IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "**B**" DELHI]

BEFORE SHRI A. D. JAIN, JM AND SHRI K. D. RANJAN, AM

I. T. A. No. 4564 (Del) of 2004

Assessment year : 2001-02.

M/s. Sharp Business Systems (India) Ltd.,		Dy. Commissioner of Income-tax,
214 – 221, Ansal Tower,	Vs.	Circle : 8 (1),
38 – Nehru Place,		NEW DELHI.
NEW DELHI – 110 019.		
PAN / GIR No. AAE CS 2980 A.		
(Appellant)		(Respondent)

Assessee by : Shri Ajay Vohra, Adv.; &
Shri Sachit Jolly, Adv.;

Department by : Shri Stephen George [CIT] – D. R.;

O R D E R.

PER K. D. RANJAN, AM :

This appeal by the assessee for assessment year 2001-02 arises out of order of the ld. CIT (Appeals)-XI, New Delhi.

2. The grounds of appeal raised by the assessee are reproduced as under :-

> *" 1. That the ld. CIT (Appeals) erred on facts and in law in confirming disallowance of Rs.3,00,00,000/- made by the assessing officer in respect of the amount paid to M/s. Larsen and Toubro Limited, in lieu of the same agreed*

not to enter into competing business with the appellant for seven years, holding the same to be a capital expenditure incurred for obtaining an enduring benefit;

2. That the ld. CIT (Appeals) erred on facts and in law in holding that the aforesaid expenditure was not allowable revenue expenditure, alleging that M/s. Larsen and Toubro was not a competitor of the appellant and the aforesaid expenditure has not been incurred for business purposes of the appellant;

3. That without prejudice, the ld. CIT (Appeals) erred on facts and in law in not holding that the aforesaid expenditure was allowable over the period the benefit of the aforesaid expenditure was to enure;

4. Further, without prejudice, the ld. CIT (Appeals) erred on facts and in law in not appreciating that the aforesaid expenditure resulted in acquisition of an intangible asset and disallowing the appellant's claim of depreciation in respect of the same alleging that the aforesaid expenditure was incurred for non-business purpose. "

3. The first issue for consideration relates to confirming the disallowance of Rs.3,00,00,000/- made by the assessing officer in respect of non-compete fee paid to M/s. Larsen and Toubro Ltd. [L & T]. The facts of the case stated in brief are that the assessee company was incorporated on 27th March, 2000 in pursuant to joint venture agreement by and between M/s. Larsen & Toubro Ltd. and M/s. Sharp Corporation, Japan. Prior to joint venture agreement L & T was engaged in the business of developing, manufacturing, marketing, distributing and selling among other things various electric equipments and products in India and had a well established country-wide sales net-work in India. On the other hand, Sharp Corporation was engaged in the business of designing, developing, manufacturing, marketing, distributing and selling various audio-visual products, house-hold electronic appliances, electric and electronic office equipments, LCD units, computers, flash memories and other related products on a world-wide basis.

4. L & T Ltd. and Sharp Corporation, Japan established the assessee company with limited liability for the purpose of importing, marketing and selling in India certain electric and electronic office products other sharp products such as (i) photo copiers; (ii) facsimile machines;

(iii); business LCD projectors; (iv) electronic cash register; (v) electronic organizers; (vi); personal computers; (vii) mobile computing and communications equipments; (viii) LCD Monitors; (ix) accessories and after sale services including parts/components of above products etc. The share holding pattern of Sharp Corporation, Japan : L & T was 74 : 26 per cent.

5. During the year under consideration the assessee imported office automatic machines like photo copiers, facsimile machines, note book computers etc. from Sharp Corporation, Japan worth Rs 39,10,20,045/- out of which sales of Rs 30,98,57,317/- were made. The assessee during the relevant period paid Rs.3 crores to L & T Ltd. in lieu of the latter, not setting up undertaking/assisting in setting up undertaking any business in India of selling, marketing and trading of electronic office products for a period of 7 years. The assessee treated the amount of Rs. 3 crores as deferred revenue expenditure in the books of accounts and was being written off over a period of 7 years. However, in the return of income the amount of Rs.3 crores was claimed as revenue expenditure under section 37(1) of the Income-tax Act, 1961.

6. On a query by the assessing officer, it was submitted by the assessee that the amount paid by Sharp Business India Ltd. to L & T was merely to facilitate the business of Sharp Systems India Ltd. and in no way going to touch the fixed capital as such. The assessee placing reliance on the decision of Hon'ble Supreme Court in the case of Empire Jute Co. Ltd. Vs. CIT 124 ITR 1 submitted that if the advantage consisted merely facilitating assessee's trading operations or enabling the management to conduct the business more efficiently/profitably, while leaving the fixed capital un-touched, the expenditure would be on revenue account, even though the expenditure might endure for an indefinite future. It was also submitted that under section 28(va)(a) of the Income Tax Act, 1961 any sum received or receivable in cash or kind under an agreement for not carrying out any activity in relation to business shall be treated as revenue receipt in the hands of the receiver and will be subject to tax accordingly. As a natural corollary the payment of the aforesaid sum of Rs.3 crores was to be treated as revenue expenditure in the hands of the payer. The assessing officer, however, held that the assessee company had made payment of the non-compete fee of Rs.3 crores to L & T who had been engaged over a period of years in the business of selling, marketing and distribution of office automation and other

products of different global leaders like Canon, HP and others and had developed a sales network all over India. By making the payment of Rs.3 crores, the assessee company had ensured itself that there will be no competitor in the field of office automation products since it was only L & T or any of its associated companies, who could have set up or undertaken or assisted in setting up an undertaking for carrying on of any business in India of selling, marketing and trading of office automation products. Secondly, by making the payment of non-compete amount of Rs.3 crores, the assessee will not be facing any competition from L & T or its associated company for a period of 7 years. Since, the expenditure had brought into existence an advantage of enduring nature and, therefore, the amount of Rs.3 crores was to be treated capital in nature. He, therefore, disallowed the claim of the assessee as revenue expenditure.

7. Before the ld. CIT (Appeals) it was submitted that non-compete fee was paid to ward off competition only for short period of time of 7 years. Had the assessee incurred such expenditure annually in smaller amounts then deduction should have been allowed. Moreover, M/s. L & T was engaged in diversified business activities. Therefore, it would not be difficult for it to re-enter the market and again make a name for itself in selling, marketing and trading office automation products. Hence, the contention of the AO that the assessee had received an enduring benefit was not tenable. The competition had been warded off only to some extent and not totally as there were many major players other than L & T which were engaged in the business of marketing and selling the electronic/electric products. It was further submitted that the payment of Rs.3 crores was made to secure the market share of the assessee and to ward off competition from a potential business rival in order to ensure and protect the profitability of the assessee. The payment of non-compete fee did not result in acquisition of any capital asset, nor did the same add to a profit earning apparatus of the assessee. It was to be further appreciated that there was non-enduring benefit in the capital field which resulted in any such advantage being treated as capital expenditure. The payment of non-compete fee has a direct or rational nexus with the assessee's business and therefore, should be treated as revenue expenditure. The assessee placed reliance on several decisions in support of its contention.

8. The ld. CIT (Appeals) after considering various arguments raised by the assessee, observed that the payment of Rs. 3 crores was allegedly made for ensuring that M/s. Larsen &

Toubro Ltd. would not set up any undertaking or assist any undertaking in India for the business of selling, marketing and trading of office equipment products for a period of 7 years. He has also observed that the Larsen and Toubro Ltd was not engaged in the business of electronic office equipments and the agreement was for period of seven years, the expenditure was not allowable as revenue expenditure as the same did not relate only to the year under consideration. He accordingly upheld the order of the assessing officer.

8.1 Before us the ld. AR of the assessee submitted that the expenditure incurred by the assessee did not add to the capital field. The expenditure incurred ensured the profitability of the assessee and, therefore, the expenditure was incurred in the revenue field. He placed reliance on the decision of Hon'ble Supreme Court in the case of Empire Jute Co. Ltd. (supra). The ld. AR of the assessee further placing reliance on the decision of Hon'ble Supreme Court in the case of CIT Vs. Madras Auto Service P. Ltd. 233 ITR 468 submitted that the object of payment of non-compete fee was to secure business. It is to be seen whether the advantage obtained by the assessee was in the capital field. The payment of non-compete fee had not created any asset or advantage in the capital field. Therefore, the payment made by the assessee towards non-compete fee was revenue in nature. He placed reliance on the decision of Hon'ble Karnataka High Court in the case of CIT Vs. HMT Ltd. 203 ITR 820 (Kar.) wherein upfront payment of lease premium and payment of rent at the rate of one rupee per annum was held to be revenue in nature. He submitted that the length of time is not material. What is to be examined is the nature of expenditure. If the expenditure incurred results in an advantage in the capital field, it would be capital in nature. If the advantage was in revenue field, the amount was allowable as revenue expenditure. The ld. AR of the assessee further submitted that there is change in judicial thinking. In the case of CIT Vs. Excel Industries Ltd. 122 ITR 995, Hon'ble Bombay High Court has held that where the payment was made by the assessee towards construction of an over-head supply line, which always belonged to Gujarat Electricity Board, the supply was guaranteed under the aforesaid agreement for a minimum period of 7 years. The assessee was to pay normal charges for the amount of electricity consumed by it. The payment made by the assessee for ensuring supply of electricity, which was essential for the manufacture of phosphorus was held to be revenue in nature. Further Hon'ble Delhi High Court in the case of

CIT Vs. Saw Pipes Ltd. 208 CTR 476 (Del.) the expenditure on laying electric service line for new unit was incurred. Ownership of cable remained with the Electricity Board. Advantage, though enduring, was intended to enable the assessee to carry on its business more efficiently, leaving the fixed capital un-touched, the expenditure was, therefore, held to be allowable as revenue expenditure. Hon'ble Supreme Court in CIT Vs. Coal Shipment P. Ltd. 82 ITR 902 (SC) has held that the payment made in pursuance to agreement not to export coal to Burma during the subsistent of agreement was allowable as revenue expenditure as the agreement could be terminated at any time at the volition of any of the parties. The payments were not related to tie up in any way to any fixed sum agreed to between the parties. Further the ld. AR of the assessee submitted that the assessee by making payment to L & T had not altogether eliminated the competition. There were many others in the field. Therefore, it could not be said that the assessee had warded off the competition altogether. He placed reliance on the following decisions :-

1. CIT v MC Nchanga Consolidated Copper Mines Ltd 58 ITR 241;
2. CIT v Late G.D. Naidu and Others 165 ITR 63 (Mad);
3. Deputy CIT v Mc Dowel And Co Ltd 291 ITR 107;
4. CIT v Eicher Ltd 302 ITR 249 (Del)
5. CIT v Lahoty Brothers Ltd 19 ITR 425 (Cal.).

8.2 He further submitted that in the case of Tecumseh India Pvt. Ltd. Vs. Addl. CIT (supra), Special Bench of ITAT, Delhi, the payment was made for acquiring business, but in the case of the assessee, the payment has been made to enhance the profitability. Therefore, the payment does not result in advantage of capital field, or any advantage of enduring nature. Therefore, the expenditure incurred by the assessee is to be treated Revenue in nature.

8.3 Alternatively, it has been submitted that in case, the expenditure is to be treated in the capital field, the depreciation should be allowed as an intangible asset has come into existence. He placed reliance on the decision of the ITAT, Chennai Bench in the case of ITO Vs. Medicorp. Technologies (India) Ltd. 30 SOT 506 (Chen).

9. On the other hand, the ld. Sr. DR submitted that the issue is squarely covered by the decision of Special Bench in the case of Tecumseh India Pvt. Ltd. Vs. Addl. CIT 127 ITD 1(Del) (SB) wherein it has been held that in a case where benefit of enduring nature had been derived, the amount incurred on non-compete fee will not be allowable as revenue expenditure. In the case of Tecumseh India Pvt. Ltd. Vs. Addl. CIT (supra) the agreement was for 5 years whereas in the assessee's case the period is 7 years. Therefore, it has been submitted that the expenditure is to be treated capital in nature. As regards allowability of depreciation on non-compete fee, the ld. CIT(DR) submitted that non-compete fee is not an intangible asset and, therefore, depreciation cannot be allowed.

10. In rejoinder the ld. AR of the assessee submitted that the payment was not made for taking over of business. Nothing was transferred. Therefore, the decision of Special Bench of the Tribunal is distinguishable. He placed reliance on the decision of Hon'ble Supreme Court in the case of Sun Engineering 198 ITR 297 (SC) for the proposition that the decision cannot be applied in piece-meal; the context in which the decision was rendered is to be seen. If the decision was to apply in the case of interveners, Special Bench should not have kept those matters pending but have decided the cases along with the case of Tecumseh India Pvt. Ltd. (supra).

11. We have heard both the parties and gone through the material available on record. In the case before us there is no dispute that before formation of joint venture by L & T and Sharp Corporation, Japan, L & T was engaged in the business of developing, manufacturing, marketing, distributing and selling among other things, various electronic equipments and products in India and had a well-established country-wide sales net-work. L & T Ltd by entering

into agreement with the assessee had undertaken not to set up any undertaking or assist in setting up, undertaking any business in India of selling/marketing and trading of electronic office products for a period of 7 years in lieu of which payment of Rs.3 crores had been received. The business of joint venture is of importing, marketing and selling in India certain electric and electronic office products. Though, the business of joint venture i.e. Sharp Business Systems (India) Ltd. appears similar to that of L & T but payment of Rs. 3,00,00,000/- has been made in lieu of the latter, not setting up undertaking/assisting in setting up, undertaking any business in India of selling, marketing and trading of electronic office products for a period of 7 years. There is no dispute about the fact that L & T Ltd was having well-established country-wide net work in developing, manufacturing, marketing, distributing and selling various electronic equipments and products in India. The joint venture would have faced tough competition if L & T had set up any undertaking or assisted in setting up, undertaking any business in India of selling/marketing and trading of electronic office products. To ward off that competition, the assessee company had paid Rs.3 crores to L & T Ltd. Therefore, by payment of non-compete fee to L & T Ltd the competition for a period of 7 years has been eliminated. The period of 7 years is quite long during which any new company can establish its reputation and a reasonable market share would have been acquired. Therefore, the payment made by the assessee to L & T Ltd. is not to increase the profitability, but to establish itself in the market and acquire market share. By keeping away L & T Ltd. from the same business, the assessee had visualized to acquire a good market share. The contention of the assessee that after a period of 7 years L & T Ltd. would have entered in the same trade and, therefore, the expenditure should be treated as revenue in nature, we are not in agreement with this arguments of the assessee. The payment has been made to ward off the competition for a period of 7 years during which any company could have set up its products and reputation in the market. Therefore, the expenditure cannot be treated to have been incurred in revenue field.

12. The next contention of the ld. AR of the assessee that the payment of non-compete fee has not created any asset or advantage in the capital field and, therefore, it should be revenue in nature. The decision of Hon'ble Supreme Court in the case of Madras Auto Services P. Ltd. (supra) cannot be applied to the facts of the case before us. In that case the assessee had taken

the premises for 39 years on lease and invested in the construction of building. The building did not belong to the assessee and the assessee was paying nominal rent for a period of 39 years. Under these circumstances, Hon'ble Supreme Court held that no asset of enduring nature was created and, therefore, the expenditure was to be treated as revenue in nature. The ratio of this decision is of no avail in the cases of non-compete payments as in that case the incurring of expenses did not create any asset as against that it has been clearly held by the Hon'ble Supreme Court in the case of Assam Bengal Cement Company Vs. CIT 21 ITR 34 (SC) that the protection fee paid by the assessee had acquired an advantage of an enduring nature which ensured for the benefit of the whole of the business. The decision of Hon'ble Gujarat High Court relied upon by assessee is not applicable to the facts of the case as in that case the assessee paid amount for laying of cables by the Electricity Board to ensure the regular supply of electricity. In the case before us, expenditure has not been laid for creation of any asset which did not belong to the assessee, but has been paid to ward off the competition. The aforesaid decision of Hon'ble Supreme Court in the case of Assam Bengal Cement Company Vs. CIT 21 ITR 34 (SC) has been referred in almost all the cases touching this issue and till the date the said decision has not been over-ruled.

13. Hon'ble Supreme Court in the case of CIT Vs. Coal Shipments Ltd. (supra) has held that even in a case where payment is made to ward off competition in business to a rival dealer would constitute capital expenditure and to hold them capital expenditure it is not necessary that non-compete fee is paid to create monopoly rights. Hon'ble Supreme Court in the case of Punjab State Industrial Development Corpn. Vs. CIT 225 ITR 792 (SC) has held that the fee paid to the Registrar for expansion of the capital base of the company was directly related to capital expenditure incurred by the company and although incidentally that would certainly help in the business of the company and may also help in profit making, it still retains the character of capital expenditure since the expenditure was directly related to the expansion of capital base of the company and thus it was not an expense in the nature of revenue. Hon'ble Delhi High Court in the case of CIT Vs. J. K. Synthetics Ltd. 309 ITR 371 (Del.) had held that the basic test to determine the nature of an expenditure remains same even in the context of modern situation and these tests are the test of (i) initial outlay of the business, (ii) the aim and objects of the

expenditure, (iii) enduring benefit test; & (iv) the test of fixed and circulating capital. In the case of assessee the payment of Rs.3 crores to L & T Ltd. has been made at the start of business of joint venture. Therefore, assessee's case will fall under the first test laid down in CIT Vs. J. K. Synthetics Ltd. (supra) which describes that if expenditure is made for initial outlay or for the extension of business or a substantial replacement of equipment then it will fall under the capital expenditure.

14. ITAT Delhi Special Bench in the case of Tecumseh India. Pvt. Ltd v Addl. CIT (supra) has examined the proposition canvassed by the assessee that the purpose of making non-compete fee is to maintain the profitability of the business by insulating the same from the risk of competition This contention of assessee has been rejected after detailed discussion keeping in view the judicial pronouncements. It has been held that when expenditure is made for initial outlay or for expansion of business or for a substantial replacement of equipment, then it would fall under capital expenditure. The payment of non-compete fee for acquisition of business has been held as capital expenditure as the same was incurred for initial outlay of the business. In the instant case the expenditure was incurred to ward off the competition for a period of 7 years at the start of the business and hence will form part of initial outlay of the business. Accordingly the assessee's case is squarely covered by the decision of Special Bench in the case of Tecumseh India. Pvt. Ltd.(supra). Therefore, the expenditure by way of non-compete fee has to be treated capital in nature.

15. We are conscious of the provisions of section 28(va) inserted in the statute by the Finance Act, 2002 w.e.f. 1.4.2003 according to which any sum, whether received or receivable, in cash or kind, under an agreement for not carrying out any activity in relation to any business will be chargeable to tax under the head *'profits and gains of business or profession'*. In the appeal before us the assessment year involved is 2001-02. It is not the case of the assessee that Larsen and Toubro Ltd had treated the payments received by it as business income and hence as a corollary to the amended provisions of section 28(va) the payment made will be treated as

revenue expenditure. Hence, it is not possible to treat the payment of non-compete fee as revenue expenditure in the hand of the assessee for the assessment year under consideration.

16. In view of the above it is held that the non-compete fee paid by the assessee to ward off competition from L & T Ltd. is capital in nature and as such, it cannot be allowed as revenue expenditure. Accordingly, we do not find any infirmity in the order passed by the ld. CIT (Appeals) confirming the addition made by the assessing officer.

17. Alternatively, it has been argued that in case the expenditure is treated as capital in nature, in view of the decision of ITAT in the case of ITO Vs. Medicorp. Technologies India Ltd. (supra) depreciation should be allowed as non-compete fee is an intangible asset. Under section 32(1)(ii) depreciation in respect of know-how, patent, copy-right, trade-mark, licences, franchises or any other business or commercial rights of similar nature being intangible assets acquired on or after 1st day of April, 1998, owned wholly and partly by the assessee and used for the purpose of business or profession, shall be allowed at the specified rates. From plain reading of language of section 32(1)(ii) it is clear that (i) the asset should intangible asset; (ii) should be wholly or partly owned by the assessee; (iii) and used for the purposes of business or profession. All three conditions are cumulative and non fulfillment of any of the condition would disentitle the assessee for depreciation allowance. Admittedly, the non-compete fee is not in the nature of know-how, patents, copy-right, trade-marks, licenses or franchises. Now, it is to be seen whether non-compete fee would fall under residuary part of the definition "any other business or commercial rights of similar nature". The intangible asset falling in expression *"any other business or commercial rights of similar nature"* should belong to same genus to which know-how, patents, copy rights, trademarks, licenses/franchises belong. Therefore, the expression "any other business or commercial rights of similar nature" would mean that the business or commercial right should be in the nature of know-how, patents, copy-rights, trade-marks, licenses or franchises. By no stretch of imagination, the non-compete fee can be treated to have belonged the same genus to which know-how, patents, copyrights, trademarks, licences/franchises belong.

18. An asset whether tangible or intangible must be one for which a market value can be ascertained. There is no dispute that know-how, patents, copyrights, trademarks, licenses/franchises etc. are intellectual property rights, which can be transferred/assigned/leased out to any other parties for a price. Non-compete agreement between two parties is like personal services contract which is un-assignable. Personal services contract cannot survive on the demise of either of the parties. Similarly the non-compete agreement between two parties will come to an end on the demise of either of the parties. While intangible assets like know-how, patents, copyrights, trademarks, licenses/franchises etc. can be sold/assigned to any other person for a value but non-compete right acquired on payment cannot be transferred for a price. No third party can be roped in, in the agreement for non-compete by way of sale/assignment as it is non saleable/un-assignable. Similarly, the right to trade freely or to compete in the market is not an asset. Hence, a right arising out of an agreement of non-compete or not to trade freely will not constitute a commercial right falling in the category of intangible assets.

19. Non-compete fee of Rs 3,00,00,00/- has been paid to ward off the competition from L& T Ltd. Hon'ble Delhi High court in the case of CIT-IV v Hindustan Coca Cola Beverages Pvt. Ltd (2011) 238 CTR (Del) 1 while dealing with issue of depreciation on goodwill in paragraph 22 held as under:

> *"22…….To effectively understand what would constitute a intangible asset, certain aspects, like the nature of goodwill involved, how the goodwill has been generated, how it has been valued, agreement under which it has been acquired, what intangible asset it represents, namely, trade mark, right, patent etc. and further whether it would come within the clause, namely, "any other business or commercial rights which are of similar nature" are to be borne in mind."*

Hon'ble Delhi High Court in para 24 explained the meaning of *"business or commercial right of similar nature"* in the following words :-

" 24. It is worth noting that the meaning of "business or commercial rights of similar nature" has to be understood in the backdrop of section 32(1)(ii) of the Act. Commercial rights are such rights which are obtained for effectively carrying on the business and commerce, and commerce, as is understood, is a wider term which encompasses in its fold many a facet. Studied in this background, any right which is obtained for carrying on the business with effectiveness is likely to fall or come within the sweep of meaning of intangible asset. The dictionary clause clearly stipulates that business or commercial rights should be of similar nature as know-how, patents, copyrights, trademarks, licences, franchises, etc. and all these assets which are not manufactured or produced over-night, but are brought into existence by experience and reputation. They gain significance in the commercial world as they represent a similar benefit or advantage or reputation built over a certain span of time and the customers associate with such assets……. "

20. Thus from the decision of Hon'ble Delhi High Court in the case of Hindustan Coca Cola Beverages Pvt. Ltd. (supra) it is clear that "business or commercial rights of similar nature" are not manufactured or produced over-night, but are brought into existence by experience and reputation. The non-compete fee is outcome of an agreement entered into between two parties. It does not represent any intangible asset, such as, know-how, patents, copy rights, trade marks, licenses, franchises etc. Therefore, in view of decision of Hon'ble Delhi High Court in the case of Hindustan Coco Cola Beverages Pvt. Ltd. (supra) non-compete agreement would not create an asset of intangible nature eligible for depreciation under section 32(1)(ii) of the Act. The decision of the ITAT, Chennai Bench in the case of ITO Vs. Medicorp. Technologies (India) Ltd. (supra) was rendered prior to the decision of Hon'ble Delhi High Court in the case of Hindustan Coca Cola Beverages Pvt. Ltd. (supra). Hence it renders no help to the assessee. Therefore, we are not in agreement with the arguments of the assessee that non-compete fee is an intangible asset to which provisions of section 32(1)(ii) of the Act are applicable. Therefore, in our considered opinion, the depreciation cannot be allowed on amount of non-compete fee. We accordingly dismiss this contention of the assessee.

21. The next contention of the assessee is that the expenditure incurred by way of non-compete fee should be allowed during the period of seven years. The reliance has been placed on the decision of the ITAT, Chennai Bench in the case of Orchid Chemicals & Pharmaceuticals Vs. ACIT (2011) 137 TTJ 373 wherein it has been held that payment of non-compete fee should be spread over in the light of decision of Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd. Vs. CIT 225 ITR 802 (SC). We have considered the submissions made by the assessee. We following the decision of Special Bench, Delhi in the case of Tecumseh India Pvt. Ltd. (supra) have held that payment of non-compete fee is capital expenditure. In Madras Industrial Investment Corporation Ltd. the assessee issued debentures in December, 1966 at a discount. The total discount on issue of Rs.1.5 crores amounted to Rs.3 lakhs. For assessment year 1968-69 the assessee wrote off Rs.12,500/- out of the total discount of Rs.3 lakhs being the proportionate amount of discount for the period of six months ending with June 30th, 1967, taking into account the period of 12 years which was the period of redemption and dividing the discount of Rs.3 lakhs over the period of 12 years. The assessing officer disallowed the claim but the AAC allowed deduction of Rs.12,500/-. On further appeal the Tribunal held that the entire expenditure of Rs.3 lakhs was allowable as expenditure incurred for the purpose of the business. On reference the High Court noted that out of the total discount of Rs.3 lakhs an amount of Rs.12,500/- had been allowed which the Department had not challenged. Hence the High Court was concerned only with the balance amount of Rs.2,87,500/- which the High Court held, could not be considered as expenditure. On further appeal to the Hon'ble Supreme Court it was held that liability to pay the discounted amount over and above the amount received for the debentures was a liability incurred by the company for the purpose of its business in order to generate funds for its business activities. It was, therefore, expenditure. The assessee had in its return correctly claimed a deduction only in respect of proportionate part of the discount of Rs.12,500/- over the relevant accounting period in question. This was also in conformity with the accounting practice of showing the discount in the "discount on debenture account" which was written off over the period of debentures. The assessee was entitled to deduct a sum of Rs.12,500/- out of discount of Rs.3 lakhs in the relevant assessment year. Hon'ble Supreme Court also held that ordinarily, revenue expenditure which is incurred wholly and exclusively for the purpose of business must be allowed in its entirety in the year it is incurred. It cannot be spread over a number of years even if the assessee has written it

off in his books, over a period of years. However, the facts may justify an assessee who has incurred expenditure in a particular year to spread and claim it over a period of ensuing years. In fact, allowing the entire expenditure in one year might give a very distorted picture of the profits of a particular year. Issuing debentures is an instance where, although the assessee has incurred the liability to pay the discount in the year of issue of debentures, the payment is to secure a benefit over a number of years. There is a continuing benefit to the business of the company over the entire period. The liability should, therefore, be spread over the period of debentures. From the decision of Hon'ble Supreme Court it is clear that expenditure which is revenue in nature and is incurred to secure a benefit over a number of years can be spread over the period of benefit derived by an assessee. However, where the expenditure incurred is in the nature of capital expenditure, the spread over cannot be allowed. Since we have held that the expenditure incurred by way of non-compete fee is capital in nature, it cannot be allowed to be spread over for the period of seven years. Therefore, the claim of the assessee for spread over of the expenditure cannot be entertained. Accordingly, this ground of appeal raised by the assessee is also dismissed.

22. In the result, the appeal filed by the assessee is dismissed.

The order pronounced in the open court on : **30th June, 2011.**

Sd/- Sd/-

[A. D. JAIN] **[K. D. RANJAN]**
JUDICIAL MEMBER **ACCOUNTANT MEMBER**

Dated : 30th June, 2011.

MEHTA

" Copy of the order forwarded to : -

1. Appellant.
2. Respondent.
3. CIT,
4. CIT (Appeals),
5. DR, ITAT, NEW DELHI.

True Copy. By Order.

Assistant Registrar, ITAT. "