

**IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT**

**BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM**

**आयकरअपीलसं./ITA No.219/SRT/2018**

**(निर्धारणवर्ष / Assessment Year: (2012-13)**

**(Virtual Court Hearing)**

|  |         |  |
|--|---------|--|
| M/s.Bayer Vapi Private Limited<br>(Formerly Known as Bilag Industries Pvt.<br>Ltd.),<br>306/3, IInd Phase, GIDC, Vapi – 396 195. | V<br>s. | The Deputy Commissioner of<br>Income Tax, Vapi Circle, Vapi. |
| <b>स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AABCB 2100 L</b>   |         |  |
| <b>(Assessee)</b>  |         | <b>(Respondent)</b>  |

Assessee by : Shri Gopala Krishnan - CA

Respondent by : Shri S.T.Bidari-CIT(DR) & Ms.Anupama Singla – Sr.DR

**सुनवाईकीतारीख/ Date of Hearing : 09/06/2021**

**घोषणाकीतारीख/Date of Pronouncement: 28/06/2021**

**आदेश / O R D E R**

**PER DR. A. L. SAINI, ACCOUNTANT MEMBER:**

Captioned appeal filed by the Assessee pertaining to A.Y.2012-13 is directed against the order passed by the Id.Commissioner of Income Tax(Appeals), Valsad dated 29.01.2018 which in turn arises out of assessment order passed by the Id.Assessing Officer under section 143(3) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'] dated 29.03.2016.

2. Grievances raised by the assessee are as follows:

- “01. *The order of assessment is contrary to the facts and prejudicial to the assessee.*
02. *On appreciation of the facts and circumstances of the case and law, the additions made by the Learned Assessing Officer and confirmed by the Learned Commissioner of Income Tax (Appeals) are contrary to law and based on erroneous understanding of the facts.*
03. *On appreciation of the facts and circumstances of the case and law the Learned Commissioner of Income Tax (Appeals) has erred in confirming*

*the action of the Learned Assessing Officer in disallowing depreciation claimed by the appellant company to the tune of Rs. 1,06,00,847/- on intangible assets purchased by the appellant company. The action of the Learned Commissioner of Income Tax (Appeals) is contrary to the facts and law and deserves to be deleted.*

04. *The appellant craves to add, amend, modify or alter the above grounds of appeal at any stage of appellate proceedings.*
05. *The appellant humbly prays that the appeal be allowed in toto.”*

3. When this appeal was called out for hearing, learned counsel for the assessee invited our attention to the order dated 24.10.2019, passed by the Division Bench of this Tribunal in assessee’s own case in ITA No.2912/Ahd/2015, for the Assessment Year 2010-11, whereby the issue relating to depreciation on intangible assets purchased by the assessee company was discussed and adjudicated in favour of assessee. Learned counsel for the assessee submitted that the present appeal is squarely covered by the aforesaid order of the Tribunal, a copy of which was also placed before the Bench.

2. Learned Departmental Representative relied upon the orders of the authorities below.

3. We see no reasons to take any other view of the matter than the view so taken by the Division Bench of this Tribunal in assessee’s own case vide order dated 24.10.2019. In this order, the Tribunal has inter alia observed as follows:

*“7. We have heard the rival submissions and perused the material available on record. We find that the same issue arisen in A.Y. 2004-05 wherein this Tribunal in ITA No.2446 & 2584/Ahd/2007 has allowed the appeal of the assessee of which relevant para 115 to 118 are reproduced as under :*

*“115. We have heard the rival submissions and perused the relevant material on record. We find that the assessee company had purchased Imidachlorpid business on slump sale basis from Mitsu Industries for Rs.27,50,38,000/- during the year under consideration. As per the Business Transfer Agreement, the assets following part included:*

| <i>Particulars</i>        | <i>Book value in Mitsu Ltd.</i> | <i>Imidaclopid Business Value</i> |
|---------------------------|---------------------------------|-----------------------------------|
| <i>1. Land</i>            | <i>56,78,283</i>                | <i>1,82,05,643</i>                |
| <i>2. Building</i>        | <i>6,38,80,263</i>              | <i>7,50,36,771</i>                |
| <i>3. Architects Fees</i> | <i>22,69,000</i>                |                                   |

|  |             |              |
|--|-------------|--------------|
| 4. Manufacturing and process Know How  |             | 16,18,00,600 |
| 5. Registration and commercial rights. |             | 1,83,14,986  |
| 6. Others                              | 1,58,428    | 16,80,000    |
| Total                                  | 7,19,85,974 | 27,50,38,000 |

116. The assessee company was asked to explain the basis for ascribing to each of the assets acquired by it since the value of assets in the books of Mitsu Industries was only Rs. 7,19,85,974. It was explained that the Mitsu industries are not a related party under section 40A(2)(b) of the Act and the assessee has acquired profit earning apparatus from Mitsu Industries Ltd. which cannot be based on book value of tangible assets debited in the books of seller. The assessee company has acquired international product registration as well as domestic registration approval and license and manufacturing and process of know-how, intellectual properties and other intangible assets such as commercial rights, registration and license for which composite consideration has been paid on mutual discussion and consent from both parties which in turn based on so many factors such as market value and tangible and intangible assets acquired from Mitsu Industries Ltd. The assessee company has repeated again and again that most of the payments are for intangible assets of manufacturing process of know-how and Registration and Commercial rights. We further find that Mitsu Ltd. is not related company under section 40A(2)(b). The assessee has acquired the Lmidachloropid business of Mitsu Limited as slump sale basis for a total consideration of Rs.27.50 crores as a going concern basis. M/s. Mitsu Industries Ltd. has been carrying on its business from last 15 years and Lmidachloropid was one of the pesticides for which necessary process, technical knowhow, knowledge and idea of business, commercial rights, marketing rights etc. Apart from above, the assessee company also purchased marketing rights of aforesaid products from Mitsu Ltd. at a cost of Rs. 18.34 crores which was capitalized as capital asset in the books of accounts. The seller company M/s Mitsu Ltd. has also obtained registration, permission for government and concerned authorities and same was transferred to Bilag Industries Pvt. Ltd. pursuant to Business Transfer Agreement (PB-75 to 89). The assessee has acquired the license like CIB registration dtd. 13.08.1999 from Central Insecticides Board, Permission received from Gujarat Pollution Board on 05.01.2004 along with permission from Ministry of Environment and Forest and that Mitsu Ltd. has capacity to manufacture lmidachloropid. The certificate from registration of insecticides dtd. 31.08.1999 u/s 9(3) of Insecticides Act 1968, which stipulates recipe being chemical composition in respect of lmidachloropid and approval from director plant Protection Quarantine and storage. It is pertinent to note that the assessee company cannot manufacture the lmidachloropid without using technical knowledge and know-how/ license / registration in respect of lmidachloropid products. These products are having associated with their own goodwill. We have perused the relevant clause of agreement of Business Transfer Agreement entered into between the parties. M/s. Mitsu Limited and the assessee company, which is reproduced hereunder:

“IMIDACLOPRID Business means the Manufacturing rights, Marketing Rights, other commercial rights, Intellectual properties and Assets of the sellers relating to development, manufacture, registration, use, sale marketing and distribution of the product”.

117. Thus, we are of the view that the lump-sum consideration was for all rights such as manufacturing rights, marketing rights, other commercial rights, intellectual properties and other assets of the seller relating to development, manufacturing process, registration, use, sale marketing and distribution of products apart from tangible assets such as Land,

*Building and other assets. We further note that M/s Mitsu Limited was not a related concerns as per the provision of Section 40(A)(2)(b) of the Income-tax Act, 1961 as the point of sales. The learned counsel submitted that assets acquired under slump sale were capitalized in books of account as per generally accepted accounting principles in a slump sale several assets are purchased for a consolidated price and price is paid for the entire business as a whole. Hence, value to individual assets cannot be assigned directly. The valuation of intangible assets and marketing rights have been done in accordance with the Accounting Standard-10 (AS-10) issued by the Institute of Chartered Accountants of India (ICAI) the company has assigned the values to the various assets on a fair basis. The payments made for acquisition of Imidachloropid products business pursuant to transfer of Business Transfer Agreement and intangible assets was allocated on the basis of valuation report from independent Valuer M/s. Bansi S. Mehta & Co. who had assigned the value of individual assets in accordance with AS-10. This valuation of items are placed at Paper Book Page No. 105 to 111. We are of the view that depreciation on intangible assets is allowable as per Section 32 of the Act. We also note that that Ahmedabad Tribunal in the case of M/s. Mitsu Ltd. , the seller company, in I.T.A. No. 1672/Ahd/2007 A.Y. 2004-05(PB-31-70) vide order dated 01.08.2008 has considered the sale of business to the assessee as slump sales and observed that the assessee has transferred machinery and infrastructure including licenses and right to manufacture products for the year 1999 onwards and even on date of sale. This fact is not disputed by the Revenue authorities. The assessee has sold a business which includes the necessary rights and technology. The value of technology and rights are determined the parties to the transaction on commercial consideration and after mutual negotiations. Accordingly, we feel that this transaction is nothing but slump sales exigible to long-term capital gain. Accordingly, this issue of appeal of the assessee is allowed. Thus, it is clear that when the slump sale with consideration of Rs. 27.50 crores as long-term capital gain has been accepted in the case of seller company, then it cannot be said that the assessee company has not paid the consideration as mentioned in Business Transfer Agreement. Once the sale is recognized and transaction has been upheld by the ITAT also then purchases have to be recognized as true. The learned counsel for the assessee also placed reliance in the case of CIT v. Smifs Securities Ltd. [2012] 24 taxmann.com 222 (SC) held that goodwill is an asset under Explanation 3(b) to section 32(1) and, thus, it is eligible for depreciation. In the case of CIT v. Techno Shares &v. Stok Ltd. [2010] 193 Taxman 248(SC)The Hon`ble Supreme Court held that right of membership to BSE was a 'business or commercial right' which gave a non defaulting containing and continuing member a right to access the exchange and to participate therein in that sense it was a license or akin to a license in terms of section 32(1)(ii). Such right vested in the exchange only on default /demise in terms of Rules and Bye Laws of the BSE, as they stood at the relevant time. However, it should not be understood to mean that every 'business or commercial right' would constitute a license or a franchise in terms of section 32(1)(ii)of the Act. Further reliance is placed in the case of M/s Trio Elevators Company (India ) Ltd. v. ACIT Circle 8 Ahmedabad [2016] 67 taxmann.com 348 (Ahmedabad –Trib) wherein it was held that admissibility of depreciation of trademark is not contingent upon its registration in the name of the assessee inasmuch as description of intangible assets is Part –B of depreciation schedule describe the same merely of 'know-how' 'patents' copyright, trademark licenses franchises or any other business or commercial rights of similar nature. Further the Hon`ble Jurisdictional High Court of Gujarat in the case of Pr. CIT v. Swastik Industries [2016] 68 taxmann.com 329 (Gujarat) held that payment of compensation made by the assessee-firm to retiring partner was to be treated as goodwill and , since , goodwill is an asset under Explanation 3 (b) to section 32 (1), assessee`s claim for depreciation on said payment was to be allowed.*

118. We further observed that the Seller company has sold and transferred various assets under a Business Transfer Agreement for which valuable consideration has been paid by the appellant company. The AO has not given any factual finding as regards her observation that the assessee company could not justify in any logical and convincing way the basis on which such huge payment was made to acquire what the appellant company terms 'intangible assets' based on which inference the assessment order has been framed. The assessee company has purchased intangible assets in the form of marketing rights, right to carry on business, right to manufacture and technical of know-how for carrying on Imidacloprid Business. The Seller company is also engaged in manufacturing pesticides for the last 15 years and the assessee company is also manufacturing pesticides for the last 3 years. This very facts means that the seller company was having better experience in terms of marketing of know-how as it was more experienced as compare to assessee who was in the market of pesticides for last 3 years only. Further reliance is placed on the judgement of Hon'ble Delhi High Court in the case of Areva T & D India Ltd. v. DCIT [2012] 20 taxmann.com 29 (Delhi) held that specified intangible assets , viz business claims, business information , business records , contracts , employees and of know-how acquired by assessee under slump sale agreement are in the nature of 'business or commercial right' of similar nature specified in section 32(1)(ii) and are accordingly eligible for depreciation. Considering the above facts we are of the view that the assessee company has acquired lmidicaholopid business for total consideration of Rs. 27.50 crores which inter-alia included intangible assets of worth Rs. 18.34 crores on which depreciation has been claimed at Rs. 2,25,14,448 besides marketing rights on which depreciation has been claimed at Rs. of Rs. 2,29,30,000 on which depreciation is very much allowable under section 32(1)(ii) of the Act. In the light of above backdrop, and facts of the case and considering the same in totality, we are inclined to agree with the assessee that the AO and Ld. CIT (A) were not justified is disallowing depreciation claimed by the appellant company to the tune of Rs.2,25,14,448 on intangible assets and Rs. 2,29,30,000 on marketing rights purchased by the assessee company. The AO is, therefore, directed to allow depreciation on intangible assets marketing rights as claimed by the assessee. In view of these facts and circumstances, the grounds of appeal no. 16 to 19 of the appeal are, therefore, allowed."

8. In view of the above, we find that the issue is covered in favour of the assessee by order of this bench as mentioned above, which has also been upheld by the Hon'ble Gujarat High Court in Tax Appeal No.166 of 2019 dated 22.04.2019, therefore respectfully following the decision of the Hon'ble High Court the above ground is allowed in favour of the assessee."

4. We also note that the said issue is also covered by the judgement of the Hon'ble Gujarat High Court in assessee's own case in Tax Appeal No.166/2019 (M/s.Bayer Vapi Pvt. Ltd.,) order dated 24.04.2019, wherein it was held as follows:

"5.5 Being aggrieved, the assessee filed appeal before the Tribunal. The Tribunal after considering the facts and evidence on record held as under :

"117. Thus, we are of the view that the lumpsum consideration was for all rights such as manufacturing rights, marketing rights, other commercial rights, intellectual properties and other assets of the seller relating to development, manufacturing process, registration,

use, sale marketing and distribution of products apart from tangible assets such as Land, Building and other assets. We further note that M/s. Mitsu Limited was not a related concerns as per the provision of Section 40(A)(2)(b) of the Income-tax Act, 1961 as the point of sales. The Learned counsel submitted that assets acquired under slump sale were capitalized in books of account as per generally accepted accounting principles in a slump sale several assets are purchased for a consolidated price and price is paid for the entire business as a whole. Hence, value to individual assets cannot be assigned directly. The valuation of Intangible assets and marketing rights have been done in accordance with the Accounting Standard-10 (AS-10) issued by the Institute of Chartered Accountants of India (ICAI) the company has assigned the values to the various assets on a fair basis. The payments made for acquisition of Imidachloropid products business pursuant to transfer of Business Transfer Agreement and intangible assets was allocated on the basis of valuation report from independent valuer M/s. Bansi S. Mehta Et Co. who had assigned the value of individual assets in accordance with AS-10. This valuation of items are placed at Paper Book Page No. 105 to 111. We are of the view that depreciation on intangible assets is allowable as per Section 32 of the Act. We also note that that Ahmedabad Tribunal in the case of M/s. Mitsu Ltd., the seller company, in ITA. No. 1672/Ahd/2007 A.Y. 2004-05(PB3170) vide order dated 01.08.2008 has considered the sale of business to the assessee as slump sales and observed that the assessee has transferred machinery and infrastructure including licenses and right to manufacture products for the year 1999 onwards and even on date of sale. This fact is not disputed by the Revenue authorities. The assessee has sold a business which includes the necessary rights and technology. The value of technology and rights are determined the parties to the transaction on commercial consideration and after mutual negotiations. Accordingly, we feel that this transaction is nothing but slump sales exigible to longterm capital gain. Accordingly, this issue of appeal of the assessee is allowed. Thus, it is clear that when the slump sale with consideration of 27.50 crores as longterm capital gain has been accepted in the case of seller company, then it cannot be said that the assessee company has not paid the consideration as mentioned in Business Transfer Agreement. Once the sale is recognized and transaction has been upheld by the ITAT also then purchases have to be recognized as true. The learned counsel for the assessee also placed reliance in the case of CIT v. Smifs Securities Ltd. [2012] 24 taxmann.com 222 (SC) held that goodwill is an asset under Explanation 3(b) to section 32(1) and, thus, it is eligible for depreciation. In the case of CIT v. Techno Shares & Stock Ltd. [2010] 193 Taxman 248(SC). The Hon'ble Supreme Court held that right of membership to BSE was a business or commercial right which gave a non defaulting containing and continuing member a right to access the exchange and to participate therein in that sense it was a license or akin to a license in terms of section 32(1)(ii). Such right vested in the exchange only on default /demise in terms of Rules and Bye Laws of the BSE, as they stood at the relevant time. However, it should not be understood to mean that every 'business or commercial right' would constitute a license or a franchise in terms of section 32(l) (ii) of the Act. Further reliance is placed in the case of M/s. Trio Elevators Company (India ) Ltd. v. ACIT Circle 8 Ahmedabad [2016] 67 taxmann.com 348 (Ahmedabad Trib) wherein it was held that admissibility of depreciation of trademark is not contingent upon its registration in the name of the assessee inasmuch as description of intangible assets is Part-B of depreciation schedule describe the same merely of 'knowhow' patents' copyright, trademark licenses franchises or any other business or commercial rights of similar nature. Further the Hon'ble Jurisdictional High Court of Gujarat in the case of Pr. CIT v. Swastik Industries [2016] 68 taxmann.com 329 (Gujarat) held that payment of compensation made by the assessee firm to retiring partner was to be treated as goodwill and since, goodwill is an asset under Explanation(1), assessee's claim for depreciation on said payment was to be allowed. 118. We further observed that the Seller

*company has sold and transferred various assets under a Business Transfer Agreement for which valuable consideration has been paid by the appellant company. The AO has not given any factual finding as regards her observation that the assessee company could not justify in any logical and convincing way, the basis on which such huge payment was made to acquire what the appellant company terms 'intangible assets' based on which inference the assessment order has been framed. The assessee company has purchased intangible assets in the form of marketing rights, right to carry on business, right to manufacture and technical of knowhow for carrying on Imidacloprid Business. The Seller company is also engaged in manufacturing pesticides for the last 15 years and the assessee company is also manufacturing pesticides for the last 3 years. This very facts means that the seller company was having better experience in terms of marketing of knowhow as it was more experienced as compare to assessee who was in the market of pesticides for last 3 years only. Further reliance is placed on the judgement of Hon'ble Delhi High Court in the case of Areva T Et D India Ltd. v. DCIT [2012] 20 taxmann.com 29 (Delhi) held that specified intangible assets , viz business claims, business information, business records contracts, 'employees and of knowhow acquired by assessee under slump sale agreement are in the nature of "business or ' commercial right' of similar nature specified in section 32(1)(ii) and are accordingly eligible for depreciation. Considering the above facts we are of the view that the assessee company has acquired Imidacloprid business for total consideration of Rs. 27.50 crores which inter-alia included intangible assets of worth Rs. 18.34 crores on which depreciation has been claimed at Rs.2,25,14,448 besides marketing rights on which depreciation has been, claimed at Rs. of Rs.2,29,30,000 on which depreciation is very much allowable under section 32(1)(ii) of the Act. In the light of above backdrop, and facts of the case and considering the same in totality, we are inclined to agree with the assessee that the AO and Ld. CIT(A) were not justified in disallowing depreciation claimed by the appellant company to the tune of Rs.2,25,14,448 on intangible assets and Rs.2,29,30,000 on marketing rights purchased by the assessee company. The AO is therefore, directed to allow depreciation on intangible assets as marketing rights as claimed by the assessee. In view of these facts and circumstances, the grounds of appeal no 16 to 19 of the appeal are therefore, allowed."*

*5.6 In view of the aforesaid findings of fact, arrived at by the Tribunal holding that the assessee having purchased various assets under the business transfer agreement by way of slump sale and further that Mitsu Industries Ltd. was not a related concern as per the provisions of section 40A(2)(b) of the Act at the point of sale, depreciation under section 32 of the Act is allowable to the assessee company both on the intangible assets as well as marketing rights. The Tribunal has therefore, not erred in allowing depreciation both on intangible assets as well as marketing rights under section 32 of the Act.*

*6. In the light of the aforesaid discussion, it is not possible to state the Tribunal has committed any legal error so as to warrant interference. No question of law, as proposed or otherwise, much less, substantial question of law, can be stated to arise out of the impugned order of the Tribunal, The appeal is, accordingly dismissed."*

5. As the issue is squarely covered in favour of the assessee by the decision of the Coordinate Bench, in assessee`s own case(supra). The said issue is also covered by the judgement of the Hon'ble Gujarat High Court in assessee`s own case(supra), and there is no change in facts and law and the Revenue is unable to produce any material to controvert the aforesaid findings of the Division Bench (supra) and findings of the Hon'ble Gujarat High Court in assessee`s own case(supra). We find no reason to interfere in the said decision of the Division Bench and decision of Hon'ble Gujarat High Court in assessee`s own case(supra), therefore, respectfully following the judgment of the Coordinate Bench and judgment of Hon'ble Gujarat High Court in assessee`s own case, we delete the addition made by AO/TPO on account of depreciation of Rs. 1,06,00,847/-.

6. In the result, the appeal of the assessee is allowed.

Order is pronounced at the time of hearing of appeal on 28/06/2021 in the Virtual Court of hearing.

**Sd/-**  
**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(Dr. A.L. SAINI)**  
**ACCOUNTANT MEMBER**

Surat /दिनांक/ Date: 28/06/2021 /sgr

**Copy of the Order forwarded to**

1. The Assessee
2. The Respondent
3. The CIT(A)
4. Pr.CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

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Assistant Registrar/Sr. PS/PS  
ITAT, Surat