

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C" MUMBAI**

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI RAJ KUMAR CHAUHAN (JUDICIAL MEMBER)**

**ITA No. 1232/MUM/2024
Assessment Year: 2021-22**

Asst. CIT-8(2)(1),
Room No. 481, Aayakar Bhavan,
Maharishi Karve Road,
Mumbai-400020.

Appellant

Vs. Piramal Glass Pvt. Ltd.,
6th floor, Piramal Tower Annexe
Ganpatrao Kadam Marg, Lower
Parel,
Mumbai-400013.
PAN NO. AABCG 0093 R
Respondent

Assessee by : Mr. Ronak Doshi &
Mr. Priyank Gala
Revenue by : Mr. Suresh Gaikwad, Sr. DR

Date of Hearing : 13/08/2024
Date of pronouncement : 27/09/2024

ORDER

PER OM PRAKASH KANT, AM

This appeal by the Revenue is preferred against order dated 19.01.2024 passed by the Ld. Commissioner of Income-tax (Appeals) – National Faceless Appeal Centre, Delhi [in short ‘the Ld. CIT(A)’] for assessment year 2021-22, raising following grounds:



1. The Ld CIT(A) has erred in deleting the disallowance of depreciation @ 25% claimed on non-compete fees being consideration paid to Piramal Enterprises Limited ("PEL.") for not competing directly or indirectly with the Appellant's business by relying upon the decision of the Hon'ble Jurisdictional High Court, Mumbai in the appellant's own case for AY 2001-02 vide ITA No. 556 of 2017 dated 11th June, 2019 (wherein the Hon'ble High Court had dismissed the revenue appeal), without appreciating the fact that the department has not accepted this decision of the Hon'ble High court, and against this decision department had filed an SLP vide Dairy no 42801-2019 & Process Id 2375/2019

2. The Ld CIT(A) has erred in deleting the disallowance of interest u/s. 36(1)(ii) of the Act amounting to Rs. 5,27,23,501/- relying on the decision of Hon'ble ITAT vide order I.T.A. No.556/Mum/2018 Dated.22.06.2020 wherein the Hon'ble ITAT has not considered the fact that interest paid on borrowed funds and used for investing in the certain group concerns were not for business purpose without appreciating the fact that the department has not accepted this decision of the Hon'ble High court, and against this decision department had filed an SLP vide Dairyano E 42801-2019 & Process Id 2375/2019."

2. Briefly stated facts of the case are that the assessee company was engaged in the business of manufacturing of glass containers for cosmetics & perfumery specially food and beverages and pharmaceuticals industries etc. For the year under consideration, the assessee filed its return of income on 15.03.2022 declaring total income at Rs.47,88,48,18,420/-. The return of income filed by the assessee was selected for scrutiny assessment and statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. In the assessment order passed u/s 143(3) of the Act dated 23.12.2022, the Assessing Officer made various disallowances including disallowance of depreciation on non-compete fee amounting to Rs. 21,53,555/- and disallowance of interest u/s 36(1)(iii) of the Act amounting to Rs.5,27,23,501/-.



3. On further appeal, the Ld. CIT(A) allowed relief on these two issues following the finding of the Co-ordinate Bench of the Tribunal and Hon'ble Jurisdictional High Court in the case of the assessee.

4. Aggrieved, the Revenue is in appeal before the Tribunal by way of raising the grounds as reproduced above.

5. We have heard rival submission of the parties and perused the relevant material on record including a Paper Book containing pages 1 to 190 filed on behalf of the assessee.

6.0 In ground No. 1, the Revenue is aggrieved with the finding of the Ld. CIT(A) deleting the disallowance of depreciation @ 25% which was claimed by the assessee on non-compete fees paid to M/s Piramal Enterprises for not competing with the business of the assessee. The relevant finding of the Ld. CIT(A) is reproduced as under:

"4.1 Ground No. 1 relates to disallowance of depreciation on non-compete fees paid and allocated over various fixed assets taken over on slump sale basis. The appellant contended in Ground No. 1 that it had paid 18 crores as payment towards non-compete fees during A.Y. 1999-2000 and the amount was paid in connection with the acquisition of glass division from Nicholas Piramal India Limited (NPIL). The appellant submitted that the same had been capitalised over various fixed assets in the ratio of their values estimated on a fair basis arrived at by technical experts. The appellant further contended that depending upon the value allocated to the respective Block of assets, depreciation at the applicable rate had been claimed along with depreciation of that Block of assets but the AO disallowed the above depreciation in the A.Y. 1999-2000 by holding that the expenditure was in no way connected with the acquisition of various assets. The appellant stated that in the present A.Y 2021-22, the AO relied on the past assessment records and disallowed the same. The



appellant contended that the allocation over various assets and liabilities was carried out on a fair basis arrived at by technical experts and was in accordance with AS-10. The appellant also relied on a case law. I have considered the submission made by the appellant and the reasons recorded by the AO. It is seen that the issue involved in this ground of appeal is covered against the appellant by the decision of the Hon'ble ITAT in the appellant's own case for AY 1999-2000. Further, the case law cited by the appellant relates to treatment of interest cost after the commencement of production and not directly related to the issue of depreciation on compete fees. Further, there is a decision of the Hon'ble ITAT in the appellant's own case on the identical issue against the appellant. Respectfully following the same, the disallowance of depreciation on non- compete fees is upheld and this ground of appeal is dismissed.

4.2 Ground No. 2 relates to disallowance of depreciation on non-compete fees @ 25% being intangible assets. The appellant has raised an alternative ground that the depreciation on non-compete fees should be allowed @ 25% for intangible assets as 'any other business or commercial right'. The appellant further stated alternatively that it has entered into an agreement effectively for a period of eighteen years and it is entitled to write off the entire non-compete fees over this period as the payment was made in the business interest of the company as per the ratio laid down by the Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd. v. CIT (225 ITR 802) (SC). The appellant further contended that the Hon'ble ITAT in the appellant's own case for A.Y. 2001-02, 2003-04, 2005-06, 2006-07, 2007-08, 2008-09, 2009-10, 2011-12, 2012-13 and 2013-14 has allowed the depreciation @25% of non-compete fees considering the compete fees as an intangible asset. Finally, the appellant contended that the Honourable Jurisdictional High Court vide its order dated June 11, 2019 has decided the issue in favour of the appellant in AY 2001-02 and allowed depreciation on non-compete fees @ 25%. Besides, the appellant also relied upon the judicial pronouncement of the other cases in support of its contention during the appellate proceedings.

4.2.1 In the present appeal, it is a fact that the appellant company is a subsidiary company of Nicholas Piramal India Limited (NPIL) and NPIL holds 53.76% of Equity shares of the appellant company. Three foreign parties have subscribed the remaining 46.24% of equity shares of the appellant company and the appellant company has two manufacturing divisions at Kosamba and Jambusar, both in Gujarat. During the assessment proceedings, the AO observed that the appellant has debited depreciation of Rs. 119,26,42,579/- in the Profit & Loss Account and claimed depreciation of Rs. 1,25,53,70,077/- as per I.T. Act, 1961 of the Act. The AO also observed that depreciation of Rs. 33,10,746/- was disallowed in assessment order for A.Y. 2018-19. With regard to disallowance of depreciation on non-compete fee, it is also a fact that appellant had paid Rs. 18 crores as payment towards non-compete fees during the A.Y. 1999-2000 and the amount was paid in connection with the



acquisition of glass division from Nicholas Piramal India Limited (NPIL). In this case, it is also a fact that the appellant has entered into an agreement effectively for a period of eighteen years. In the return of income, the appellant has claimed the depreciation on non-compete fee at the applicable rate depending upon the value allocated to the respective block of assets. After consideration of appellant's submission, I find that the present issue has been decided by the Hon'ble ITAT Mumbai Bench in its order vide ITA No. 9645/Mum/2004 & ITA No. 9498/Mum/2004 dated 02.03.2016 for A.Y. 2001-02 wherein the alternate claim of the appellant for depreciation @25% on compete fees has been allowed. The relevant portion of the said order dated 02.03.2016 is reproduced as under:

"5. We have considered rival contentions and carefully gone through the orders of the authorities below and found that the Hon'ble Madras High Court and Hon'ble Karnataka High Court have clearly held that non-compete fee in the nature of commercial rights, therefore, eligible for claim of depreciation. This issue has also been dealt by the coordinate bench in the case of Shreya Life Science Private Limited, ITA No.7071/Mum/2010, order dated 14-1-2016, wherein the Tribunal after relying various judicial pronouncements as well as the decision of Hon'ble Supreme Court in the case of Smifs Securities Pvt. Ltd., 327 ITR 323, allowed the depreciation on non-compete fees after having the following observations:-

"19. Now coming to the claim for depreciation on non-compete fee, we found that after paying the non-compete fee the assessee has acquired commercial rights. Commercial right comes into existence whenever the assessee makes payment for non-compete fee and after obtaining non-compete right, the assessee can develop and run his business without bothering about the competition and therefore non-compete right is intangible asset eligible for depreciation. Generally, non-compete fee is paid for a definite period which in this case is four years. The idea is that by that time, the business would stand firmly on its own footing and can sustain later on. This clearly shows that the commercial right comes into existence whenever the assessee makes payment for non-compete fee. Now, the second question is whether such right can be termed as "or any other business or commercial rights of similar nature" for construing the same as "intangible asset". Here, the doctrine of ejusdem generis would come into operation. The term "or any other business or commercial rights of similar nature" has to be interpreted in such a way that it would have same similarities as other assets mentioned in cl. (b) of Expin. 3. The other assets mentioned are know-how patents, copyrights, trade marks, licences, franchises, etc. In all these cases no physical asset comes into possession of the assessee. What comes in is only a right to carry on the business smoothly and successfully and therefore even the right obtained by way of non-compete fee would also be covered by the term "or any other business or commercial rights of similar nature" because after



obtaining non-compete right, the assessee can develop and run his business without bothering about the competition. The right acquired by payment of non-compete fee is definitely intangible asset. Moreover, this right (asset) will evaporate over a period of time of four years in this case because after that the protection of non-competition will not be available to the assessee. This means, this right is subject to wear and tear by the passage of time, in the sense, that after the lapse of a definite period of four years, this asset will not be available to the assessee and, therefore, this asset must be held to be subject to depreciation. Assessee would be entitled to depreciation in respect of non-compete fee which is in the nature of intangible asset.

20. Madras Bench of the Tribunal in the case of Real Image Tech (P) Ltd. (120 TTJ 983) has been held that payment made under a non-compete agreement was capital expenditure and entitled to depreciation as in intangible asset. The bench applied the decision of the Mumbai Tribunal in the case of Techno Shares and Stocks Ltd. (101 TTJ 349) (Bom) (depreciation on stock exchange membership card) which was confirmed by the Hon'ble Supreme Court in 327 ITR 323. Recently Hon'ble Supreme Court in case of Simfs Securities Ltd. held that even goodwill which is a commercial right is eligible for claim of depreciation.

21. In a recent ruling, the Hon'ble Madras High Court in the case of Pentasoft Technologies Ltd. held that non-compete fee paid to a transferor under a composite agreement for restraining him from entering a similar business for ten years was eligible for depreciation.

22. Recently, the Mumbai Bench of the Income-tax Appellate Tribunal in the case of Ind. Global Corporate Finance Pvt. Ltd. held that the non-compete fee is not a deductible expenditure since it is capital in nature. However, the non-compete right is an intangible asset" eligible for depreciation under the Income-tax Act, 1961. Further, the decision of Real Image Tech (P) Ltd. has been followed by the Mumbai Tribunal in the case of Schott Glass India Pvt. Ltd. and therefore, the depreciation claim is allowed on non-compete fees.

23. In view of the above discussion, we conclude that so long as the non-compete fee in question is capital expenditure, the same is entitled for depreciation. Accordingly, we direct the AO to allow the claim of depreciation on the amount of non-compete fee paid, treating the same as intangible assets. We direct accordingly."

It is also seen that the Hon'ble ITAT, Mumbai Bench has followed the above decision in its order being ITA No. 8360/Mum./2010 dated 16th December, 2016 for AY 2006-07, ITA Nos.4777/Mum./2016 for AY 2005-06, ITA no.4778/Mum./2016 for AY 2007-08, ITA No. 4780/Mum./2016 for A.Y. 2008-09 and ITA No.4779/Mum./2016 for AY 2009-10, ITA No. 157/Mum./2016 dated 4th January, 2017 for AY 2011-12, IT(TP)A no. 3046/Mum./2017 dated 07.06.2019 for



A.Y. 2012-13 and ITA No. 556/Mum./2018 dated 22.06.2020 for A.Y. 2013-14 in appellant's own case and allowed the appellant's claim of depreciation on non-compete fees @25% by treating it an intangible asset.

4.2.2 Further, Hon'ble Jurisdictional High Court, Mumbai in the appellant's own case for AY 2001-02 vide ITA No. 556 of 2017 dated 11th June, 2019 had dismissed the argument of the Revenue that it is not an intangible asset qualified for the depreciation u/s 32 of the Act by referring the decision of the Hon'ble Division Bench of Gujarat High Court in the case of Principal Commissioner of Income tax vs. Ferromatice Milacron India (P.) Limited [2018] 99 taxmann.com 154 (Gujarat) wherein the similar issue was decided in favour of the appellant and also reproducing the relevant portion of the judgment in the order of the appellant, which is as under:-

"We may recall the Assessing Officer does not dispute that the expenditure was capital in nature since by making such expenditure, the assessee had acquired certain enduring benefits. He was, however, of the opinion that to claim depreciation, the assessee must satisfy the requirement of Section 32(1)(ii) of the Act, in which Explanation 3 provides that for the purpose of - the said sub-section the expression "assets" would mean (as per clause (b)) intangible assets, being know-how, patents, copyrights, trade marks, licenses, franchises or any other business or commercial rights of similar nature. In the opinion of the Assessing Officer, the non-compete fee would not satisfy this discrimination. Going by his opinion, no matter what the rights acquired by the assessee through such non-compete agreement, the same would never qualify for depreciation in section 32(1)(ii) of the Act as being depreciable intangible asset. This view was plainly opposed to the well' settled principles. In case of Techrio Shares & Stocks Limited (supra) the Supreme Court held that payment for acquiring membership card of Bombay economic and money value. The expenses incurred by the assessee which satisfied the test of being a license or any other business or commercial right of similar nature.

In case of Areva T & D India Limited (supra) Division Bench of Delhi High Court had an occasion to interpret the meaning of intangible assets in context of section 32(1)(i) of the Act. It was observed that on perusal of the meaning of the categories of specific intangible assets referred to in section 32(1)(ii) of the Act preceding the term "business or commercial rights of similar nature" it is seen that intangible assets are not of the same kind and are clearly distinct from one another. The legislature thus did not intend to provide for depreciation only in respect of the specified intangible assets but also to other categories of intangible assets which may not be possible to exhaustively enumerate. It was concluded that the assessee who had acquired commercial rights to sell products under the trade name and through the network created by the seller for sale in India were entitled to depreciation.



In the present case, Mr. Patel was erstwhile partner of the assessee. The assessee had made payments to him to ward of competence and to protect its existing business. Mr. Patel, in turn, had agreed not to solicit contract or seek business from or to a person whose business relationship is with the assessee. Mr. Patel would not solicit directly or indirectly any employee of the assessee. He would not disclose any confidential information which would include the past and current plan, operation of the existing business, trade secretes lists etc.

It can thus be seen that the rights acquired by the assessee under the said agreement not only give enduring benefit, protected the assessee's business against competence, that too from a person who had closely worked with the assessee in the same business. The expression "or any other business or commercial rights of similar nature" used in Explanation 3 to sub-section 32(1)(ii) is wide enough to include the present situation."

5. No question of law in this respect therefore arises."

4.2.3 After considering the orders of Honourable Jurisdictional High Court and ITAT in appellant's own case, I am of the considered view that the non-compete fee is an intangible asset and the appellant is entitled for the depreciation. Hence, the AO is directed to allow depreciation on non-compete fee @ 25% by treating it as an intangible asset. Therefore, this grounds no' 2 of the appeal is allowed.

Since the main ground No.2 of the appeal has been allowed the alternate ground of allowing write off over a period of 18 years has become infructuous and the same is dismissed as such."

6.1 The 1d CIT(A) has deleted the addition in view of decision of Hon'ble Bombay High Court in the case of the assessee for earlier AY 2001-02, which is a binding precedent. Before us, the Revenue has preferred the appeal only on the ground that decision of the Hon'ble Jurisdictional High Court in assessee's own case has not been accepted by the Revenue and SLP has been preferred against the same. In our opinion, merely by filing SLP against decision of the Hon'ble Bombay High Court, same cannot be considered as stayed and therefore, till the issue is decided by the Hon'ble



Supreme Court, the finding of the Hon'ble Jurisdictional High Court in the case of the assessee is a binding precedent for the Tribunal and therefore, we do not find any infirmity in the order of the Ld. CIT(A) on the issue in dispute and accordingly, we uphold the same. The ground No. 1 of the appeal of the Revenue is accordingly dismissed.

7. In ground No. 2, the Revenue is aggrieved with the deletion of the disallowance of interest u/s 36(1)(iii) of the Act amounting to Rs.5,27,23,501/- by the ld CIT(A) relying on the decision of the Hon'ble Jurisdictional High Court in ITA No. 556 of 2017. The relevant finding of the Ld. CIT(A) is reproduced as under:

"4.4 Ground No. 4 relates to disallowance of interest of Rs. 5,27,23,501/- u/s 36(1)(iii) of the Act: In this ground of appeal, the appellant contended that during the year under consideration it has neither made additional investment nor made any sale of investments but the AO has disallowed interest on borrowed funds of Rs. 5,27,23,501/- on the ground that borrowed funds were used for investment in shares of companies for acquiring controlling interest and not used for business purpose. The appellant submitted that it had made investment in foreign subsidiaries so as to explore the market overseas and extend its business globally through its subsidiary and these facts also filed during the assessment proceedings vide letter dated October 28, 2022. The appellant further submitted that since the appellant and CGCL were in the same line of business, the primary objective of investing in the shares of CGCL was to earn income by way of royalty, technical/management fees and dividend. The appellant's plea that it had net worth of Rs. 201.58 crores in the F.Y. 1999-2000 against the investment in CGCL of Rs. 28.89 crores and the investments in Piramal Glass UK and Piramal Glass USA were made to enable the assessee company to explore the overseas market through subsidiary companies. The appellant contended that it has sufficient own funds and the investments are out of own funds and entire interest is allowable u/s 36(1)(iii) of the Act. Reliance is also made on the decision of the Hon'ble Supreme Court in the case of Reliance Industries Ltd 102 taxmann.com 52 and Bombay High Court in the case of Reliance Utilities & Power Ltd 313 ITR 340 and Reliance Communication Infrastructure 207 Taxman 219. The



appellant also submitted that the Hon'ble ITAT has also decided the issue in favour of the appellant in its own case. Further, the appellant submitted that the Hon'ble Jurisdictional High Court in appellant's own case vide its order dated June 11, 2019 decided the issue in favour of the appellant.

4.4.1 It is a matter of fact that the appellant had borrowed funds and invested the same for purchase of shares of subsidiary company. The appellant has made direct sales of glass bottles to its Ceylon subsidiary and it had net worth of Rs. 201.58 crores in the F.Y. 1999-2000 against the investment in CGCL of 28.89 crores. On verification of the written submission of the appellant, it is also observed that the appellant has outstanding investments of Rs. 18.54 crores made in PG Ceylon Ple during the F.Y. 1999-2000, Rs. 16.27 crores made in PG Ceylon Ple, Srilanka during the F.Y. 2007-08, Rs. 0.12 crores made in PG International Inc, USA during the F.Y. 2002-03, Rs. 1.16 crores made in PG UK Ltd., UK during the F.Y. 2005-06, Rs. 22.76 crores made in PG USA Inc, USA during the F.Y. 2005-06 and Rs. 0.31 crores made in PG Europe SARL during the F.Y. F.Y. 2010-11. It also reveals that the appellant has total own funds of Rs. 4,383.89 crores and investment in subsidiaries only to the tune of Rs. 59.14 crores as on the last day of the present financial year. This shows that the appellant has prima facie sufficient own funds for investments made in subsidiaries.

4.4.2 Also, it is seen that the instant issue of disallowance of interest of Rs. 5,27,23,501/- u/s 36(1)(iii) of the Act on a/c of investment in subsidiaries is covered by Hon'ble ITAT Mumbai Bench decision in favour of the appellant own case vide ITA No. 4777/Mum./2016 dated 30th April, 2019 for AY 2005-06, AY 2007-08 & AY 2009-10. It is also observed that the said Tribunal has decided the issue in favour of the appellant for holding that the investments of funds are for the purpose of investment vide ITA No. 9645 and 9498/Mum./2004 dated 2nd March 2016, vide ITA No. 8360/Mum./2010 dated 16.12.2016, vide ITA No. 157/Mum./2016, dated 04.01.2017, ITA(TP) No. 3046/Mum/2017 dated 07.06.2019 and ITA No. 556/Mum./2018 dated 22.06.2020 for the A.Ys. 2001-02, 2006-07, 2011-12, 2012-23 and 2013-14 respectively.

4.4.3 Further, the order of the Hon'ble Jurisdictional High Court [ITA No. 556 of 2017] dated 11.06.2019 in appellant's own case reveals that the similar issue has been decided in favour of the appellant by rejecting the Revenue appeal. The relevant portion of this judgment as in para 6 is reproduced as under:

We notice that this Court in the case of Commissioner of Income Tax, Panaji Goa v. Phil Corpn. Limited held that the Assessee was entitled to deduction of interest on overdraft under Section 36(1)(iii) of the Act when the investment was made by the Assessee in shares of subsidiary of the



company to have control over the said company. Madras High Court in the case of Commissioner of Income Tax, Chennai v. Shriram Investments (Firm) Moogambika Complex, Chennai has taken similar view. Similar opinion is expressed by Calcutta High Court in CIT v. Rajeeva Lochan Kanoria. Similar view was also expressed by Delhi High Court in case of Eicher Gooderarth Limited v. Commissioner of Income Tax. Under the circumstances, no question arises in this respect."

4.4.4 After considering the above facts, it is seen that the issue involved in this ground of appeal is covered in favour of the appellant by the decision of the Hon'ble ITAT Mumbai bench and the Hon'ble Jurisdictional High Court in appellant's own case. Therefore, the appellant's submission on this count that the investments in subsidiaries were made to enable the company to explore the overseas market through subsidiary companies, is found to be correct. Keeping in view of the above decisions, the appellant succeeds on this issue. Therefore, this ground of appeal is allowed."

7.1 On this ground also the Revenue has preferred the appeal only for the reason that SLP filed by the assessee against the decision of the Hon'ble Jurisdictional High Court is pending. Following our finding in ground No. 1 of the appeal, the decision of the Hon'ble Jurisdictional High Court being a binding precedent, we do not find any infirmity in the order of the Ld. CIT(A) on the issue in dispute and accordingly, we uphold the same. The ground No. 2 of the appeal of the Revenue is accordingly dismissed.

8. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court on 27/09/2024.

**Sd/-
(RAJ KUMAR CHAUHAN)
JUDICIAL MEMBER**

**Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER**

Mumbai;
Dated: 27/09/2024



Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,
(Assistant Registrar)
ITAT, Mumbai