

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

**Before Shri Inturi Rama Rao, Accountant Member
&
Shri Sandeep Singh Karhail, Judicial Member**

ITA No.239/Coch/2023 :Asst.Year 2011-2012
ITA No.240/Coch/2023 :Asst.Year 2012-2013
ITA No.241/Coch/2023 :Asst.Year 2013-2014
ITA No.242/Coch/2023 :Asst.Year 2014-2015
ITA No.243/Coch/2023 :Asst.Year 2017-2018

M/s.Inditrade Capital Limited (formerly known as JRG Securities Limited) 2 nd Floor, MES Building Kaloor S.O., Ernakulam-682 017. PAN : AAACJ7327G.	v.	The Assistant Commissioner of Income-tax, Cir.1(2) Kochi. / Income Tax Officer Corp.Ward (1(1)) Kochi.
(Appellant)		(Respondent)

Appellant by : Sri.Aneesh Vishwanathan, CA
Respondent by : Smt.Leena Lal, Senior AR

Date of Hearing : 27.03.2025	Date of Pronouncement : 14.05.2025
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ORDER

Per Inturi Rama Rao, AM :

These are appeals filed by the assessee-company directed against different orders of the National Faceless Appeal Centre / Commissioner of Income-tax (Appeals) [“the CIT(A)”] for the assessment years 2011-2012, 2012-2013, 2013-2014, 2014-2015 and 2017-2018.

2. For the sake of clarity and convenience, the facts relate to the appeal in ITA No.239/Coch/2023 for assessment year 2011-2012 are stated hereunder.

3. The appellant raised the following grounds of appeal:-

"1. Disallowance of depreciation on non-compete fee amounting to INR 93,75,000

1.1 On the facts and circumstances of the case and in law, the learned CIT(A) has erred in disallowing an amount of INR 93,75,000 on account of depreciation claimed on non-compete fees paid under 32(1)(ii) of the Act, without considering the detailed submissions and judicial precedents quoted by the Appellant.

1.2 On the facts and circumstances of the case, the CIT(A) has erred in purely relying only on the decision of Delhi High Court in case of Sharp Business System v CIT (2012) 254 CTR 233 and Fortis Hospitals Ltd (ITA 132/2021), by treating non-compete fee as Capital in nature and not eligible for depreciation, without considering the fact that the High Court of Madras, recently in 2021, in the case of CIT v. Areva T & D India Ltd. (129 taxmann.com 55), after considering on the decision of the Delhi High Court in case of Sharp Business System (supra), has held that, expenditure incurred for acquiring non-compete right is capital in nature and entitled to depreciation under section 32(1)(ii) of the Act.

1.3 On the facts and circumstances of the case, the CIT(A) has erred both in law and in facts, inter-alia; in not evaluating the detailed submissions filed and case laws cited by the assessee rendered in the context of the said claim. Further, the CIT(A) has also erred in not considering the findings of the Honourable Supreme Court in case of CIT vs. Vegetable Products Ltd (88 ITR 192) wherein it was held that, "if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted. This is a well-accepted rule of construction recognised by this court in several of its decisions."

[Emphasis Supplied]

1.4 On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in disallowing the depreciation claimed on non-compete fee without evaluating the true nature of such expense and its deductibility under the Act.”

4. Briefly, the facts of the case are that the appellant is a company incorporated under the provisions of Companies Act, 1956. It is engaged in the business of share broking and trading in securities. The return of income for the assessment year 2011-2012 was filed on 30th September, 2011 disclosing a loss of Rs.1,47,96,114. Against the said return of income, the assessment was completed by the Assistant Commissioner of Income-tax, Circle 1(2), Kochi (hereinafter “the AO”), vide order dated 3rd February, 2014 passed u/s.143(3) of the Income-tax Act, 1961 (hereinafter “the Act”) at a total loss of Rs.54,21,114. While doing so, the AO disallowed the claim for allowance of depreciation on non-compete fee of Rs.93,75,000. The factual backgrounds leading to the above addition are as under.

5. The appellant-company had entered into a non-compete agreement on 29th April, 2009 with the promoter of the company, wherein the promoters had agreed not to operate and carry on the business related to the appellant company for a period of three years from the date of agreement. In consideration of the same, the appellant company paid a lump sum compensation amounting to Rs.5 crore to the promoters, for not to operate and carry on the business of the appellant company for a period of three years, within the territory of India. It is contended before the AO that pursuant to this agreement, the company

had acquired a commercial right, which would fall within the ambit of “intangible asset” in terms of the provisions of section 32(1)(ii) of the Act. Accordingly, the appellant made a claim for allowance of depreciation at the rate of 25% of the sum paid, placing reliance on the following decisions :-

- (i) Pentasoft Technologies Ltd. v. DDCIT, Tax case (Appeals) No.1195 by Hon’ble Madras High Court.
- (ii) Ind Global Corporate Fiannce (P) Ltd. v. ITO (2013) 33 taxmann.com 388 (ITAT Mumbai Bench)
- (iii) ACIT v. Real Image Tech (P) Ltd 177 Taxmann (Chennai) (Mag.)
- (iv) Scott Glass India (P) Ltd. (ITA No.1698/Mum/2003) (ITAT Mumbai)
- (v) Sri.B.Ravendran Pillai v. CIT (194 Taxman 477) (Kerala HC)
- (vi) CIT v. Best & Co. 60 ITR 11 (SC)

6. However, the AO was of the opinion that the claim of allowance of depreciation cannot be allowed, placing reliance on the decision of the Hon’ble Delhi High Court in the case of Sharp Business Solution v. CIT (2012) 254 CTR 233 (Delhi). Accordingly, made the disallowance of depreciation claimed as non-compete fee of Rs.93,75,000.

7. Being aggrieved by the above assessment order, an appeal was filed before the CIT(A), who vide the impugned order, confirmed the disallowance of depreciation on account of non-compete fee, placing reliance on the decision of the Hon’ble Delhi High Court in the case of

Sharp Business Solutions, cited supra, which was subsequently followed by the Hon'ble Delhi High Court in the case of Fortis hospitals Limited v. ACIT in ITA No.132/2021 (judgment dated 29th July, 2021).

8. Being aggrieved, the appellant is in appeal before the Tribunal, in the present appeal. It is contended that on account of payment of non-compete fee, the appellant company had acquired a right, which not only provide enduring benefit but also protected the assessee's business against competition. The right so acquired is intangible asset, which qualifies for allowance of depreciation u/s.32(1)(ii) of the Act. The appellant also placed reliance on the following judgments:-

(i) Hon'ble Bombay High Court in the case of PCIT v. Music Broadcast (P.) Ltd. (155 taxmann.com 277)

(ii) Hon'ble Madras High Court in the case of CIT v. Areva T & D India Ltd. (129 taxmann.com 55)

(iii) Hon'ble Gujarat High Court in the case of PCIT v. Ferromatic Milacron India (P.) Ltd. (99 taxmann.com 154)

(iv) Hon'ble Karnataka High Court in the case of CIT v. Ingersoll Rand International Ind. Ltd. (2014) 48 taxmann.com 349)

(v) Hon'ble Kerala High Court in the case of B.Ravindran Pillai v. CIT (194 Taxman 477).

9. It is further submitted that the decision of the Hon'ble Delhi High Court in the case of Sharp Business Solution v. CIT (2012) 254 CTR 233 (Delhi) was distinguished on facts by the Hon'ble Madras High

Court in the case of CIT v. Areva T & T India Ltd. (129 taxmann.com 55). It is further submitted that in any event, in view of the decision of the Hon'ble Supreme Court in the case of CIT v. Vegetable Products Ltd (88 ITR 192), if two reasonable construction of taxing provision are possible, that construction which favours the assessee must be adopted.

10. On the other hand, the learned Senior DR submits that the decision of the Hon'ble Delhi High Court in the case of Sharp Business Solution v. CIT (2012) 254 CTR 233 (Delhi) is squarely applicable to the facts of the case and does not require any interference on this Tribunal.

11. We heard the rival submissions and perused the material on record. The sole issue that arises for our consideration is whether or not the depreciation is allowable in respect of the right acquired in terms of non-compete agreement entered into by the appellant-company with its earlier promoters. We have perused the non-compete agreement entered into by the appellant-company with the promoters on 29th April, 2009. The agreement had showed a payment of consideration of Rs.5 crore in consideration of the promoters not carrying on the business relates to the appellant for a period of three years within the territory of India. The department does not dispute the existence of such an agreement nor there was any allegation that it is a sham document. The non-compete fee paid by the appellant-company was for the purpose of its business having enduring benefit resulting in an acquisition of intangible asset, which qualifies for allowance of depreciation u/s.32(1) of the Act, as held by the following High Courts :-

- (i) Hon'ble Bombay High Court in the case of PCIT v. Music Broadcast (P.) Ltd. (155 taxmann.com 277)
- (ii) Hon'ble Madras High Court in the case of CIT v. Areva T & D India Ltd. (129 taxmann.com 55)
- (iii) Hon'ble Gujarat High Court in the case of PCIT v. Ferromatic Milacron India (P.) Ltd. (99 taxmann.com 154)
- (iv) Hon'ble Karnataka High Court in the case of CIT v. Ingersoll Rand International Ind. Ltd. (2014) 48 taxmann.com 349)
- (v) Hon'ble Kerala High Court in the case of B.Ravindran Pillai v. CIT (194 Taxman 477).

12. The decision of the Hon'ble Delhi High Court in the case of Sharp Business Solution, cited supra, was distinguished by the Hon'ble Madras High Court in the case of Asianet Communications Ltd. v. CIT (2018) 407 ITR 706 (Mad.). The relevant observations of the Hon'ble Madras High Court, reads as under:-

“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 on competition, it entered into agreement by paying a non-compete fee of Rs. 73 crores to L and T Ltd. of setting up or undertaking or assisting in the setting up or undertaking any business in India, of selling and trade of electronic office products for seven years and this amount was treated as deferred revenue expenditure in the assessee's books of account and written-off over corresponding period of seven years.

There is a marked difference in the factual position in Sharp Business System (supra) and the factual position in the case on hand where the assessee's business continues to remain the same, and this is also one more reason to hold that the decision

in Sharp Business System (supra) is not applicable to the facts of the case apart from the reservation expressed by us above.”

13. In the light of the above legal position, we are of the considered opinion that the claim of allowance of depreciation on the payment of non-compete fee results in an acquisition of intangible asset, which qualifies for allowance of depreciation u/s.32(1)(ii) of the Act. Accordingly, this grounds of appeal stands allowed.

14. In the result, the appeal filed by the assessee stands allowed.

ITA No.240/Coch/2023 : Asst.Year 2012-2013

15. Briefly, the facts of the case are that the return of income for the assessment year 2012-2013 was filed by the appellant on 30th September, 2012 disclosing Nil income after claiming carried forward loss of Rs.5,21,57,391. Against the said return of income, the assessment was completed by the AO vide order dated 27th March, 2015, passed u/s.143(3) of the Act at a total loss of Rs.1,79,04,252. While doing so, the AO made following disallowances:-

Sr. No.	Particulars	Amount (Rs.)
(i)	Disallowance u/s.36(1)(va) of the Act in respect of employees' contribution towards ESI and Labour Welfare Funds	1,64,173
(ii)	Disallowance u/s.14A r.w.r 8D	52,77,806
(iii)	Disallowance of proposed rights issue expenses	1,18,19,512
(iv)	Disallowance of depreciation on non-compete fee	70,31,250
(v)	Disallowance of interest on borrowed working capital fund	50,67,973

(vi)	Addition on account of interest on income-tax refund	7,27,980
(vii)	Addition on account of difference in amount received	1,04,447

16. Being aggrieved by the above additions, an appeal was filed before the CIT(A), who vide the impugned order, confirmed the disallowance of belated remittance to the contribution to ESI and Labour Welfare Funds, placing reliance on the judgment of the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. v. CIT (2022) 448 ITR 518 (SC). The learned CIT(A) also confirmed the addition u/s.14A, placing reliance on explanation inserted to sec.14A of the Act by the Finance Act, 2022. The learned CIT(A) also confirmed the disallowance of expenditure incurred in connection with the proposed rights issue of Rs.1,18,19,512, placing reliance on the judgment of the Hon'ble Supreme Court in the case of Brook Bond India Limited v. CIT (1997) 225 ITR 798 (SC) and CIT v. Kodak India Limited (2002) 253 ITR 445 (SC). However, directed the AO to delete the addition on account of audit fees of Rs.41 lakh. The learned CIT(A) also confirmed the disallowance of depreciation on account of non-compete fee paid relying upon the decision of the Hon'ble Delhi High Court in the case of Sharp Business Solution, cited supra. However, the CIT(A) granted relief in respect of disallowance of interest u/s.36(1)(iii) of the Act and difference for TDS credit. Thus, the appeal filed by the assessee stands partly allowed.

17. Being aggrieved, the appeal is in appeal before the Tribunal, in the present appeal. Grounds of appeal No.1 challenges the disallowance

of belated remittance of the employees' contribution to ESI and Labour Welfare Fund amounting to Rs.1,64,173 paid before the due date for filing the return of income. The said issue is no longer res integra, as it stood settled by the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. v. CIT (2022) 448 ITR 518 (SC). Since the decision of the learned CIT(A) is in consonance with the law laid down by the Hon'ble Apex court, we do not find any merit in the grounds of appeal raised by the assessee. Accordingly, this grounds of appeal stand dismissed.

18. The grounds of appeal No.2 challenges the disallowance u/s.14A of the Act as confirmed by the CIT(A). The AO made the disallowance of Rs.52,77,806 u/s.14A of the Act by holding that the provision of sec.14A are attracted even in the absence of exempt income. On appeal before the CIT(A), the CIT(A) has confirmed the disallowance, placing reliance on the explanation inserted to sec.14A by the Finance Act, 2022. It is settled position of law that before insertion of explanation to sec.14A of the Act by the Finance Act, 2022, in the absence of any exempt income no disallowance can be made by resorting to the provisions of sec.14A of the Act. Reliance can be made to the following judgments :-

(i) Redington (India) Ltd. v. Addl.CIT (2017) 392 ITR 633 (Mad.)

[The Hon'ble Supreme Court has dismissed the SLP filed by the Department on the ground of delay as well as on merits.]

(ii) CIT v. Chettinad Logistics Pvt. Ltd. (2018) 95 taxmann.com 250 (SC)

(iii) Cheminvest Ltd. v. CIT (2015) 378 ITR 33 (Delhi)

(iv) Pr.CIT v. Amadeus India Pvt. Ltd. (2023) 452 ITR 206 (Delhi)

(v) Pr.CIT v. Novell Software Development (India) Pvt. Ltd. (2021) 434 ITR 154 (Karn.)

[The Hon'ble Supreme Court also dismissed the SLP filed by the department in the case of Pr.CIT v. GVK Project and Technical Services Ltd. (2019) 106 taxmann.com 180 (Delhi) both on delay and on merits]

19. The statute is amended by insertion of explanation to sec.14A of the Act, by Finance Act, 2022 proposing to make disallowance of expenditure even in the absence of actual exempt income u/s.14A. This explanation was held to be prospective in nature applicable from assessment year 2023-2024 by the Hon'ble Delhi High Court in the case of Pr.CIT v. Era Infrastructure (India) Ltd. (448 ITR 674 (Del.)), cannot be presumed to have been retrospective effect. In view of the decision of the Hon'ble Delhi High Court, the CIT(A) had clearly fell in error in confirming the disallowance u/s.14A of the Act, placing reliance on the explanation to sec.14A. Thus, grounds of appeal No.2 filed by the assessee stands allowed.

20. Grounds of appeal No.3 challenges the disallowance of rights issue expenditure of Rs.1,18,19,512. It is submitted that the appellant had incurred a total expenditure of Rs.1,18,19,512 towards proposed rights issue, which was abundant subsequently. The learned AR relied on the decision of the co-ordinate bench of the Tribunal in the case of

Nimbus Communications Ltd. v. ACIT (ITA No.2361/Mum/2007 – order dated 28th January, 2010).

21. On the other hand, the learned Senior DR, relying on the decision of Brook Bond India Limited v. CIT (1997) 225 ITR 798 (SC), submits that the expenditure was incurred on capital account, it cannot be allowed as deduction.

22. We heard the rival submissions and perused the material on record. Undisputedly, the expenditure was incurred by the appellant on a proposed rights issue expenditure, which was abandoned for the reasons best known to the appellant-company. The expenditure was not incurred during the previous year relevant to the assessment year under consideration. Thus, the condition precedent for allowance of deduction as revenue expenditure u/s.37(1) of the Act, does not stand settled and there was no material on record to show that even the proposed rights issue was abandoned during the previous year relevant to the assessment under consideration. Moreover, any expenditure incurred on the expansion of capital base of the appellant-company is nothing but a capital expenditure as allowed by the Hon'ble Apex Court in the case of Brook Bond India Limited v. CIT and CIT v. Kodak India Limited, cited supra. Thus, we do not find any infirmity either in law or in facts in the orders of the authorities below. This grounds of appeal is dismissed.

23. Grounds of appeal No.4 challenges the disallowance of depreciation on non-compete fees. This issue, we dealt with in

assessee's appeal in ITA No.239/Coch/2023 for assessment year 2011-2012. Thus, for the reasoning and findings given by us therein, this grounds of appeal is also allowed.

24. In the result, the appeal filed by the assessee stands partly allowed.

ITA No.241/Coch/2023 : Asst.Year 2013-2014

23. Grounds of appeal No.1 challenges the disallowance u/s.14A of the Act. This issue, we dealt with in assessee's appeal in ITA No.240/Coch/2023 for assessment year 2012-2013. Thus, for the reasoning and findings given by us therein, this grounds of appeal stands allowed.

24. Grounds of appeal No.2 challenges the disallowance of depreciation on non-compete fees. This issue, we dealt with in assessee's appeal in ITA No.239/Coch/2023 for assessment year 2011-2012. Thus, for the reasoning and findings given by us therein, this grounds of appeal stands allowed.

25. In the result, the appeal filed by the assessee stands allowed.

ITA No.242/Coch/2023 : Asst.Year 2014-2015

26. Grounds of appeal No.1 challenges the disallowance u/s.14A of the Act. This issue, we dealt with in assessee's appeal in ITA No.240/Coch/2023 for assessment year 2012-2013. Thus, for the

reasoning and findings given by us therein, this grounds of appeal stands allowed.

27. Grounds of appeal No.2 challenges the disallowance of depreciation on non-compete fees. This issue, we dealt with in assessee's appeal in ITA No.239/Coch/2023 for assessment year 2011-2012. Thus, for the reasoning and findings given by us therein, this grounds of appeal stands allowed.

28. In the result, the appeal filed by the assessee stands allowed.

ITA No.243/Coch/2023 : Asst.Year 2017-2018

29. Grounds of appeal No.1 challenges the disallowance u/s.14A of the Act. This issue, we dealt with in assessee's appeal in ITA No.240/Coch/2023 for assessment year 2012-2013. Thus, for the reasoning and findings given by us therein, this grounds of appeal stands allowed.

30. Grounds of appeal No.2 challenges the disallowance of depreciation on non-compete fees. This issue, we dealt with in assessee's appeal in ITA No.239/Coch/2023 for assessment year 2011-2012. Thus, for the reasoning and findings given by us therein, this grounds of appeal stands allowed.

31. Grounds of appeal 3 challenges denial of brought forward MAT credit for the year under consideration. No material was shown to us the availability of brought forward MAT credit. In view of above, we do

not find any reason to interfere with the orders of the authorities below.
This grounds of appeal is dismissed.

32. In the result, the appeal filed by the assessee stands partly allowed.

33. To sum up, the appeal in (i) ITA No.239/Coch/2023 for Asst.Year 2011-2012 stands allowed, (ii) ITA No.240/Coch/2023 for Asst.Year stands partly allowed, (iii) ITA No.241/Coch/2023 for Asst.Year 2013-2014 stands allowed, (iv) ITA No.242/Coch/2023 for Asst.Year 2014-2015 stands allowed, and (v) ITA No.243/Coch/2023 for Asst.Year 2017-2018 stands partly allowed.

Order pronounced on this 14th day of May, 2025.

Sd/-
(Sandeep Singh Karhail)
JUDICIAL MEMBER

Sd/-
(Inturi Rama Rao)
ACCOUNTANT MEMBER

Cochin; Dated : 14th May, 2025.
Devadas G*

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2. The Respondent.
3. The CIT, Cochin.
4. The DR, ITAT, Cochin.
5. Guard File.

Asst.Registrar/ITAT, Cochin