

IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A" : HYDERABAD

BEFORE SHRI D. MANMOHAN, VICE PRESIDENT
AND
SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER

ITA.No.24/Hyd/2013
Assessment Year 2009-2010

SWAWS Credit Corporation (P) Ltd., Hyderabad. PAN AACCS5368J (Appellant)	vs.	DCIT, Circle-3(3) Hyderabad. (Respondent)
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For Assessee :	Mr. Samuel Nagadesi
For Revenue :	Mr. A. Sitarama Rao

Date of Hearing :	28.09.2016
Date of Pronouncement :	21.10.2016

ORDER

PER B. RAMAKOTAIAH, A.M.

This appeal by the assessee is directed against the order of the CIT(A)-IV, Hyderabad dated 29.10.2012. The issue in this appeal is with reference to claim of depreciation/deffered revenue expenditure on the lump sum consideration paid for creation of client base as an intangible asset.

2. Briefly stated, the assessee company in the previous year 2008-09 relevant to the Assessment Year 2009-10 has acquired micro finance business consisting of loan portfolio of existing clients from the SWAS Society by paying a lump sum consideration of Rs.6 Crore consisting of two parts- Rs.4 Crore paid as a client creation cost @ Rs.400 per customer and Rs.2 Crore paid towards brand, logo, intellectual property, internal control systems, and related procedure based recovery systems.

The assessee treated the same as deferred revenue expenditure as per the accounting policy stated at 2 (g) - of the Significant Accounting Policies in Schedule 17 Annexed to the Annual Financial Statements i.e., Balance Sheet as on 31.03.2009, Income and Expenditure Account for the Year ended 31.03.2009 and Cash Flow Statement for the year ended 31.03.2009. Accordingly, assessee followed the policy of treating the same as deferred revenue expenditure by grouping the same under "Miscellaneous Expenditure (to the extent not written off or adjusted) in the Balance Sheet and followed the policy of writing off the same to the extent either Rs.120 Lakhs or 30% of the Profit Before Interest and Tax whichever is less. Accordingly, the assessee charged Rs.56,19,306 being 30% of the PBIT to the profit and loss account of the relevant Previous Year. The assessee in the computation of income added back the amount of Rs.56,19,306 being the amount debited to P& L Account and claimed Rs.1,20,00,000 as deduction which is 20% of the total amount of Rs.6 Crore paid being 1/5th of expenditure.

2.1. Before the Assessing Officer, the assessee claimed that the same is a revenue expenditure and that the deferred revenue expenditure is allowable. The assessee relied on Madras Investment Corporation Ltd., (1997) 91 Taxman 340 (SC), Hindustan Aluminum Corporation Ltd., vs. CIT (1982) 11 Taxman 129 (Cal), CIT vs. Prakash Pictures (2003) 127 Taxman 654 (Bom) and ITO vs. Shreys Shipping Ltd., (2003) 86 ITD 556 (Mum). The Assessing Officer however, disallowed the claim and restricted the allowance to Rs.50,00,000 as depreciation @25% in respect of the Rs.2 crore component of the consideration as intangible asset under Section 32 of the Income Tax Act, 1961.

The alternate claim of the assessee that the client creation cost is also part of the intangible asset as the same relates to acquisition of business or commercial rights in the existing business and the component of Rs.4 crore paid towards the client creation cost is also eligible for depreciation at the rate of 25% within the meaning of Section 32(1)(ii) was rejected by the Assessing Officer.

2.2. Aggrieved by the assessment order, the assessee preferred an appeal before the CIT(A) and reiterated the claim under Section 32(1)(ii) and also reiterated the alternate claim of deferred revenue expenditure. The assessee placed reliance on the following decisions :

- (i) Areva T and D India Ltd., Vs. DCIT (2012) 345 ITR 421 (Del)
- (ii) Hindustan Coca Cola Beverages P Ltd., (2011) 331 ITR 192.
- (iii) Techno Shares and Stocks Ltd., (2010) 327 ITR 323 (SC)
- (iv) Skyline Caterers P Ltd., Vs. ITO (2008) 306 ITR (AT) 369 (Mum)
- (v) CIT vs. Mediworld Publication (2011) 337 ITR 178 (Del)

The Commissioner (Appeals) rejected the contention that the amount of Rs.4 Crore component should also be treated as intangible asset and depreciation to be allowed on the same. The alternate ground of allowing the claim of deferred revenue expenditure was also rejected by the Commissioner (Appeals) stating that there is specific submission and there is no provision

in the Income Tax Act for allowing deferment of expenditure except in specific circumstances.

3. Aggrieved by the order of the CIT(A), the assessee is in appeal before the Tribunal in which the main relief is claimed in ground No.3 which is as under :

“On the facts and in the circumstances of the case the Ld. CIT(A) ought to have appreciated that the said payment is the payment for acquisition of business or commercial rights and accordingly fall within the scope of clause (b) of Explanation-3 to sub-section (1) of section 32 of Income Tax Act, 1961, accordingly depreciation ought to have been allowed under section 32(1)(ii) of the said Act.

3.1. Ground Nos. 4 and 5 are alternate grounds that the amount can be allowed as deferred revenue expenditure proportionately as treated by the assessee or even allowed as expenditure under section 37(1) in the year of acquisition of the client base.

4. Learned Counsel for the assessee reiterated the submissions made before the authorities and relied on the Coordinate Bench decision in the case of SKS Micro Finance Ltd., vs. DCIT, Circle-3(2), Hyderabad (2013) 145 ITD 111 (ITAT-HYD) wherein on similar facts the Coordinate Bench has allowed the claim of depreciation. He also relied on the decision of the Hon'ble Supreme Court in the case of CIT vs. Smifs Securities Ltd., 348 ITR 302(SC) and also ITAT, Delhi Bench decision in the case of M/s. Cyber India Online Limited vs. ACIT, Circle-3(1), New Delhi in ITA.No.1299/Del./2010 dated 27.11.2013. He also relied on the decision of Hon'ble Delhi High Court in the case of CIT, Delhi-1 vs. MIS Bharti Teletech Ltd., in ITA.No.496/2014 dated

15.04.2015 in support of the claims. With reference to the alternate claim of deferred revenue expenditure, Learned Counsel for the assessee relied on the decision of Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation 225 ITR 802 and other decisions relied on before the Assessing Officer. It is also the contention, as raised in ground No.5, that entire expenditure can be treated as revenue expenditure and allowed under section 37(1) as the expenditure incurred for the purpose of business.

5. Ld. D.R. however, relied on the orders of the Assessing Officer and Ld. CIT(A) to submit that expenditure is capital in nature but not an intangible asset as decided by the authorities.

6. We have considered the rival submissions and perused the orders placed on record. There is no dispute with reference to the amount of Rs.6 crore paid for acquiring the business of SWAS society out of which Rs.2 crores was treated by the Assessing Officer itself as logo/intellectual property and allowed depreciation at 25%. The only dispute is with reference to Rs.4 crore paid as client creation cost. The terms of MOU as considered by the Ld. CIT(A) in para 5.1 are as under :

“5.1 The MOU inter alia provided as follows:

*TRANSFER OF PORTFOUO AND MICRO FINANCE
OPERATIONS OF SWAWS TO SCCI LTD.*

3.1. SWAWS proposes to transfer its Loan Portfolio and other associated assets as a going concern along with various rights, borrower base to SCCI Ltd. with effect from April 1, 2008, subject to the ultimate agreement of its creditors. The Loan Portfolio is located and is being serviced

by 43 branches of SWAWS, which are more descriptively stated in Schedule 1 to this MOU. Individual List of Borrowers, their outstanding, along with loan documents executed as on December, 31, 2007 is attached in Schedule-1A and position on March 31, 2008 on closing hours, would be provided to enable SCCI Ltd. to takeover.

5. TRANSFER AND USAGE OF BRAND "SWAWS" AND OTHER INTELLECTUAL PRPerty RIGHTS ASSOCIATED WITH ITS MICRO FINANCE BUSINESS

5.1. SWAWS also hereby transfers its brand name established as "SWAWS" as well as associated logos etc. and allows SCCI Ltd. to use the logo, trademarks and' other inscriptions, method of writing, by-lines stating the product and. mission, objectives etc. presently being used by SWAWS for its micro finance program and the Brand name "SWAW\$" itself, to be used in all states and elsewhere in India and abroad for the micro finance program being presently executed by SWAWS. SCCI LTD shall be free to use these brand name and logo for their operations elsewhere in India or- the world at its discretion.

6. CONSIDERATION FOR TRANSFER, FEE, ROYALTY:

6.1. SWAWS shall be entitled to charge the following fee and consideration.

6.1.1. One time reimbursement of customer creation costs, for having identified, motivated, trained, credit checked and risk filtered, approximately 100,000 customers on December 31, 2007, since all of these customers are generating net positive revenue for SWAWS at present, aggregating to Rs.40.00 Million at the rate of approximately Rs.400 per customer.

6.1.1.1. This consideration shall become payable in cash to SWAWS in two or more instalments in whatever convenient lot so that the entire amount is paid on or before 31st March, 2008.

6.1.1.2. Any default in payments will attract an interest of 12% on overnight balances.

6.1.2. *One time payment of Rs. 20.00 Million, towards the cost of Brand 'SWAWS', for its logo, copyrights and other intellectual property Rights associated with the same and the business of internal controls systems, computer software and related procedure based recovery systems.*

6.1.2.1 *The payment satisfaction of. this consideration will be done through allotment of 60,00,000 Equity shares of Class B of face value of Rs. 10 each fully and up. (whose voting rights along with other investors in this clause shall always be not less than 52%) in SWAWS credit corporation India Ltd. upon transfer of business and not later than 1st April, 2008 to SWAWS."*

6.1. These terms are similar to the terms agreed by SKS Finance when it acquired a business of similar nature. The said company acquired the client base from M/s. Swayam Krushi Sangham wherein also the entire business was taken-over as going concern. On similar facts, the Coordinate Bench has considered the claim of the assessee towards depreciation and held as under :

"10. We have heard rival submissions of the parties and perused the material on record. We have also carefully applied our mind to the decisions cited before us. As would be evident from the orders of the revenue authorities, assessee 's claim of depreciation was disallowed by holding that the acquisition of client base of SKS society is neither an intangible asset nor a business or commercial right of similar nature. Before venturing into deciding the issue, it is necessary at this stage to look at the actual nature of transaction between the assessee and SKS society. As per the terms of MOU (page-15 of the paper book) SKS Society transferred all the assets and properties including the existing loans and the receivables in relation to the Micro Finance Activity carried out by it till 31st August, 2005 together with the software/hardware/furniture and fixtures and other movable properties. The consideration for portfolio transfer as mentioned in clause-1 of the MOU reads as under:-

"Parties agree that the assets, properties loans, software, hardware, furniture and fixtures more particularly set out in Annexure A comprises the Portfolio.

The Portfolio has been valued by the Statutory Auditor of SKS Society and based on such valuation, the Parties agree to the following consideration payable for the Portfolio transfer to SKS Company.

One time reimbursement of customer transfer costs Rs. 39.70 Million for having identified, motivated, trained, credit checked and risk-filtered, approximately 113,270 customers on August 31, 2005, or at the cost of Rs 350.50 per customer, since all of these customers are generating net positive revenue for SKS at present.

(b) One time reimbursement of an amount of Rs. 8.25 million towards cost of internal controls systems, computer software and related procedure based recovery systems etc.

(c) Towards corporate services including strategic planning, all technical matters of group formation, addressing recovery issues, identification of new markets, market surveys, change in the method and procedures of financial services, introduction of new products, impact assessment, avenues for negotiation of new loans from prospective funders, generation additional revenues through grants, fees etc, training of key human resources, establishing/upgrading the MIS and ongoing accounting, quality control and internal audit systems.

(d) Rs. 3.32 Million towards furniture, computers and fixtures.

In consideration of the SKS Company agreeing to pay the above amounts, SKS Society agrees to transfer the Portfolio to SKS Company. It is hereby agreed and acknowledged between the Parties that the transfer of the loans would require the consent of the lenders, Parties agree to cooperate with each other to ensure that the approvals from the lenders are duly obtained,...."

11. Clause-3 of the MOU even provided for transfer of employees of SKS Society. Therefore, reading of the MOU as a whole gives an impression that the entire business of SKS Society was transferred to the assessee company as a going concern by way of slump sale. This also included the acquisition of rights over more than 110000 existing clients of SKS Society. This fact has also not been disputed by the Assessing Officer or CIT (A). The Assessing Officer even has accepted it as a capital asset. However, both the Assessing Officer as well as CIT (A) have disallowed the claim of depreciation solely on the ground that the right acquired over the clients of SKS Society is not an

intangible asset u/s 32(1)(ii) of the Act. At this stage it would be appropriate to look into the provision contained u/s 32(1)(ii) of the Act.

"32(1) In respect of depreciation of –

(i)....."

(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"

A reading of the aforesaid provision makes it clear that depreciation would be allowable on intangible assets being know-how, patents, copy-rights, trade marks, licenses, franchises or any other business or commercial rights of similar nature if the following conditions are fulfilled.

i) Such asset is acquired after 1-4-1998.

ii) The asset is owned wholly or partly by the assessee

iii) Such asset is used for the purpose of business or profession of the assessee

So far as the aforesaid conditions are concerned, it appears from facts on record that the assessee has acquired the asset after 1-4-1998. The assets are owned wholly by the assessee and it is also used for the purpose of business or profession of the assessee. Therefore, the only requirement for allowability of depreciation is whether the cost paid for acquisition of clients can be considered as an intangible asset as per the definition u/s 32(1)(ii) of the Act. It is not disputed that the assessee has acquired the entire business and commercial asset of SKS on payment of lumpsum consideration which included the cost of acquisition of the existing customer base of SKS Society. It is also a fact that, the customer base acquired by the assessee has provided an impetus to the business of the assessee as the customers acquired are with proven track record since they have already been trained, motivated, credit checked and risk filtered. They are source of assured economic benefit to the assessee and certainly are tools of the trade which facilitates the assessee to carry on the business smoothly and effectively. Therefore, by acquiring the customer base the assessee has

acquired business and commercial rights of similar nature. The CIT(A) has rejected assessee' claim of intangible asset on the conclusion that it does not come within the terms of know-how, patent, copyright, trademark, licence or business and intangible asset referred to in Sec.32(1)(ii) will apply to these limited category of intangible assets and not to a wider category of intangible assets. The Hon'ble Delhi High Court in case of Areva T & D India Ltd. Vs. DCIT (supra) while interpreting the term "business or commercial rights of similar nature" by applying the principle of ejusdem generis held as under :

"In the present case, applying the principle of ejusdem generis, which provides that where there are general words following particular and specific words, the meaning of the latter words shall be confined to things of the same kind, as specified for interpreting the expression "business or commercial rights of similar nature" specified in section 32(1)(ii) of the Act. It is seen that such rights need not answer the description of "know-how, patents, trade marks, licences or franchises" but must be of similar nature as the specified assets. On a 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 the aforesaid intangible assets are not of the same kind and are clearly distinct from one another. The fact that after the specified intangible assets the words "business or commercial rights of similar nature" have been additionally used, clearly demonstrates that the Legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets, which were neither feasible nor possible to exhaustively enumerate. In the circumstances, the nature of "business or commercial rights" cannot be restricted to only the aforesaid six categories of assets, viz., know-how, patents, trade marks, copyrights, licences or franchises. The nature of "business or commercial rights" can be of the same genus in which all the aforesaid six assets fall. All the above fall in the genus of intangible assets that form part of the tool of trade of an assessee facilitating smooth carrying on of the business. In the circumstances, it is observed that in the case of the assessee, intangible assets, viz., business claims; business information; business records; contracts; employees; and know-how, are all assets, which are invaluable and result in carrying on the transmission and distribution business by the assessee, which was hitherto being carried out by the transferor, without any interruption. The aforesaid intangible assets are, therefore, comparable to a

*licence to carry out the existing transmission and distribution business of the transferor. In the absence of the aforesaid intangible assets, the assessee would have had to commence business from scratch and go through the gestation period whereas by acquiring the aforesaid business rights along with the tangible assets, the assessee got an up and running business. This view is fortified by the ratio of the decision of the Supreme Court in *Techno Shares and Stocks Ltd. (2010) 327 ITR 323 (SC)* wherein it was held that intangible assets owned by the assessee and used for the business purpose which enables the assessee to access the market and has an economic and money value is a "licence" or "akin to a licence" which is one of the items falling in section 32(1) (ii) of the Act.*

In view of the above discussion, we are of the view that the specified intangible assets acquired under slump sale agreement were in the nature of "business or commercial rights of similar nature" specified in section 32(1)(ii) of the Act and were accordingly eligible for depreciation under that section."

*12. The Hon'ble Supreme Court in case of *CIT vs. Smifs Securities Limited (supra)* while considering whether goodwill would fall under the expression "any other business or commercial right of similar nature" held that the principle of *ejusdem generis* would strictly apply while interpreting the expression "any other business or commercial right of similar nature" and by applying the said principle goodwill is held to be an intangible asset. In case of *Hindustan Coca Cola Beverages Pvt. Ltd. (supra)* the Hon'ble Delhi High Court upholding the view of the Income-tax Appellate Tribunal, Delhi Bench in treating goodwill as an intangible asset held that the meaning of business or commercial rights of similar nature if understood in the backdrop of section 32(1)(ii) of the Act would mean commercial rights or such rights which are obtained for effectively carrying on business and commerce and commerce as is understood is a wider term which encompasses in its fold many of facet . The Hon'ble High Court held that 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 Income-tax Appellate Tribunal Mumbai Bench in case of *Skyline Caterers P. Ltd. Vs. ITO [306 ITR (AT) 369]* has held that any other business or commercial rights of similar nature include such rights which can be used as a tool to carry on the business. The Income-tax Appellate Tribunal Hyderabad Bench in case of *AP Paper Mills Ltd. Vs. ACIT (128 TTJ 596)* while allowing depreciation on goodwill holding it to be*

an intangible asset observed that it is a business of commercial rights of similar nature to the rights mentioned in section 32 of the IT Act. The Income-tax Appellate Tribunal Mumbai Bench in case of M/s India Capital Markets P. Ltd. Vs. DCIT (ITA No.2948/Mum/2010 dated 12-12-2012 while considering a similar nature of acquisition of clientele held that acquisition of such clientele would come within the expression "any other business or commercial rights of similar nature" as the rights over the clients is used as a tool to carry on the business by the assessee and as such depreciation is allowable on such intangible asset.

13. It will be pertinent to mention here that the CIT (A) while coming to his conclusion that the clients creation cost paid by the assessee is not an intangible asset has relied upon the decision of Hon'ble Bombay High Court in case of CIT vs. Techno Shares and Stocks Ltd. And Others (225 CTR 337) wherein the Hon'ble Bombay High Court while considering the issue of transfer of membership card of Bombay Stock Exchange has held that it does not constitute an intangible asset. However, this decision of the Hon'ble High Court has been reversed by the Hon'ble Supreme Court in Techno Shares and Stocks Ltd. Vs. CIT (327 ITR 323).

14. The learned departmental representative has relied upon a decision of Hon'ble Delhi High Court in case of Sharp Business Systems vs. CIT (ITA.No.492/Del/2012 dated 5-11-2012) wherein the Hon'ble Delhi High Court has held that depreciation cannot be allowed on non compete fee as it does not come within the meaning of intangible asset as provided u/s 32(1)(ii) of the Act. However, a reading of the aforesaid judgment would make it clear that the Hon'ble Delhi High court came to such a conclusion as it held that an agreement on non compete fee is purely personal. The Hon'ble High Court further held that the words similar 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 u/s 32(1) (ii) of the Act. However, the facts in the present case are different. The MOU between the assessee and SKS Society cannot be said to be purely personal. On the other hand, the acquisition of rights over the assets of SKS Society including the customer base is an intangible asset against the entire World as held by the Hon'ble Delhi High Court. Therefore, the facts of the case considered in the light of the ratio laid down by various judicial precedents referred to hereinabove, in our view, the client acquisition cost paid by the assessee is towards acquiring an

intangible asset and therefore eligible for depreciation u/s 32(1)(ii) of the Act. In aforesaid view of the matter, we direct the Assessing Officer to allow the assessee's claim of depreciation. Hence, the grounds raised by the assessee are allowed.

6.2. Since the facts are similar, respectfully following the same, we are of the opinion that client creation cost is an intangible asset and is eligible for depreciation at 25%. Assessing Officer is directed to allow depreciation as claimed in the computation of income.

7. Since main ground of 3 is allowed, the alternate grounds raised in ground Nos. 4 and 5 that expenditure is revenue in nature or treated as deferred revenue expenditure over a period of time becomes academic in nature.

8. In the result, appeal of the assessee is allowed.

Order pronounced in the open Court on 21.10.2016.

Sd/-
(D.MANMOHAN)
VICE PRESIDENT

Sd/-
(B. RAMAKOTAIAH)
ACCOUNTANT MEMBER

Hyderabad, Dated 21st October, 2016

VBP/-
Copy to

1.	SWAWS Credit Corporation India (P) Limited, Secunderabad. C/o. Samuel Nagadesi, C.A. 408, Sri Ramakrishna Towers, Besides Image Hospitals, Ameerpet, Hyderabad – 500 073.
2.	DCIT, Circle-3(3), I.T. Towers, Masab Tank, Hyderabad.
3.	CIT(A)-IV, Hyderabad.
4.	CIT-III, Hyderabad.
5.	D.R. I.T.A.T. "A" Bench, Hyderabad.
6.	Guard File