

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F" MUMBAI**

**BEFORE SHRI S.RIFAUH RAHMAN (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA No.848/MUM/2020
(Assessment Year: 2012-13)**

Deputy Commissioner of Income
Tax, Central Circle – 7(2),
Room No. 655, Aayakar Bhavan,
M.K. Road, Mumbai -400 020

Vs. M/s Mumbai Nasik Expressway
Ltd., 803, 8th Floor, A-Wing,
One BKC, Bandra Kurla Complex
Bandra (E), Mumbai – 400 051

PAN No. AAECM3349K

(Revenue)

(Assessee)

Assessee by : None
Revenue by : Ms. Usha Gaikwad, D.R

Date of Hearing : 25/08/2021
Date of pronouncement : 01/09/2021

ORDER

PER RAVISH SOOD, J.M:

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-49, Mumbai, dated 05.11.2019, which in turn arises from the order passed by the A.O u/s 143(3) r.w.s 263 of the Income Tax Act, 1961 (for short 'Act'), dated 31.08.2017. The revenue has assailed the impugned order on the following solitary ground before us:

- “1. Whether on the facts and circumstances of the case and in the law, the Ld. CIT(A) erred in deleting the disallowance made by the Assessing Officer without considering the fact that the matter is sub-judice and the department has not accepted the decision of the Hon'ble ITAT w.r.t order u/s 263 of the Act passed by the CIT.”
2. Briefly stated, the assessee company is engaged in the business of improvement, operation and maintenance, rehabilitation and strengthening of

existing two lane road and widening to four lane divided carriageway from Km. 539.5 to Km. 440 (Vadape-Gonde Section) of NH-3 on Build, Operate and Transfer (BOT) basis in the State of Maharashtra. The assessee company had entered into a concessionaire agreement with National Highway Authority of India (NHAI) on 14th October, 2005, which laid down the rights, responsibilities and obligations of the assessee. The assessee company had filed its return of income for A.Y. 2012-13 on 27.09.2010, declaring a total loss of Rs.153,87,93,284/- and 'book profit' u/s 115JB of Rs.7,56,60,340/-. Original assessment was framed by the A.O u/s 143(3) of the Act, dated 30.03.2015 and the loss returned by the assessee company was accepted as such.

3. After culmination of the assessment proceedings, the Pr.CIT (Central)-4, Mumbai, called for the assessment records of the assessee company. Observing, that the A.O while framing the assessment vide his order passed u/s 143(3), dated 30.03.2015 had wrongly allowed the assessee's claim for depreciation u/s 32(1)(ii) of Rs.182.79 crore, the Pr.CIT called upon the assessee to explain as to why the assessment order may not be set-aside in exercise of the powers vested with him u/s 263 of the Act. As the reply filed by the assessee did not find favour with the Pr.CIT, therefore, he vide his order u/s 263 of the Act set-aside the assessment order qua the issue of the assessee's claim of depreciation u/s 32(1)(ii) @ 25% with reference to the expenditure that was incurred by it for development of roads as per BOT agreement, with a direction to the A.O to frame a de novo assessment after taking note of the directions of the CBDT in Circular No. 9 of 2014, dated 23.04.2014.

4. The A.O in the course of the set-aside proceedings observed, that the assessee company which was awarded a project by NHAI of NH-3 on BOT basis had capitalized the cost of the project in its books of accounts and had written off the same over the period of BOT contract of 19 years from the completion of construction of the same. However, it was observed by the A.O, that the

assessee while computing its taxable income had claimed depreciation @ 25%. Referring to the annual accounts of the assessee for the year under consideration, it was observed by the A.O that as per 'Annexure 2' to Form 3CD (as per Form 3CB to 3CD) in Block VIII pertaining to Concession Rights an amount of Rs.334,40,25,560/- had been added during the year in question to the opening W.D.V of Rs.415,29,22,175/-; and depreciation was claimed @ 25% on the total amount of Rs.731,17,57,434/- therein amounting to Rs.182,79,39,359/-. In the backdrop of the aforesaid facts the A.O issued a 'Show cause' notice (SCN) to the assessee company and called upon it to explain that as to why its claim for depreciation on roads @ 25% amounting to Rs.182,79,39,359/- may not be disallowed u/s 32(1)(ii) of the Act. In support of his aforesaid conviction, it was observed by the A.O that the CBDT vide Circular No. 9 of 2014, dated 23.4.2014, had clarified that in respect of BOT arrangements for development of roads/highways etc. the assessee undertaking the project of improvement, operation and maintenance etc. not being an owner of the property either wholly or partly, thus, would not be eligible for depreciation u/s 32(1)(ii) of the Act. It was further noticed by the A.O that the CBDT vide its aforesaid Circular No. 9 of 2014 (supra), had clarified that the cost of construction on development of infrastructure facility of roads/highways under BOT projects was to be amortized and claimed as allowable business expenditure under the Act. Backed by his aforesaid observation, the A.O disallowed the assessee's claim of depreciation of Rs.182,79,39,359/-. Accordingly, the A.O vide his order passed u/s 143(3) r.w.s 263, dated 31.08.2017 assessed the income of the assessee company at Rs. 28,91,46,080/-.

5. Aggrieved, the assessee carried the matter in appeal before the CIT(A). It was observed by the CIT(A) that the order passed by the Pr. CIT-4, Mumbai, u/s 263 of the Act, dated 22.03.2017 had thereafter been quashed by the Tribunal, as under :

"We noted that this issue is again decided by the Special Bench of ITAT Hyderabad in the case of ACIT vs. Progressive Construction Ltd. {2018} 92 taxmann.com 104 [Hyderabad-Trib.] SB, wherein it is held that the expenditure incurred by the assessee for construction of road under BOT contract by Gout, of India, have given rise to an intangible asset as defined under explanation 3(b) read with section 32(1)(iii) of the Act, assessee would be eligible to claim depreciation on such asset at specified rates. The Special Bench has finally held that although the assessee is not the owner of the land but the right granted by the Gout, of India under the Concession Agreement (CA) has a license permitting the assessee to do certain acts and deeds which otherwise would have unlawful or not possible to do in the absence of CA. Thus, the right granted by the assessee under CA to operate the project/ project facility and collect toll charges is a license or akin to license, hence, being an intangible asset eligible for depreciation under section 32(1)(ii) of the Act. Finally, the Tribunal decided the issue vide Para 14 to 17 as under: -

.....

12. As the issue is highly debatable in the given facts of the case, revision under section 263 of the Act is not permissible. Hence, the revision order is quashed and the appeal of assessee is allowed."

Observing, that as the order passed by the Pr. CIT- 4, Mumbai u/s 263 of the Act had been set-aside by the Tribunal, therefore, as a consequence thereto the assessment framed by the A.O vide his order passed u/s 143(3) r.w.s 263, dated 31.08.2017 could not survive on standalone basis, the CIT(A) deleted the disallowance of the assessee's claim for depreciation of Rs.182.79 crores that was made by the A.O.

6. The revenue being aggrieved with the order passed by the CIT(A) has carried the matter in appeal before us. The Id. Authorized Representative (for short 'A.R') for the assessee at the very outset submitted that as the order passed by the Pr. CIT-4, Mumbai, u/s 263 of the Act, dated 22.03.2017 had been quashed by the Tribunal, therefore, the CIT(A) had rightly observed that as a consequence thereto the assessment framed by the A.O u/s 143(3) r.w.s 263, dated 31.08.2017 cannot survive on a standalone basis and thus, had to meet the same fate.

7. Per contra, the Id. Departmental Representative (for short 'D.R') did not controvert the aforesaid contentions that were advanced by the assessee's counsel.

8. We have heard the Id. Authorized Representatives for both the parties, perused the orders of the lower authorities and the material available on record. As observed by us hereinabove, the original assessment was framed by the A.O vide his order passed u/s 143(3), dated 30.03.2015, wherein the returned loss of Rs.153,87,93,284/- and the 'book profit' u/s 115JB of Rs.7,56,60,340/- was accepted as such. Observing, that the A.O while framing the assessment u/s 143(3), dated 30.03.2015 had wrongly allowed the assessee's claim for depreciation of Rs. 182.79 crores u/s 32(1)(ii) i.e @ 25% with reference to the expenditure that was incurred by it for development of roads as per BOT agreement, the Pr.CIT-4, Mumbai had vide his order passed u/s 263 of the Act, dated 22.03.2017 set-aside the assessment order with a direction to the A.O to frame a de novo assessment after considering the CBDT Circular No. 9 of 2014, dated 23.04.2014 after verifying the factual position. Thereafter, the A.O vide his order passed u/s 143(3) r.w.s 263, dated 31.08.2017 giving effect to the directions of the Pr.CIT-4, Mumbai, had assessed the income of the assessee company at Rs. 28,91,46,080/-. In the meantime, the assessee had assailed the order passed by the Pr. CIT u/s 263 of the Act, dated 22.03.2017 before the Tribunal, which was set-aside by the Tribunal vide its order passed in Mumbai Nasik Expressway Limited Vs. The Pr. Commissioner of Income-tax, Central Circle 4, Mumbai in ITA No. 3910/Mum/2017; dated 15.04.2019, observing as under :

"8. We have heard the rival contentions and gone through the facts and circumstances of the case. We have gone through the facts and noted from the decision relied on by the learned Counsel for assessee of Hon'ble Supreme Court in the case of Mysore Minerals Ltd. v. CIT (239 ITR 775), wherein it is held as under: -

“In our opinion, the term owned” as occurring in section 32(1) of the Income-tax Act, 1961, must be assigned a wider meaning. Anyone in possession of property in his own title exercising such dominion over the property as would enable others being excluded therefrom and having the right to use and occupy the property and/or to enjoy its usufruct in his own right would be the owner of the buildings though a for-ma) deed of title may not have been executed and registered as contemplated by the Transfer of Property Act, the Registration Act, etc. "Building owned by the assessee" the expression as occurring in section 32(1) of the income-tax Act means the person who having acquired possession over the building in his own right uses the same for the purposes of the business or profession though a legal title has not been conveyed to him consistently with the requirements of laws such as the Transfer of Property Act and the Registration Act, etc., but nevertheless is entitled to hold the property to the exclusion of all others.”

9. Similarly, basing the above decision, it is very clear that an assessee need not be a legal owner of an asset to claim depreciation. In case where an assessee is entitled to hold the property to the exclusion of all others and exercise dominion over the property and have the right to use and occupy the property and/or to enjoy its usufruct in his own right would be the owner. All of these conditions in our view is satisfied in the present case and thus the assessee is entitled to depreciation under section 32(1)(ii) of the Act on such intangible assets. We also noted that the Circular also does not dispute that the expense incurred by the assessee brings to it an enduring benefit in the form of right to collect toll during the period of the agreement. In the present case as mentioned earlier, and at the cost of repetition we reiterate that the Company has incurred huge costs with an intention to avail an enduring benefit for the purposes of its business which is to collect toll as per the facts stated above. Separately, we would like to refer a recent decision of the Coordinate Bench of Mumbai Tribunal in the case of ACIT v. West Gujarat Expressway Ltd. (2015) 154 ITD 103. The Tribunal in this case after considering the Circular has held that the expense incurred by the assessee for availing an enduring benefit is nothing but an intangible asset and that the assessee is entitled to depreciation on the same under section 32(1)(ii) of the Act. The extract of one of the important observations made by the Tribunal is reproduced below:

“It is not disputed that the assessee has been given license/commercial right over the project to receive the toll. The assessee may be 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(l)(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. 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.”

10. Further, we noted that the Circular states that the assessee does not hold any right in the project except the recovery of toll fee to recoup the expense incurred. This view was also adopted by the Revenue in the aforesaid case wherein it stated that the assessee has not acquired any right of the nature referred to in section 32(1)(ii) of the Act and only allows the assessee to recover the costs incurred for the construction of road facility. The Tribunal has observed this to be factually and legally misplaced. The relevant extract of the decision is reproduced below:

“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)(ii) of the Act required that the assets mentioned therein should be acquired by the assessee after spending money. The said argument in our view is factually and legally misplaced. Factually speaking, it is wrong to say that impugned right acquired by the assessee was without incurrence of any cost. In fact, it is quite evident that assessee got the right to collect toll for the specified period only after incurring expenditure through its own resources on development, construction and maintenance of the infrastructure facility. Secondly, section 32(1)(ii) 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.”

11. Now the question arises before us whether in the above given facts the issue is debatable or not. We noted that this issue is again decided by the Special Bench of ITAT Hyderabad in the case of ACIT vs. Progressive Construction Ltd. (2018) 92 taxmann.com 104 (HyderabadTrib.) SB, wherein it is held that the expenditure incurred by the assessee for construction of road under BOT contract by Govt. of India have given rise to an intangible asset as defined under explanation 3(b) read with section 32(1)(iii) of the Act, assessee would be eligible to claim depreciation on such asset at specified rates. The Special Bench has finally held that although the assessee is not the owner of the land but the right granted by the Govt. of India under the Concession Agreement (CA) has a

license permitting the assessee to do certain acts and deeds which otherwise would have unlawful or not possible to do in the absence of CA. Thus, the right granted by the assessee under CA to operate the project/ project facility and collect toll charges is a lisenice or akin to licence, hence, being an intangible asset eligible for depreciation under section 32(1)(ii) of the Act. Finally, the Tribunal decided the issue vide Para 14 to 17 as under: -

“14. It has been the contention of the learned Senior Standing Counsel that as the term "license" has not been defined under the Income Tax Act, 1961, the definition of "license" under the Indian Easements Act, 1882, has to be looked into. Accepting the aforesaid contention of the learned Senior Standing Counsel, let us examine the definition of "license" extracted herein above. A plain reading of section 52 of the Act makes it clear, a right granted to a person to do or continue to do something in the immovable property of the grantor, which, in the absence of such right would be unlawful and such right does not amount to an easement or interest in the property, then such right is called a license. If we examine the facts of the present case, vis-a- vis, the definition of license under the Indian Easements Act, 1882, it would be clear that immovable property on which the project/project facility is executed/implemented is owned by the Government of India and it has full power to hold, dispose off and deal with the immovable property. By virtue of the C.A., assessee has only been granted a limited right to execute the project and operate the project facility during the concession period, on expiry of which the project/project facility will revert back to the Government of India. What the Government of India has granted to the assessee is the right to use the project site during the concession period and in the absence of such right, it would have been unlawful on the part of the concessionaire to do or continue to do anything on such property. However, the right granted to the concessionaire has not created any right, title or interest over the property. The right granted by the Government of India to the assessee under the C.A. has a license permitting the assessee to do certain acts and deeds which otherwise would have been unlawful or not possible to do in the absence of the C.A. Thus, in our view, the right granted to the assessee under the C.A. to operate the project/project facility and collect toll charges is a license or akin to license, hence, being an intangible asset is eligible for depreciation under section 32(1)(ii) of the Act.

15. Even assuming that the right granted under the C.A. is not a license or akin to license, it requires examination whether it can still be considered as an intangible asset as described under section 32(1)(ii) of the Act. In this context, it has been the contention of the learned Senior Standing Counsel that the intangible asset mentioned under section 32(1)(ii) of the Act are specifically identified assets, except, the assets termed as "any other business or commercial rights of similar nature". He had submitted, applying the principle of ejusdem generis the rights referred to in the

expression "any other business or commercial rights of similar nature", should be similar to one or more of the specifically identified assets preceding such expression. The aforesaid contention of the learned Departmental Representative is unacceptable for the reasons enumerated hereinafter.

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 *eiusdem 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 *eiusdem 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."

12. As the issue is highly debatable in the given facts of the case, revision under section 263 of the Act is not permissible. Hence, the revision order is quashed and the appeal of assessee is allowed."

As the order passed by the Pr.CIT-4, Mumbai u/s 263 of the Act, dated 22.03.2017 had been set-aside by the Tribunal, therefore, the CIT(A) taking cognizance of the said fact had quashed the assessment order passed by the

A.O u/s 143(3) r.w.s 263, dated 31.08.2017. We have given a thoughtful consideration to the issue before us and find no infirmity in the view taken by the CIT(A) that now when the order passed by the Pr. CIT-4, Mumbai u/s 263 of the Act, dated 22.03.2017 had been quashed by the Tribunal, therefore, as a consequence thereto the assessment order passed by the A.O u/s 143(3) r.w.s 263, dated 31.03.2017 cannot survive on a standalone basis and had to meet the same fate. Our aforesaid view that when the very order passed u/s 263 of the Act by the CIT/Pr. CIT is set-aside, then, the assessment framed pursuant to the said order cannot survive on a standalone basis is supported by the order of the ITAT, Delhi in the case of DCIT Vs. M/s Eastern India Power Tech Ltd., ITA 683/Del/2012. Also, a similar view had been taken by the ITAT Ahmedabad in the case of DCIT Vs. M/s The Grand Bhagwati Banquets and Hotels Ltd., ITA No. 2528/Ahd/2016. Accordingly, in the backdrop of our aforesaid deliberations, we concur with the view taken by the CIT(A) that now when the order passed by the Pr. CIT-4, Mumbai u/s 263 of the Act, dated 22.03.2017 in itself had been quashed by the Tribunal, therefore, as observed by him, and rightly so, the assessment order passed by the A.O in consequence thereto u/s 143(3) r.w.s 263, dated 31.08.2017 could not be sustained and was liable to be vacated. We, thus, in terms of our aforesaid observations finding no infirmity in the view taken by the CIT(A) uphold his order. The **Ground of appeal No. 1** is dismissed.

9. Resultantly, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 01.09.2021

Sd/-
 (S. Rifaur Rahman)
 ACCOUNTANT MEMBER

Sd/-
 (Ravish Sood)
 JUDICIAL MEMBER

Mumbai;
 Dated: 01.09.2021
 *PS: Rohit

Copy of the Order forwarded to :

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

BY ORDER,
//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai