

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

**BEFORE SHRI PAVAN KUMAR GADALE, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

**ITA NO. 824 & 825/MUM/2021
(A.Y: 2017-18 & 2012-13)**

M/s. Marie Gold Realtors Pvt. Ltd., 21 st Floor, Nirmal Building Nariman Point Mumbai - 400021 PAN: AAECM7896B	v.	ACIT – Central Circle – 8(1) 656, Aayakar Bhavan M.K. Road Mumbai - 400020
(Appellant)		(Respondent)

Assessee by	:	Shri Siddharth Kotari
Department by	:	Shri S.N. Kabra
Date of Hearing	:	03.06.2022
Date of Pronouncement	:	26.07.2022

ORDER

PER S. RIFAUR RAHMAN (AM)

1. These appeal are filed by the assessee against different orders of the Learned Commissioner of Income Tax (Appeals)-50, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 31.03.2021 for the A.Y. 2017-18 and 2012-13.

2. Since the issues raised in both the appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed off by this consolidated order. We are taking Appeal in ITA.No. 824/MUM/2021 for Assessment Year 2017-18 as a lead case.

3. Brief facts of the case are, assessee has filed its return of income on 31.10.2017 declaring loss of ₹.13,80,94,761/-. The return was processed u/s.143(3) of Income-tax Act, 1961 (in short "Act"). Subsequently return was selected for complete scrutiny under CASS. Accordingly, notice u/s. 143(2) and 142(1) were issued and served on the assessee. In response assessee filed various details on e-Filing portal. During the assessment proceedings Assessing Officer observed that assessee has claimed total depreciation of ₹.11,62,82,222/- (including depreciation of tenancy rights of ₹.8,47,48,773/- claimed as intangible assets) under the head depreciation allowable as per I.T. Act. Assessing Officer observed that during the year under consideration assessee has made an addition of ₹.1,17,35,000/- to tenancy rights which had an opening WDV at ₹.32,72,60,093/- and accordingly, claimed depreciation on tenancy rights as stated above i.e. 8,47,48,773/-. Accordingly, assessee was asked to substantiate why the depreciation claimed on tenancy rights should not be disallowed as the same is not permissible

under the provisions of Act. In response assessee submitted that in the earlier Assessment Year i.e. A.Y. 2013-14 in ITA.No. 3495/MUM/2018 vide order dated 03.01.2019, ITAT has allowed claim of the assessee.

4. After considering the submissions of the assessee, Assessing Officer rejected the submissions made by the assessee and by relying in the case of Dabur India Ltd., in ITA.No. 4679/MUM/2012, rejected the submissions made by the assessee by relying on Hon'ble Apex Court decision in the case of Techno Shares and Stocks Ltd., [327 ITR 323 (SC)]. Further, he explained the reasons why the case of the assessee is not falling u/s.32(1)(ii) of the Act which does not include the term licence, with the above observation he disallowed the deduction claim made by the assessee.

5. Aggrieved, assessee preferred an appeal before the Ld.CIT(A) and filed detailed submissions before him. Ld.CIT(A) after considering the detailed submissions found merit in the order passed by the Assessing Officer and further he relied in the case of Premier Book Co. v. ACIT in ITA.No. 4215/Del/2016 and ACIT v. Malayala Manorama Co. Ltd., [131 TTJ 342] sustained the addition made by the Assessing Officer and dismissed the ground raised by the assessee.

6. Aggrieved assessee is in appeal before us raising following grounds in its appeal: -

"1. On the facts and in the circumstances of the appellant's case and in law the Ld. CIT(A) erred in confirming the AO's action of not allowing the depreciation of Rs. 8,47,48,773/- on tenancy rights.

2. On the facts and in the circumstances of the appellant's case and in law the Ld. CIT(A) erred in confirming the AO's action of not allowing the depreciation on tenancy rights without appreciating the fact that tenancy rights falls within the purview of section 32(1)(ii) of the Income Tax Act, 1961.

3. On the facts and in the circumstances of the appellant's case and in law the Ld. CIT(A) erred in confirming the AO's action of not treating the tenancy rights as a licence, an intangible asset on which depreciation is allowable."

The appellant craves leave to add to, alter, amend and /or delete all or any of the foregoing grounds of appeal.

The appellant prays this Hon'ble Tribunal to delete the addition/disallowance made by the Ld. AO and confirmed by the Ld.CIT(A)."

7. At the time of hearing, Ld. AR submitted that the term tenancy rights is similar to the term licence and she brought to our notice Para No. 4 of the Assessment Order and she further brought to our notice Page No. 27 of the Paper Book which is the decision of the ITAT Delhi in M/s. Premier Book Company v. Addl. CIT in ITA.No. 5149/Del/2014 dated 11.08.2021 and relevant ratio of the decision which is in Para No. 24 of the Tribunal order. She submitted that commercial rights are such rights which are obtained for effectively carrying on the business and commerce,

and commerce, as is understood, is a wider term which encompasses in its fold many a facet. Studied in this background, any right which is obtained for carrying on the business with effectiveness is likely to fall or come within the sweep of meaning of intangible asset. The dictionary clause clearly stipulates that business or commercial rights should be of similar nature as knowhow, patents, copyrights, trademarks, licences, franchises, etc. and all these assets which are not manufactured or produced overnight but are brought into existence by experience and reputation. They gain significance in the commercial world as they represent a particular benefit or advantage or reputation built over a certain span of time and the customers associate with such assets.

8. On the other hand, Ld.DR relied on the decisions referred by the Ld.CIT(A) i.e. Premier Book Co. *v.* ACIT in ITA.No. 4215/Del/2016 and ACIT *v.* Malayala Manorama Co. Ltd., [131 TTJ 342] and supported the finding of the lower authorities.

9. Considered the rival submissions and material placed on record, we observe from the record that the assessee has acquired various tenancy rights and claimed depreciation on such tenancy rights @25% and even in the current assessment year assessee has acquired additional tenancy

rights of ₹.1,17,35,000/- and claimed depreciation on both current as well as opening WDV. We observe that this is not the first year assessee is claiming such depreciation. Even in the previous assessment years assessee has claimed the depreciation. Therefore, assessee has submitted that depreciation has to be allowed on the ground of consistency since the depreciation is allowed in the previous assessment year. At the same time this issue is a peculiar issue involving divergent views in various courts. It is important to note that the order of the Hon'ble ITAT (Delhi) in Premier Book Company has been superseded by a subsequent order of the Hon'ble ITAT in the same case, ITA No. 5149/Del/2014 decided on 11.02.2021. The Tribunal in this order has relied on the case of Hindustan Coca Cola Beverages [198 Taxxman.com 104 Delhi] where the Hon'ble High court has taken a view that meaning of the phrase 'rights of similar nature' should be given a wider meaning. The relevant part of the decision of the tribunal is reproduced below: -

"We have carefully considered the orders of the authorities below. At the very outset, we have to state that depreciation has been claimed on the written down value as on 01.04.2009 which means that depreciation was claimed in earlier years also. We find that this is not the initial year of claim of depreciation. In our considered opinion, unless claim is disturbed in the initial A.Y of the claim, the same cannot be disturbed in the subsequent A.Y if the facts are same."

10. The Hon'ble Delhi High Court in the case of Hindustan Coco Cola Beverages (supra) had an occasion to examine the provisions of section 32 of the Act. The decision has been discussed in the later part of this order.

11. The above order in the Premier Book Company case relied upon by the Assessing Officer does not have any mention of the decision of a higher court in Hindustan Coco Cola beverages. Further the earlier Premier Book Co, case relied upon by Assessing Officer takes a very restricted view of the meaning of the phrase "rights of similar nature". The Assessing Officer has mentioned the decision in Techno Shares & Stocks where it was decided that a membership card of BSE was depreciable under sec 32(1) of the Act. The decision of the case of Techno Shares and Stocks has simply been brushed away stating that, a BSE membership card is a asset different from tenancy right. The fact is that both the membership card and tenancy right enabled the assessee to carry on its business. The tenancy rights represent the licence for the place to carry on the business. Therefore, it is commercial rights for carrying on business and eligible for depreciation.

12. The decision in the case Malayala Manorama Co. Ltd. can also be differentiated from the assessee case. In that decision it was held that an amount paid by the assessee in respect of lease premises is not eligible u/s 32(1)(ii) of the Act as the assessee by the payment had not acquired any asset tangible or intangible. The facts are that assessee has acquired a premises on rent on sublease from M M rubber who was original lessee. The Tribunal found that the amount paid was refundable if the occasions arises. In the case of assessee however the amount paid is for purchase of tenancy right and the amount is not refundable under any circumstances. What the assessee has acquired is tenancy right which is transferable. Thus it is a asset which is intangible in nature and being connected in an integral way to the business, is eligible for depreciation u/s 32(1)(ii) of the Act.

13. We observed from the submissions made by the assessee that in the case of CIT v. M/s. Areva T & D India Limited, Hon'ble Madras High Court decided this particular issue in favour of the assessee and it is held as under: -

"As far as the present case is concerned, we must point out to the agreement with the landlord, which showed the payment of consideration for the surrender of tenancy rights. The Revenue does not dispute the existence of such an agreement. It is also not disputed by the Revenue that the purchase of the premises by the

assessee was from M/s. Harsaran Singh Constructions Pvt Ltd., which had nothing to do with the landlord. Given the fact that tenancy right is a capital asset, as held by the Apex Court in the decision reported in (2005} 273 ITR 1 (SC) (CIT Vs. D.P. Sandhu Bros. Chembur P. Ltd.) that the surrender of tenancy rights amounted to transfer and hence, being a capital receipt, on the facts thus placed before this Court that the amount paid on account of surrender of tenancy rights being given by the assessee to the builder, there is no exchange of one property for the other. Hence, we have no hesitation in accepting the plea of the assessee, thereby rejecting the Revenue's contention raised in all these Tax Cases. Consequently we hold that the assessee is entitled to depreciation'.

It is respectfully submitted that if an intangible asset enables and permits an assessee to carry on its business, it falls within the expression "any other business or commercial rights of similar nature" and depreciation is allowable on the said intangible asset. in the facts of the present case tenancy right enables and permits the assessee to permit third party to occupy the premises for carrying out their commercial activities and thereby pursue its objects. Hence, in the facts of the present case tenancy rights are similar or akin to licence and eligible for depreciation.

14. Further, it is brought to our notice that in the case of CIT v. Hindustan Coca Cola Beverages (P.) Ltd., (2011) 198 TAXMAN 104 (Del) the Hon'ble Delhi High Court interpreted the term commercial rights in the backdrop of section u/s. 32(1)(ii) of the Act and it is held as under: -

"The scope of section 32 has been widened by the Finance (No. 2) Act, 1998 whereby depreciation is allowed on intangible assets acquired on or after 1-4-1998. As per section 32(1)(ii), depreciation is allowable in respect of know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets. Scanning the anatomy of the section, it can safely be stated that the provision allows depreciation on both, tangible and intangible assets and clause (ii) enumerates the intangible assets on which depreciation is allowable. The assets, which are included in the definition of intangible assets, include, along with other things, any other

business or commercial rights of similar nature. The term 'similar' has been dealt with by the Apex Court in Nat Steel Equipment (P) Ltd. v: Collector of Central Excise AIR 1988 SC 631 wherein the Apex Court has opined that the term 'similar' means corresponding to or resembling something in many aspects. [Para 21]

The assessee's claim was that the Assessing Officer had treated the transactions keeping in view the concept of business or commercial rights of similar nature and put those in the compartment of intangible assets. To effectively understand what would constitute an intangible asset, certain aspects like the nature of goodwill involved, how the goodwill has been generated, how it has been valued, agreement under which it has been acquired, what intangible asset it represents, namely, trademark, right, patent, etc., and further, whether it would come within the clause, namely, 'any other business or commercial rights which are of similar nature' have to be borne in mind. [Para 22]

On a scrutiny of the order passed by the Tribunal, it was crystal clear that the depreciation was claimed by the assessee on goodwill on account of payment made for the marketing and trading reputation, trade style and name, marketing and distribution, territorial know-how, including information or consumption patterns and habits of consumers in the territory and the difference between the consideration paid for business and value of the tangible assets. The Tribunal had treated the same to be valuable commercial asset similar to other intangibles mentioned in the definition of the block of assets and, hence, eligible for depreciation. It had also been noted by the Tribunal that the said facts were stated by the assessee in the audit report and the Assessing Officer had examined that report and also made queries and accepted the explanation offered by the assessee. The acceptance of the claim of the assessee by the Assessing Officer would come in the compartment of taking a plausible view inasmuch as basically intangible assets are identifiable non-monetary assets that cannot be seen or touched or physically measured which are created through time and/or effort and which are identifiable as separate assets. They can be in the form of copyrights, patents, trademarks, goodwill, trade secrets, customer lists, marketing rights, franchises, etc., which either arise on acquisition or are internally generated. (Para 23)

The meaning of business or commercial rights of similar nature has to be understood in the backdrop of section 32(1)(ii). Commercial rights are such rights which are obtained for effectively carrying out

the business. Commerce, as is understood, is a wider term which encompasses in its fold many facets. Studied in this background, any right which is obtained for carrying on the business with effectiveness is likely to fall or come within the sweep of meaning of an intangible asset. The dictionary meaning clearly stipulates that business or commercial rights should be of similar nature as know-how, patents, copyrights, trademarks, licences, franchises, etc., and all these assets are not manufactured or produced overnight but are brought into existence by experience and reputation. They gain significance in the commercial world as they represent a particular benefit or an advantage or reputation built over a certain span of time and the customers associate themselves with such assets. Goodwill, when appositely understood, does convey a positive reputation built by a person/company/business concern over a period of time, regard being had to the wider expansion of the definition after the amendment to section 32 by the Finance (No. 2) Act, 1998 and the auditor's report and the explanation offered before the Assessing Officer. The Tribunal was justified in holding that if two views were possible and the Assessing Officer had accepted one of the views which was a plausible one, it was not appropriate on the part of the Commissioner to exercise his power under section 263, solely on the ground that in the books of account it was mentioned as a 'goodwill' and nothing else. [Para 24]

In view of the aforesaid analysis, the order passed by the Tribunal was justified. [Para 25]

15. After considering the above discussion, we are of the view that the Coordinate Bench of Delhi in the recent decision in the case of M/s. Premier Book Company v. Addl. CIT (supra) has dealt with this particular issue in detail and decided that tenancy rights will fall within the definition of intangible assets as per section u/s. 32(1)(ii) of the Act. Respectfully following the above said decision, we are inclined to allow the ground raised by the assessee.

16. Coming to the appeal relating to A.Y. 2012-13, since facts in these cases are mutatis mutandis, therefore the decision taken in A.Y. 2017-18 is applicable to these Assessment Year also. Accordingly, these appeals are allowed.

17. In the result, appeals filed by the assessee are allowed.

Order pronounced in the open court on 26th July, 2022.

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai / Dated 26.07.2022
Giridhar, Sr.PS

Sd/-
(S. RIFAUZ 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