

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT)
"H" BENCH, MUMBAI**

**BEFORE SHRI AMARJIT SINGH, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA.NO. 3372/MUM/2017 (A.Y: 2012-13)

M/s. KDL Biotech Ltd., Savroli Village Khalapur Taluka, Khapoli Mumbai – 410202 PAN: AAACM2824M	v.	ACIT – Central Circle – 3(3) Air India Building, Nariman Point Mumbai – 400 021
(Appellant)		(Respondent)

Assessee by	:	None
Department by	:	Ms. Neha Thakur
Date of Hearing	:	31.03.2022
Date of Pronouncement	:	31.03.2022

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of Learned Commissioner of Income-tax (Appeals)-15, Mumbai [hereinafter for short "Ld. CIT(A)] dated 21.02.2017 for the A.Y. 2012-13.

2. Assessee has raised following grounds in its appeal: -

"1. On the facts and circumstances of the Appellant's case and in law the Ld. Commissioner of Income Tax (Appeals) erred in

confirming the action of Ld. Assessing Officer in disallowing the depreciation on intangible technical knowhow of Rs. 47,77,500/- as per the grounds stated in the order or otherwise.

2. *On the facts and circumstances of the Appellant's case and in law Ld Commissioner of Income Tax (Appeals) erred in confirming the action of Ld. Assessing Officer in disallowing the depreciation on non-compete fees of Rs. 1,10,74,219/- as per the grounds stated in the order or otherwise.*

3. *On the facts and circumstances of the Appellant's case and in law Ld Commissioner of Income Tax (Appeals) erred in confirming the action of Ld. Assessing Officer in making an addition of Rs. 8,237/by invoking the provisions of Sec. 14A r.w.r. 8D of the Income Tax Act, 1961 as per the grounds stated in the order or otherwise.*

4. *On the facts .and circumstances of the Appellant's case and in law Ld Commissioner of Income Tax (Appeals) erred in making an addition of Rs. 33,58,534/- on account of cessation of liability as per the grounds stated in the order or otherwise.*

5. *The Appellant craves leaves to add, to amend, alter, modify and / or oat any or all of the above grounds of appeal, each of which are without prejudice to one another."*

3. At the time of hearing, none appeared on behalf of the assessee and from the record we observed that the appeal was filed by the assessee on 08.05.2017 and subsequently hearing was fixed on several occasions and none appeared on behalf of the assessee till 07.02.2022. The bench considered the fact that repeated notices through RPAD were sent to the assessee on the address mentioned in Form-36 and the said notices have been returned back unserved by the postal authorities with the remark "company closed". The earlier Bench observed that on a perusal of the records it transpired that the Hon'ble Bombay High Court in Company Petition No. 902 of 2014 vide order dated 14.12.2017 has

declared the company commercially insolvent and has appointed liquidator. Subsequently further notices were issued to the assessee and considering the overall facts on record we observed that no liquidator was brought on record and further we observe from the order of the Hon'ble Bombay High Court that the liquidator was appointed but liquidator has not taken any steps to represent this case and it is the responsibility of the liquidator to take action in favour of the company. Since there is no steps taken by the liquidator to represent the case before the Tribunal. At this stage we deem it fit and proper to dismiss this case with a rider that the liquidator may revive this case by filing Miscellaneous Application by properly bringing on record the reasons for non prosecuting the present appeal and bringing on record proper reasons for revival of the appeal. Liberty is given to the assessee to file Miscellaneous Application for recall of this order within the provisions of section 254(2) of the Act.

4. On merits, Ld. DR briefly explained the facts and supported the orders of the lower authorities.

5. Heard Ld. DR and perused the material placed on record, orders of the authorities below. On perusal of the order of the Ld.CIT(A), we find that the Ld.CIT(A) considered this aspect of the matter elaborately with

reference to the submissions of the assessee and the averments in the Assessment Order and sustained the addition made by the Assessing Officer. While holding so, the Ld.CIT(A) observed as under: -

"11. I have considered the facts of the case, contentions and submissions of the assessee as well as the order of the AO, While deciding this issue, in the case of the assessee vide order dated 14.03.2016, my Id. predecessor had examined the facts of the case in great detail and then reached on the conclusion that the assessee has only split the part of the purchase value of the plant and machinery as the non compete fee with an intention to claim higher depreciation and most probably with a view to avoid capital gains in the hands of M/s Koprán. The AO correctly denied the depreciation claimed on the above intangible asset and he therefore upheld the addition made by AO. For clarity, the relevant portion of CIT(A) order is reproduced as under:

""T have gone through the agreement and have considered the arguments of the assessee. The products that Koprán was manufacturing are Amoxycillin, Ampicillin, Cloxacillin, Dicloxacillin and Flucloxacillin. Koprán sold the entire manufacturing facility to the assessee. It is seen from the product list that these are all generic products, which are being manufactured by even small plants on job work basis. Manufacturing these products does not require high technological capabilities or know-how. Only thing that is required is licensed manufacturing plant which any way was sold to the assessee, As the products are generic anybody can manufacture them. Thus, there is no way that Koprán can as such compete with the assessee once its manufacturing facility is sold off. From the agreement, it can be inferred that assessee has only split the part of the purchase value of the plant and machinery as the non-compete fee with an intention to claim higher depreciation by assessee and most probably to avoid capital gains in the hands of Koprán. The facade of non-compete fees is only created for the mutual benefit of the assessee and Koprán. Be that as it may, it is held by AO that non-compete fee is not an asset within the meaning of section 32. Assessee in support of its argument that it is intangible

asset on the decisions Madras High .court in the case of Pentasoft Technologies ITA No 1195/2008 and decision of Hon'ble Hyderabad Tribunal in the case of Owens Corning Industries (I) P Ltd ITA Nos 549 & 595/Hyd/2014. On perusal of records, it is observed that similar disallowance was made in AY 2010-11 which was subjected to appeal. CIT(A) 39, Mumbai relying on ITAT, Chennai decision in the case of Medicorp Technologies (2009) 30 SOT 506 (Chen Trib), held that depreciation is not allowable as non-compete fees and it was further stated by the CIT(A) that Koprana, with the prior permission of assessee, can divulge secret formula or process of manufacturing to anybody. Further, it is observed that there is no clause in the agreement as to what would happen if there is any breach. Citing these clauses, it was held that what was acquired is business or commercial right which not eligible for depreciation. As the facts for the year under consideration are same and in view of the above discussion that Koprana as such is not capable of competing once the manufacturing facility itself is sold, following the stand taken by my predecessor, I confirm the disallowance made by the AO."

12. As the issue has been dealt with elaborately by my Ld. Predecessor in the case of the assessee for A.Ys.2010-11 and 2011-12 and as the facts and circumstances of the year under consideration are same, I have no reason to deviate from the stand of my Ld. Predecessor. Accordingly, the addition made by the AO is confirmed. Consequently, this ground of appeal of assessee is also rejected.

.....

22. In view of the above, I hold that provisions of Sec.14A read with Rule 8D are applicable to the appellant's case. Further the disallowance worked out by the AO under Sec.14A read with rule 8D appears to be totally justified and does not call for any interference. The same is, therefore, upheld. Consequently the ground taken by the assessee is dismissed.

.....

27. I have considered the facts of the case, contentions and submissions of the assessee as well as the order of the AO. It is

gathered that the assessee has outstanding creditors for more than 3 years amounting to Rs. 37,50,970/-. Out of which an amount of Rs.3,16,209/ was paid till 31.03.2012 and amount of Rs.41,226/ was written back and therefore net amount outstanding was Rs.33,58,534/-. During the course of assessment proceedings, the AO asked the assessee to explain as to why the provision of section 41(1) of the Act may not be invoked in respect of the above creditors and why the above liability may not be treated as ceased and brought to tax in the hands of the assessee. However it appears that the assessee could not give any satisfactory reply in this regard. Therefore the AO invoked the provisions of section 41(1) in respect of the above amount and added back the same in the hands of the assessee.

28. During the course of appellate proceedings also the assessee has not furnished any credible explanation as to why these Amounts has been outstanding for a long long time and why the relevant liability had not been paid by assessee. It is gathered that out of total amount of Rs.37,50,970/- only an amount of Rs. 3,16,209/- has been paid back till today, even after a period of 8 years. Therefore, it is but natural that the assessee has no intention whatsoever to pay this liability nor the creditors have any interest in recovering the same from the assessee. It is also gathered that the assessee company already has gone into liquidation and apparently has not been doing any business at present. If that be the case, there appears to be no possibility of paying this liability in future either. Therefore, the above liability is as good as having ceased and therefore provision of section 41(1) are clearly applicable. Therefore, such amounts are liable to be taxed in the hands of the assessee.

29. The Ld. AR in this regard also relied upon various case laws. However, it may be mentioned that facts of the present case, as brought out in the preceding paras are clearly distinguishable to the facts of various case laws relied upon by the assessee and therefore ratio of these case laws in my humble opinion may not be applicable to the facts of the present case.

30. In view of the above facts, addition of Rs.33,58,534/- made by the AO u/s 41(1), as Cessation of Liability is confirmed. Consequently, the ground taken by the assessee in this regard is rejected."

6. On a careful perusal of the order of the Ld.CIT(A) and the reasons given therein, we do not find any reason to interfere especially when there is no material to controvert the findings of the First Appellate Authority. Accordingly, appeal filed by the assessee is dismissed.

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

Order pronounced in the open court on 31.03.2022

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER
Mumbai / Dated 31/03/2022
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT 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