



## **Bombay High Court rejected the claim of depreciation on the Bombay Stock Exchange Membership Card**

Recently, the Bombay High Court in the case of various stock broking houses<sup>1</sup> held that the depreciation cannot be granted on Bombay Stock Exchange Membership Card (BSE card) acquired on or after 1 April 1998 either by nomination or directly through the stock exchange.

### **Facts of the case**

- The taxpayers owning a BSE card acquired on or after 1 April 1998 either by nomination or directly through the stock exchange, claimed depreciation on the BSE card after considering it as an intangible asset under the provision of section 32 of the Income-tax Act, 1961 (the Act).
- The Income-tax Appellate Tribunal held that the BSE card acquired on or after 1 April 1998 was an intangible asset and depreciation was allowable on the BSE card.

### **Issue before the High Court**

- Whether the depreciation under section 32 of the Act was allowable on the BSE card acquired on or after 1 April 1998?

### **Contentions of the tax department**

- The tax department after relying on the decision of the Supreme Court in the case of Alps Theatre<sup>2</sup> contended that the BSE card was neither an asset nor a capital asset which was subject to wear and tear and therefore depreciation was not allowable on the BSE Card.

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<sup>1</sup> CIT v. Techno Shares & Shares Limited and Various other Stock Broking Houses (ITA no. 971 of 2006 and 218 of 2007)

<sup>2</sup> CIT v. Alps Theatre [1967] 65 ITR 377 (SC)

- The BSE card was only a personal privilege granted to a member to trade in shares on the floor of the Stock Exchange and such a privilege cannot be equated with the expression 'licences' or the expression 'any other business or commercial right of similar nature' enumerated in Section 32 of the Act. The tax department placed reliance on the decisions of the Supreme Court in the case of Stock Exchange, Ahmedabad<sup>3</sup> and Vinay Bubna<sup>4</sup>.
- The expression 'licences' as well as the expression 'business or commercial rights of similar nature' in section 32(1)(ii) of the Act are referable to the intellectual property rights such as know-how, patents, copyrights, trade marks and franchises. Since the BSE card does not fall in any of the above categories the depreciation cannot be allowed on the BSE card acquired by the taxpayers.

### **Contentions of the taxpayers**

- The expression 'licences' used in section 32 of the Act has been deliberately used in a wider sense so as to allow depreciation on all types of licences, except personal licenses which are purely regulatory in nature.
- It was contended by the taxpayer that the BSE card is nothing but a 'licence' which permits or entitles the taxpayer to carry on the business of trading in shares on the Stock Exchange. BSE card is a source from which the revenue income flows. Acquisition of the BSE card is a must for entering into a share broking business and without acquiring such a card, share broking business cannot be carried on by the taxpayer. Therefore, the BSE card which permits or entitles the taxpayer to carry on share broking business would be covered within the meaning of the expression 'licences' set out under section 32(1)(ii) of the Act and accordingly depreciation should be allowed on the BSE card.
- Further, since the expression 'licences' used in section 32 of the Act is applicable to all types of licences (except personal licences) it is clear that the expression 'business or commercial rights of similar nature' would apply to all business or commercial rights which are akin to licences. It is contended that neither the rule of noscitur a sociis nor the rule of ejusdem generis are applicable in the present case, because the legislature has intentionally used the expression 'licences' which has a wider meaning and the said intention has been reiterated in the Memorandum explaining the amendment to section 32 of the Act by Finance Act, 1997.
- As per section 47(xi) of the Act the membership card of a recognised stock exchange acquired on or after 1 April 1998 is a capital asset and liable to capital gains tax. Accordingly, there is no reason as to why the BSE card acquired on or after 1 April 1998

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<sup>3</sup> Stock Exchange, Ahmedabad v. ACIT [2001] (248 ITR 209) (SC)

<sup>4</sup> Vinay Bubna v. Stock Exchange [1999] (6 SCC 215) (SC)

should not be treated as a capital asset for the purposes of depreciation.

### **Ruling of the High Court**

- Though the term 'licences' is a very wide term and includes permission to carry on any trade, business, profession, etc, it is used in section 32(1)(ii) of the Act in a restricted sense.
- The depreciation on a class of tangible and intangible assets under section 32 of the Act was allowed on assets specifically enumerated therein. All intangible assets enumerated in section 32(1)(ii) of the Act (except the term 'licences') belong to the class of intellectual properties. As the expression 'licences' in section 32(1)(ii) of the Act is preceded by the expressions know-how, patents, copyrights, trade marks and succeeded by the expression 'franchises' which are all relatable to intellectual property rights, the term 'licences' in section 32(1)(ii) of the Act is, applying the principle of Noscitur a sociis, intended to be used restrictively and as applying only to licences relating to acquisition / user of intellectual property rights.
- Further, if the expression 'licences' in section 32(1)(ii) of the Act is construed widely so as to apply to all types of licences relating to intangible assets then it would defeat the object of the Act, because, depreciation under section 32 of the Act is intended to a limited category of intangible assets and not to a wider category of intangible assets. Therefore, it is reasonable to construe that the expression 'licences' used in section 32(1)(ii) of the Act will apply to licences relatable to intellectual properties only and not to all licences.
- A BSE card cannot be considered as "business or commercial right" because what section 32(1)(ii) of the Act contemplates is "business or commercial rights" relating to intellectual properties and not all categories of business or commercial rights. Further, a BSE card is not a business or commercial right relating to intellectual property rights therefore, depreciation cannot be allowed on it.
- The fact that a BSE card is a capital asset and liable for capital gains tax is irrelevant because section 32 does not allow depreciation on all capital assets but only on capital assets which fall in the enumerated categories.
- Accordingly, the High Court held that the depreciation under section 32 of the Act was not allowed on the BSE card.

### **Our Comments**

Allowability of depreciation on stock exchange membership card has been a subject matter of debate before various bench of Tribunal. The Bombay High Court, after considering various judgments on the matter, has ruled in favour of the tax department by observing that the expression 'licences' used in section 32(1)(ii) of the Act will apply to licences relatable to intellectual properties only and not to all licences.

Further, a BSE card is not a business or commercial right relating to intellectual property rights therefore, depreciation cannot be allowed on it.

We would like to bring to your attention that various bench of Tribunal have dealt with several types of rights (intangible assets) for the allowability of depreciation. Some of the key decisions are given below:

S.r. no.	Intangible assets	Case laws	Allowed
1.	License for making roads for government	Asoka Info (P) Ltd. v. ACIT [2009] 123 TTJ 77 (Pune)	Yes
2.	Goodwill	Kotak Forex Brokerage Ltd. v. ACIT (ITA no. 2692/Mum/2007)	Yes
3.	Marketing Rights	Sarabhai Zydus Animal Health Ltd. v. ACIT (ITA no. 26/ Del of 2005)	Yes
4.	Non Compete Right	ACIT v. Real Image Tech. (P) Ltd. [2009] 120 TTJ 983 (Chen)	Yes

In the above cases the Tribunal has examined the meaning of various intangible assets mentioned in section 32 of the Act. Further it has also dealt with the ambit of the term 'any other business or commercial rights of a similar nature' and allowed depreciation on various different rights (intangible assets).

The matter with respect to allowability of depreciation on stock membership card may now get referred to the Supreme Court for finality.

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