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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 1453 OF 2017

Pr. Commissioner of Income Tax – 10

....Appellant

V/s.

M/s. India Medtronic Pvt. Ltd.

....Respondent

Mr. Akhileshwar Sharma for Appellant.

Mr. Nishant Thakkar a/w Mr. Hiten Chande i/b PDS Legal for Respondent.

CORAM : K.R. SHRIRAM &

R.I. CHAGLA, JJ.

DATED : 30th SEPTEMBER, 2021

PC. :

1. Respondent is engaged in manufacturing and trading of life saving devices. For the assessment year 2002-2003 respondent had claimed expenditure of Rs.4,73,00,000/- on account of amount payable to three directors of Medtech Devices Ltd., towards non-compete agreement entered with them. Respondent claimed payment of non-compete fee as revenue expenditure. The Assessing Officer held that the amount paid was in the nature of capital expenditure and passed order under Section 143 (3) of the Income Tax Act, 1961 (the Act) adding this amount of Rs.4,73,00,000/- to the total income of respondent.

2. Aggrieved by this order respondent preferred an appeal to CIT (A). CIT (A) agreed that the payment of non-compete fee was on account of

business necessity so as to prevent the directors of Medtech Devices Ltd., from starting an alternative company on their own. But agreed with the Assessing Officer that the expenditure made towards non-compete fee was capital in nature. Respondent impugned this order of CIT (A) before the Income Tax Appellate Tribunal (ITAT). The ITAT partly allowed the appeal and expressed a view that the assessee was entitled to depreciation on the payment of non-compete fee as the assessee acquired intangible asset in the nature of any other business or commercial right. The ITAT directed the Assessing Officer to allow depreciation at the admissible rate on the non-compete fee of Rs.4,73,00,000/- paid by respondent. Impugning this order of ITAT, appellant has approached this court and has proposed following question of law.

QUESTIONS OF LAW

i. “Whether non-compete fees is an intangible asset of any other business or commercial rights of similar nature as per section 32 (1) (ii) of Income Tax Act, 1961?”

ii. “Whether non-compete fees is an intangible asset as per section 32 (1) (ii) of Income Tax Act, 1961?”

3. This issue is no more resintegra. The Division Bench of this Court in ***Income Tax Appeal No. 556 of 2017, Pr. Commissioner of Income Tax – 7 Vs. Piramal Glass Limited, Order dated 11th June, 2019*** has held that the payment of non-compete fee would fall under the expression “or any other business or commercial rights of similar nature” used in explanation 3 to Sub Section 32 (1) (ii) of the Act. Paragraph No.3, 4 and 5 in the said order reads as under :

3. Question No. (a) noted above pertains to the decision of the Tribunal to grant depreciation on the Assessee's payment of non-compete fees. According to the Revenue, this being an intangible asset, no depreciation under Section 32 of the Income Tax Act, 1961 (**'the Act'** for short) was available.

4. We however notice that similar issue has been considered by the different High Courts and held in favour of the Assessee. A reference can be made to the decision of the Division Bench of the Gujarat High Court in the case of **Principal Commissioner of Income Tax v. Ferromatice Milacron India (P) Limited¹**. It was also the case where the Assessee had incurred expenditure pursuant to the non-compete agreement and claimed depreciation on such asset. While dismissing the Revenue's Appeal against the Judgment of the Tribunal, following observations were made :

"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 known-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 Techno Shares & Stocks Limited (supra) the Supreme Court held that payment for acquiring membership card of Bombay Stock Exchange was intangible assets on which the depreciation can be claimed. It was observed that the right of such membership included right of nomination as a license which was one of the items which would fall under Section 32(1)(ii). The right to participate in the market had an 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

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the meaning of intangible assets in context of section 32(1)(ii) 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 secret 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. In our view, the Tribunal has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that question as pressed raises any

substantial question of law.

The appeal is devoid of merits and it is dismissed with no order as to costs.

(R.I. CHAGLA J.)

(K.R. SHRIRAM, J.)