

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'B', BANGALORE**

**BEFORE SHRI A. K. GARODIA, ACCOUNTANT MEMBER
AND
SMT ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER**

**ITA No.1185 & 1186 (Bang) 2016
(Assessment years : 2010 - 11 & 2011 - 12)**

M/s Sangeetha Mobiles Pvt. Ltd.,
37, "SRUBUVASA NILAYA",
Sannidhi Road, Basavanagudi,
Bangalore - 560004
PAN : AAMCs5916J

Appellant

Vs

The Addl. CIT, range - 12,
Bangalore

Respondent

Assessee by : Shri V. Srinivasan, C. A.

Revenue by : Shri S. Sundar Rajan, JCIT

Date of hearing : 18-10-2016

Date of pronouncement: : 03-11-2016

ORDER

PER SHRI A.K.GARODIA, AM

Both these appeals are filed by the assessee. These are directed against two separate orders of learned CIT (A) 6 Bengaluru, both dated 21.03.2016 for A. Ys. 2010 - 11 & 2011 - 12.

2. Both these appeals were heard together and are being disposed of by this common order for the sake of convenience.

3. The assessee has raised several grounds in both years but effective grievances are only two common grievances in both years. First grievance is about disallowance of depreciation of Rs.131,30,361/- in A.Y. 2010 – 11 and Rs. 229,78,131/- in A. Y. 2011 – 12 being depreciation on Goodwill. The second grievance is about disallowance of depreciation of Rs. 890,704/- in A.Y. 2010 – 11 and Rs. 565,953/- in A. Y. 2011 – 12 being depreciation on interiors. There is one more issue in A. Y. 2010 – 11 only regarding disallowance of depreciation of Rs. 404,253/- on computer software.

4. Regarding the first issue, it is submitted by the learned AR of the assessee that the copy of Assets Purchase Agreement is available on pages 78 to 115 of the paper book and from the same, it can be seen that the assessee has purchased various tangible assets as listed on page 110 to 111 of the paper book and deposits with various landlords of Rs. 63.14 Lacs as per details on pages 112 to 113 of the paper book is also taken over by the assessee. He submitted that in addition to this, the assessee has also acquired the trade mark “WAVETEL” along with corporate name, trade name, domain names and other intellectual property rights of WAVE as can be seen on page 103 of the paper book. Thereafter, he drawn our attention to page 102 of the paper book and submitted that this was also agreed that WAVE and Mr. V. F. John Yesudhas will not do anything for 12 months, which may be deemed to be in competition with the business of the

assessee. Thereafter he drawn our attention to Para 4 of the agreement on pages 87 & 88 of the paper book and pointed out that the purchase price agreed is Rs. 13 Crores in a combined manner. Then he pointed out that at pages 125 & 126 of the paper book is the invoice raised by WAVE and as per the same, the value of tangible assets is Rs. 179,69,104/- including interiors Rs. 118,76,051 plus VAT. Thereafter, he drawn our attention to page 3 of the assessment order where the A.O. has noted that the assessee has accounted for Rs. 63.14 lacs as Rent deposits and claimed depreciation on Fixed assets Rs. 179,69,105/- and also claimed depreciation on Goodwill Rs. 1050,42,884/-. Then he submitted that as per the A. O., the amount of Rs. 1050,42,884/- is not Goodwill but payment for eliminating Competition from wave Communication and it is normally termed as fee paid for non – competition. For this, he drew our attention to page 8 of the assessment order. Thereafter he submitted that as per the assessee, this payment of Rs. 1050.43 Lacs is for goodwill but even if the contention of the A. O. is accepted that this is not Goodwill but Non Compete Fee then also depreciation is allowable at same rate i.e. applicable to intangible assets. In support of this contention, he placed reliance on the judgment of Hon'ble Karnataka High Court rendered in the case of CIT vs. M/s Ingersoll Rand International Ind. Ltd. in ITA No. 452 of 2013 dated 30.06.2004 (227 Taxman.com 176), copy on pages 181 to 205 of the paper book. He further submitted that Para 8 of this judgment on pages 200 to 205 of

the paper book is relevant as per which it is held by Hon'ble Karnataka High Court that the right acquired by the assessee on payment of non compete fees is a commercial or a business right which is similar in nature to know – how, patents, copyrights, licenses, franchises etc and it falls in the category of “Intangible Assets” and consequently depreciation is allowable u/s 32 (1) (iii).

5. As against this, learned DR of the revenue supported the orders of the authorities below. He also submitted that it is noted by the learned CIT (A) in Para 14 of his order that in the Remand Report (Copy on pages 142 to 144 of the paper book), the A.O. has distinguished the facts of the present case with the facts in the case of CIT vs. M/s Ingersoll Rand International Ind. Ltd. (supra). At this juncture, a query was raised by the bench asking the learned DR of the revenue to point out the difference in facts as reported by the AO in the remand report. In reply, learned DR of the revenue pointed out that the A.O. reported that the AO has reproduced relevant observations of Hon'ble High Court as per which, in that case, the right acquired by way of non compete can be transferred to any other person. He submitted that in the present case, the rights acquired by the assessee by way of non compete cannot be transferred to any other person and therefore, this judgment is not applicable in the present case and in the present case, the judgment of Hon'ble Delhi

High Court rendered in the case of Sharp Business System vs. CIT, 254 CTR 233 is applicable.

6. We have considered the rival submissions. Regarding the issue in respect of allowability of depreciation on Goodwill/Non Compete Fees, we find that as per the facts noted by Hon'ble Karnataka High Court in Para 8 as reproduced below, the right acquired by way of non compete can be transferred to any other person but in the case of Sharp Business System vs. CIT (Supra), Hon'ble Delhi high Court judgment is on the basis of this fact of that case that the right acquired by way of non compete cannot be transferred to any other person:-

“8. Therefore what is to be seen is, what are the nature of intangible assets which would constitute business or commercial rights to be eligible for depreciation. In this regard, it is necessary to notice that the intangible assets enumerated in Sec.32 of the Act effectively confer a right upon an assessee for carrying on a business more efficiently by utilizing an available knowledge or by carrying on a business to the exclusion of another assessee. A non-compete right encompasses a right under which one person IS prohibited from competing in business with another for a stipulated period. It would be the right of the person to carry on a business in competition but for such agreement of non-compete. Therefore the right acquired under a

non-compete agreement is a right for which a valuable consideration is paid. This right is acquired so as to ensure that the recipient of the non-compete fee does not compete in any manner with the business in which he was earlier associated. The object of acquiring a know-how, patents, copyrights, trademarks, licences, franchises is to carry on business against rivals in the same business in a more efficient manner or to put it differently in a best possible manner. The object of entering into a non-compete agreement is also the same i.e., to carry on business in a more efficient manner by avoiding competition, atleast for a limited period of time. On payment of non-compete, the payer acquires a bundle of rights such as restricting receiver directly or indirectly participating in a business which is similar to the business being acquired, from directly or indirectly soliciting or influencing clients or customers of the existing business or any other person either not. to do business with the person who has acquired the business and paid the non-compete fee or to do business with the person receiving the non-compete fee to do business with a person who is directly or indirectly in competition with the business which is being acquired. The right is acquired for carrying on the business and therefore, it is a business right. The word 'commercial' is defined in Black's Law Dictionary as 'related to or connected with trade and commerce in general 'commerce' is defined as 'the exchange of goods, productions or property of any kind, the buying, selling and exchanging of articles'. A right by way of non-compete is acquired essentially for trade and commerce and therefore, it will also qualify as a commercial right. A right

acquired by way of non-compete can be transferred to any other person in the sense that the acquirer gets the right to enforce the performance of the terms of agreement under which a person is restraining the other businessman from competing with the assessee, he gets a vested right which can be enforced under law and without that, the other businessman can compete with the first businessman. When by payment of non-compete fee, the businessman gets his right what he is practically getting is kind of monopoly to run his business without bothering about the competition. Generally, non-compete fee is paid for a definite period. 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. Therefore, that right which the assessee acquires on payment of non-compete fee confers in him a commercial or a business right which is held to be similar in nature to know-how, patents, copyrights, trademarks, licences, franchises. Therefore, the commercial right thus acquired by the assessee unambiguously falls in the category of an 'intangible asset'. Their right to carry on business without competition has an economic interest and money value. The term or any other business or commercial rights of similar nature has to be interpreted in such a way that it would have some similarities as other assets mentioned in Cl(b) of Explan.3. Here the doctrine of ejusdem generis would come into operation and therefore, the non-compete fee vests a right in the assessee to carry on business without competition which in turn

confers a commercial right to carry on business smoothly. When one the expenditure incurred for acquiring the said right is held to be capital in nature. Consequently, the depreciation provided under sec.32(1)(ii) is attracted and the assessee would be entitled to the deduction as provided in the said provision i.e precisely what the Tribunal has held”.

7. Now we examine the facts of the present case to see as to whether the rights acquired by the assessee by way of non compete can be transferred to any other person or not. When we carefully go through this judgment in full and Para 8 as reproduced above in particular, we reach to the conclusion that the main basis of the judgment of Hon’ble Karnataka High Court is this that on payment of non compete fees, the payer acquires a bundle of rights such as restricting receiver directly or indirectly participating in a business which is similar to the business being acquired, from directly or indirectly soliciting or influencing clients or customers of the existing business or any other person either not to do business with the person who has acquired the business and paid non compete fees or to do business with a person who is directly or indirectly in competition with the business which is being acquired. These rights are held to be business rights. Thereafter, it is noted by Hon’ble Karnataka High Court that this right can be transferred to any other person in the sense that the acquirer gets the right to enforce the

performance of the terms of agreement under which a person is restrained from competing. In the present case also, it is specified in Para 11 of the agreement page 102 of the paper book that unless permitted by the assessee i.e. SMPL, WAVE and Mr. V. F. John Yesudhas will not do anything which may amount to competition with the present assessee. Hence in the present case also, the assessee i.e. the acquirer gets the right to enforce the performance of the terms of agreement under which the seller WAVE and Mr. V. F. John Yesudhas including their associates, partners and relatives shall not compete with the assessee i.e. the acquirer. Hence, in our considered opinion, the facts of the present case are similar to the facts in the case of the judgment in the case of CIT vs. M/s Ingersoll Rand International Ind. Ltd. (supra) and in the present case also, this right acquired by the assessee can be transferred to any other person in the sense that the assessee acquirer gets the right to enforce the performance of the terms of agreement under which the seller is restrained from competing. Therefore, respectfully following this judgment, we hold that even if the right acquired by the assessee is held to be non compete right then also, it is eligible for depreciation u/s 32 (1) (iii). Regarding the judgment of Hon'ble Delhi High Court on which reliance has been placed by the learned DR of the revenue i.e. the judgment rendered in the case of Sharp Business System vs. CIT (Supra), we hold that since, we are following the judgment of Hon'ble Jurisdictional High Court, the judgment of any other High Court is

not relevant even if the same is contrary to the judgment of Hon'ble Jurisdictional High Court because we are bound to follow the judgment of Hon'ble Jurisdictional High Court. Hence, we do not examine the applicability of this judgment. Now, this aspect has become academic as to whether the right acquired is Goodwill or non compete right. Accordingly, Ground No. 2 in both years is allowed.

8. Regarding the second issue in both years i.e. disallowance of depreciation of Rs. 890,704/- in A.Y. 2010 – 11 and Rs. 565,953/- in A. Y. 2011 – 12 being depreciation on interiors and third issue in A. Y. 2010 – 11 only regarding disallowance of depreciation of Rs. 404,253/- on computer software, learned AR of the assessee made various submissions but the learned DR of the revenue submitted that these issues were not decided by the learned CIT (A) and hence, on these issues, the matter may be restored to CIT (A) for his decision on these issues.

9. We have considered the rival submissions and we find force in the submissions of the learned DR of the revenue because we find that in fact, learned CIT (A) has decided only one issue in both years i.e. the allowability of depreciation on goodwill/non compete fees. Hence on these two issues, we restore the matter to the file of the learned CIT (A) for his decision on these issues.

10. In the result, the appeal of the assessee is partly allowed in the terms indicated above.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-
(SMT ASHA VIJAYARAGHAVAN
JUDICAL MEMBER

Sd/-
(A.K. GARODIA)
ACCOUNTANT MEMBER

Place: Bangalore:

D a t e d : 03.11.2016

am*

Copy to :

- 1 Appellant
- 2 Respondent
- 3 CIT(A)-II Bangalore
- 4 CIT
- 5 DR, ITAT, Bangalore.
- 6 Guard file

By order

AR, ITAT, Bangalore

1.	Date of Dictation
2.	Date on which the typed draft is placed before the dictating Member
3.	Date on which the approved draft comes to the Sr. P. S.
4	Date on which the order is placed before the dictating Member for pronouncement
5.	Date on which the order comes back to the Sr. P.S.
6.	Date of uploading the order on website
7.	If not uploaded, furnish the reason for doing so.....
8.	Date on which the file goes to the Bench Clerk
9.	Date on which order does for Xerox & endorsement
10.	Date on which the file goes to the Head Clerk.....
11	The date on which the file goes to the Assistant Registrar for signature on the order.....
12	The date on which the file goes to the dispatch section for dispatch of the Tribunal order.....
13	Date of dispatch of order.....

