IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F", MUMBAI

BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER
AND SHRI VIVEK VARMA, JUDICIAL MEMBER

ITA No. 4842/Mum/2004
(Assessment year : 1999-00)

Gujarat Glass Private Limited, (Now known as Piramal Glass Limited), 4th Floor, Piramal Tower Annexe, Ganpatrao Kadam Marg, Lower Parel (West), Mumbai -400 013	**Vs**	Asst. Commissioner of Income Tax, Range 6(3), Aayakar Bhavan, M.K. Road, Mumbai-400 020

ITA No. 4779/Mum/2004
(Assessment year : 1999-00)

Asst. Commissioner of Income Tax, Range 6(3), Mumbai-400 020	**Vs**	Gujarat Glass Private Limited, (now known as Piramal Glass Limited) Mumbai -400 013 PAN: **AAACG 1524 C**
(Appellant)		(Respondent)
Appellant-assessee by	:	Mr. S.E. Dastur, Senior Advocate and Mr. Niraj Sheth
Respondent-revenue by	:	Mr. A.P. Singh

Date of Hearing : 26-02-2013
Date of Pronouncement : 05-04-2013

O R D E R

PER VIVEK VARMA, JM:

The cross appeals have been filed by the assessee and the department against the order of the CIT(A)XXVI, Mumbai, dated 31.03.2004. As both the appeal emanate from the same order, we are disposing off both the appeals by way of a common order for the sake of convenience and brevity.

2. For the sake of continuity and clarification, we must mention that the

cross appeals were heard and adjudicated vide ITAT order dated 16.12.2008. Against this order, the assessee moved a Miscellaneous Application under section 254(2), because the impugned aspect was adjudicated against the assessee, placing reliance on the Third Member decision rendered by the coordinate Bench at Delhi in the case of Paper Products Limited vs Add. CIT, in ITAs No. 4750/Del/2002, 911/Del/2003, 1320/Del/2004, 4970/Del/2004, 4807/Del/2002, 1007/Del/ 2003, 1347/Del/2004 and 5078/Del/2004, dated 15.04.2008, which was not referred to by either parties in the course of hearing of the appeal before the ITAT. As a result, the impugned issue was recalled.

3. From the recalled order, the jurisdiction cast upon the ITAT is limited to the extent, to delve upon the original grounds no. I and III in the assessee's appeal and as consequence of these grounds, the appeal filed by the department also has to be adjudicated.

4. In the appeal filed by the assessee and by the department, the issue pertains to non compete fee and its application, that is, whether non compete fee is an intangible asset, liable for depreciation, or whether, amount paid by the assessee can be spread over, over the tenor period.

5. Hence, the instant appeal on the issue of treatment to be given on the applicability of non compete agreement.

6. In the integram, the assessee filed an additional ground of appeal, which reads as under:

> *Ground No I.*
> *The CIT(A) ought to have held that the payment of Rs. 18 crore was made for know how and the consequent non compete covenant, for which allowance should have been made in Appellant's Income.*
> *Ground No. II*
> *The Appellant craves leave to add, alter, amend or delete all or any of the grounds of appeal.*

7. The DR raised an initial objection on the additional ground, as raised at

this stage of the proceeding. The DR submitted that additional ground, even if legal, cannot be raised in the recalled proceeding and as such, the issue taken up in the additional ground was never a part of any proceedings at any stage at any earlier proceedings. He further pointed out that in the relevant section now, and earlier in the Appendix, there was no mention of non compete fee. He further argued that payment for *non compete fee* cannot now be allowed to be changed to *technical knowhow*. The DR also placed reliance on the decision of the coordinate Bench in the case of Tokhem Enterprises vs ITO, ITA no. 1218/Mum/2006, reported in (2011) 14 taxmanonline.com 3 (Mum), wherein it was held that additional ground raised in the recalled proceedings cannot be allowed.

8. Countering the initial objection as raised by the DR, the Senior Counsel pointed out that even during the course of original hearing, the issue was a part of the grounds of appeal, as mentioned in Ground No. III, i.e. alternative ground. The AR submitted that in any case, this being purely a legal issue, ground can be taken for the first time at any stage of the prosecution and the assessee was well within its rights to raise the additional ground.

9. We have heard the arguments on the raising of the additional ground of appeal and we are of the view that once an issue is subject matter of recalled proceedings, court is bound within the parameters of the proceedings and jurisdiction entrusted on a very limited sphere. Having observed this, we cannot ignore the Full bench decision of the Hon'ble Bombay High Court in the case of Ahmedabad Electricity Co. Ltd. vs CIT, reported in 199 ITR 351 (Bom.) (FB), wherein the Hon'ble Bombay High Court observed, *"that Rules 11 and 29 of the Income-tax Appellate Tribunal Rules indicate that the scope of enquiry before the Tribunal can be wider than the points which are raised before the Tribunal. The Tribunal, therefore, would ordinarily have the power to allow additional points to be raised before it so long as*

they arise from the subject matter of proceedings and not necessarily only the subject matter raised in the memorandum of appeal".

10. Taking into consideration the ratio laid down by the Hon'ble Full Bench of the Bombay High Court in Ahmedabad Electricity Co. Ltd. *(supra)*, and the facts of the instant case and jurisdiction cast upon the ITAT, via the recalled portion of the order, we find that the issue of non compete fee as per original proceedings, and seeking it now as knowhow, are in tandem. We, therefore, admit the additional legal ground as raised on 04.11.2011.

ITA no. 4842/Mum/2004 : Assessee's appeal:

11. Grounds no. I, II & III and Additional Ground are against the disallowance of Rs. 18,00,00,000/- paid by the assessee for acquiring knowhow and/or payment as non compete fee, which are being reproduced hereunder for convenience :

GROUND I

1. *The Commissioner of Income-tax (Appeals)XXVI, Mumbai ["the CIT(A)"] erred in confirming the action of the Assistant Commissioner of Income-tax, Range 6(3) ["the AO'] in disallowance of depreciation on the capitalised sum of non-compete fees over various assets on the alleged ground that the expenditure is in no way connected with the acquisition of various assets.*
2. *He failed to appreciate and ought to have held that:*
   (i) the non-compete fees formed part of the total consideration paid for acquisition of the glass division:
   (ii) allocation over various assets and liabilities was carried out on a fair basis arrived at by technical experts; and
   (iii) the said allocation was in accordance with Accounting Standard 10, "Accounting for Fixed Assets", issued by the Institute of Chartered Accountants of India, the Apex Accounting Body, which requires a company to allocate the composite slump consideration paid for a bunch of assets on a fair basis.
3. *The Appellant, therefore, prays that depreciation of be allowed on the value of assets after allocation of the non-compete fees.*

GROUND II

Without Prejudice to Ground I

1. *The CIT(A) erred in confirming the action of the AO in not allowing payment of Rs. 18 crores towards non-compete fees as revenue expenditure*
2. *He failed to appreciate and ought to have held that:*
   (i) payment made to a rival to ward off competition in business, would be revenue expenditure inasmuch as it was a facilitate its profits by

eliminating competition, and not towards acquiring a business actually generating profits; and

(ii) judged by the test of business expediency, the amount was expended wholly and exclusively for the business of the Appellant.

3. The Appellant therefore prays that it be held that, expenditure of Rs. 18 crores incurred by the Appellant for increasing the profit earning capacity of the business is revenue in nature, and hence allowable as business expenditure u/s. 37(1) of the Income-tax Act, 1961, ("the Act").

GROUND III

Without Prejudice to Ground I & II

1. The CIT(A) erred in confirming the action of AO of disallowing depreciation claimed on payment of non-compete Fees of Rs. 18 crores on the alleged ground that the right obtained thereby was not covered by Appendix I and part B defining intangible assets.

2. He failed to appreciate and ought to have held that:

(i) The Appendix I Part B speaks of "know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature … 25%", and

(ii) The phrase "any other business or commercial rights of similar nature" is wide enough to cover non-compete fees within its ambit.

3. The Appellant, therefore, prays that the depreciation be allowed at 25% on the said capital asset emerging through payment of non-compete fees."

12. The facts, as taken from the CIT(A)'s order are, that the assessee company, i.e. Gujarat Glass Private Limited (GGPL) was incorporated on 06.02.1998, as a subsidiary of M/s Nicholas Piramal India Limited (NPIL), this company later became Gujarat Glass Limited (GGL) (Now known as Piramal Glass Limited). The assessee-company (GGL), and NIPL are the group companies of Piramal Enterprises Limited (PEL).

13. The assessee company (GGL), was carved out of NPIL, being the two glass manufacturing units, located at Kosamba and Jambusar (both in Gujarat).

14. Immediately after inception of GGPL, on 06.02.1998, vide an agreement dated 26.02.1998 with PEL, assessee sought to acquire technical knowhow, preambled as Non Competition Agreement, wherein NPIL was the confirming party. GGPL, thereafter entered into an agreement dated 16.04.1998 with NPIL for spin off, sell and transfer as slump sale with effect from 01.04.1998, which was approved by the Board of Directors in the EGM of NPIL on 20.03.1998 for the manufacture and marketing of glass to be produced by the newly

incorporated company, i.e. GGL.

15. To demonstrate the business and commercial relationship of PEL, NPIL and GGL (assessee company), the Senior Counsel assailed the agreements as entered into by the assessee company.

16. The Senior Counsel first referred to the agreement dated 26.02.1998 entered into by the assessee and PEL, wherein it clearly mentioned,

> *"B. PEL owns and possess the technical know-how for manufacturing and marketing glass containers for pharmaceutical industry and is entitled to make it available to manufacturing companies.*
> *C. The said Gujarat Glass Division of NPIL, is using the said technical know-how provided by PEL for it's business of manufacturing glass containers, as aforesaid.*
> *D. Over the years the Glass products of the Gujarat Glass Division having been well accepted not only in domestic market but also in the international markets, PEL is negotiating for strategic alliances and joint ventures for technology upgradation for the said Gujarat Glass Division.*
> *E. PEL and NPIL therefore are desirous to spin off the said Gujarat Glass Division of GGL to be a separate subsidiary Company of NPIL so that marketing of glass containers by using the technical know-how which would also facilitate inviting the partners for alliance, joint venture developments/diversification of business and that equity participation can also be offered in GGL to such incoming partner.*
> *F. As a result of the protracted negotiations between PEL and NPIL, NPIL has agreed to enter into a Memorandum of Undertaking with GGL, for spin-off, sale and transfer of its said Glass Division to GG with effect from 1st April, 1998 and also to initiate all the required process of obtaining statutory and other approvals, consents, no-objection including approval of its shareholders required under section 293(1)(ii) and 372 of the Companies Act, 1956 for such spin off the Gujarat Glass Division and making investment in GGL.*
> *G. PEL has agreed to refrain from (i) providing the technical knowhow for manufacture of glass containers to any other Company or entity so that the said technical know-how is exclusive with GGL, (ii) carrying on the business of packaging or of manufacturing glass, and (iii) competing with the business of GGL as GGL would carry on the business which at present is being carried on in Gujarat Glass Division, after the said Division is spun-off in favour of the GGL.*
>
> *NOW THIS AGREEMENT WITNESSETH AND THE PARTIES THERETO HEREBY MUTUALLY AGREE AS FOLLOWS:*
>
> 1. *In consideration of the aforesaid agreement, PEL agrees that it shall not carry on the business of manufacture, sale and distribution of glass containers nor shall it carry on any business of packaging or of manufacturing of glass which business has now to be carried on by GGL from 31st day of March, 1998 nor shall it compete with the business of NPIL for a period of three years from the date of this Agreement. (few words of the clause are not clear in the xerox copy)*
> 2. *PEL shall not directly or indirectly make available in any manner whatsoever to any person, Company or entity the technical know-how for*

manufacturing and marketing the glass containers which at present is being used by the said Gujarat Glass Division and upon spinning off the Division to GGL, the said know-how will be used by GGL.

3. *PEL shall not directly or indirectly engage in the manufacture, sale or distribution of the glass containers, whether under the brand name "Gujarat Glass" or any other brand name during the term of this Agreement.*
4. *In consideration for the restrictive covenants, agreed and undertaken by PEL herein, GGL has agreed to pay a sum of Rs. 18,00,00,000/- (Rupees Eighteen Crores Only) to PEL on/or immediately after the execution of this Agreement.*
5. *During the term of this Agreement, PEL shall not directly or indirectly own, manage, operate, control or to be employed by, participate in or be connected in any manner whatsoever in the business of packaging or manufacturing glass or the business which shall compete with GGL's business".*

17. According to this agreement, besides providing technical knowhow, PEL shall refrain from the market, manufacture and trade of glass for three years. This tenor was later on extended to 18 years vide a supplementary agreement dated 04.03.1999.

18. NPIL, who till 31.03.1998 was holding the technical knowhow for the manufacture and trade of glass, as provided by PEL, entered into an agreement with GGL (assessee) on 16.04.1998, with effect from 01.04.1998, which reads as under:

IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES HERETO AS UNDER :

"1. The vendor shall spin off, sell and transfer as slump sale, in favour of the Purchaser and the Purchaser shall acquire with effect from 1st day of April, 1998, as going concern the said Glass Division of the Vendor consisting of both the aforesaid factories of the Vendor which are situated at Kosamba and Jambusar and on the land or ground more particularly described in Annexures '1A' and '1B' hereto on which the said factories are situate along with the plants and machinery, furniture, equipment and fixtures lying in the said two factories, the net current assets and the liabilities together with the manufacturing and all other licences, permits, etc. pertaining to the said Glass Division (hereinafter collectively referred to as "the Undertaking") at or for a lumpsum consideration of Rs. 1,865,200,000/- (Rupees One Billion Eight Hundred and Sixty Five Million and Two Hundred Thousand Only) the mode and manner for payment of which shall mutually be decided by the Vendor and the Purchaser.

2. The Purchaser shall take over the Vendor the contingent liability listed in Annexure '2' to this Agreement. The Purchaser agrees that it shall be liable for such contingent liabilities and shall discharge the same as and when demanded.

3. The Vendor has obtained the consent of its shareholders as required under section 293(1)(a) of the Companies Act, 1956 for the spin-off & transfer of the Undertaking by means of a resolution passed at the extraordinary general meeting of its shareholders held on 20th March, 1998. A certified true copy of the said resolution is annexed hereto as Annexure '3'.

4. The Purchaser and the Vendor both agree that the Vendor shall sell and the Purchaser shall purchase the said Glass Division of the Vendor at the agreed consideration as aforesaid free from all encumbrances (except any encumbrances created or existing to secure only the liabilities referred to in Clause 3 above) and that they shall enter into the execute such deeds, agreements and other documents as may be required and as the Vendor and the Purchaser may mutually decide so as to expeditiously complete the transfer of the Glass Division/Undertaking by the Vendor or the Purchaser.

5. The Purchaser shall have the use & benefit of the Undertaking from 1st April, 1998 and before 31st March, 1999 the legal & beneficial transfer and assignment of the Undertaking to the Purchaser shall be completed in accordance with the agreement between the parties & all applicable laws & all consents, no-objections and permissions (by whatever name called) required for the same shall be obtained & all conditions thereof shall be complied with. The aforesaid consideration shall be paid by the Purchaser to the Vendor in accordance with the Schedule of payments to be mutually agreed between the Purchaser and the Vendor in writing.

6. The Vendor and the Purchaser may mutually decide the mode of transfer and/or making available to the Purchaser the concerned properties of the Company (movable and immovable and of any other nature whatsoever) including the land with the factory building and other structures standing thereon effective from 1st day of April, 1998 irrespective of the date of execution of the agreements/documents effecting such transfer.

7. With effect from the 1st day of April, 1998

a) The Vendor shall be deemed to have and hold possessed the assets of the said Glass Division/Undertaking which are the subject matter of this Memorandum of Undertaking for and on account of the Purchaser and declares that it shall not alienate, change, mortgage or otherwise encumber or dispose off or deal with any part of the assets of its Glass Division except as may be agreed by the Purchaser in writing".

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19. On the basis of these two agreements, which, according to the Senior Counsel, had to read in conjunction with each other, submitted that, the effective date of acquisition of technical knowhow and applicability of non compete agreement *was* 01.04.1998.

20. The revenue authorities seized with the impugned issue, rejected the claim of the assessee, wherein it had prayed for allowance of the same to be a revenue expenditure or in the alternative, to treat the payment made to PEL to

the tune of 18 crores in lieu of acquisition of an asset which was eligible for depreciation. The CIT(A), however, directed the AO to spread over the payment of Rs. 18 crores over the period of the tenor, in 18 years (against this direction, the department is in appeal before the ITAT).

21. The Senior Counsel has submitted that in the present proceedings he shall demonstrate that the payment made to PEL, was, for the purpose of acquisition of a capital asset and as a consequence thereof, the assessee was correct to claim depreciation, allowable under section 32 of the Income Tax Act, 1961.

22. To demonstrate that the payment was for the purpose of acquisition of capital asset and the claim of depreciation thereon, the Senior Counsel referred to the relevant section, i.e. section 32(1)(ii), which reads as,

> *"32(1) In respect of depreciation of –*
> *(i) building, machinery, plant or furniture, being tangible assets;*
> *(ii) knowhow, patents, copywriters, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after 1st day of April, 1998,*
> *owned, wholly or partly, by the assessee and used for the purpose of the business or profession, the following deduction shall be allowed –*

23. The Senior Counsel submitted, for the purposes of impugned issue, *clause* under reference *is* (ii) to sub section (1) of section 32. As mentioned in the facts, the assessee came into being in February of 1998, when it entered into an agreement with PEL who would provide technical knowhow to the assessee, which was, till then and upto 31.03.1998 was to be used by NPIL. The assessee then, vide agreement dated 16.04.1998 took over glass divisions, forming a distinct company from NPIL. The assessee, therefore, took over, amongst other assets, technical knowhow and enforced non compete agreement to be effective from 01.04.1998.

24. The Senior Counsel demonstrated from the conjoined reading of the two agreements that the assessee entered into first agreement with PEL on

26.02.1998 and then with NPIL on 16.04.1998. He submitted that, reading of both the agreements independently of each other and in isolation, would not render any inference.

25. The Senior Counsel, thus argued that whether it was in the name of *technical knowhow, license or any other business or commercial rights of similar nature*, was in fact acquired on 01.04.1998 vide agreement dated 16.04.1998, as prescribed in the section, i.e. *on or after 01.04.1998.*

26. In support of his argument, that rights, by whatever nomenclature, it could be taken, the Senior Counsel placed reliance on the following decisions,

> *1. ACIT vs Real Image Tech. (P.) Ltd. (120 TTJ 983)(TChn.)*
> *The assessee acquired assets of M/s JS, a firm and RIPL, a company. It later decided to pay non-compete fee to is, RIPL and RIPCL and claimed the expenses as revenue and alternatively claimed depreciation. The Tribunal allowed depreciation on non-compete payment by treating it as 'any other business or commercial right of a similar nature'. The Tribunal held that when by payment of non-compete fee, the businessman gets a vested right, which can be enforced under law. The Tribunal examined whether non-compete fees could be termed as 'any other business or commercial rights' for construing the same as an intangible asset. The Tribunal applied the rule of 'ejusdem generis' and held that non-compete was similar to the items specified earlier.*
> *Tribunal also followed Mumbai Tribunal in Techno Shares & Stocks Ltd. v. ITO [2006] 101 TTJ 349. It may be noted that the view taken by the Mumbai Tribunal that stock exchange card is depreciable has been ultimately upheld by the Supreme Court in 327 ITR 323.*
> *2. ITO Vs Medicorp Technologies India Ltd. (30 SOT 506)(TChn.)*
> *The assessee acquired the business of Medispan Ltd. and also agreed to pay non-compete fee of Rs. 2 crore to it for not competing for a period of 10 years. The Tribunal at Para 21.1 held that what was acquired by the assessee by paying an amount of Rs. 2 crores as non-compete fee was a business/commercial right. Thereafter, the Tribunal examined the items specifically mentioned in section 32(1)(ii) and came to the conclusion that non-compete fee being of similar nature was 'any other business or commercial rights' and therefore it was eligible for depreciation under section. 32(1)(ii) of the Act.*
> *3. Bunge Agribusiness (lndi) (P.) Ltd. Vs DCIT (132 lTD 549)(Mum.)*
> *The assessee purchased the edible oils and bakery fats Division of Hindustan Lever Ltd. and paid non-compete fee to HLL. The assessee claimed the amount as revenue and alternatively claimed depreciation. The Mumbai Tribunal held that the expenditure was capital following the decision of the Delhi Special Bench. Thereafter, it held that such non-compete right was depreciable following Chennai Tribunal in the case of ACIT Vs Real Image Tech. (P.) Ltd. (120 TTJ 983)(Chn.).*
> *4. M/s Scott Glass India Pvt. Ltd. Vs. DCIT (1698/Mum/2003)(Mum.)*
> *The assessee acquired all the assets of BGTL and paid non-compete fee of Rs.*

34.47 crore. The Mumbai Tribunal allowed depreciation thereon relying on the decisions of the Chennai Tribunal in the cases of Medicorp, Real Image and Radaan.

5. Serum Institute of India Ltd. Vs ACIT (147 Ui 594)(TM Pune)

TVL, the predecessor company (which was later amalgamated into the assessee) paid non- compete fee of Rs. 2.4 crore to its founder, Dr. Rao and claimed the same as revenue expenditure and alternatively claimed depreciation. The Tribunal held that the payment gave rise to a capital asset, which was a business or commercial right. The Tribunal followed the decision of the Chennai Bench in the case of Real Image.

6. Ind Global Corporate Finance Pvt. Ltd. vs DCIT 2012 TIOL 524 ITAT Mum

The assessee acquired the merchant banking business from Ind Global Financial Trust Ltd. and paid non-compete fee to the Managing Director of the seller company. The assessee claimed that the payment was deferred revenue expenditure. The said claim was disallowed by the AO but was allowed by the CIT(A). Before the Tribunal, the assessee raised an additional ground claiming depreciation on such payment, if it was held to be capital in nature. The Tribunal held that the payment was capital following Tecumseh but allowed the additional ground by relying on the decision in the case of Real Image and Schott Glass.

B Goodwill

1. CIT vs Smifs Securities Ltd. 348 ITR 302 (SC)

The assessee acquired goodwill in the process of amalgamation of another company into itself. Depreciation was claimed thereon. The Supreme Court held that a reading of the words "any other business or commercial rights of similar nature" in section 32(1) indicates that goodwill would fall under the said expression. The Supreme Court held that the principle of ejusdem generis would strictly apply while interpreting the said expression. Thus it held that goodwill was an intangible asset eligible for depreciation.

2. CIT vs KEC International Ltd. ITXA No. 40 of 2011

In this case, the Hon'ble Bombay High Court has followed the decision of the Supreme Court in Smifs Securities and held that depreciation is allowable on goodwill.

3. Areva T & D India Ltd. vs DCIT 345 ITR 421 (Del)

The assessee acquired by way of a slump purchase the transmission and distribution business of Alstom Projects India Ltd. The excess of the total sale consideration over value of tangible assets was treated as goodwill and depreciation was claimed thereon. The Delhi High Court relied on the decision of the Supreme Court in Techno Shares and its decision in Hindustan Coca Cola's case to hold that depreciation was allowable on goodwill. The High Court noted that the legislature had used the words "any other business or commercial rights of similar nature" because it 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. Relying on the decision of the Supreme Court in Techno Shares, the High Court held that the right was akin to a license without which the assessee would have to start its business from scratch and go through the gestation period. Therefore, the amount paid was held to be in respect of an intangible asset

4. Kotak Forex Brokerage Ltd. Vs ACIT (33 SOT 237)(Mum.)

In this case, the assessee paid an amount of Rs. 1.88 crore towards the use of the name 'Kotak' and claimed depreciation thereon terming it as depreciation on goodwill. The Tribunal held that business or commercial rights are rights obtained for effectively carrying on the business or commerce. Commerce is a

wider term, which encompasses business in its fold. Therefore, any right which is obtained for carrying on the business effectively and profitably has to fall within the meaning of intangible asset. The Tribunal held that goodwill was similar to the specified assets and accordingly the assessee was allowed depreciation.

5. CIT Vs Hindustan Coca Cola Beverages (P.) Ltd. (331 ITR 192)(Delhi)

In this case, the High Court held that commercial rights are such rights which are obtained for effectively carrying out the business and commerce as is understood is a wider term which encompasses in its fold many a facet. Studied in this background, 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 assets.

6. Koch Chemical Technology Group India Pvt. Ltd. Vs DCIT (ITA No. 2680/Mum/09)(Mum.)

The Mumbai Tribunal following the decision of the Delhi High Court in the case of Hindustan Coca Cola Beverages (P.) Ltd. (supra) has stated that depreciation is allowable on goodwill, being intangible assets.

C Other Examples of Commercial Rights

1. Techno Shares & Stocks Ltd. Vs CIT (327 ITR 323)(SC)

The Apex Court held that depreciation was allowable on the cost of the BSE membership card under section 32(1)(ii). The Supreme Court held that the right of the membership was a 'business or commercial right' which gave a non-defaulting continuing member a right to access the exchange and to participate therein and in that sense it was a licence or akin to a licence.

2. Jyoti (India) Metal Industries Pvt. Ltd. vs ACIT ITA No. l8l/Mum/2008

The assessee acquired "market network rights" from its sister concern and claimed depreciation thereon. The Tribunal following the decision of the Supreme Court in Smifs Securities allowed such depreciation. The Tribunal held that it is settled that the meaning of business or commercial right of a similar nature has to be understood in the context of purpose of such rights obtained as for effectively carrying on the business and commerce.

3. Sarabhai Zydus Animal Health Ltd. Vs ACIT (ITA No. 26/Del of 2005)(TDel.)

The assessee was a joint venture company. It paid Rs. 2 crore by way of distribution franchisee fee for acquiring distribution rights from one of its promoters. The Tribunal held that that the amount of Rs. 2 crores representing distribution franchise fee paid to Ambalal Sarabhai was in respect of commercial rights referred in Section 32(1)(ii) of the Act and depreciation was allowable thereon.

4. Ashoka Info (P.) Ltd. Vs ACIT (35 SOT 50)(TPune)

The assessee carried out construction and development of State Highway No. 141. The said project was awarded with toll collection rights. The assessee claimed depreciation on toll collection rights. The Tribunal applied the rule of 'ejusdem generis' and held that the right to collect toll was a commercial right akin to license and hence was depreciable.

Spread over of non-compete payment over various assets of Glass Division taken over:

1. Tecumseh India (P.) Ltd. Vs ACIT (127 lTD 1)(Delhi)(SB)

The Special Bench of Delhi Tribunal was concerned with a case of takeover of business and payment of non-compete fee. The Tribunal noted that the purchase price paid for the business (excluding non-compete fee) was Rs. 49.85 crores. If a further sum of Rs. 2.65 crores paid on account of non-compete fee was added to the same, the total would come to Rs. 52.50 crores, which was the amount mentioned in the MOU for transfer of the business. Therefore, the Tribunal held

that non-compete fee was capital expenditure.
Thereafter, at Para 127, Tribunal observed, relying on the decision of the Supreme Court in Assam Bengal Cement Co. Ltd. (27 ITR 34) (SC) that the payment of non-compete fee went to appreciate the whole of the capital assets of the business.
2. CIT vs Smifs Securities Ltd. 348 ITR 302
This view has also been held by the Supreme Court in the case of CIT vs Smifs Securities Ltd. 348 ITR 302. At Para 6, the Supreme Court has noted that because of acquisition of goodwill the market worth of the assessee stood increased.
Therefore, it is submitted that if the non-compete fee is not found to be depreciable as an intangible asset, then, it should be spread over various assets and depreciation should be allowed on the increased value of the respective blocks".

27. The Senior Counsel, therefore, concluded that on reading of the two agreements cohesively, and in conjunction with each other and placing reliance on the various decisions, as extracted above, the assessee was eligible for the claim for depreciation, as per section 32(1)(ii) of the Income Tax Act, 1961.

28. The DR once again reiterated the submissions made against the additional grounds of appeal and argued that payment for non compete fee cannot now be allowed to be changed to technical knowhow.

29. The DR also submitted that for bringing into operation section 32(1)(ii), if at all, in the present case, twin conditions had to be satisfied, i.e. *(a) the asset is acquired* and *(b) it is put to use.* This arrangement, according to the DR was acquired vide agreement dated 26.02.1998, therefore, according to the DR, the assessee failed on two counts, i.e. in so far as (a), as above, it would fall in assessment year 1998-99 as the relevant provision specifically provides, *"... on or after 1st day of April 1998",* which would automatically oust the applicability and (b), as above, whether at all *non compete fee* could be taken to be an asset.

30. According to the DR, first, if at all, the arrangement to be taken to be an asset, it was acquired on 26.02.1998, when it entered into the agreement with PEL preambled as Non Competition Agreement. From the details, as provided by the assessee, the payment was made by GGL to PEL, which was distinct

from the agreement entered into by GGL with NPIL. Since the agreement was dated 26.02.1998, the arrangement came into effect on 26.02.1998, which fell in assessment year 1998-99 and not in the current year, till which time it was not inserted as the provision in the Act. He further, that for the purposes of depreciation, it could only be put to use after the amendment came into the Act, therefore, on both these counts, the assessee falls outside the legislative intendment & therefore, the revenue authorities were correct in denying even the depreciation, to the assessee.

31. The DR, also submitted that though the goodwill is an asset, but non-compete fee is an arrangement provided by one contracting party to the other to allow the other party to stand and establish itself in the business/market and in any case, non compete fee does not figure in the relevant provision. The DR, also placed reliance on the decision of coordinate Bench at Delhi in the case of Sharp Business Systems (India) Ltd. vs DCIT, reported in 133 ITD 275 (Del), wherein, after detailed discussion, the Delhi Bench decided that non compete fee is not an asset, on which depreciation could be allowed, because, according to the Delhi Bench, it is an arrangement, not an asset.

32. The DR, finally submitted that no submissions came forthwith from the Senior Counsel, on the basis on which the issue was recalled and the instant hearing is taking place. The DR, therefore, submitted that since there are no comments on the Third member decision of Paper Products Limited, by the Senior Counsel, then it must be assumed that the case cited by the original Bench in the original hearing is acceptable to the assessee and also that the observations of the revenue authorities must be sustained and the claim now being raised through the additional ground be rejected and dismissed.

33. In the rejoinder, the Senior Counsel submitted that the assessee had allocated the non compete fee to its assets as on 01.04.1998, as per the

purchase price paid to NPIL, which were Rs. 2,69,59,41,000/- for fixed assets plus Rs. 18,00,000,563/- as non compete fee, which aggregated to Rs. 2,87,59,41,563/-.

34. He further submitted that additional ground on legality can be raised at any stage during the pendency of trial, as laid down by the Hon'ble Supreme Court of India in the case of National Thermal Power Co. Ltd. vs CIT reported in 229 ITR 383. This, according to the Senior Counsel was a general ratio, but specifically, with regard to the instant case, he submitted that the issue was very much under consideration, even in its original adjudication, wherein the coordinate Bench at page 2 of the order takes cognizance of the issues being agitated by the assessee. The Senior Counsel also referred to the case of Mysore Minerals Ltd. vs CIT, reported in 239 ITR 775 (SC), wherein, the Hon'ble Apex Court observes that the intention of the legislature is to provide depreciation on assets. He also referred to the case of CIT vs S.M. Chitnavis, reported in AIR 1932 PC 178, dated 26.04.1932, wherein the case was with regard to bad debts, which was not statutorily allowable. The Privy Council held, *"although Act nowhere in term authorized deduction of bad debts of a business, such as a deduction was necessarily allowable"*.

35. He further submitted, going strictly by the agreement, as mentioned earlier, the assessee paid the impugned amount of Rs. 18,00,00,000/- to PEL to acquire the knowhow, with effect from 01.04.1998, which in any case has got covered in the relevant section, which incidentally starts with the word *"knowhow"*. In the decision of Nair Service Society Ltd. vs K.C. Alexander, reported in 1968 AIR 1165 SC (*mentioned in the case of Mysore Minerals (supra)*), took reference from the decision of Perry Vs Clissold, reported in (1907) AC 73 PC. Hon'ble Supreme Court in the case of Mysore Minerals *(cited by the Senior Counsel)*, makes reference to the decision of CIT vs Podar Cements Pvt. Ltd., reported in 226 ITR 625(SC), wherein the Hon'ble Supreme

Court held, *"We are conscious of the settled position that under the common law, 'owner' means a person who has got valid title legally conveyed to him after complying with the requirements of law such as the Transfer of Property Act, Registration Act etc. But, in the context of section 22 of the Income Tax Act, having regard to the ground realities and further having regard to the object of the Income Tax Act, namely, 'to tax the income'. We are of the view, 'owner' is a person who is entitled to receive income from the property in his own right"*. This position may be a little different from the decision of Privy Council, cited above, wherein the Privy Council observed, *"It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the statute of limitation applicable to the case, his right is forever extinguished and the possessory owner acquires an absolute title"*. In the present case, the transfer of an intangible, from PEL to GGL took effect on 01.04.1998. Keeping in view the decision of Podar Cements *(supra),* GGL could only exert its domain on and after 01.04.1998. Before this date, the intangible was in use by NPIL, which the owner, PEL could have never transferred to GGL. After this date, neither PEL nor NPIL could ever exert any right of any kind over the knowhow. Therefore, the transfer of knowhow by PEL to the assessee can only be called a transfer of an asset on and with effect from 01.04.1998, for which the assessee claimed depreciation in the current assessment year.

36. He further pointed out that, it is also important to mention here that goodwill, as such also, is not one of the intangibles, included in the impugned provision, but the Hon'ble Supreme Court in the case of CIT vs Smifs Securities Ltd. reported in 348 ITR 302 has held that *"goodwill"* is an asset under Explanation 3(b) of section 32(1) and thus, eligible for depreciation. Therefore, reading alongside the decision of Hon'ble Privy Council, *"although Act nowhere*

in terms authorized deduction of bad debts of a transaction, such a deduction was necessarily allowable", which only means the second expression has to be read in conjunction with the eight expressions, cited in the relevant provision and doctrine of *ejusdum generis* is applicable to the second expression, as belonging to the same genus, as that in the first part of cluase (ii). The Senior Counsel, therefore, concluded that though non compete fee, *per se,* is not specifically mentioned, but just like goodwill, this has to be accepted as *"any other business or commercial rights of similar nature".*

37. After hearing both the parties at great length, to which we extend our deepest appreciation for the assistance provided, and on taking note of the facts, taking into consideration the details and scanning the cases cited before us, we have to :

a) adjudicate what is the character of non compete arrangement/agreement.

b) whether the payment is made for acquisition of a capital asset, on which depreciation is allowable.

c) what would be the effect of the Third Member decision of Paper Products Limited, incorporated at the time of adjudication of the original order, by the coordinate bench.

38. The issue to ascertain *the year of application of non compete fee*, if at all, we hold the same to be a capital asset, and whether at all depreciation would be allowed, is not in dispute, therefore, the submission of the DR, that twin condition has to be proved, i.e. acquisition of the asset and putting it to use, find themselves cleared and the submissions of the DR are, thus, over ruled, because on reading of the relevant clauses of the agreements, entered into by the assessee first with PEL and then with NPIL, the assessee, in any case had to wait upto 01.04.1998, and according to the agreement dated 26.02.1998, clause C, page 2 and clause F, page 3, which reads as under:

C. The said Gujarat Glass Division of NPIL, is using the said technical know-how provided by PEL for it's business of manufacturing glass containers, as aforesaid.

F. As a result of the protracted negotiations between PEL and NPIL, NPIL has agreed to enter into a Memorandum of Undertaking with GGL, for spin-off, sale and transfer of its said Glass Division to GG with effect from 1st April, 1998 and also to initiate all the required process of obtaining statutory and other approvals, consents, no-objection including approval of its shareholders required under section 293(1)(ii) and 372 of the Companies Act, 1956 for such spin off the Gujarat Glass Division and making investment in GGL.

G. PEL has agreed to retrain from (i) providing the technical know how for manufacture of glass containers to any other Company or entity so that the said technical know-how is exclusive with GGL, (ii) carrying on the business of packaging or of manufacturing glass, and (iii) competing with the business of GGL as GGL would carry on the business which at present is being carried on in Gujarat Glass Division, after the said Division is spin-off in favour of the GGL."

39. The clauses clearly show that under no circumstance, the new company, i.e. the assessee, shall be able to use the technical knowhow upto 31.03.1998. The agreement between GGL and PEL under all circumstances and for all practical purposes was a prospective agreement, which could only have been made effective from 01.04.1998. It is also interesting to note that, the AO also took note of this fact, because, the AO noted that the payment of the agreed amount was paid to PEL on 02.04.1998. This can only infer, that the agreement dated 26.02.1998 *actually came into force on 01.04.1998.*

40. On these fact, it is clear that the operation of the agreement, technical knowhow and application of non compete arrangement came into force on 01.04.1998, which would fall in assessment year 1999-2000, i.e. the year under consideration.

41. Diverting our attention towards the issues as mentioned above in para 37, whether at all the knowhow and/or application of non compete agreement would fall within the scope of provision of section 32(1)(ii). As we have already seen that the present section became effective from 1st April 1998, which included the following intangibles:

Knowhow
Patents

Copyrights
Trademarks
licenses
franchises
or any other business or commercial rights of similar nature

42. If we strictly go by the two agreements entered into by the assessee, first with PEL on 26.02.1998 and then with NPIL on 16.04.1998, we find that agreement dated 26.02.1998 with PEL is Non Competition Agreement and talks of transfer of knowhow to GGL with effect from 01.04.1998 and agreement dated 16.04.1994 with NPIL in clause 3 talks of spin off and transfer as per the consent taken by the shareholders as per section 293(1)(a) of the Companies Act, 1956 being the squeal of the Boards Resolution passed by NPIL in its *Extra Ordinary General Meeting (EGM)*, held on 20.03.1998, which reads as under:

> *"Resolved that pursuant to the provisions of Section 293(1)(a) and all other applicable provision, if any, of the Companies Act, 1956 (including any statutory modifications or re-enactment thereof for the time being in force) and subject to to such other approvals, including of financial institutions, banks, debenture trustees as may be and to the extent required, the consent of the Company be and is hereby accorded to the Board of Directors of the Company (hereinafter referred to as "the Board" which term shall also mean and include any Committee(s) which the Board may constitute to exercise the powers of the Board including the powers conferred by this resolution) to transfer the Company's Glass Division including the assets and liabilities together with the use of all the licenses, permits, consents and approvals whatsoever and all the rights, benefits and obligations attached thereto, as a going concern to Gujarat Glass Limited, a newly incorporated Company for the purpose, effective from 1st April, 1998 for such consideration and on such terms and conditions as the Board may deem fit, with liberty to the Board to appoint its Committee(s) authorising the powers vested in the Board.*
> *Resolved further that the Board be and is hereby authorised to settle all or any of the matters pertaining to or arising out of and incidental to such transfer of the Glass Division of the Company as aforesaid and to do and perform all such acts, deeds, matters and things as they may deem necessary, desirable or appropriate and to execute all such deeds, agreements, documents, undertakings, declarations writings etc, for completing such transfer of the said Division as aforesaid as it may consider necessary, expedient, usual, requisite, desirable or proper for giving effect to this resolution".*

43. From the reading of the two agreements conjointly, we come to an understanding that the new company, i.e. GGL, i.e. the assessee acquired the non compete arrangement from PEL also with effect from 01.04.1998.

44. When we take into consideration DR's argument that in accordance with the decision of Delhi ITAT in the case of Sharp Business System *(supra),* non compete fee is not eligible for depreciation, we must accept that the order of the coordinate Bench is not only very detailed and well speaking, we must say that the coordinate Bench very logically explained the expression, *"any other business or commercial rights of similar nature".* When we read the relevant portion of the provision, the initial part, i.e. knowhow, patents, copyrights, trademarks, license, franchises, has been disjointed by the conjunction *'or.* When we read the relevant clause, it reads as *knowhow, patents, copyrights, trademarks, licenses, franchises* ***or*** *any other business or commercial rights of similar nature.* The use of the disjunction 'or' has a very relevant role, because, the legislature accepts the difference and distinction of intangibles and rights. It is because of this reason, various decision have placed the doctrine of *ejusdem generis* to explain the genus. The legislature has used *'or'* in the provision for explaining the distinction of *application of like nature with that of the unlike nature*, which is an accepted principle i.e. doctrine of *ejusdem generis*. It is important to point out that even when we read the Third Member decision in the case of Paper Products Limited vs Add. CIT referred to in the original order of the ITAT, In our view, taking note of the word 'or', used as a disjunction is essential to carve out a meaningful *genus.*

45. The Senior Counsel argued at length, whether such non compete right constitute is a *right in rem* or otherwise, is a matter to be decided by an appropriate higher judicial forum. In the instant proceedings, we cannot import the decision of Hon'ble Supreme Court of India in the case of Smifs *(supra),* wherein the Hon'ble Apex Court held that goodwill was an intangible asset and eligible for depreciation. It is important to observe that the Hon'ble Apex Court was seized with the issue of goodwill only.

46 In the synopsis filed by the assessee, the Senior Counsel referred to a

number of decisions of the various coordinate benches, which included the decision of Tecumseh India (P) Ltd. vs ACIT, rendered by the Special Bench at Delhi *(supra),* wherein the issue was with regard to the expenditure incurred on account of non compete fee being capital or revenue. In the instant case, the case referred by the coordinate Bench in the original proceedings of Paper Products Ltd. *(supra)* is on a different premise, i.e. whether the capital expenditure incurred for acquiring a capital asset, eligible for the claim of depreciation. Decision in the case of Tecumseh India *(supra*) is the closest in so far as the decision rendered by a bench of equal strength. Since all the other decisions rendered by the coordinate Benches are by the regular benches, cannot be relied upon.

47. We find that the issue in reference is dealt with only by the Third Member decision in the case of paper Products Limited *(supra).*

48. When we take into consideration, DR's submission that non compete does not find place in the provision, we have to accept this proposition, because non compete fee does not fall within the ambit of any other commercial or business rights, because, even when we examine the meaning of different words, as per law Lexicon, as provided by the Senior Counsel,

> the meaning of the word *license*, as per Law Lexicon means,
>
> *"An authority to do something which would otherwise be inoperative, wrongful or illegal; a formal permission from a Constituted authority to do something".*
> *"Permission or authority to do a particular thing".*
> *"Permission for the licensee to produce or distribute the licensor's product under the licensor's name."*
> *"Granting of permission or license to a Certifying Authority. (Information Technology)".*
>
> the meaning of the word *franchise*, as per law Lexicon, franchise means,
>
> *"Franchise. The right conferred by the government to engage in a specific business or a exercise corporate powers. – Also termed corporate franchise; general franchise. (Black, 7th Edn. 1999)*
> *"When referring to government grants (other than patents, trademarks,*

and copyrights), the term 'franchise' is often used to connote more substantial rights, whereas the term 'license' connotes lesser rights. Thus, the rights necessary for public utility companies to carry on their operations are generally designated as franchise rights. On the other hand, the rights to construct or to repair, the rights to practice certain professions, and the rights to use or to operate automobiles are generally referred to as licenses." I Eckstrom's Licensing in Foreign and Domestic Operations S. 1.02(3), at 1-10 to 1-11 (David M. Epstein ed., 1998)."

the meaning of the word *knowhow*, as per Law Lexicon means :

"Knowledge, experience and skills, include technical, management, scientific and financial.
Saleable knowledge of techniques or processes. (Banking)
'Know-how' indicates something essentially different from secrete and confidential information. It indicates the way in which a skilled man does his job, with his skill and experienced. Stevenson Jordan and Harrison v. Macdonald and Evans [1952] 1 TLR 101.
"Know-how" is the fund of technical knowledge and experience acquired by a highly specialized production organization. It is usually noted vary according to, and may even be determined by, its use. Like office or factory buildings, patents and trademarks, and good will, it may be described as a "capital asset" while it is retained by a manufacturer for his own purposes, but, unlike these, its supply to another is not a transfer of a fixed capital asset because it is not lost to supplying manufacturer (Rolls-Royce v. Jeffrey; Rolls-Royce v. I.R.C., [1962] 1 All ER 801 (HL).
In Sections 530 and 531 [disposal of know-how] 'know-how' means any industrial information and techniques likely to assist in the manufacture or processing of goods or materials, or in the working of a mine, oil-well or other source of mineral deposits (including the searching for, discovery or testing of deposits or the winning of access thereto), or in the carrying out of any agricultural, forestry or fishing operations. [(English) Income and Corporation Taxes, 1988. S. 533(7)]
['know-how' seems to me to indicate something essentially different from secret and confidential information. It indicates the way in which a skilled man does his job, and is an expression of his individual skill and experience" per Evershed Mr., in Stevenson Jordon and Harrison v. Macdonald and Evans, (1952) 1 TLR 101."

49. The expression non compete fee could not be extracted.

50. It is important, therefore, to read both the parts as read by the coordinate Bench in Sharp Business Systems *(supra) to explain the genus of "any other business or commercial rights of similar nature" with the earlier words*. We, therefore, accept the ratio laid down by the coordinate bench at Delhi. The issue has since been upheld by the Hon'ble Delhi High Court in the case of Sharp Business System vs CIT, in ITA No. 492 of 2012, order dated

05.11.2012. This order of the Hon'ble Delhi High Court, therefore, impliedly, sustained the order of the Third Member decision in the case of Paper Products Ltd., because of which the case was partly recalled, as per the instant proceedings.

51. We are therefore, of the opinion, that the assessee does not satisfy, the payment made to acquire non compete right, being an asset, as per the second part of clause (ii) to section 32(1), and is, therefore, not eligible for depreciation as per law.

52. We, therefore, sustain the order of the CIT(A) on this issue and consequentially sustain the order of the AO, wherein the AO had disallowed the depreciation, as claimed at Rs. 18,00,00,000/-, which, in our opinion is as per law.

53. The grounds no. I, II, III and Additional Ground, which came up for our consideration are therefore, rejected.

54. The other grounds, forming part of the present proceedings are thus academic and are rendered infructuous.

ITA no. 4779/Mum/2004 : Appeal by the revenue

55. Grounds raised by the revenue in its appeal are as under:

> *"1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the Assessing Officer to allow the write off of payments of Rs 18 crores of non compete fees made to Piramal Enterprises Ltd. (PEL) over a period of 18 years accepting the assessee's contention that payment was made in the business interest of the company relying upon the decision of the Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd. (MIICIL)(225 ITR 802) which is distinguishable in the present facts and circumstances of the case in as much as in the case of MIICL, the liability to pay the discounted amount over and above the amount received for the debentures was a liability which was incurred in order to generate funds for business activities whereas in the present case non compete-fees have been paid to refrain the Piramal Group of companies from undertaking any competing business in any manner*

which, by its very nature, is capital expenditure.

2. *On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the Assessing Officer to consider the fair value of the depreciable assets acquired on lump sump sale from Nicholas Piramal India Ltd. (NPIL) as actual cost for the purpose of computation of allowable depreciation without giving any reasons for the same and without appreciating the decisions reported in 109 ITR 324, 109 ITR 739, 156 ITR 360, 199 ITR 299 as relied upon by the Assessing Officer."*

56. The appeal, though decided in the original round, also was recalled because of the ground recalled in ITA no. 4842/Mum/2004.

57. In the impugned order of CIT(A), it was found that the CIT(A) allowed the spread over of Rs. 18,00,00,000/- over a period of 18 years, i.e. the tenor period of non compete applicability.

58. Since we have held the payment of Rs. 18,00,00,000/- to be a capital expenditure cannot be allowed as an expense and we have also held that non compete fee is not an asset, depreciation cannot be allowed, we therefore, allow the spread over as well. Since we have rejected the appeal filed by the assessee, the ground raised by the department are allowed.

59. In the result, the appeal filed by the department is allowed.

To sum up:

Assessee's appeal stands dismissed.

Revenue's appeal stands allowed.

Order pronounced on in the open court on 5th of April, 2013.

Sd/-	**Sd/-**
(D. KARUNAKARA RAO)	**(VIVEK VARMA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai: **5th April, 2013**

Copy to:

1) The Appellant
2) The Respondent
3) The CIT(A)-XXVI, Mumbai
4) The CIT, City-6, Mumbai
5) The DR, "F" Bench, Mumbai.
6) Copy to Guard File.

By Order

/ / True Copy / /

Asst. Registrar,
ITAT, Mumbai

*Chavan