

IN THE INCOME TAX APPELLATE TRIBUNAL “ E ” BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
AND SHRI RAMLAL NEGI JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.666/Mum/2016

(निर्धारण वर्ष / Assessment Year : 2010-2011)

SNB Infrastructure Pvt. Ltd. 512, A-Wing, Kohinoor City, Commercial-1, Kirool Road, Kurla, Mumbai-400 070.	बनाम/ Vs.	Income tax Officer Ward 10(1)(4) Mumbai.
स्थायी लेखा सं./PAN :AAMCS 0182 N		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by :	Shri Pheroze Andhyarjuna
प्रत्यर्थी की ओर से/ Respondent by :	Shri V.Justin-DR

सुनवाई की तारीख /Date of Hearing : 23/02/2018

घोषणा की तारीख /Date of Pronouncement : 02/05/2018

आदेश / ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER:

This appeal by the revenue is directed against the order of ld. Commissioner of Income tax(Appeals) -22, Mumbai dated 19/11/2015. It pertains to assessment year 2010-11. The Grounds of appeal read as under :-

“1. On the facts and in the circumstances of the case and in law the learned CIT (A) erred in sustaining the order of the AO. The learned CIT (A) ought to have granted the claim of depreciation on intangibles for Rs.1,58,75,000/-- and accepted the share of profit of Rs.9,24,154/-from SNB-RCC(JV) as exempt income.

2. On the facts and in the circumstances of the case and in law the learned CIT (A) under a mistaken impression about the intangibles being not existed denied the claim of depreciation for Rs.1,58,75,000/-.The learned CIT (A) failed to appreciate that the consideration through allotment of shares established that the intangibles necessarily formed an asset in the books of accounts on the date of succession.

3. On the facts and in the circumstances of the case and in law the learned CIT (A) failed to appreciate that the successor company paid full cost for assets acquired by allotting the shares to the partners of the firm. The denial of the claim for depreciation of Rs.1,58,75,000/--on the ground of no cost was without any basis and not borne by facts.

4. On the facts and in the circumstances of the case and in law the learned CIT (A) ought to have granted the claim of depreciation of Rs.1,58,75,0007-. The denial on the pretext of there being no cost of acquisition was an irrelevant consideration as the claim of depreciation was based on the ownership and user for intangibles.

5. *On the facts and in the circumstances of the case and in law the learned CIT (A) erred in denying the claim of depreciation of Rs.1,58,75,000/- on intangibles. The learned CIT (A) failed to realize that conditions precedent being met for succession under 47(xiii) the claim for depreciation made on the assets on the date of succession which included intangibles as well.*

6. *On the facts and in the circumstances of the case and in law the learned CIT (A) ought to have accepted that the cases relied upon were that of the jurisdictional ITAT and thus of binding nature and squarely applicable on the issue of depreciation on intangibles. The learned CIT (A) dismissed the same without in a perfunctory and arbitrary manner.*

On the facts and in the circumstances of the case and in law the learned CIT (A) erred in denying the claim of exempt income on the share of profit from SNB RCC (JV). The learned CIT (A) ought to have held that the income was exempt under the provisions of section 86 read with section 67A.

8. *On the facts and in the circumstances of the case and in law the learned CIT (A) misdirected himself in assuming that the Company was not a member of AOP. The learned CIT (A) failed to realize that upon the partnership firm was succeeded by the Company and the claim made by the company was valid and legally tenable.*

9. *On the facts and in the circumstances of the case and in law the learned CIT (A) denied the claim of exempt income to the share of profit of R.9,24,154/- on the specious ground of capital Investment. The learned CIT (A) ought to have examined the schedules for appreciation of the same.*

10. *All the above grounds are independent and without prejudice to each another.*

11. *The appellant craves leave to add, amend, alter, substitute modify any or all grounds of appeal at the time of hearing.*

2. Although the assessee has raised may Grounds there are basically two issues. The First issue relates to depreciation on tangibles and the Second issue relates to claim of exempt profit from SNA RCC (JV).

2.1. Apropos the first issue the brief facts of this issue are as under :-

2.2. The assessee company during the year had entered into Succession Agreement with M/s. Shyam Narayan & Bros., a registered Partnership Firm. On perusal of the succession agreement and records it was evident that the partners of M/s. Shyam Narayan & Bros and Directors of the assessee company were the same and there was no other party involved in the said transaction. It was observed that subsequent to the said succession, intangible assets on account ,of Goodwill and Commercial Rights & Registration were created in the books of the appellant company. The Assessing Officer found that this transaction was just a book entry and no consideration was paid- by the appellant company on account of the said intangible assets. In view of the aforesaid discussion, the claim of depreciation on goodwill and commercial rights and registration amounting to Rs.1,58,75,000/- was

disallowed and added back to the total income of the assessee company. In this regard, we may gainfully refer to the Assessing Officer's observation as under:

6.1 During the year the assessee Company has entered into Succession Agreement with M/s. Shyam Narayan & Bros., Regd. Partnership Firm. On perusal of the succession agreement and records it is evident that the partners of M/s. Shyam Narayan & Bros and Directors of the assessee Company are common and there is no other party involved in the said transaction. It is observed that out of the said transaction there was an intangible asset Goodwill/ Commercial Rights & Registration are created by the assessee Company. It is worthwhile to note that by definition depreciation shall be allowable on asset as per Provisions of Section u/s. 32 of the I.T. Act, 1961. This transaction was just a book entry amongst the common parties and there can be no creation of asset out of the said transaction as there is no future economic benefits which are flowing out of the same. It is beyond doubt that no goodwill or any other asset can be created out of transaction with oneself. Furthermore, the assessee Company entered in any, agreement for purchase of goodwill nor paid any consideration on account of goodwill.

6.2 In view of the aforesaid discussion the claim of depreciation on Goodwill and Commercial Rights & Registration amounting to Rs.1,58,75,000/- is disallowed and added back to the total income of the assessee company.

2.3. Against the above order assessee appealed before the CIT(A). The Id. Commissioner of Income tax (Appeals) noted the submissions of the assessee as under :-

“The claim of depreciation on the intangible assets of commercial rights and registrations and goodwill is of Rs. 79,37,500 each and an aggregate of Rs.1,58,75,000/-. We submit that the provisions under section 47 provide for certain transactions which though are transfer within the meaning of transfer under 2(47) are not treated as transfer for the purposes of determination of capital gains. We submit that one such clause is (xiii) section 47. The said section relates to the transfer of partnership business and succeeded by a private limited company. We submit that under the said provision the business of erstwhile partnership firm Shyam Narayan & Bros was succeeded by the appellant Company. We submit that in pursuance of such transfer the assets and liabilities relating to business stood transferred under the provisions of section 47 (xiii). We submit that there is also an express reference to the intangible assets in the said section which indicates that the possibility of intangibles being a part of assets and liabilities was envisaged by the legislature. We submit that the express provision of intangibles covers the transfer of intangibles which in our case are that of commercial rights and registrations along with goodwill. We submit that the legislature having provided the mechanism of the transfer without it being considered as a transfer for the purposes of capital gains cannot go against in claim of depreciation on intangibles on the ground for acquisition cost of such intangibles. We submit that the chargeability or otherwise to, capital gains, of a transaction of transfer would not determine the claim of depreciation on such intangibles. We therefore submit that the transaction of transfer needs to be looked as an independent transaction and linking it to the claim of depreciation would be reading more into the provisions which are not provided in the statute. We therefore submit that the claim of depreciation on these intangible assets needs to be allowed. We request your honour to consider it so and grant the claim of depreciation of Rs.1,58,75,000/-. We shall be highly obliged for the same. We submit that the legislature has in appropriate cases provided for the values to be adopted for the purposes of transfer. We submit that the transfers in the case of slump sale, demergers the basis of transfer provides for the book value to be adopted while no such prescription is there for the purposes

of transfer under 47(xiii). We submit that the legislature having permitted the transfer of assets and liabilities at values other than book values the same cannot be denied on the premise that no cost can be attributed to such intangibles. We therefore submit that the values of intangibles arising in the 'course of transfer under 47 (xiii) cannot be ignored for the purposes of claim of depreciation. We request your honour to hold it so and allow the claim of depreciation of Rs. 1,58,75, 000/-. We shall be highly obliged for the same.

We submit that there are requirements which need to be satisfied under the transfer under 47(xiii). We submit that the requirements being met and in pursuance of which the appellant Company has succeeded to the partnership firm. We submit that the conditions having been satisfied for the transfer the assets transferred have to be considered at its stated value. We submit that the values to be adopted for the purposes of transfer are required to be adopted in the appellant company. We submit that the intangibles having been adopted in terms of the succession deed the same cannot be excluded for the purposes of depreciation. We therefore submit that a transaction which is within the legislative ambit needs to be given effect and acted upon. We therefore submit that the depreciation needs to be allowed and considered on the intangibles. We therefore request your honour to allow the claim of depreciation on the intangibles. We shall be highly obliged for the same. We submit that direct ruling, on the issue of claim of depreciation such transferred assets are not available in public domain. We submit that there have been cases, however, on the issue of transfer under Section 47(xiv) with regard to the creation of intangibles at the time of transfer. We submit that no fault has been found on such intangibles arising on the eve of transfer under 47(xiv). We therefore submit that the acceptance of the intangibles in such transfer affirms that the same is within the tenets of the legal provisions. We rely on one such ruling of Mumbai Tribunal wherein the Hon'ble ITAT in the case of Asst.CIT v. Nayan L Mepani (MumO (2012) 49 SOT 641 (Mumbai) for the proposition that the intangibles arising on the transfer under 47(xiv) doesn't violate the provisions and resultantly the amounts considered under the transfer needs to be taken as the cost of acquisition for the purposes of depreciation. We also rely on one more case on the same issue in the case of ACIT vs. Joe Marcelinho Mathias (2013-TIOL-955-ITAT-PANAJI. We submit that the appellant's transaction is same on the principles and thus the stated amounts towards intangible assets needs to be accepted for the purposes of depreciation. We therefore, submit that the depreciation on intangibles be allowed. We request your honour to grant it so. We shall be highly obliged for the same."

2.3.1. However the Ld. Commissioner of Income tax(Appeals) was not convinced. He upheld the action of the Assessing Officer by holding as under :-

5.3. I have considered the facts and circumstances of the case. The appellant has sought to justify its claim of depreciation on intangible assets by referring to the provisions under section 47 which provide for certain transactions which though are transfer within the meaning of transfer under 2(47) are not treated as transfer for the purposes of determination of capital gains. Attention was drawn to clause (xiii) of the said section which relates to the transfer of partnership business and succession by a private limited company. It was contended that there is an express reference to the intangible assets in the said section which indicates that the possibility of intangibles being a part of assets and liabilities was envisaged by the legislature and that the express provision of intangibles covers the transfer of intangibles which in its case are that of commercial rights and registrations along with goodwill. I find no merits in the appellant's contention. In tangible assets on account of goodwill and commercial rights and registration existed in the books of the partnership firm before succession. The question of intangible assets being transferred to the succeeding appellant company, therefore, does not arise. The appellant also drew attention to the issue of transfer under Section 47(xiv) with regard to the creation of intangibles at the time of transfer. It was submitted that no fault has been found on such intangibles arising on the eve of transfer under 47(xiv) and that the acceptance of the intangibles in such transfer affirms that the same is within the tenets of the legal provisions. Reliance was placed on the ruling of

Mumbai Tribunal wherein the Hon'ble ITAT in the case of Asst.CIT v. Nayan L. Mepani (MumO (2012) 49 SOT 641 (Mumbai) held that the intangibles arising on the transfer under 47(xiv) does not violate the provisions and resultantly the amounts considered under the transfer needs to be taken as the cost of acquisition for the purposes of depreciation. The judgement relied upon by the appellant is also not applicable in the instant case. It is precisely because of the fact that no consideration was paid for the intangible assets which were created on succession that depreciation was disallowed as there was no cost of acquisition. In view of all these facts and observations, the appellant's grounds of appeal on the issue of depreciation on intangible assets are dismissed.

2.4. Against above order assessee is in appeal before us.

2.5. We have heard both the Counsel and perused the records. The Id. Counsel of the assessee reiterated the submissions made before the Ld. Commissioner of Income tax(Appeals). He submitted that the assessee company has duly taken over the partnership firm. The goodwill and commercial rights were duly taken over from the partnership firm. Assessee is very much eligible as per law to claim depreciation there upon. In this regard he referred to the paper book filed by the assessee. Per contra Ld. Departmental Representative relied upon the order of the Id. CIT(A). He submitted that the Id. CIT(A) has given a clear finding in his order that there was no such goodwill or commercial right in existence in the books of the partnership firm which has been taken over. Hence, Ld. Departmental Representative submitted that there is no question of granting any depreciation on the asset which were never in existence.

2.6. We have carefully considered the submissions and perused the records.

2.7. We find that the Id. Commissioner of Income Tax (Appeals) in his order has given a clear finding that no tangible asset on account of goodwill and commercial rights and registration existed in the books of the firm before succession. This duly corroborates that the assessee has created artificially these assets after the succession of the firm. Apparently this is a colorable device to claim huge depreciation on this account. In this regard, we note that the assessee has submitted paper book before us which is running into 83 pages. On paper book no. 1, we note that there is a balance sheet of M/s. Shyam Narayan & Brothers, the firm which has succeeded as on 31.09.2009. In this balance sheet in

fixed assets there is a mention of schedule E and F being details of business fixed asset and non business fixed asset respectively. However, we note that no such schedule has been attached. In this balance sheet there is no mention anywhere whatsoever about the existence of any goodwill or commercial right which has been claimed by the assessee company to have taken over. It may also be noted that in the succession agreement produced in PB pg. 68, which is dated 01.10.2009, it has been mentioned that the assets and consideration thereof are as per the balance sheet of the firm M/s. Shyam Narayan & Brothers as on 30.09.2009. Hence, it is clear that as on 30.09.2009 in the balance sheet submitted of the firm in succession there was no existence of any goodwill or commercial right. Now further we note that in pages 6 to 30, the assessee has attached in the said paper book balance sheet as on 01.10.2009 of M/s. Shyam Narayan & Brothers. In this balance sheet account there is an existence of fixed assets, business and non business of same amount as mentioned in the balance sheet as on 30.09.2009. However, in this balance sheet, in page no. 11, there is schedule E which mentions goodwill and commercial rights of Rs.63,50,000/- each. This schedule is an unsigned document as against the main balance sheet which contains a signature of Chartered Accountant and a partner of the firm. We find it is strange that when the firm has been taken over on the balances of existing as on 30.09.2009, how on 01.10.2009 in the balance sheet of the same firm, balances as on 30.09.2009 are existing and surprisingly there is an existence of unsigned Schedule E and F which were absent in the earlier balance sheet.

3. We further note that in the succession agreement produced before us there is no mention of existence of any goodwill and similar right which is being taken over. The said agreement only mentions that the balance sheet of the firm drawn on 30.09.2009 will be taken over and the consideration shall be discharged by way of allotment of equity shares to the partners of the said firm in ratio of capital balance. In the paper book submitted, the assessee has produced Form No.2

submitted before the Registrar of Companies pursuant to section 75(1) of the Companies Act. The said Form No.2 runs of 4 pages running from PB pgs. 64 to 67. In the said Form of allotment the property and asset acquired have been shown at Rs.20,74,79,650/-. Furthermore, there is no mention in the column for goodwill and other items. This makes it further clear that no information about the existence of goodwill or commercial right was there on the date of allotment after the succession. Furthermore, the said allotment also shows share premium of Rs.17,78,39,700/-. We find there is no mention whatsoever in the succession agreement for allotment of shares on premium. The Id. Counsel of the assessee submitted that he had no information or details as to how and on what account the share premium was arrived at and mentioned.

4. In the light of the above factual details and evidence we are of the considered opinion that Id. Commissioner of Income tax(Appeals) is quite correct in holding that there is no evidence whatsoever on record regarding the existence of goodwill and commercial right claimed to have been taken over from partnership firm either in the books of the said partnership firm or from documents submitted before the registrar of Companies. In such situation when no intangible asset on account of goodwill and commercial right and registration existed in the books of the partnership firm before succession, there is no question of the assessee company taking over the same and claiming depreciation there upon. In view of this factual finding the entire claim of the assessee regarding the reliance upon provisions of section 47(xiii) and the case laws doesn't support the case of the assessee in as much as there is no quarrel about the principles laid down in the Act and those case laws. However the facts of the present case are totally different as it has not been established that the assets in the form of goodwill and commercial right claimed which has been taken over were in existence in the books of the predecessors firm. We concur with the Assessing Officer that these assets were artificially created

subsequent to the succession of the firm in the books of the assessee company. The only purpose of this action is to claim huge depreciation in hands of the assessee company.

5. Hence, in the background of the aforesaid discussion, we do not find any infirmity in the order of the Id. Commissioner of Income Tax (Appeals). Accordingly, we affirm the same.

6. Apropos the Second issue

The brief facts of the case are that on perusal of computation of income it was seen that the assessee company had reduced Rs. 9,24,154/- from business income as exempt share of income from A.O.P. The Assessing Officer observed that during the course of scrutiny proceedings the representative did not furnish any details/supporting evidences to justify the same and that in the absence of details and evidences the genuineness of the claim was not verifiable. Therefore, the claim of reduction of exempt share of income from A.O.P. from business income made in the computation of income was disallowed.”

8. Before the Id. Commissioner of Income tax(Appeals) assessee’s submission were as under :-

“During appellate proceedings, the appellant submitted as under:-

" The share of income from AOP being SNB-RCC JV of Rs. 9,24,154/- has been not considered alleging the details have not been furnished. We submit that the details were duly furnished during the assessment proceeding which perhaps through • inadvertence has missed the attention of the learned AO. We also enclosed the copy of return and the annual accounts of the AOP. The claim of exemption was made under section 86 read with section 67A. We therefore submit that the share of income from SNB-RCC JV being an AOP is not subjected to tax and is therefore exempt. We request your honour to consider it so. We shall be highly obliged for the same."

9. Considering the above Id. Commissioner of Income tax(Appeals) held as under :-

“6.3. I have considered the facts and circumstances of the case. The appellant had submitted copies of the Income Tax return, assessment order u/s 143(3) and audit report and balance sheet of the AOP, M/s SNBL& RCC JV. It is seen from the balance sheet of the AOP that there is a balance of Rs. 73,76,423/- in the capital account. In the Audit Report in Form No. 3CD, the profit sharing ratios of the members are shown at 97% and 3% for M/s Shyam Narayan & Bros and M/s Rajesh Construction Co. respectively. The appellant's name does- not figure as a member of the AOP in the Audit Report.

Moreover, perusal of the appellant's balance sheet also shows no investment made in the said AOP. In view of all these facts, the action of the Assessing Officer in disallowing the share of profit of AOP claimed by the appellant I from its total income is upheld. The appellant's ground of appeal on this issue is dismissed."

10. We have heard both the counsel and perused the records. We find that the assessee has claimed as exempt share of profit from AOP, M/s. SNBL&RCC JV. This share in the said AOP has also been claimed to have taken over from the partnership firm which has been succeeded. However, as noted by the Id. Commissioner of Income Tax (Appeals) and also observed by us from the balance sheet as on 31.03.2010 of the said AOP produced in PB pgs. 79-80 in the capital account as on 31.03.2010 there is no mention of the assessee company as partner. In the capital account of AOP, M/s. Shyam Narayan & Bros capital account exists as under:

Opening balance as on 01.04.2009	Rs.60,83,439/-
All credit transactions	Rs.9,24,15,425/-
Balance as on 31.03.2010	Rs.70,07,593.25/-

11. Now we note that in the balance sheet of the assessee company, produced before us in the sundry debtor group summary on page no. 83, there is a mention of M/s. SNBL & RCC JV capital account at Rs.70,07,593/-. We find it is strange that when the balance sheet of the M/s. SNBL & RCC JV does not show the assessee company as a partner, despite the said balance sheet of AOP being certified by a Chartered Accountant, how the assessee company's balance sheet shows the existence thereof as sundry debtor is not understandable. We further note that the Id. Commissioner of Income Tax (Appeals) has given a finding that in the Audit Report of AOP in Form No. 3CD, the profit sharing ratios of the members are shown at 97% and 3% for M/s Shyam Narayan & Bros and M/s Rajesh Construction Co. respectively. The assessee's name does not figure as a member of the AOP in the Audit Report. In these circumstances, in our considered opinion, the action of the authorities below

in disallowing the share of the profit of the AOP claimed by the assessee is correct. Hence, we affirm the order of the authorities below.

12. In the result, this appeal by the assessee stands dismissed.

Order pronounced in the open court on 2nd May, 2018.
आदेश की घोषणा खुले न्यायालय में दिनांक: 2nd May, 2018 को की गई।
Sd/- Sd/-

(RAMLAL NEGI)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 02/05/2018

JV, Sr. PS

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)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

(SHAMIM YAHYA)

लेखा सदस्य / ACCOUNTANT MEMBER

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai