

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "C", MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND  
SHRI G. MANJUNATHA, HON'BLE ACCOUNTANT MEMBER**

**ITA.NOs. 2433 & 3078/MUM/2018  
(A.Ys: 2013-14 & 2014-15)**

DCIT (IT) - Circle – 14(2)(1) Room No. 432, 4 <sup>th</sup> Floor Aayakar Bhavan, M.K. Road Mumbai – 400 020	v.	IMCD Group B.V. India Branch {currently known as IMCD India Pvt. Ltd.,} Flat No. 1402, C-38/39 G-Block, Crenscenzo Building B.K.C., Bandra (E), Mumbai - 51  <b>PAN: AABCI8417R</b>
<b>(Appellant)</b>		<b>(Respondent)</b>

**ITA.NOs. 2735 & 3403/MUM/2018  
(A.Ys: 2013-14 & 2014-15)**

IMCD Group B.V. India Branch {currently known as IMCD India Pvt. Ltd.,} 1101-1103, B-Wing, One BKC Bandra Kurla Complex, Bandra (E) Mumbai – 400 051  <b>PAN: AABCI8417R</b>	v.	DCIT (IT) - Circle – 2(2)(1) Mumbai
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>Assessee by</b>	<b>:</b>	<b>Shri R. Sandeep Bagmar</b>
<b>Department by</b>	<b>:</b>	<b>Kumari Padmapani Bora</b>
<b>Date of Hearing</b>	<b>:</b>	<b>20.11.2019</b>
<b>Date of Pronouncement</b>	<b>:</b>	<b>28.11.2019</b>

## ORDER

### PER C.N. PRASAD (JM)

1. These cross appeals are filed by the Revenue and assessee against different orders of the Ld. Commissioner of income-tax -56, Mumbai [hereinafter for short "Ld. CIT(A)] dated 17.01.2018 and 20.02.2018 for the A.Y. 2013-14 and A.Y. 2014-15 respectively.

2. Revenue in its appeals raised the following common grounds except for the figures for both the assessment years: -

*"1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in directing the AO to allow the depreciation of Rs.8,96,61,500/- on non-compete fees without appreciation the fact that non-compete fees is not an asset and is a right available against the contracting parties only and hence not an asset.*

*2. Whether the Ld. CIT(A) was right in not considering the decisions of M/s Srivatsan surveyors Pvt. Ltd vs ITO (ITAT Chennai) and Sharp Business System (India) vs CIT-III (New Delhi High Court) wherein it was held that non-compete fees was not an asset.*

*3. Whether the Ld. CIT(A) was right in relying on the decision of Mumbai ITAT in the case of M/s India Medtronic Pvt. Ltd. vs ACIT though the decision in this case was on the issue of depreciation on goodwill and not on non-compete fees.*

*4. The appellant prays that the order of the CIT(A) on the above ground be reversed and that of the Assessing Officer be restored."*

3. The assessee in its appeals contended that the amounts paid by the assessee over and above and the net realizable value of the trade debtors, trade creditors and the trade stock for acquisition of an on-going concern is nothing but goodwill and is eligible for depreciation.

Alternatively, it was also contended that the excess consideration paid is non-compete fee and eligible for deduction U/s. 37 of the Act as revenue expenditure.

4. At the outset, Ld. Counsel for the assessee submitted that the Tribunal for the immediately preceding assessment year A.Y. 2012-13 in ITA.No.1544/Mum/2016 dated 11.07.2018 in assessee's own case held that such payments are non-compete fee entitled to claim depreciation. It is further submitted that if depreciation is allowed on non-compete fee the contention raised by the assessee in its appeals that it is goodwill becomes only academic.

5. On the other hand, Ld. DR strongly placed reliance on the decision of the Hon'ble Delhi High Court in the case of the Sharp Business System v. CIT in ITA No. 492/2012 dated 05.11.2012 and the decision of the Chennai Bench of the Tribunal in the case of Srivatsan Surveyors Pvt. Ltd., v. ITO [32 SOT 268] and submitted that in this decision it has been held that depreciation on restrictive covenant is not allowable u/s. 32(1)(ii) of the Act.

6. We have heard the rival submissions and perused the orders of the authorities below and the decisions relied on. We find that the Tribunal in

assessee's own case decided the issue for the A.Y. 2012-13 in ITA.No. 1544/Mum/2016 dated 11.07.2012 holding that the payment made by the assessee for restrictive covenant is in the nature of non-compete fees and is entitled for depreciation. While coming to such conclusion the Tribunal considered the decision of the Hon'ble Delhi High Court in the case of the Sharp Business System v. CIT (supra) which the Ld.DR relied on. The Tribunal followed the decision of the Hon'ble Madras High Court in the case of the Pentasoft technologies Ltd. v. DCIT [264 CTR 187] and the decision of the Hon'ble Karnataka High Court in the case of CIT v. Ingersoll Rand International Ind Ltd. [48 taxman.com 349] while coming to the conclusion that the assessee is entitled for depreciation on non-compete fee observing as under: -

*"9. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that our indulgence in the present appeal has been sought for adjudicating, as to whether the DRP is right in concluding that the claim of the assessee as regards depreciation on the composite amount of Rs.10,90,49,099/- paid towards goodwill and non-compete fees on acquisition of a going concern was in order, or not. We have perused the orders of the lower authorities and find that the assessee had during the year under consideration taken over the running business of Mata Polymers Pvt. Ld and Silco Auxichem (I) Pvt. Ltd, for a total consideration of Rs.13,49,99,000/-. Out of the aforesaid consideration of Rs. 13,49,99,000/- an amount of Rs.2,59,04,000/- pertained to the net value of trade debtors, trade creditors and trade stock which were finally taken over by the assessee. The excess amount of Rs.10,90,49,099/- which was paid by the assessee, was a composite payment made to the seller towards goodwill and non-compete fees. We find that the claim of the assessee as regards depreciation of Rs.1,36,31,137/- on the aforesaid amount so paid to*

the seller, was disallowed by the A.O in his draft assessment order passed under Sec.143(3) r.w.s. 144C(1)of the Act. The DRP observing that the assessee was entitled for depreciation on the aforesaid amount of Rs.10,90,49,099/- paid towards goodwill and non-compete fees, thus issued necessary directions to the A.O.

10. We find from the perusal of the Sale and purchase agreement, dated 20.10.2011, entered into between Mata Polymers Pvt. Ltd./Silco Auxichem (I) Pvt. Ltd and the assessee, that the aforesaid amount of Rs.10,90,49,099/- was paid by the assessee over and above the net value of assets so acquired, by way of a composite payment towards goodwill and non-compete fees. We further find that no bifurcation as regards the aforesaid payment is discernible from the aforesaid agreement. We find that as observed by us hereinabove, the issue that a payment made towards noncompete fees pursuant to a composite agreement, by virtue of which the transferor was restrained from the using same trade mark, copyright etc., has to be read as a supporting clause to transfer of copyright and patents transferred as intangible assets in terms of Sec. 32(1)(ii) of the Act. Our aforesaid view stands fortified by the judgment of the Hon<sup>ble</sup> High Court of Madras in the case of Pentasoft Technologies Ltd. Vs. DCIT (2014) 264 CTR 187) (Mad). The High Court in the aforementioned case, not being persuaded to subscribe to the claim of the revenue, had concluded that the payment made towards non-compete fees under an agreement should be read as a supporting clause to the transfer of the copyright and patents to strengthen the commercial right, which was transferred in favour of the buyers. The High Court holding that the assessee would be entitled for claim of depreciation under Sec.32(1)(ii) as regards the payment made towards noncompete fees pursuant to a composite agreement, had observed as under:

“17. Be that as it may, the only reason assigned by the Tribunal is that the non-compete fee is not an asset, which the assessee could use like a licence or franchise and therefore, depreciation cannot be allowed.

18. In the preceding paragraphs, we have referred to the agreement entered into between the parties. The said agreement dated 23.02.2000 is a composite agreement by virtue of it, there was transfer of all rights over the IPRs as well as the training and development programmes to be exclusively used by the assessee for a fixed fee. Under the

*agreement, the consideration payable for transfer of IPRs and towards non-compete fee have not been segregated or distinctly mentioned. In order to qualify for a depreciation under Section 32(1)(ii) of the Act, it would first be relevant to refer to the said provision, which reads as under:*

*"Depreciation: 32(1) [in respect of depreciation of*

*(i).....*

*(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April 1998, owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed -]*

*Therefore, in terms of the above provision, deduction is allowable in respect of depreciation of patents, copy rights, trade marks, licence, franchise, etc or any other business or commercial rights of similar nature. There is no difficulty insofar as the trade mark and copy rights, which have been transferred in favour of the assessee.*

19. *The only issue is whether non compete agreement/arrangement would fall within the ambit of clause (ii) of Section 32(1) of the Act.*

20. *It is the case of the Revenue that this non-compete fee is in the nature of a negative right and it cannot be of a commercial right of similar nature and the expression „similar nature“ shall be relatable to patents, copy rights and trade mark licence or franchise or any other business. Therefore, it is submitted that this negative right cannot be construed either as a licence or as a commercial right to be eligible for deduction.*

21. *We are unable to agree with the stand taken by the Revenue for the simple reason that the agreement between the parties is a composite agreement. Under the agreement, the transferor had transferred all its rights, copy rights, trade marks in respect of the word “pentasoft” as well as the training and development division exclusively to be exploited by the assessee. In order to strengthen those rights transfer under the said composite agreement, there was a non compete*

clause by virtue of which, the transferor was restrained from using the same trade mark, copyrights etc., in favour of the assessee. Therefore, the non compete clause under the agreement should be read as a supporting clause to the transferor of the copy rights and patents rather to strengthen the commercial right, which was transferred in favour of the assessee.

22. Learned counsel for the assessee contended that the non- compete is in effect an indirect licence. However, we are not inclined to agree with the said submission since non compete, at best could be a commercial right because that right is relatable to the transfer of trade mark, copy rights and patents. Therefore, the view taken by the Commissioner of Income Tax(Appeals) in this regard is acceptable.

23. In the case of *Techno Shares and Stocks Ltd vs. Commissioner of Income Tax* reported in 327 ITR 323 (SC), the assessee therein before the Hon'ble Apex Court claimed depreciation on the membership card held by it with the Bombay Stock Exchange enables it to trade on the floor, is a business or commercial right in the nature of a licence under Section 32 (1)(ii) of the Act. 24. The Department on the other hand, pointed out that membership is a personal privilege and that it is not an asset and that it is not owned by the assessee and therefore, the claim of the assessee for depreciation was not admissible under Section 32(1)(ii) of the Act.

25. While answering the question, the Hon'ble Supreme Court considered the rules of the Bombay Stock Exchange and after perusing Rules 5 to 10, it held thus:

....."that the right of nomination is conferred on the member of the exchange; that , the said right shall cease and vest in the exchange when his membership gets forfeited to the exchange; that on such forfeiture the right of membership gets vested in the exchange and on such vesting the exchange has the right to deal with it as it may think fit. That, on forfeiture even the right of nomination vests in the exchange. Thus, a non-defaulting continuing member owns the right of nomination with respect to the membership of the exchange till his right of membership is forfeited to the exchange."

However, the Hon'ble Supreme Court observed that the right of membership including the right of nomination gets vested in the exchange on the demise/default committed by the member; that on such forfeiture and vesting in the exchange, the same gets disposed of by inviting offers and the consideration received thereof is used to liquidate the dues owed by the former/defaulting member to the exchange or clearing house.

26. It further held that it is this right of membership, which allows the nondefaulting member to participate in the trading session on the floor of the exchange. The said membership right is the business or commercial right conferred by the rules of the Bombay Stock Exchange on the non-defaulting continuing member.

27. We are conscious of the fact that the Hon'ble Supreme Court clarified that the said judgment is strictly confined to the right of the membership conferred upon the member under the Bombay Stock Exchange membership card during the relevant assessment years and that judgment should not be understood to mean that every business or commercial right would constitute a 'licence' or a 'franchise'. Therefore, the said decision was rendered after taking into consideration the Rules of the Bombay Stock Exchange.

28. In the case of hand, we have analysed the agreement and also in the previous portion of this order elaborated upon the various terms and conditions, which bind the parties had observed that the earlier transfer of the trade mark, patents and other rights in favour of the assessee was undoubtedly the transfer of intangible assets, which in terms of section 32(1)(ii) of the Act would be a capital asset entitled to depreciation.

29. In the light of the above, we have no hesitation in setting aside the order passed by the Income Tax Appellate Tribunal and answer the issue in favour of the assessee. In such circumstances, there is no necessity for us to consider the alternative submission made by the learned counsel for the assessee."

We further find that a similar view had also been taken by the High Court of Karnataka in the case of CIT Vs. Ingersoll Rand

*International Ind Ltd. (2014 (48 taxaman.com 349). The High Court in the aforementioned case after considering the decision of the High Court of Delhi in the case of Sharp business decisions Vs. CIT (2012) (27 taxmann.com 50), had concluded that the assessee would be entitled to claim depreciation on the non compete fees paid by it.”*

7. Facts being identical, respectfully following the said decision, we hold that the assessee is entitled for depreciation on the non-compete fee. Thus, we sustain the order of the Ld. CIT(A) in treating the payments in the nature of non-compete fee and allowing depreciation. As the Tribunal in assessee's own case has already held that the payments are in the nature of non-compete fee and entitled for depreciation the contentions raised by the assessee that it is in the nature of goodwill is only academic as submitted by the Ld. Counsel for the assessee. Since the ITAT held that the payments are non-compete fee and allowed depreciation the contention of the assessee in its appeal that it is non-compete fee is eligible for deduction U/s. 37 of the Act as revenue expenditure is rejected.

8. In the result, appeals of the Revenue as well as the assessee are rejected.

Order pronounced in the open court on the 28<sup>th</sup> November, 2019

Sd/-  
**(G. MANJUNATHA)**  
**ACCOUNTANT MEMBER**  
Mumbai / Dated 28/11/2019  
Giridhar, Sr.PS

Sd/-  
**(C.N. PRASAD)**  
**JUDICIAL MEMBER**

**Copy of the Order forwarded to:**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)  
**ITAT, Mum**