IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad 'B' Bench, Hyderabad

Before Shri Laxmi Prasad Sahu, Accountant Member
AND
Shri K.Narasimha Chary, Judicial Member

ITA No.349/Hyd/2017		
Assessment Years: 2001-02		
Dr.Reddy's Laboratories Limited 8-2-337, Road No.3 Banjara Hills Hyderabad-500 034 PAN : AAACD7999Q	Vs.	DCIT,Circle-1(2) Hyderabad
(Appellant)		(Respondent)
Assessee by:	Shri P.S.R.V.V.Surya Rao, CA	
Revenue by:	Shri Y.V.S.T.Sai,CIT-DR	
Date of hearing:	05.07.2022	
Date of pronouncement:	08. 07.2022	

O R D E R

Per Shri Laxmi Prasad Sahu, A.M.:

This appeal filed by the assessee is directed against the order dated 30.11.2016 of the Learned Commissioner of Income Tax (Appeals)-5, Hyderabad relating to AY 2001-02. On the following grounds of appeal:

1 The ld.CIT(A) erred in confirming the order of Assessing Officer and not appreciating the submission of assessee that the non-compete fee paid to Dr.PV Venugopal is an intangible asset eligible for depreciation u/s. 32(1)(ii)

2. The ld.CIT(A) failed to appreciate the submissions of assessee and erred in dismissing the ground of the assessee that DEPB is eligible for deduction u/s. 80HHC.

2. Brief facts of the case are that the assessment order passed by the AO pursuant to the order of ITAT in ITA No. 417 /Hyd/2006 vide order dated 25.07.2013. The AO observed as under:-

"with regards to non-compete fee of Rs.2.30 crores paid to Dr.P.V.Venugopal, the ITAt set aside the issue to the file of the Assessing Officer to consider allowance of depreciation on the above amount, if any following the directions of the ITAT, opportunity was given to the assessee, Shri P.S.R.V.V. Surya Rao, CA, AR of the assessee company along with Director (Taxation), Shri Simhachal Mohanty appeared from time to time and furnished the information as called for.

The Hon'ble ITAT has held that the expenditure cannot be considered for allowance u/s. 37. However, directed the AD to consider the same for allowance u/s. 32(2), considering the nature of payment and also in light of the fact that the non-compete fee is only for a period of 18 months the same cannot be treated on par with other items, know-how, patents, copyrights, trade marks, licences, franchises. Hence the same is disallowed.

With regards to deduction u/s. 80HHC on DEPB, the ITAT restored the issue to the file of the Assessing Officer to work out eligible deduction u/s, 80HHC, following the principles laid down by the Supreme court in the case of Topman Exports. Following the directions of the ITAT, opportunity was given to the assessee, Shri P.S.R.V.V. Surya Rao, CA, AR of the assessee company along with Director (Taxation), Shri Simhachal Mohanty appeared from time to time and furnished the information as called for.

As per the principle laid down by the Hon'ble Supreme Court in the case cited above, the assessee company was asked to furnish the purchase price of the DEPB. The assessee company expresses its inability to furnish the same as the same were very old. In the absence of the purchase price, the difference of DEPB which is to be considered for allowance cannot be worked out. Accordingly, the deduction u/s. 80HHC for DEPB is not considered."

3. Aggrieved from the above order of the AO ,the ld.CIT(A) dismiss the appeal of the assessee.

4. Aggrieved from the order of the ld.CIT(A), the assessee filed before the Income tax Appellate Tribunal

5. The ld. AR re-attracted the submissions made before the lower authorities. The ld. AR submitted that the non-compete fee paid to Dr.P.V..Venugopal is in the nature of intangible asset and it is

eligible for depreciation as per section 32 of the I.T.Act,1961. The Hon'ble Tribunal had decided that it is a capital expenditure, once it has been treated as a business capital expenditure, the depreciation should be allowed, whether the asset is a tangible or intangible, in support of his argument, he relied on the following judgments

1. SKS Micro Finance Ltd vs DCIT(ITA No.435/Hyd/2010, 12222/Hyd/2011 & 1789/Hyd/11) ITAT, Hyderabad
2. ACIT vs. GE Plastics India Ltd. (ITA No.483/Ahd/2007) -ITAT, Ahmedabad
3. CIT vs. Ingersoll Rand International Ind.Ltd.-2014(9) TMI 692- High Court of Karnataka
4. CIT vs. Hindustan Coco Cola Beverages Pvt.Ltd.-2011(1) TMI 138-High Court of Delhi.

6. The ld. AR further submitted that in respect of ground No.2 that the assessee has received cash benefit which comes under section 28(iiid), but not the section 28(iiib), therefore assessee is eligible for claim of deduction u/s. 80HHC on the export benefits. He further submitted that the evidences are available with the assessee and if the assessee is given a chance for production of details in respect of the export benefits definitely the assessee will submit the details as required by the AO.

7. On the other hand the ld. DR relied on the order of the lower authorities and submitted that the issue is squarely covered by the judgment of Co-ordinate Bench of the Tribunal of ITAT, Delhi Bench in case of [2022] 139 taxmann.com 87 (Delhi – Trib.) Sagar Ratna Restaurants (P.) Ltd.v. Assistant Commissioner of Income-tax, in which it has been held as under:-

Section 32 of the Income-tax Act, 1961 - Depreciation - Allowance/Rate of (Non-competefee) - Assessment year 2014-15 - Assessee-company paid non-competefees and treated same as capital expenditure - Assessee claimed depreciation on non-competefees - Assessing Officer disallowed said claim on ground that non-competefees was not in nature of intangible asset as per section 32(1)(ii) - Whether advantage arising from non-competefees was restricted only against seller and it would not be similar to intangible assets with

business or commercial right which could be transferred or traded and, thus, non-competefee paid by assessee would not be an intangible asset within ambit of section 32(1)(ii) and depreciation claimed on same was to be disallowed - Held, yes [Para 6] [In favour of revenue].

8. He further submitted that the agreement was made only for 18 months, which is a very short period for treating the capital expenditure and assessee was unable to establish any enduring benefit on the said capital expenditure. The ld.CIT(A) has examining the issue in details accordingly, the order of the ld.CIT(A) should be affirmed.

9. Further, in respect of ground No.2, the ld. DR relied on the order of the lower authorities and he submitted that the assessee was unable to substantiate that the export benefit is on transfer of DEPB which falls as per clause (iiid) of section.28 of the I.T.Act. In the profit and loss account, the assessee has credited as export benefits of Rs.71.3 millions, it is a net benefit received by the assessee

10. After hearing both the sides and perused the entire material available on records. We observed that the non compete fee paid to Dr.P.V.Venugopal upon the letter agreeing to refrain for a period of 18 months from entering into agreement as a non-compete fee has been held as capital expenditure as per the order of the ITA No.417/Hyd/2006 for AY 2001-02, order dated 25.07.2013 and the issue has been examined by the AO and not allowed the depreciation on the capital expenditure incurred by the assessee and ld.CIT(A) has confirmed the order of the AO. A similar issue has been decided by the Hon'ble Madras High Court in the case of [2021] 129 taxmann.com 55 (Madras) Commissioner of Income Tax, LTU, Chennai v Areva T & D India Ltd.

8. *The second question is as to whether the non compete fee is an asset in the nature of patents, copyrights, trademark, licence, franchises or any other business or commercial right of similar nature and as to whether the assessee is eligible to claim depreciation under section 32 of the Act.*

9. *The Tribunal took note of the decision of the High Court of Delhi in the assessee's own case for the Areva T & D India Ltd. v. Dy. CIT [2012] 20 taxmann.com 29/208 Taxman 252/345 ITR 421 and allowed the appeal filed by the assessee thereby reversing the findings of the CIT(A).*

10. *Mrs. R. Hemalatha, learned Senior Standing Counsel appearing for the appellant/Revenue has placed reliance on the decision of the Delhi High Court in the case of Sharp Business System v. CIT [2012] 27 taxmann.com 50/211 Taxman 576 in support of her contention that the amount paid as non compete fee did not qualify for depreciation under section 32(1)(ii) of the Act.*

11. *In the decision in the case of Asianet Communications Ltd. v. CIT [2018] 96 taxmann.com 399/257 Taxman 473/407 ITR 706, a Division Bench of this Court, to which, one of us (TSSJ) was a party, had considered the same issue as to, where the non compete fee paid by the assessee was for the purpose of its business and it did not entail an enduring benefit to the assessee in its business, whether the payment of such fee was to be allowed as revenue expenditure. In this decision, the Court took note of the decision of the Delhi High Court in the case of Sharp Business System and it has been held as follows :*

> *"36. So far as the decision in Sharp Business System (supra) is concerned, as pointed out earlier, in paragraph 5 of the judgment, it has referred to the decision of this Court in G.D. Naidu. The discussion is in paragraph 9 and the conclusion is in paragraph 10.*
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> *37. In paragraph 9 of the judgment, the Court has not discussed the decision of G.D. Naidu, though it has referred to it in paragraph 5 of the judgment. This is pointed out because, the Court has discussed the decision in Blaze & Central (P.) Ltd. (supra), which was distinguished in G.D. Naidu. We find that in paragraph 9 of the judgment, the Court after referring to Empire Jute Co. Ltd. (supra) and Alembic Chemical Works Co. Ltd. (supra), has pointed out that the single test, that is, whether the payment results in an enduring benefit cannot be conclusive in a decision as to whether an expenditure qualifies as one falling or in the capital field and that the decisions have emphasized the need to shift from a narrower field to a broader one, to ascertain the real nature of the advantage, which the taxpayer would derive.*
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> *38. Thus, the test to be applied following Empire Jute Co. Ltd. (supra) is to see as to whether it added to the capital of the assessee, whether a new asset was created and whether there was an addition or expansion of the profit making apparatus of the assessee and whether the assessee acquired source of profit or income when such investment was made. However, the Court in our respectful view, applied the test, which does not flow from the test laid down in Empire Jute Co. Ltd. (supra) by observing that the test is one of ascertaining whether from commercial angle and the advantage results in a capital field or it is the expenditure falls legitimately within the revenue field. Ultimately, the Court held that the arrangement for a period of 7 years is an enduring benefit. This in our respectful view, does not fulfil the test laid down by Empire Jute Co. Ltd. (supra) and in fact, the Court itself had pointed out that is not*

the conclusive test to determine whether expenditure is in capital field or revenue. Thus, for the above reasons, we are not in respectful agreement with the reasoning given by the Hon'ble Division Bench in Sharp Business System (supra).

39. It would be relevant to note that, in the case of Sharp Business System (supra), the Joint-venture company was incorporated in the assessment year 2001-02 and in the first year of business, with a view to warding off competition, it entered into agreement by paying a non-compete fee of Rs. 73 Crores to L & T Ltd., of setting-up or undertaking or assisting in the setting-up or undertaking any business in India, of selling, marketing and trade of electronic office products for seven years and this amount was treated as deferred revenue expenditure in the assessees books of accounts and written-off over corresponding period of seven years.

There is a marked difference in the factual position in Sharp Business System (supra) and the factual position in the case on hand where the assessee's business continues to remain the same, and this is also one more reason to hold that the decision in Sharp Business System (supra) is not applicable to the facts of the case apart from the reservation expressed by us above."

15. In the decision of this Court in the case of Asianet Communications Ltd., the Court distinguished the decision of the Delhi High Court in the case of Sharp Business System. We would hasten to add that the facts in the case of Sharp Business System were couched differently in the sense that a sum of Rs. 73 Crores was paid to M/s. L & T Ltd., as consideration for the latter in setting-up or undertaking or assisting in the setting-up or undertaking any business in India, of selling, marketing and trade of electronic office products for seven years. The facts of the case of the assessee before us are entirely different. This aspect had been noted by the Tribunal in paragraph 11 of the impugned order. The Tribunal also took note of the fact that in the assessee's own case, the High Court of Delhi decided the issue in favour of the assessee.

***16.** Before us, a chart has been filed showing the issue relating to depreciation on non compete fee. From the chart, we find that for the assessment year 2001-02, the Assessing Officer himself allowed it, which was confirmed by the CIT(A) and the decision of the CIT(A) was accepted by the Department. For the assessment year 2002-03, no scrutiny assessment had been carried out. For the assessment year 2003-04, the CIT(A) allowed it and the Assessing Officer gave effect to the order passed by the CIT(A). For the assessment year 2004-05, no scrutiny assessment was carried out and for the assessment year 2005-06, the claim was allowed by the CIT(A) and it was given effect to by the Assessing Officer. Thus, the Assessing Officer was bound to be consistent with the earlier decisions."*

11. Respectfully following the above decision of Hon'ble Madras High Court. We hold that the assessee is eligible to claim of depreciation on non-compete fee as intangible assets.

12. In the result, the ground No.1 is allowed

13. According to the next issue regarding ground No.2 the Co-ordinate Bench of the Tribunal in the case of ITA No.417/Hyd/2006 for AY 2001-02, the issue has been send back to the AO for working out the eligibility of deduction u/s. 80HHC, following the principles laid down by the Hon'ble Supreme Court in the case of Topman Exports vs. Commissioner of Income tax, Mumbai (2012) 18 taxmann.com 120, but during the proceedings u/s.254 o the I.T.Act, the assessee could not produce any documents in respect of export benefits credited into the profit and loss account. During the course of arguments the ld. AR undertook that if a chance is given again to the assessee, he would be eligible to produce the details whether it comes u/s. 28(iiib) or 28(iiid). Considering the prayer of the assessee, we are sending back again to the AO for computation of the eligibility deduction u/s.80HHC. In the result, the ground No. 2 is allowed for statistical purposes.

14. In the result, the appeal of the assessee is partly allowed for statistical purpose.

Order pronounced in the Open Court on 08th July, 2022.

Sd/-	**Sd/-**
(K.NARASIMHA CHARY) **JUDICIAL MEMBER**	**(LAXMI PRASAD SAHU)** **ACCOUNTANT MEMBER**

Hyderabad, dated 08th July, 2022.
Thirumalesh/sps

Copy to:

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2	DCIT,Circle-1(2) Hyderabad
3	CIT(A)-5, Hyderabad
4	Pr.CIT-5, Hyderabad
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order