

आयकर अपीलीय अधिकरण

मुंबई पीठ “के”

श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री अमरजीत सिंह, लेखा सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH “K”, MUMBAI

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

आअसं.570/मुं/2018 (नि.व. 2011-12)

ITA NO.570/MUM/2018(A.Y.2011-12)

Abbott Healthcare Private Limited.,
4, Corporate Park, Sion -Trombay Road,
Chembur, Mumbai 400 071.

PAN: AAACK-3935-D

..... अपीलार्थी /Appellant

बनाम Vs.

Asstt. Commissioner of Income Tax, Circle 2(1)(1),
Room No.561, 5th Floor,
Aaykar Bhavan, M.K.Road,
Mumbai 400 020

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : S/Shri Raghavendra Singh/
Lokesh Shah/Kiran Belkar

प्रतिवादी द्वारा/Respondent by : Smt. Monica Khare

सुनवाई की तिथि/ Date of hearing : 04/05/2022

घोषणा की तिथि/ Date of pronouncement : 02/08/2022

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

The assessee is in second round before the Tribunal . This appeal of the assessee along with Cross Appeal by Revenue in ITA No.711/Mum/2018 for the same assessment year was decided by the Tribunal vide order dated 06/01/2020. Thereafter, the assessee filed Miscellaneous Application u/s. 254(2) of the Income Tax Act, 1961 [in short ‘the Act’] i.e. MA

No.229/Mum/2020 in ITA No. 570/Mum/2018 seeking rectification in the order of Tribunal.

2, The Co-ordinate Bench disposed of the said Miscellaneous Application vide order dated 08/03/2021 by observing as under:-

“4. Upon careful consideration, we note that in Miscellaneous Application there is no whisper of additional ground remaining un-adjudicated. We note that additional ground was not adjudicated by the ITAT as there was no discussion on the subject. However, since the assessee has submitted photocopy of the ITAT receipt for filing additional ground in the interest of justice, we deem it appropriate that ITA No. 570/Mum/2018 be recalled only to consider the veracity and adjudication of the said additional ground raised by the assessee.

5. In the result, ITA No. 570/Mum/2018 is recalled only to the extent of considering the claim of the assessee claim regarding additional ground as discussed above.”

3. The assessee raised additional grounds of appeal in respect of depreciation on Non-Compete Fee u/s. 32 of the Act. The additional grounds of appeal raised by assessee read as under:=-

“a) On the facts and in the circumstances of the case, the Ld. Commissioner of Income-tax (Appeals) ought to have allowed the claim of depreciation amounting to INR 128,38,65,000/- on non-compete fees, under Section 32 of the Act;

b) On the facts and in the circumstances of the case, the Ld. Commissioner of Income-tax (Appeals) ought to have allowed the said claim of depreciation on the right acquired by payment of non-compete fees, by holding that such right was an intangible asset as per clause {b} of Explanation 3 to Section 32(1) of the Act;

c) On the facts and in the circumstances of the case, the Ld. Commissioner of Income-tax (Appeals) ought to have followed the judicial precedents regarding admissibility of depreciation on non-compete fees relied upon by the Assessee before him, including the orders passed by jurisdictional benches of the Hon'ble Income-tax Appellate Tribunal in Piramal Glass Ltd. v. Deputy Commissioner of Income-tax, Mumbai, [2017] 80 taxmann.com 68 (Mumbai - Trib.) and ACIT, CC-44, Mumbai v. Shreya Life Science Pvt. Ltd. 2016 (1) TMI1094 - ITAT Mumbai.”

4. The assessee had filed an application dated 05/04/2019 under Rule 11 of Income Tax (Appellate Tribunal) Rules 1963 giving the background for

raising additional grounds of appeal. The relevant extract of the application is reproduced herein below:-

" 3. During the previous year relevant to Assessment Year 2011-12, the Assessee had entered into a Business Transfer Agreement dated May 21, 2010 with Piramal Healthcare Limited ("Piramal"), in order to acquire Piramal's Base Domestic Formulations business on a slump sale basis. Out of the total consideration paid, an amount of INR 513,54,60,000 was capitalized in the books of accounts of the Assessee towards non-compete fees. On this consideration attributable to non-compete fees, the Assessee claimed depreciation under Section 32 of the Income-tax Act, 1961 ("the Act") at the rate of 25%, being INR 128,38,65,000.

4. The Assessing Officer passed an Assessment Order dated 28.05.2015, disallowing the claim of depreciation on non-compete fees. Against the said Assessment Order, the Assessee preferred an appeal before the Ld. Commissioner of Income-tax (Appeals) - 55, Mumbai, inter-alia challenging the disallowance of depreciation on non-compete fees claimed by the Assessee under Section 32 of the Act. During the course of the appellate proceedings, the Assessee also raised an alternate ground before Ld. Commissioner of Income-tax (Appeals), Mumbai for allowance of non-compete fee as deferred revenue expenditure. This claim of the Assessee for allowance of non-compete fee as deferred revenue expenditure was duly allowed by the Ld. Commissioner of Income-tax (Appeals), vide the impugned order-in-appeal dated 08.11.2017. The Ld. Commissioner of Income-tax (Appeals) did not record any specific finding regarding the claim of depreciation on non-compete fees under Section 32 of the Act.

5. Against the impugned order-in-appeal dated 08.11,2017 passed by the Ld. Commissioner of Income-tax (Appeals), the Assessee has preferred an appeal (being ITA No. 570/Mum/2018) before this Hon'ble Tribunal, on certain other grounds decided by the Ld. Commissioner of Income-tax (Appeals) against the Assessee. The Revenue has also preferred an appeal (being ITA No, 711/Mum/2018) against the said order-in-appeal, challenging the allowance of non-compete fee as deferred revenue expenditure ordered by the Ld. Commissioner of Income-tax (Appeals).

6. The additional grounds raise a pure question of law that does not warrant appreciation of any additional fact(s), as all the relevant fact(s) required to be taken into account for entertaining and adjudicating the additional grounds are part of the record. It is imperative to state that the question of law arising from the additional grounds goes to the root of the matter and clearly transpires from the proceedings before the lower authorities. Further, the question of law arising from the additional grounds is necessary to be adjudicated upon, in order to correctly assess the tax liability of the Assessee. Reliance is placed in this regard on the judgment of the Hon'ble Supreme Court in National Thermal Power Co. Ltd v. Commissioner of Income-tax, [1998] 229 ITR383 (SC).

7. It is further submitted that the issue pertaining to allowance of non-compete fee as deferred revenue expenditure raised by the Revenue is inextricably linked with the issue

relating to the claim of depreciation on non-compete fee. Thus, the additional grounds of appeal are apposite for deciding the issue involved in the grounds raised by the Revenue.”

5. Shri Raghavendra Singh appearing on behalf of the assessee submitted that the issue raised in additional grounds of appeal does not require any additional evidence to be placed on record. It is a legal issue, hence, can be decided on the basis of documents and material already available on record.

5.1 The Id. Authorized Representative for the assessee submitted that assessee company is engaged in the business of manufacturing and trading of pharmaceutical, nutritional , diagnostic and vascular products. A business transfer agreement dated 21/05/2010 was entered into by the assessee with M/s. Piramal Healthcare Ltd. Pursuant to the said agreement the assessee acquired Base Domestic Formulations business (comprising of healthcare solutions business and mass market branded Formulation – True Care™ business) a branded generic business of M/s Piramal Health Care Ltd. as a going concern on slump sale basis w.e.f. 08/09/2010. The assessee claimed depreciation @25% on Non-compete Fee of Rs.513.54 crores paid as part of slump sale agreement. During assessment proceedings the Assessing Officer questioned assessee’s claim of depreciation on Non-compete Fee and disallowed assessee’s claim of deprecation of Rs.128.38 crores on Non-compete Fee. The assessee carried the issue in appeal before the CIT(A). Before the CIT(A) the assessee made primary claim of depreciation on Non-compete Fee. The assessee also raised an alternate ground without prejudice to the primary contention that Non-compete Fee be treated as deferred revenue expenditure and the same should be allowed to be amortized over a period of eight years. The CIT(A) accepted assessee’s alternate prayer and

directed the Assessing Officer to treat Non-compete Fee as deferred revenue expenditure for a period of eight years. The Department assailed the findings of CIT (A) including the findings on non-compete fee in appeal before the Tribunal in ITA No.711/Mum/2018 (supra). The Tribunal vide order dated 06/01/2020 dismissed the ground raised by the Revenue assailing the relief allowed by CIT (A) on the issue of non-compete fee. Against the Tribunal order, the Department is in appeal before the Hon'ble High Court.

5.2 The Id. Authorized Representative for the assessee submitted that the assessee initially did not raise any ground on the issue of Non-compete Fee before the Tribunal as the assessee had got relief on the alternate plea to treat the Non-compete Fee paid as deferred revenue expenditure. Subsequently, the assessee by way of additional grounds of appeal claimed that depreciation be allowed to the assessee u/s.32 of the Act on Non-compete Fee. The Id. Authorized Representative for the assessee submitted that the Tribunal in the case of Piramal Glass Ltd vs. DCIT reported as 80 taxmann.com 68 and in the case of ACIT vs. Shreya Life Sciences Pvt. Ltd. 2016(1) TMI 1094 (Mum) has allowed deprecation on Non-compete Fee. The Department challenged the order of Tribunal in the case of Piramal Glass Ltd. before the Hon'ble High Court in Income Tax Appeal No.556 of 2017. The Hon'ble Jurisdictional High Court vide order dated 11/06/2019 by referring to the decision of Hon'ble Gujarat High Court in the case of PCIT vs. Ferromatic Milacron India (P) Ltd., Tax Appeal No.1233 of 2018 decided on 09/11/2018 dismissed the appeal of Revenue and upheld the findings of Tribunal in allowing depreciation on Non-compete Fee. The Id. AR submitted that apart from the decision of Hon'ble Jurisdictional High Court in the case of Piramal Glass Ltd.(supra) and the

decision of Hon'ble Gujarat High Court in the case of PCIT vs. PCIT vs. Ferromatic Milacron India (P) Ltd., (supra), the Hon'ble Karnataka High Court in the case of CIT vs. Ingersoll Rand International Industries Ltd., 227 Taxman 176 and the Hon'ble Madras High Court in the case of Pentasoft Technologies Ltd. vs. DCIT, 222 Taxman 209 has held that expenditure incurred for acquiring Non-compete right is capital in nature, hence, entitled for depreciation u/s 32(1) (ii) of the Act.

6. Per contra, Smt. Monica Khare representing the Department relied on the decision of Tribunal dated 06/01/2020 in Department's appeal in ITA No.711/Mum/2018(supra) to contend that the issue was already discussed by the Tribunal and the decisions in the case of Ingersoll Rand International Industries Ltd.,(supra) and Pentasoft Technologies Ltd. (supra) were considered and thereafter, the Tribunal upheld the findings of CIT(A) in allowing Non-compete Fee as deferred revenue expenditure.

7. Rebutting the contentions made on behalf of the Revenue, the Id. Authorized Representative for the assessee submitted that before passing of the order by Tribunal on 06/01/2020 the Hon'ble Bombay High Court in the case of Piramal Glass Ltd. vide order dated 11/06/2019 had already held that the assessee is eligible for claiming depreciation u/s. 32 of the Act on Non-compete Fee paid. The Id. Authorized Representative for the assessee further asserted that non-consideration of judgment by a Jurisdictional High Court is a mistake apparent from record. To buttress his submissions he placed reliance on the decision of Hon'ble Supreme Court of India in the case of ACIT vs. Saurashtra Kutch Stock Exchange Ltd. reported as 305 ITR 227.

8. We have heard the submissions made by rival sides. The solitary issue before us for adjudication is with respect to assessee's claim of depreciation amounting to Rs.128,38,65,000/- on Non-compete Fee u/s. 32 of the Act. Since, the issue has been dealt with by the Assessing Officer and the CIT(A), non fresh evidence is required to be adduced for the adjudication of the issue raised by way of additional grounds. Hence, the additional grounds of appeal are admitted and decided as under.

9. The assessee had paid Non-compete Fee to the tune of Rs.513,54,60,000/-. The assessee claimed depreciation u/s. 32 on Non-compete Fee being an intangible asset. The Assessing Officer disallowed assessee's claim. The assessee carried the issue in appeal before the First Appellate Authority. Before the CIT(A) the assessee raised primary contention that the assessee's claim of depreciation on Non-compete Fee is allowable and to support its contention the assessee placed reliance on the following decisions:

(i) CIT vs. Ingersoll Rand International Industries Ltd.(supra)

(ii) Pentasoft Technologies Ltd (supra)

In alternate without prejudice to the primary contention the assessee raised a plea that the payment of Non-compete Fee be allowed as deferred revenue expenditure. The CIT(A) allowed assessee's alternate plea. Against the order of CIT(A) the Revenue filed appeal assailing the findings of CIT(A) in allowing Non-compete Fee as deferred revenue expenditure. The Tribunal dismissed the ground raised by Revenue and upheld the findings of CIT(A). The assessee

raised additional grounds of appeal claiming depreciation u/s. 32 of the Act on Non-compete Fee.

10. We find that the First Appellate Authority had passed the order on 08/11/2017. The CIT(A) did not have the benefit of decision rendered by Hon'ble Jurisdictional High Court in the case of Piramal Glass Ltd.(supra) as the said decision is subsequent in time. The said decision by Hon'ble Jurisdictional High Court was not brought to the notice of Co-ordinate Bench during the hearing of the appeal. The decision in the case of Piramal Glass Ltd. was brought to the notice of Tribunal for the first time in Miscellaneous Application proceedings u/s. 254(2) of the Act.

11. One of the questions of law for consideration before the Hon'ble Bombay High Court in the case of PCIT vs. Piramal Glass Ltd.(supra) was:

"(a) Whether on the facts and in the circumstances of the case and in law, the ITAT is right in deleting the disallowance of depreciation claim on the non-compete fees paid when it is clear that it does not represent any intangible asset qualified for the depreciation as per Section 32 of the I.T.Act, 1961?"

The Hon'ble Court answered the question against the Revenue and in favour of the assessee by observing as under:

"3. Question No. (a) noted above pertains to the decision of the Tribunal to grant depreciation on the Assessee's payment of non-compete fees. According to the Revenue, this being an intangible asset, no depreciation under Section 32 of the Income Tax Act, 1961 ('the Act' for short) was available.

*4. We however notice that similar issue has been considered by the different High Courts and held in favour of the Assessee. A reference can be made to the decision of the Division Bench of the Gujarat High Court in the case of **Principal Commissioner of Income Tax v. Ferromatic Milacron India (P.) Limited**. It was also the case where the Assessee had incurred expenditure pursuant to the non-compete agreement and claimed*

depreciation on such asset. While dismissing the Revenue's Appeal against the Judgment of the Tribunal, following observations were made :

"We may recall the Assessing Officer does not dispute that the expenditure was capital in nature since by making such expenditure, the assessee had acquired certain enduring benefits. He was, however, of the opinion that to claim depreciation, the assessee must satisfy the requirement of Section 32(1)(ii) of the Act, in which Explanation 3 provides that for the purpose of the said sub-section the expression "assets" would mean (as per clause (b)) intangible assets, being known-how, patents, copyrights, trade marks, licenses, franchises or any other business or commercial rights of similar nature. In the opinion of the Assessing Officer, the non-compete fee would not satisfy this discrimination. Going by his opinion, no matter what the rights acquired by the assessee through such non-compete agreement, the same would never qualify for depreciation in section 32(1)(ii) of the Act as being depreciable intangible asset. This view was plainly opposed to the well settled principles. In case of Techno Shares & Stocks Limited (supra) the Supreme Court held that payment for acquiring membership card of Bombay Stock Exchange was intangible assets on which the depreciation can be claimed. It was observed that the right of such membership included right of nomination as a license which was one of the items which would fall under Section 32(1)(ii). The right to participate in the market had an economic and money value. The expenses incurred by the assessee which satisfied the test of being a license or any other business or commercial right of similar nature

In case of Areva T & D India Limited (supra) Division Bench of Delhi High Court had an occasion to interpret the meaning of intangible assets in context of section 32(1)(ii) of the Act. It was observed that on perusal of the meaning of the categories of specific intangible assets referred to in section 32(1)(ii) of the Act preceding the term "business or commercial rights of similar nature" it is seen that intangible assets are not of the same kind and are clearly distinct from one another. The legislature thus did not intend to provide for depreciation only in respect of the specified intangible assets but also to other categories of intangible assets which may not be possible to exhaustively enumerate. It was concluded that the assessee who had acquired commercial rights to sell products under the trade name and through the network created by the seller for sale in India were entitled to depreciation.

In the present case, Mr.Patel was erstwhile partner of the assessee. The assessee had made payments to him to ward of competence and to protect its existing business. Mr.Patel, in turn, had agreed not to solicit contract or seek business from or to a person whose business relationship is with the assessee. Mr. Patel would not solicit directly or indirectly any employee of the assessee. He would not disclose any confidential information which would include the past and current plan, operation of the existing business, trade secretes lists etc.

It can thus be seen that the rights acquired by the assessee under the said agreement not only give enduring benefit, protected the assessee's business against competence, that too from a person who had closely worked with the assessee in the same business. The expression "or any other business or commercial rights of similar nature" used in Explanation 3 to sub-section 32(1)(ii) is wide enough to include the present situation."

5. No question of law in this respect therefore arises."

12. In the present case payment of non-compete fee in accordance with terms of agreement between the assessee and Piramal Healthcare Ltd. is not disputed by the Revenue. Ergo, in light of the facts of case and the decision by Hon'ble Bombay High Court referred above, we hold that the assessee is eligible for depreciation u/s. 32 of the Act on Non-compete Fees paid being an intangible asset. The additional grounds of appeal raised by the assessee are thus, allowed.

Order pronounced in the open court on Tuesday the 2nd day of August, 2022.

Sd/-

(AMARJIT SINGH)

लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated 02/08/2022

Vm, Sr. PS(O/S)

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
6. गार्ड फाइल/Guard file.

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BY ORDER,

(Dy./Asstt. Registrar)/
Sr.Private Secretary
ITAT, Mumbai