आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई।

IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH: CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री एस जयरामन, लेखा सदस्य के समक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA Nos.967, 968 & 969/Chny/2019**
निर्धारण वर्ष **/Assessment Years: 2007-08, 2008-09 & 2015-16**

M/s.Indus Mobile Distribution P.Ltd., No.281, TTK Road, Alwarpet, Chennai-600 018.	**Vs.**	The Asst. Commissioner-of Income Tax, Central Circle-1(1), Chennai.
[PAN: AABCI 6304 D]		
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**

अपीलार्थी की ओर से/ Appellant by	:	Mr. B.Ramakrishnan, FCA
प्रत्यर्थी की ओर से /Respondent by	:	Mr. S.Bharath, CIT
सुनवाई की तारीख/Date of Hearing	:	20.11.2019
घोषणा की तारीख /Date of Pronouncement	:	18.02.2020

आदेश **/ O R D E R**

PER S. JAYARAMAN, ACCOUNTANT MEMBER:

The assessee filed these appeal against the orders of the Commissioner of Income Tax (Appeals)-18, Chennai, in ITA Nos.754 & 755/16-17 dated 04.02.2019 for the AYs 2007-08 & 2008-09, and in ITA No.289/17-18 dated 04.02.2019 for the AY 2015-16, respectively.

2. The Ld.AR submitted that the AO made disallowance on advertising expenses and professional expenses including Branding expenses, while making the assessments for the AYs 2007-08 & 2008-09 respectively,

which was upheld by the Ld.CIT(A). In this regard, Ld.AR submitted that this issue is already covered in the assessee's own case in its favour for the AY 2009-10 in ITA No.675/Chny/2018 dated 09.10.2019.

3. We heard the rival submissions and gone through the relevant material. The relevant portion of the order of the Tribunal is extracted as under:

> *3. During the course of hearing, it is submitted that assessee made a claim for deduction for advertisement expenditure of □6,71,96,585/- which includes sum of □5,02,00,000/- towards brands expenditure. It is stated before us that branding expenditure incurred by M/s. Univercell Telecommunications (P) Ltd are paid by assessee. Necessity of incurring brand expenditure as explained by the assessee is as under:-*
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> > *"As we operate in a very competitive dynamic market, these are new entrants in the market like other telecom specialized stores. Operators are entering the mobile retained space and manufacturers like Samsung have entered into these business. In addition, online space is growing day by day with big brands like Flipkart and Amazon dominating and customers get better deals online".*
>
> *It is settled principle of law that the Assessing Officer is not expected to question the necessity of the expenditure. The brand expenditure is nothing but business promotion expenditure which is Revenue in nature and which is clearly allowed as deduction. Thus, grounds of appeal No.6 filed by the assessee is allowed.*

Since the facts and circumstances have not changed, following the above order, this issue is decided in favour of the assessee. Therefore, corresponding grounds of appeal for the AYs 2007-08 & 2008-09 are allowed.

4. The Ld.AR submitted that while making the assessment for the AY 2015-16 that the AO disallowed the employees contribution towards PF without appreciating the fact that the same had been remitted before the due date of filing of the return u/s.139(1). However, the Ld.CIT(A) confirmed the disallowance. In this regard, the Ld.AR submitted that this

issue is covered by the order of the Hon'ble Madras High Court in the case of Industrial Security & Intelligence India Pvt. Ltd., in its favour in TCA No.585 & 586 of 2015 dated 24.07.2015.

5. We heard the rival submissions and gone through the relevant material. Following the decision of the Hon'ble Jurisdictional High Court, it is held that the disallowance is not warranted. We allow the assessee's appeal on this issue.

6. The Ld.AR submitted that the AO made disallowance of depreciation on trade mark. On appeal, the Ld.CIT(A) confirmed the disallowance. In this regard, the Ld.AR submitted that this issue is covered in favour of the assessee in the assessee's own case for the AYs 2007-08 to 2009-10 in ITA Nos.673-675/Chny/2018 dated 16.05.2019.

7. We heard the rival submissions and gone through the relevant material. The relevant portion of the order relied on by the assessee is extracted as under:

> *6. The brief facts of the case are as under:*
>
> *The appellant namely M/s. Indus Mobile Distribution Pvt. Ltd is a company incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of wholesale trading and distribution of mobile phones and accessories. The return of income for the AY 2007-08 was filed on 26.10.2007 disclosing total income of Rs. 17,58,080/-, and the same was revised on 29.10.2013 at a loss of Rs.1,01,33,182/-. Against the said return of income, there was no scrutiny assessment proceedings. Subsequently, during the course of assessment proceedings for assessment year 2010-2011, ld. Assessing Officer found that the claim of depreciation on intangible asset was not correct and therefore initiated the reassessment proceedings by issuing notice u/s.148 of the Income Tax Act, 1961 (in short ''the Act'') on 13.03.2013 to the appellant. In response to notice u/s.148 of the Act, the appellant had filed reply vide letter dated 11.04.2013 stating that to treat the income originally filed as return in response to notice issued u/s.148 of the Act. Subsequently, assessee had sought reasons for reopening the assessment and the same was provided by l*

Assessing Officer through his letter dated 08.07.2013. Finally assessment was completed at a total loss of Rs.57,83,182/- by disallowing the depreciation on intangible assets being trade mark acquired from ''M/s. Univercell Telecommunications India Pvt. Ltd'' at a cost of Rs. 3,48,00,000/-. While denying the claim for depreciation on intangible assets, ld. Assessing Officer had questioned the genuineness of agreement of assignment of trade mark right entered between the appellant and the M/s. Univercell Telecommunications India Pvt. Ltd dated 01.02.2007. The genuineness of the agreement is doubted on the ground that the agreement was on the post dated stamp paper which is dated 09.07.2007 and also the agreement is signed by one Shri. D. Satish Babu in all capacities i.e. assignor, assignee and confirming party and also questioned the necessity of procuring the trade mark and again giving back to the same party for a consideration of 0.01% of the turnover. Based on these facts, ld. Assessing Officer inferred that the transaction were malafide and disallowed the claim for depreciation.

7. Being aggrieved by the ld. Assessing Officer order, assessee filed an appeal before ld. Commissioner of Income Tax (Appeals) contending that the very reopening the assessment is not valid in law, in as much as, reopening is based on change of opinion on the same set of facts which are in existence and also contending that Assessing Officer had no power to question the necessity to enter into transaction and also finding fault with the conclusion reached by the Assessing Officer that the transaction is malafide and transaction between assessee and M/s. Univercell Telecommunications India Pvt. Ltd is based on irrelevant material. However, ld. Commissioner of Income Tax (Appeals) dismissed the appeal both on the reopening and merits of the issue.

8. Being aggrieved, the appellant is in appeal before us in the present appeal. Ld. Authorised Representative Mr. B.Ramakrishnan, submitted that the conclusion reached by the Assessing Officer that it is an attempt by the parties to claim higher depreciation in order to evade taxes, it is based on the irrelevant material as much as appellant company had been incurring losses and M/s. Univercell Telecommunications India Pvt. Ltd is making profits. Further ld. Authorised Representative submitted that Assessing Officer as well as ld. Commissioner of Income Tax (Appeals) had failed to consider the facts that the agreement to purchase M/s. Univercell Telecommunications India Pvt. Ltd is reached on 01.02.2007 which is evidenced by passing of the consideration statement in agreement dated 01.02.2007 and the addendum dated 02.02.2007 was entered in order to reduce the terms and conditions into writing and to ensure the clarity of the agreement. Therefore, the date of the stamp paper has no relevance, in as much as, the substance of the transaction remaining the same, therefore he submitted that the orders of the lower authorities cannot be sustained.

9. On the other hand, the ld. Sr. Departmental Representative placed reliance on the orders of lower authorities.

10. We heard the rival submissions and perused the material on record. The short issue involved in this appeal is whether or not the transaction of purchase of trademark from one Shri. D. Satish Babu for a consideration of Rs.3,48,00,000/- is genuine. There is no dispute that Shri. D. Satish Babu is a owner of trademark ''Univercell'' as the trademark ''Univercell'' is registered under the name of Shri. D. Satish Babu by the Government of India and this trademark was purchased by the appellant for a consideration of Rs. 3,48,00,000/- , and the said consideration was paid on 15.02.2007. Ld. Assessing Officer had doubted the genuineness of the transaction primarily for following reasons namely:-

> *(i) the agreement entered between the parties on 01.02.2007 was on stamp paper which is post dated.*
>
> *(ii) It is a device adopted by the parties to evade the taxes*
>
> *(iii) There is no necessity of buying the trade mark and again allowing M/s. Univercell Telecommunications India Private Limited to use this trademark for a consideration of 0.01% on the sales turnover.*

The Assessing Officer had not disputed, in principle, the eligibility of trademark for depreciation nor the cost of acquisition of trademark, but disallowed the claim doubting the

genuineness of the transaction. Now we shall dwell upon each of the reasons assigned by the Assessing Officer.

11. There is no requirement under law that an agreement to purchase trademark should be in writing on a stamp paper. An agreement in writing is entered in order to reduce the agreed terms and conditions in writing so as to avoid any misunderstanding in future. Therefore, the fact that the agreement is entered on post dated stamp paper is immaterial and not germane to decide whether or not transaction is genuine. It is not the case of the Assessing Officer that substance of the transaction is something else. Therefore the reasoning of the Assessing Officer, as well as ld. Commissioner of Income Tax (Appeals) that the agreement is entered on post dated stamp paper, transaction is not genuine cannot be sustained.

12. As regards to the allegation that it is adopted to avoid evading the taxes, from the perusal of the assessment order, it is clear that even after disallowance of claim for depreciation on the trademark still the assessment resulted in losses. It is an admitted fact that payee had disclosed this income in his hands and therefore there is no motive of evasion of taxes, that can be attribute to this transactions. Finally necessity of entering into agreement, it is a settled proposition of law that it is not open to the Assessing Officer to question the necessity of incurring an expenditure and he cannot step into the shoes of the assessee as how to conduct the business of the assessee. In this connection, reliance can be placed on the decision of Hon'ble Supreme Court in the case of Eastern Investments Ltd. vs. CIT, 20 ITR 1. Recently the Hon'ble Delhi High Court in the case of CIT vs. EKL Appliances Ltd, 345 ITR 241 after referring the above said judgment of Supreme Court, wherein it was held as follows:

> *"19. There is no reason why the OECD guidelines should not be taken as a valid input in the present case in judging the action of the Transfer Pricing Officer. In fact, the Commissioner of Income-tax (Appeals) has referred to and applied them and his decision has been affirmed by the Tribunal. These guidelines, in a different form, have been recognized in the tax jurisprudence of our country earlier. It has been held by our courts that it is not for the Revenue authorities to dictate to the assessee as to how he should conduct his business and it is not for them to tell the assessee as to what expenditure the assessee can incur. We may refer to a few of these authorities to elucidate the point. In Eastern Investments Ltd. v. CIT [1951] 20 ITR 1 (SC) it was held by the Supreme Court that (page 6) "There are usually many ways in which a given thing can be brought about in business circles but it is not for the court to decide which of them should have been employed when the court is deciding a question under section 12(2) of the Income-tax Act". It was further held in this case that "it is not necessary to show that the expenditure was a profitable one or that in fact any profit was earned". In CIT v. Walchand and Co. P. Ltd. [1967] 65 ITR 381 (SC), it was held by the Supreme Court that in applying the test of commercial expediency for determining whether the expenditure was wholly and exclusively laid out for the purpose of business, reasonableness of the expenditure has to be judged from the point of view of the businessman and not of the Revenue. It was further observed that the rule that expenditure can only be justified if there is corresponding increase in the profits was erroneous. It has been classically observed by Lord Thankerton in Hughes (Inspector of Taxes) v. Bank of New Zealand [1938] 6 ITR 636 (HL) that "expenditure in the course of the trade which is unremunerative is none the less a proper deduction, if wholly and exclusively made for the purposes of trade. It does not require the presence of a receipt on the credit side to justify the deduction of an expense". The question whether an expenditure can be allowed as a deduction only if it has resulted in any income or profits came to be considered by the Supreme Court again in CIT v. Rajendra Prasad Moody [1978] 115 ITR 519 (SC), and it was observed as under (page 523):*
>
> *"We fail to appreciate how expenditure which is otherwise a proper expenditure can cease to be such merely because there is no receipt of income. Whatever is a proper outgoing by way of expendi ture must be debited irrespective of whether there is receipt of income or not. That is the plain requirement of proper accounting and the interpretation of section 57(iii) cannot be different. The deduction of the*

expenditure cannot, in the circumstances, be held to be condi tional upon the making or earning of the income."

It is noteworthy that the above observations were made in the context of section 57(iii) of the Act where the language is somewhat narrower than the language employed in section 37(1) of the Act. This fact is recognised in the judgment itself. The fact that the language employed in section 37(1) of the Act is broader than section 57(iii) of the Act makes the position stronger.

20. In the case of Sassoon J. David and Co. Pvt. Ltd. v. CIT [1979] 118 ITR 261 (SC), the Supreme Court referred to the legislative history and noted that when the Income-tax Bill of 1961 was introduced, section 37(1) required that the expenditure should have been incurred "wholly, necessarily and exclusively" for the purposes of business in order to merit deduction. Pursuant to public protest, the word "necessarily" was omitted from the section.

21. The position emerging from the above decisions is that it is not necessary for the assessee to show that any legitimate expenditure incurred by him was also incurred out of necessity. It is also not necessary for the assessee to show that any expenditure incurred by him for the purpose of business carried on by him has actually resulted in profit or income either in the same year or in any of the subsequent years. The only condition is that the expenditure should have been incurred "wholly and exclusively" for the purpose of business and nothing more. It is this principle that, inter alia, finds expression in the OECD guidelines, in the paragraphs which we have quoted above".

Thus law is settled to the extent that it is outside the domain of the ld. Assessing Officer to question the necessity of incurring an expenditure. Thus the reasons assigned by the Assessing Officer that the transaction for purchase of trademark are not genuine cannot stand test of the law. Furthermore, it is an settled principle of law that intangible assets such as trademark, goodwill are also qualifies for depreciation at prescribed rates. Therefore we do not concur with the views of the lower authorities in disallowing the claim for depreciation on trademark. Accordingly, we set aside the orders of the lower authorities and allow the grounds of appeal filed by the assessee. Hence grounds of appeal 3 to 5 filed by the assessee are allowed.

Since, the facts are same for this AY, following the above order in the assessee's own case, this issue is allowed in the assessee's favour.

8. The next issue is that the AO found that M/s.Rocky Marketing (Chennai) Pvt. Ltd., had written off ₹6,30,40,743/- being trade receivable from the assessee. The assessee had stopped making any payment as well as stopped sourcing mobile phone from the above company since July, 2015; the above amount having been claimed as bad debt was allowed in the hands of the above company; and hence he added the said amount is a 'cessation of liability' u/s.41(1) stating that the sum of

₹6,30,40,743/- unilaterally written off as bad debts by M/s.Rocky Marketing (Chennai) Pvt. Ltd. shall be deemed to be the business profits in the hands of the debtor, the assessee as per clause(a) of Sec.41(1) of the IT Act, 1961.

9. Aggrieved the assessee filed an appeal before the Ld.CIT(A). the Ld.CIT(A) held that "the AO has specifically pointed out that in the assessment of the creditor viz Rocky Marketing (Chennai) Pvt Ltd which is also assessed by this same AO, who has held that the claim of the said debtor in respect of the debts due from the appellant has been written off and has allowed the same. Further, it is relevant to mention that M/s. Rocky Marketing (Chennai) Pvt Ltd has waived off the liability. Thus the AO's action in applying Sec. 41(1) is correct and is in accord with the intent and provisions of Sec. 41(1) that was introduced with a view to prevent conferment of double benefit to creditors like the appellant in the form of non-requirement of payment of liabilities and continuing to keep the said liability in the books of account. In view of the ratio in the cases of Shailesh D. Shah, Mumbai vs Department Of Income Tax ITA 7012/M/10 and Chipsoft Technology (P) Ltd (Del), 210 Taxman 173 (Delhi) there is cessation of liability by operation of law as the creditor assessed before the same assessing officer has written off the dues from the appellant. The appellant has not made out a case that the liability is to be discharged except saying that the liability has not been written back. Here, the assessing officer, after having allowed the bad debts written off

by the debtor has not chosen to keep quiet and has taken action in the case of the creditor i.e the appellant. In the circumstances, I am of the view that no interferences in the AO's action in invoking s 41(1) of the Act is called for. The appellant's ground is dismissed".

10. Aggrieved against that order, the assessee filed this appeal. The Ld.AR submitted that this issue covered by the order of the Hon'ble ITAT Kolkata in the case of Jashojit Mukherjee reported in [2018] 93 taxmann.com 366 (Kolkata-Trib) dated 04.05.2018.

11. Per Contra, the Ld.DR supported the order of the Ld.CIT(A). Further, he invited our attention to Explanation-1 to Sec.41(1), which is extracted as under:

> *"Explanation-1 For the purposes of this sub-section, the expression "loss or expenditure or some benefit in respect of any such trading liability by way of remission or cessation thereof" shall include the remission or cessation of any liability by a unilateral act by the first-mentioned person under clause (a) or the successor in business under clause (b) of that sub-section by way of writing off such liability in his accounts".*

12. We heard the rival submissions and gone through the relevant material. It is clear from the above that the very same AO allowed the write off of M/s.Rocky Marketing (Chennai) Pvt. Ltd., in its hands. Therefore, M/s.Rocky Marketing (Chennai) Pvt. Ltd., has waived off the liability from the assessee's hand. As per the explanation extracted, supra, the remission or cessation of any liability by a unilateral Act, is covered u/s.41(1) and hence, we do not find any reason to interfere with the order of the Ld.CIT(A). Therefore, corresponding grounds of the assessee fail.

13. In the result, the appeals filed by the assessee in ITA Nos.967 & 968/Chny2019 for the AYs 2007-08 & 2008-09 are allowed and ITA No.969/Chny/2019 for the AY 2015-16 is partly allowed.

Order pronounced on the 18th February, 2020, in Chennai.

Sd/-	***Sd/-***
(एन.आर.एस. गणेशन**)**	**(**एस जयरामन**)**
(N.R.S. GANESAN)	**(S. JAYARAMAN)**
न्यायिक सदस्य**/JUDICIAL MEMBER**	लेखा सदस्य**/ACCOUNTANT MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 18th February, 2020.
TLN

आदेश की प्रतिलिपि अग्रेषित**/Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF