

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'E': NEW DELHI)**

**BEFORE SHRI G.D. AGRAWAL, PRESIDENT
&
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No:- 7751/Mum/2010,
(Assessment Year: 2005-06)**

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| DCIT-2(3) | Vs. | M/s SGE Advisors (India) Pvt. Ltd. |
| PAN No: AAACS8138C | | |
| APPELLANT | | RESPONDENT |

**Cross Objection No.-94/Mum/2012
(Arising out of ITA No.- 7751/Mum/2010)
Assessment Year- 2005-06**

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| SGE Advisors (India) Pvt. Ltd., (Formerly known as Suncap Financial Advisory Services (India) Pvt. Ltd. which was formally known as Sun F & C Asset Management (I) Private Limited] | Vs. | Assistant Commissioner of Income Tax, 2(3), Mumbai. |
| PAN No: : AAACS8138C | | |
| APPELLANT | | RESPONDENT |

ITA No:- 4782/Del/2013
(Assessment Year 2005-06)

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| Income Tax Officer, Ward 8(1), New Delhi. | Vs. | M/s SGE Advisors (India) Pvt.Ltd., (Formerly known as Suncap Financial Advisory Services (India) Pvt. Ltd.) 9 th Floor, Meridian Commercial Tower, Raisana Road, New Delhi- 110001. |
| PAN No: AAACS8138C | | |
| APPELLANT | | RESPONDENT |

Revenue By : Sh. B.R. Mishra (Sr. DR)
Assessee by : Sh. R.K. Mehra (CA)

Date of Hearing : 21.05.2018.
Date of Pronouncement : 05/07/2018.

ORDER

PER: KULDIP SINGH, JM

Since identical questions of facts and law have been raised in both the aforesaid inter connected appeals, as well as Cross Objections the same are being disposed of by way of consolidated order for the sake of brevity and to avoid repetition of discussion.

2. The Appellant, DCIT-2(3), (hereinafter referred to as the 'Revenue') by filing the present appeal bearing **ITA No. 7751/M/2010**, sought to

set aside the impugned order dated 19.08.2010 qua Assessment Year 2005-06 by the Ld. CIT(A)-6, Mumbai, on the grounds that:-

" On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in allowing relief to the assessee to the extent impugned in the grounds enumerated below:

1. The Order of the CIT(A) is opposed to law and facts of the case.

2(a) On the facts and in the circumstances of the case, and in law the Ld.CIT(A) erred in holding that the compensation received by the assessee for transferring the business of Investment Management to Principal Asset Management Company is not chargeable to tax as neither the cost of acquisition or cost of improvement is determinable.

2(b) The Ld. CIT(A) erred in relying upon the decision of the Hon'ble Supreme Court in the case of B.C. Srinivasa Shetty which stands superceded by virtue of amendments made by Finance Act 2002 in the provisions of sec. 55(2)(a) w.e.f. 01/04/2003.

2(c) The Ld. CIT(A) erred in not appreciating the provisions of sec. 55(2)(a) which provides that cost of right to carry on any business shall be taken to be nil if no cost was incurred for its acquisition.

3(a) Without prejudice to the above, the Ld. CIT(A) failed to appreciate that the compensation received by the assessee is business income being revenue in nature as it was received as a compensation for not carrying out the business of Management of Mutual Fund Scheme.

3(b) The Ld. CIT(A) failed to appreciate that the compensation received by the assessee is business income under the provisions of section 28(va)(a) of the IT Act as it was received for not carrying out a business.

4. For these and other grounds that may be urged at the time of hearing, the decision of the CIT(A) may be set aside and that of the AO restored."

3. The Appellant, SGE Advisors [India] Private Limited (hereinafter referred to as the 'Assessee') by filing the present Cross Objection bearing **CO. No. 94/M/2012**, sought to set aside the impugned order dated 19.08.2010 qua Assessment Year 2005-06 by the Ld. CIT(A)-6, Mumbai, on the grounds that:-

1. Retirement Fees of Rs. 263,151/-

- a. *The learned CIT(A) erred in partly confirming the order of the Assistant Commissioner of Income-tax 2(3), Mumbai ("ACIT") in treating the retirement fees to the extent of Rs. 2,63,151/- as chargeable under the head "Capital Gains".*
- b. *The learned CIT(A) erred in confirming the finding of the learned ACIT that the right to manage the schemes of Mutual Fund is a capital asset.*
- c. *The learned CIT(A) erred in not appreciating that the Retirement Fees received is in the nature of a capital receipt not chargeable to tax.*
- d. *Without prejudice to the above, the learned CIT(A) erred in allocating the fixed component of the Retirement Fees towards the Mutual Fund schemes on the same basis as variable component of the Retirement Fees.*
- e. *The learned CIT(A) erred in not appreciating in the correct perspective the submissions made by the respondent."*

2. Disallowance of Ongoing expenses of Rs. 2,093,261/-

- a. *The learned CIT(A) erred in not deleting the addition made by the learned ACIT on account of ongoing expenses of Rs. 2,093,261/-.*
 - b. *He erred in not appreciating that the expenses were incurred wholly and exclusively for the purpose of the business.*
 - c. *The learned CIT(A) erred in not appreciating in the correct perspective the submissions made by the respondent.*
3. *Each one of the above grounds is without prejudice to the other.*

4. *The respondent reserves the right to amend, alter or add to any of the above grounds."*

4. The Appellant, Income Tax Officer Ward 8(1), New Delhi, (hereinafter referred to as the 'Revenue') by filing the present appeal bearing **ITA No. 4782/Del/2013**, sought to set aside the impugned order dated 17.05.2013 qua Assessment Year 2005-06 by the Ld. CIT(A)-XI, New Delhi, on the grounds that:-

- "1. The Ld. CIT(A) has erred in directing the AO to comply with the directions of Ld. CIT(A), Mumbai and not levy capital gains tax on retirement fees of Rs. 5,37,68,659/-.*
- 2. The Ld. CIT(A) has erred in directing the AO to verify the working of the short term capital gain of Rs. 2,63,150/-.*
- 3. The appellant craves to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal."*

5. Briefly stated the facts necessary for adjudication of the controversy at hand are: assessee being an Investment Manager for the schemes of the Sun F&C Mutual Fund up to 15.05.2004 had received retirement fees of Rs. 5,87,35,492/- (after reducing the W.D.V. Written Down Value of Rs. 49,66,833/-) as short-term capital gain from the Principal Asset Management Company Ltd., as consideration for retiring as an Principal Asset Management Company of Sun F&C Mutual Fund.

Aforesaid arrangement has been approved by the Securities and Exchange Board of India (SEBI). It is the case of the assessee that aforesaid amount was paid for acquisition of the rights to manage assets, which was in the nature of payment for acquiring the right/license to manage the schemes, which was capitalized by the assessee as intangible assets and depreciation was claimed u/s 32 of the Income-tax Act, 1961 (for short 'the Act') in respect of such Retirement fees paid. AO considered the Retirement Fees as capital asset of which assessee had been claiming depreciation @ 25% of the written down value year after year. The Assessing Officer accordingly tax the capital gains as the management right was a capital asset, which has been accepted by the company itself and the management rights have been transferred to the Principal Asset Management Company and Principal Trustee Company Ltd., and has declined the contentions of the assessee that the consideration is called "Retiring Fees". So, the AO accordingly treated Rs. 5,37,68,659/- (after reducing WDV of Rs. 49,66,833/-) as short term capital gains.

6. Assessee carried the matter before the Ld. CIT(A) by way of filing the appeal, who has partly allowed the appeal. Feeling aggrieved, the Revenue has come up before the Tribunal by way of filing the present appeal and the Assessee has also filed Cross Objection challenging the impugned order passed by the Ld. CIT(A) by treating the Retirement fees

of Rs. 2,63,151/- as chargeable under the head "Capital Gains" and Disallowance of Ongoing Expenses of Rs. 2,093,261/- exclusively incurred by the assessee for the purpose of business.

7. We have heard the Ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and order passed by the revenue authorities below in the light of the facts and circumstances of the case.

8. Undisputedly, the Ld. CIT(A) vide impugned order has passed on the relief to the assessee on the sole ground that: since u/s 48 of the Act neither the cost of acquisition nor the cost of improvement can be determined, the capital gains computation mechanism fails and as such the capital gains are not ascertainable, hence no capital gains tax is leviable on the Retirement fees received in respect of such schemes. The Ld. CIT(A) arrived at the aforesaid findings by relying upon the decision rendered by Hon'ble Supreme Court of India in the case of **B.C. Srinivasa Shetty (128 ITR 294)**. However, on the other hand, Ld. DR for the Revenue challenged the impugned order.

9. It is not in a dispute that total 14 schemes have been transferred by the assessee pursuant to its retirement to Principal Mutual Funds out of which two schemes were acquired from JF Mutual Fund during the Financial Year 2002-03 for a consideration of Rs. 88,29,925/- and same

was capitalized as intangible asset and depreciation @ 25% was claimed by assessee as per section 32 of the Act. The Written Down Value of the said asset at the beginning of the relevant Assessment Year was Rs. 49,66,833/-.

10. In the backdrop of the aforesaid facts and circumstances of the case, the Ld. DR challenging the impugned order contended inter alia that as per amended provisions contained u/s 55(2)(a) of the Act w.e.f. 01.04.2003, the word 'right to carry on any business' has been inserted and the assessee did not get the 'right to carry on any business' and contended in the alternative if the case of assessee is not covered u/s 55(2)(a) it is covered u/s 28(va)(a) of the Act as per ground no. 3(b) raised in this case.

11. However, on the other hand, Ld. AR for the assessee in order to repel the arguments addressed by Ld. DR for the Revenue contended that the 12 schemes were floated by the company and no cost of acquisition was there. That there was no such condition in the agreement to attract provisions contained u/s 55(2)(a) and 28(va)(a) as the case may be which are not applicable to the case of the assessee.

12. In the backdrop of the aforesaid facts and circumstances of the case, order passed by the lower revenue authorities, and argument

addressed by the Ld. Authorized Representatives of the parties to the appeal, the question arises for determination in the case is:-

"As to whether the cost of acquisition of a right to carry on any business shall be taken as nil, if no cost was incurred for its acquisition as per provisions contained u/s 55(2)(a) or that the compensation received by the assessee is to be treated as business income under the provision of section 28(va)(a) of the Act, as the same was received for not carrying out the business."

13. First of all, to proceed further, we would like to extract provision contained u/s 55(2)(a) of the Act for ready perusal as under:-

"55(1) For the purpose of [sections 48 and 49]

(2) [For the purpose of sections 48 and 49, "cost of acquisition".-

[(a) In relation to a capital asset, being goodwill of a business [or a trade mark or brand name associated with a business] [or a right to manufacture, produce or process any article or thing] [or right to carry on any business [or profession]], tenancy rights, stage carriage permits or loom hours.-

(i) in the case of acquisition of such asset by the assessee by purchase from a previous owner, means the amount of the purchase price; and

(ii) in any of other [not being a case falling under sub-clauses (i) to iv) of sub-section (1) of section 49], shall be taken to be nil."

14. No doubt, in the case cited as B.C. Srinivasa Shetty (supra), Hon'ble Supreme Court of India held that "goodwill generated in newly commenced business cannot be described an asset within the meaning of

section 45 of the Act and the transfer of good-will initially generated in a business does not give rise to a capital gain for the purpose of Income Tax”

15. However, as per amended provisions contained u/s 55(2)(a) of the Act extracted above w.e.f. 1.4.2003 are applicable to the instant case. For the purpose of section 48 & 49 cost of acquisition in relation to a capital asset being goodwill of a business shall be taken as nil.

16. So, when the assessee company had undisputedly been running 14 schemes, out of which 12 schemes were floated by it and two schemes were acquired from J.F. Mutual Funds during the Financial Year 2002-03 for a consideration of Rs. 88,29,925/- and the said consideration paid by the assessee for acquisition of rights to manage asset was in the nature of payment for acquiring the right/license to manage to schemes, the same mere capitalized as intangible asset and claimed depreciation @ 25%, the transfer of whole business by the assessee in terms of agreement dated 3.6.2004 to the Principal Asset Management Company and Principal Trustee Company Ltd. by virtue of para 5.2 of the agreement, the consideration of Rs. 53768659/- received by the assessee is for transfer of the management rights to the transferee free company which cannot be treated as 'Retiring fees' because while acquiring management rights by the assessee company of two schemes acquired from J.F. Mutual Funds,

assessee itself admitted by claiming the depreciation on the consideration of Rs. 88,29,925/- @ 25% with Written Down Value of such right at Rs. 49,66,833/- as on 31.3.2005. When the assessee itself has admitted acquisition of management right qua two schemes acquired from J.F. Mutual funds as intangible assets, the assessee is estopped by its own act and company from denying the management rights transfer for a consideration of Rs. 5,37,68,659/- transferred by it to Principal Mutual Funds as intangible asset/good will.

17. So, we are of the considered view that B.C. Srinivasa Shetty (Supra) case as relied upon by the Ld. CIT(A) is not applicable to the facts and circumstances of this case, in the face of the provisions contained u/s 55(2)(a) of the Act. Thus question framed is determined in affirmative. In these circumstances, findings returned by the Ld. CIT(A) granting relief to the assessee, that no capital gain is leviable on the retirement fees received by the assessee in this case is not sustainable in the eyes of the Law, hence, reversed and the findings returned by AO are hereby restored. So Ground nos. 1 to 2 (a), (b), (c) of ITA No. 7751/M/2010 raised by the Revenue are determined in its favour and Ground nos. 2 (a),(b),(c), raised by the assessee in its Cross Objections are determined against the Assessee and Ground nos. 3 (a) (b) in view of our finding on

ground nos. 2, Ground nos. 3(a)(b) have since become infructuous hence decided against the Revenue.

Ground no. 2 A,b,c, of Cross Objection 94/M/12

18. So far as disallowance of ongoing expenses of Rs. 2093261 made by the AO and confirmed by the Ld. CIT(A) is concerned, undisputedly, the identical issue had come up before the Co-ordinate Bench of Tribunal in ITA No. 2112/Del/2014 in the case of Income Tax Officer vs. M/s SGE Advisors (India) Pvt. Ltd. vide order dated 15.12.2017.

19. The Ld. CIT(A) in para 8.1 of the impugned order has not decided this issue rather stated that the Ld. AR for the assessee fairly conceded that, this issue is covered against them by his predecessor orders for A.Y. 2003-04. Thus, decided the same against the assessee. However, in the face of the admitted facts that this issue was raised by the assessee in A.Y. 2003-04 before Co-ordinate Bench of Tribunal by filing cross objection in ITA No. 2112/Del/2014 which has been remitted back to the Ld. CIT(A) to decide the afresh after providing an opportunity of being heard to the assessee by returning the following findings:-

"6.1 After going through the aforesaid finding given by the Ld. CIT(A) on the legal issue which is involved in the Cross Objection filed by the Assessee, we are of the view that Ld.CIT(A) has passed a non-speaking order without consulting the assessment records. Therefore, in the interest of justice, we aside the issues involved in the Cross Objection to the file of the Ld.CIT(A) with the

directions to decide the same afresh, as per law, after giving adequate opportunity of being heard to the assessee and after consulting the assessment records and then pass a speaking order. It is made clear that we are not commenting upon the merits of the case."

20. In view of the matter, this ground is remanded back to the Ld. CIT(A) to decide afresh after providing an opportunity of being heard to the assessee, in the light of the decision rendered by the Tribunal for A.Y. 2003-04 in assessee's own case.

21. In view of what has been discussed above, ITA No. 7751/M/2010 is decided in favour of the Revenue and Cross Objection No. 94/M/2012 filed by the Assessee is partly allowed in favour of the assessee. However, ITA No. 4782/Del/2013 filed by the Revenue for A.Y. 2005-06 is hereby dismissed being not maintainable, in the face of the fact that the identical appeal on the same cause of action for A.Y. 2005-06 being ITA no. 7751/M/2010 was already pending and now decided by the Tribunal.

Order pronounced in the open court on 05/7//2018

Sd/-

**(G.D. AGRAWAL)
PRESIDENT**

Sd/-

**(KULDIP SINGH)
JUDICIAL MEMBER**

Dated: 05.07.2018
Pooja/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

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| Date of dictation | 18/6/2018 |
| Date on which the typed draft is placed before the dictating Member | 2/07/2018 |
| Date on which the typed draft is placed before the Other Member | |
| Date on which the approved draft comes to the Sr. PS/PS | 3/7/2018 |
| Date on which the fair order is placed before the Dictating Member for pronouncement | 5/7/2018 |
| Date on which the fair order comes back to the Sr. PS/PS | 5/7/2018 |
| Date on which the final order is uploaded on the website of ITAT | |
| Date on which the file goes to the Bench Clerk | |
| Date on which the file goes to the Head Clerk | |
| The date on which the file goes to the Assistant Registrar for signature on the order | |
| Date of dispatch of the Order | |