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

Date of Decision: 29th July, 2021

\+ **ITA 132/2021**

FORTIS HOSPITALS LTD. ..... Appellant

Through Mr.Ajay Vohra, Sr.Adv. with Mr. Aniket D. Agrawal, Ms. Manisha Sharma, Advocates

versus

ACIT, CIRCLE – 9(2), NEW DELHI ..... Respondent

Through Mr.Sanjay Kumar, Sr.SC and Ms.Easha Kadian, Adv.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

The hearing has been conducted through video conferencing.

CM No.22635/2021 (Exemption)

Allowed, subject to all just exceptions.

CM APPL. 22634/2021 (Delay)

1. This is an application filed by the appellant seeking condonation of delay in filing of the appeal.

2. The appellant claims that the certified copy of the Impugned Order dated 30.08.2019 passed by the learned Income Tax Appellate

Tribunal (hereinafter referred to as the 'learned ITAT') was received by it on 27.09.2019. The appellant thereafter, filed an application under Section 254(2) of the Income Tax Act, 1961 before the learned ITAT on 26.02.2020. The same was dismissed by the learned ITAT vide its Impugned Order dated 15.12.2020. A copy thereof was received by the appellant on 25.01.2021. The appellant also claims the benefit of the orders passed by the Supreme Court in ***Re: Cognizance for Extension of Limitation***, in Suo Motu Writ Petition (Civil) No. 3 of 2020, extending the period of limitation.

3. For the reasons stated in the application, the same is allowed and the delay in filing of the appeal is condoned.

ITA 132 of 2021

1. This appeal has been filed by the appellant under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') challenging the Order dated 30.08.2019 passed by the learned ITAT, Bench 'B', New Delhi, in I.T.A. No. 2910/DEL/2017, titled ***ACIT, Circle – 9(2), New Delhi* v. *Fortis Hospitals Ltd.***, partly allowing the appeal filed by the respondent herein and disallowing the depreciation claimed by the appellant herein on the non-compete fee. The appeal further challenges the Order dated 15.12.2020 passed by the learned ITAT in Miscellaneous Application No. 72/DEL/2020 partly allowing the application filed by the appellant under Section 254(2) of the Act, however, upholding its finding *vis-à-vis* depreciation claimed by the appellant on the non-compete fee.

2. The appellant had entered into a Business Transfer Agreement with Wockhardt Hospitals Ltd. on 24.08.2009, for acquiring a business division of Wockhardt Hospitals Ltd. consisting of ten hospitals situated in the cities of Bangalore, Kolkata and geographical limits of Eastern Mumbai. The appellant claims to have also paid non-compete fee of ₹15.50 crores to Wockhardt Hospitals Ltd. for not directly or indirectly carrying on the business of hospital and related services for a period of three years in the cities of Bangalore, Kolkata and geographical limits of Eastern Mumbai. The said non-compete fee is claimed to have been capitalized by the appellant in its books of accounts.

3. On 15.10.2010, the appellant filed the return of income for the Assessment Year 2010-11 *inter alia* claiming depreciation of ₹1,93,75,000/- on the non-compete fee paid to by it to Wockhardt Hospitals Ltd., as intangible asset under Section 32(1)(ii) of the Act.

4. By the Assessment Order dated 20.03.2013 passed by the Assessing Officer under Section 143(3) of the Act the said claim of the appellant was disallowed, observing as under:

> "***Disallowance on non deduction of TDS on the payment of non compete fee***
>
> *During the course of assessment proceedings it has been noticed that the assessee has required Wockhard Group of Hospital . From the perusal of the details submitted by the assessee it was noticed that the assessee had paid non compete fee amounting to Rs. 15.5 crore to the wockhard group as a part of sale consideration. It has also been noticed that the*

assessee has treated the non compete fee as "Intangible Assets". The assessee was asked as to whether TDS has been deducted on the payment of non compete fees. The asseasee has submitted that it has not deducted any TDS on the said amount as its part of the sale consideration.

Here it is pertinent to mention the section 194L of the income Tax Act 1961 "Any person responsible for paying to a resident any sum being in the nature of compensation or the enhanced compensation or the consideration or the enhanced consideration on account of compulsory acquisition, under any law for the time being in force, of any capital asset shall, at the time of payment of such sum in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to ten percent of such sum as income-tax on income comprised therein:

Provided that no deduction shall be made under this section where the amount of such payment or, as the case may be, the aggregate amount of such payments to a resident during the financial year does not exceed one hundred thousand rupees".

The above quoted section clearly says that any person responsible for paying any sum in the nature of compensation is liable to deduct TDS equal to 10% of ·such sum. The non compete fees paid by the assessee to the Wockhard Group is in the nature of a compensation paid by the assessee so that the assessee can do his business in an unfettered manner. Further, the non compete fees is in the nature of capital assets as assessee has himself declared, therefore the above quoted section squarely applies on the assessee.

In view of the above discussion therefore the entire amount of non compete fee of an amount of Rs.15.5 crores is being disallowed u/s 40(a)(ia) of the IT Act, 1961. Since, I am

> *satisfied that assessee has concealed its income by furnishing inaccurate particulars of its income, therefore penalty proceedings u/s 271(1)(c) of the Act, is initiated separately.*"

5. Aggrieved of the above Assessment Order, the appellant filed an appeal before the learned Commissioner of Income-Tax (Appeals) [hereinafter referred to as the 'learned CIT(A)'], being Appeal No. – 90/13-14. The learned CIT(A) was pleased to partially allow the said appeal vide its Order dated 07.02.2017. On the claim of depreciation on the non-compete fee, the learned CIT (A) observed as under:

> "*5.1 Having gone through the submissions of the appellant, order of the assessment made by the Assessing Officer and the material evidences placed on the record, it emerges from the facts that the appellant had paid non compete fee of Rs.15.50 crore as part of the sale consideration for acquiring the Wockhardt Group of Hospitals without deducting the tax within the meaning of section 194L of the Act and accordingly the provisions of Section 40(a)(ia) came into play. Further, the said payment was capital in nature as declared by the assessee itself. The Assessing Officer made a disallowance of the entire sum of Rs.15.50 crore although the appellant had claimed the deduction of a sum of Rs.1,48,63,000/- towards the depreciation. It is clear from the language of the Statute that the assessee was not obliged in law to deduct any tax since section 194L invoked by the Assessing Officer ceased to operate w.e.f. 1st of June, 2000.*
>
> *It is clear from the order of the assessment made by the Assessing Officer that the amount of non compete fee of Rs.15.50 crore has been capitalized in the books of accounts. The appellant has claimed the depreciation of Rs.1,48,63,000/- treating the*

> *payment of the non compete fee as intangible asset. The Assessing Officer in this regard is directed to allow the depreciation as per the provisions of the Statute applied to the intangible assets.*
>
> *5.2 The appellant had raised the additional ground during the appellate proceedings, however, the assessee has of its own treated the non compete fee as the capital expenditure and accordingly capitalized the amount in the books of accounts and no appeal against the such proposition was filed by the appellant. In view of the above, the additional ground raised in this regard is dismissed.*"
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> (Emphasis supplied)

6. Aggrieved of the above, the respondent filed an appeal before the learned ITAT, being I.T.A. No. 2910/DEL/2017.

7. The learned ITAT, placing reliance on the judgment of this Court in ***Sharp Business System* v. *Income-tax – III***, 2012 SCC OnLine Del 5639: 211 Taxman 576 (Delhi), has held that the non-compete fee cannot be termed as 'intangible asset' and therefore, depreciation claimed on the same could not be allowed.

8. As noted hereinabove, the appellant filed an application under Section 254(2) of the Act before the learned ITAT, being Miscellaneous Application No. 72/Del/2020. However, vide the impugned order dated 15.12.2020, the finding with respect to the claim of depreciation of non-compete fee was upheld by the learned ITAT.

9. The learned senior counsel for the appellant submits that the learned ITAT has exceeded its jurisdiction by delving into issues that

were accepted by the Assessing Officer. He submits that the Assessing Officer had rejected the claim of the appellant on account of depreciation on non-compete fee, not on the ground that it was not an intangible asset but on the ground of non-deduction of TDS, thereby being disallowed under Section 40(a)(ia) of the Act. It was only this limited finding which was challenged by the appellant before the learned CIT(A). The Assessing Officer had therefore, accepted the claim of the appellant that the depreciation claim on non-compete fee could be claimed. The Revenue did not challenge the said order. Appeal was filed only by the appellant herein. In appeal, the learned CIT(A) had set aside this finding of the Assessing Officer, by holding that the appellant was not obliged in law to deduct any tax under Section 194L of the Act as the said section ceased to operate with effect from 01.06.2000. The learned CIT (A) therefore, also did not dispute that the non-compete fee was entitled to depreciation as an intangible asset. The learned senior counsel submits that the learned ITAT, therefore, could not have reopened this issue on which there was no dispute raised by the respondent. Placing reliance on the judgments of the Supreme Court in ***Hukumchand Mills Ltd.* v. *Commissioner of Income Tax, Central Bombay***, AIR 1967 SC 455: (1967) 63 ITR 232; and ***MCorp Global Pvt. Ltd.* v. *Commissioner of Income Tax***, (2009) 3 SCC 420: (2009) 309 ITR 434, the learned senior counsel for the appellant submits that that the learned ITAT has no power to enhance the assessment or take back the benefit granted to the assessee by the Assessing Officer. He further places reliance on:

(i) *Indian Steel & Wire Products Ltd. v. CIT: 208 ITR 740 (Cal.);*
(ii) *CIT vs. G.M. Chennabasappa: 35 ITR 261 (AP);*
(iii) *Pokhraj Hirachand vs. CIT: 49 ITR 293 (Bom.);*
(iv) *The Motor Union Insurance Co. Ltd vs. CIT: 13 ITR 272 (Bom.);*
(v) *Chandulal Lallubhai (HUF) vs. CIT: 139 ITR 642, 649-50 (Guj.);*
(vi) *Rajgarhia vs. ITO: 107 ITR 347; and*
(vii) *Daimler India Commercial Vehicles (P.) Ltd. vs. DCIT: 416 ITR 343 (Mad.);*

10. He further submits that even otherwise, non-compete fee, being an 'intangible asset', is entitled for claim of depreciation under Section 32(1)(ii) of the Act. He submits that the ***Sharp Business System*** (supra) is not correctly decided and is pending a challenge before the Supreme Court with leave having being granted by the Supreme Court vide its Order dated 24.03.2014 in SLP(C) No. 11410 of 2013. He further submits that another Appeal, being ITA 22 of 2015, titled ***Hindustan Coca-Cola Beverages Pvt. Ltd.* v. *Deputy Commissioner of Income-Tax***, raising identical issues, stands admitted by this Court vide its order 24.09.2015. He submits that therefore, the present appeal deserves to be admitted on the questions of law as framed in the appeal.

11. We have considered the submissions made by the learned senior counsel for the appellant, however, find no merit in the same.

12. As far as the question of jurisdiction is concerned, the finding of the Assessing Officer in his Assessment Order dated 20.03.2013 has

been reproduced hereinabove. The same clearly show that the Assessing Officer did not go into the question as to whether the non-compete fee can be treated as an 'intangible asset', whereby the appellant would be entitled to claim of depreciation under Section 32(1)(ii) of the Act, or not. The claim of the appellant of depreciation was in fact rejected by the Assessing Officer. Therefore, there was no occasion for the respondent to have challenged the said order. In appeal, the CIT(A) went ahead and directed the Assessing Officer to allow the claim of depreciation on the non-compete fee treating the same to be an 'intangible asset'. It was this finding which was challenged by the respondent in appeal, including on the following ground:

> "*2. The Grounds of appeal are as under:*
>
> *xxxxx*
>
> *2. Ld. CIT(A) erred in law and on the facts of the case in direction the AO to allow depreciation on non compete fee treating it as intangible asset. The CIT(A) failed to appreciate that non compete fee is not covered in intangible assets as held by the Hon'ble Delhi High Court in the case of Sharp Business System in ITA 492/2012.*"

13. It therefore, cannot be said that the issue of claim of depreciation on non-compete fee stood concluded before the Assessing Officer and/or the learned ITAT has exceeded its jurisdiction in considering the same.

14. On merit, this Court in ***Sharp Business Systems*** (supra) has held, as under:

> " *12. ... The question here, however, is whether a non-compete right of the kind acquired by the assessee against L&T for seven years amounts to a depreciable intangible asset. As discussed earlier, each of the species of rights spelt-out in Section 32(1)(ii), i.e. know-how, patent, copyright, trademark, license or franchise as or any other right of a similar kind which confers a business or commercial or any other business or commercial right of similar nature has to be "intangible asset". The nature of these rights mentioned clearly spell-out an element of exclusivity which enures to the assessee as a sequel to the ownership. In other words, but for the ownership of the intellectual property or know-how or license or franchise, it would be unable to either access the advantage or assert the right and the nature of the right mentioned or spelt-out in the provision as against the world at large or in legal parlance "in rem". However, in the case of a non-competition agreement or covenant, the advantage is a restricted one, in point of time. It does not necessarily - and not in the facts of this case, confer any exclusive right to carry-on the primary business activity. The right can be asserted in the present instance only against L&T and in a sense, the right "in personam". Indeed, the 7 years period spelt-out by the non-competing covenant brings the advantage within the public policy embedded in Section 27 of the Contract Act, which enjoins a contract in restraint of trade would otherwise be void. Another way of looking at*

> *the issue is whether such rights can be treated or transferred - a proposition fully supported by the controlling object clause, i.e. intangible asset. Every species of right spelt-out expressly by the Statute - i.e. of the intellectual property right and other advantages such as know-how, franchise, license etc. and even those considered by the Courts, such as goodwill can be said to be alienable. Such is not the case with an agreement not to compete which is purely personal. As a consequence, it is held that the contentions of the assessee are without merit; this question too is answered against the appellant and in favour of the Revenue.*
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> *13. For the above reasons, this Court is of the opinion that the words "similar business or commercial rights" have to necessarily result in an intangible asset against the entire world which can be asserted as such to qualify for depreciation under Section 32(1)(ii) of the Act.*"

15. Though an appeal against the said judgment is claimed to be admitted by the Supreme Court, it is not claimed by the appellant that the operation of the judgment was also stayed by the Supreme Court. We, therefore, presently are bound to follow the same and see no reason to disagree with the same. Merely because another appeal raising similar questions has been admitted by this Court, also does not persuade us to admit the present appeal as well only on this ground.

16. In view of the above, we find no reason to entertain the present appeal. The same is dismissed. There shall be no order as to costs.

NAVIN CHAWLA, J

MANMOHAN, J

JULY 29, 2021/Arya/P