



**Reserved On : 18/02/2026**  
**Pronounced On : 12/03/2026**

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**R/TAX APPEAL NO.1234 of 2007**  
**With**  
**R/TAX APPEAL NO.1235 of 2007**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR. JUSTICE A.S. SUPEHIA** **Sd/-**

**and**

**HONOURABLE MR. JUSTICE PRANAV TRIVEDI** **Sd/-**

Approved for Reporting	Yes	No
		✓

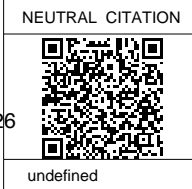
**THE COMMISSIONER OF INCOME TAX AHMEDABAD - I**  
**Versus**  
**ZYDUS LIFESCIENCES LIMITED**  
**(Amendment carried out as per order dated 04.02.2026)**

Appearance:

MR.VARUN K.PATEL(3802) for the Appellant  
 MR R.K. PATEL, SENIOR ADVOCATE with DARSHAN R PATEL,  
 ADVOCATE (8486) for the Opponent

**CORAM: HONOURABLE MR. JUSTICE A.S. SUPEHIA**  
**and**  
**HONOURABLE MR. JUSTICE PRANAV TRIVEDI**  
**COMMON CAV JUDGMENT**  
**(PER : HONOURABLE MR. JUSTICE A.S. SUPEHIA)**

(1) The captioned appeals emanates from the judgement and order dated 20.10.2006 passed by the Income Tax Appellate Tribunal, Ahmedabad (for short "the Tribunal") in ITA No.642/AHD/2005 for Assessment Year (AY), 2001-2002, and ITA No.1302/AHD/2005 for AY 2001-02, wherein the Tribunal has allowed the cross-appeals filed by the respondent-assessee and revenue, partly. Both



the assessee and revenue had challenged the orders passed by Commissioner of Income Tax, Appeals (CITA).

(2) In Tax Appeal No.1234 of 2007, the following substantial law was formulated vide order dated 25.03.2008:

“Whether the Appellate Tribunal is right in law and on facts in reversing the order of CIT(A) wherein it was held that the consideration of Rs.29.10 crores received by the assessee for assignment of trademark / brand name was liable to tax as capital gain?”

(3) In Tax Appeal No.1235 of 2007, this Court framed the following substantial questions of law vide order dated 25.03.2008:

- A) *Whether the Appellate Tribunal is right in law and on facts in confirming the order passed by the CIT(A) directing to allow short term capital loss of Rs.2,50,45,545 as claimed by the assessee?*
- B) *Whether the Appellate Tribunal is right in law and on fact confirming the order passed by the CIT(A) directing to treat the trade receipt on account of sale of trademark of Rs.29.10 Crore as capital gain?”*

Thus, one of the substantial questions of law relating to the consideration of Rs.29.10 crores

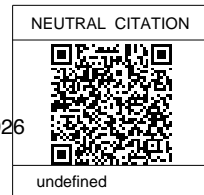


to be liable to tax as capital gain is common in the captioned Tax Appeals.

**BRIEF FACTS**

(4) The respondent-M/s.Cadila Health Care along with Ambalal Sarabhai Enterprise Ltd., had formed 50:50 Joint Venture Company called '*Sarabhai Zydus Animal Health Ltd.*'. vide Deed of Assignment dated 15.06.2000, by selling / transferring 22 veterinary trademarks / brand names '*along with goodwill of the business*' for the consideration of Rs.29.10 crores. By this deed, the assessee had transferred its veterinary/ animal health business to the JV Company.

(5) Upon undertaking necessary valuation of the trade marks from KPMG India Pvt. Ltd., the assessee under its letter dated 02.03.2004, represented that the sale consideration of Rs.29.10 crores was a capital receipt not chargeable to income tax for Assessment Year (for short "the AY") 2001-02. It was presented by the assessee that its capital asset Trade marks is a self-generated asset, and it does not fall within the purview of section 45 read with section 48 of the Income Tax Act, 1961 (for short "the Act").



While placing reliance on the provisions of section 55(2)(a) of the Act, it is contended that the same applies retrospectively w.e.f 1<sup>st</sup> April, 2002. The Assessing Officer (for short "the AO") passed the assessment order dated 31.03.2004 under section 143(3) of the Act by taking support from the assignment deed that the "Trade marks have been sold along with goodwill", and the generation of brand name, it cannot be said that no cost has been incurred. The Assessing Officer has also invoked the provisions of section 55(2) (a) of the Act will apply to the assessee, and the trademark or brand name developed during the course of business will be taxable under the head of "capital gains", by taking cost as 'Nil'. It is held that the amendment introduced vide Finance Act, 2001 is only clarificatory, and the money realised by the assessee is taxable under section 28(iv) of the Act as business income, and was not a capital receipt.

(6) Thus, the entire controversy rests on the Deed of Assignment dated 15.06.2000, vide which the assessee has sold the Trade Marks along with business for consideration of Rs.29.10 crores. The Assessing Officer has held that the same is taxable, however, ultimately the Tribunal has

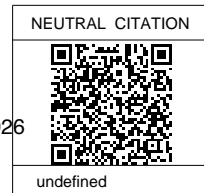


held in the favour of the assessee. Primarily, for arriving at the conclusion, the Tribunal has primarily placed reliance on the judgment of the Supreme Court in the case of Commissioner of Income-tax vs. B.C.Srinivasa Shetty, [1981] 128 ITR 294 (SC).

**SUBMISSIONS ON BEHALF OF THE REVENUE:**

(7) The following submissions are advanced by the learned senior standing counsel Mr.Varun K Patel.

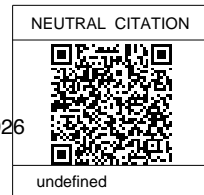
i) Regarding the substantial question of law relating to taxability of consideration of Rs.29.10 crores for assignment trademarks along with the goodwill of business, learned senior standing counsels Mr.Varun K Patel has submitted that in the present case, the assessee along with Ambalal Sarabhai Enterprise Ltd., had formed 50:50 Joint Venture Company called '*Sarabhai Zydus Animal Health Ltd.*' (hereinafter referred to as '*JV Company*'). While referring to the Deed of Assignment dated 15.06.2000, it is contended that the assessee had agreed to assign and transfer about 22 veterinary trademarks '*along with goodwill of the business*' concerned in the goods for which the said trademarks are



registered and/or being used, to the JV Company for the consideration of Rs.29.10 crores. By this deed, the assessee had transferred its veterinary/ animal health business to the JV Company.

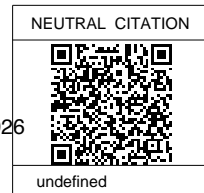
ii) That the said consideration of Rs.29.10 crores received by the assessee for transfer of Trademark along with goodwill to its JV company is taxable as 'income from the business and profession' under section 28(iv) and/or under section 41(1) of the Act; and alternatively, the said consideration is taxable as capital gain.

iii) Regarding taxability of said consideration received by the assessee as income from business and profession, learned advocate for the appellant-Revenue submitted that the aforesaid consideration received on transfer of Trademark/brand name along with goodwill is the benefit accruing from business activities carried out by it over the years, which is converted into money and therefore, the same is taxable as benefit accruing/ arising from business under section 28(iv) of the Act. Further, the assessee had incurred expenses relating to the Trademark/



brand name and had already claimed the same as deduction and, therefore, the benefit which accrued to the assessee on transfer of said trademark / brand name is also liable to be taxed under section 41(1) of the Act. It is contended that the decision of this Court in the case of Pr. Commissioner of Income Tax-4 Ahmedabad vs. Zyduz Wellness Ltd. (order dated 14.03.2017 in Tax Appeal No.139 of 2017) cited by the assessee rather supports the contention of the appellant-Revenue that the said consideration is taxable under Section 41(1) of the Act as expenses related to trademark were already claimed as deduction/ revenue expenses.

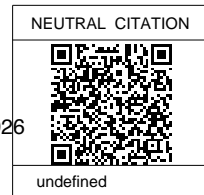
iv) Reference is made to the Assessment Order, and the valuation report reproduced in Paragraph No.3.1.3 of the Assessment Order, and it is contended that the methodology adopted by KPMG for valuing the said Trademark / brand name is the similar to 'valuation of goodwill'. It is therefore submitted by the learned advocate for the appellant-Revenue that the entire amount of Rs.29.10 crores received by the assessee is essentially towards transfer of goodwill of business only. It is relevant to submit that the



assessee had transferred its veterinary/ animal health business to the JV Company. The words *'concerned in the goods for which the said trademarks are registered and/or being used'* after the words *'goodwill of the business'* mentioned in the deeds of assignment defines the business for which the goodwill is transferred to the JV Company i.e. veterinary / animal health business.

v) That no bifurcation was provided in the said valuation report dividing consideration towards Trademark and / or goodwill separately. In absence of any specific valuation assigned to trademark, it is not open for the assessee to contend that the entire amount of Rs.29.10 crores is received for transfer of trademark only. Rather, it is clear from the said valuation report that the entire consideration of Rs.29.10 crores is received by the assessee only towards transfer of goodwill as the said value of consideration is derived applying methodology for valuation of goodwill.

vi) That the burden is on the assessee to provide and prove such bifurcation of consideration towards Trademarks and / or goodwill separately.



However, the assessee has failed to discharge said burden.

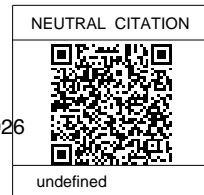
vii) It is also relevant to submit that subsequent to the decision of the Supreme Court in the case of **B.C.Srinivasa Setty (supra)**, there is an amendment in Section 55(2) of the Act by the Finance Act, 1987, and it is not in dispute that by virtue of the said amendment, the transfer of self-generated goodwill is now taxable as capital gain by taking cost of acquisition of such self-generated asset as nil.

viii) It is contended that without prejudice to the aforesaid contentions, even if it is assumed without admitting that the said consideration of Rs.29.10 crore was received by the assessee towards transfer of trademark only and not towards goodwill, then also the same is taxable as capital gain in view of the amendment in Section 55(2) of the Act by the Finance Act, 2001, whereby it is clarified that the cost of acquisition relating to self-generated Trademark / brand name shall be NIL. It is submitted that the said amendment is clarificatory / declaratory nature and by virtue of the said amendment in Section 55(2) of the Act



by the Finance Act, 2001, the legislature has merely clarified / declared that the cost of acquisition in relation to self-generated trademark is 'Nil'. It is therefore submitted that applying the said amendment retrospectively, even if the entire amount of consideration of Rs.29.10 crores is treated as received towards the transfer of Trademarks only, the same is taxable as capital gain. Reliance is placed on the following two decisions of Apex Court in support of the aforesaid contention regarding retrospective operation of the said amendment in Section 55(2) of the Act by the Finance Act, 2001 : (I) CIT vs. Podar Cement Pvt. Ltd., (1997) 226 ITR 625 (SC) – (Paragraph Nos.2, 21, 22, 42 to 52) ; (ii) ITO vs. Vikram Sujitkumar Bhatiya, (2023) 453 ITR 417 (SC)-Paragraph Nos.10.6 to 11.

ix) Further, regarding the reliance of the respondent assessee on the decision of Bombay High Court in the case of CIT vs. Fernhill Laboratories and Industrial Establishment 348 ITR-1 (Bom.), it is submitted by the learned advocate for the appellant-Revenue that the said decision is distinguishable on facts and in law on following grounds:



(a) As per Paragraph No.5 of the said decision, there is clear bifurcation of the sale consideration received towards the each of the assets transferred viz. trademark, goodwill and design. Whereas, in the present case, no such bifurcation is provided. Rather, in the present case from the record it is clearly establish that the entire amount of consideration is received by the assessee towards transfer of goodwill only;

(b) The issue of retrospective effect of the amendment in Section 55(2) of the Act by the Finance Act, 2001 regarding cost of acquisition of self-generated Trademark as nil was not considered by the Bombay High Court.

x) It is therefore submitted by the learned advocate that in view of the above, the impugned order of the Tribunal is erroneous and unsustainable in law. The Tribunal ought to have upheld the Assessment Order treating the said consideration of Rs.29.10 crores received by the assessee as business income; or in alternative, the Tribunal ought to have directed to tax the said consideration as capital gain.



(8) Regarding admitted substantial question of law – A in Tax Appeal No.1235 of 2007 – with respect to short term capital loss of Rs.2,50,45,545/-, learned advocate for the appellant-Revenue has fairly admitted that the appellant-Revenue is not in a position to controvert the applicability of decision of Supreme Court in the case of CIT vs. Walfort Share and Stock Brockers Pvt. Ltd., 326 ITR 1 (SC).

**SUBMISSIONS ON BEHALF OF THE ASSESSEE :**

(9) Responding to the foregoing submissions, *per contra* learned Senior Advocate Mr.R.K.Patel has submitted that the judgement and order passed by the Tribunal does not call for any interference since the same is appropriately passed after considering the assignment deed and the legal precedent.

a) It is submitted that the respondent-assessee has transferred by way of sale 22 self-generated trade marks for Rs.29.10 crores, as appearing at Schedule to the Deed of "Assignment of Trademarks" dated 15.06.2000, as per basis of valuation by competent valuer KPMG. The



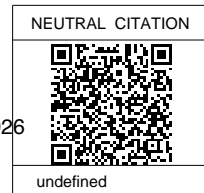
respondent - assessee is a manufacturing pharmaceutical company and proprietor under the Trade and Merchandise Marks Act, 1958. The said trademarks are transferred along with goodwill of the business concerned in the goods for which the said trademarks are registered and / or being used by the assignor assessee. (Page No.36 of the Paper Book at the Tribunal). Hence, it is seen that "intrinsic value" of registered trademark is transferred by way of sale along with all its right, title and interest embedded therein. In other words, no goodwill of the pharmaceutical business of the respondent - assessee Company is transferred on transfer of the said trademarks, and the transferred trademarks are "Registered Trademarks" whereas goodwill of the overall business of the assessee company is not registered and is not transferred.

b) While referring to the valuation report, it is urged that selected valuation approach is "Discounted Cash Flow" (DCF) approach which is a standard accepted valuation procedure and has no nexus with overall goodwill of the business of the assessee.



c) That out of 22 brands / trademarks, five large brands which constitute 60% of the turnover are defined as select brands for valuation and rest of the brands are categorized so as to obtain a consolidated valuation results as reflected at Rs.29.90 crores on estimated basis, and at no point of time the overall goodwill of the business of the assessee is made a basis for valuation of 22 trademarks which are transferred without any restrictive covenants.

d) Reliance is placed on the High Court of Bombay decision in the case of ***Fernhill Laboratories and Industries (supra)*** dated 12.06.2012, against which SLP is rejected vide CC No.4126/2013, dated 22.02.2013. It is contended that Bombay High Court has considered the CBDT Circular No.14 of 2001 explaining the prospective effect of Section 55(2) of the Act from 01.04.2002 and to apply in relation to AY 2002 03 and subsequent years. In this regard reliance is also placed on the decision in case of Commissioner Of Income Tax (Central)-I, New Delhi Vs. Vatika Township Private Limited, (2014) 367 ITR 466 (SC), wherein the Larger Bench of the Supreme Court has held by way of a ratio that understanding of CBDT Circular itself regarding



the applicability of provision vide explanatory notes on provision by way of a circular is prospective in nature as can be seen more particularly at Paragraph No.39(e) of the decision.

e) That the Respondent assessee has never incurred any cost of acquisition for the 22 trademarks that are transferred during the AY 2001-02. Even after setting aside of the proceedings by the CIT (Appeals) and directing the AO to determine the cost of acquisition of trademarks transferred by the assessee, the AO has taken NIL as cost of acquisition of trademark by the order dated 07.03.2005 filed before this Court.

f) It is submitted that the meaning of "Adjusted", "Cost of Improvement" and "Cost of Acquisition", as envisaged under Section 55 of the Act is amended from time to time with special reference to amendment under Section 55(2)(a) of the Act, wherein it is clearly visible that legislature has intended to rope into tax net different intangible assets at different point of time like goodwill of the business w.e.f. 01.04.1995, trademark or brand name associated



with the business w.e.f. 01.04.2002. Legislature has consciously made the scope and ambit of both these amendments prospectively applicable and no Court till date has taken a view that the said amendments are retrospective in nature. In other words, views expressed by the explanatory circulars issued by CBDT in the realm of interpretation of amendment remains intact since CBDT is the ultimate authority entitled to execute and implement the provisions of the Income Tax Act, 1961. The contention of the assessee is fully supported with the ratio of Supreme Court of India decision of ***Vatika Township (supra)***.

g) Reliance is placed on decision of High Court of Karnataka in the case of Commissioner of Income-tax, Bangalore vs. Associated Electronics and Electrical Industries, [2016] 65 taxmann.com 253 (Karnataka) dated 18.12.2015.

h) It is contended that the expenses incurred for registration and transfer of trademarks can never be equated with cost of acquisition of trademarks. In this regard reliance is placed on the decision in Tax Appeal No.139 of 2017, dated 14.03.2017, in the case of PCIT vs. Zydus



Wellness Ltd. (Guj.). Hence, such expenses cannot be correlated and equated at par with cost of acquisition of self-generated trade marks, whose cost is indeterminable in arithmetical terms.

i) *Apropos* Question A for short term capital loss of Rs.2,50,45,545/ is concerned it is contended that it is directly concluded in favor of assessee by decision of Apex Court of India in the case of **Walfort Share and Stock Brokers (supra)**, Paragraph No.20 onwards and Commissioner of Income Tax vs. Globe Capital Market Ltd. [2015] 120 DTR (SC) 311 following Walfort Share and Stock Brokers decision, compiled at Serial Nos.5 and 6 of the judgments filed before the Court.

#### **ANALYSIS AND CONCLUSION**

(10) We shall now deal with the primary common substantial question of law formulated in captioned tax appeals, which is as below:

*"Whether the Appellate Tribunal is right in law and on facts in reversing the order of CIT(A) wherein it was held that the consideration of Rs.29.10 crores received by the assessee for assignment of trademark / brand name was liable to tax as capital gain ?"*

(11) It is not in dispute that the Respondent-M/s Cadila Health Care along with Ambalal Sarabhai Enterprise Ltd., had formed 50:50 Joint Venture



Company called '*Sarabhai Zydus Animal Health Ltd.*'. vide Deed of Assignment dated 15.06.2000, by selling / transferring 22 veterinary trademarks/brand names '*along with goodwill of the business*' for the consideration of Rs.29.10 crores. By this deed, the assessee had transferred its veterinary/ animal health business to the JV Company.

(12) The Assessing Officer passed the assessment order dated 31.03.2004 under section 143(3) of the Act by taking support from the assignment deed that the "*Trade marks have been sold along with goodwill*", and from the generation of brand name, it cannot be said that no cost has been incurred. The Assessing Officer has also invoked the provisions of section 55(2)(a) of the Act will apply to the assessee, and the trademark or brand name developed during the course of business will be taxable under the head of "*capital gains*", by taking cost as '*Nil*'. It is held that the amendment introduced vide Finance Act,2001 is only clarificatory, and the money realized by the assessee is taxable under section 28(iv) of the Act as business income, and was not a capital receipt.



(13) Thus, the entire controversy rests on the Deed of Assignment dated 15.06.2000, vide which the assessee has sold the Trade Marks along with goodwill of business for consideration of Rs.29.10 crores. The AO has held that the same is taxable, however, ultimately the Tribunal has held in the favour of the assessee. Primarily, for arriving at the conclusion, the Tribunal has primarily placed reliance on the judgment of the Supreme Court in the case of **B.C.Srinivasa Shetty (supra)**.

(14) We may at this stage refer to the legal precedent governing the issue. The Supreme Court in the case of **B.C.Srinivasa Shetty. (supra)**, while dealing with the sections 45, 48 and 55(2) of the Act in context of capital gain arising from the sale of goodwill has held thus:

*"09 The point to consider then is whether if the expression "asset" in sec. 45 is construed as including the goodwill of a new business, it is possible to apply the computation sections for quantifying the profits and gains on its transfer.*

*10 The mode of computation and deductions set forth in Section 48 provides the principal basis for quantifying the income chargeable under the head "Capital gains". The section provides that the income chargeable under that head shall be computed by deducting from the full value of the consideration received or*

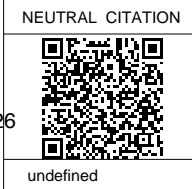


*accruing as a result of the transfer of the capital asset :*

*"(ii) the cost of acquisition of the capital asset ... "*

*11 What is contemplated is an asset in the acquisition of which it is possible to envisage a cost. The intent goes to the nature and character of the asset, that it is an asset which possesses the inherent quality of being available on the expenditure of money to a person seeking to acquire it. It is immaterial that although the asset belongs to such a class it may, on the facts of a certain case, be acquired without the payment of money. That kind of case is covered by Section 49 and its cost, for the purpose of Section 48 is determined in accordance with those provisions. There are other provisions which indicate that Section 48 is concerned with an asset capable of acquisition at a cost. sec. 50 is one such provision. So also is sub-sec. (2) of Section 55. None of the provisions pertaining to the head "Capital gains" suggests that they include an asset in the acquisition of which no cost at all can be conceived. Yet there are assets which are acquired by way of production in which no cost element can be identified or envisaged. From what has gone before, it is apparent that the goodwill generated in a new business has been so regarded. The elements which create it have already been detailed. In such a case, when the asset is sold and the consideration is brought to tax, what is charged is the capital value of the asset and not any profit or gain.*

*12 In the case of goodwill generated in a new business there is the further circumstance that it is not possible to determine the date when it comes into existence. The date of acquisition of the asset is a material factor in applying the computation provisions pertaining to capital gains. It is possible to say that the "cost of acquisition" mentioned in*



*sec. 48 implies a date of acquisition, and that inference is strengthened by the provisions of Ss. 49 and 50 as well as sub-sec. (2) of Section 55.*

*13 It may also be noted that if goodwill generated in a new business is regarded as acquired at a cost and subsequently passes to an assessee in any of the modes specified in sub-sec. (1) of Section 49, it will become necessary to determine the cost of acquisition to the previous owner. Having regard to the nature of the asset, it will be impossible to determine such cost of acquisition. Nor can sub-sec. (3) of sec. 55 be invoked, because the date of acquisition by the previous owner will remain unknown.*

*14 We are of opinion that the goodwill generated in a newly commenced business cannot be described as an "asset" within the terms of sec. 45 and therefore its transfer is not subject to income-tax under the head "capital gains".*

(15) The aforesaid judgement has been followed by the High Court of Bombay in the case of **Fernhill Laboratories and Industrial Establishment (supra)**. The Bombay High Court has also considered the amendment to section 55(2)(a) of the Act introduced w.e.f 01.04.2002, and it is held that the same applies prospectively. It is held thus:

*"8. We have considered the rival submissions. Section 45 of the Act is a charging section for the purpose of levying capital gains. However to impose the charge, parliament has enacted provision to compute profits or gains under that head. Section 48 of the said Act provides the manner in which the income chargeable under*



the head capital gains is to be computed i.e. by deducting costs of acquisition of the capital asset from the full consideration received on the transfer of the capital asset. The Supreme Court in the matter of B. C. Srinivasa Shetty (supra) was dealing with the issue whether the transfer of the goodwill by partnership firm can give rise to a capital gain tax under Section 45 of the said Act. The Apex Court held that where the cost of acquisition of the capital asset is nil then the computation provision fails and the transfer of goodwill not give rise to capital gains tax. Prior to the amendment made to Section 55(2) by the Finance Act, 2001 effective from 1/4/2002 by adding the words "trade mark or brand name associated with the business" self generated assets such as trademark did not have any cost of acquisition. Therefore, for the period under consideration the computation provision under Section 48 of the said Act fails resulting in such transfer of trade marks not being chargeable to capital gains tax. Consequent to amendment made to Section 55(2) with effect from 1/4/2002 by which the words trade mark or brand name associated with the business was introduced into it, the computation provision becomes workable and the consideration received for the sale of trade mark would be subject to capital gains tax. However, for the period prior to 1/4/2002 the sale of self generated trademark is not liable to capital gains tax. In fact, when the amendment was made to Section 55 by Finance Act, 2001 the Central Board of Excise and Customs had issued a circular bearing No.14/2001 explaining the provision of the Finance Act, 2011 relating to direct taxes provided as under:

"42- Providing for cost of acquisition of certain intangible capital asserts under section 55



42.1 Under the existing provisions of sub-section (2) of section 55 of the Income tax Act, the cost of acquisition of an intangible capital asset, being goodwill of a business or a right to manufacture, produce or process any article or thing, tenancy rights, stage carriage permits or loom hours, is the purchase price in case the asset is purchased by the assessee from a previous owner, and nil in any other case. It was pointed out that certain similar self generated intangible assets like brand name or a trademark may not be considered to form part of the goodwill of a business and consequently it may not be possible to compute capital gains arising from the transfer of such assets.

42.2- The Act has therefore amended clause (a) of sub-section (2) to provide that the cost of acquisition in relation to trademark or brand name associated with a business shall also be taken to be the purchase price in case the asset is purchased from a previous owner and nil in any other case.

42.3- This amendment will take effect from 1st April, 2002, and will, accordingly, apply in relation to the assessment year 2002-2003 and subsequent years."

**(9)** From the above circular, it would be clear that the amendment bringing self generated intangible assets such as trademark to capital gains tax only with effect from Assessments Year 2002-03 onwards. In this case, we are concerned with Assessment Year 1999-2000 and therefore, the amendment would not have any effect. Further as held by the Supreme Court in the matter of Dy. CIT v/s. Core Health Care ltd. reported in 298 ITR 194 that a provision



*introduced with effect from a particular date would not have retrospective effect unless it is expressly stated to be so. Consequently, the sale of self generated trade marks during the Assessment year 1999-2000 are not chargeable to capital gains tax. So far as the sale of self generated designs (i.e. not acquired) the same is also not chargeable to capital gains tax not only for the reasons applicable to trade marks but for the fact that even till this date, no amendment has been made to Section 55(2) of the said Act defining cost of acquisition of design as in the case of trademark goodwill etc."*

(16) Similarly, the Karnataka High Court in the case of **Associated Electronics & Electrical Industries (Banglore) (P) Ltd. (supra)**, wherein the High Court while considering the Deed of Assignment assigning the trademarks along with the goodwill of the Assignor's business in context of the aforesaid provisions has held thus:

*"14. A reading of these provisions would make it clear that any profits or gains arising from the transfer of a capital asset effected in the previous year shall be chargeable to income tax under the head 'capital gains'. The income chargeable under the head 'capital gains' shall be computed as per the provisions of Section 48 of the Act. In the present case, the said computation shall be, deducting the cost of acquisition of the asset from the full value of consideration. The cost of acquisition in relation to a 'capital asset' in case of goodwill of a business, shall be taken to be 'Nil', as the question involved is relating to the transfer of goodwill of a business.*



15. Section 55(2) of the Act is amended by Finance Act, 2001 inserting the words 'or a trademark or brand name associated with a business'. Thus, it is clear that the cost of acquisition in relation to a trademark or brand name associated with the business comes within the tax net subsequent to 1.4.2002. Admittedly, the said amendment is not applicable to the present case. Hence, the assessment to capital gains can be sustained only if the capital asset transferred was the 'goodwill of the business' of the company.

16. The expression 'goodwill' has been considered and explained by the Apex Court in 'S.C. Cambatta & Co. (P.) Ltd.'s case (supra), wherein their Lordships having considered the Judgments of various Courts, have held as under:

"6. It will thus be seen that the goodwill of a business depends upon a variety of circumstances or a combination of them. The location, the service, the standing of the business, the honesty of those who run it, and the lack of competition and many other factors go individually or together to make up the goodwill, though many other factors go individually or together to make up the goodwill, though locality always plays a considerable part. Shift the locality, and the goodwill may be lost. At the same time, locality is not everything. The power to attract custom depends on one or more of the other factors as well. In the case of a theatre or restaurant, what is catered, how the service is run and what the competition is, contribute also to the goodwill."

17. The Hon'ble Apex Court in Guzdar Kajora Coal Mines Ltd.'s case (supra), was dealing with the case of the purchases made by the Assessee therein by Deed of Conveyance



executed by the liquidators of Guzdar Kajora Colliery Co., Ltd., all the colliery lands, hereditaments and premises, mines, minerals, powers and privileges and all other hereditaments together with the machinery thereon belonging to the latter company. It is held that even if it is not expressly mentioned that goodwill has been sold, it can be shown and ascertained by evidence whether the same has been purchased or not by the Assessee.

**18.** In the case of *R.C. Cooper v. Union Of India* (AIR 1970 SC 564), the Apex Court has held that goodwill of a business is an intangible asset representing the whole advantage of reputation and connection formed with the customers together with the circumstances making the connection durable.

**19.** In *Corpus Juris Secundum*, it has been observed that "goodwill" has no existence except in connection with the continuing business.

**20.** In the case in *IRC v Muller & Co.'S Margarine Ltd.* 1901 AC 217 Lord Machnaghten has observed thus:

"What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a new business at its first start.... if there is one attribute common to all cases of goodwill it is the attribute of locality. For goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business. Destroy the business, and the goodwill perishes with it,



*though elements remain which may perhaps be gathered up and be revived again".*

**21.** *Section 37 of the Trade and Merchandise Marks Act, 1958 provides for assignability and transmissibility of registered trademarks which is as under:*

*"Notwithstanding anything in any other law to the contrary, a registered trade mark shall subject to the provisions of this chapter, be assignable and transmissible, whether with or without the goodwill of the business concerned and in respect either of all the goods in respect of which the trade mark is registered or of only some of those goods".*

**22.** *The meaning of the expression "goodwill" as explained in these judgments referred to above vis-à-vis the provision of Trade and Merchandise Marks Act, 1958 makes it clear that the 'trade mark' and 'goodwill' are two distinct separate concepts. Section 55(2)(b) of the Act prior to the amendment provided for the levy of tax on capital gains in relation to a capital asset, being goodwill of a business. Insertion of the words, "registered trademarks or brand name associated with the business" by the Finance Act, 2001 depicts the intention of the Legislature to levy tax in relation to capital asset, being a trade mark or brand name associated with the business, which was not exigible to tax during the relevant assessment year.*

**XXXXXX**

**27.** *We have perused the relevant clauses of the settlement deed entered into between the parties extracted supra, which clearly indicates, the assignment made by the assessee company to M/s Sharp Corporation,*

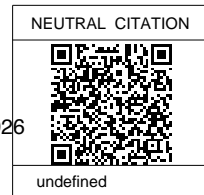


*is only transfer of trademarks and the goodwill associated with the trade marks. It cannot be misconstrued to that of goodwill of a business. It is observed in the judgment of the ITAT, "it is common ground before us that the assessee did not sell its entire business undertaking to Sharp Corporation". This admitted fact itself proves that the assessee has transferred only the trademarks and not the goodwill of a business. Even assuming the goodwill related to the trade mark is transferred, it cannot be construed as the goodwill of a business. If the arguments of the revenue that the transfer of trade mark itself is goodwill of a business is accepted, then there was no necessity for the Legislature to amend Section 55(2)(a) of the Act inserting the words "trade mark" or "brand name" associated with the business by Finance Act, 2001."*

(17) A holistic reading of the foregoing observations dealing with the assignment of trade mark along with goodwill of business prior to amendment in section 55(2)(a) of the Act w.e.f. 01.04.2002 read with section 45 and 48 of the Act, establishes that the consideration received on "transfer of trademark along with goodwill", is not chargeable to taxable and will not be an "asset" to attract the charging provisions of section 45 (1) of the Act, and its assignment/transfer is not subject to income tax under the head of "capital gains". In the instant case, we agree with the findings of the Tribunal that in

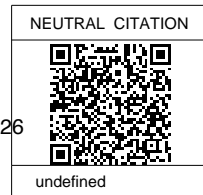


fact the assessee has transferred the trademark, but not the good will. From the assignment deed, it is evident that what is transferred are 22 self-generated trade marks for Rs.29.10 crores, as appearing at Schedule to the Deed of "Assignment of Trademarks" dated 15.06.2000, as per basis of valuation by competent valuer KPMG. The assessee is a pharmaceutical manufacturing company and the 22 trademarks are transferred along with goodwill of the business concerned in the goods for which these trademarks are registered and/or being used by the assignor assessee. The pharmaceutical business of the assessee is not entirely transferred, and it retains substantial business with it. Thus, no goodwill of the pharmaceutical business of the respondent-assessee Company is transferred on transfer of the 22 registered trademarks. It is settled legal precedent that goodwill has no independent existence, and it cannot subsist by itself, and is attached to a business, and if the business is destroyed the goodwill also perishes with it, though some elements remain which may perhaps be gathered up and be revived again. In the present case, thus, the Tribunal has



precisely held that there has been transfer of trademarks and not the goodwill of the business.

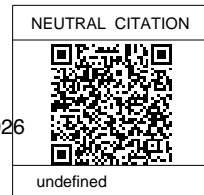
(18) Section 2(47) of the Act classifies transfer in relation to categories of capital gains. Section 2(24)(vi) of the Act mentions that income includes any capital gains chargeable under Section 45 of the Act. Section 45 of the Act stipulates that any profits and gains arising from the transfer of capital assets shall be chargeable to income tax under the head of capital gain. Capital asset has been defined under section 2(14) of the Act. Thus, there has to be transfer of capital asset for satisfied capital gains. Section 48 of the Act provides the Mode of Computation on the income chargeable under the head "Capital gains" by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset on - (i) expenditure incurred wholly and exclusively in connection with such transfer; and, ii) the cost of acquisition of the asset and the cost of any improvement thereto. Section 2(22B) of the Act defines fair market value in relation to an of the asset which means - (i) the price that the capital asset would



ordinarily fetch on sale in open market, and (ii) where the price referred is not ascertainable, such price as may be determinable as per rules made under the Act. At this stage in order to answer the situation arising from the interpretation and applicability of the statute on the consideration received on a capital asset liable to tax, the law declared by the Supreme Court in case of **B.C.Srinivasa Shetty (supra)** comes into play. The Apex court has observed the nature of the acquisition of asset of which it is possible to envisage cost under Section 48 of the Act and that there are other provisions which indicate that Section 48 of the Act is concerned with an asset capable of acquisition at a cost and Section 50 of the Act is one such provision. So also is Sub-section (2) of Section 55 of the Act. Section 55(2) of the Act stipulates the Meaning of 'adjusted', 'cost of improvement' and 'cost of acquisition. The case of the respective parties hinges on the provisions of Section 55(2) (a) of the Act, which read thus:

"(2) For the purposes of sections 48 and 49, "cost of acquisition" –

(a) in relation to a capital asset, being goodwill of a business [or a trade mark or brand name associated with a business or a right to manufacture, produce or process any

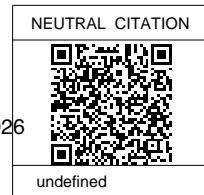


article or thing] [or right to carry on any business or profession], tenancy rights, stage carriage permits or loom hours,-

- (i) in the case of acquisition of such asset by the assessee by purchase from a previous owner, means the amount of the purchase price; and
- (ii) in any other case [not being a case falling under sub-clauses(i) to (iv) of sub-section(1) of section 49, shall be taken to be nil;"]

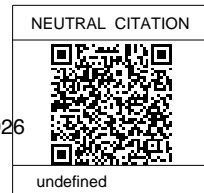
(19) Thus, none of the provisions pertaining to the head "Capital gains" suggests that they include an asset in the acquisition of which no cost at all can be conceived. Section 55(2) of the Act is amended by Finance Act, 2001 inserting the words 'or a trademark or brand name associated with a business', which has prospective effect from 01.04.2002. Thus, it is apparent that that the cost of acquisition in relation to a trademark or brand name associated with the business comes within the purview of taxability subsequent to 01.04.2002. In the instant case, the amendment is not applicable since the entire transaction is prior to the cut-off date.

(20) On the facts and in the circumstances of the assessee's case, the AO was not justified in taxing the consideration of Rs 29.10 crores



received for assignment of Trade Marks as business income of the assessee. For justifying his reasoning for taxing the said receipt as business income, the Assessing Officer has attempted to invoke the provisions of Section 28(iv) and Section 41(1) of the Act. In our view, none of the provisions under either of these sections can be applied on the facts of the case, since the Section 28(iv) of the Act provides that "the value of any benefit or perquisite, whether convertible into money or not, arising from the exercise of a business or a profession" shall be chargeable to Income tax under the head "profits and gains of business or profession." The sale consideration for assignment of trade marks as a benefit or perquisite arising from the exercise of a business cannot be treated as the value of any benefit or perquisite arising from the business or a profession, more particularly the same being intangible assets and the cost of acquisition cannot be ascertained.

(21) Section 41(1) of the Act provides that "where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure on trading liability incurred by the assessee and subsequently during any previous



year, the person has obtained any amount or benefit, whether in cash or in any other manner whatsoever, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits or gains of business or profession." In our view the AO has not made out any case for taxing the sale consideration of trademarks as profit chargeable to tax under Section 41(1) of the Act.

(22) We may at this stage incorporate the relevant findings of the Tribunal.

"14... ..

*(b) We have no hesitation in holding that the trade marks/brand names under consideration are required to be treated as "capital assets". The Assessee is right in contending that section 2(14) which defines a "capital asset", covers within its scope "property of any kind held by an assessee whether or not connected with business or profession" In fact, even the Hon'ble Supreme Court has rightly held in the case of CIT v/s Express Newspapers Ltd. 53 ITR 250 (SC), "the fact that capital gains are connected with the capital assets of the business will not make that profits of business" Under the circumstances, the conclusion sought to be drawn by the Assessing Officer in the assessment order that the sale consideration of Rs.29.10 crores for assignment of trade marks/ brand names should be treated as business income is required to be rejected in toto.*

*(c) Once it is held that the trade marks/brand names assigned by the appellant are capital*



assets under section 2(14) of the Income tax Act, the only logical conclusion that can follow is that the resultant gains from the transfer or assignment of the same are in the nature of capital gains. However, as held by the Hon'ble Supreme Court in the case of CIT v/s B.C. Srinivasa Setty, 128 ITR 294(SC), "none of the provisions pertaining to the head "capital gains" suggest that they include an asset in the acquisition of which no cost at all can be conceived. "If the asset under consideration is a self generated asset, it does not fall within the purview of section 45 r.w.s. 48 of the Income tax Act. The issue for consideration, therefore, is whether the trade marks/brand names under consideration can be classified as "self generated assets" it has not been disputed even by the Assessing Officer that the trade marks/brand names were in any manner purchased or acquired by the appellant for any consideration. The Assessee has rightly contended that in respect of the trade marks/brand names of its Veterinary Division, which came to be assigned to Sarabhai Zydus Animal Health Ltd., no cost of acquisition was incurred by it and they were generated or evolved in the business over the years. The Assessing Officer has tried to take the view that for building brand name, systematic efforts in terms of man, maternal and money are needed and, therefore, in his view, it was not proper to say that for generating trade marks/brand names, no cost has been incurred. However, the finer aspect of the evaluation of the intangible assets such as trade marks has been lucidly explained in the land mark judgement of the Apex Court in B.C. Srinivasa Setty(Supra). The following ratio of the said judgment in regard to the evaluation of "Goodwill" would squarely apply in the case of the evaluation of intangible assets such as trade mark/brand name:

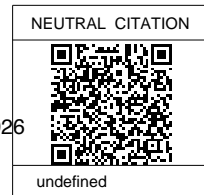
"In a progressing business goodwill tends to show progressive increase and in a



*failing business it may begin to wane. Its value may fluctuate from one moment to another depending on changes in the reputation of the business. It is affected by everything relating to the business, the personality and business rectitude of the owners, the nature and character of the business, its name and reputation, its location, its impact on the contemporary market, the prevailing socio-economic ecology, introduction to old customers and agreed absence of competition. There can be no account in value of the factors producing it. It is also impossible to predict the moment of its birth. It comes silently into the world unheralded and unproclaimed and its impact may not be visibly felt for an undefined period. Imperceptible at birth it exists enwrapped in a concept, growing or fluctuating with the numerous imponderables pouring into, and affecting the business"*

*In our view, therefore, the trade marks/brand names in the case of the Assessee are clearly required to be held as "self generated"*

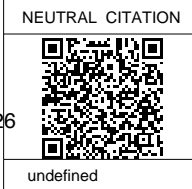
*(d) We also find merit in the submissions made by the learned AR by way of rejoinder to the issues raised by the learned CIT (Appeals). We are in full agreement with the view taken by the IT AT Mumbai Bench in 'Voltas Ltd. v/s DCIT (supra) that the amount paid for registration of Trade Mark cannot be said to be the cost of the Trade Mark. Since it has not been disputed that no other direct cost was incurred by the Assessee for acquisition of these Trade Marks/Brand Names, we have no hesitation in holding that since they were self generated and did not have any cost of acquisition, the ratio laid down in the case of B.C. Srinivasa Setty would squarely apply on the facts of the present case.*



*(e) We are also inclined to uphold the submission of the learned A.R., which is clearly supported by the Deed of Assignment and the Valuation Report of KPMG, that the subject matter of assignment for which the consideration of Rs 29.10 crores was received by the Assessee was Trade Marks" and not "Goodwill" as held by the CIT (Appeals)."*

(23) Thus, we do not find that the Tribunal has committed any patent illegality in applying the legal precedent in light of the nature of the Deed of Assignment entered into between the assessee and its joint venture. Thus, the common substantial question(s) of law formulated in both Tax Appeals relating to the treating the sale / assignment of Trademark / Brand name as capital gain is answered in favour of the assessee.

(24) The revenue has also attempted to build up its case on the method of valuation adopted by the valuer in arriving at the valuation of the Trademark. The valuer-KPMG has adopted the methodology of "Discounted Cash Flow" (DCF), which is a standard accepted valuation procedure. The adoption of particular methodology will have no impact on the nature of assignment/transfer of goodwill of the business of the assessee. Adoption of valuation cannot alter the nature of

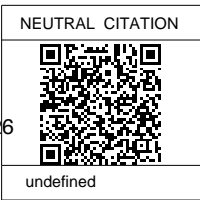


transfer or the intent of the assignment deed. Hence, we cannot set aside the order of the Tribunal only on a particular methodology adopted by the valuer.

(25) Thus, on an overall analysis, the common substantial question of law is answered in favour of the assessee and against the Revenue.

(26) With regard to the substantial question of law at (A) in Tax Appeal No.1235 of 2007 with respect to short term capital loss of Rs.2,50,45,545/-, the appellant-Revenue has fairly admitted that the appellant-Revenue is not in a position to controvert the applicability of decision of the Apex Court in the case of **Walfort Share and Stock Brockers Pvt. Ltd. (supra)**. Hence, the same is answered in favour of the assessee.

(27) On the substratum of the foregoing observations, we do not find any infirmity or illegality in the judgement and order of the Tribunal. Hence, the Appeals stand **dismissed**.



(28) Registry to place a copy of this judgment in the connected Tax Appeal.

**Sd/- .**  
**(A. S. SUPEHIA, J)**

**Sd/- .**  
**(PRANAV TRIVEDI, J)**

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*Bhavesh-[PPS]\**