

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A" : HYDERABAD
(THROUGH VIDEO CONFERENCE)**

**BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

I.T.A. Nos. 2119, 2120 & 2121/HYD/2018

Assessment Years: 2012-13, 2013-14 & 2014-15

Dy.Commissioner of
Income Tax,
Circle-16(2),
HYDERABAD

M/s.Madhurai Tuticorin
Vs Expressways Ltd.,
HYDERABAD
[PAN: AAECM7403L]

(Appellant)

(Respondent)

For Revenue : Shri R.Dipak, DR

For Assessee : Shri P.Murali Mohana Rao, AR

Date of Hearing : 22-04-2021

Date of Pronouncement : 09-06-2021

ORDER

PER S.S.GODARA, J.M. :

These Revenue's appeals for AYs.2012-13, 2013-14 & 2014-15 arise from the CIT(A)-4, Hyderabad's orders; all dated 16-08-2018 passed in appeal Nos.0175 / 15-16 / ACIT, Cir.16(2) / CIT(A)-4 / Hyd / 17-18, 0008 / 16-17 / ACIT, Cir.16(2) / CIT(A)-4 / Hyd / 18-19 & 0393 / 16-17 / DCIT, Cir.16(2) / CIT(A)-4 / Hyd / 18-19; respectively involving proceedings u/s.143(3) of the Income Tax Act, 1961 [in short, 'the Act'].

Heard both the parties. Case files perused.

2. We notice during the course of hearing that the Revenue's identical first and foremost substantive ground in former two appeals ITA Nos.2119 & 2120/Hyd/2018 seeks to revive the Assessing Officer's action denying depreciation claim of Rs.43,17,06,474/- and Rs.1,41,73,68,447/-; assessment year-wise, respectively. Its case as per the corresponding grounds' averments is that the assessee; who is not owner of the fixed asset in the nature of the road project concerned, ought to have amortized the corresponding expenditure of license fee etc. as per the CBDT's circular No.9/2014, dt.23-04-2014. We notice in this factual backdrop that the CIT(A)'s detailed discussion treating the assessee's depreciation claim to be in the nature of a right to collect toll forming an intangible asset u/s.32(1)(ii) of the Act reads as under:

"5. Ground no.3, 4 & 9 to 11 are with regard to disallowance of depreciation of Rs.203,68,32,837/- by treating the same as capital expenditure to be amortised. In this regard, the Assessing Officer submitted as under:

On perusal of Depreciation of fixed assets/ it is observed that the assessee-company is claiming depreciation of Rs.245,61,03,549/- @25% on the opening WDV of Rs.982,44,14,194/-.

However, there were several disputes on the expenditure incurred on development and construction facilities like roads/highways on BOT basis. To put an end to these disputes, CBDT has issued a circular vide no. 09/2014 dated 23.04.2011 which has clarified all the issues regarding allowability of depreciation on projects developed under BOT.

Therefore, in order to amortize the expenditure incurred, the cost of construction on development of infrastructure facility, copy of concessionaire agreement, time taken for creation of such facility and date of commencement etc. were called for. The assessee-company submitted the information called for.

After perusal of the information submitted, the amount to be amortized and amount of amortization allowable as business expenditure under the Act for the FY 2011-12 relevant to AY 2012-13

was calculated at Rs.41,92,70,712/-. In view of this, excess claim of depreciation of Rs.203,68,32,837/-(Rs.245,61,03,549 - Rs.41,92,70, 712)

5.1 During the course of appellate proceedings, the appellant contended as under:

- The assessee company was awarded the work of construction on National Highway 45 B by NHAI for widening the existing 2 lane portion between Km 138.800 to Km 266.957, Madhurai to Tuticorin section in the state Tamil Nadu to 4 lane through a concession on BOT basis on 24.07.2006. The assessee company has started the work of laying road as well as bridges in the FY 2006-07 (20.012007) and completed the work during the FY 2011-12 (30.06.2011). As the project is completed during the FY 2011-12, accordingly the assessee company incurred total project cost at Rs. 9,82,44,14,194/- which is shown as Gross block of the carriageway and claimed depreciation at the rate of 25% in the computation of income. During the year under consideration (AY 2012-13), the assessee has claimed depreciation of Rs. 2,45,61,03,549/- @ 25% on the Value of asset available for depreciation of Rs. 9,82,44,14,194/- as the asset block carriage ways was formed during the year under consideration.

- As per the Terms of Agreement (Concession Agreement) made by the assessee company with the National Highways Authority of India (NHAI), the assessee company was to complete the work at its own cost including operation and maintenance and collection of toll fee for a period of 20 years. It is also submitted that as per terms of the agreement entered into with the NHAI, assessee was required to develop the said infrastructure facility by arranging funds on its own. The assessee was also under an obligation to maintain the said infrastructure facility (i.e. Road and Bridges) at its own cost for a specified period i.e. 20 years. At the end of the specified period, assessee was under an obligation to transfer the infrastructure facility to the Government. In consideration and in terms of the agreement with the NHAI, assessee was bestowed with a right to collect toll from the motorists using the road facility during the specified period.

- The assessee capitalized the construction and development cost of the infrastructure facility under the head 'Carriageway' and claimed the same to be an intangible asset within the meaning of Section 32(1)(ii) of the Act and thus claimed depreciation @ 25% amounting to Rs. 2,45,61,03,549/- in the computation of income.

- In this regard we would like to submit that the AO has followed the CBDT Circular No.09/2014 dated 23.04.2014 and accordingly calculated the allowable depreciation of Rs.41,92,70,712/- and disallowed the excess claim of depreciation of Rs.203,68,32,837/-

being the difference amount of depreciation. In this regard firstly we would like to submit that the AO has erred in not giving the calculation of allowable expenditure as per the Circular an amount Rs.41,91,70,712/-. It is also submitted that assessee has claimed depreciation rightly in year under consideration for an amount of Rs. 2,45,61,03,549/- and AO is incorrect to apply the CBDT Circular and restrict the claim of expenditure up to Rs. 41,92,70,712/-. In this regard we would like to submit the following submission which may please be considered in favor of the assessee company.

- CBDT Circular No 09/2014 dated 23.04.2014 is not applicable in year under consideration :- In this regard we would like to submit that the AO has calculated the business expenditure depreciation in year under consideration by following the CBDT Circular No. 09/2014 dated 23.04.2014 at Rs. 41,92,70,712/- and disallowed the claim of deprecation of Rs. 203,68,32,837/- (Rs.2,45,61,03,549-Rs.41,92,70,712) in year under consideration. In this regard specifically we would like to submit that the AO erred in following the CBDT Circular passed as on 23.04.2014 without appreciating the fact that this Circular does not have retrospective effect and as the same is not applicable to the financial years prior to the date of the Circular.*

- We would like to submit that as per para 7 of the above circular clearly says that if assessee claimed deduction in earlier years prior to the assessment year under consideration then that may be deducted from cost of project. The relevant extract of the CBDT Circular is reproduced hereunder :-*

7. In the case where an assessee has claimed any deduction out of initial cost of development of infrastructure facility of roads/highways under BOT projects in earlier year, the total deduction so claimed for the Assessment Years prior to the Assessment Year under consideration may be deducted from the initial cost of infrastructure facility of roads/highways and the cost 'so reduced' shall be amortized equally over the remaining period of toll concessionaire agreement.

- As can be seen from the above extract of circular that this was applicable from the year in which the same has been passed. Therefore, application of this Circular in year under consideration is incorrect.*

- It is very clear from the above para of CBDT Circular that in all previous years before the Circular passed the assessee company is eligible for the deduction claimed. Accordingly the claim of depreciation of assessee in the year under consideration being the earlier years of Circular passed is correct and same should be allowed.*

- It is pertinent to mention here that in the case of DCIT V s Mis Progressive Construction Ltd, Hyderabad, ITA No 214/Hyd/2014 which has been passed as on 07.11.2014 after the date of CBDT Circular has allowed the claim of depreciation of Assessee Company @ 25% on intangible assets after discussing the Board Circular passed in this regard. Relevant para of the same is as under.-

"5. After considering the rival contentions, we do not see any merit in Revenue grounds. Learned D.R. vehemently supported that depreciation cannot be allowed and relied on the Board circular No.9 of 2014 dated 23.04.2014. As seen from the above circular issued recently, the Board is aware that there were disputes as to whether the expenditure incurred on development and construction of infrastructural facilities like roads/high ways on BOT basis with right to collect toll, is entitled for deduction under section 32(1)(ii) or the same can be amortized by treating it as an allowable business expenditure under relevant provisions of the I.T.Act. The Circular went on to clarify that the amount can be amortized over the period of toll construction concessionaire agreement. As can be seen from the circular, the Board in fact has accepted that the cost incurred towards development of road/highways is revenue expenditure and relying on the judgment of Hon'ble Supreme Court in the case of Madras Industrial investment Corporation Ltd., vs. CIT 225 ITR 802, allowed spreading over the liabilities over number of years. Since the amount is allowable as an expenditure that too as revenue expenditure, the Board circular is in fact advantageous to the assessee who are in development of infrastructure facilities but not owning the property which was constructed. In this case, assessee has initially treated the entire cost as building and claimed 10% depreciation in A Y.2009-10. This claim is in fact justified also. The Coordinate Bench in the case of PBR Industries Ltd., ITANo.1171/H/07, 1175/H/07, 1176/H/08 and ITANo.1196/H/08 dated 08.06.2011 allowed such expenditure incurred on BOT project as revenue expenditure amortized over a period of concession.

However, they are also equally good number of cases as relied by Ld. CIT(A), that the same cannot be considered as an intangible asset. The Coordinate Benches in the case of Nyse Infrastructure P. Ltd., vs. DCIT ITA No.301/H/2009 dated 05.06.2009 and other cases on similar facts allowed depreciation holding that entire asset is intangible asset. Since the Ld. CIT(A) allowed depreciation as claimed by assessee which is also supported by various case law, we do not see any reason to interfere with the order of Ld. CIT(A) as the entire cost incurred on the project is to be allowed as deduction to assessee either as amortized revenue expenditure or as depreciation. Since assessee choose to claim depreciation, we do

not see any reason to disallow the same. Accordingly, there is no merit in Revenue grounds."

- *Therefore, the claim of depreciation being 25% which is work out at Rs. 245,61,03,549/- in year under consideration is correct and hence we request you to kindly delete the addition made by the AO in this regard as CBDT circular is not applicable in year under consideration.*
- *Right to collect toll in Concession Agreement is an intangible asset under section 32(1)(ii) of the Act :-*

In connection with the claim of depreciation applicable to the building we would like to submit that the as per provisions of section 32(1)(ii) the asset is intangible asset and assessee company is eligible for depreciation at the rate of 25% in year under consideration. It is submitted that the assessee had acquired the right of exploitation by constructing the road with its own monies. The assessee acquired the right to exploit the asset i.e., road for a period of 20 years. The right to exploit is in the nature of a licence granted by the owner of the asset which is admittedly the NHAI or it is in the nature of a business right or a commercial right acquired by incurring the expenditure. Therefore the asset definitely is an intangible asset. The intangible asset is the right of licence granted by the owner i.e. NHAI to collect Toll for the period of 20 years which is in consideration of the construction of the road with the funds of the assessee, the owner of the licence or the business or commercial right for the period that it lasts is none other than the assessee. In fact that the limited rights for a period entitle such owner of limited rights to depreciation is very well stated by the Hon'ble Supreme Court in the case of Mysore Minerals Limited Vs CIT (239 ITR 775).

It is submitted that the right to collect toll fee granted to the assessee in consideration of constructing road for the NHAI is in the nature of licence or business right or commercial asset and therefore, an intangible asset coming ul s 32(1)(ii) of the IT Act. The assessee is, therefore, entitled to depreciation on the cost incurred to acquire the right to collect Toll for 20 years.

Further, it is submitted that costs capitalised by the assessee have been incurred for development and construction of the infrastructure facility, i.e., Road and Bridge. The assessee was to build, operate and transfer the said infrastructure facility in terms of an agreement with the Government. 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 free of charge. In consideration of developing, constructing, maintaining the facility for a specified period and thereafter transferring it to the Government

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 to be in the nature of 'intangible asset' falling within the purview of section 32(1)(ii) of the Act and has been eligible for claim of depreciation.

It is pertinent to mention here that though the NHAI remains legal owner of the site with full powers to hold, dispose of and deal with the site consistent with the provisions of the agreement, the assessee had been granted not merely possession but also right to enjoyment of the site and NHAI was obliged to defend this right and the assessee has the power to exclude others. Being so, the assessee is entitled for depreciation.

In this regard, we have placed reliance on the following case laws -

- DCIT Vs Mis Progressive Construction Ltd, Hyderabad, ITA No 214/Hyd/2014:- held that " Since the Ld. CIT(A) allowed depreciation as claimed by assessee 'which is also supported by various case law, we do not see any reason to interfere with the order of Ld. CIT(A) as the entire cost incurred on the project is to be allowed as deduction to assessee either as amortized revenue expenditure or as depreciation. Since assessee choose to claim depreciation, we do not see any reason to disallow the same. Accordingly, there is no merit in Revenue grounds.*
- Nyse Infrastructure ,P. Ltd., vs. DCIT ITA.No.301/Hyd/2009:- on similar facts allowed depreciation holding that entire asset is intangible asset.*
- DCIT vs. Mis Swarna Tollway Pvt Ltd, ITA No 1184 to 1189/Hyd/2013 dated 16.01.2014 :- wherein it was held that assessee company is entitled to claim the depreciation u/s.32(1)(ii) of the IT Act.*
- Ashoka Info Pvt. Ltd. in ITA No. 44/PN/07 dated 31.12.2008 of the Pune Bench :- The facts of this case is very similar to the facts of the our present case as in this case the question was whether the licence granted by the Maharashtra Government for collection of toll on Ahmednagar - Karmala Road which was constructed and maintained by the assessee there on Build, Operate and Transfer (BOT) basis in terms of the agreement with the Maharashtra Government for a fixed period of 16 years and 9 months is an intangible asset so as to allow depreciation as described under Clause 32 (1)(ii) of the IT Act. The Hon'ble Pune Bench in that case held that assessee there was entitled to depreciation u/s. 32(1)(ii) of the IT Act.*

• *Reliance Ports & Terminals Limited (ITA Nos. 1743, 1744 & 1745/ Mum/2007, dt. 26.11.2007) :- held that the right to collect Toll is an intangible asset and eligible for depreciation u/s 32(1)(ii) of the IT Act.*

Further, we would like to submit that the issue of depreciation claim is squarely covered with the following judgements :-

• *ACT v. M/s. Navayuga Engineering Co. Ltd., Visakhapatnam (ITA Nos. 1050/Hyd/2009 to 1053/Hyd/2009, dated 08,10,2010 Hyd. Trib.)*

• *M/s. Navayuga Engg. Co. Ltd., Hyderabad v. ACIT (ITA No. 989/Hyd/2011 dated 16.01.2013 Hyd. Trib.)*

• *ACIT v. M/s. Navayuga Engg. Co. Ltd. (ITA No. 1283/Hyd/2011 dated 08.06.2012) (Hyd. Trib.)*

• *DCIT v. M/s. Navayuga Engg. Co. Ltd. (ITA No. 55/Hyd/2013, dated 05.04.2013 (Hyd. Trib.)*

• *Ashoka Buildcon Ltd., in ITA No. 1302/PN/09, dated 20.3.2012*

• *Kalyan Toll Infrastructure Ltd., in ITA Nos. 201 & 247/ Ind/2008, dated 14.12.2010*

• *Dimension Construction (P.) Ltd., in IT A Nos. 222, 233 & 857/ PN/2009, dated 18.3.2011.*

• *Gujarat Road & Infrastructure Co. Ltd. v. CIT (7 ITR(T) 730) (AHD)*

• *Maharashtra State Road Development Corpn. Ltd. v. ACIT [2010] 126 ITD 279 (MUM.)*

• *ACIT v. Ashoka Infraways (P.) Ltd. [2013] 33 taxmann.com 499 (Pune _ Trib.)*

• *M/s. Moradahad Toll Road Company Limited v. ACIT M/s. Moradahad Toll Road Company Limited v. ACIT*

• *Ashoka Infrastructure Ltd., Pune v. ITO (ITA No 989/PN/2010 dated 18 July, 2013 (Pune Trib.).*

• *ACIT vs. Viva Highways Pvt. Ltd., Nashik (ITA No.187/PN/2012 - dated 29 April, 2013 (Pune Trib.)*

As can be seen from the above judgments, that issue is squarely covered and Assessee Company is eligible for the claim of depreciation at the rate of 25% on intangible assets. The AO ought to have appreciated the fact that the CBDT Circular no. 09/2014 is not applicable in year under consideration. Therefore, the addition made by the AO is not correct and not justified.

Request :- In view of the above submission, it is requested before your good selves that the assessee company is correct in claiming the

depreciation at the rate of 25% amounting of Rs.245,61,03,549/- and disallowance made by the AO towards the excess depreciation of Rs. 203,68,32,8371- (Rs. 245,61,03,549 – Rs.41,92,70,712) is required to be deleted.

5.2 I have carefully considered the assessment order, facts of the case, submissions of the appellant and case laws relied upon by the appellant. In this regard reliance is placed on the Hon'ble ITAT, Hyderabad, decision in the case of DCIT, Circle 16(3), Hyd. Vs. M/s. Progressive Construction Ltd., Hyderabad in ITA No.214/Hyd/2014 for the A.Y. 2009-10, wherein it was held as under.:

“Since the Ld. CIT(A) allowed depreciation as claimed by assessee which is also supported by various case law, we do not see any reason to interfere with the order of Ld. CIT(A) as the entire cost incurred on the project is to be allowed as deduction to assessee either as amortized revenue expenditure or as depreciation. Since assessee choose to claim depreciation, we do not see any reason to disallow the same. Accordingly, there is no merit in Revenue grounds”.

Respectfully following the decision of the Hon'ble ITAT, Hyderabad, the Assessing Officer is directed to delete the addition towards depreciation”.

3. We have given our thoughtful consideration to the rival contentions supporting and opposing the impugned depreciation disallowance. It has come on record that this tribunal's Special Bench's decision in M/s. Progressive Construction Ltd. (supra) has already settled the issue that such a license agreement amounts to an intangible asset in the nature of right to collect toll amounts to an intangible asset u/s.32(1)(ii) of the Act. The Revenue's stand that the assessee ought to have amortised the license fee paid to “NHAI” as per the CBDT's circular (supra) also fails to make any difference since the same could not be taken as an attempt at the Board's part to deny depreciation relief in any manner; whatsoever. Hon'ble apex court's decision Taparia Tools Ltd. Vs. JCIT (2015) [372 ITR 605] (SC) holds that the

mere option of amortisation would not debar an expenditure claim which is otherwise admissible as per law. We thus affirm the CIT(A)'s findings *qua* the first issue of depreciation disallowance. The Revenue's corresponding grounds are rejected.

4. Next comes the second identical issue of disallowance of Rs.2,53,39,545/- and Rs.3,54,98,306/- towards provision for periodical maintenance declined in the course of assessment by the Assessing Officer on the ground that the same is towards repair of damages having occurred to the road project(s) due to traffic within the specified period of five years but not because of traffic of 5th year only. He further held that the assessee-company had to carry out a periodical maintenance of road project as per its agreement with NHAI only. All this resulted in the impugned disallowance. The CIT(A) has reversed the assessment findings as follows:

"6. Ground nos. 5, 6 & 12 to 13 are with regard to disallowance of Rs.7,45,50,000/- towards provision for Periodic Maintenance. In this regard, the Assessing Officer submitted as under:

On verification of P&L Account it is noted that the assessee debited an amount of Rs.5,98,00,000/- towards provision for periodic maintenance, which is not a allowable expenditure as per provisions of IT Act. when this observation was putforth before the assessee's AR, the assessee-company vide letter dated 13.01.2015 submitted that the assessee-company, as per concessionaire agreement with NHAI has to do periodic maintenance of carriageway once in every five year. The assessee-company has to recover the expenditure from toll revenue only but there will be no additional income in 5th year. The expenditure is towards repairs of damages occurred to road due to traffic during period of 5 years but not because of traffic of gh year. Hence, the assessee-company apportioned the expenditure for 5 years and made provision for periodic maintenance of Rs.7,45,50,000/-.

The assessee's submissions are carefully considered. The assessee's contention is not acceptable. Therefore, the amount of Rs.7,45,50,000/- was disallowed and added to the returned income.

6.1 During the course of appellate proceedings, the appellant contended as under:

In tills regard we would like to submit that the assessee company has made the provision of periodic maintenance in the five years as per the Clause no. 3.3.7 of Volume II in Schedule L of the 'Concession Agreement' with NHAI, the Company is required to overlay the entire project expenditure at a stretch once in every 5th year from the date of Commercial Operation. Hence the provision made for periodic maintenance cannot be treated as "Not an ascertained Liability". Relevant clause of agreement has been reproduced hereunder for your kind reference:-

As per Concession Agreement Clause 3.3.7(i)"

(a) This activity shall be carried out as required and at least once 5th year (from COD) and in the last year of concession period. Road making as specified and other road side features shall be restored to meet the relevant standards to the satisfaction of the independent consultant"

(b) The periodic maintenance activities shall also include profile corrective course of overlaid with the periodic renewal of the wearing course of the road payment. The same shall be undertaken on all roads and payments in the Project facilities including on the truck lay-bays bus-bags and way side amenities -service area. The concessionaire may adopt cost effective treatment like Asphalt concrete, recycling, stone mastic, micro seal etc.

As can be seen from the above clause of Concession Agreement with NHAI, assessee has to overlay the road once in every 5 years from Commercial Operation Date (COD). The amount of such expense is very high and such expense was related to 5 years. So, by using the matching concept of accounting this provision is debited in P&L account, on the bases of above mentioned clause provision was made every year accordingly.

Therefore, whenever company has incurred actual expense related to periodic maintenance it was adjusted such amount from provision for periodic maintenance and balance has been debited in to the P & L account in year of incurred.

Provision of Major Maintenance made Correctly at Rs. 7,45,50,000/-:

The company has achieved COD (Commercial Operation Date) in the month of June 2011 as per the completion certificate dated 25.07.2012. Accordingly, the first cycle of Major Maintenance / Periodic Maintenance is due to be completed by May 2016. Since the entire expenditure will be spent in the 5th year, the company has made yearly provision and debited P & L account using the matching concept of accounting.

Provision has been made on the basis of the SBI Capital Market Project Report: In this regard we would like to submit that the assessee company has obtained the project report from the SBI Capital Market towards the projected financial of the company. As per the above project report the assessee company supposes to incur the Periodic maintenance expenditure in the financial year ends on March 2015, being the fifth year of project. Therefore in the projected cash flow statement of this project report in Appendix 7 showing the maintenance expenditure at Rs. 49.70 crores on March 2015.

We would like to submit that the as the assessee company has obtained the project report from SBI capital market and as per that Projected Cash Flow Statement an estimate of Provision for periodic maintenance of Rs.49.70 crores on March 2015. Therefore on the above report basis the assessee has made the provision of periodic maintenance at. Rs. 7.45 crores in the year under consideration. In this regard we would like to submit that the assessee company has calculated the Provision of Periodic Maintenance at Rs. 7.45 crores in the year under consideration, details of the same is given as under :-

<u>Calculation Provision of Periodic maintenance for the AY.2012-13</u>	
Date of commencement of maintenance expenditure after the date of completion of project on 30.06.2011.	02.07.2011
Date of completion of maintenance as per the period of 5 years cycle	01.07.2016
Total number of days for a maintenance period of 5 years (From 02.07.2011 to 01.07.2016)	1827 Days
Days of maintenance in the FY 2011-12 (From 02.07.2011 to 31.03.2012)	274 Days
Estimated Periodic Maintenance Cost as per the SBI Capital Market Report as on March 2015	Rs.49.70 crores
Proportionate portion of Provision of Periodic Maintenance for the FY 2011-12 (i.e. Rs.49.70 crores * 274 days/1827 days)	Rs.7.45 crores

As can be seen from the above calculation that assessee company has provision of Rs. 7.45 crores in the year under consideration as per the project cost of the maintenance work suppose to be incurred

in the fifth year. As can be seen from the above that Assessee Company has made provision in the above five years on the basis of the projected financial and estimated cost and same should be allowed as provision.

Further, it is submitted that at time of insurance of actual expenditure, the assessee would only debit the excess of amount expenditure incurred over and above the provision. As a result the Assessee Company would not excess claim of provision in respect of the major maintenance work and has rightly claimed the provision in financial statement.

Under the Matching Principle Concept, though the assessee may be incurring expenditure at a later date, has created the provision as the need for incurring such expenditure since such expenditure arise over a period of time and claiming such periodic expenditure in the year in which it is actually incurred would give incorrect picture of the financial results in the year under the claim.

The foreseeable expenditure was liable to be considered while determining the income of the assessee for the period under consideration. The expenditure was ascertained expenditure on the maintenance portion of the contract though it was an estimation made in the light of the available information. The assessee is following the mercantile system of accounting and it is entitled to deduct expenditure which is incidental to the business and such expenditure was deductible on accrual basis though it may not have been actually incurred during the relevant assessment year. Hence, the addition made is to be deleted.

Major Maintenance work given to Contractor, M/s Madhucon Infra Limited :- In the case of Assessee Company, the major maintenance work completed through outside contractor i.e. M/ s Madhucon Infra limited. We would like to submit that as the Extension was completed on 30.06.2011, the assessee entered into Maintenance contract with M/s.Madhucon Infra limited on 01.07.2011. The company has entered into the agreement on 20th June 2014, with the M/s. Madhucon Projects Limited for execution of Periodic maintenance work. These agreements are entered for a period of 1 year and thus, there are 5 maintenance agreements with M/s.Madhucon Infra limited for maintenance period of 5 years.

Request :- It is submitted that the assessee company has made provision for the periodic maintenance correctly on the basis of the projected financial and accordingly created the provision of Rs. 7.45 crores in the year under consideration. The Provision for this periodic maintenance was made duly on the basis of mercantile accounting system and same should be allowed in the year under consideration. Therefore, from the above it is very clear that the assessee company

has incurred the major maintenance of expenditure in every fifth year as per the agreement with NHAI and accordingly made the provision in this regard which is as per the accounting and same should be allowed in the year under consideration. Hence, it is requested before you that kindly delete the addition of Rs. 7,45,50,000/- in respect of the periodic maintenance.

6.2 I have carefully considered the assessment order, facts of the case and submissions of the appellant. Since the appellant has provided these periodic expenses based on contract agreement between the appellant and the contractor, hence, the provision of section 438 of the Act is not applicable in this case. Therefore, all the submissions of the appellant are accepted and thereby the addition made by the Assessing Officer is deleted”.

5. We have given our thoughtful consideration to the rival contentions. Learned departmental representative's vehement argument is that the Assessing Officer had rightly disallowed the impugned periodic maintenance claim. The assessee's case on the other hand is that this provision for periodical maintenance is very well based on its corresponding agreement clause with the NHAI. The Revenue has nowhere disputed the assessee's liability to maintain the road project even in the assessment findings as well. And also that Section 43B does not cover any of these clauses in principle as it has been observed in the CIT(A)'s order. We thus quote the hon'ble apex court's landmark decision Chainrup Sampatram Vs. CIT (1953) [24 ITR 481] (SC) that an expenditure could be booked at the first sign of probability whereas the converse is not true *qua* income which has to be recognised as per the conservative system of accounting only. We thus affirm CIT(A)'s lower appellate findings under challenge allowing the assessee's periodical maintenance claim going by its agreement clauses than mere estimation based thereupon. The Revenue's first appeal ITA No.2119/Hyd/2018 raising these two substantive

grounds only fails. Its last appeal ITA No.2121/Hyd/2018 raising identical sole substantive issue of disallowance of provision for periodical maintenance of Rs.3,54,98,306/- also meets the same outcome.

6. We are now left all the Revenue's third substantive grievances seeking to revive disallowance of interest payment of Rs.21,35,00,000/- converted into FITL (Funded Interest Term Loans). The CIT(A)'s detailed discussion deleting the impugned disallowance reads as under:

“Ground nos. 10 & 11 are with regard to disallowance of interest payment converted into FITL of Rs.21,35,00,000/-. In this regard, the Assessing Officer stated as under:

It is observed from Note-2.4 (Long Term Borrowings) that there are following fresh Funded Interest Term Loans from the banks:

<i>FITL - IDBI</i>	<i>Rs.4,38,00,000/-</i>
<i>FITL-SBH</i>	<i>Rs.91,00,000/-</i>
<i>FITL-VB</i>	<i>Rs.1,78,00,000/-</i>
<i>FITL-CB</i>	<i>Rs.5,35,00,000/-</i>
<i>FITL-CBI</i>	<i>Rs.3,58,00,000/-</i>
<i>FITL-IIFCL</i>	<i>Rs.5,35,00,000/-</i>
<i>TOTAL</i>	<i>Rs.21,35,00,000/-</i>

As per the provisions of Section 43B, the interest payments are allowable only on the basis of actual payment. It is specifically given in the explanation that the conversion of outstanding interest into Funded Interest Term Loan shall not be construed to the payment and the same shall be disallowed as per the provisions of Section 43B. Therefore, assessee is requested to explain as to why the above interest payments, which are not paid but merely converted into FITL shall not be disallowed. In response, assessee has filed a letter dated 29.2.2016. As the assessee itself has agreed with the observation and also considering the facts & issues of the case, the interest converted in FITL amounting to Rs.21,35,00,000/- was disallowed and added to the returned income.

6.1 Regarding the above addition, during the course of appellate proceedings, the appellant contended as under:

The AO disallowed an amount of Rs.21,35,00,000/- towards the interest payments into FITL u/s.43B observing that the interest payments are allowable only on the actual payment and not the outstanding interest converted into Funded Interest Term Loan.

In this connection, we would like to submit that during the year under consideration, the assessee company has entered into Mater Restructuring Agreement vide agreement dated 25.03.2013 with 5 Financial Institutions for the amount of interest payable for the period from December 2012 to March 2013 into Funded Interest Term Loan. As the amounts have been converted into FITL before the end of financial year, there is no liability of interest payable At this juncture, we would like to submit that the financial institutions to whom interest was to be paid, have agreed to convert said interest amount into term loan and the interest amount so payable should be taken as constructively paid and has to be allowed as deduction. Further, it is submitted that the interest amount was funded by the financial institutions itself for the interest payable amount by the assessee.

It cannot, therefore, be said that the assessee has not paid the interest during the year under reference, since the amount of interest debited to the P and L A/c., is deemed to have been paid off by transferring the same to the Funded Interest term loan, and no liability remains therefore, the expenditure is fully allowable under the provisions of the IT Act. The provisions of Section -43B of the Act, are not applicable to the facts of the case and that therefore, no disallowance under the above section is called for.

It is deemed to be the actual payment and same should be allowable under provisions of section 43B of the Act. Further, the word "actual" is used in the section only to emphasise that the payment should be real and a payment in fact and not something that is pretence or a fiction.

In view of the facts submitted above, it is requested the Ld. Commissioner of Income Tax (Appeals) to delete the entire additions made and to direct the Assessing Officer to pass necessary modification order for the asst. year 2013-14.

6.2 I have carefully considered the assessment order, facts of the case and submissions of the appellant. Since the appellant has provided these periodic expenses based on contract agreement between the appellant and the contractor, hence, the provision of Section 43B of the Act is not applicable in this case. Therefore, all the submissions of the appellant are accepted and thereby the addition made by the Assessing Officer is deleted”.

6.1. It is sufficiently clear that the Assessing Officer had invoked Section 43B of the Act towards the impugned provision of interest payment than actual payment of interest sum. We notice that there is no rebuttal from the Revenue's side *qua* the clinching fact that the impugned 'funded interest term loan' is not a loan transaction but assessee's contract agreement with the creditor party and therefore, the CIT(A) has held that the same is not exigible to 'actual payment' contemplated u/s.43B of the Act. We thus decline the Revenue's instant last substantive ground as well. This remaining appeal ITA No.2120/Hyd/2018 is also rejected therefore.

7. These Revenue's appeals are dismissed in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the open court on 9th June, 2021

Sd/-
(LAXMI PRASAD SAHU)
ACCOUNTANT MEMBER

Hyderabad,
Dated: 09-06-2021

TNMM

Sd/-
(S.S.GODARA)
JUDICIAL MEMBER

Copy to :

1. Deputy Commissioner of Income Tax, Circle-16(2), Hyderabad.

2. M/s. Madhurai Tuticorin Expressways Ltd., Plot No. 1129/A, Madhucon House, Rd. No. 36, Jubilee Hills, Hyderabad.

3. CIT(Appeals)-4, Hyderabad.

4. Pr. CIT-4, Hyderabad.

5. D.R. ITAT, Hyderabad.

6. Guard File.