



**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"F" BENCH, MUMBAI**  
**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND**  
**SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

ITA no.4132/Mum./2016  
(Assessment Year : 2010-11)

Income Tax Officer  
Ward-9(2)(1), Mumbai

..... Appellant

v/s

Babaji Shakti Cargo Movers Pvt. Ltd.  
Plot no.2, Behind EXCOM House  
Saki Vihar Road, Saki Naka  
Andheri (E), Mumbai 400 072  
PAN – AADCB7698D

..... Respondent

Revenue by : Ms. S. Padmaja  
Assessee by : Shri Radheshyam Jajoo

Date of Hearing – 21.02.2018

Date of Order – 28.02.2018

**ORDER**

**PER SAKTIJIT DEY, J.M.**

This is an appeal by the Revenue against order dated 7<sup>th</sup> March 2016, passed by the learned Commissioner (Appeals)-16, Mumbai, for the assessment year 2010-11.

2. The only ground raised by the Revenue reads as under:-

*"Whether on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing depreciation fo ₹ 50,00,000 on non-compete fee as depreciation is not allowable under section 32(1)(ii) on the amount of non-compete fee paid by the assessee as it does not represent any intangible asset, such as, knowhow, patents, copyright,*

*trademarks, licenses or franchises within the meaning of section 32(1)(ii)."*

3. Brief facts are, the assessee, a company, is engaged in the business of providing cargo handling services, agent for transport of goods by air, road and business auxiliary services. For the assessment year under dispute, the assessee filed its return of income on 28<sup>th</sup> September 2011, declaring total income of ₹ 7,09,208. During the assessment proceedings, the Assessing Officer noticing that the assessee has claimed depreciation on goodwill and non-compete fee by treating as intangible asset called upon the assessee to justify its claim with supporting evidence. From the details submitted by the assessee the Assessing Officer found that by agreement dated 2<sup>nd</sup> June 2009, M/s. Babaji Shivram Clearing and Carriers Pvt. Ltd has taken over the business of a partnership firm in the name and style of M/s. Shakti Cargo Movers. He also found that the sale consideration of the business included goodwill and non-compete fee. After perusing the details, the Assessing Officer called upon the assessee to justify the claim of depreciation on goodwill and non-compete fee, considering the fact that goodwill and non-compete fee formed part of sale consideration paid by M/s. Babaji Shivram Clearing and Carriers Pvt. Ltd. on 2<sup>nd</sup> June 2009 for acquiring the business of M/s. Shakti Cargo Movers, whereas, the assessee company was incorporated on 4<sup>th</sup> June

2009. Thus, the Assessing Officer was of the opinion that there being no transfer of asset by M/s. Babaji Shivram Clearing and Carriers Pvt. Ltd. to the assessee, claim of depreciation cannot be allowed. Without prejudice to the aforesaid reasoning for disallowing the claim of depreciation, the Assessing Officer also held that non-compete fee not being in the nature of an intangible asset as prescribed in section 32(1)(ii) of the Act, assessee's claim of depreciation cannot be allowed. Being aggrieved of the disallowance of depreciation on non-compete fee, the assessee preferred appeal before the first appellate authority.

4. The learned Commissioner (Appeals) after considering the submissions of the assessee in the context of facts and material on record found that the business of M/s. Shakti Cargo Movers was acquired by M/s. Babaji Shivram Clearing and Carriers Pvt. Ltd., which is the 100% holding company of the assessee. He also found that immediately after the payment of sale consideration by the holding company the assessee company was formed and the entire business was acquired by the newly formed company. The learned Commissioner (Appeals) found that the Assessing Officer has not doubted the valuation of entire business and the consideration paid by the assessee as per valuation-cum-due diligence report submitted by the assessee. He, therefore, negated the Assessing Officer's reasoning

regarding the ownership of the assets acquired from the erstwhile partnership firm. As regards allowability of depreciation on non-compete fee as an intangible asset, the learned Commissioner (Appeals) following the decision of the Hon'ble Supreme Court in CIT v/s Smifs Securities Ltd., 24 taxmann.com 222 (SC) and few other decisions held that non-compete fee and goodwill being in the nature of intangible assets as described in section 32(1)(ii) of the Act, assessee's claim of depreciation is allowable.

5. The learned Departmental Representative relying upon the observations of the Assessing Officer submitted, the assessee company having come into existence at a date later the date on which the business of the firm was acquired, depreciation on payment of non-compete fee cannot be allowed. Insofar as the issue whether non-compete fee can be considered as an intangible asset thereby eligible for depreciation under section 32(1)(ii), the learned Departmental Representative relied upon the observations of the Assessing Officer.

6. The learned Authorised Representative placed strong reliance upon the findings of the learned Commissioner (Appeals).

7. We have considered rival submissions and perused materials on record. From the ground raised by the Revenue it is very much clear

that the Revenue is only disputing the allowance of claim of depreciation by treating non-compete fee as an intangible asset. No ground has been raised by the Department disputing the ownership of the asset. Thus, the contention of the learned Departmental Representative regarding the ownership of the assets on the basis of date of coming into existence of the assessee company is not maintainable as the department has accepted the decision of the Commissioner(Appeals) on this issue. Therefore, we proceed to decide the only issue raised by the Revenue as to whether non-compete fee can be treated as an intangible asset under section 32(1)(ii) of the Act. A reading of the said provision makes it clear that the scope of intangible asset is not restricted to knowhow, patents, copyrights, trademarks, licenses, franchises, etc., but it will also encompass any other business or commercial right of similar nature. This view has also been expressed by the Hon'ble Supreme Court in Smifs Securities Ltd. (supra). Thus, keeping in view the ratio laid down by the Hon'ble Supreme Court in Smifs Securities Ltd. (supra) and other decisions relied upon by learned Commssioner (appeals), it has to be held that the assessee is eligible to claim depreciation in respect of amount paid towards non-compete fee. Further, assessee's case gets strength from the fact that the Department has not challenged the decision of the learned Commissioner (Appeals) in allowing assessee's claim of

depreciation on goodwill. In view of the above, we uphold the order of the learned Commissioner (Appeals) by dismissing the ground raised.

8. In the result, Revenue's appeal is dismissed.

Order pronounced in the open Court on 28.02.2018

**Sd/-  
RAJESH KUMAR  
ACCOUNTANT MEMBER**

**Sd/-  
SAKTIJIT DEY  
JUDICIAL MEMBER**

**MUMBAI, DATED: 28.02.2018**

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Pradeep J. Chowdhury  
Sr. Private Secretary*

True Copy  
By Order

(Asstt. Registrar/Sr.P.S)  
ITAT, Mumbai