IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI "A" BENCH: NEW DELHI

(THROUGH VIDEO CONFERENCING)

BEFORE SHRI G.S. PANNU, VICE PRESIDENT AND
SHRI KUL BHARAT, JUDICIAL MEMBER

ITA Nos.1592 & 1593/Del/2017
Assessment Years : 2012-13 & 2013-14

BSC C&C Kurali Toll Road Ltd., 74, Hemkunt Colony, New Delhi-110048. PAN-AADCB1505H	Vs	DCIT, Circle-5(1), New Delhi.
APPELLANT		**RESPONDENT**
Appellant by	Sh. Amarjeet Singh, CA.	
Respondent by	Sh. Satpal Gulati, CIT DR	
Date of Hearing	30.03.2021	
Date of Pronouncement	18.05.2021	

ORDER

PER KUL BHARAT, JM :

Both appeals filed by the assessee for the assessment years 2012-13 & 2013-14 are directed against the order of learned CIT(A)-35, New Delhi both dated 02.02.2017.

2. Both appeals were taken up together and being disposed of by way of a consolidated order. First we take up **ITA No.1592/Del/2017** relating to Assessment Year 2012-13 wherein the assessee has raised following grounds of appeal:-

1. "That on the facts and circumstances of the case and in law, the Learned CIT (Appeals) has erred while confirming the reduction of depreciation on Toll Road developed by the appellant company from 25% to 10% and confirming addition of Rs.70,58,54,074/-

(including addition made as Ground of Appeal No.-2) on the ground that the roads are included in the definition of Building without accepting appellant's contention that the appellant company has Rights in the developed Toll Road and the appellant is eligible for depreciation @ 25% under the head Intangible Assets.

2. That on the facts and circumstances of the case and in law, the Learned CIT (Appeals) has erred while confirming deduction of Grant of Rs.43.92 Crores received from NHAI out of the total cost of project of Rs.441,27,05,614/- on the ground that the grant given by NHAI is to meet part of the cost of the project and is not a contribution towards the Equity Support.

3. That on the facts and circumstances of the case and in law, the Learned CIT (Appeals) has erred while confirming disallowance of provision made for major maintenance expenses amounting to Rs.3,00,00,000/- on the ground that the said provision is contingent in nature and the assessee has not made any expenditure on that count during the year under consideration and such a maintenance envisaged in the Common Rupee Loan Agreement at best is merely an estimate, indefinite, likely to take place at some future date and the same has not taken place at all.

3. Facts in brief are that the case of the assessee company was taken up for scrutiny assessment and the assessment u/s 143(3) of the Income tax Act, 1961 (in short "the Act") was framed vide order dated 27.02.2015. Thereby, the claim of the assessee regarding depreciation @ 25% and provision for maintenance of Road was disallowed. However, the Assessing Officer allowed depreciation @ 10% instead 25% as claimed by the assessee.

4. Aggrieved against this, the assessee preferred appeal before Ld.CIT(A) who sustained both the disallowances.

5. Now, the assessee is in further appeal before this Tribunal.

6. Ground of appeal No.1 raised by the assessee is against adopting the depreciation @10% as against 25% claimed by the assessee.

7. Ld. Counsel for the assessee submitted that the issue is no more *res integra*. Under the identical facts, the issue is already decided in favour of the assessee vide various judicial pronouncements. Ld. Counsel for the assessee submitted that the assessee had developed Toll Road on Kurali-Kiratpur section in Punjab on BOOT basis. The contract was awarded by National Highway Authority of India ("NHAI"). The entire cost of construction was Rs.4,41,27,05,614/- including grant from NHAI amounting to Rs.43.92 crores. The assessee had claimed depreciation on the same @ 25% under the head intangible assets. He further submitted before the Assessing Officer it was claimed that the assessee is entitled for depreciation @ 25%. However, the Assessing Officer restricted it to 10% following the judgement of Hon'ble Allahabad High Court rendered in the case of *CIT vs Noida Toll Bridge Co. Ltd. 213 Taxman 333*. He contended that the authority below erred in holding that the assessee owned the road, which *exfacie* is incorrect. He submitted that the assessee is given right to collect the toll fee, such right cannot be equated with ownership. He drew our attention to clause 3.2 of Chapter II of contract to buttress the contention that the assessee is entitled to enjoy levy and appropriate the fee from vehicles and persons

liable to payment of fee for using the highway or any part thereof. Hence, the assessee got right only to collect fee from the vehicles entering the road. He submitted that the Assessing Officer has failed to take note of the judgement of the Hon'ble Bombay High Court and the decision of Special Bench of this Tribunal. The Hon'ble Bombay High Court in *North Karnataka Expressway Ltd. vs CIT in Appeal No.499 of 2012* and also the Mumbai Bench of this Tribunal referred in the case of *ACIT vs M/s. West Gujarat Expressway Ltd. in ITA Nos. 5904 & 6244/M/2012* vide order dated 15.04.2015 have ruled in favour of the assessee. He also relied on the decision of the Co-ordinate Bench of this Tribunal in the case of *DCIT vs M/s. Progressive Construction Ltd. in ITA No.214/Hyd/2014* dated 07.11.2014 and also on the decision of the Indore Bench of this Tribunal in the case of *M/s. Kalyan Toll Infrastructure Ltd. vs ACIT in ITA Nos. 201 & 247/Ind/2008* vide order dated 14.12.2010.

8. Ld. Counsel for the assessee also relied on the decision of Hyderabad Bench of this Tribunal in the case of *M/s. Mokama Munger Highway Ltd. vs ACIT in ITA Nos. 1729, 2145 & 2146/Hyd/2018* order dated 03.07.2019. Ld. Counsel for the assessee submitted that the Assessing Officer and Ld.CIT(A) have relied upon the decision of *CIT vs Noida Toll Bridge Co. Ltd. 213 Taxman 333*. He submitted that in the light of judgement of Hon'ble Bombay High Court in the case of *North Karnataka Expressway Ltd. vs CIT in Appeal No.499 of 2012 (supra)* which the assessee had relied, the assessee is entitled for depreciation @

25%. He therefore, contended that the judgement of the Hon'ble Allahabad High Court is not to be followed. As it is settled law in, if there are two possible views which is supporting the assessee should be adopted. In support of this contention, re relied upon the judgement of Hon'ble Apex Court rendered in the case of *CIT vs M/s Vegetable Products Ltd. 88 ITR 192 (SC).*

9. On the contrary, Ld. CIT DR opposed these submissions and supported the orders of the authorities below.

10. We have heard the rival submissions and perused the material available on record. The issue under dispute is with regard to availability of depreciation to the assessee whether it is to be allowed keeping the right to collect toll fee as intangible assets or it to be treated as building or plant & machinery as held in the decision relied by the Ld.CIT(A) rendered in the case of *CIT vs Noida Toll Bridge Co. Ltd. (supra).* We find that there were conflicting decisions rendered by the Hon'ble High Court and Co-ordinate Benches of the Tribunal. However, the Tribunal in the case of *ACIT vs M/s. West Gujarat Expressway Ltd. (supra)* after considering the conflicting views held as under:-

> *28. "In view of the express provisions of the Act, we have no doubt to hold that the assessee is entitled to collect tax being an intangible commercial right under section 32(1)(ii) at the rate as has been prescribed under the relevant rules. Our above view is further supported by the decision of the co-ordinate Pune bench of the Tribunal in the case of M/s. Ashoka Infrastructure Ltd. Vs. ITO in ITA No.989/PN/2010 & ITA No.1105/PN/2010,wherein, the*

Tribunal while further relying upon another decision of the Co-ordinate Bench of the Tribunal in the case of 'Ashoka Infraways Pvt. Ltd. Vs. ACIT' in ITA No.185 & 186/PN/2012 dated 29.04.2013, has held in clear terms that the claim of the assessee for depreciation on "licence to collect toll" being an 'intangible asset' falling within the scope of section 32(1)(ii) of the Act is liable to be upheld. The relevant part of findings of the Tribunal for the sake of convenience is reproduced as under:

> *"6. At the time of hearing, it was a common point between the parties that an identical issue has been considered by the Pune Bench of the Tribunal in the case of Ashoka Infraways Pvt. Ltd. vs. ACIT vide ITA Nos. 185 & 186/PN/2012 dated 29.04.2013. As per the Tribunal following the precedents by way of various decisions of different Benches of the Tribunal mentioned therein, the claim of the assessee for treating the 'License to collect Toll' as an intangible asset eligible for the claim of depreciation @ 25% as per Section 32(1)(ii) of the Act was justified. The following discussion in the order of the Tribunal dated 29.04.2013 (supra) is relevant :-*
>
> > *"7. Before us, it was a common point between the parties that the impugned issue has been adjudicated in favour of the assessee in the following decisions of the Tribunal:-*
> >
> > *i) Ashoka Buildcon Ltd. in ITA.No.1302/PN/09 dated 20.03.2012.*
> >
> > *ii) M/s. Kalyan Toll Infrastructure Ltd. in ITA.Nos.201 & 247/Ind/2008 dated 14.12.2010.*
> >
> > *iii) Dimension Construction Pvt. Ltd. in 1TA.No.222, 223, 233 & 857/PN/2009 dated 18.03.2011.*

iv) Ashoka Info (P) Ltd. (supra)

v) Reliance Ports and Terminals Ltd. (supra).

8. The Ld. CIT(DR) appearing for the Revenue, has submitted that the 'intangible assets' eligible for depreciation in section 32(1)(ii) of the Act, are only those which are owned by the assessee and have been acquired after spending money. In the case of the assessee, by way of an agreement, assessee was awarded a work to construct a road by using own funds and the expenditure incurred was allowed to be reimbursed by permitting the assessee a concession to collect toll/fees from the motorists using the road. Therefore, it could not be said that such a right was within the purview of section 32(1)(ii) of the Act. However, the Ld. CIT(DR) has not contested the factual matrix that identical issue has been considered by our coordinate Benches in the case of Ashoka Buildcon Ltd. (supra), Kalyan Toll Infrastructure Ltd. (supra), Dimension Construction Pvt. Ltd. (supra) and Ashoka Info (P) Ltd. (supra).

9. On the other hand, the Ld. Representative for the respondent assessee pointed out that the aforesaid argument set up by the Revenue has also been considered in the aforesaid precedents before concluding that the impugned 'Right to collect Toll' was an 'intangible asset' eligible for claim of depreciation @ 25% as per sec. 32(1)01) of the Act.

10. We have carefully considered the rival submissions. Factually speaking, there is no dispute to the fact that the costs capitalised by the assessee under the head 'License to collect Toll' have been incurred for development and construction of the infrastructure facility, i.e., Dewas By- pass Road. It is also not in dispute that the assessee was to build, operate and transfer the said infrastructure facility in terms of an agreement with the Government of Madhya Pradesh. The

expenditure on development, construction and maintenance of the infrastructure facility for a specified period was to be incurred by the assessee out of its own funds. Moreover, after the end of the specified period, assessee was to transfer the said infrastructure facility to the Government of Madhya Pradesh free of charge. In consideration of developing, constructing, maintaining the facility for a specified period and thereafter transferring it to the Government of Madhya Pradesh free of charge, assessee was granted a Right to collect Toll' from the motorists using the said infrastructure facility during the specified period. The said Right to collect the Toll' is emerging as a result of the costs incurred by the assessee on development, construction and maintenance of the infrastructure facility. Such a right has been adjudicated by the Tribunal in the aforesaid precedents to be in the nature of 'intangible asset' falling within the purview of section 32(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)(i1) 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)(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."

7. In terms of the aforesaid precedent, the claim of the assessee in the present case for depreciation on 'License to collect Toll', being an 'intangible asset' falling with the scope of Section 32(1)(ii) of the Act is liable to be upheld. We hold so.

8. 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.

30. So far as the other alternative contention of the assessee that the project be treated as plant & machinery and the depreciation be accordingly allowed to it, we do not find that the said license of right to collect toll in any way falls in the definition of plant & machinery. As held by the Hon'ble Bombay High Court, even the assessee is not the owner of the toll road. The assessee has been given only the right to develop, maintain and operate the toll road and further to collect the toll for the specified period. This right as discussed above is an intangible asset falling under section 32(1)(ii) of the Act."

11. The Special Bench of this Tribunal in *ITA No.1845/Hyd/2014* in the case of *ACIT vs Progressive Construction Ltd.* order dated *14.02.2017* under the identical facts has held as under:-

17. "In the case of Techno Shares and Stocks Ltd. v/s CIT, [2010] 327 ITR 323 (SC), 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. Therefore, respectfully following the view expressed by the Hon'ble Bombay High Court and the Special Bench of this Tribunal, we hold that the assessee is eligible for depreciation @ 25% as claimed by the assessee. Thus, Ground of appeal No.1 raised by the assessee is allowed.

13. At the outset, Ld. Counsel for the assessee submitted that he does not wish to raise Ground No.2 of the appeal. Thus, Ground No.2 raised by the assessee is not pressed hence, the same is dismissed as not pressed.

14. Ground of appeal No.3 raised by the assessee is against the disallowance made by the Assessing Officer with regard to provision made for maintenance of the roads.

15. Ld. Counsel for the assessee reiterated the submissions as made in the written submissions. For the sake of clarity, the submissions of the assessee are reproduced hereunder:-

".....That the appellant company has developed a Toll Plaza at Kurali Kiratpur Section on BOT Basis (Built, Operate and Transfer Basis). The company has to collect Toll from vehicles and as per the terms of the agreement with the employer (NHAI), Company has to execute the Major Maintenance Work of the total stretch once after every 5 years as provided in Clause No. 3.3.7 of Schedule L (Operation & Maintenance) of the Concession Agreement. Only

relevant pages have been attached considering the same very voluminous.

That estimated cost of Major Maintenance is as detailed in the Common Rupee Loan Agreement entered into with the Financers (Banks & Financial Institutions) of the Project. Year-wise amount of Major Maintenance Expenditure is detailed in Schedule 5 - "MMR" of the Common Rupee Loan Agreement. Only relevant Schedule 5 has been attached considering the whole Agreement very voluminous. As per the said Schedule 5, Major Maintenance Expenditure to be incurred in the first 5 years is Rs.60.34 Crores (2.94 + 8.98 + 15.01 + 21.05 + 12.36).

Calculation of the Provision for Major Maintenance of Rs.3.00 Crores is as below:

S. No.	Particulars	Amount (Rs. in Crores)
l	Maintenance Expenditure to be incurred in the first 5 years	60.34
2	Project Operations were started from 09.08.2011	
3	Proportion of Maintenance expenditure for each year shall be	12.07
4	Being not having full year operations of the project, provision has been created only for one quarter i.e. Rs.12.07 Crores/4	3-00

With regard to the allowability of the provision for major maintenance, we have to submit that the above said amount is not a provision, rather it is a mandatory liability imposed on the appellant by way of Concession Agreement as detailed above. This is a liability with regard to expenses which the assessee has to incur against the present receipts/ income.

Case Laws supporting the contention of the appellant:

l. Hon'ble Supreme Court the case of M/s. Rotork Controls India Pvt. Ltd. Vs. CIT (314 ITR 0062 - SC) has given the following findings with regard to a provision:

"FINDINGS:

What is a provision? This is the question which needs to be answered. A provision is a liability which can be measured only by using a substantial degree of estimation.

A provision is recognized when:

(a) an enterprise has a present obligation as a result of a past event;

(b) it is probable that an outflow of resources will be required to settle the obligation; and

(c) a reliable estimate can be made of the amount of the obligation. If these conditions are not met, no provision can be recognized.

Liability is defined as a present obligation arising from past events, the settlement of which is expected to result in an outflow from the enterprise of resources embodying economic benefits.

A past event that leads to a present obligation is called as an obligating event. The obligating event is an event that creates an obligation which results in an outflow of resources. It is only those obligations arising from past events existing independently of the future conduct of the business of the enterprise that is recognized as provision. For a liability to qualify for recognition there must be not only present obligation but also the probability of an outflow of resources to settle that obligation (emphasis supplied).

Lastly, a reliable estimate can be made of the amount of the obligation. In short, all three conditions for recognition of a provision are satisfied in this case."

Hon'ble Apex Court in the above said further gave an example of different options related to the Product Warranties.

> *"To give an example of Product Warranties, a company dealing in computers gives warranty for a period of 36 months from the date of supply. The said company considers following options:*
>
> *(a) account for warranty expense in the year in which it is incurred;*
>
> *(b) it makes a provision for warranty only when the customer makes a claim; and*
>
> *(c) it provides for warranty at 2% of turnover of the company based on past experience (historical trend).*
>
> *The first option is unsustainable since it would tantamount to accounting for warranty expenses on cash basis, which is prohibited both under the Companies Act as well as by the Accounting Standards which require accrual concept to be followed (emphasis supplied). In the present case, the Department is insisting on the first option which, as stated above, is erroneous as it rules out the accrual concept (emphasis supplied).*
>
> *The second option is also inappropriate since it does not reflect the expected warranty costs in respect of revenue already recognized (accrued). In other words, it is not based on matching concept. Under the matching concept, if revenue is recognized the cost incurred to earn that revenue including warranty costs has to be fully provided for. When Valve Actuators are sold and the warranty costs are an integral part of that sale price then the appellant has to provide for such warranty costs in its account for the relevant year, otherwise*

the matching concept fails. In such a case the second option is also inappropriate.

Under the circumstances, the third option is most appropriate because it fulfills accrual concept as well as the matching concept. For determining an appropriate historical trend, it is important that the company has a proper accounting system for capturing relationship between the nature of the sales, the warranty provisions made and the actual expenses incurred against it subsequently. Thus, the decision on the warranty provision should be based on past experience of the company. A detailed assessment of the warranty provisioning policy is required particularly if the experience suggests that warranty provisions are generally reversed if they remained unutilized at the end of the period prescribed in the warranty. Therefore, the company should scrutinize the historical trend of warranty provisions made and the actual expenses incurred against it. On this basis a sensible estimate should be made. The warranty provision for the products should be based on the estimate at year end of future warranty expenses. Such estimates need reassessment every year. As one reaches close to the end of the warranty period, the probability that the warranty expenses will be incurred is considerably reduced and that should be reflected in the estimation amount. Whether this should be done through a pro rata reversal or otherwise would require assessment of historical trend. If warranty provisions are based on experience and historical trend(s) and if the working is robust then the question of reversal in the subsequent two years, in the above example, may not arise in a significant way.

An analysis of the facts of the case of assessee, on the basis of finding given by the Apex Court in the above said case can be made as follows:

(a) Present obligation as a result of past event

The assessee company entered into an agreement with NHAI to develop a Toll Road and collect toll from the vehicles. As per the terms of the agreement with the employer (NHAI) Company has to execute the Major Maintenance work of the total stretch once in every 5 years. The assessee company has a present obligation against the toll fee collected by it. There is an outflow of resources.

(b) it is probable that an outflow of resources will be required to settle the obligation

To settle the above said obligation of Major Maintenance, there is certainly an outflow of the resources.

(c) a reliable estimate can be made of the amount of the obligation. If these conditions are not met, no provision can be recognized.

Estimate of the expenditure has been duly documented in the Schedule - 5 "MMR" of the Rupee Term Loan Agreement in which the consortium of banks have provided that the company will build up a Major Maintenance Reserve.

2. *In the case of Bharat Earth Movers Vs. CIT [245 ITR 428 (SC)], Hon'ble Supreme Court had referred to principles were laid down in the case of Metal Box Co. of India Ltd. Vs. their Workmen [73 ITR 53 (SC)]. Hon'ble Court had extracted and reproduced some relevant principles as under:*

(I) "For an assessee maintaining his accounts on mercantile system, a liability already accrued, though to be discharged at a future date, would be a proper deduction while working out the profits and gains of his business, regard being had to the accepted 3/5 principles of commercial practice and

accountancy. It is not as if such deduction is paid; permissible only in case of amounts actually expended or

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

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

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

.....

Applying the above-said settled principles to the facts of the case at hand we are satisfied that provision made by the appellant company for meeting the liability incurred by it under the leave encashment scheme proportionate with the entitlement earned by employees of the company, inclusive of the officers and the staff, subject to the ceiling on accumulation as applicable on the relevant date, is entitled to deduction out of the gross receipts for the accounting year during which the provision is made for the liability. The liability is not a contingent liability. The High Court was not right in taking the view to the contrary.

The appeal is allowed. The judgment under appeal is set aside. The question referred by the Tribunal to the High Court

is answered in the affirmative, i.e. in favour of the assessee and against the Revenue."

3. Recently, Hyderabad ITAT in the case of Mokama Munger Highway Limited (A group company of the appellant company) in ITA Nos. 1729, 2145 & 2146/Hyd/20i8 for the Assessment Years 2013-14 to 2015-16 decided the above said issue in favour of the assessee. Hon'ble court has held as follows:

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

It has been held likewise in the following decisions:

1. CIT Vs. Hewlett Packard India (P) Ltd. [314 ITR 55 (Del)]

2. Aggarwal and Modi Enterprises (Cinema Project) Co. Pvt. Ltd. Vs. Commissioner of Income tax [281 ITR 469 (Delhi)]

3. DCIT Vs. First Source Solution Ltd. [168 DTR (Mumbai)(Trib) 161]

Prayer:

In view of above submissions, it is submitted that all the conditions for recognizing a liability for the purposes of provisioning- which relates to present obligation arising out of obligating events, involvement of outflow of resources and which involves reliable estimation of obligation stands satisfied and making a provision from the current year's income fulfills accrual concept as well as the matching concept. Further, the project may be terminated, if the appellant defaults or is in material breach of any of the Project Agreements including maintenance. Hence, the disallowance of Rs.3.00 Crores made on account of Provision for Major Maintenance may kindly be allowed to the assessee as it is."

16. Per contra, Ld. CIT DR opposed the submissions and supported the orders of the authorities below.

17. We have heard the rival contentions and perused the material available on record. Ld.CIT(A) has decided the issue against the assessee upholding the action of the Assessing Officer. The relevant contents of Ld.CIT(A) is reproduced as under:-

".....Thus, one of the prime conditions for any deduction on account of business expenditure is that that same should have been incurred during the previous year.'

In the present case, the Toll road became operational in August, 2011. No expenditure was actually incurred for any repair or maintenance in the given previous year. (The appellant has not filed any proof if any of the same.) The liability created by the agreement has not crystallized and the quantified in the previous year. A provision for a contingent liability is not allowable as a deduction (Indian Molasses Co. Pvt. Ltd. vs. CIT (1959) 37 ITR 66 (SC).

I find that the appellant has quoted the decision of Hon'ble SC in the case o M/s. Rotork Controls in support of its contention. However, the facts of the case i not similar to that of the appellant hence I find the reliance of the above decision as ill founded.

The appellant has tried to justify its argument by stating that it has obligation of maintenance for which it has made an estimate of expenses from current years income.

I observe that such a maintenance envisaged in the common Rupee Loan Agreement at best is merely an estimate, indefinite, likely to take place at some future date. In the present year, the same has not taken place at all.

In view of the above fact, I find that the arguments put forth by the AR, ha no force. I observe that the AO has formulated a very comprehensive analysis 01 the subject at para 5 of the assessment order as follows: "Any minor repair for maintenance of road during the year is always an allowable expenditure, but, after 5 years assessee would, if required, spend almost 15% of the cost of project in relaying of the road, which will be in the nature of Capital expenditure and should be added in the depreciated value of the

cost of the project. Hence any repair i regular nature which is required for day to day running of business (i.e. Collection of Toll) only needs to be allowable. Hence, the provision for major maintenance allowed will not give true and fair profitability of the assessee. Hence, the provision for major maintenance being contingent nature is disallowed on the ground that assessee has not made any expenses on that count during the year und consideration." In view of the same and discussion by me (supra) I uphold the order of the AO. Ground no. 3 is dismissed."

18. During the course of hearing, Ld. Counsel for the assessee took us through the chart wherein it was mentioned that the maintenance expenditure to be incurred in five years was Rs.60.34 crore, project operations were started on 09.08.2011 and estimation of maintenance expenditure was estimated to Rs.12.07 crores and being not having full year operations of the project, provision was created for only one quarter i.e. Rs.12.07 crore/4 i.e. Rs.3 crore. Reliance is placed upon the judgement of Hon'ble Supreme Court in *M/s. Rotork Controls India (P.) Ltd. vs CIT reported in 314 ITR 0062 [2009] [SC].* Further, reliance was placed upon the judgement of Hon'ble Supreme Court in the case of *Bharat Earth Movers vs CIT reported in 245 ITR 428 [2000] [SC]* and also the decision Hyderabad Bench of Tribunal in the case of *M/s. Mokama Munger Highway Ltd. vs ACIT (supra).*

19. In the light of the above case laws as relied upon by the Ld. Counsel for the assessee, we are of the considered view that the claim of provision as made by the assessee is in accordance with settled principal of law. Therefore, the authorities below were not justified in making the

disallowance. Thus, Ground of appeal No.3 raised by the assessee is allowed.

20. Now, coming to **ITA No.1593/Del/2017** filed by the assessee relating to Assessment Year 2013-14. The assessee has raised following grounds of appeal:-

> *1. "That on the facts and circumstances of the case and in law, the Learned CIT (Appeals) has erred while confirming the reduction of depreciation on Toll Road developed by the appellant company from 25% to 10% and confirming addition of Rs.46,98,20,742/- (including addition made as Ground of Appeal No.-2) on the ground that the roads are included in the definition of Building without accepting appellant's contention that the appellant company has Rights in the developed Toll Road and the appellant is eligible for depreciation @ 25% under the head Intangible Assets.*
>
> *2. That on the facts and circumstances of the case and in law, the Learned CIT(Appeals) has erred while confirming deduction of Grant of Rs.43.92 Crores received from NHAI out of the total cost of project of Rs.441,27,05,614/- for the A.Y. 2012-13 and thereby reducing the depreciation claimed to the said extent on the ground that the grant given by NHAI is to meet part of the cost of the project and is not a contribution towards the Equity Support.*
>
> *3. That, on the facts and circumstances of the case and in law, the Learned CIT(Appeals) has erred while confirming disallowance of provision made for major maintenance expenses amounting to Rs.6,00,00,000/- on the ground that the said provision is contingent in nature and the assessee has not made any expenditure on that count during the year under consideration and such a maintenance envisaged in the Common Rupee Loan Agreement at best is merely*

an estimate, indefinite, likely to take place at some future date and the same has not taken place at all."

21. The grounds raised in Assessment Year 2013-14 is identical to the grounds raised in Assessment Year 2012-13 except change in figures.

22. Both representatives adopted the same arguments as in ITA No.1592/Del/2017.

23. We have considered the rival submissions of the parties and also perused the material available on record. We find that there is no change into facts and circumstances have been pointed by the Revenue. We, therefore taking the consistent view, the grounds raised in this appeal are also partly allowed. Our finding in ITA No.1592/Del/2017 for Assessment Year 2012-13 would apply *mutatis mutandi* to the identical grounds raised in this year as well.

24. In the result, both appeals of the assessee are partly allowed.

Above decision was pronounced on conclusion of Virtual Hearing in the presence of both the parties on 18th May, 2021.

Sd/-	***Sd/-***
(G.S. PANNU)	**(KUL BHARAT)**
VICE PRESIDENT	**JUDICIAL MEMBER**

** Amit Kumar **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI