आयकर अपील य अ धकरण, अहमदाबाद ायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,
'' A'' BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
Ms. MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./**ITA No.2701/AHD/2011**

नधा रणवष/Asstt. Year: 2008-2009

A.C.I.T., Mehsana Circle, Mehsana.	Vs.	M/s.Neptune Industries Ltd. GIDC Estate, Phase-II, Dediyasan, Mehsana. PAN : AABCN4995M

(Applicant)		(Respondent)

Revenue by	:	Shri S.K. Dev, Sr.D.R
Assessee by	:	Shri S.N. Divatia, A.R

सुनवाई क तारख/**Date of Hearing : 17/07/2019**
घोषणा क तारख /**Date of Pronouncement: 30/07/2019**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Revenue against the order of the Learned Commissioner of Income Tax (Appeals)-, Gandhinagar dated 23/08/2011(in short ñLd.CIT(A)ò) arising in the matter of assessment order passed under s.143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dt. 28/12/2010 relevant to the Assessment Year 2008-2009.

The Revenue has raised the following grounds of appeal;

1. *The Ld.CIT(A) has erred in law and on facts in deleting the disallowance of Rs.1,98,37,500/- out of depreciation on intangibles being technical know-how and trademark.*

2. *The learned CIT(Appeals) has erred in law and on facts in deleting the disallowance of Rs.16,78,636/- out of capital gain on transfer of land under the scheme of succession u/s.47 (xiii) of the I.T. Act.*

3. *The learned CIT(Appeals) has erred in law and on facts in deleting the addition of Rs.16,16,310/- on account of payment made to sister concerns u/s.49A(2) of the I.T. Act.*

4. *On the facts and circumstances of the case the ""Ld.CIT(A) ought to have upheld the order of the Assessing Officer.*

5. *It is therefore prayed that the order of the learned CIT(Appeals) may be set aside and that of the A.O be restored to the above extent.*

1st we take up the issue raised by the Revenue in the ground No. 2.

The issue raised by the assessee in ground No. 2 is that the Ld. CIT-A erred in deleting the addition of Rs. 16,78,636/- representing the capital gain on the transfer of land treating the impugned transaction covered under the scheme of succession under section 47(xiii) of the Act.

2. The facts, in brief, are that the assessee in the present case is the limited company and engaged in the activity of Manufacturing of Machinery on a turn-key basis. There were two partnership firms namely M/s Neptune Equipment & M/s Neptune Engineering Co., which were succeeded by the existing company (assessee) with effect from 20th September 2007. The assessee acquired the assets/liabilities from both the firms as stood in the balance sheet of the respective firms immediately before the date of succession, i.e. 19th September 2007 as detailed under;

Assets	***Acquired from M/s.Neptune Equipment Rs.***	***Acquired from M/s.Neptune Engineering Rs.***	***Total Rs.***
Land	*23,00,000/-*	*4,00,000/-*	*27,00,000/-*
Building Plant & Machineries and other tangible movable and immovable assets	*84,50,000/-*	*16,36,000/-*	*1,00,86,000/-*
Technical Know How	*6,62,50,000/-*	*91,20,000/-*	*7,53,70,000/-*
Trade Name	*35,00,000/-*	*4,80,000/-*	*39,80,000/-*
Net working capital	*23,00,000/-*	*5,64,000/-*	*28,64,000/-*
Total	*8,28,00,000/-*	*1,22,00,000/-*	*9,50,00,000/-*

2.1 The assessee during the assessment proceedings claimed that there is no capital gain arising on account of the succession of the firms by the assessee by the provisions of section 47(xiii) of the Act.

2.2 However, the AO was not satisfied with the contention of the assessee by observing that

a. The existing company succeeded the firms. Therefore the condition as specified under the provisions of section 47(xiii) of the Act has not complied.
b. The condition as specified under section 47(xiii)(b) of the Act, i.e. The partners of the firm immediately before the succession should become the shareholders of the company in the proportion of the capital account as stood in the firm immediately before the date of succession. In the case on hand, the valuation of technical know-how and the trademark as determined by the firms has been made nil. Therefore the condition

of having a shareholding in the company in the proportion of share capital has not complied.

c. There was the change in the constitution of the firms immediately before the date of succession by introducing new partners to comply the condition for holding voting rights in the company by the partners of the firm not less than 50%. Thus the assessee to escape from the capital gain has arranged the transaction in such a manner to avail the benefit of the provisions of section 47(xiii) of the Act which is unwanted.

In view of the above, the AO determined the capital gain of Rs. 16,78,636.00 (Rs. 14,35,636.00 + Rs. 2,43,000.00) in respect of the land acquired by it from the impugned partnership firms and added to the total income of the assessee.

The aggrieved assessee preferred an appeal to the Ld. CIT-A.

3. The assessee before the Ld. CIT-A submitted that it had satisfied all the conditions as specified under the provisions of section 47(xiii) of the Act.

i. All the assets and liabilities of the partnership firms as stood immediately before the date of succession have been transferred to the assessee.

ii. Similarly, all the partners of the firm have become the shareholder of the company in the same proportion of their capital in the firm as stood immediately before the date of succession.

iii. The partners of the firm received the consideration only in the form of allotment of shares. There was no other benefit directly or indirectly received by the partners of the firm from the company.

iv. Similarly, the aggregate shareholding of the partners in the company is not less than 50% of the total voting power of the company, which was continued as such for five years from the date of succession.

3.1 There is no requirement under the provisions of section 47(xiii) of the Act that the partnership firms should be converted into a company. As such, an existing company can also acquire the partnership firm in the manner as provided under section 47(xiii) of the Act.

3.2 There is a violation of the provisions specified under section 47(xiii) of the Act even if the AO treats the value of the technical know-how/trade name acquired by the assessee as nil.

3.3 The introduction of the partners in the firm before the succession of such firm by the company is not prohibited under the provisions of section 47(xiii) of the Act.

In view of the above, the assessee claimed before the Ld. CIT-A that there was no violation of the provisions of section 47(xiii) of the Act and therefore, it cannot be denied the benefit as provided in such section of the Act.

3.4 The Ld. CIT-A after considering the submission of the assessee held that the assessee has fulfilled the conditions as specified under section 47(xiii) of the Act. Accordingly, there cannot be any addition on account of transfer of such land to the assessee. Hence the Ld. CIT-A deleted the addition made by the AO.

Being aggrieved by the order of the Ld. CIT-A, the Revenue is in appeal before us.

4. Both the Ld. DR and Ld. AR before us relied on the order of the authorities below as favourable to them.

5. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the instant case relates to the transfer of assets by the partnership firms to the assessee in the manner of succession as provided under section 47(xiii) of the Act. The AO alleges that the conditions as specified under section 47(xiii) of the Act has not been satisfied. Therefore the transfer of land to the assessee by the partnership firms is chargeable to tax in its hands being the successor of the firms.

5.1 However, we note that there is no requirement under the provisions of section 47(xiii) of the Act that the firms should be converted into the company. It is sufficient if the existing company acquires all the assets and liabilities of the partnership firms in the manner as provided under section 47(xiii) of the Act to claim the exemption from the capital gain.

5.2 Similarly, even if the valuation of the technical know-how and the trademark is determined at nil value, then also there would not be any violation of holding the shares in the proportion of the capital in the firm as stood immediately before succession as specified under section 47(xiii) of the Act.

5.3 We also note that there is no prohibition for the introduction of new partners in the partnership firms before the date of succession. As such, the introductions of the partners in the firm before the date of succession does not act as an estoppel on the operation of the exemption provided under section 47(xiii) of the Act.

In view of the above, we hold that there was no violation of the provisions of section 47(xiii) of the Act and accordingly conclude that there cannot be any income on account of transfer of the impugned land to the assessee. Hence we uphold the finding of the Ld. CIT-A.

The 1st issue raised by the Revenue is that the Ld. CIT-A erred in deleting the addition made by the AO for Rs. 1,98,37,500/- on account of the depreciation on technical know-how and trademark.

6. The assessee has acquired two partnership firms in the year under consideration in the manner as provided under section 47(xiii) of the Act. The assessee has also acquired technical know-how and the trademark from both the partnership firm aggregating to Rs. 7,93,50,000/-. The assessee accordingly in its books of accounts claimed depreciation on such technical know-how and trademark at the rate of 25% amounting to Rs. 1,98,37,500/-.

6.1 The assessee also claimed that both the partnership firms acquired by it had valued the technical know-how and trademark based on the valuation report certified by the qualified chartered accountant. The partnership firms have developed the intangible assets after putting so many years in the business, which resulted in innovative ideas/activities starting from the designing to installation/commissioning of the projects(machinery). As such,

it was not possible for the assessee company without using such technologies to sustain in the business of manufacturing of machines, particularly ceramic machines on a turn-key basis.

6.2 Similarly, the partnership firms have earned a trading name, which is their property and also possessed by them.

6.3 However, the AO was of the view that the technical know-how/trademark has nil value, and therefore, the assessee cannot claim the depreciation on such technical know-how and trademark. The opinion of the AO was based on the following facts:

i. The valuation of such technical know-how and trademark has been valued at nil value in the case of the firm namely M/s Neptune Equipment Co. in the scrutiny assessment framed under section 143(3) of the Act.

ii. The assessee and the partnership firm acquired by it are engaged in the same kind of business and having common partners/shareholders belonging to the same family since the inception of the business. As such, the assessee and the firms started the same business activities since the dates when these entities came into existence, i.e. 14th June 1999 and 13th December 1998.

iii. There was no distinction between the machinery manufactured by the assessee viz a viz by the partnership firm.

iv. The assessee supplied these machinery to the common customers.

v. Both the assessee and the firm are using the same logo of *"Neptune."*

vi. Both the assessee and the firms are operating from the same premises.

vii. The valuation determined of the firms is based on the highly inflated figures of sales and presumption of certain expenses, a surplus of cash.

viii. Similarly, the word ôNeptuneô cannot fetch any goodwill by the partnership firms. It is because the same word is used by the assessee as well. Moreover, the same word is commonly used in the market.

In view of the above, the AO treated the value of the technical know-how and trademark of both the partnership firms at nil. Accordingly, he disallowed the depreciation claimed by the assessee amounting to Rs. 1,98,37,500.00 and added to the total income of the assessee.

The aggrieved assessee preferred an appeal to the Ld. CIT-A.

7. The assessee before the Ld. CIT-A submitted that it had incurred a cost of Rs. 7,93,50,000/- on the acquisition of impugned technical know-how and trademark from both the partnership firms. The assessee against the acquisition of such intangible assets has paid the consideration by issuing shares to the partners of both the firms.

7.1 There was no violation of the provisions of section 47(xiii) of the Act. Therefore the assessee has acquired such intangible assets from the

partnership firms as reflected in the respective balance sheets before the date of succession.

7.2 The assessee also claimed that the valuation of the intangible assets is based on the report furnished by the qualified chartered accountant.

8. The Ld. CIT-A after considering the submission of the assessee, observed certain facts as detailed under:

i. The partnership firms before transferring itôs all assessee liabilities to the assessee have incorporated all its assets and liabilities including the intangible assets on its balance sheet so that a true and fair picture can be brought on record. Accordingly, the assessee has recorded the value of the intangible assets in the balance sheet based on valuation report furnished by the qualified chartered accountant.

ii. All the assets and the liabilities were taken over by the assessee from the partnership firms as mandated under the provisions of section 47(xiii) of the Act.

iii. Similarly, all other conditions as specified under section 47(xiii) of the Act regarding the shareholding pattern with the voting rights, allotment of the shares for the consideration had been fulfilled which were also accepted by the AO in the assessment proceedings except the valuation of intangible assets.

iv. The actual cost incurred by the assessee in the acquisition of the intangible assets cannot be doubted because it was acquired against the payment by way of the allotment of shares to the partners.

8.1 In case the AO was not satisfied with the valuation report furnished by the assessee, then at the most, he should have referred the matter to the departmental valuation Officer or other independent valuer/expert. As such, the valuation report furnished by the assessee can be agitated by referring to the Valuation Officer.

In view of the above, the Ld. CIT-A deleted the disallowance of the depreciation made by the AO.

Being aggrieved by the order of the Ld. CIT-A, Revenue is in appeal before us.

9. The Ld. DR before us submitted that the value of the technical know-how is nil. Therefore, the assessee cannot be allowed any depreciation. The learned AR in support of his claim also relied on the judgement of Hon'ble Gujarat High Court in the case of CIT versus Sandvik Chokshi Ltd. reported in 55 taxmann.com 45 fund and on the judgement of Hon'ble Supreme Court in the case of Guzdar Kajora Coal Mines Ltd. Vs. CIT reported in 85 ITR 599.

10. On the other hand, the Ld. AR before us submitted that the AO has not pointed out any defect in the valuation report furnished by the qualified chartered accountant for the valuation of technical know-how/trademark.

11. Both the parties before us relied on the order of the respective authorities below as favourable to them.

12. We have heard the rival contentions of both the parties and perused the materials available on record. In the instant case, the assessee has acquired certain intangible assets from the partnership firms in the manner provided under section 47(xiii) of the Act. However, the AO was of the view that the valuation of such intangible assets represents at nil value. Accordingly, he disallowed the depreciation claimed by the assessee on such intangible assets. However, the Ld. CIT-A deleted the disallowance made by the AO by observing that the assessee has complied the conditions as specified under section 47(xiii) of the Act and the assessee has incurred the cost on the acquisition of such intangible assets. Therefore he was of the view that the AO cannot determine the value of such intangible assets at nil without referring to the departmental valuation Officer.

12.1 Now the issue before us, arises as to whether the assessee is entitled to the depreciation on the intangible assets acquired by it in the given facts and circumstances. There is no dispute qua the fact that the assessee has incurred a cost by issuing shares to the partners of the partnership firms against the acquisition of the businesses. Indeed the value of the intangible assets was based on the valuation report furnished by the qualified chartered accountant that was not disbelieved by the AO. In our considered view, in case the AO disagreed with the valuation of the intangible assets, then he should have referred the matter to the DVO. But in the case on hand, he has not done so.

12.2 We also note that the ITAT Mumbai Bench in the case of the DCIT versus Suyash Laboratories Ltd reported in 65 taxmann.com 217 held that the depreciation on the revalued assets could not be disallowed in the hands of the assessee if acquired in the manner specified under section 47(xiii) of the Act. The relevant extract of the order is reproduced as under;

"A perusal of the assessment order shows that the AO has heavily relied upon Explanation-1 to Sec. 43(6) of the Act. The relevance of the applicability of Explanation-1 to Sec. 43(6) of the Act is highly questionable in the hands of the present assessee inasmuch as the said explanation refers to the provisions of Sec. 170(2) of the Act which is relevant when the predecessor cannot be found then the assessment of the income of the previous year in which the succession took place upto the date of succession and of the previous year preceding that year shall be made on the successor in like manner and to the same extent as it would have been made on the predecessor. The facts of the case in hand do not warrant any relevance to the aforesaid provision of the Act."

12.3 We also note that the ITAT Ahmedabad in the case of DCIT Vs. Zydus Wellness Ltd. in ITA No. 529/AHD/2017 vide order dated 18-06-2018 has decided the issue in favour of the assessee by observing as under:

5. We have heard the Ld.representatives of the respective parties. We have perused relevant materials on record. We have also gone through the judgement of the Hon'ble Gujarat High Court wherein the issue has been decided in favour of assessee in assessee's own case for AYs 2010-11, 2011-12 & 2012-13. The Hon'ble Gujarat High Court while dismissing the appeal preferred by the Revenue against the order passed by this Ld.Tribunal in Tax Appeal No.346 of 2018, dated 16.04.2018 observed as follows:-

"6. With respect to the claim of depreciation, the decision of Supreme Court in case of Smifs Securities Ltd. (supra) would squarely apply. There is no material referred to by the Assessing Officer to hold that the claim of depreciation was fictitious. If we read his entire expression in this respect, he seems to be suggesting that being an intangible asset acquisition thereof would not qualify for depreciation. If that be so, the view of the Assessing Officer was opposed to the decision of the Supreme Court in case of Smifs Securities Ltd. (supra). On the other hand, if the observations of the Assessing Officer can be seen as his findings that the claim itself was

baseless, there was no discussion or reference to any material to enable him to come to such a conclusion.

7. In the result, tax appeal is dismissed."

6. The Coordinate Bench of this Tribunal in ITA No.80/Ahd/2016 for AY 2012-13, dated 01.02.2018 while rejecting the appeal preferred by the Revenue in assessee's own case observed as follows:-

> *"4. Before us, the ld.counsel for the assessee has placed on record copy of the Hon'ble Gujarat High Court order in the case of assessee reported in Pr.CIT Vs. Zydus Wellness Ltd., 87 taxmann.com 82 (Guj.) rendered in Tax Appeal No.779 of 2017 dated 3.10.2017. Hon'ble High Court upheld order of the ITAT vide which depreciation was granted to the assessee on goodwill. Similarly, in the Asstt.Year 2011-12, Tribunal has dismissed appeal of the Revenue whereby the Tribunal has upheld grant of depreciation on goodwill at the end of ld.CIT(A) vide order dated 8.6.2015. Considering judgement of the Hon'ble Gujarat High Court and order of the Tribunal in the case of assessee in different assessment years, we are of the view that the assessee is entitled for depreciation on goodwill. The ld.CIT(A) has examined all these facts, and thereafter, allowed the depreciation. The ld.CIT(A) has rightly appreciated the controversy and no interference is called for in his order. Accordingly, the appeal of the Revenue is dismissed."*

7. Taking into consideration of the entire aspects of the matter, we find that the issue is covered in assessee's own case by number of judgements and orders passed by this Ld.Tribunal as well as the Hon'ble Jurisdictional High Court. We, therefore, respectfully following the decision of the Coordinate bench as mentioned above in assessee's own case as well as the judgement passed by the Hon'ble Jurisdictional High Court, find no reason to interfere with the order passed by the Ld.CIT(A) allowing the claim of depreciation of goodwill made by the assessee.

12.4 We also note that the ruling relied upon by the learned DR before us are distinguishable from the facts on hand. The ruling of the Hon'ble Supreme Court in the case of Guzdar Kajora Coal Mines Ltd. *(Supra)* cannot be applied

to the case on hand as it relates to the provisions of Indian income tax Act 1922 and it does not relate to the succession of the firm by the company.

12.5 Similarly the principles laid down by the Hon'ble Gujarat High Court in the case of Sandvik Chokshi Ltd. *(supra)* is based on the slump sale and there was not assign the value to the assets acquired by the assessee. However, in the case on hand there was a valuation report furnished by the assessee certifying that all the assets and liabilities which were acquired at the book value in the manner provided under section 47(xiii) of the Act.

12.6 We also note that all the conditions as specified under the provisions of section 47(xiii) of the Act has duly complied. Therefore we are of the view that the assessee cannot be denied for the amount of depreciation claimed by it. Hence, we do not find any reason to interfere in the finding of the Ld. CIT-A.

The last issue raised by the Revenue in the ground No. 3 is that the Ld. CIT-A erred in deleting the addition made by the AO for Rs. 16,16,310/- on account of payment made to the persons specified under section 40A(2) of the Act.

13. The assessee in the year under consideration has made a payment towards certain expenses amounting to Rs. 80,81,548.00 to the parties as specified under section 40A(2) of the Act. The details of the expenses and the associated parties/sister concerns are available on page 23 of the AO order. The AO during the assessment proceedings found that the expenses are excessive and unreasonable, and accordingly he invoked the provisions of under section 40A(2) of the Act and made the disallowance at the rate of 20%

of such expenses amounting to Rs. 16,16,310/- and added to the total income of the assessee.

The aggrieved assessee preferred an appeal to the Ld. CIT-A.

14. The Ld. CIT-A deleted the addition made by the AO by observing as under:

> *4.4 Having regard to the-facts of the case, assessment order and the Appellant's written submission, I hold that disallowance of Rs.16,16.310/-, being 20% of total payment of Rs.80,81,550/- to sister concerns, made by the Assessing Officer u/s 40A(2) of the Act is deleted for the followjng reasons:*
>
> *(a) Admittedly, the Appellant has. made payment td sister concerns, however, contracts have been given to the sister concerns after obtaining various quotations from the market and comparing the same with the quotation obtained from the sister concerns, as well as the said sister concerns have employed qualified technical professionals to. carry out the contract work.*
>
> *(b) To Invoke provisions of S.40A(2) of the Act,.it is obligatory and mandatory on the part of the Assessing Officer to demonstrate that payments made by the Appellant to sister concerns are higher than the market rate. In the present case before me, the Appellant has obtained various quotations from the market and after making the comparison, with the rates of the sister concerns, the contract has been given to them. In nut shell, the payment to sister concerns have been made against-the provisions for services at prevailing market rate. The Assessing Officer has not carried out any such kind of exercise to find out the fair market value of the said services and whether it is comparable with the payment made to the sister concerns and on tli e contrary, the assessing officer has made adhoc disallowance of 20% of total payments made to the sister concerns, which is not acceptable as per the provisions of S.40A(2) of the Act.*
>
> *(c) Considering the binding decision of Ahmedabad Tribunal in the cae of Gujarat Aluminium Extrusion Pvt. Ltd. (supra), it legally settled that for applying provisions of S.40A(2) of the Act, without determining the market value of goods/services provided, the disallowance cannot be sustained.*

Being aggrieved by the order of the Ld. CIT-A, the Revenue is in appeal before us.

15. Both the parties before us relied on the order of the authorities below as favourable to them.

16. We have heard the rival contentions and perused the materials available on record. At the outset, we note that the AO has made the disallowance after treating the payment made by the assessee to the specified persons under section 40A(2) of the Act as excessive and unreasonable without bringing any comparative cases. In such cases, we are of the view that the expenses incurred by the assessee cannot be held excessive and unreasonable until and unless these are backed by some documentary evidence. Accordingly, we are of the view that the order of the Ld. CIT-A does not suffer from any infirmity. Accordingly, we uphold the order of the Ld. CIT-A. Hence the ground of appeal of the Revenue is dismissed.

17. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the Court on 30/07/2019 at Ahmedabad.

-Sd-	**-Sd-**
(Ms. MADHUMITA ROY)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 30/07/2019

Manish