आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'ई', मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL "E", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM
&
SHRI SANDEEP GOSAIN, JM

आयकर अपील सं./**ITA No.7071/Mum/2010**

(**निर्धारण वर्ष /** Assessment Year: 2002-03)

ACIT, CC-44, Mumbai.	Vs.	Shreya Life Science Pvt. Ltd. Shreya House, 301-A, Pareira Hill Road, Andheri (East), Mumbai-400099
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AADCS 9890 C**		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

राजस्व **की ओर से** /Revenue by : Shri Rajneesh K. Arvind (DR)

निर्धारिती **की ओर से** /Assessee by : Shri Satish R Mody

सुनवाई की तारीख **/ Date of Hearing :** **26/10/2015**

घोषणा की तारीख**/Date of Pronouncement** **14/01/2016**

आदेश / O R D E R

***PER R.C.SHARMA (A.M)*:**

This is an appeal filed by the Revenue against the order of CIT(A), for the assessment year 2002-03, in the matter of order passed u/s.143(3) r.w.s. 147-13A of the I.T. Act.

2. Following grounds taken by the Revenue :-

> *"1. On the facts and in the circumstances of the case, the ld. CIT(A) erred in law in holding that the notice issued u/s.147 is bad in law and reassessment made is invalid without appreciating the fact that the AO had not discussed this issue at all in his original assessment order.*
> *2. On the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in deleting the disallowance of Rs.2.50 cr. being 1/4th of Rs.10 cr. paid to M/s Rallies India Ltd as non-compete fees treated by the AO as capital expenditure without appreciating the facts brought on record by the AO.*
>
> *The appellant prays that the order of CIT(A) on the above grounds be set aside and that of Assessing Officer be restored."*

3. Rival contentions have been heard and record perused. From the record, we found that original assessment was completed u/s 143(3) of I.T. Act on 31.03.2005. Notice u/s.148 was issued on 30.03.2007. Assessee has objected to the reopening of the assessment on the ground that all the relevant details were submitted during the original assessment. The issue was examined and the assessment was completed by A.O. under scrutiny assessment.. No fresh material is brought on record and reassessment proceedings is only due to change of opinion. After completion of assessment u/s 143(3) of the Act on 31-3-2005, the A.O. issued letter dated 08.11.2007 wherein it was stated that the non-compete fee paid by the assessee is capital in nature which gives enduring benefit hence cannot be allowed. Since the same was claimed as revenue expenditure by the assessee there is escapement of income accordingly he reopened the assessment by issue of notice u/s.148.

4. From the record, we found that the assessee entered into non-compete agreement dated 30.06.2001 with M/s. Rallis India Ltd., the assessee paid Rs.10 crores of non compete fee which was claimed by him @ Rs. 2.5 Crores in AYs. 2002-03, 2003-04, 2004-05 and 2005-06. All details pertaining to non compete fee were duly furnished to the AO, upon being satisfied with the merits of the case, the original assessment was completed treating non compete fee of Rs.2.5 crores as revenue expenditure.

5. It was submitted before the Learned CIT(A) that the reassessment proceedings were initiated only due to change of opinion on the issue

which was examined and concluded earlier. Reliance was placed on following decisions:-

(i) CIT vs. Bhanji Lavji 79 ITR 582 (SC)
(ii) Sirpur Paper Mills vs. ITO 114 ITR 404 (AP)
(iii) CIT vs. Ranjit Kaur 81 TTJ 269 (Chand.)

Once, all the primary facts disclosed by the assessee, it is for the AO to draw proper conclusions. If the conclusions drawn by the AO are erroneous, the AO can not reopen the assessment merely on the basis of change of opinion as held in the case of J.P. Bajpai (HUF) vs. CIT 140 TM 34 (Allahabad). That, there is no failure or omission on the part of the assessee to disclose truly and wholly all material facts. Suo-moto, the assessee disclosed all the relevant details pertaining to non compete fee.

Further, the assessee relied on various judicial precedents on the issue of reassessment u/s.147 which are listed as under: -

(i) Sesa Goa Ltd. vs. JCIT (2007) 294 ITR 101
(ii) German Remedies Ltd. (2006) 285 ITR 26 (Bom)
(iii) ITO vs. Lakhmani Mewal Das (1976) 103 ITR 437
(iv) CIT vs. Holck Larsen 85 ITR 467 (Bom)
(v) CIT vs. Kelvinator of India Ltd. (2002) 256 ITR 1 (Del.)
(vi) N.C. Gupta vs. ACIT (2004) 90 ITD 768 (Del.)
(vii) Sanghvi Swiss Refills P. Ltd. vs. ACIT (2006) 300 ITR 276 (Bom.)

6. By the impugned order, the CIT(A) held the reopening as invalid by observing that there was mere change of opinion. Precise observation of ld. CIT(A) was as under:-

> *The information on record is carefully examined. The crux of the matter is whether the issue of non compete fee was examined by the AO during the original assessment proceedings or not? In order to verify this aspect*

the assessment records were called for. The details were furnished by the assessee vide it letter dated 25.03.2005, where the notes on transaction pertaining to non compete fee was submitted. In this back ground, it is evident that the AO examined this issue, applied his mind, and allowed the expenditure of non compete fee as revenue expenditure in the original assessment proceedings. In such circumstances reopening the assessment u/s.147 without any fresh material amounts to change of opinion on the same set of facts and such assessment cannot be held valid in accordance with Hon'ble Supreme Court decision in the case of CIT vs. Kelvinator of India Ltd. (2010) 34 DTR (SC) 49, wherein it was held that mere change of opinion cannot be perse reason to reopen the assessment and the AO has no power to review the assessment.

7. On the merits also CIT(A) allowed assessee's claim after observing as under: -

The facts of case are, the appellant is a pharmaceutical company. Vide agreement dated 12.02.2001 with M/s. Rallis India Ltd. had acquired the pharma business of M/s. Rallis India Ltd. for an amount of Rs.49 crores which includes non compete fee of Rs.10 crores. The relevant portion of non compete agreement dated 30.06.2001, between appellant and M/s. Rallis India Ltd. read as –

"Non-Compete:

(i) SELLER agrees and covenants with and undertakes to the PURCHASER that neither SELLER nor any of its Affiliates shall, for a period of 4 (four) years from the closing date, directly or indirectly compete with or engage and/ or participate in the business of promotion, marketing, sale and distribution of formulations or bulk drugs, pharmaceuticals and other medicinal preparations which are or were being hithertobefore promoted, marketed, sold, traded or dealt with by the SELLER.

(ii) SELLER agrees and covenants with and undertakes to the PURCHASER that neither SELLER nor any of its affiliates shall, for a period of 4 (Four) years from the closing date, directly or indirectly engage in marketing and distribution of any other bulk drugs, pharmaceuticals and other medicinal preparations without prior consent of the PURCHASER and the PURCHASER shall have discretionary right to refuse or withhold such permission.

(iii) For the purpose of assuring to the PURCHASER the full benefit of the business and goodwill of the said Pharmaceutical business Undertaking, the SELLER shall undertake and agree that they will not at any time after the closing date disclose to any person or themselves use for any purpose and shall use best endeavors to prevent the publication or disclosure of any information concerning the business, accounts or business or affairs pertaining to the said Pharmaceutical Business Undertaking of the said SELLER or any

of its clients or customers transactions or affairs of which they have knowledge."

The non compete agreement is valid for a period of 4 years accordingly the assessee claimed non compete fee of Rs.2.5 crores each in AYs 2002-03, 2003-04, 2004-05 and 2005-06. The AO held that such non compete fees of Rs.2.5 Crores is capital in nature, as it gives enduring benefit accordingly it was disallowed. For the first time, such addition was made in AY 2004-05. The addition was made in the subsequent AY 2005-06 also. The assessment for AYs 2002-03 and 2003-04 were reopened. The reassessment of AY 2002-03 was completed u/s 143(3) r.w.s. 147 on 24.12.2007 which is the subject matter of the appeal now. For AY 2004-05, the same issue was adjudicated upon by the CIT(A) vide his order dated 09.10.2007 and appeal was allowed. Relevant portion is repeated as under:

"There is force in the contention of the appellant that this non compete fee was not a very comprehensive benefit of enduring nature in the sense that by this agreement the appellant was only able to augment profits in respect of bulk drugs. It has been pointed out by the appellant that this non compete fees is only in respect of promotion, marketing and distribution of bulk pharmaceuticals and other medicinal preparation for four years and that too, only in India. There was no restriction on manufacturing and selling it outside India. It has been stated by the appellant that a substantial business of the appellant is outside India. It has further been stated that this agreement was only for four years, seller would be free after four years and therefore, this did not have enough durability to make it an asset of enduring nature. It has also been pointed out that the products referred to in this agreement was generic in nature and there were many players offering similar products at comparable prices. Therefore, non compete agreement with Rallis India Ltd. only helped in augmenting the profit during the year and no other enduring benefit. It is also an important fact that brand name 'Rallis' was not transferred and the seller was free to use the same brand name when it would decide to resume its activities after four years. I agree with the appellant that competition has not been eliminated for good. It has not only been suspended for a limited purpose for four years, which in the circumstances of the appellant's balance sheet may help in augmenting the profit but cannot eliminate the competition, altogether. In fact, Rallis was free to pass on this right to any other competitor after 4 years. It cannot be said that benefit will be for more than 4 years. The appellant has rightly spread this in four years. The arrangement only helped in augmenting domestic profit for four years and M/s. Rallis coming back to restart the businesses was never removed entirely. The AO has not brought anything on record which was not disclosed in earlier years. On the facts of the appellant's case, it has to be held that expenditure has been incurred for augmenting of profit. According, the claim of the appellant is allowable."

8. In view of the identical facts and circumstances of the case, following the principle of consistency, the appeal is allowed and the A.O is directed to allow the claim of non compete fee of Rs.2.5 crores as Revenue expenditure.

9. Against the above order of CIT(A), Revenue is in appeal before us.

10. The ld. D.R. contended that non-compete fee was paid by the assessee has wrongly been allowed by the A.O. as revenue expenditure while framing assessment u/s 143(3) of the Income Tax Act, 1961. However, subsequently, it came to the notice of the A.O. that non-compete fee was capital in nature, therefore, by allowing the claim of the same as revenue expenditure would arose escapement of income. Accordingly, the A.O. was justified in reopening the assessment. On merit, he contended that the Tribunal in earlier assessment year has held that non-compete fee was capital in nature.

11. On the other hand, the ld. Counsel for the assessee contented that full information was supplied to the A.O. during the course of scrutiny assessment framed u/s 143(3) of the Act and after discussing the issue in detail, the A.O. has passed the order. Thus, reopening was merely on the basis of change of opinion. The ld. Counsel relied on the decision of Hon'ble jurisdictional High Court in the case of Dynacraft Air Controls vs. Smt. Sheha Joshi & Ors in Writ Petition (L) No. 55 of 2013, 168 of 2013 & 57 of 2013 dated 8th February, 2013 wherein after relying on the decision of Hon'ble Supreme Court in the case of CIT vs. Kelvinator of India Ltd. held that mere change of opinion is not sufficient for reopening the assessment and reopening was held to be invalid. Further reliance was placed on the decision of Hon'ble Bombay High Court in the case of CIT vs. M/s Jet Speed Audio Pvt. Ltd. in IT Appeal No. 285 of 2013 dated 28th January, 2015 wherein it was held that reassessment on the basis of change of opinion are held to be not valid. Further reliance was placed on

the decision of Hon'ble Delhi High Court in the case of BLB Ltd. Vs. ACIT, (2012) 343 ITR 129 (Delhi) wherein it was observed that the payment of non-compete fee in the original assessment treated as a revenue expenditure by the A.O., the reassessment proceedings could not be initiated on the ground that the A.O. was legally wrong and had misapplied and wrongly understood the law/legal position.

12. Reliance was also placed on the decision of Hon'ble Bombay High Court in the case of Mrs. Parveen P. Bharucha vs. Vs. DCIT/Union of India in Writ Petition No. 10447 of 2011 dated 27th June, 2012 wherein the Hon'ble Court observed that a fresh application of mind on the same set of facts amounts to a change of opinion and does not warrant reopening and for this proposition, reliance was placed on the decision of Asian Paints Ltd. Vs. DCIT, 308 ITRE 195.

13. The ld. A.R. further placed reliance on the decision of Hon'ble Bombay High Court in the case of OHM Stock Brokers (P.) Ltd. Vs. CIT, [2013] 215 TAXMAN 53 (Writ Petition Nos. 79 to 82 of 2013 dated February, 20, 1013) wherein it was held that the A.O. having made relevant enquiries, allowed asssessee's claim in respect of payments and subsequently A.O. initiated reassessment proceedings was held to be not justified.

14. We have considered the rival contentions and carefully gone through the orders of the authorities below. We have also deliberated upon the judicial pronouncements referred by the lower authorities and also cited by the ld. A.R. and ld. D.R. during the course of hearing before us, in the context of factual matrix of the case. From the record we found that during the course of original assessment proceedings u/s 143(3) of the Act, the A.O. has called all the details with regard to the payment of non-compete fee and after examining the same, allowed the assessee's

claim of such non-compete fee as revenue in nature. Thereafter, on the very same set of facts, the A.O. changed his opinion and reopened the assessment stating that non-compete fee paid by the assessee is capital in nature which gives enduring benefit to the assessee, hence, cannot be allowed. By the impugned order, the ld. CIT(A) has dealt with all the relevant details with regard to the facts on record to the effect that there is a change of opinion. In the case of Kelvinator of India Ltd. (supra) it was held by the Hon'ble Supreme Court that reopening on the basis of change of opinion is not sustainable in law. We also found that to check the assessee's contention regarding change of opinion, the ld. CIT(A) called for assessment records and details were also called from the assessee vide letter dated 25-2-2005 where the notes on transaction pertaining to non-compete fee was submitted. After taking all these documents on record, the ld. CIT(A) reached to the conclusion that the A.O. has examined the issue, applied his mind and allowed the expenditure of non-compete fee as revenue expenditure in the original assessment proceedings. Under these circumstances, the reopening of assessment u/s 147 of the Act without any fresh material amounts to change of opinion on the same set of facts and such action cannot be held valid in accordance with the decision of Hon'ble Supreme Court in the case of Kelvinator reported in 34 DTR 49 wherein it was held that mere change of opinion per se can not be a reason to reopen the assessment and A.O. has no power to review the assessment.

15. The Hon'ble Delhi High Court in the case of BLS Ltd. (supra) exactly on similar set of facts quashed the reassessment proceedings. In this case also, the A.O. has allowed the assessee's claim for non-compete fee as revenue expenditure in the original assessment u/s 143(3) of the Act on 30-1-2006. The A.O. thereafter issued notice u/s 148 of the Act for reassessment on the ground that non-compete fee which

was allowed as revenue expenditure to the assessee was required to be capitalised and added back to the income of the assessee.

16. Applying the proposition of law laid down in the decisionbs referred above, vis-a-vis the findings recorded by the ld. CIT(A) with regard to the change of opinion, we do not find any infirmity in the order of the ld. CIT(A) quashing the reassessment proceedings on the ground of change of opinion.

17. With regard to claim of revenue expenditure in respect of non compete fee of Rs.2.5 crores, we found that as per non compete agreement, it was paid for a period of four years. The assessee claimed 1/4th of it amounting to Rs.2.5 crores in each of four years commencing from assessment years 2002-03 to 2005-06. The AO held that non compete fee is capital in nature as it gives enduring benefit. Accordingly, assessee's claim of revenue expenditure in respect of non compete fee of Rs.2.5 crores was declined. By the impugned order, the Ld. CIT(A) has allowed assessee's claim by observing that non compete fee was not a very comprehensive benefit of enduring nature in the sense that by this agreement the assessee was only able to augment profit in respect of bulk drugs. After giving detailed finding the Ld. CIT(A) allowed assessee's claim of treating the non compete fee as revenue expenditure. However, in an appeal filed by Revenue in the assessment year 2004-05, allowing claim of revenue expenditure by CIT(A), the Tribunal reversed the order of the CIT(A) treating the non compete fee as capital expenditure.

18. So far as assessee's claim of revenue expenditure is concerned, we set aside the order of the Ld. CIT(A) on this issue, by following the order of the Tribunal in assessee's own case in the A.Y. 2004-05 dated 28.02.2011 where non compete fee was treated as capital expenditure.

19. Now coming to the claim for depreciation on non compete fee, we found that after paying the non compete fee the assessee has acquired commercial rights. Commercial right comes into existence whenever the assessee makes payment for non compete fee and after obtaining non compete right, the assessee can develop and run his business without bothering about the competition and therefore non compete right is intangible asset eligible for depreciation. Generally, non-compete fee is paid for a definite period which in this case is four years. The idea is that by that time, the business would stand firmly on its own footing and can sustain later on. This clearly shows that the commercial right comes into existence whenever the assessee makes payment for non-compete fee. Now, the second question is whether such right can be termed as "or any other business or commercial rights of similar nature" for construing the same as "intangible asset". Here, the doctrine of ejusdem generis would come into operation. The term "or any other business or commercial rights of similar nature" has to be interpreted in such a way that it would have same similarities as other assets mentioned in cl. (b) of Expin. 3. The other assets mentioned are know-how, patents, copyrights, trade marks, licences, franchises, etc. In all these cases no physical asset comes into possession of the assessee. What comes in is only a right to carry on the business smoothly and successfully and therefore even the right obtained by way of non-compete fee would also be covered by the term "or any other business or commercial rights of similar nature" because after obtaining non-compete right, the assessee can develop and run his business without bothering about the competition. The right acquired by payment of non-compete fee is definitely intangible asset. Moreover, this right (asset) will evaporate over a period of time of four years in this case because after that the protection of non-competition will not be available to the assessee. This means, this right is subject to wear and tear by the passage of time, in the sense, that after the lapse of a definite period of four years, this asset will not be available to the assessee and, therefore,

this asset must be held to be subject to depreciation. Assessee would be entitled to depreciation in respect of non- compete fee which is in the nature of intangible asset.

20. Madras Bench of the Tribunal in the case of Real Image Tech (P) Ltd. (120 TTJ 983) has been held that payment made under a non-compete agreement was capital expenditure and entitled to depreciation as in intangible asset. The bench applied the decision of the Mumbai Tribunal in the case of Techno Shares and Stocks Ltd. (101 TTJ 349) (Bom) (depreciation on stock exchange membership card) which was confirmed by the Hon'ble Supreme Court in 327 ITR 323. Recently Hon'ble Supreme Court in case of Simfs Securities Ltd. held that even goodwill which is a commercial right is eligible for claim of depreciation.

21. In a recent ruling, the Hon'ble Madras High Court in the case of Pentasoft Technologies Ltd. held that non-compete fee paid to a transferor under a composite agreement for restraining him from entering a similar business for ten years was eligible for depreciation.

22. Recently, the Mumbai Bench of the Income-tax Appellate Tribunal in the case of Ind. Global Corporate Finance Pvt. Ltd. held that the non compete fee is not a deductible expenditure since it is capital in nature. However, the non compete right is an 'intangible asset' eligible for depreciation under the Income-tax Act, 1961. Further, the decision of Real Image Tech (P) Ltd. has been followed by the Mumbai Tribunal in the case of Schott Glass India Pvt. Ltd. and therefore, the depreciation claim is allowed on non compete fees.

23. In view of the above discussion, we conclude that so long as the non compete fee in question is capital expenditure, the same is entitled for deprecation. Accordingly, we direct the AO to allow the claim of depreciation on the amount of non compete fee paid, treating the same as intangible assets. We direct accordingly.

24. In the result, the ground of reopening is decided in favour of assessee, whereas ground of treating the non compete fee as revenue expenditure is decided in favour of Revenue. Ground with regard to claim of deprecation on non compete fee is decided in favour of assessee.

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

order pronounced in the open court on this 14/01/2016.

Sd/-	Sd/-
(SANDEEP GOSAIN)	**(R.C.SHARMA)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक Dated 14/01/2016
NEELAM/pkm

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार
(Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai