IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 556 OF 2017

Pr.Commisisoner of Income Tax - 7 ... Appellant

Versus

Piramal Glass Limited ... Respondent

Mr.Suresh Kumar for the Appellant.
Mr.Mehul Agarwal i/b. Mr. Atul Jasani for the Respondent.

CORAM : AKIL KURESHI &
S.J. KATHAWALLA, JJ.
DATE : 11TH JUNE, 2019

P.C.:

1. This Appeal filed by the Revenue to challenge the Judgment of the Income Tax Appellate Tribunal ('**the Tribunal**' for short). Following questions of law are presented for our consideration :

> *"(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 ?*
> *(b) Whether on the facts and in the circumstances of the case and in law, the ITAT is right in deleting the disallowance of interest on the borrowed funds when the Assessee had not demonstrated whether the purpose for which advance were made is covered by the principle of commercial expediency and also the investment was made for acquiring the controlling interest in the associate concern ?*

(c) Whether on the facts and in the circumstances of the case and in law, the ITAT is right in deleting the disallowance of interest on the borrowed funds given to the sister concern and its directors when it is for the assessee to prove that each of the loan on which the assessee paid interest in the accounting year was utilized for the purposes of the business ?"

2. We notice that before the Tribunal there was Cross Appeal filed by the Revenue. From the Revenue's Appeal disposed of by the Tribunal, following two additional questions are framed in this Appeal :

"(i) Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in deleting the ground raised by the revenue on write off of non compete fees of Rs.18 Crores over a period of 18 years without discussing the issue on merits ?
(ii) Whether on the facts and in the circumstances of the case and in law, non-compete fee of Rs.18 Crores paid by the assessee can be written off in 18 years in a manner granted by the CIT(A) ? "

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. Ferromatice Milacron India (P.) Limited***[1] . 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*

1 (2018) 99 taxmann.com 154 (Gujarat)

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 deprecation.

In the present case, Mr.Patel was erstwhile partner of the assessee. The assessee had made payments to him to ward off 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.

6. Question No. b arises in following manner :

Assessee had borrowed funds and invested the same for purchase of shares of subsidiary company. On the borrowing, the Assessee had paid interest of Rs.38.22 Crores and claimed it as business expenditure. Assessing Officer was of the opinion that such expenditure shall not allowable. The Tribunal by the impugned Judgment held that the expenditure incurred for gaining controlling interest of a subsidiary company is a business expenditure.

We notice that this Court in the case of ***Commissioner of Income Tax, Panaji Goa v. Phil Corpn. Limited***[2] held that the Assessee was entitled to deduction

2 202 Taxmann 368 (Bombay)

of interest on overdraft under Section 36(1)(iii) of the Act when the investment was made by the Assessee in shares of subsidiary of the company to have control over the said company. Madras High Court in the case of ***Commissioner of Income Tax, Chennai v. Shriram Investments (Firm) Moogambika Complex, Chennai***[3] has taken similar view. Similar opinion is expressed by Calcutta High Court in ***CIT v. Rajeeva Lochan Kanoria***[4]. Similar view was also expressed by Delhi High Court in case of ***Eicher Gooderarth Limited v. Commissioner of Income Tax***[5]. Under the circumstances, no question arises in this respect.

7. Question No. c pertains to the interest free advances made by the Assessee to the sister concern out of borrowed funds. In this case, the Tribunal by the impugned Judgment followed the decision of the Supreme Court in case of ***S.A. Builders Limited v. Commissioner of Income Tax (Appeals) Chandigarh***[6] and held that such expenditure was made for the purpose of business. No question of law therefore arises.

8. Question Nos. (i) and (ii) proposed by the Revenue arising out of its Cross Appeal before the Tribunal become infructious in view of our decision in Question No. (a). In the result, Appeal is dismissed.

(S.J.KATHAWALLA, J.) **(AKIL KURESHI, J.)**

3 229 Taxman 179 (Madras)
4 (1994) 208 ITR 616 (1995) 80 Taxmann 572 (Cal.)
5 233 Taxmann 285 (Delhi)
6 (2007) 156 Taxman 74 (SC)