2023:DHC:6548-DB

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 16.08.2023*

\+ **ITA 515/2019 & CM Add1s.24043-44/2019**

PR. COMMISSIONER OFLNCOME TAX -1, CHANDIGARH ..... Appellant

Through: Mr Sanjeev Menon, Sr Standing Counsel.

versus

M/S KUANTUM PAPERS LTD. ..... Respondent

Through: Mr Rohit Jain with Mr Aniket D. Agarwal, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (Oral)

CM Appl.24044/2019

1. Allowed, subject to just exceptions.

CM Appl.24043/2019 ***[Application filed on behalf of the appellant/revenue seeking condonation of delay of 50 days in filing the appeal]***

2. This is an application filed on behalf of the appellant/revenue seeking condonation of delay in filing the appeal.

2.1 According to the appellant/revenue, the delay involved is 50 days.

3. Mr Rohit Jain, who appears on behalf of the respondent/assessee, does not oppose the prayer made in the application.

4. Accordingly, the delay is condoned. The application is disposed of, in

the aforesaid terms.

ITA 515/2019

5. This appeal concerns Assessment Year (AY) 2008-09.

6. *Via* this appeal, the appellant/revenue seeks to assail the order dated 11.05.2017, passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].

7. Insofar as this appeal is concerned, the following two issues arise for consideration:

(i) Whether the respondent/assessee has rightly claimed depreciation amounting to Rs.7,44,36,019/- concerning the chemical recovery plant?

(ii) Whether the claim for depreciation on the brands used by the respondent/assessee, concerning its paper manufacturing business, were intangible assets within the meaning of Section 32(1)(ii) of the Income Tax Act, 1961 [in short, "Act"] and hence, amenable to the claim of depreciation?

8. Insofar as the first issue is concerned, the entire controversy veers around one single aspect i.e., whether or not the respondent/assessee has commenced the use of the chemical recovery plant as of 21.03.2008. Qua this aspect, the Assessing Officer (AO) has held against the respondent/assessee, which triggered the respondent/assessee's appeal before the Commissioner of Income Tax-Appeals [in short, "CIT(A)"].

9. While the appeal was in progress before the CIT(A), the respondent/assessee filed certain additional documents to establish the use of the chemical recovery plant with effect from 21.03.2008.

10. At that stage, the CIT(A) called for a remand report from the AO. The

AO submitted the remand report, dated 27.01.2012, concerning the additional documents.

10.1 Based on the additional documents, the CIT(A) concluded that the chemical recovery plant had, in fact, commenced production with effect from 21.03.2008. Therefore, the proportionate depreciation amounting to Rs.7,44,36,019/-, as claimed by the respondent/assessee was allowed.

10.2 Thus, on this aspect the CIT(A) recorded the following findings:

> *"6.6 Coming to the merit of the case, I find that the AO has disallowed the above claim of depreciation by taking a view that the Chemical Recovery Plant was not put to use during the year under consideration as certain parts were still under construction I testing stage as per details retrieved from "details of addition of fixed assets" submitted by the assessee on sample basis. However, as argued by the Id. AR, the total depreciation (including additional depreciation) claimed by the assessee for the above plant was Rs.7,67,09,4811- which included depreciation on factory building at Rs.22,73,462/- and depreciation on plant and machinery at Rs.7,44,36,109/-. The AO has disallowed the depreciation on plant and machinery, but has allowed depreciation on the factory building which is part and parcel of the same Chemical Recovery Plant. It is argued by the Id. AR, both the building and plant and machinery were compositely completed and put to use together in March 2008. It is argued that the AO's action in partly allowing depreciation on the above factory while disallowing depreciation on the remaining part is bad in law and facts.*
>
> *Further, it is argued by the Id. AR that the said Chemical Recovery Plant was fully commissioned on 21.03.2008 and it started its operations from the said date. The said plant generated 1823 tonnes of steam and 33 tonnes of caustic soda totalling Rs.21,49,2051- during the year ended 31.03.2008.*
>
> *Further, the said expansion project was appraised and financed by the State Bank Group led by SBI which appointed M/s R.R. Dehra & Associates, an independent firm of Chartered Engineers to monitor the implementation of above project and to submit periodical reports I certificates with regard to the progress of the said project. A copy of the reports I certificates dated 30.04.2008 issued by the above Chartered Engineer firm certifying that the said project was commissioned on 21.03.2008 was filed before the AO during the assessment proceeding, copy of which is filed by the appellant as part of the Paper Book. It is further argued by the ld. AR that a copy of the publication regarding status of implementation of the above project as per the Stock Exchange*

and SEBI guidelines was also submitted before the AO. Further, copy of Board Resolution of the assessee company dated 29.04.2008 stating that the date of commissioning of the Chemical Recovery Plant was 21.03.2008 was also filed before the AO. The assessee has also charged in its book an amount of Rs. 19,98,0901- as depreciation on the above plant for the period of one month as per the Companies Act Copies of all the bills relating to addition to fixed assets including machineries for the above plant were produced before the AO. It is submitted by the ld. AR that the AO's observation that some assets were still under construction I testing stage based on some samples of bills is completely erroneous as the said bills nowhere mentioned that the assets were at construction I testing stage. Further, the appellant during the appellate proceeding submitted copy of the relevant records of the Central Excise registers and statutory returns filed with the Central Excise Department for the purpose of Cenvat credit as well as the Inward Gate Passes (IGP) showing receipt of incoming materials I items in the factory premises. Copies of the IGPs in respect of items contained in the invoices mentioned by the AO in the assessment order were also submitted. As mentioned earlier in this order, the above documentary evidences were forwarded to the AO during the remand proceeding for examination. The AO vide his remand report dated 31.01.2012 has mentioned that he has duly verified the statutory Excise returns filed with the Central Excise Department alongwith Cenvat credit records wherein the said Cenvat credit pertaining the Chemical Recovery Plant (CRP) was entered and also its corresponding entries in the Excise records - RG 23 C
Part II
(Entry book of duty credit of capital goods) and tallied the same with the Central Excise records, original invoices, and original IGPs. The original IGPs which are made at the time receipt of the material were also produced before the AO during the remand proceeding and were duly verified by him and tallied with the relevant invoices. The AO has not made any adverse comment whatsoever on merit. Considering the above, I find that the impugned addition of Rs.7,44,36,1091- made by the AO cannot be sustained on facts or in law. The same is, therefore, deleted."

11. Likewise, insofar as the second issue is concerned, the CIT(A) ruled in favour of the respondent/assessee and sustained the claim of depreciation on the brand names by treating the same as intangible assets, which, according to him, fell within the purview of Section 32(1)(ii) of the Act. Being aggrieved, the appellant/revenue carried the matter in appeal to the Tribunal.

The Tribunal, *via* the impugned order, has sustained the view of the CIT(A).

13. Mr Sanjeev Menon, learned senior standing counsel, who appears on behalf of the appellant/revenue, says that the Tribunal has erred in sustaining the order of the CIT(A).

14. Insofar as the first issue is concerned, Mr Menon submits that the additional evidence was entertained by the CIT(A) without giving an opportunity to the AO. Therefore, flowing from this submission, the contention of Mr Menon is that once the additional evidence is taken out of the equation, the claim of deprecation on the chemical recovery plant cannot be sustained. In support of his plea, Mr Menon relied upon the judgment of the Madras High Court rendered in ***Narendra Kumar Sakaria vs. Assistant Commissioner of Income-Tax*** (2018) SCC OnLine Mad 13781.

15. Regarding the other issue, Mr Menon relies upon the AO's order to contend that since brand name is not referred to in clause (ii) of Sub-section (1) of Section 32 of the Act, the respondent/assessee could not have claimed depreciation *qua* the same.

16. We have heard the learned counsel for the parties and perused the record.

17. According to us, both the CIT(A) and the Tribunal were correct. The argument raised by Mr Menon that the additional evidence could not have been admitted by the CIT(A) is nothing but a red herring. Clearly, even according to him, the respondent/assessee furnished sufficient cause as to why the additional evidence ought to be admitted.

18. The CIT(A) noted the fact that the AO had flagged the issue concerning depreciation at the fag end of the assessment proceedings, which, in a sense, did not provide enough time for placing relevant material

before the AO.

19. The record shows that the CIT(A) did not stop at there, but went further by calling for a remand report. As noted above, the remand report was submitted by the AO on 27.01.2012, which specifically concerned the additional evidence that the respondent/assessee sought to place on record.

19.1 These aspects are not disputed by Mr Menon. Mr Menon seeks to convey to the court that, thereafter, another opportunity ought to be given to the AO.

20. According to us, this argument is completely misconceived. The remand report that the AO was called upon to furnish gave an opportunity to him to rebut the contents of the additional document and/or have his say *qua* the same.

21. Even if we were to assume that Mr Menon is right in this behalf, the least that could have been done, by the appellant/revenue, then, was to raise a specific ground in the appeal preferred before the Tribunal.

21.1 The record seems to disclose that no such ground was raised; a broad and omnibus ground was raised, which simply said that the order passed by the CIT(A) was erroneous.

21.2 This which brings us to the decision that Mr Menon has placed before us in support of his submissions. According to us, the judgment of the Madras High Court in ***Narendra Kumar Sakaria*** is clearly distinguishable as in this case an opportunity was granted to the AO to submit a remand report.

22. As regards the other aspect, which is whether the respondent/assessee could claim depreciation *qua* brand names, in our view, is no longer *res integra,* in view of the judgment of the Supreme Court in ***Commissioner of***

Income-Tax vs. Smifs Securities Ltd. (2012) 348 ITR 302 (SC). The Supreme Court's observations are as under:

> "*[Question (b)*
>
> *5. "Whether goodwill is an asset within the meaning of Section 32 of the Income Tax Act, 1961, and whether depreciation on 'goodwill' is allowable under the said section?"*
>
> *Answer*
>
> *6. In the present case, the assessee had claimed deduction of Rs 54,85,430 as depreciation on goodwill. In the course of hearing, the explanation regarding origin of such goodwill was given as under:*
>
> > *"In accordance with the scheme of amalgamation of YSN Shares and Securities (P) Ltd. with Smifs Securities Ltd. (duly sanctioned by the Hon'ble High Courts of Bombay and Calcutta) with retrospective effect from 1-4-1998, assets and liabilities of YSN Shares and Securities (P) Ltd. were transferred to and vest in the company. In the process goodwill has arisen in the books of the company."*
>
> *It was further explained that excess consideration paid by the assessee over the value of net assets acquired of YSN Shares and Securities (P) Ltd. (amalgamating company) should be considered as goodwill arising on amalgamation. It was claimed that the extra consideration was paid towards the reputation which the amalgamating company was enjoying in order to retain its existing clientele.*
>
> *7. The assessing officer held that goodwill was not an asset falling under Explanation 3 to Section 32(1) of the Income Tax Act, 1961 ("the Act", for short).*
>
> *8. We quote hereinbelow Explanation 3 to Section 32(1) of the Act:*
>
> > *"Explanation 3.—For the purposes of this sub-section, the expressions 'assets' and 'block of assets' shall mean—*
> >
> > *(a) tangible assets, being buildings, machinery, plant or furniture;*
> >
> > *(b) intangible assets, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature."*
> >
> > *Explanation 3 states that the expression "asset" shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature. A reading of the words "any other business or commercial rights of similar nature" in clause (b) of Explanation 3 indicates that goodwill would*

> *fall under the expression "any other business or commercial right of a similar nature". The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3(b).*

9. In the circumstances, we are of the view that "goodwill" is an asset under Explanation 3(b) to Section 32(1) of the Act.
10. One more aspect needs to be highlighted. In the present case, the assessing officer, as a matter of fact, came to the conclusion that no amount was actually paid on account of goodwill. This is a factual finding. The Commissioner of Income Tax (Appeals) ["CIT (A)", for short] has come to the conclusion that the authorised representatives had filed copies of the orders of the High Court ordering amalgamation of the above two companies; that the assets and liabilities of M/s YSN Shares and Securities (P) Ltd. were transferred to the assessee for a consideration; that the difference between the cost of an asset and the amount paid constituted goodwill and that the assessee Company in the process of amalgamation had acquired a capital right in the form of goodwill because of which the market worth of the assessee Company stood increased. This finding has also been upheld by the Income Tax Appellate Tribunal ("ITAT", for short). We see no reason to interfere with the factual finding.
11. One more aspect which needs to be mentioned is that, against the decision of ITAT, the Revenue had preferred an appeal to the High Court in which it had raised only the question as to whether goodwill is an asset under Section 32 of the Act. In the circumstances, before the High Court, the Revenue did not file an appeal on the finding of fact referred to hereinabove.
12. For the aforestated reasons, we answer Question (b) also in favour of the assessee."

22.1 Reference has also been made to ***Commissioner of Income-Tax vs. Glenmark Pharmaceutical Ltd.*** (2013) 351 ITR 359 (Bom).

23. A careful perusal of Section 32(1)(ii) of the Act, read with clause (b) of Explanation 3 would show that trademarks are covered under the said provision.

23.1 Brand names are a specie of the trademark. This is evident upon reading the definition of "trademark" and "mark" provided in the allied statute i.e., Trademarks Act, 1999 [in short, "TM Act"]. The relevant provisions are extracted hereafter:

*"2.**Definitions and interpretation.***
(1) In this Act, unless the context otherwise requires,-
xxx xxx xxx

"(n)"mark" includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof;"
xxx xxx xxx

(zb) "trade mark" means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours; and..."

24. A perusal of the definition would show that the trademark means a mark which is capable of being represented graphically, and is capable of distinguishing the goods or services of one person from those of others, and may include the shape of goods, their packaging, and combination of colours.

25. The expression "mark" which is defined in Section 2(m) of the TM Act, includes, among others, a 'brand'.

26. Therefore, a conjoint reading of these Sections would clearly point in the direction that the expression "trademark" under Section 32(1)(ii) and in the appended Explanation i.e., Explanation 3(b) would clearly include brand names. For a clearer understanding of the issue, for the sake of convenience, the relevant parts of Section 32(1)(ii) and Explanation 3(b) are set forth hereafter:

*"**32. Depreciation.***
(1) In respect of depreciation of—
(i) ***xxx xxx xxx***
(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, owned, wholly or partly, by the assessee and used for the

purposes of the business or profession, the following deductions shall be allowed—

(i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed;

(ii) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed:

Provided that no deduction shall be allowed under this clause in respect of—

(a) any motor car manufactured outside India, where such motor car is acquired by the assessee after the 28th day of February, 1975 but before the 1st day of April, 2001, unless it is used—

(i) in a business of running it on hire for tourists ; or

(ii) outside India in his business or profession in another country ; and

(b) any machinery or plant if the actual cost thereof is allowed as a deduction in one or more years under an agreement entered into by the Central Government under section 42 :

Provided further that where an asset referred to in clause (i) or clause (ii) or clause (iia) or the first proviso to clause (iia), as the case may be, is acquired by the assessee during the previous year and is put to use for the purposes of business or profession for a period of less than one hundred and eighty days in that previous year, the deduction under this sub-section in respect of such asset shall be restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under clause (i) or clause (ii) or clause (iia), as the case may be :

xxx xxx xxx

Explanation 3.—For the purposes of this sub-section, the expression "assets" shall mean—

(a) ***xxx xxx xxx***

(b) ***intangible assets, being know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature…"***

[Emphasis is ours]

27. A careful perusal of clause (b) of Explanation 3 extracted hereinabove shows that the definition of assets, as explained in the Explanation, includes commercial rights of similar nature. Brand names certainly invest in the

owner commercial rights, and therefore, will fall within the scope of intangible assets, which are amenable to deprecation under Section 32(1)(ii) of the Act.

28. Thus, for the foregoing reasons, no substantial question of law arises for our consideration. The appeal is, accordingly, closed.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

AUGUST 16, 2023/pmc