

OD-2

ITAT/103/2010
IA No.GA/1/2010 (Old No.GA/1467/2010)

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

COMMISSIONER OF INCOME TAX,
KOLKATA-IV, KOLKATA

-Versus-

M/S. STEWART MACKERTICH WEALTH
MANAGEMENT LTD.

Appearance:

Mr. Prithu Dudheria, Adv.
...for the appellant.

Mr. J. P. Khaitan, Sr. Adv.
Mr. Pratik Ghose, Adv.
Mr. Avishek Roy Chowdhury, Adv.
...for the respondent.

BEFORE:

The Hon'ble JUSTICE T.S. SIVAGNANAM

-And-

The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 6th June, 2022.

The Court : This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the 'Act' for brevity) is directed against the order dated 30th November, 2009 passed by the Income Tax Appellate Tribunal, "C" Bench, Kolkata in ITA No.1709/Kol/2009 for the assessment year 2000-01.

The revenue has raised for the following substantial questions of law for consideration:

- i) *Whether the Learned Income Tax Appellate Tribunal, "C" Bench, Kolkata erred in law in the facts and circumstances of the case in holding that revenue has failed to explain that delay in filing the departmental appeals was due to sufficient cause ?*
- ii) *Whether the Learned Income Tax Appellate Tribunal, "C" Bench, Kolkata erred in law in the facts and circumstances of the case in dismissing the appeal treating the same as unadmitted being time barred inasmuch as the learned Tribunal did not appreciate the materials on record, evidence and the legal proposition involved in the case and quashed the orders passed by the learned CIT on mere surmise and conjecture ?*

We have heard Mr. Prithu Dudheria, learned standing counsel appearing for the appellant and Mr. J. P. Khaitan, learned senior counsel assisted by Mr. Pratik Ghosh and Mr. Avishek Roy Chowdhury, learned Advocates for the respondent/assessee.

The appeal filed by the revenue before the tribunal was time barred. The tribunal considered the cause shown and found that there was no explanation for the delay in filing the appeal though the delay was only 79 days. More importantly, the tribunal took note of the fact that the earlier assessment in the assessee's own case namely, for the assessment year 2003-04, identical issue was considered by the tribunal and by an order dated 18th May, 2007, the appeal filed by the revenue was dismissed. The revenue carried the matter by way of appeal before this Court in ITA No.642 of 2007 which was dismissed by the

judgment dated February 19, 2008. The revenue filed appeal before the Hon'ble Supreme Court which was dismissed as reported in [2012] 348 ITR 302 (SC) in the case of Commissioner of Income Tax vs. SMIFS Securities Ltd. Before the Hon'ble Supreme Court, two of the questions raised by the revenue are whether (a) Stock Exchange Membership Cards are assets allowable for depreciation under Section 32 of the Act; (b) Whether goodwill is an asset within the meaning of Section 32 of the Act and whether depreciation on goodwill is allowable under the said Section ? Both these questions were answered in favour of the assessee and against the revenue. In so far as question (a) is concerned, the revenue conceded that the issue is covered by the decision of the Hon'ble Supreme Court in *Techno Shares and Stocks Ltd. vs. CIT* reported in [2010] 327 ITR 323 (SC). So far as question no.(b) is concerned, the Hon'ble Supreme Court held as follows:

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 Scheme of Amalgamation of YSN Shares & Securities (P) Ltd with Smifs Securities Ltd (duly sanctioned by Hon'ble High Courts of Bombay and Calcutta) with retrospective effect from 1st April, 1998, assets and liabilities of YSN Shares & Securities (P) Ltd were transferred to and vest in the company. In the process goodwill has arisen in the books of the company."

7. It was further explained that excess consideration paid by the assessee over the value of net assets acquired of YSN Shares and Securities Private Limited [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.

8. The Assessing Officer held that goodwill was not an asset falling under Explanation 3 to Section 32 (1) of the Income Tax Act, 1961 ['Act', for short].

9. 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."

10. 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 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).

11. *In the circumstances, we are of the view that "Goodwill" is an asset under Explanation 3(b) to Section 32(1) of the Act.*

12. *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.*

13. *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."

From the order impugned in this appeal we find that the revenue did not dispute the fact that identical issue was considered in the assessee's own case for the assessment year 2003-04 and the appeal filed by the department was dismissed by the tribunal as well as by this Court. We also note that the decision of this Court has been affirmed by the Hon'ble Supreme Court. Thus, we find that there is no ground to interfere with the order passed by the tribunal both on the limitation as well as on merits.

Accordingly, the appeal is dismissed and the substantial questions of law are answered against the revenue.

Consequently, the connected application for stay (IA No.GA/1/2010) stands closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)