

IN THE INCOME TAX APPELLATE TRIBUNAL

“B” BENCH : BANGALORE

BEFORE SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER AND  
SHRI LALIET KUMAR, JUDICIAL MEMBER

ITA No.2255/Bang/2018
Assessment Year : 2015-16

M/s. Padmini Products Pvt. Ltd., #157, K Kamaraj Road, Bangalore – 560 042. <b>PAN: AADCP1790L</b>	vs.	The Deputy Commissioner of Income Tax, Circle – 5 (1) (2), Bangalore.
APPELLANT		RESPONDENT
Appellant by	:	Shri M. Gandhi, CA
Respondent by	:	Shri R.N. Siddappaji, Addl. CIT (DR)
Date of hearing	:	28.11.2018
Date of Pronouncement	:	29.11.2018

**ORDER**

*Per Shri A.K. Garodia, Accountant Member*

This appeal is filed by the assessee and the same is directed against the order of Id. CIT(A)-5, Bangalore dated 13.05.2018 for Assessment Year 2015-16.

2. The grounds raised by the assessee are as under.

*“1. The order of the Learned Commissioner (Appeals) In so far as it is prejudicial to the interest of the Appellant is not justified in law and on facts and circumstances of the case.*

*2. As regards disallowance of depreciation on intangible assets to the extent of Rs.1,64,95,840/-.*

*1. The Learned Commissioner (Appeals) is not justified in upholding the action of the Learned Assessing Officer in denying depreciation of Rs.1,64,95,840/-(Rs.84,56,239/-+Rs.80,39,601/-) on intangibles being brand names and trademarks valued at Rs.65,26,40,150/-.*

*2. The lower authorities have failed to appreciate that revaluation of the intangibles was effected by the erstwhile firm, before the succession, and not that of the Appellant as a result of on succession.*

*3. The lower authorities have failed to appreciate that the assets (including the intangible assets) of the erstwhile firm were transferred to the Appellant in the succession as contemplated under Section 47(xiii) of the IT Act.*

*4. The lower authorities have failed to appreciate that neither under Section 47(xiii) or elsewhere in the IT Act is there a stipulation that*

*assets cannot be revalued prior to succession or the fact that transfer needs to necessarily take place at the book value. The very fact that Section 47(xiii) exempts such transaction from the purview of transfer for the purpose of capital gains is that there is a contemplation that in a scenario of succession there could arise profits due to the sale of assets at a value higher than the cost.*

*5. The lower authorities have failed to appreciate that Section 47(xiii) makes an explicit mention of transfer of intangible assets.*

*6. The lower authorities have failed to appreciate that where it was intended that the transfer of assets should not take place at a value higher than the book value, the same has been explicitly provided for as in the case of Section 2 (19AA) of the Act which explains the term demerger.*

*7. The lower authorities have failed to appreciate that in cases where it was intended that the effect of revaluation needs to be ignored the same has been explicitly provided for as envisaged under Section 50B of the Act, dealing with Computation of capital gains in a slump sale.*

*8. Without prejudice to the above, the lower authorities have failed to appreciate that the revaluation of the assets of the firm has to be necessarily carried out and the partners' accounts have to be necessarily credited in respect of such revaluation when the business of the firm is succeeded to by the company keeping in mind the business reality that the shares of the company may be listed or venture capitalists may invest in the company.*

*9. The lower authorities have failed to appreciate that Section 43(1) of the Act which defines the term 'actual cost' nowhere stipulates that the incurrance of the expenditure needs to be necessarily in cash.*

*10. The lower authorities have failed to appreciate that Board Circular No.21 dated 09.07.1969 in paragraph 11 (though currently withdrawn vide Circular No.382 for different reasons) had recognized the transfer of technical know-how or services or delivery abroad of machinery and plant for consideration in the form of Shares.*

*11. The lower authorities have failed to appreciate that the Board Circular No 382 dated 04.05.1984 clarifies the aspect regarding 'Taxation of Shares of Indian Companies allotted to non-residents in consideration for the purchase of machinery and plant delivered abroad under clause (vi/vii) of sub-section (1) thereby recognizing the acquisition of assets for consideration other than cash.*

*12. The lower authorities have failed to appreciate Schedule VI of the Companies Act, 1956 also recognizes the allotment of Shares for consideration other than cash.*

*13. The Learned Commissioner (Appeals) is not justified in upholding the action of the Learned Assessing Officer, in disallowing the depreciation on intangible assets, when in fact, the existence of the aforesaid intangible assets and valuation thereof certified by a valuer has not been disputed by the Learned Assessing Officer.*

*14. The Learned Commissioner (Appeals) is not justified in upholding the action of the Learned Assessing Officer in disallowing the depreciation, when the fact that the intangibles originally belonged to the firm has not been questioned and in the Appellant's own case for AY 2013-14 the Hon'ble ITAT has allowed the depreciation.*

*15. The Learned Commissioner (Appeals) is not justified in upholding the action of the Learned Assessing Officer in disallowing the depreciation even when the Hon'ble ITAT has allowed the appeal of the Appellant for A Y 2013-14.*

*For the above reasons and for such other reasons which may be allowed by the Hon'ble members to be urged at the time of hearing, it is prayed that the aforesaid appeal be allowed."*

3. It was submitted by Id. AR of assessee that although the assessee has raised as many as 15 grounds of appeal but the only grievance of the assessee is regarding non-granting of depreciation on intangible assets to the extent of Rs. 1,64,95,840/- being brand names and trademarks valued at Rs. 65,26,40,150/-. He submitted a copy of the Tribunal order in assessee's own case for Assessment Year 2013-14 in ITA Nos. 1530 & 1531/Bang/2016 dated 28.04.2017. He also submitted that in this order for Assessment Year 2013-14, the Tribunal has followed another Tribunal order in assessee's own case for Assessment Year 2012-13 and reproduced the relevant paras from the earlier Tribunal order in para no. 9 of this Tribunal order for Assessment Year 2013-14. He submitted that the issue should be decided in favour of the assessee by following the Tribunal order in Assessment Year 2013-14.
4. As against this the Id. DR of revenue supported the order of CIT(A). He also submitted that as per the Tribunal order for Assessment Year 2012-13 reproduced by the Tribunal in later order for Assessment Year 2013-14, the issue was decided by the Tribunal against the assessee and appeal of the assessee was dismissed and therefore, the issue in dispute is covered against the assessee by the Tribunal order in assessee's own case for Assessment Year 2012-13.

5. We have considered the rival submissions. First of all, we reproduce the relevant para from the impugned order of CIT(A) and the same is para no. 5 which reads as under.

*“5. I have considered the above grounds of appeal, statement of facts and written submissions filed by the appellant and also perused the assessment order. The Assessing Officer has observed that the firm was converted into private Ltd. Company on 30.01.2004, As a result of the succession, the assessee revalued all its intangible assets and arrived at value of Rs. 65,26,40,150/- and the same assets and Liabilities have been increased notionally by the assessee after the conversion into a company. Intangibles were simply valued in the hands of company at the time of succession, as per assessee’s own estimation, but not for any Actual consideration. further, it was found that the assessee neither purchase or Acquire these intangibles from any third party, nor was there any actual cost incurred by the appellant and therefore, the appellant is not entitled to claim depreciation on intangible assets which was not existing before its conversion into private limited company on 30.01.2004. The Assessing Officer has disallowed the depreciation claimed on revalued intangible asset of the pre-conversion period while allowing the depreciation relating to the intangible assets of post conversion period. As there is no infirmity in the impugned order passed by the Assessing Officer no interference is needed. The grounds taken are thereby dismissed. Whereas, the AR of the appellant has pleaded that the losses are allowed to be carried forward as per the provisions of law. The Assessing Officer is directed accordingly.”*

6. Now we reproduce Para nos. 9 and 10 from the Tribunal order in assessee’s own case for Assessment Year 2013-14 because in Para 9 of this Tribunal order, there is reproduction of the relevant para from the Tribunal order in assessee’s own case for Assessment Year 2012-13. These paras are as under.

*“9. Having carefully examined the orders of lower authorities in the light of rival submissions, we find that this issue has been raised before the Tribunal in earlier AY 2012-13. The Tribunal following its order for earlier years had decided the issue in favour of assessee, after holding that depreciation is allowable on intangible assets. The relevant observations of the order of Tribunal are extracted hereunder for the sake of reference:-*

*“8. With respect to ground No.2, it is pointed out by the learned DR that this issue is covered against the assessee in the assessee’s own case for earlier assessment years from 2005-06 to 2008-09 in ITA Nos.429 to 430/Bang/2013 dated 10/1/2014, wherein at paragraph 16 to 25 it has been held as under:*

*““16. The first question for adjudication before us is whether the earlier partnership firm was required under*

*law to revalue the assets before its conversion into a company. As rightly pointed out by the learned counsel for the assessee, when a partnership firm is dissolved, it needs to revalue its assets as the partners are entitled to receive the value of the assets as on the date of dissolution in the ratio of their contribution of capital and, therefore, to arrive at the value of the assets as on the date of dissolution the revaluation of assets and liabilities is required to be done. Similar is the case where any of the partners retires or any new partner is inducted. But what happens when there is no induction of a new partner or retirement of any partner or dissolution of partnership firm? The requirement of revaluation of the assets and liabilities arises only in the circumstances mentioned above. In the case on hand, the assessee had revalued its assets on the ground that it was getting converted into a private limited company. The learned counsel for the assessee had placed reliance upon the decision of the Hon'ble Supreme Court in the case of Kartikeya A.V Sarabhai (cited Supra) in support of his contention that the shareholders who buy shares will not have any interest in the property of the company which is entirely distinct from the shareholder and the true position of the shareholder in a company on buying the shares is that he becomes entitled to a percentage in the profits of the company if and when company declares, subject to memorandum of association that the profits or any portion thereof should be distributed as dividend amongst the shareholders and he has further right to percentage in the assets of the company which would be left-over after winding up. Thus, he tried to bring out distinction between the rights of the partners in a partnership firm which is joint and several in contrast to the rights and liabilities of the shareholders in a company. He has also relied upon the decision of the Hon'ble Supreme Court in the case of Vodafone International holdings reported in 341 ITR 1 (SC) to bring out distinction between the holding company and wholly owned subsidiary in which the Hon'ble Supreme Court has held that the legal relationship between the holding company and wholly owned subsidiary is that they are two legally distinct persons and holding company does not own the assets of a subsidiary and in law the management of the business of the subsidiary also lies with its directors. Thus, according to him, the partnership firm and the assessee company are two different and distinct legal entities and it cannot be said that the assessee company has not acquired any assets from the erstwhile partnership firm. To appreciate these contentions of the assessee, we have to examine the procedure and effect of conversion of a partnership firm into a company. The Hon'ble Bombay High Court in the case of CIT Vs. Texspin*

*Engg and Manufacturing Works reported in (2003) 263 ITR 345 (Bom) has considered the effect of conversion of a partnership firm into a limited company by virtue of sec. 575 of the Companies Act and has held that under part IX of the Companies Act, when a partnership firm is converted to a limited company, the properties of the erstwhile firm vests in the limited company. It was observed that there is a difference in vesting of the property and distribution of the property. It was held that on vesting in the limited company under part IX of the Companies Act, the properties vest in the company as they exist while distribution of property on dissolution pre-supposes division, realization, encashment of assets and appropriation of the realized amount as per the priority and that this difference is very important. Having observed thus, the Hon'ble High Court held that there is no transfer of property and no capital gains arise from such a transaction. The Hon'ble High Court was dealing with the case of the partnership firm while in the case on hand, we are dealing with the case of the company. In the case of Texspin, the questions considered were –*

*(1) whether capital gains arose in the hands of the partnership firm on conversion of the firm into the company, and*

*(2) whether the firm was entitled to depreciation on the assets owned by it till the date of transfer.*

17. *The case on hand is a reverse case. The company is claiming the depreciation on the value of the assets in its books of accounts. The claim of depreciation is on trademarks which are intangible assets and depreciation thereon is allowable u/s 32(1)(ii) of the IT Act. The two conditions mentioned in sec. 32 are that the assets should be owned by the assessee and should have been used for the purposes of the business or profession of the assessee. The sub-clauses thereto enumerate the deductions allowable u/s 32. Sub-clause (ii) thereof provides for a deduction at a prescribed percentage of the written down value of the block of assets. 5th proviso thereto provides that in respect of circumstances such as succession, amalgamation or demerger, the average deduction on account of depreciation on tangible or intangible assets shall not exceed, in any previous year, the deduction calculated at the prescribed rates as if the succession, amalgamation or demerger has not taken place and such deduction shall be apportioned between the predecessor and the successor, or the amalgamating company and amalgamated company or the demerged company and the resulting company as the case may be, in the ratio of days for which the assets were used by them.*

18. In all the three circumstances above, the erstwhile company ceases to exist and a new company comes into existence. In the case on hand also, on account of conversion, the erstwhile partnership firm ceased to exist while the company has come into existence. Therefore, the assets come to vest in the hands of the company and there is no cost of assets to the company on such vesting. When the transaction itself has been treated to be not a transfer, but is akin to succession, in our opinion the 5th proviso to sub-clause (ii) of sec. 36(1) applies and the depreciation has to be calculated as if there is no transfer.

19. Further, as there is no transfer, there is no cost to the assessee. Depreciation is allowable on the WDV of the asset and WDV has been defined u/s 43(6) to mean in the case of assets acquired in the previous year, the actual cost to the assessee. As actual cost to the assessee was 'Nil', the WD value of the assets in the hands of the predecessor firm shall be considered for the allowance of depreciation.

20. Therefore, we do not see any reason to interfere with the orders of the authorities below.

21. The learned counsel for the assessee had placed reliance upon the decision of ITAT at Ahmedabad in the case of Prakash Chemical Agencies Pvt. Ltd. reported in (2012) 136 ITD 222 (Ahd) but we find that it is the case of a takeover of the business of a partnership firm by the assessee company therein whereas in the case before us, it is the case of conversion of partnership firm into a company. Therefore, the said decision is not applicable to the case on hand.

22. The other objection of the learned counsel for the assessee is that the conversion has taken place in the previous year relevant to assessment year 2004-05 and hence it can be examined only in A.Y 2004-05 and not in subsequent year. We are unable to argue with this contention of the assessee. Sub-sec(6) of sec. 43 defines 'Written Down Value' and it provides for both the acquisition of assets during the relevant previous year and acquisition of assets before the relevant previous year and both the clauses mention 'actual cost to the assessee'. In the second circumstance i.e. where the assets are acquired before the previous year as in the case of the assessee before us, the WDV shall be the actual cost to the assessee less all depreciation actually allowed to him under the Income-tax Act. Therefore, it is clear that the claim of depreciation can be examined even in the assessments years subsequent to the assessment year in which the

*succession has taken place. This argument is accordingly rejected.*

*23. The other objection of the assessee is that though only the AO is entitled to invoke the provisions of Explanation 3 to sec. 43(1) of the IT Act, the CIT(A) has invoked the same which is impermissible. On perusal of the order of the CIT(A), we find that he has not invoked the provisions of Explanation 3 to sec. 43(1) of the IT Act but has only justified the action of the AO in questioning the claim of depreciation by citing the provision of sec. 43(1) and Explanation 3 thereof. Therefore, we see no strength in this argument of the assessee.*

*24. Further, u/s 251 of the IT Act, the powers of the CIT(A) are co-terminus with that of the AO meaning that he can do what the AO could do and can also direct the latter to do what the latter failed to do as laid down by the Hon'ble Supreme Court in the case of CIT Vs. Kanpur Coal Syndicate (1964) 53 ITR 225 (SC). Therefore, we do not see any infirmity in the order of the CIT(A) which needs interference. Therefore, this argument of the assessee is also rejected.*

*In the result, the appeals filed by the assessee for all the 25. assessment years are dismissed.”*

*9. Respectfully following the decision of coordinate bench of the tribunal in the assessee's own case, we deem it appropriate to dismiss this ground of the assessee as well.”*

*10. Since the Tribunal has taken a particular view in the earlier assessment year, we find no reason to take a contrary view in this appeal. Accordingly, following the order of Tribunal for the earlier year, we direct the AO to allow depreciation for intangible assets.”*

7. When we go through the relevant paras reproduced from the Tribunal order in assessee's own case for Assessment Year 2012-13, we find that in that year, the issue was decided by the Tribunal against the assessee. We find that in para 9 of this Tribunal order for Assessment Year 2013-14, an apparent mistake has been committed by saying that the Tribunal in its order for earlier years has decided the issue in favour of the assessee because we find that as per the relevant paras reproduced from the Tribunal order for Assessment Year 2012-13, it has been stated that the issue is covered against the assessee as per the Tribunal order in assessee's own case for Assessment Years 2005-06 & 2008-09 in ITA Nos. 429 to

430/Bang/2013 dated 10.01.2014 and para nos. 16 to 25 of that Tribunal order for earlier years were also reproduced and as per the same, the appeals of the assessee for Assessment Years 2005-06 and 2008-09 are dismissed by the Tribunal and respectfully following that Tribunal order, the appeal of the assessee for Assessment Year 2012-13 was also dismissed. Although in Assessment Year 2013-14, the Tribunal has stated in para no. 10 of that Tribunal order which has been reproduced above that the Tribunal finds no reason to take a contrary view in this appeal and therefore, following the Tribunal order for earlier years, the AO was directed to allow depreciation on intangible assets. When the issue was decided by the Tribunal against the assessee for Assessment Years 2005-06 and 2008-09 and also for Assessment Year 2012-13, this Tribunal order for Assessment Year 2013-14 in which, it is stated that the earlier tribunal orders are being followed, it cannot be considered as binding precedence and hence, by respectfully following the earlier Tribunal orders for Assessment Years 2005-06, 2008-09 and 2012-13, the issue in dispute is decided against the assessee.

8. In the result, the appeal filed by the assessee is dismissed.

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

Sd/-  
(LALIET KUMAR)  
Judicial Member

Sd/-  
(ARUN KUMAR GARODIA)  
Accountant Member

Bangalore,  
Dated, the 29<sup>th</sup> November, 2018.  
/MS/

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

By order

Assistant Registrar,  
Income Tax Appellate Tribunal,  
Bangalore.