आयकर अपीलीय अधिकरण 'ए' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकरअपील सं./ ITA No.2254/Chny/2018
(**निर्धारण वर्ष** / Assessment Year: 2011-12)
&
आयकरअपील सं./ ITA No.3480/Chny/2018
(**निर्धारण वर्ष** / Assessment Year: 2013-14)
&
आयकरअपील सं./ ITA No.3481/Chny/2018
(**निर्धारण वर्ष** / Assessment Year: 2014-15)
&
आयकरअपील सं./ ITA No.2746/Chny/2019
(**निर्धारण वर्ष** / Assessment Year: 2016-17)

M/s. Harita Fehrer Limited No.29, Jayalakshmi Estates, Haddows Road, Chennai-600 006.	**बनाम**/ Vs.	**DCIT-Corporate Circle-2(2)** / **ACIT, Salary Circle-II** Chennai.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AACCH-1037-R**		
(अपीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से/ **Appellant by**	:	Shri Pradeep Dinodia, (FCA), Shri Ravikumar, (CA) & Shri Anil Kumar, (CA) - Ld. ARs
प्रत्यर्थीकीओरसे/**Respondent by**	:	Shri AR.V. Sreenivasan (Add.CIT)-Ld. DR

सुनवाईकीतारीख**/Date of Hearing**	:	17-01-2023
घोषणाकीतारीख /**Date of Pronouncement**	:	31-01-2023

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeals by assessee for different Assessment Years (AY) assail separate appellate orders and one of the issues is stated to be common issue. The Ld. AR placed on record issue-wise chart and advanced arguments. To support the same, our attention has been drawn to various documents and reliance has been placed on various judicial pronouncements, the copies of which have been placed on record. The Ld. Sr. DR also advanced arguments controverting the arguments of Ld. AR and filed written submissions which have been duly been considered while adjudicating the appeals. Having heard rival submissions and after due consideration of case records, our adjudication would be as under.

2. The lead appeal is for AY 2011-12 which arises out of the order of Ld. Commissioner of Income Tax (Appeals)-13 [CIT(A)] dated 07-05-2018 in the matter of an assessment framed by Ld. Assessing Officer [AO] u/s. 143(3) of the Act on 21-02-2014. The grounds raised by the assessee read as under: -

Ground No 1:
The learned Commissioner of Income Tax (Appeals) erred in denying depreciation of Rs.1,07,81,250/- on non-compete fee capitalized which represents intangible assets being technical know-how, processes etc., used in the business and hence is entitled to depreciation.
The learned CIT (A) ought to have appreciated the fact that the appellant had received technical know-how and special processes from the transferor along with the foam division, which are of the nature of intangible assets and are entitled to depreciation. (CIT vs Smifs Securities Ltd- 348 ITR 302 -SC).
Without prejudice, if the amount is held to be as non-compete, the same is allowable as revenue expenditure. (Carborundum Universal Ltd vs JCIT - 2012-TIOL-790 - Madras HC and Orchid Chemicals & Pharmaceuticals Ltd vs Assistant Commissioner of Income tax, 131 ITD 385- IT AT Chennai).
Ground No 2:

The learned CIT (A) erred in upholding he disallowance of depreciation in excess of 15% claimed on computer software for which the new appendix 1 of the Income tax Rules prescribe 60% depreciation.
The learned CIT (A) ought to have appreciated that software is entitled to 60% depreciation and when the same is allowed on the brought forward written down value of software, the same ought to have been allowed in respect of the additions made during the year also.
Ground No 3:
The learned CIT (A) erred in upholding the denial of additional depreciation claimed at 10% on Rs. 3,24,90,224/-, being the additions made to the in-house blending unit by the appellant.
The learned CIT (A) ought to have appreciated that the in-house blending unit was erected and fabricated by the supplier at the premises of the appellant and raised various invoices towards the same. The asset was installed on 01.03.2011 by the appellant and the additional invoice raised by the contractor on 31.03.2011 were only towards additional fabrication of the unit.
The learned CIT (A) ought to have appreciated further that when the normal depreciation in respect of the said asset is allowed by considering the installation of the asset on the said date, he ought to have allowed the additional depreciation on the asset also.
Ground No 4:
The learned CIT (A) erred in upholding the disallowance of bad debts written off claimed by the appellant amounting to Rs. 1,21,11,523/-.
The learned CIT (A) ought to have appreciated that the write off of the debtors by the appellant in the books of account is sufficient to claim the bad debts and the appellant need not prove the debt has become bad, in order to claim the same under section 36(1)(vii) of the Income tax Act, by following the decision of Hon' ble Supreme Court in the case of TRF Ltd Vs CIT (323 ITR 397)."

3. As is evident, the issues that fall for our consideration in this year are – (i) Depreciation on non-complete Fees; (ii) Applicable Rate of depreciation on computer software; (iii) Claim of additional depreciation; (iv) Assessee's claim of bad-debts written-off. The assessee being resident corporate assessee is stated to be engaged as foam manufacturer.

4. Issue No.1 - Disallowance of depreciation on Non-complete fees paid by the assessee

4.1 The erstwhile assessee M/s Harita Polymer Pvt. Ltd. purchased foam division from another entity i.e., Polyflex India Pvt. Ltd. (PIPL) on a slump-sale basis for total consideration of Rs.47.30 Crores under a

‘Business Purchase Agreement’ (BPA) dated 10-11-2008. The agreement had non-compete clause wherein PIPL was precluded from establishing the foam business within a period of 2 years from the date of sale of the business to the assessee. Accordingly, a sum of Rs.5.50 Crores was capitalized by the assessee as 'non-compete fees' in the books of accounts and written-off over a period of 2 years. However, in the computation of income, the assessee claimed depreciation on this amount @25% being depreciation rate as applicable to an ‘intangible asset’. The same was on the ground that the payment of non-compete fees confers a right on the assessee to enforce the other person not to do a particular commercial activity and hence, it constitutes a commercial right. This clause was incorporated as a negative covenant to preclude PIPL from competing with the business of the assessee.

4.2 However, Ld. AO opined that the BPA did not contain quantification of allocation of the consideration of Rs.5.50 Crores as paid by the assessee. The allocation of expenditure towards ‘non-compete fees’ was against Sec.2(42C) which define ‘slump sale’ to mean transfer of one or more undertaking for a lump sum consideration without assigning any values to the assets and liabilities. The claim of the assessee was neither evidenced by an agreement nor has any basis or justification under the Income Tax Act. It was more in the nature of facilitation and reduction of its profits and not a prudent commercial practice as claimed by the assessee. The non-compete fees so paid by the assessee was not an asset which the assessee could use like license or franchise etc. in its business. Actually, it was a payment made to ward-off a competitor for a specified number of years. In other words, it only confers a right to sue in case of breach by a person to whom the amount is paid. Further,

it could be enforced only when the default occurs. Further, the sum so received by recipient would be liable to tax u/s 28 (va) except when the receipts are chargeable to tax under the head 'capital gains'. The assessee has not treated the payment on revenue account but treated the same as intangible asset and incorrectly claimed depreciation. Accordingly, the depreciation claim of Rs.107.81 Lacs was disallowed.

4.3 The Ld. CIT(A) endorsed the views of Ld. AO that non-compete fees so paid by the assessee was not an asset which the assessee could use like license or franchise etc. in its business. It was a payment made to ward-off competition for a specified number of years. In other words, it only confers a right to sue in case of breach by a person to whom the amount is paid. Further, it can be enforceable only when default occurs. Accordingly, the impugned disallowance was confirmed against which the assessee is in further appeal before us.

Our findings and Adjudication

5. From the fact, it emerges that the assessee has purchased foam division from PIPL vide business purchase agreement dated 10-11-2008 on slump sale basis for aggregate consideration of Rs.47.30 Crores. Under this method of acquisition, separate values to assets and liabilities are not assigned and the business is acquired on lump sum basis. For the purpose of accounting, the assessee would allocate the consideration towards each assets and liabilities so acquired which would equate to total consideration paid by the assessee under the agreement. It could be seen that the business purchase agreement contain a non-compete clause wherein the seller i.e., PIPL was precluded from establishing the foam business within a period of 2 years from the date of sale of the business to the assessee. The same was

with a view to ward-off the competition in the same line of business. The assessee has assigned valuation of Rs.5.5 Crores to this right and accordingly, capitalized the same in the books of accounts and wrote-off the same over a period of two years i.e. over the period during which this right was enforceable. For the purpose of computation of income, the assessee treated the payment so made as 'intangible asset' and claimed applicable depreciation of 25%. This exercise, for the first time, has been done by the assessee in AY 2010-11 which is precisely the argument of Ld. AR.

6. The Ld. AR has submitted that under block of asset concept, once an asset forms block of assets and depreciation is claimed as well as allowed, the individual asset looses identity and the depreciation is allowed on a block as a whole. Accordingly, once this position has been accepted by revenue in initial year, the depreciation claim could not be denied in subsequent years following rules of consistency as laid down by Hon'ble Supreme Court in the case of **Radhasoami Satsang vs. CIT (60 Taxman 248).** The Ld. Sr. DR, on the other hand, submitted that rule of consistency would have no application and the principles of res-judicata are not applicable to Income Tax proceedings and each year is a separate unit of assessment. The Ld. Sr. DR submitted that the said case law would have no application since in that case, a particular position continued for more than 20 years. Further, error committed by Ld. AO in one year would not bind the department and the error need not be continued. In the present case, no findings were rendered by Ld. AO in AY 2010-11 on this issue and therefore, the arguments of Ld. AR could not be accepted. The Ld. Sr. DR relied on the decision of Hon'ble Delhi High Court in the case of **Sharp Business System vs. CIT (27**

Taxmann.com 50) which was followed by same court in **Fortis Hospitals Ltd. vs. ACIT (ITA No.132/2021 dated 29.07.2021)**. The Ld. AR, on the other hand, inter-alia, relied on the decision of Hon'ble High Court of Madras in **Pentasoft Technologies Ltd. vs. DCIT (41 Taxmann.com 120)** as well as the decision of Hon'ble High Court of Delhi in **Areva T & D India Ltd. (345 ITR 421)** besides the decision of Hon'ble Apex Court **in CIT vs. Smifs Securities Ltd. (348 ITR 392)** to support the argument that the non-compete fees would constitute intangible asset which would be eligible for depreciation at applicable rate.

7. We find that this claim has been made by the assessee for the first time in AY 2010-11. The return for that year was scrutinized by Ld. AO and no addition was made on this account. The assessees' return of income for AY 2012-13 as well as for AY 2015-16 has been processed u/s 143(1) wherein this issue has reached finality and the similar claim made by the assessee has been accepted. The only dispute is with respect to AY 2011-12, 2013-14, 2014-15 and 2016-17. Thus, from AYs 2010-11 to 2016-17, the claim has been accepted in three years whereas the claim has not been accepted in four years. Considering the same, the arguments of Ld. Sr. DR that it was the error of initial year, could not be accepted. The rule of consistency would clearly favor the case of the assessee and the ratio of decision of Hon'ble Supreme Court in the case of **Radhasoami Satsang vs. CIT (60 Taxman 248),** in our considered opinion, could be applied to the case of the assessee.

8. Proceeding further, the term 'intangible asset' as defined in Sec.32(1)(ii) would mean: -

> Know-how, patents, copyrights, trademarks, licenses, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, not being goodwill of a business or profession.

The expression 'business or commercial rights of similar nature', in our considered opinion, is sufficient enough to cover the right acquired by the assessee against PIPL precluding it to compete with the assessee in same line of business for 2 years. The assessee, by law, has right to seek exclusion of PIPL from competing in the same line of business for 2 years. This right would possibly enable the assessee to run its business more profitably and would enable it to ward-off at least one of the competitors in the market. The decision of Hon'ble High Court of Madras in **Pentasoft Technologies Ltd. vs. DCIT (41 Taxmann.com 120),** rendered on similar facts, supports our view. In that case, the assessee made payment towards acquisition of intellectual Property Rights (IPR) and non-compete fees and claimed depreciation. The Tribunal allowed depreciation on IPR but denied depreciation on non-compete fees on the ground that it was not an asset. Further, there was no break up of amount as to how much amount was allocable towards IPR and how much amount was allocable towards non-compete fees. Upon further appeal, Hon'ble Court adjudicated the issue in assessees' favor as under: -

> **19.** The only issue is whether non compete agreement/arrangement would fall within the ambit of clause (ii) of Section 32(1) of the Act.
> **20.** It is the case of the Revenue that this non-compete fee is in the nature of a negative right and it cannot be of a commercial right of similar nature and the expression 'similar nature' shall be relatable to patents, copy rights and trade mark licence or franchise or any other business. Therefore, it is submitted that this negative right cannot be construed either as a licence or as a commercial right to be eligible for deduction.
> **21.** We are unable to agree with the stand taken by the Revenue for the simple reason that the agreement between the parties is a composite agreement. Under the agreement, the transferor had transferred all its rights, copy rights, trade marks in respect of the word 'pentasoft' as well as the training and development division

exclusively to be exploited by the assessee. In order to strengthen those rights transfer under the said composite agreement, there was a non compete clause by virtue of which, the transferor was restrained from using the same trade mark, copyrights etc., in favour of the assessee. Therefore, the non compete clause under the agreement should be read as a supporting clause to the transferor of the copy rights and patents rather to strengthen the commercial right, which was transferred in favour of the assessee.

22. Learned counsel for the assessee contended that the non-compete is in effect an indirect licence. However, we are not inclined to agree with the said submission since non compete, at best could be a commercial right because that right is relatable to the transfer of trade mark, copy rights and patents. Therefore, the view taken by the Commissioner of Income Tax(Appeals) in this regard is acceptable.

23. In the case of *Techno Shares & Stocks Ltd.* (*supra*), the assessee therein before the Hon'ble Apex Court claimed depreciation on the membership card held by it with the Bombay Stock Exchange enables it to trade on the floor, is a business or commercial right in the nature of a licence under Section 32(1)(ii) of the Act.

24. The Department on the other hand, pointed out that membership is a personal privilege and that it is not an asset and that it is not owned by the assessee and therefore, the claim of the assessee for depreciation was not admissible under Section 32(1)(ii) of the Act.

25. While answering the question, the Hon'ble Supreme Court considered the rules of the Bombay Stock Exchange and after perusing Rules 5 to 10, it held thus:

> ".....that the right of nomination is conferred on the member of the exchange; that, the said right shall cease and vest in the exchange when his membership gets forfeited to the exchange; that on such forfeiture the right of membership gets vested in the exchange and on such vesting the exchange has the right to deal with it as it may think fit. That, on forfeiture even the right of nomination vests in the exchange. Thus, a non-defaulting continuing member owns the right of nomination with respect to the membership of the exchange till his right of membership is forfeited to the exchange.
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> However, the Hon'ble Supreme Court observed that the right of membership including the right of nomination gets vested in the exchange on the demise/default committed by the member; that on such forfeiture and vesting in the exchange, the same gets disposed of by inviting offers and the consideration received thereof is used to liquidate the dues owed by the former/defaulting member to the exchange or clearing house."

26. It further held that it is this right of membership, which allows the non-defaulting member to participate in the trading session on the floor of the exchange. The said membership right is the business or commercial right conferred by the rules of the Bombay Stock Exchange on the non-defaulting continuing member.

27. We are conscious of the fact that the Hon'ble Supreme Court clarified that the said judgment is strictly confined to the right of the membership conferred upon the member under the Bombay Stock Exchange membership card during the relevant assessment years and that judgment should not be understood to mean that every business or commercial right would constitute a 'licence' or a 'franchise'. Therefore, the said decision was rendered after taking into consideration the Rules of the Bombay Stock Exchange.

28. In the case of hand, we have analysed the agreement and also in the previous portion of this order elaborated upon the various terms and conditions, which bind the parties had observed that the earlier transfer of the trade mark, patents and

other rights in favour of the assessee was undoubtedly the transfer of intangible assets, which in terms of section 32(1)(ii) of the Act would be a capital asset entitled to depreciation.

29. In the light of the above, we have no hesitation in setting aside the order passed by the Income Tax Appellate Tribunal and answer the issue in favour of the assessee. In such circumstances, there is no necessity for us to consider the alternative submission made by the learned counsel for the assessee.

We find that the ratio of aforesaid decision is applicable to the case of the assessee and favors the claim so made.

9. Similar is the decision of Hon'ble High Court of Delhi in **Areva T & D India Ltd. (345 ITR 421).** The Hon'ble Court, elaborating on the concept of 'business or commercial rights of similar nature' held as under: -

12. In the present case, it is seen that the assessee vide slump sale agreement dated 30th June, 2004, acquired, as a going concern, the transmission and distribution business of the transferor Company w.e.f. 1st April, 2004. As a result thereof, the running business of transmission and distribution was acquired by the transferee lock, stock and barrel minus the trademark of the transferor which was retained by the transferor, for lump sum consideration of Rs.44.7 Crores. It is further seen that the book value of the net tangible assets (assets minus liabilities) acquired was recorded in the balance sheet of the transferor as on the date of transfer as Rs.28.11 Crores. The said assets and liabilities were recorded in the books of transferee at the same value as appeared in the books of the transferor. The balance payment of Rs.16,58,76,000/- over and above the book value of net tangible assets, was allocated by the transferee towards acquisition of bundle of business and commercial rights, clearly defined in the slump sale agreement, compendiously termed as "goodwill" in the books of accounts, which comprised, inter alia, the following:- (i) Business claims, (ii) Business information, (iii) Business records, (iv) Contracts, (v) Skilled employees, (vi) knowhow. It is also observed that the AO accepted the allocation of the slump consideration of Rs.44.7 Crores paid by the transferee, between tangible assets and intangible assets (described as goodwill) acquired as part of the running business. The AO, however, held that depreciation in terms of Section 32(1)(ii) of the Act was not, in law, available on goodwill. The CIT(A) and the ITAT approved the reasoning of the AO thereby holding disallowance of depreciation on the amount described as goodwill. It was thus argued on behalf of the assessee Company that Section 32(1)(ii) would mean rights similar in nature as the specified assets, viz., intangible, valuable and capable of being transferred and that such assets were eligible for depreciation. On behalf of the respondent it was argued that applying the doctrine of noscitur sociis the expression "any other business or commercial rights of similar nature" used in Explanation 3(b) to Section 32(1) has to take colour from the preceding words "knowhow, patents, copyrights, trademarks, licenses, franchises". It was urged that the Supreme Court had clearly held in Techno Shares & Stocks Ltd. (

supra) that "Our judgment should not be understood to mean that every business or commercial right would constitute a "licence" or a "franchise" in terms of section 32(1)(ii) of 1961 Act".

13. In the present case, applying the principle of ejusdem generis, which provides that where there are general words following particular and specific words, the meaning of the latter words shall be confined to things of the same kind, as specified for interpreting the expression "business or commercial rights of similar nature" specified in Section 32(1)(ii) of the Act, it is seen that such rights need not answer the description of "knowhow, patents, trademarks, licenses or franchises" but must be of similar nature as the specified assets. On a perusal of the meaning of the categories of specific intangible assets referred in Section 32(1)(ii) of the Act preceding the term "business or commercial rights of similar nature", it is seen that the aforesaid intangible assets are not of the same kind and are clearly distinct from one another. The fact that after the specified intangible assets the words "business or commercial rights of similar nature" have been additionally used, clearly demonstrates that the Legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets, which were neither feasible nor possible to exhaustively enumerate. In the circumstances, the nature of "business or commercial rights" cannot be restricted to only the aforesaid six categories of assets, viz., knowhow, patents, trademarks, copyrights, licenses or franchises. The nature of "business or commercial rights" can be of the same genus in which all the aforesaid six assets fall. All the above fall in the genus of intangible assets that form part of the tool of trade of an assessee facilitating smooth carrying on of the business. In the circumstances, it is observed that in case of the assessee, intangible assets, viz., business claims; business information; business records; contracts; employees; and knowhow, are all assets, which are invaluable and result in carrying on the transmission and distribution business by the assessee, which was hitherto being carried out by the transferor, without any interruption. The aforesaid intangible assets are, therefore, comparable to a license to carry out the existing transmission and distribution business of the transferor. In the absence of the aforesaid intangible assets, the assessee would have had to commence business from scratch and go through the gestation period whereas by acquiring the aforesaid business rights along with the tangible assets, the assessee got an up and running business. This view is fortified by the ratio of the decision of the Supreme Court in Techno Shares & Stocks Ltd. (supra) wherein it was held that intangible assets owned by the assessee and used for the business purpose which enables the assessee to access the market and has an economic and money value is a "license" or "akin to a license" which is one of the items falling in Section 32(1)(ii) of the Act.

14. In view of the above discussion, we are of the view that the specified intangible assets acquired under slump sale agreement were in the nature of "business or commercial rights of similar nature" specified in Section 32(1)(ii) of the Act and were accordingly eligible for depreciation under that Section.

15. In view of the above, it is not necessary to decide the alternative submission made on behalf of the assessee that goodwill per se is eligible for depreciation under Section 32(1)(ii) of the Act. In the circumstances, the substantial question of law is decided in the affirmative and this appeal is allowed in favour of the assessee and against the Revenue and the impugned order is set aside.

It was held by Hon'ble Court that that the Legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets, which were neither feasible nor possible to exhaustively enumerate. Therefore, the nature of "business or commercial rights" could not be restricted to only the aforesaid six categories of assets, viz., knowhow, patents, trademarks, copyrights, licenses or franchises. The nature of "business or commercial rights" can be of the same genus in which all the aforesaid six assets fall. All the above fall in the genus of intangible assets that form part of the tool of trade of an assessee facilitating smooth carrying on of the business.

10. This decision has subsequently been followed by Hon'ble High Court of Madras in the case of the same assessee for AY 2006-07 which is reported as **129 Taxmann.com 55**. In this decision, Hon'ble Court has distinguished the decision of Hon'ble Delhi High Court in **Sharp Business System vs. CIT (27 Taxmann.com 50)** as under: -

> 11. 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.
> 12. 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).
> 13. 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.
> 14. 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.
>
> 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).
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> 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.
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> 40. 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. 17. Therefore, we find that the Tribunal rightly granted relief to the assessee. Accordingly, substantial question of law No. 2 is answered against the Revenue.

Thus, the case law of **Sharp Business System vs. CIT (27 Taxmann.com 50),** as referred to by revenue, has been distinguished and held to be not applicable.

11. Considering the facts and circumstances of the case and respectfully following the binding judicial precedents, we would uphold the claim of the assessee. The Ld. AO is directed to grant depreciation to the assessee as claimed in computation of income for all the years. The corresponding grounds raised in all the four years stand allowed.

12. Issue No.2 - Disallowance of depreciation on software

12.1 The assessee claimed depreciation @ 60% on 'Software'. The Ld. AO held that as per depreciation schedule Rule 5, such depreciation @ 60% is allowed on 'computers including software'. The word 'including' implies that only computer systems having inbuilt software i.e., computer systems sold along with incorporated/embedded software is eligible for depreciation @ 60%. However, the assessee has purchased software

independent of the computer/hardware which would be eligible for normal depreciation of 15% as applicable to Plant and Machinery. Accordingly, the differential depreciation of Rs.5.07 Lacs was disallowed and added back to the income of the assessee. The Ld. CIT(A) confirmed the disallowance against which the assessee is in further appeal before us.

12.2 We do not concur with the observations of Ld. AO that the software which is in-built into the computer system would alone be eligible for higher rate of depreciation since the expression used is 'computers including software'. The literal interpretation of the same would be that computers or any other software purchased by the assessee would have same rate of depreciation on the logic that software would primarily be used along with computer system. However, there is no requirement that the same should be in-built into the computer system. The same may be independently purchased by the assessee and could be used along with computer system. Nevertheless, the same would remain computer software only which would have same rate of depreciation as applicable to a computer system. The decision of Special Bench of Delhi Tribunal in **Amway India Enterprises vs. DCIT [111 ITD 112 (Delhi)]** supports our view. It could also be seen that similar rate of 60% has already been allowed by revenue to the assessee in all the other years and this dispute has been raised in this year only. Therefore, we direct Ld. AO to allow depreciation at higher rate of 60%. The corresponding grounds raised by the assessee stand allowed.

13. Issue No.3 - Disallowance of additional depreciation on newly installed In-house blending plant

13.1 The assessee made additions of Rs.324.90 Lacs to fixed asset in respect of ‘In house blending unit' which include professional fees of Rs.72.12 Lacs being paid to M/s. Fehrer Automotive GmbH. The Ld. AO held that additional depreciation has been claimed on Professional service charges which do not form an element of 'Actual Cost'. The legislative intent behind granting additional depreciation was to provide incentives for fresh investments in the industrial sector. To give impetus to such investment, such additional deprecation of 20% was granted. The Explanation-3 to Section 43(1) extends the meaning of 'actual cost' in certain circumstances and grants power to the Assessing Officer to determine the actual cost in the hands of the assessee. The professional service for formulation, development, process support and engineering support was capitalized towards acquisition of in-house blending unit which was a colorable device to claim additional depreciation not on plant and machinery per se but on services of professional nature. Similarly, the additional material in respect of fabrication unit was supplied by the assessee vide tax invoice dated 31.03.2011 to the Polyol Blending Shop for Rs.16.13 Lacs which would show that the capital goods forming spare part of the "in house blending unit’ has been dispatched only on 31.03.2011. It would follow that the said plant and machinery namely ‘in house blending unit’ had not been installed which would disentitle the assessee to claim additional depreciation. Finally, the additional depreciation of Rs.32.49 Lacs as claimed by the assessee was disallowed and added back to its income. The Ld. CIT(A) confirmed

the disallowance against which the assessee is in further appeal before us.

13.2 From the fact it emerges that the assessee has claimed normal depreciation as well as additional depreciation on 'in house blending unit'. This unit has been installed at assessee's premises under a contract with MEFCO Engineers Private Ltd. The assessee has also received professional and technical services for installation of the said unit which has been capitalized along with the cost of the asset as per normal accounting practice and principles. The said expenditure was directly incurred towards installation of the Machinery and the assessee has capitalized the same by including it in the actual cost of the plant as per Sec. 43(1) of the Act. Accordingly, normal depreciation as well as additional depreciation has been claimed on aggregate amount so capitalized by the assessee. The Ld. AO has allowed normal depreciation but denied additional depreciation on the ground that the fees so paid by the assessee would not form part of actual cost. The said claim has been termed as a colorable device without any basis. When the actual cost has been accepted for granting normal depreciation then there is no logic to discard the same while granting additional depreciation to the assessee. Pertinently, similar claim denied in AY 2013-14 was deleted by first appellate authority which has not been challenged by revenue any further. In AY 2014-15, no dispute has been raised by the revenue on additional depreciation claimed by the assessee on newly installed Plant & machinery. Therefore, considering the fact of the case, denial of additional depreciation on Professional fees as well as additional material issued by the assessee at year-end could not be held to be justified. The Ld. AO is directed to allow the

same. The corresponding grounds raised by the assessee stand allowed.

14. Issue No.4 - Disallowance of Bad debts claimed:

14.1 The assessee claimed doubtful bad-debts for Rs.121.11 Lacs in the computation of income. It transpired that the said amount was provided in the books for AY 2010-11 and disallowed in computation of business income for that year. The Ld. AO noted that that the bad debts pertained to PIPL and debtors had not become bankrupt. The assessee did not make required efforts to recover the debts and therefore, the same was disallowed. The Ld. CIT(A) held that the burden was on assessee to show that the there was no reasonable expectation of recovering the debts. Since the burden was not discharged, the action of Ld. AO was confirmed against which the assessee is in further appeal before us.

14.2 We find that the law in this regard has fairly been settled by Hon'ble Supreme Court in the case of **TRF Limited v. CIT (190 Taxman 391)** by holding that after 1-4-1989, it is not necessary for assessee to establish that debt, in fact, has become irrecoverable. Rather, it is enough if bad debt is written off as irrecoverable in accounts of assessee. In other words, if the debtors have been written-off as irrecoverable, the same would be sufficient to claim the deduction u/s 36(1)(vii). Upon perusal of assessee' computation of income for AY 2010-11, we find that the assessee has made provision for bad and doubtful debts for Rs.121.11 Lacs which has been added back in the computation of income. In other words, the same has not been claimed in that year rather the same has been claimed in the computation of income for AY 2011-12 as 'Bad Debts W/off disallowed in earlier years and claimed now' which has been

denied by Ld. AO. It appears that the assessee has made provisions in AY 2010-11 which has now been claimed. The necessary facts showing the circumstances and the fact whether debtors have actually been written-off in this year is not available on record. The assessee has kept the details of bad-debts written off at Page No.332 of the paper-book. Therefore, on the facts and circumstances of the case, we remit this issue back to the file of Ld. AO for de novo adjudication to ascertain the facts whether the debts have actually been written-off in this year which would be evident form perusal of provision for bad and doubtful account. The assessee is directed to furnish requisite details. The corresponding grounds raised by the assessee stand allowed for statistical purposes.

Conclusion

15. The appeal for AY 2011-12 stands partly allowed whereas all the other appeals stand allowed in terms of our above order.

Order pronounced on 31st January, 2023.

Sd/-	**Sd/-**
(MAHAVIR SINGH)	**(MANOJ KUMAR AGGARWAL)**
उपाध्यक्ष /VICE PRESIDENT	**लेखासदस्य / ACCOUNTANT MEMBER**

चेन्नई/ Chennai; दिनांक/ Dated : 31-01-2023
EDN

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant2. प्रत्यर्थी/Respondent 3. आयकरआयुक्त (अपील)/CIT(A)4. आयकरआयुक्त/CIT
5. विभागीयप्रतिनिधि/DR6. गार्डफाईल/GF