

Separate consideration paid while acquiring shares to get commercial rights of marketing was goodwill; depreciable

Summary – The High Court of Delhi in a recent case of MIS Bharti Teletech Ltd., (the Assessee) held that where apart from paying consideration, while acquiring shares of a company, assessee paid separate amount to transferor company to get commercial right for marketing, customer support, distribution and associate setups, depreciation was to be allowed on same

Facts

- The assessee-company acquired the shares of company 'S'. The consideration paid by the assessee, *inter alia*, included the sum of Rs. 9 Crore for the marketing, customer support, distribution and associate setups of 'S'. The assessee claimed depreciation on said amount which was allowed in the preceding assessment years.
- The Assessing Officer disallowed depreciation claim in current year on the ground that (i) such marketing setups could be created by any other party including the assessee itself without being impeded by such marketing network of any other party; (ii) that no ownership rights resulted on account of the purported acquisition; neither can the effective user of such acquisition be gauged from the agreement. It would be pertinent to note that one of the stipulated conditions of the aforesaid agreement was non-disclosure of this agreement to any third party without prior written consent, and that (iii) what had been acquired was not the ownership right but an arrangement for use of such network and said payment was euphemistically termed as goodwill.
- On appeal, the Commissioner (Appeals) as well as the Tribunal allowed the depreciation claim of the assessee on basis of previous year's reasoning.
- On revenue's appeal before the High Court:

Held

- The question as to whether the claim for depreciation confirms to one or the other description under section 32, especially *Explanation 3* has to be examined with reference to what is put forward by the assessee in the given facts of each case. The structure of the definition, or rather expanded definition, which by *Explanation 3* spells out what are intangible assets (Know-how, patents, copyrights, trademarks, licences, franchises etc.) being of a peculiar nature, the claim which the Court would necessarily have to consider is whether the item claimed to be eligible for depreciation confirms to 'other business or commercial rights of similar nature'. In the facts of the present case, a reading of the agreement between STL and the assessee clarifies that a specific amount, *i.e.*, Rs. 9 crores was paid by the assessee to the transferor who owned commercial rights towards the network and the facilities. The consideration was a specific value but for which the network would

not have been otherwise transferred. In that sense, it constituted business or commercial rights which were similar to the numerated intangible assets. In so concluding, however, this Court does not lay down the general or particular principle that every such claim has to be necessarily allowed as was apparently understood by the Tribunal. The circumstance that the declaration of law in *CIT v. Smifs Securities Ltd.* [2012] 348 ITR 302/210 Taxman 428/24 taxmann.com 222 (SC) envisions inclusion of goodwill as an asset and, therefore, entitled to depreciation, in other words does not necessarily mean that in every case the goodwill claim has to be allowed. In the present case, though termed as goodwill, what was actually parted with by STL was a commercial right, *i.e.*, exclusivity to the network which would not have been otherwise available but for the terms of the arrangement. So viewed, the conclusions arrived at by the Commissioner (Appeals) and the Tribunal cannot be faulted.