hon'ble Supreme Court in the case of 'Goetze (India) Limited v. CIT' (2006) 157 Taxman 1, regarding the restriction of making the claim through a revised return was limited to the powers of the Assessing Authority and the said judgment does not impinge on the power or negate the powers of the appellate authorities to entertain such claim by way of additional ground. Reliance can also be placed in this regard on the decisions of the Tribunal in the case of "PV. Ananthkrishnan vs. ACIT" in ITA No.1820/M/2011 decided on*

05.05.2014 and in the case of "The Presidency Co-operative Housing Society Ltd. vs. ACIT in ITA No.4051/M/2011 decided on 16.05.2014.

*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 amortization for 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).*

*In view of the above discussed factual and legal position, we have no hesitation to hold that the assessee is entitled to put his alternate claim that the deduction allowable to him may be considered as allowable as depreciation treating the project/investments made under the head "Plant & machinery" or treating it as a right/license to collect the toll tax as intangible asset.*

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 1<sup>st</sup> 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.*
- ii) 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)(i) 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(1)(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(1)(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(1)(i) 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 inurrence 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(1)(i1) 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(1)(i1) 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 within the scope of Section 32(1)(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.”*

9. Following the same parity of reasoning, we hold that the assessee is entitled to claim the depreciation on intangible assets as provided under section 32(1)(ii) of the Act. 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 thus, directed to allow the claim of

assessee vis-à-vis depreciation on intangible asset under section 32(1)(ii) of the Act.

10. In the result, the appeal of Revenue is dismissed.

Order pronounced on this 30<sup>th</sup> day of August, 2017.

**Sd/-**  
**(ANIL CHATURVEDI)**  
लेखा सदस्य / ACCOUNTANT MEMBER

**Sd/-**  
**(SUSHMA CHOWLA)**  
न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 30<sup>th</sup> August, 2017.

GCVSR

**आदेश की प्रतिलिपि अग्रहित/Copy of the Order is forwarded to :**

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-1, Nashik;
4. आयकर आयुक्त / The Pr. CIT-1, Nashik;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "ए" / DR 'A', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary  
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune