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

+ INCOME TAX APPEAL No. 768/2018

Date of decision: 25th July, 2018

COMMISSIONER OF INCOME TAX Appellant
Through: Mr. Ashok K. Manchanda, Sr.
Standing Counsel with Mr. Aditya,
Advocate.
versus

SINOCHEM INDIA CO. PVT. LTD. Respondent
Through Nemo.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL):

CM No. 29468/2018

Exemption allowed, subject to all just exceptions.

ITA No. 768/2018 & CM No. 29467/2018

There is delay of 36 days in filing of the appeal. However, before issuing notice on the application seeking condonation of delay, we have proceeded to examine the appeal on merits.

2. This appeal by the Revenue in the case of Sinochem India Company Private Limited relates to Assessment Year 2010-11 and impugns order dated 13th December, 2017 passed by the Income Tax Appellate Tribunal (Tribunal, for short) in ITA No. 3927/Del/2014.

3. Question of law raised relates to the claim for depreciation on intellectual property rights acquired and purchased by the assessee from Monsanto India Limited.

4. During the period relevant to the assessment year, the assessee had made an addition of Rs.17,88,300/- on account of acquisition of intellectual property rights to the existing assets in the form of intellectual property rights acquired earlier for Rs.34.37/- crores.

5. The assessee had claimed depreciation of Rs. 3,44,37,935/- on the said block of assets. On being questioned by the Assessing Officer on the claim for depreciation, the assessee in the reply had stated their position and stand as under:-

“As per Section 32(1) (ii) of ITA 1961, depreciation is allowed on prescribed capital assets purchased by the assessee. Out of various prescribed assets, intangible assets are one category of eligible assets and the following intangible assets qualify for depreciation allowed at the rate of 25%

- a. Know how;
- b. Patents;
- c. Copyrights;
- d. Trademarks;
- e. License;
- f. Franchise;
- g. Other business rights of similar nature;
- h. Other commercial rights of similar nature;

As per the provision of Income Tax Act, claim of depreciation generally based on twin conditions viz,

- (1) Ownership of eligible assets, and
- (2) Asset is put to use by the tax payer

As we have purchased the same from Monsanto India Limited (It was using the same for many years) and we have the ownership of the assets and assets are in put to use for commercial purpose before commencement our company, hence we fulfill both the conditions as required under the Act and have rightly claimed depreciation on intellectual property right.

Hence it is requested to withdraw the objection that the traders are not allowed depreciation against intellectual property right by your good self”

6. Assessment order dated 18th February, 2013 made an addition of Rs.3,44,37,935/- by disallowing depreciation on the intellectual property rights for the reasons recorded in paragraph 3.1, which we would like to reproduce:-

“3.1 The assessee in its reply above is incorrect to state that the asset is being used by the assessee. During the year assessee has only purchased finished products from M/s Monsanto USA in bulk and has sold in India in the convenient packagings. Thus it is evidently clear that assessee has not used its assets towards manufacturing activities. Under these facts & circumstances depreciation claimed on account affixed assets in the category on intellectual property for Rs.3,44,37,935/- is disallowed and added back to the total income of the assessee.”

(Addition of Rs.3,44,37,935/-)
(emphasis supplied)

Thus, the claim for depreciation was disallowed on the ground that the capital asset in form of intellectual property rights was not used for manufacturing activities. We have to examine the disallowance made for the reason stated. Cost of acquisition, ownership and eligibility to claim depreciation was not disputed. Depreciation as claimed was disallowed on the ground of absence of the intellectual property rights being put to use for manufacturing activities.

7. The Commissioner of Income Tax (Appeals) deleted the disallowance and allowed depreciation observing that the assessee was engaged in manufacturing job work and trading in agro-chemical (i.e. pesticides etc). The intellectual property rights acquired were in respect of (a) product registration (b) right to reference and use of registration data in support of the product registration (c) benefits of continuing business contracts (d) business information (e) business intellectual property rights (f) trademarks and (g) all the seller's rights against third parties, including rights and warranties, conditions, guarantees or indemnities relating to such assets.

8. The assessee had purchased products from Monsanto India Limited and had thereafter sold these products with the acquired and purchased trademarks like Lasso, Machete and Fast Mix. Sales were through chain of dealers and retailers. Trademarks acquired and owned by the assessee were advertised for sale

promotions. Total sales had increased and jumped from Rs.8.19 crores in the last year to Rs. 100.19 crores in the period relevant to the Assessment year 2009-10. Business and market intelligence information acquired was put to use in the sales and marketing activities. Section 32 of the Act does not make any distinction between trading business or manufacturing business. As long as the intellectual property rights were used for the purpose of business, condition of Section 32 that the asset should be used for business would be satisfied and met. In the alternative, reference was made to the decision of Delhi High Court in ***Capital Bus Service Private Limited versus CIT***, (1980)123 ITR 404 that depreciation could be allowed even if the assets are kept ready for actual use the moment the need arises.

9. Aggrieved, the Revenue had preferred an appeal before the Tribunal, which has been dismissed by the impugned order. The reasoning given by the Tribunal while dismissing the appeal reads as under:-

“8. We have carefully considered the rival contention as well as perused the orders of the lower authorities. Admittedly during the year the appellant has claimed depreciation on business intellectual property right amounting to Rs.5,66,14,759/- as acquired from Monsanto India Ltd for Rs.34,55,06,220/-. The company is admittedly using this brand for the past year also and the depreciation for the earlier assessment year has already been allowed to the assessee on similar facts. These facts have not been disputed by the Id. Departmental Representative or by the Assessing Officer.

Further, the Ld. CIT (A) has also mentioned that no remedial action has been taken by the Ld. Assessing Officer for assessment year 2009-10, in which the original depreciation was allowed by the Ld. Assessing Officer. The Ld. CIT(A) allowed the claim of the assessee holding that assessee is engaged in the trading activity of such products which have definitely taken place during the year under consideration, as well as in the immediately preceding previous year. Further, according to him as there is no distinction between the trading business or manufacturing business of the assessee as the amounts have been used for the purposes of the trading business the appellant is entitled for depreciation under section 32 (1) of the Act. He alternatively relied upon the decision of the Hon'ble Delhi High Court in case of Capital Bus Services Private Ltd Vs. CIT, wherein it is held that the allowance of depreciation does not depend upon the actual use of the assets but it is sufficient if the asset in question is By the appellant —ready for actually using, the profit making apparatus the movement a need arises. However, he has held that appellant case is on stronger footing since the business intellectual property rights were in hand with the appellant for manufacturing the products and also the appellant has used it for the trading purposes under the seal of its own by using the brand name of Monsanto. In view of the above facts we do not find any infirmity in the order of the Ld. CIT (A) and none has been pointed out by the Ld. departmental representative. It could not be controverted by the revenue that the assessee has used these brands for the purpose of its trading business. furthermore, no provision could be shown before us that if the assets have been used for the purpose of the

trading business depreciation on intellectual property cannot be allowed. In view of this we uphold the findings of the Ld. First appellate Authority in deleting the depreciation disallowance made by the Ld. Assessing Officer on business intellectual property rights amounting to Rs. 3,44,37,935/-. In the result, the solitary ground raised by the revenue is dismissed.”

10. The purchase of intellectual property rights by the assessee are not disputed. Consideration paid is also not disputed. The nature and character of the intellectual property rights, as noticed in the order passed by the Commissioner of Income Tax (Appeals), are again not disputed. The intellectual property rights purchased by the assessee included trademarks ‘Lasso’, ‘Machete’ and ‘Fast Mix’, rights to reference and use of registration data in support of product registration, benefits of business contracts, business information, business intellectual property right, trademarks and rights against third parties. It is an accepted and admitted position that the products sold by the respondent-assessee had borne the trademarks ‘Lasso’, ‘Machete’ and ‘Fast Mix’. Substantial advertisement and sales promotion expenditure was incurred. Use of intellectual property rights for sales and marketing was not questioned and commented upon in the assessment order. Depreciation was disallowed as the asset had not been put to use for manufacturing activities. This cannot be a ground and reason to hold that the assessee had not “put to use” the intellectual property rights assets in the year in question. Mere purchase of the

products, from third party or the fact that assessee was not engaged in manufacturing activity, would not make any difference.

11. In view of the aforesaid position, we are not inclined to issue notice on the application for condonation of delay. Consequently, the said application and as a sequitur the appeal would be treated as dismissed. No costs.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

JULY 25, 2018
MR/VKR



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