IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD BENCH "D"

Before SHRI BHAVNESH SAINI - JM
And SHRI A K GARODIA, AM

ITA no.483/Ahd/2007
(Assessment Year:-2003-04)

The Assistant Commissioner of Income-tax, Circle-1(1), Baroda	V/s	GE Plastics India Ltd., [Amalgamated with GE India Industrial Pvt. Ltd.] Plastic Avenue, PO Jawaharnagar, Baroda
PAN:		
[Appellant]		[Respondent]

ITA no.573/Ahd/2007
(Assessment Year:-2003-04)

GE Plastics India Ltd., [Amalgamated with GE India Industrial Pvt. Ltd.] Plastic Avenue, PO Jawaharnagar, Baroda	V/s	The Assistant Commissioner of Income-tax, Circle-1(1), Baroda
[Appellant]		[Respondent]

Assessee by :-	Shri S N Soparkar and Ms. Urvashi Shodhan, ARs
Revenue by:-	Shri Ravindra Kumar, CIT – DR

Date of Hearing:-	25-01-2012
Date of Pronouncement:-	23-03-2012

O R D E R

PER A K GARODIA (AM):- These are cross appeals filed by the Revenue and the assessee which are directed against the order of the learned CIT(A)-I, Baroda dated 24-11-2006 for Assessment Year 2003-04. These appeals were heard together and are being disposed of by this consolidated order for the sake of convenience.

2 First we take up the Revenue's appeal i.e. ITA No.483/Ahd/2007. Ground no.1 reads as under:-

> [1] On the facts and in the circumstances of the case and in law, the CIT(A) erred in allowing depreciation on non-compete fee of Rs.4,55,40,000/-, by treating the same as intangible asset u/s 32(1)(ii), which does not constitute a business or commercial right having connotation of a positive right but a fee paid for a negative act of not carrying on the same business.

3 The learned DR of the Revenue supported the assessment order and placed reliance on the following judicial pronouncements:-

(i) R Keshvani vs. ACIT (2009) 116 ITD 133 (Mumbai)
(ii) Srivatsan Surveyors (P) Ltd. vs. ITO (2009) 125 TTJ 286 (Chennai)
(iii) CIT vs. Hoogly Mills Co. Ltd. (2006) 157 Taxman 347 (SC)
(iv) Bharatbhai J Vyas vs. ITO (2006) 97 ITD 248 (Ahd)

4 As against this, the learned AR on behalf of the assessee supported the order of the learned CIT(A) in respect of Revenue's appeal and placed reliance on the following judicial pronouncements:-

(i) ACIT vs. Real Image Tech. (P) Ltd. (2009) 177 Taxman 80 (Chennai) (Mag)
(ii) ITO vs. Medicorp Technologies India Ltd. (2009) 30 SOT 506 (Chennai)
(iii) 118 TTJ 334 (Mumbai)
(iv) 116 ITD 348

5 We have considered the rival submissions, perused the material on record and have gone through the orders of the authorities and the judgments cited by both the sides. We find that this issue has been decided by the learned CIT(A) as per para-9 of his order which is reproduced below:-

> "9. I have carefully considered the rival submissions and perused the case law. It is observed that the Assessing Officer has held the expenditure incurred for obtaining non competition from JISL as not an intangible asset u/s. 32(1)(ii) for two reasons: (a) Is not covered under the phrase 'any other business or rights of similar nature' and, (b) that it is not capable of and transfer like other intangible assets of know how,
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> With regard to the objection at (b) above, it is observed that earning of the Right of absence of competition from M/s. JISL in business of extrusion and for the licence manufacture poly carbonate sheets in the entire Asia Pacific Region for a period of 10 years is a Right in the nature of an intangible capital asset. This Right of absence of competition or the 'Non-compete Right' is an asset which is cable of being transferred. The biggest evidence in this support is available from the fact that this right has been further transferred by the appellant company to M/s. G.E. Lighting India Pvt. Ltd. at the time of amalgamation. It is also observed in this behalf that the said development confirms that the Non-compete Right is a capital asset that can be owned and can also be transferred. To that extent the views of the Assessing Officer are differed from. It is, therefore, held that the Non-compete Right is a capital asset.
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> It follows from above, that the expenditure incurred for the acquisition of Non-compete Right is not a revenue expenditure since the same has been incurred for the acquisition of a capital asset. It is pertinent to

point out in this regard that the appellant has acquired the Right of no competition in extrusion business and to manufacture poly carbonate sheets and to operate in the entire Asia Pacific Region for a period of 10 years. It has resulted in the acquisition of an unrivaled and non-competed business domain / territory for the appellant for a sufficiently tong period of 10 years. The acquisition of such a business domain / territory with no competition has brought advantages in the capital field. The transaction resulting in the acquisition of the Right to conduct extrusion business and to operate in the Asia Pacific Region without any competition is final and irreversible. This Right has become the ownership right of the appellant. It is this expenditure which has bought this ownership right to the appellant. Under the circumstances, it is held to be an expenditure on capital account incurred for the acquisition of the Non-compete Right, a capital asset.

As regards the objection of the Assessing Officer at (a) above, it is apposite to extract the relevant provisions

> "Section-32. Depreciation.
> (1) In respect of depreciation of
> (i) Buildings, Machinery..... being tangible assets;
> (ii) Know-how, patents, copyrights, trade marks, licences, franchises, or any other business or commercial rights of similar nature being intangible assets acquired on or after the 1st day of April, 1998,
> owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed."

The basic objection-of the Assessing Officer has been "that the business or commercial rights to qualify as an intangible assets has to be of 'similar' nature as know how, patents, copyrights, trade marks etc. and the Non-compete Right is not of the 'similar nature' as know how, patent etc. He has drawn this distinction by saying that the intangible assets like know how, patents etc. are capable of being owned and being transferred which characteristics are missing from the Non-compete Right. In this regard it is observed that it has already been held above that the Non-compete Right is an asset capable of being owned and transferred in the hands of the appellant and this view has been supported by the fact that the said Non-compete Right

> has actually been subsequently transferred by the appellant to M/s. G.E. Lighting India Pvt. Ltd. It is further observed that the Non-compete Right is clearly in the nature of a business or commercial right and since it is capable of being owned and transferred, it is "of similar nature' as know how, patents, copyrights etc. as contained in clause (ii) of sub section (1) of sec. 32 of the Act. Under the circumstances, it is held that the Non-compete Right is an intangible capital asset for the purposes of section 32(l)(ii) of the Act and is eligible for depreciation at the admissible rates. The Assessing Officer is directed to treat the same as intangible capital asset and allow depreciation as per rules. The alternate plea of the appellant that the same be allowed as revenue expenditure has already been dismissed hereinbefore."

6. Now, we first consider the applicability of various judgments cited by the learned DR on behalf of the Revenue. We find that except one judgment of the Tribunal rendered in the case of Srivatsan Surveyors (P) Ltd. vs. ITO (2009) 125 TTJ 286 (Chennai), other judgments cited by the learned DR are not regarding the allowability of depreciation on Non-Compete Fees. In those cases, the issue involved is regarding allowability of depreciation on goodwill and gratuity and hence, these judgments are not applicable in the facts of the present case. Regarding the Tribunal' decision rendered in the case Srivatsan Surveyors (P) Ltd. (supra), we find that in this case, the issue was decided against the assessee on the basis that the depreciation on restrictive covenant is 'a right in persona' and not a 'right in rem' and hence, depreciation on it is not allowable as per the provisions of section 32(1)(ii). In that case, Rs.1 crore was paid to one of the Directors on the basis of non-compete covenant entered into between the assessee company and its director Shri R Srivatsan, as per which the said Director agreed not to carry on his individual business of general insurance survey, loss

assessment, valuation of assets, etc. for a period of seven years. In the present case also, non-compete fee was paid for the acquisition of Non-Compete Rights from JISL for agreeing for not entering into or participate in any business which directly compete with the business of the assessee company. It shows that the facts are similar and therefore, this Tribunal decision cited by the learned DR of the Revenue is applicable in the present case but at the same time, we find that the subsequent decision of the Tribunal rendered in the case of ITO vs. Medicorp Technologies India Ltd. (supra) is also regarding the allowability of depreciation on Non-Compete Fees paid by the assessee of Rs.2 crores and in that case, the issue was decided by the Tribunal in favour of the assessee. It is now settled position of law that when there are two views possible, the view favourable to the assessee should be followed as was held by the Hon'ble Apex Court in the case of CIT vs. Vegetable Products Ltd. (1073) 88 ITR 192 (SC). Hence, we decide this issue in favour of the assessee by following the Tribunal decision rendered in the case of ITO vs. Medicorp Technologies India Ltd. (supra). Ground no.1 raised by the Revenue is dismissed.

7 Ground no.2 in the Revenue's appeal reads as under:-

> [2(a)]On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing to exclude sales tax of Rs.6,25,45,754/- from the total turnover for the purpose of computing deduction u/s.80HHC by ignoring the ratio laid down by the Supreme Court in the case of Chowringhee Sales Bureau P. Ltd vs. CIT 87 ITR 542 (SC) and Sinclair Murray & Co P. Ltd. vs. CIT 97 ITR 615 (SC), holding that the collection of sales tax forms part of trading receipts and hence total turnover.

[2(b)]The CIT(A) also failed to take note of the definition of total turnover in clause (ba) of the Explanation below section 80HHC, excluding only freight & insurance up to the customs station, leaving the concept of total turnover to be understood as in common commercial parlance.

[2(c)]The CIT(A) failed to take note of the mandate of section 145A(b), inserted w.e.f. 1.4.1999, governing the computation of profits having inescapable bearing on the computation of deduction u/s.80HHC, which is made by apportioning the same profits in the ratio of export turnover to total turnover.

8 The learned DR on behalf of the Revenue supported the assessment order whereas the learned AR on behalf of the assessee supported the order of the learned CIT(A). It was also submitted by him that this issue is now covered in favour of the assessee by the judgment of the Hon'ble Supreme Court rendered in the case of CIT vs. Lakshmi Machine Works (2007) 290 ITR 667 (SC). By respectfully following this judgment of the Hon'ble Apex Court, we decline to interfere in the order of the learned CIT(A) on this issue. This ground is also rejected. The appeal of the Revenue is dismissed.

9 Now, we take up the assessee's appeal i.e. ITA No.573/Ahd/2007. Ground no.1 reads as under:-

"1 The Id. CIT (A) erred in law and on facts in confirming disallowance made by AO of Rs.24, 54,480/- expenses paid to the consultants and lawyers on account of due diligence and other compliance checks to be capital in nature. Ld. CIT (A) ought to have allowed the expenses as claimed by the assessee holding the same to be revenue in nature."

10 The learned AR on behalf of the assessee submitted that the expenditure is allowable as revenue expenditure and in support of his contention, reliance was placed on the judgment of the Hon'ble Andhra Pradesh High Court rendered in the case of CIT vs. Coromondal Fertilizers (2001) 247 ITR 417 (AP). It was his alternative submission that in case, it is held that the expenditure is not allowable as revenue expenditure, depreciation should be allowed. The learned DR supported the order of the authorities below.

11 We have considered the rival submissions, perused the material on record and have gone through the orders of the authorities below and the judgment cited by the learned AR of the assessee. We find that a clear finding is given by the learned CIT(A) that the expenditure of Rs.24,54,480/- incurred on account of due diligence and other compliance checks to Consultants and Lawyers is towards the acquisition of extrusion business and hence, it is of capital nature. Under these facts, the judgment of the Hon'ble Andhra Pradesh High Court cited by the learned AR of the assessee is not of help to the assessee. So far the alternative contention is concerned for allowing depreciation, we feel that depreciation is allowable when the asset in question is put to use. It is not on record as to whether newly acquired extrusion business had commenced the business in the present year or not and hence, for this purpose, we set aside the order of the learned CIT(A) and restore this aspect of the matter back to the file of the learned CIT(A) to decide as to whether newly acquired extrusion business had commenced business in the

present year or not and whether depreciation is allowable in the present year or not on this amount of Rs.24,54,480/-. The learned CIT(A) should pass necessary order as per law as per above discussion after providing adequate opportunity of being heard to both the sides. This ground is allowed for statistical purpose.

12 Ground no.2 in the assessee's appeal and additional ground raised by the assessee are as under:-

> [2] The Id. CIT (A) erred in not appreciating the claim of the appellant that non compete fees paid to Jain Irrigation Systems Ltd. of Rs.4,63,58,160/-ought to be allowed as deduction u/s 37 of the Act as revenue expenditure.
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> Additional Ground:-
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> [1] The sum of Rs.4,63,58,160 paid to Jain Irrigation Systems Ltd. on account of non compete fees ought to have been considered and allowed by the lower authorities as allowable revenue expenditure under section 37 of the Income-tax Act, 1961.

13 It was fairly agreed by the learned AR of the assessee that this issue is now covered against the assessee by the decision of the Special Bench of ITAT rendered in the case of Tecumseh India (P) Ltd. vs. Addl. CIT (2010) 127 ITD 1 (Delhi)(SB). By respectfully following this decision of the Special Bench of the ITAT, this ground of the assessee is rejected. Ground no.2 and the additional ground raised by the assessee are rejected.

14 Ground no.3 of the assessee's appeal reads as under:-

> [3] The Id. CIT (A) erred in law and on facts in confirming the action of AO in computing deduction u/s 80HHC of the Act after setting off of unabsorbed depreciation of Rs.21,35,96,830/- of earlier years against the total income. Ld. CIT (A) ought to

have quashed this action of AO and allowed deduction u/s 80HHC of the Act as claimed by the appellant.

15 It was fairly agreed by the learned AR of the assessee that this issue is covered against the assessee by the decision of the Hon'ble Supreme Court in the case of CIT vs. Shirke Construction Equipment Ltd. (2007) 291 ITR 380 (SC). By respectfully following this decision of the Hon'ble Apex Court, this issue is decided against the assessee. The ground raised by the assessee is rejected.

16 Ground no.4 in the assessee's appeal reads as under:

[4] The Id. CIT (A) erred in law and on facts in confirming the action of AO in computing deduction u/s 80HHC of the Act after setting off of unabsorbed depreciation of Rs.21,35,96,830/- of earlier years against income computed under MAT provisions. Ld. CIT (A) ought to have quashed this action of AO and allowed deduction u/s 80HHC of the Act as claimed by the appellant.

17 It was submitted by the learned AR of the assessee that this issue is covered in favour of the assessee by the following judgments:-

(i) CIT vs. Packworth Udyog Ltd. (2011) 331 ITR 416 (Kerala) (FB)
(ii) DCIT vs. Syncome Formulations (I) Ltd. (2007) 106 ITD 193 (Mum)(SB)

The learned DR supported the orders of the authorities below.

18 We have considered the rival submissions, perused the material on record and have gone through the orders of the authorities below and the judgments cited by the learned AR of

the assessee. We find that this issue is now covered in favour of the assessee by the judgments cited by the learned AR of the assessee. By respectfully following the said decisions, this issue is decided in favour of the assessee. Ground no.4 is allowed.

19 Ground no.5 in the appeal reads as under:-

> [5] The ld. CIT(A) erred in law and on facts in confirming the action of the AO in computing deduction u/s 80HHC of the Act after setting off of unabsorbed depreciation of Rs.21,35,96,830/- of earlier years against income computed under MAT provisions. Ld. CIT(A) ought to have quashed this action of AO and allowed deduction u/s 80HHC without setting off of unabsorbed depreciation while computing income u/s 115JB of the Act.

It was submitted by the learned AR of the assessee that this issue is covered in favour of the assessee by the judgment of the Hon'ble Apex Court in the case of Ajanta Pharma Ltd. vs. CIT (2010) 327 ITR 305 (SC). The learned DR supported the order of the authorities below. But we decide this issue in favour of the assessee by respectfully following the decision cited by the ld. AR of the assessee.

20 Ground no.6 in the appeal reads as under:-

> [6] The Id. CIT (A) erred in law and on facts in confirming the addition of provision for doubtful debts of Rs.13,52,896/- made by AO to the book profits u/s 115JB of the Act. Ld. CIT (A) failed to appreciate that the appellant has been claiming bad debts by adopting provisions for bad and doubtful debts hence when provision is not allowed as deduction then actual amount of bad debts claimed during this year should be allowed as deduction while computing book profits u/s 115JB of the Act."

21 The learned AR of the assessee fairly conceded that this issue is to be decided against the assessee in view of the retrospective amendment in section 115JB by the Finance (No.2) Act, 2009 with effect from 01-04-2001 as per which clause (i) was inserted in Explanation 1 to section 115JB. Accordingly, this ground of the assessee is also rejected.

22 In the result, the assessee's appeal is partly allowed and the Revenue's appeal is dismissed.

Order pronounced in the court today on 23-03-2012

Sd/-	Sd/-
(BHAVNESH SAINI) **JUDICIAL MEMBER**	**(A K GARODIA)** **ACCOUNTANT MEMBER**

Date	:	23-03-2012

Copy of the order forwarded to:

1.	GE Plastics India Ltd., [Amalgamated with GE India Industrial Pvt. Ltd.] Plastic Avenue, PO Jawaharnagar, Baroda
2.	The Assistant Commissioner of Income-tax, Circle-1(1), Baroda
3.	CIT concerned
4.	CIT(A)-I, Baroda
5.	DR, ITAT, Ahmedabad Bench-, Ahmedabad
6.	Guard File

BY ORDER

Deputy Registrar
Assistant Registrar
ITAT, AHMEDABAD