

TAX FLASH NEWS

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Payment for excess of the liability over the assets of a bank on its acquisition represents intangible asset eligible for depreciation

Recently, the Mumbai Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of NKGSB Co-operative Bank Ltd.¹ (the taxpayer) held that excess of the liability over the assets of a bank on its acquisition represents intangible asset eligible for depreciation under Section 32(1)(ii) of the Income-tax Act, 1961 (the Act).

Facts of the case

The taxpayer is a co-operative bank engaged in the banking business. During the year, the taxpayer acquired another co-operative bank under the directions of the Reserve Bank of India (RBI). The cost on acquisition was to be amortised over a period of 5 years. However, considering the growth of bank for the year, the entire amount was debited in the Profit & Loss Account during the year itself.

In the computation of income, the cost has been added back. The taxpayer claimed excess of the liability over the assets of bank as intangible asset eligible for depreciation under Section 32(1)(ii) of the Act.

The Assessing Officer (AO) disallowed the claim of the taxpayer relying on the decision of the Bombay High Court in the case of Techno Shares & Stocks Ltd.². Further, the AO relied on the decision of the Supreme Court in Techno Shares & Stocks Ltd.³ where it was held that the asset in the nature of know-how, trademarks, franchises, copyrights are in the nature of intellectual property right (IPR) and the asset in the form of license must be in the nature of IPR only, to fall within the provisions of Section 32(1)(ii). In that case, it was held that since the stock exchange membership card was not in the nature of intellectual property, the same was not eligible for depreciation. Subsequently, the Commissioner of Income-tax (Appeals) [CIT(A)] allowed taxpayer's appeal.

Tribunal decision

The AO was not justified in applying the ratio laid down by the Jurisdictional High Court in the case of Techno Shares & Stock Ltd. The expenditure claimed by the taxpayer on acquisition of the bank was capital in nature which was corroborated by the decision of the Pune Tribunal, in the case of Cosmos Co-operative Bank Ltd.⁴ where it was held that the cost of acquisition was intangible in nature and it was on account of business or commercial rights of similar nature which is covered under Section 32(1)(ii).

The facts of the decision of the Supreme Court in the case of Techno Shares and Stock Ltd. were distinguishable insofar as the facts of the present issue is concerned. Therefore, the decision relied upon by the tax department was not applicable to the facts of the present appeal. Accordingly, the order of the CIT(A) was upheld by dismissing the grounds raised by the tax department.

Our comments

The issue with respect to the eligibility of depreciation on payment of excess of assets over liabilities on acquisition of business has been a subject matter of debate before the Courts/Tribunal.

The Tribunal⁵ in some of the cases have held that the excess payment under the business acquisition agreement would fall within the expression 'any other business or commercial rights of similar nature' and thus the taxpayer would be entitled to depreciation.

¹ ACIT v. NKGSB Co-operative Bank Ltd. (ITA no.4928/Mum/2017) – Taxsutra.com

² CIT v. Techno Shares & Stocks Ltd. (ITA No.971/2006 and 218/2007) (Bom)

³ Techno Shares & Stocks Ltd. v. CIT [2010] 327 ITR 323 (SC)

⁴ Cosmos Co-operative Bank Ltd. v. DCIT [2014] 64 SOT 90 (Pune)

⁵ Skyline Caterers (P.) Ltd. v. ITO [2009] 116 ITD 348 (Mum), Kotak Forex Brokerage Ltd. v. ACIT [2010] 131 TTJ 404 (Mum)

The Supreme Court in the case of Smifs Securities Ltd.⁶ held that goodwill in the form of difference between the amount paid and the cost of the net asset acquired from the amalgamating company was an asset under Explanation 3(b)2 to Section 32(1) and therefore eligible for depreciation under the Act. Relying on the Supreme Court decision, the Tribunal/Courts have allowed the depreciation on goodwill. However, the Finance Bill 2021 has proposed that goodwill of a business or profession will not be considered as a depreciable asset and no depreciation to be allowed even in respect of purchased goodwill.

Thus it would become important to analyse whether the rights acquired on acquisition would fall under the expression 'any other business or commercial rights of similar nature' and thus the taxpayer would be entitled to depreciation.

The Tribunal in the present case has held that the excess of the liability over the assets of the bank represents intangible asset eligible for depreciation under Section 32(1)(ii).



⁷ CIT v. Smifs Securities Ltd. [2012] 24 taxmann.com 222 (SC)

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