

\$~1

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

DECIDED ON: 15.04.2015

+

ITA 496/2014

COMMISSIONER OF INCOME TAX, DELHI-I Appellant

Through: Mr. Kamal Sawhney, Sr. Standing
Counsel with Mr. Sanjay Kumar, Jr. Standing
Counsel and Mr. Mukul Mathur, Advocates.

versus

MIS BHARTI TELETECH LTD. Respondent

Through: Mr. Kaanan Kapur with Mr. Bhushan
Kapur, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.K. GAUBA

S.RAVINDRA BHAT, J. (OPEN COURT)

1. This matter is taken up today as 14.04.2015 was declared a holiday on account of 'Ambedkar Jayanti'.
2. The Revenue is aggrieved by an order of the Income Tax Appellate Tribunal ('ITAT') dated 07.03.2014 whereby it affirmed the Appellate Commissioner's order on the depreciation claim for AY 2006-07 by the assessee for the sum of Rs.53,39,256/-.
3. The facts necessary to decide the present appeal are that on 29.09.2000, the assessee acquired the shares of M/s Siemens Telecom Ltd. ('STL'). The consideration paid by the assessee, *inter alia*,

included the sum of Rs.9 Crores for the “marketing, customer support, distribution and associate setups” of STL. It is a conceded fact that for the previous assessment years, i.e., 2002-03, 2003-04 and 2004-05, the depreciation claim of the assessee was allowed and had acquired finality. In these circumstances when the returns for AY 2006-07 were considered by the Assessing Officer (‘AO’), he re-examined the agreement between STL and the assessee in the light of the depreciation claim made. The AO rejected the depreciation claim, *inter alia*, holding as follows: -

“3.6 A marketing set up can be created by any other party including the assessee itself without being impeded by such marketing network of any other party.

3.7 It is unfathomable to understand any ownership rights resulting on account of the purported acquisition. Neither can the effective user of such acquisition be gauged from the agreement. It would be pertinent to note that one of the stipulated conditions of the aforesaid agreement is non disclosure of this agreement to any third party without prior written consent.

3.8 From the totality of events and circumstances, it is axiomatically held that what has been acquired is not the ownership right but an arrangement for use of such network. In view of this, no depreciation can be allowed on such payment which has euphemistically been termed as goodwill. On a different note, it can always be said that goodwill never depreciates; on the contrary, it only appreciates. The claim of the assessee company regarding depreciation on 'goodwill' is, therefore, rejected and an amount of Rs.53,39,356 is added back to the income.”

4. The assessee’s appeal was allowed by the Commissioner

(Appeals) (hereafter referred to as ‘CIT (A)’) on the basis of the previous years’ reasoning which had accepted the depreciation claims. The CIT (A) also considered the relevant statutory provisions and the decision of this Court in *CIT v. Hindustan Coca Cola Beverages Pvt. Ltd.*, (2011) 331 ITR 192. The ITAT by the impugned order affirmed the findings of the CIT (A).

5. It is urged by Mr. Kamal Sawhney, Sr. Standing Counsel that given the nature of the definition of asset under Section 32 (1), Explanation 3 (b), only intangible assets which are akin to those enumerated, i.e., know-how, patents, copyrights, trademarks, licences, franchises etc. can claim depreciation. It was urged that this is apparent from the reading of an expression “any other business or commercial rights of similar nature”.

6. Learned counsel submitted, therefore, that the nature of the marketing rights were such that there was no similarity or identity with the enumerated rights set out in Explanation 3 (b) and having regard to these facts, unless the assessee demonstrated and proved that such rights were akin to the intangible assets mentioned, it could not claim depreciation.

7. Mr. Kaanan Kapur, learned counsel for the assessee, on the other hand, relied upon the ruling in *Hindustan Coca Cola Beverages (supra)* and also pointed out that Supreme Court’s ruling in *CIT v. M/s Smifs Securities Limited*, (2012) 348 ITR 302 (SC) has held that the claim for depreciation of goodwill is admissible.

8. The relevant provision, i.e., definition of assets in Section 32 which enables the assessee to claim depreciation reads as follows:-

“32. (1) [In respect of depreciation of -

- (i) buildings, machinery, plant or furniture, being tangible assets;*
- (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.*

XXX

XXX

XXX

Explanation 3. - For the purposes of this sub-section, [the expression “assets” shall mean -

- (a) tangible assets, being buildings, machinery, plant or furniture;*
- (b) intangible assets, being know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature.”*

9. In *Hindustan Coca Cola Beverages (supra)*, this Court had an occasion to consider Explanation 3 (b) in the specific context of claim for depreciation of goodwill. The Division Bench noticed the various decisions of the Supreme Court including *Nat Steel Equipment Pvt. Ltd. v. Commissioner of Central Excise*, AIR 1988 SC 631 in the context of what is meant by the term ‘similar’. The Court also recollected the Supreme Court’s ruling in *CIT v. B.C. Srinivasa Setty*, (1981) 128 ITR 294 (SC) in the specific context of what is meant by goodwill and thereafter preceded to held as follows: -

“22. Regard being had to the concept of "goodwill" and the statutory scheme, the claim of the Assessee and the delineation thereon by the tribunal are to be scanned and appreciated. The claim of the Assessee-Respondent, as is

discernible, is that the assessing officer had treated the transactions keeping in view the concept of business or commercial rights of similar nature and put it in the compartment of intangible assets. To effectively understand what would constitute an intangible asset, certain aspects, like the nature of goodwill involved, how the goodwill has been generated, how it has been valued, agreement under which it has been acquired, what intangible asset it represents, namely, trademark, right, patent, etc. and further whether it would come within the clause, namely, "any other business or commercial rights which are of similar nature" are to be borne in mind.

23. On a scrutiny of the order passed by the tribunal, it is clear as crystal that the depreciation was claimed on goodwill by the Assessee on account of payment made for the marketing and trading reputation, trade style and name, marketing and distribution, territorial know-how, including information or consumption patterns and habits of consumers in the territory and the difference between the consideration paid for business and value of tangible assets. The tribunal has treated the same to be valuable commercial asset similar to other intangibles mentioned in the definition of the block of assets and, hence, eligible to depreciation. It has also been noted by the tribunal that the said facts were stated by the Assessee in the audit report and the assessing officer had examined the audit report and also made queries and accepted the explanation proffered by the Assessee. The acceptance of the claim of the Assessee by the assessing officer would come in the compartment of taking a plausible view inasmuch as basically intangible assets are identifiable non-monetary assets that cannot be seen or touched or physical measures which are created through time and / or effort and that are identifiable as a separate asset. They can be in the form of copyrights, patents, trademarks, goodwill, trade secrets, customer lists, marketing rights, franchises, etc. which either arise on acquisition or are internally generated.

24. It is worth noting that the meaning of business or commercial rights of similar nature has to be understood in the backdrop of Section 32(1)(ii) of the Act. Commercial rights are such rights which are obtained for effectively carrying on the business and commerce, and commerce, as is understood, is a wider term which encompasses in its fold many a facet. Studied in this background, any right which is obtained for carrying on the business with effectiveness is likely to fall or come within the sweep of meaning of intangible asset. The dictionary clause clearly stipulates that business or commercial rights should be of similar nature as know-how, patents, copyrights, trademarks, licences, franchises, etc. and all these assets which are not manufactured or produced overnight but are brought into existence by experience and reputation. They gain significance in the commercial world as they represent a particular benefit or advantage or reputation built over a certain span of time and the customers associate with such assets. Goodwill, when appositely understood, does convey a positive reputation built by a person / company / business concern over a period of time. Regard being had to the wider expansion of the definition after the amendment of Section 32 by the Finance Act (2) 1998 and the auditor's report and the explanation offered before the assessing officer, we are of the considered opinion that the tribunal is justified in holding that if two views were possible and when the assessing officer had accepted one view which is a plausible one, it was not appropriate on the part of the Commissioner to exercise his power under Section 263 solely on the ground that in the books of accounts it was mentioned as "goodwill" and nothing else. As has been held by the Apex Court in *Malabar Industrial Co. Ltd.* (supra), *Max India Ltd.* (supra) and *Commissioner of Income Tax v. Vimgi Investment P.Ltd.* [2007] 290 ITR 505 (Delhi) once a plausible view is taken, it is not open to the Commissioner to exercise the power under Section 263 of the Act."

10. In *Smifs (supra)*, the Court was pointedly answering the questions as to whether goodwill would be within the meaning of Section 32. After quoting Explanation (3) to Section 32 (1), the Supreme Court held as follows: -

“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 Private Limited 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 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 afore-stated reasons, we answer Question No. [b] also in favour of the Assessee.”

From the above discussion, it is apparent that the question as to

whether the claim for depreciation confirms to one or the other description under Section 32, especially Explanation 3 has to be examined with reference to what is put forward by the assessee in the given facts of each case. The structure of the definition, or rather expanded definition, which by Explanation 3 spells out what are intangible assets (know-how, patents, copyrights, trademarks, licences, franchises etc.), being of a peculiar nature, the claim which the Court would necessarily have to consider is whether the item claimed to be eligible for depreciation confirms to “other business or commercial rights of similar nature”. In the facts of the present case, a reading of the agreement between STL and the assessee clarifies that a specific amount, i.e., Rs.9 Crores was paid by the assessee to the transferor who owned commercial rights towards the network and the facilities. The consideration was a specific value but for which the network would not have been otherwise transferred. In that sense, it constituted business or commercial rights which were similar to the enumerated intangible assets. In so concluding, however, this Court does not lay down the general or particular principle that every such claim has to be necessarily allowed as was apparently understood by the ITAT. The circumstance that the declaration of law in *Smifs Securities (supra)* envisions inclusion of goodwill as an asset and, therefore, entitled to depreciation, in other words does not necessarily mean that in every case the goodwill claim has to be allowed. In the present case, though termed as goodwill, what was actually parted with by STL was a commercial right, i.e., exclusivity to the network which would not have been otherwise available but for

the terms of the arrangement. So viewed, this Court is satisfied that the conclusions arrived at by the CIT (A) and the ITAT cannot be faulted. No substantial question of law arises; the appeal is consequently dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**R.K. GAUBA
(JUDGE)**

APRIL 15, 2015
/vikas/