आयकर अपीलीय अधिकरण “बी” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, MUMBAI

माननीय श्री महावीर सिंह, न्यायिक सदस्य **एवं**
माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।

BEFORE HON’BLE SHRI MAHAVIR SINGH, JM AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकरअपील सं./ I.T.A. No.2845/Mum/2002
(**निर्धारण वर्ष /** Assessment Year: 1996-97)

DSP Merrill Lynch Limited Ground Floor, A wing One BKC, G Block Bandra Kurla Complex Bandra (East), Mumbai-400 05	बनाम/ Vs.	**JCIT-Special Range-22** Mumbai
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AAACD-0535-G		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Appellant by	:	Shri Nitesh Joshi- Ld. AR
Respondent by	:	Shri Ajay Kumar- Ld. DR

सुनवाई की तारीख/ **Date of Hearing**	:	01/08/2019
घोषणा की तारीख / **Date of Pronouncement**	:	22/10/2019

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year [in short referred to as ‘AY’] 1996-97 contest the order of Ld. Commissioner of Income-Tax (Appeals)-IV, Mumbai, [in short referred to as ‘CIT(A)’], *Appeal No. CIT(A)-IV/Cir.4/21/1999-2000* dated 28/02/2002 on following grounds of appeal: -

1. The learned Commissioner of Income-tax (Appeals) erred in law in upholding the action of the learned Joint Commissioner of Income-tax in disallowing the claim of the appellant for deduction of a sum of Rs.8,00,00,000/- paid to M/s. D.S. Purbhoodas & Co. towards non-competition fees by treating it as a capital expenditure.
2. a) The learned Commissioner of Income-tax (Appeals) erred in law in upholding the action of the learned Joint Commissioner of Income-tax in restricting the claim of the appellant for deduction under Section 80-O of the Act to Rs.1,57,538/- as against a sum of Rs.2,17,15,296/- as claimed by the appellant.

   b) The learned Commissioner of Income-tax (Appeals) erred in law in upholding the action of the learned Joint Commissioner of Income-tax in restricting the eligible amount for the purpose of computing deduction under Section 80-O of the Act to Rs.56,92,198/- as against the eligible amount of Rs.4,34,30,591/- as worked out by the appellant.

   c) The learned Commissioner of Income-tax (Appeals) erred in law in upholding the action of the learned Joint Commissioner of Income-tax in not allowing the claim for deduction under Section 80-O of the Act on the convertible foreign exchange brought into India by the appellant. The appellant submits that the learned Commissioner of Income-tax (Appeals) ought to have directed the learned Joint Commissioner of Income-tax not to reduce the expenses from the convertible foreign exchange brought into India by the appellant.

   d) The learned Commissioner of Income-tax (Appeals) erred in law in upholding the action of the learned Joint Commissioner of Income-tax in deducting the indirect expenses while calculating the deduction under Section 80-O of the Act.

   e)Without prejudice to what is stated above, the appellant submits that the learned Commissioner of Income-tax (Appeals) erred in law in upholding the action of the learned Joint Commissioner of Income-tax in apportioning indirect expenses to the extent of Rs.53,77,222/- in respect of the eligible amount of Rs.56,92,198/- as worked out by the learned Joint Commissioner of Income-tax, ignoring the various details filed / submissions made before the learned Commissioner of Income-tax (Appeals).

   (f) Without prejudice to what is stated above, the appellant submits that the learned Commissioner of Income-tax (Appeals) erred in law in upholding the action of the learned Joint Commissioner of Income-tax in working out deduction under Section 80-O of the Act at Rs.7,83,996/- in accordance with the order of Commissioner of Income-tax (Appeals) for assessment years 1992-93 and 1993-94.

   (g)The appellant submits that the learned Commissioner of Income-tax (Appeals) erred in holding that the appellant has failed to substantiate its claim that it has furnished commercial information to the client and that the information furnished is general and vague overlooking the fact that the appellant had submitted voluminous data in this regard during the course of the hearings.

   (h)The appellant submits that in concluding that the appellant was not entitled to a deduction under section 80-O as claimed, both the Assessing Officer as well as the Commissioner of Income-tax (Appeals) have made certain statements which are factually incorrect and / or are not germane to the determination of the issue raised in the present appeal.

3. The learned Commissioner of Income-tax (Appeals) erred in law in considering 50% of business meeting expenditure as entertainment expenditure as against 25% considered by the appellant.
4. The learned Commissioner of Income-tax (Appeals) erred in law in not giving any direction in respect of the action of the learned Joint Commissioner of Income-tax in disallowing a sum of Rs.1,64,794/- under Rule 6D in respect of travelling expenses as against disallowance of a sum of Rs.1,12,633 as per the return of income filed by the appellant.
5. The appellant submits that the learned Joint Commissioner of Income-tax be directed:
   i)to allow the claim of the appellant for deduction of a sum of Rs.8,00,00,000/- in respect of non-competition fees;
   ii) to allow the deduction under Section 80-O of the Act in respect of the convertible foreign exchange brought into India by the appellant;
   iii)to restrict the disallowance of entertainment expenses under Section 37(2) of the Act to Rs.3,84,437/- as considered in the return of income filed by the appellant;
   vi) to restrict the disallowance of travelling expenses to a sum of Rs.1,12,633/- as per the return of income filed by the appellant;
   and to modify the assessment in accordance with the provisions of law.
6. Each of the above grounds of appeal are independent and without prejudice to each other."

As evident from grounds of appeal, the assessee is primarily aggrieved on 4 counts viz- (i) Disallowance of non-compete fees for Rs.8 Crores (ii) Quantum of Deduction u/s 80-O; (iii) Disallowance of entertainment expenditure; (iv) Disallowance of travelling expenditure u/r 6D.

2.1 Facts on record would reveal that the assessee being resident corporate assessee was assessed for year under consideration u/s 143(3) on 26/03/1999 wherein the income of the assessee was determined at Rs.741.57 Lacs after certain additions / disallowances as against returned income of Rs.475.76 Lacs filed by the assessee on 29/11/1996. The assessee, formerly known as DSP Financial Consultants was incorporated in the year 1975 and was engaged in the business of Merchant Banking, Broking in equity and debt market, ICDs,

Distribution of Securities etc. The assessee is stated to have acquired the membership of NSE during the year 1994.

2.2 During assessment proceedings, it transpired that the assessee entered into an agreement *with* another entity viz. *D.S. Prabhodas & Co [DSP]* for payment of Rs.8 Crores as non-compete fees. It was submitted that DSP, a member of the stock exchange was carrying on, in addition to the other business, the business of (a) broker in whole sale debt market and (b) distribution of units of domestic mutual funds in the primary market (hereinafter referred to as the "Competing Business"). Accordingly, after obtaining the membership of NSE and wholesale debt market, the assessee was to undertake the Competing Business as that of DSP which would be in direct competition of DSP. Therefore, in order to ensure the avoidance of commercial inconveniences in the future and to enable the business to continue its same course and only to remove a difficulty that would arise in the smooth carrying on of its business, to lead in synergy and in turn lead to higher profitability, the assessee entered into a Non-Compete Agreement with DSP on 05/04/1995 pursuant to which a sum of Rs 8 crores was paid by the assessee to DSP. Accordingly, during assessment proceedings, the assessee contended that this amount should be allowed as deduction while computing the income. The assessee, in its books of accounts, wrote-off a portion of the same i.e. Rs.1.60 Crores in the Profit & Loss Account and carried forward the balance amount of Rs.6.40 Crores for write-off in subsequent years. This amount of Rs.1.60 Crores written-off has been added back while computing the business income and the assessee, by way of note to the computation of income, pleaded for deduction of full

amount of Rs.8 Crores during the year under consideration. However, finding that no such claim was made in the original return of income which was processed u/s 143(1)(a) on 24/11/1997 and no revised return was filed, the claim could not be entertained at the stage of assessment proceedings. It was also noted that the payee DSP & CO. reflected the aforesaid receipts as capital receipts which was denied by Ld. AO and the assessee was in further appeal. Finally, the stated expenditure to ward-off competition in business was held to be a capital expenditure and deduction thereof was denied to the assessee.

2.3 The second issue arises out of deduction u/s 80-O which provides for deduction to the extent of 50% in respect of royalties, commission or similar payment received by eligible entities for the use outside India of any patent, invention, model, design, secret formula or process, or similar property right, or information concerning industrial, commercial or scientific knowledge, experience or skill provided the income was received in convertible foreign exchange. The assessee claimed such deduction for Rs.192.69 Lacs on account of fees received from certain clients. The assessee attributed cost of Rs.24.78 Lacs towards the same. However, during assessment proceedings, the assessee claimed higher amount of Rs.204.75 Lacs as deductible u/s 80-O. The learned AO, after examining the nature of services rendered by the assessee in terms of CBDT Circular No. 187 dated 23/12/1975 and after perusal of respective agreements entered into by the assessee with service recipients, came to a conclusion that the eligible amount for consideration of deduction would be Rs.56.92 Lacs only, which after deduction of allocable expenditure of Rs.53.77 Lacs, would come down

to Rs.3.15 Lacs and accordingly, 50% of the same i.e. Rs.1.57 Lacs would be allowable to the assessee as deduction u/s 80-O. It was noted that none of the agreements entered into by the assessee had received the approvals either from Chief Commissioner of Income Tax or from the Board and therefore, the decision in **CIT V/s Bhaichand Amouluk Consultancy Pvt. Ltd. 208 ITR 1** was found to be not applicable to the facts of the case.

2.4 Another addition arose out of *adhoc* disallowance of entertainment expenditure. The assessee considered 25% of business meeting expenses as entertainment expenditure. However, Ld. AO estimated the same @75%. Further, the assessee worked out travelling expenditure disallowance u/r 6D by not including expenditure other than lodging and Boarding. The Ld. AO, reworked the same and computed disallowance of Rs.1.64 Lacs on this count.

Aggrieved by aforesaid additions / disallowances / adjustment, the assessee agitated the same before first appellate authority vide impugned order dated 28/02/2002.

3.1 The learned CIT(A) confirmed the stand of Ld. AO with respect to non-compete fees by observing as under: -

> 3.2. I have considered the submissions of the assessee and also the Order of the Assessing Officer. Regarding the observation of the Assessing Officer, though the claim of the assessee cannot be entertained since it has been made in the form of a note along with the return of income cannot be said to be correct. The claim made by way of a note in the computation of a total income which was filed along with the return of income is a valid and legal claim. Hence, Assessing Officer's contention to this extent is not accepted. Coming to the merits of the case, the assessee has agreed to pay Rs.8,00,00,000/- to DSP & Co. for preventing DSP & Co. from doing the same business i.e. distribution of mutual fund units in primary market and broking in public debts. Though the assessee claimed it to be revenue expenditure, in view of the fact that this expenditure has been incurred for increasing its own profits, the same cannot be accepted. As per the agreement dated 5th April, 1995,

as per the clause 1 of the said agreement in consideration of a sum of Rs.8,00,00,000/- paid by DSP Merrill Lynch to DSP & Co, the DSP & Co. covenanted with DSP Merrill Lynch from the date of the agreement that DSP & Co. will not carry on the competitive business. The competitive business was also been defined in clause 4 of the agreement which is distribution of domestic mutual funds and acting as a broker in wholesale debt market. Further, clause 2 clarifies and amplifies the meaning of "will not carry on the competitive business". It says that DSP *& Co.* will not directly or indirectly help or a as a manager as an agent or any person or company engaged, concerned or interested in the competitive business and DSP & Co. will not assist, shall not part with any information or expertise they are in position of. Thus, it is very clear that these payments have been made to ward off competition in the business to a rival would constitute capital expenditure. If the object of making that payment is to derive by eliminating the competition over some length of time where every benefit is of an enduring nature but is to exhaust in a year or a short period the expenditure is of revenue in nature. It is true if the benefit is only for short period of time, the expenditure can be held to be revenue but as per the agreement, it is abundantly clear that the benefit which has agreed to the assessee is ever lasting. There is no restriction of any kind has been imposed on the business activities to be carried out by the assessee nor there has been any time stipulation, it is as long as assessee continues to do business. Hence the judgment of Calcutta High Court in the case of Hindustan Pilkington Glass Works [139 ITR 581] squarely applies in the instant case which has considered various decisions quoted by the assessee. The facts of the case briefly as under:

> The assessee entered into a tripartite agreement with two other concerns which produce the same type of commodity as was produced by the assessee. The object of agreement was elimination of competition in order to prevent the annihilation of the business. Under the terms of agreement, one of the concerns agreed not to produce a particular commodity and in consideration thereof the other two concerns agreed to pay to it a stipulated sum every year. The agreement was for a period of five years but could be brought to an end only if there is a mutual consent in all the parties. While deciding the question whether the sum paid by the assessee under the agreement was liable as business expenditure, the Hon'ble High court has held "we are of the opinion that the question must be considered to be capital expenditure in the background of the acts of this case. The profit making apparatus was improvement. It was improved to last beyond the year in question and the business was to be carried on unfettered by rival competitors which would endure and the benefit would last beyond five years. The view we are taking is in consonance with the view of Punjab and Haryana High Court in the case of Biharilal Beni Prasad V CIT 35 ITR 576 though the facts that case were different. It is also in consonance with a view of Allahabad High Court in the case of Neel Kamal Talkies V CIT 87 ITR 691 is also with the decision of Madras High Court in the case of Blaze and Central Private Limited V CIT 120 ITR 33 though in that case also facts were different.'

Thus the courts have held that any money paid to ward off the competition is capital in nature and more so if the benefit is acquired without any restriction in the form of time limits. Hence the claim of the assessee that amount paid to DSP & Co. should

be treated as revenue expenditure is negative and the addition in this behalf is upheld.

3.2 Regarding deduction u/s 80-O, it was noted that eligible amounts were restricted by Ld. AO in case of income arising out of contracts with three entities viz. Dresdner Bank, Merryl Lynch and John Govett. The information supplied by the assessee with respect to contract with John Govett was found to be very general and vague in nature and it was noted that the assessee failed to substantiate his claim that it furnished any commercial information to that client and therefore, the disallowance, with respect to this entity was justified. Similar was the factual matrix in case of contract with Dresdner Bank wherein it was found that the assessee supplied economic and statutory information as part of industrial and commercial information and therefore, the agreement was composite in nature and hence, entire receipts could not be considered as eligible for deduction. Therefore, the stand of Ld. AO in recomputing the receipts from this entity was also upheld. Regarding contract with Merryl Lynch, although the assessee claimed to have involved extensively in the provision of information in regard to the GDR issue stated to be carried out by Merryl Lynch, however, it was observed that the assessee furnished information only to the extent that one of the employee attended a road show in respect of GDR issue of SBI and there was no other information provided by the assessee to substantiate the claim. The assessee could not furnish details of information provided to the service recipient in exchange of fees. Finally, it was concluded that the assessee was not furnishing any commercial and industrial information but merely acting as agent, soliciting and coordinating for

Merryl Lynch and therefore, the Ld. AO was justified in restricting the deduction. In other words, the action of Ld. AO in restricting the deduction to Rs.1.57 Lacs was upheld.

3.3 The ahdoc estimation of 75% as made by Ld. AO against entertainment expenditure was reduced to 50% whereas other adhoc disallowances on account of conference expenditure and staff welfare expenditure was deleted. However, no directions were issued against disallowance of local travelling expenses u/r 6D.

3.4 Aggrieved by the adjudication of first appellate authority, the assessee is under appeal before us.

4. We have considered the rival submissions, oral as well as written, advanced by respective representatives. We have also perused relevant material on record and deliberated on the judicial pronouncements as cited before us.

5. So far as the deduction u/s 80-O is concerned, the Ld. AR pleaded that the issue may be restored back to the file of lower authorities to compute the deduction in terms of order of this Tribunal in assessee's own case for AYs 1990-01, 1992-93 & 1993-94 common order dated 28/02/2007, a copy of which has been placed on record. After going through the cited order of Tribunal, we find that the factual matrix in those years was different since the relevant agreements were approved by Chief Commissioner of Income Tax Act as opposed to the facts of present year in which Ld. AO has noted that agreements were not approved by Chief Commissioner of Income Tax or by the Board. Secondly, as noted by first appellate authority in the impugned order, the assessee could not provide the requisite details to establish the exact

nature of services being rendered by the assessee and failed to demonstrate that the said receipts squarely fall within the ambit of Section 80-O. Nevertheless, keeping in view the submissions made, we restore this matter back to the file of Ld. first appellate authority to adjudicate the same de-novo after reappreciating the factual matrix including the stand taken by the department in earlier years. The assessee, in turn, is directed to substantiate his claim with requisite details and evidences that the receipts qualified for deduction u/s 80-O. Thereafter, the question of allocation of expenditure against the same may be adjudicated as per factual matrix including the basis of allocation & mechanism devised / adopted in earlier years. Accordingly, this ground of appeal stands allowed for statistical purposes.

6. So far as the disallowance of entertainment expenditure is concerned, we find no infirmity in the order of first appellate authority in restricting the same to 50% and therefore, confirm the same. Similarly, no serious arguments have been advanced with respect to disallowance of local travelling expenses u/r 6D and therefore, we confirm the order of Ld. AO, in this regard. Ground Nos. 3 & 4 stand dismissed.

7.1 Coming to the issue of deduction non-compete fees, it is quite evident from records that the assessee has paid a sum of Rs.8 Crores to DSP primarily as non-compete fees under an agreement. In its books of accounts, the assessee has written-off the same in 5 equal installments and accordingly, the assessee had debited a sum of Rs.1.60 Crores in the Profit & Loss Account during the year under consideration. The said write-off was *suo-moto* disallowed and added back by the assessee while computing the income for year under consideration. However, the

assessee, by way of note to computation of income, asserted that the said expenditure, being revenue in nature, was allowable in full during the year itself. The Ld. first appellate authority, after examining assessee's claim, observed that as per the terms of the agreement, it was quite clear that that the benefit which accrue to the assessee was ever lasting since there was no time stipulation. In the above factual matrix, the decision of Hon'ble Calcutta High Court rendered in **Hindustan Pilkington Glass Works [139 ITR 581**] was found to be squarely applicable to the facts of the case wherein Hon'ble Court had observed that the profit-making apparatus had improved. The improvement was to last beyond the year in question and the business was to be carried on unfettered by rival competitors which would endure and the benefit would last beyond five years. Similar view was stated to be expressed by Hon'ble Punjab and Haryana High Court in the case of **Biharilal Beni Prasad V CIT [35 ITR 576]**, Hon'ble Allahabad High Court in the case of **Neel Kamal Talkies V CIT [87 ITR 691]** and Hon'ble Madras High Court in the case of **Blaze and Central Private Limited V/s CIT [120 ITR 33].** On the basis of these facts, it was observed that any money paid to ward-off the competition was capital in nature and more so, if the benefit was acquired without any restriction in the form of time limits, the expenditure would be capital expenditure.

6.2 Before us, the Ld. AR has asserted that the reason for entering into non-compete agreement was primarily to concentrate on the competing Business in one single entity and eliminate the conflict of interest with a view to bring efficiency in operation and to avoid any commercial inconveniences in smooth carrying on of assessee's business. The Ld.

AR has also asserted that since the assessee was already a member of NSE, it would receive an immediate benefit by avoiding possible competition from the DSP and therefore, it was not a benefit that would endure for a longer period of time. The exit of DSP from the Competing business would have an immediate impact on the business of the assessee and in order to protect the business interest, the assessee had paid the said amount to ward-off competition. The benefit was therefore instantaneous. Reliance has been placed on the decision of Hon'ble Bombay High Court in the case of **CIT V/s Six Sigma Gases India Pvt Ltd [ITA No 1259 of 2016]** to submit that this case was concerned with a situation where the payment was made by the assessee with the promoter to not to engage in the same business for the period of 5 years. The Revenue contended that since the payment was made to the promoter to avoid competition for a period of 5 years, the assessee had acquired an enduring benefit. However, it was argued by the assessee that under the non-compete agreement, the assessee had received an immediate benefit by avoiding possible competition from the original promoters of the Company. The Hon'ble Court held that the assessee had entered into non-compete agreement with the promoter to avoid immediate competition and the business of the assessee continued. No new business was acquired and hence the benefit obtained was instantaneous. Reliance has also been placed on the decision of Hon'ble Bombay High Court in **CIT V/s Everest Advertising Pvt Ltd [ITA No 6539 of 2010]** wherein the Court held that the Tribunal has recorded a finding that exit of Mr. Kapadia would have immediate impact on the business of the assessee-company and in order to protect the

business interest, the assessee had paid the said amount to ward off the competition and hence the expenditure was of revenue in nature. Similarly, Hon'ble Madras High court in **Asianet Communication Ltd V/s CIT [257 Taxman 473]** also treated the expenditure as revenue in nature where the non-compete agreement was for a period of 5 years holding that the same does not result into any enduring benefit to the assessee. The Court held that on account of the payment of non-compete fee, the assessee had not acquired any new business, profit making apparatus had remained the same, the assets used to run the business remained the same and there was no new business or no new source of income, which accrue to the assessee on account of the payment of non-compete fee. The Ld.AR further submitted that the decision in the case of **Hindustan Pilkington Glass Works,** which was relied on by the CIT(A), was also considered and it was observed that the said decision was prior to the decision of the Division Bench in the case of G.D. Naidu, which read as follows: —

"26...... *It may be also mentioned that in the present case, it is not a new business of the assessee, though the new partners have come in for the first time. The old business of the outgoing partners was being carried on by the new partners and we have already pointed out that even the Income-tax Officer has registered the firm under the Income-tax Act for the subsequent years also,*

Therefore, since the assessee had already acquired the membership of NSE in 1994 to undertake the Competing business, the assessee had not acquired any new business. The profit-making apparatus had remained the same, the assets used to run the business remained the same and there was no new business or no new source of income,

which accrue to the assessee on account of the payment of non-compete fee. The payment of the non-compete fee would only enable the existing business of the appellant to run smoothly and to remove difficulties which may arise. The payment was expected to result in synergy and in turn lead to profitability for the business. The Ld. AR further submitted that by entering into the non-compete agreement with DSP, the assessee avoided immediate competition. It was submitted that the competing business which was to be undertaken by the assessee i.e. broking of wholesale debt market and distribution of mutual funds, was a business already undertaken by various players in the market and the segment was fiercely competitive. By entering into the non-compete with one of the players (DSP), it has sought to avoid an immediate competition. The clients of DSP at that point in time may approach other service providers in the industry including the assessee. The emergence or non-emergence of DSP again in that business would be of no consequence. In future whether the assessee is able to retain its clientele would depend on the quality of its services, pricing strategy and various other factors. Accordingly, it was not the case of the Appellant that by DSP not entering into the Competing business for a certain period of time would result into an enduring benefit to the Appellant. Therefore, the fact that no period has been specified for under non-compete business by DSP would have no relevance in the instant case as the assessee was already in the similar line of business prior to entering into the non-compete agreement with DSP, the payment was made to avoid immediate competition and not to acquire any new business.

6.3 Per Contra, Ld. DR has asserted that the real determination of the nature of claim would depend upon facts of each transactions including the period of non-compete agreements and as to whether the payment of non-compete fees was likely to result in enduring benefits to the assessee or not? Our attention has been drawn to operative Clauses 1 & 2 of the agreement dated 05/04/1995 which has been entered into by the assessee with M/s DSP, which would read as under: -

1. In consideration of a sum of Rs.8 Crores paid by the covenantee to the covenantor (receipt whereof the covenantor doth hereby admit and acknowledge) the covenantor hereby covenants with the covenantee that from the date of this agreement, the covenantor will not carry on the competitive businesses.
2. The aforesaid covenant is binding upon the covenantor, its partners and such covenant not to carry on the competitive businesses shall also mean that the covenantor and / or its partners shall not without the consent in writing of the covenantee either solely or jointly enter into partnership with any other third party and / or enter into any arrangement or association with any third party with the object to carry on the competitive business and shall not directly and / or indirectly help or act as manager or agent for any other person, persons or company engaged, concerned or interested in the competitive business or otherwise engage in or be interested in the competitive business. It is further agreed that the covenantor or its partners shall not assist any third party carrying on such business and shall not part with any information and / or expertise that they possess in respect of such business to any other party.

The Ld. DR pointed out that a plain reading of the agreement would make it clear that there was no limitation period or time stipulation as to applicability of terms of the agreement and it was for perpetuity. The said agreement resulted into cessation of a particular segment of the business of DSP i.e. Broking in wholesale debt market and distribution of units of Mutual fund and the restrictive covenants would result into providing enduring benefits to the assessee and therefore the decision of Hon’ble Calcutta High Court rendered in **Hindustan Pilkington Glass Works [139 ITR 581**], as relied upon by Ld. first appellate authority,

would squarely apply to the factual matrix as supported by other decisions cited in the impugned order. The case laws being relied upon by Ld. AR was sought to be distinguished on facts. It was asserted that in the case of **CIT V/s Six Sigma Gases India Pvt Ltd [ITA No 1259 of 2016],** the period of restriction was certain. Similarly, in the case law of **Everest Advertising Pvt. Ltd,** the payment was made to outgoing Chairman not to provide advertisement, advisory services and financial services etc. to assessee's clients. The case law of **Asianet Communication Ltd.** dealt with a situation wherein the assessee had not acquired any new business or new source of income and the profit-making apparatus remained the same as against the fact of the present case which provide for enduring benefits to the assessee in perpetuity. The agreement entered into by the assessee resulted into complete annihilation of competitive business in a particular segment i.e. broking in wholesale market and distribution of units of mutual funds and thus, providing enduring benefit to the assessee, which would constitute capital expenditure.

6.4 Upon careful consideration of the terms of agreement, undisputedly the agreement is for perpetuity and the covenantor i.e. M/s DSP is restrained forever from carrying out its business in the segment of broking in wholesale market and distribution of units of mutual funds and there is complete annihilation of competitive business in a particular segment. Upon consideration of Rectial-5 of the agreement, it also transpires that M/s Merrill Lynch & Co. Inc. USA agreed to acquire the shares representing 40% of assessee's capital at a substantial value, *inter-alia,* on the condition that the covenantors refrain from carrying on

the competitive businesses. The terms of the agreement would establish that the benefits of restrictive covenants were foreseen over a longer period of time rather than immediate benefits which would justify the investment at substantial value. This would also negate the arguments of Ld. AR that the assessee would receive immediate benefit by avoiding possible competition from DSP and the benefit would not endure for a longer period of time. If that be so, there would have been no necessity for the assessee to put restrictions on competitor in perpetuity rather the benefits were perceived to have accrued to the assessee over longer period of time. Therefore, we find the arguments of Ld. AR to be contradictory to the terms of the agreement. Moreover, nothing emanates as well as nothing has been brought on record by the assessee to fortify the submissions of immediate benefit and therefore, this argument could not be termed as more than mere submissions. Therefore, we do not find much force in the theory of immediate benefit as advanced by Ld. AR before us. Rather, we are of the considered opinion, that by entering into the said agreement, the assessee acquired valuable business right in perpetuity which was designed to bring enduring benefits to the assessee over indefinite period of time. The same was the perception while entering the said agreement. It is also noted that the assessee had recently acquired the membership of NSE and it was contemplating entering into a particular segment of business. This activity proposed to be carried out by the assessee was at nascent stage and the terms of the agreement led to complete annihilation of its competitor business segment forever. Therefore, we find substantial force in the arguments of Ld. DR, in this regard.

6.5 The Ld. AR has, in the course of submissions, has relied upon certain judicial pronouncements which has been distinguished by Ld. DR. As evident from the perusal of case law, the Hon'ble Bombay High Court refused to entertain the question raised by revenue in **CIT V/s Everest Advertising Pvt Ltd (ITA No. 6539 of 2010 04/12/2012)** which dealt with a situation wherein the payment was made by the assessee to outgoing Chairman restricting him for 3 years not to enter into any relationship of any industry including the provisions of advertisement services, advisory services financial services, employment services with any of the assessee's clients and sister concern of its clients, which is clearly not the case here. In the present case, the assessee's competitor i.e. DSP has been put under blanket restriction not to compete in a particular business segment forever which would indicate that the benefits were perceived to be received by the assessee in perpetuity.

6.6 Similarly, the decision of Hon'ble Madras High Court in **Asianet Communications Ltd. (96 Taxmann.com 399 26/06/2018)** has been rendered in a situation wherein restrictive covenants were in operation for a period of 5 years only and the payment was made to outgoing director of the company who agreed to sell 50% of shareholding to the other director and entered into non-compete agreement for 5 years against certain consideration. However, the factual matrix, as noted in preceding paragraphs, is quite different.

6.7 Another decision referred to by Ld. AR is the decision of Hon'ble Bombay High Court in **Pr.CIT V/s Six Sigma Gases Pvt Ltd [ITA No 1259 of 2016 dated 28/01/2019]** wherein the Hon'ble court refused to admit the question of law as raised by the revenue. We find that this

case deals with a situation wherein the assessee entered into non-compete agreement with the original promoter of the company against certain consideration for a period of 5 years and accordingly, Ld. AO allowed the expenditure over 5 years as deferred revenue expenditure i.e. the said expenditure was not treated as capital expenditure by Ld. AO. The Hon'ble Court, referring to the decision in Everest Advertising Pvt.Ltd. (supra) & Asianet Communications Ltd. (supra) refused to admit the revenue's appeal. However, clearly the facts are different here since the restrictive conditions have been imposed on a separate entity in perpetuity.

6.8 The factual matrix in the decision of Hon'ble Madras High Court in **Carborandum Universal Ltd V/s JCIT [26 taxmann.com 268 10/09/2012)** was also different since non-compete fees was paid to outgoing Chairman to put restrictions for 5 years.

6.9 Therefore, on the facts and circumstances, we found that non-compete fees paid by the assessee to ward-off the rival competition in perpetuity would partake the character of capital expenditure in the hands of the assessee and the deduction of the same has rightly been denied by the lower authorities. This ground stands dismissed.

7. Ground No. 5 list relief sought by the assessee whereas ground nos. 6 & 7 are general in nature and hence, do not require any specific adjudication.

8. Finally, the appeal stands partly allowed for statistical purposes in terms of our above order.

Order pronounced in the open court on 22nd October, 2019.

Sd/-	**Sd/-**
(Mahavir Singh)	**(Manoj Kumar Aggarwal)**
न्यायिक सदस्य / **Judicial Member**	लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 22/10/2019
Sr.PS, Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / **ITAT, Mumbai.**