IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No. 1020/Bang/2007
Assessment Year : 2000-01

The Deputy Commissioner of Income Tax, Central Circle – 1(3), Bangalore.	**Vs.**	M/s. Wipro GE Medical Systems Ltd., Plot no. 4, Kadugodi Indl. Area, Sadaramangala, Bangalore – 560 067. **PAN: AAACW1685G**
APPELLANT		**RESPONDENT**

Assessee by	**:**	Shri K.R. Pradeep & Smt. Girija G.P., Advocates
Revenue by	**:**	Shri K.R. Narayana, Addl. CIT-DR

Date of Hearing	**:**	21-10-2022
Date of Pronouncement	**:**	30-11-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal arises out of remand by *Hon'ble Karnataka High Court* in *ITA No. 1058/2008* vide order dated 02/12/2016 in an appeal filed by revenue.

2. The Ld.AR submitted that revenue filed appeal before the *Hon'ble Karnataka High Court* against order dated 20/06/2008 passed by this *Tribunal* on following issues.

1) Reduction in claim of exemption of profits u/s. 10A.
2) Reduction in claim u/s. 80HHE.

3) Reduction of claim u/s. 80IB
4) Disallowance of non-compete fee paid as a revenue expenditure

3. *Hon'ble High Court* while dealing with the above issues framed the following questions of law.

> *"(i) Whether the appellate authorities were correct in holding that when computing deduction u/s 10A of the Act expenditure should be confined to manufacturing division and not equally distributed to all units of respective employee cost based on pay roll, travel and living cost of employees, R & D expenditure etc., by insulating Section 10A of the Act divisions by following earlier years orders, by following the view in the earlier years?*
> *(ii)*
> *(iii) Whether the appellate authorities were correct in holding that when computing deduction u/s 80HHE of the Act the total turnover should be computed on the business carried on by the assessee and not only on the profits of the undertaking which was considered for deduction u/s 80HHE of the Act, by following the view in the earlier years?*
> *(iv)*
> *(v) Whether the appellate authorities were correct in reversing the finding of the assessing Officer that the assessee had not computed the deduction u/s80HHE of the Act by taking the profits of business amounting to Rs.4,01,94,255/- and excluding 90% of agency commission, sundry income, provision no longer required etc., as per Explanation (c) to Section 80HHE of the Act, by following the view in the earlier years?*
> *(vi) Whether the appellate authorities were correct in reversing the finding of the assessing Officer that the non-competition fee of Rs.1,18,14,504/- paid in respect of Marquette range of products was not a revenue expenditure and consequently the claim of ¼ of the same being written off in the accounts amounting to Rs.29,53,625/- during the current assessment year was not justified, by following the view in the earlier years?"*"

4.*Hon'ble High Court* observed that in respect of first three issues, the decision of *Coordinate Bench, of Hon'ble High Court in ITA 776/2006 dated 05/11/2013, ITA 507/2002 vide order dated*

25/08/2010, and ITA 3204/2005 vide order dated 28/02/2012 decided the same issue in favour of assessee.

5. However, regarding the questions framed in respect of non-compete fee being (iii) and (iv), the issue was remanded to the *Tribunal* by observing as under:

> *"9. However, learned counsel appearing for appellant - revenue did contend that so far as question Nos.(iii) & (iv) are concerned, there is no discussion at all by the Tribunal. He further contended that even if question Nos.(i) and (ii) are answered in favour of the assessee against the revenue, then also Tribunal being ultimate fact finding authority could have examined the facts and they could have considered the appeal of the revenue and as the same has not been done, this Court may remand the matter to the Tribunal for further examination.*
> *10. The learned counsel appearing for the Assessee is unable to show any specific discussion in the impugned order of the Tribunal for consideration of the facts concerning to questions (iii) and (iv). Not only that, but even if it is considered that question nos.(i) and (ii) are answered in favour of the assessee, then also, the Tribunal will be required to consider the facts of the present case and thereafter will have to record the ultimate conclusion. Since there is no discussion on facts to that extent by the Tribunal, we find that so far as consideration of question nos. (iii) and (iv), matter may be required to be remanded to the Tribunal. Suffice it to observe that the Tribunal will examine the facts and figures in light of question nos.(i) and*
> *(ii) answered in favour of the assessee and will give opportunity of hearing to the Revenue as well as to the assessee and shall pass the appropriate orders in accordance with law.*
> *11. In the result, question Nos.(i) and (ii) are answered in favour of the assessee against the Revenue.*
> *So far as consideration of facts of the present case is concerned, in light of question Nos.(iii) and (iv) formulated, matter is remanded to the Tribunal."*

6. The Ld.AR thus submitted that the only issue that is to be considered in the present remand proceeding, is in respect of disallowance of non-compete fee.

7. Now coming to the issue that has been remanded to this *Tribunal,* the brief facts that arises in respect of the same are as under:

> *"The appellant company entered into an agreement with Marquette Electronics (SEA) Pte Ltd, Singapore Marquette Electronics (India) Pvt Ltd, India, Marquette Electronics (M) SDN BI-ID, Malaysia and Marquette Electronics (SEA) Ltd, Thailand (known as Ramesh Affiliates) and V.Ramesh (SELLERS) to acquire from the sellers the business of distribution and service of GEM:MS products and other medical equipment and services in the Territory mentioned in the agreement. As a part of the agreement a sum of Rs. 1,18,14,504/- was paid towards the non-competition and other covenants. The same was claimed as allowable revenue expenditure."*

8. It was submitted before the Ld.AO that the assessee had written off Rs.29,53,626/-(being the 1/4th of the total expenditure) on account of miscellaneous expenditure and claimed the balance being Rs.88,60,879/- as revenue expenditure.

9. The Ld.AO while considering the claim was of the opinion that assessee received an enduring benefit and therefore the expenditure cannot be allowed as revenue in the hands of assessee. The Ld.CIT(A) relied on the decision of *Hon'ble Supreme Court* in case of *Coalshipments Pvt. Ltd.* wherein *Hon'ble Supreme Court* had held that payments made towards off competition in a business to a rival would constitute capital expenditure if the object of making that payment is to derive advantage by eliminating competition over some month of time.

10. The Ld.AO further recorded the observations of the *Hon'ble Supreme Court* that went to add that, although an enduring benefit need not be of an everlasting character it should not be so

transiting and ephemeral that it can be terminated at any time at the violation of any of the parties.

Against this order of the Ld.AO, assessee preferred appeal before the Ld.CIT(A).

11. The Ld.CIT(A) allowed the claim of assessee by observing as under:

> *"Before me it is submitted that on reading of the underlying agreement it is clear that the said payment was made towards enhancement of market share and to obligate Ramesh Affiliates from not carrying out certain activities which the appellant was carrying on. The net effect was increase in market share with less fetters thereby increase in the profits earned. The payment ensured a commercial advantage in the realm of working capital in as much as no capital asset was acquired from out of these payments made. The said expenditure was incurred wholly and exclusively for the purposes of the business and no tangible asset accrued to the assessee. The appellant has relied on the decisions of the Supreme Court in 124 ITR 1- Empire Jute Co Ltd v CIT, 177 ITR 377 — Alembic Chemical Works Co Ltd v CIT, 288 ITR 1 — S.A. Builders Pvt Ltd and the decision of the jurisdictional High Court in the case of Mcdowell Co Ltd in ITA.No. 12/99, and also recent decision of the ITAT, Kolkatta in the case of Shaw Wallace & Co Ltd in ITA.No. 470/Ca1/1998. Further, it is submitted similar type of payment made in the AY: 1991-92 have been allowed by the ITAT in the appellant's own case as revenue expenditure and accordingly prayed for allowing the deduction as claimed.*
>
> *I have gone through the records, the agreement and the arguments Of the appellant.*
> *The payment of Rs. 1,18,14,504/- is evidenced by an agreement entered into with various parties as mentioned supra. The purpose of the payment is delineated in the agreement and the expenditure gives rise to a business advantage in form of larger market share and profits. If the assessee had incurred expenditure on marketing, sales promotion and advertisement, etc., to increase the market share and profits, the expenditure would have been allowed as revenue expenditure without any argument to the contrary. By incurring the expenditure the appellant has not acquired any capital asset or right in any capital asset. The AO has erred in coming to the conclusion that*

> *the assessee has derived enduring benefit from the payment made and therefore it is a capital expenditure. Moreover similar type of expenditure incurred by the appellant in the AY: 1991-92, has been allowed as revenue expenditure. Therefore following the decision of the ITAT in the appellant's own case and also the decision of the jurisdictional High Court in the case of Mcdowell's mentioned supra and the ratio's laid down in the various decisions of Supreme Court, High court and ITAT cited by the appellant, I hold that the payment of Rs. 1,18,14,504/- as revenue expenditure and I direct the AO to allow the same."*

12. The Ld.DR submitted that, the issue regarding the non-compete payments was decided by *Hon'ble Karnataka High Court* by way of consolidated order in assessee's own case, passed in *ITA Nos. 438 to 444/2002 dated 21/09/2007 for A.Y. 1991-92.* Reliance was also placed by the Ld.DR on;

- *Decision of Hon'ble Supreme Court in case of and CIT vs. Coal Shipments Pvt.Ltd reported in (1971) 82 ITR 902 and*
- *Decision of Hon'ble Delhi High Court in case of Sharp Business System vs.CIT reported in (2012) 27 taxmann.com 50.*

13. The Ld.DR submitted that though the agreement is for a period of three years, the intention of the parties must be looked into. The Ld.DR submitted that as the assessee secured the advantage of enduring nature under the agreement, the payment in question has been rightly treated as capital expenditure.

14. On the contrary, the Ld.AR primarily submitted that, the Ld.AO is recording the fact that the view taken by this *Tribunal* in the Assessment year 1991-92 is not applicable to the facts for the year under consideration.

15. The Ld.AR submitted that the expenditure was been incurred for business necessity and the agreement was been entered for a period of 3 years. He referred to the following observation by the Ld.AO in order to support his submissions that, there was no

transfer of intangible/capital asset to the assessee against which the non compete payment was made. In support of his submissions he relied on following decisions:

- *Hon'ble Supreme Court in case of Empire Jute CO.Ltd vs. CIT reported in (1980) 124 ITR 1;*
- *Hon'ble Karnataka High Court in case of CIT vs. Mc.Dowell & Co.Ltd reported in (2007)291 ITR 107*
- *Hon'ble Madras High Court in case of Asianet Communications Ltd vs. CIT reported in (2018) 407 ITR 706*
- *Hon'ble Karnataka High Court in case of CIT vs. M/s. Hewlett Packard India Sales Pvt.Ltd. in ITA no.33/2006 dated 09/01/2020*

16. Ld.AR argued that the revenue is admitting to the fact that the payments are made towards the restrictive covenant and therefore has to be treated as revenue expenditure.

We have perused the submissions advanced by both sides in the light of the records placed before us.

17. *Hon'ble Supreme Court* in the case of *Empire Jute Co. Ltd.* v. *CITI* reported in *(1980) 3 Taxman 69,* held as under:—

> *'The decided cases have, from time to time, evolved various tests for distinguishing between capital and revenue expenditure but no test is paramount or conclusive. There is no all embracing formula which can provide a ready solution to the problem; no touchstone has been devised. Every case has to be decided on its own facts, keeping in mind the broad picture of the whole operation in respect of which the expenditure has been incurred. But a few tests formulated by the courts may be referred to as they might help to arrive at a correct decision of the controversy between the parties. One celebrated test is that laid down by Lord Cave L.C. in Atherton v. British Insulated and Helsby Cables Ltd. [1925] 10 TC 155, 192 (HL), where the learned Law Lord stated:*
>
> > *".....when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."*
>
> *This test, as the parenthetical clause shows, must yield where there are special circumstances leading to a contrary conclusion and, as pointed out by Lord Radcliffe in Commissioner of Taxes v. Nchanga*

Consolidated Copper Mines Ltd. [1965] 58 ITR 241 (PC), it would be misleading to suppose that in all cases, securing a benefit for the business would be, prima facie, capital expenditure so long as the benefit is not so transitory as to have no endurance at all. There may be cases where expenditure, even if incurred for obtaining advantage of enduring benefit, may, none the less, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit is, therefore, not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case. But even if this test were applied in the present case, it does not yield a conclusion in favour of the revenue. Here, by purchase of loom hours no new asset has been created. There is no addition to or expansion of the profit-making apparatus of the assessee. The income-earning machine remains what it was prior to the purchase of loom hours. The assessee is merely enabled to operate the profit making structure for a longer number of hours. And this advantage is clearly not of an enduring nature. It is limited in its duration to six months and, moreover, the additional working hours per week transferred to the assessee have to be utilised during the week and cannot be carried forward to the next week. It is, therefore, not possible to say that any advantage of enduring benefit in the capital field was acquired by the assessee in purchasing loom hours and the test of enduring benefit cannot help the revenue.

Another test which is often applied is the one based on the distinction between fixed and circulating capital. This test was applied by Lord Haldane in the leading case of John Smith and Son v. Moore [1921] 12 TC 266, 282 (HL) where the learned law Lord drew the distinction between fixed capital and circulating capital in words which have almost acquired the status of a definition. He said:

> *"Fixed capital as what the owner turns to profit by keeping it in his own possession ; circulating capital as what he makes profit of by parting with it and letting it change masters."*

Now so long as the expenditure in question can be clearly referred to the acquisition of an asset which falls within one or the other of these two categories, such a test would be a critical one. But this test also sometimes breaks down because there are many forms of expenditure which do not fall easily within these two categories and not infrequently, as pointed out by Lord Radcliffe in Commissioner of Taxes

v. Nchanga Consolidated Copper Mines Ltd. [1965] 58 ITR 241 (PC), the line of demarcation is difficult to draw and leads to subtle distinctions between profit that is made "out of" assets and profit that is made "upon" assets or "with" assets. Moreover, there may be cases where expenditure, though referable to or in connection with fixed capital, is nevertheless allowable as revenue expenditure. An illustrative example would be of expenditure incurred in preserving or maintaining capital assets. This test is, therefore, clearly not one of universal application. But even if we were to apply this test, it would not be possible to characterise the amount paid for purchase of loom hours as capital expenditure, because acquisition of additional loom hours does not add at all to the fixed capital of the assessee. The permanent structure of which the income is to be the produce or fruit remain, the same; it is not enlarged. We are not sure whether loom hours can be regarded as part of circulating capital like labour, raw material, power, etc., but it is clear beyond doubt that they are not part of fixed capital and hence even the application of this test does not compel the conclusion that the payment for purchase of loom hours was in the nature of capital expenditure. The revenue, however, contended that by purchase of loom hours the assessee acquired a right to produce more than what it otherwise would have been entitled to do and this right to produce additional quantity of goods constituted addition to or augmentation of its profit-making structure. The assessee acquired the right to produce a larger quantity of goods and to earn more income and this, according to the revenue, amounted to acquisition of a source of profit or income which though intangible was nevertheless a source or "spinner" of income and the amount spent on purchase of this source of profit or income, therefore, represented expenditure of capital nature. Now it is true that if disbursement is made for acquisition of a source of profit or income, it would ordinarily, in the absence of any other countervailing circumstances, be in the nature of capital expenditure. But we fail to see how it can at all be said in the present case that the assessee acquired a source of profit or income when it purchased loom hours. The source of profit or income was the profit-making apparatus and this remained untouched and unaltered. There was no enlargement of the permanent structure of which the income would be the produce or fruit. What the assessee acquired was merely an advantage in the nature of relaxation of restriction on working hours imposed by the working time agreement, so that the assessee could operate its profit-earning structure for a longer number of hours. Undoubtedly, the profit-earning structure of the assessee was enabled to produce more goods, but that was not because of any addition or augmentation in the profit-making structure, but because the profit-making structure could be operated for longer working hours. The expenditure incurred for this purpose was primarily and essentially related to the operation or working of the looms which constituted the profit-earning apparatus of the assessee. It was an expenditure for operating or working the looms for longer working hours with a view to producing a larger quantity of goods and earning more

income and was, therefore, in the nature of revenue expenditure. We are conscious that in law as in life, and particularly in the field of taxation law, analogies are apt to be deceptive and misleading, but in the present context, the analogy of quota right may not be inappropriate. Take a case where acquisition of raw material is regulated by quota system and in order to obtain more raw material the assessee purchases the quota right of another. Now, it is obvious that by purchase of such quota right, the assessee would be able to acquire more raw material and that would increase the profitability of his profitmaking apparatus, but the amount paid for purchase of such quota right would indubitably be revenue expenditure, since it is incurred for acquiring raw material and is part of the operating cost. Similarly, if payment has to be made for securing additional power every week, such payment would also be part of the cost of operating the profit-making structure and hence in the nature of revenue expenditure, even though the effect of acquiring additional power would be to augment the productivity of the profit-making structure. On the same analogy payment made for purchase of loom hours which would enable the assessee to operate the profit-making structure for a longer number of hours than those permitted under the working time agreement would also be part of the cost of performing the income earning operations and hence revenue in character. When dealing with cases of this kind where the question is whether expenditure incurred by an assessee is capital or revenue expenditure, it is necessary to bear in mind what Dixon J. said in Hallstorm's Property Ltd. v. Federal Commissioner of Taxation (72 CLR 634) : "What is an outgoing of capital and what is an outgoing on account of revenue depends on what the expenditure is calculated to effect from a practical and business point of view rather than upon the juristic classification of the legal rights, if any, secured, employed or exhausted in the process." The question must be viewed in the larger context of business necessity or expediency. If the outgoing expenditure is so related to the carrying on or the conduct of the business that it may be regarded as an integral part of the profit-earning process and not for acquisition of an asset or a right of a permanent character, the possession of which is a condition of the carrying on of the business, the expenditure may be regarded as revenue expenditure. See Bombay Steam Navigation Co. (1953) P. Ltd. v. CIT [1965] 56 ITR 5 2 (SC). The same test was formulated by Lord Clyde in Robert Addie and Sons' Collieries Ltd. v. IRC [1924] 8 TC 671, 676 (C Sess) in these words : "Is it a part of the company's working expenses ?-is it expenditure laid out as part of the process of profit earning ?-or, on the other hand, is it a capital outlay ?-is it expenditure necessary for the acquisition of property or of rights of a permanent character, the possession of which is a condition of carrying on its trade at all ?" It is clear from the above discussion that the payment made by the assessee for purchase of loom hours was expenditure laid out as part of the process of profit earning. It was, to use Lord Sumner's words, an outlay of a business "in order to carry it on and to earn a

profit out of this expense as an expense of carrying it on". [John Smith and Son v. Moore [1921] 12 TC 266, 296 (HL)]. It was part of the cost of operating the profit-earning apparatus and was clearly in the nature of revenue expenditure. It was pointed out by Lord Radcliffe in Commissioner of Taxes v. Nchanga Consolidated Copper Mines Ltd. [1965] 58 ITR 241 (PC) that "in considering allocation of expenditure between the capital and income accounts, it is almost unavoidable to argue from analogy". There are always cases falling indisputably on the one or the other side of the line and it is a familiar argument in tax courts that the case under review bears close analogy to a case falling on the right side of the line and must, therefore, be decided in the same manner. If we apply this method, the case closest to the present one that we can find is Nchanga Consolidated Copper Mines' case [1965] 58 ITR 241 (PC). The facts of this case were that three companies which were engaged in the business of copper mining formed a group and consequent on a steep fall in the price of copper in the world market, this group decided voluntarily to cut its production by 10 per cent. which for the three companies together meant a cut of 27,000 tons for the year in question. It was agreed between the three companies that for the purpose of giving effect to this cut, company B should cease production for one year and that the assessee-company and company R should undertake between them the whole group programme for the year reduced by the overall cut of 27,000 tons and should pay compensation to company B for the abandonment of its production for the year. Pursuant to this agreement the assessee paid to company B, pounds.1,384,569 by way of its proportionate share of the compensation and the question arose whether this payment was in the nature of capital expenditure or revenue expenditure. The Privy Council held that the compensation paid by the assessee to company B in consideration of the latter agreeing to cease production for one year was in the nature of revenue expenditure and was allowable as a deduction in computing the taxable income of the assessee. Lord Radcliffe, delivering the opinion of the Privy Council, observed that the assessee's arrangement with companies R and B "out of which the expenditure arose, made it a cost incidental to the SUNIL production and sale of the output of the mine" and as such its true analogy was with an operating cost. The payment of compensation represented expenditure incurred by the assessee for enabling it to produce more goods despite the cut of 10 per cent. and it was plainly part of the cost of performing the income-earning operation. This decision bears a very close analogy to the present case and if payment made by the assesseecompany to company B for acquiring an advantage by way of entitlement to produce more goods notwithstanding the cut of 10 per cent. was regarded by the Privy Council as revenue expenditure, a fortiori, expenditure incurred by the assessee in the present case for purchase of loom hours so as to enable the assessee to work the profit making apparatus for a longer number of hours and produce more goods than what the assessee would otherwise be entitled to do, must be held to be of revenue

character. The decision in IRC v. Carron Company [1968] 45 TC 18 (HL), also bears comparison with the present case. There certain expenditure was incurred by the assessee-company for the purpose of obtaining a supplementary charter altering its constitution, so that the management of the company could be placed on a sound commercial footing and restrictions on the borrowing powers of the assessee-company could be removed. The old charter contained certain antiquated provisions and also restricted the borrowing powers of the assesseecompany and these features severely handicapped the assessee-company in the development of its trading activities. The House of Lords held that the expenditure incurred for obtaining the revised charter eliminating these features which operated as impediments to the profitable development of the assesseecompany's business was in the nature of revenue expenditure since it was incurred for facilitating the day-today trading operations of the assessee-company and enabling the management and conduct of the assesseecompany's business to be carried on more efficiently. Lord Reid emphasised in the course of his speech that the expenditure was incurred by the assessee-company "to remove antiquated restrictions which were preventing profits from being earned" and on that account held the expenditure to be of revenue character. It must follow on an analogical reasoning that expenditure incurred by the assessee in the present case for the purpose of removing a restriction on the number of working hours for which it could operate the looms, with a view to increasing its profits, would also be in the nature of revenue expenditure. We are, therefore, of the view that the payment of Rs. 2,03,255 made by the assessee for purchase of loom hours represented revenue expenditure and was allowable as a deduction under s. 10(2)(xv) of the Act. We accordingly allow the appeal and answer the question referred by the Tribunal in favour of the assessee and against the revenue. The revenue will pay to the assessee costs throughout.'

18. In the present case, the "non-compete fee" paid by the assessee to the transferor company under an agreement, where the transferor company shall not directly or indirectly manage, operate or have an interest in control or participate or compete against the assessee anywhere in the world for three years. Thus, the expenditure incurred primarily and essentially, related to the non-competition of the transferor company against the assessee in the same business, constituted the profit-earning apparatus of the assessee.

19. We refer to the decision of *Honble Supreme Court* incase of *Guffic Chem Pvt.Ltd vs.CIT* reported in *(2011) 10 taxmann.com 105*, wherein it is held as under:

> *"7. Two questions arose for determination, namely, whether the amounts received by the appellant for loss of agency was in normal course of business and therefore whether they constituted revenue receipt? The second question which arose before this Court was whether the amount received by the assessee (compensation) on the condition not to carry on a competitive business was in the nature of capital receipt? It was held that the compensation received by the assessee for loss of agency was a revenue receipt whereas compensation received for refraining from carrying on competitive business was a capital receipt. This dichotomy has not been appreciated by the High Court in its impugned judgment. The High Court has misinterpreted the judgment of this Court in Gillanders' case (supra). In the present case, the Department has not impugned the genuineness of the transaction. In the present case, we are of the view that the High Court has erred in interfering with the concurrent findings of fact recorded by the CIT(A) and the Tribunal. One more aspect needs to be highlighted. Payment received as non-competition fee under a negative covenant was always treated as a capital receipt till the assessment year 2003-04. It is only vide Finance Act, 2002 with effect from 1.4.2003 that the said capital receipt is now made taxable [See: Section 28(va)]. The Finance Act, 2002 itself indicates that during the relevant assessment year compensation received by the assessee under non-competition agreement was a capital receipt, not taxable under the 1961 Act. It became taxable only with effect from 1.4.2003. It is well settled that a liability cannot be created retrospectively. In the present case, compensation received under Non-Competition Agreement became taxable as a capital receipt and not as a revenue receipt by specific legislative mandate vide Section 28(va) and that too with effect from 1.4.2003. Hence, the said Section 28 (va) is amendatory and not clarificatory. Lastly, in Commissioner of Income-Tax, Nagpur v. Rai Bahadur Jairam Valji reported in 35 ITR 148 it was held by this Court that if a contract is entered into in the ordinary*

course of business, any compensation received for its termination (loss of agency) would be a revenue receipt. In the present case, both CIT (A) as well as the Tribunal, came to the conclusion that the agreement entered into by the assessee with Ranbaxy led to loss of source of business; that payment was received under the negative covenant and therefore the receipt of 50 lakhs by the assessee from Ranbaxy was in the nature of capital receipt. In fact, in order to put an end to the litigation, Parliament stepped in to specifically tax such receipts under non-competition agreement with effect from 1.4.2003."

20. There are plethora of decisions that have ruled that merely because there is presence of profit earning apparatus it cannot be concluded that the non compete fee paid by the assessee is in the nature of capital in nature. What needs to looked into is whether there is a transfer of any capital asset that is instrumental to the earning of profits. We are unable to ascertain this fact as the agreement dated 21/06/1999 has not been filed in the paper book. The Ld.AO though have referred to certain caluses from the agreement, will not be conclusive enough to determine the actual intention of the parties to the agreement.

21. We therefore deem it proper to remand this issue to the file of the Ld.AO for due verification of the above fact and to consider the claim in accordance with the law that was applicable to the assessee during the relevant period having regard to the ratio laid down by *Hon'ble Supreme Court* in the case of *Empire Jute Co. Ltd.* v. *CITI(supra)* and the following decisions.

- *Decision of Hon'ble Karnataka High Court order in case of The Commissioner of Income Tax and Anr. Vs. M/S Hewlett Packard India Sales Pvt. Ltd. in ITA 33/2006 dt.09.01.2020*
- *Decision of Hon'ble Karnataka High Court in case of Commissioner of Income Tax vs. Mcdowell & Co. Ltd. reported in (2007) 291 ITR 0107*

- *Decision of Hon'ble Madras High Court in case of Aslant Communications Ltd. vs. Commissioner of Income Tax reported in (2018) 407 ITR 0706 (Mad)*

Accordingly this ground raised by the assessee stands allowed for statistical purposes.

In the result, the appeal filed by the assessee stands allowed for statistical purposes.

Order pronounced in the open court on 30th November, 2022.

Sd/-	Sd/-
(CHANDRA POOJARI)	(BEENA PILLAI)
Accountant Member	Judicial Member

Bangalore,
Dated, the 30th November, 2022.
/MS /

Copy to:

1. Appellant	4. CIT(A)
2. Respondent	5. DR, ITAT, Bangalore
3. CIT	6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore