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DEPUTY COMMISSIONER OF INCOME TAX & ORS. vs. GEA PROCESS ENGINEERING INDIA PRIVATE LIMITED & ORS.

BOMBAY TRIBUNAL

MAHAVIR SINGH, JM & RAMIT KOCHAR, AM.

ITA No. 4154/Mum/2015, 4337/Mum/2015 (C.O. No.147/Mum/2015)

Jan 3, 2019

(2019) 55 CCH 0008 MumTrib

Legislation Referred to

Section 32

Case pertains to

Asst. Year 2007-08

Decision in favour of:

Assessee

Depreciation—Excess amount paid on net asset value of business acquired—Goodwill—Assessee filed return of income—During assessment proceeding, AO noted that earlier assessee was incorporated as a JVC with L and N however, later said JV was discontinued and entire stake of L in assessee company was taken over by N—Consequently, assessee's name was changed and became wholly owned subsidiary of N—Assessee had acquired Food and Pharma division of L and took over their assets and liabilities—At time of acquisition, net assets of said division was in a negative figure whereas, sale consideration paid by assessee to L was in a positive one—Differential between sale consideration paid by assessee for acquisition and net asset value as on date of takeover, was recognized in assessee's books of accounts as goodwill—Assessee also submitted valuation list to quantify valuation of intangible assets—Assessee had claimed depreciation on Goodwill and intangibles which was denied by AO—CIT(A) confirmed AO's action—Held, excess consideration paid over and net asset value of business acquired should be goodwill being 'any other business or commercial rights of similar nature' and would be entitled for depreciation u/s 32—Assessee while acquiring Food and Pharma division had paid consideration in excess of net asset value of said divisions of L as on date of takeover and consequently, excess was reflected as Goodwill in books of accounts of assessee under head 'Intangibles' and thus, assessee would be entitled for claiming depreciation on said excess consideration—Assessee's appeal allowed.

Held

The assessee is engaged in the business of Engineering, Procurement and Construction(EPC) of Food, Dairy, Chemical and Pharma Plants. The assessee was incorporated in the year 1992 as a JV with L and N. However, in the year 2005, the JV was discontinued and the entire stake of L in the assessee was taken over by N. Thereafter, name of the assessee was changed and it became the wholly owned subsidiary of N. The assessee had acquired Food and Pharma division

of L and took over their assets and liabilities. The net assets of those divisions were at the time of acquisition by the assessee was a negative figure whereas; the sale consideration paid by the assessee for said acquisition was Rs. 22.74 crores. The differential between the two or the balancing figure of Rs. 49.22 crores being difference between sale consideration paid by the assessee to L towards acquiring these divisions and net asset value of these divisions on the date of takeover, was recognized in the books of accounts of the assessee, after the takeover, as Goodwill under the head 'intangibles'. Supreme Court in the case of CIT v. Smifs Securities Limited has held that the excess consideration paid over and net asset value of the business acquired shall be goodwill being 'any other business or commercial rights of similar nature' and will be entitled for depreciation u/s 32. The assessee while acquiring Food and Pharma division had paid consideration in excess of net asset value of the said divisions of L as on the date of takeover and consequently, the excess was reflected as Goodwill in the books of accounts of the assessee under the head 'Intangibles' and we are of the considered view that the assessee will be entitled for claiming depreciation on the said excess consideration being Goodwill as the same being 'any other business or commercial rights of similar nature' as defined in Explanation 3 to s. 32(1).

(Para 9)

CIT v. Smifs Securities Limited (2012) 348 ITR 302(SC), followed.

Conclusion

The excess consideration paid over and net asset value of the business acquired shall be goodwill being 'any other business or commercial rights of similar nature' and will be entitled for depreciation u/s 32.

In favour of

Assessee

Cases Referred to

CIT v. Smifs Securities Limited (2012) 348 ITR 302(SC)

Triune Energy Services Private Limited v. DCIT reported in (2016) 237 Taxman 230(Delhi HC)

Hinduja Foundries limited v. ACIT reported in (2016) 178 TTJ 88(Chennai-trib.)

CIT v. B.C. Srinivasa Setty [1981] 128ITR 294/5 Taxman 1 (SC)

DCIT v. Toyo Engineering India Limited in ITA no. 3279/Mum/2008, order dated 13.10.2014

Counsel appeared:

Manoj Kumar,DR for the Revenue. : Sunil Motilala, Jiger Saiya for the Assessee

RAMIT KOCHAR, AM.

1. There are cross appeals filed by the assessee as well Revenue for the impugned assessment year 2007-08 before Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal"). The assessee has also filed cross objections against the Revenue's appeal. The appeals before the tribunal has arisen against the appellate orders dated 06.04.2015 passed by learned Commissioner of Income-tax(Appeals)-56,Mumbai .The assessment order was framed by learned Assessing Officer(hereinafter called "the AO") vide assessment order dated 09.02.2011 passed u/s 143(3) read with Section 144C(4) of the Income-tax Act,1961(hereinafter called "the Act") which was in pursuance to the order dated 29.10.2010 passed by Transfer Pricing Officer(hereinafter called "the TPO") u/s 92CA(3) of the 1961 Act.

2. First, we shall dispose of Revenue's appeal in ITA no. 4154/Mum/2015 for AY 2007-08 and Cross Objections in C.O.No. 147/Mum/2015 arising out of Revenue's appeal in ITA no. 4154/Mum/2015, filed by the assessee. against aforesaid Revenue's appeal. This appeal filed by the Revenue in ITA No. 4154/Mum/2015 and C.O.No. 147/Mum/2015 filed by the assessee, both for AY 2007-08 are disposed of because the tax effect in the Revenue's appeal is less than Rs.

20 lacs as per the CBDT Circular No. 3/2018, F. No. 279/Misc.142/2007-ITJ (Pt) dated 11th July, 2018 issued by Central Board of Direct Taxes, Department of Revenue, Ministry of Finance, Government of India.

3. The Ld. DR submitted that this appeal filed by Revenue is not maintainable as tax effect is less than Rs. 20 lacs being a low tax effect appeal covered by CBDT circular no. 3/2018 dated 11.07.2018 and this appeal of the Revenue is also not covered by any of exceptions as notified by CBDT circular and this appeal is thus not maintainable as tax effect is less than Rs. 20 lacs. The learned AR also submitted that tax effect involved in this Revenue's appeal is less than Rs. 20 lacs and the CBDT Circular No. 3/2018 is applicable to this appeal and this appeal filed by the Revenue is not maintainable in terms of CBDT circular no 3/2018 dated 11.07.2018 . The said CBDT circular dated 11.07.2018 is reproduced as hereunder:-

Circular No. 3/2018

F No 279/Misc. 142/2007-ITJ (Pt)

Government of India

Ministry of Finance Department of Revenue

Central Board Direct Taxes

New Delhi the 11th July, 2018

Subject: Revision of monetary limits for filing of appeals by the Department before Income Tax Appellate Tribunal, High Courts and SLPs/appeals before Supreme Court-measures for reducing litigation-Reg.

Reference is invited to Board's Circular No. 21 of 2015 dated 10.12.2015 wherein monetary limits and other conditions for filing departmental appeals (in Income-tax matters) before Income Tax Appellate Tribunal, High Courts and SLPs/ appeals before Supreme Court were specified.

2. In supersession of the above Circular, it has been decided by the Board that departmental appeals may be filed on merits before Income Tax Appellate Tribunal and High Courts and SLPs/ appeals before Supreme Court keeping in view the monetary limits and conditions specified below.

3. Henceforth, appeals/ SLPs shall not be filed in cases where the tax effect does not exceed the monetary limits given hereunder:

S. No.	Appeals/ SLPs in Income-tax matters	Monetary Limit (Rs.)
1,	Before Appellate Tribunal	20,00,000
2.	Before High Court	50,00,000
3.	Before Supreme Court	1,00,00,000

It is clarified that an appeal should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed above. Filing of appeal in such cases is to be decided **on merits** of the case.

4. For this purpose, 'tax effect' means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issues against which appeal is intended to be filed (hereinafter referred to as 'disputed issues'). **Further, 'tax effect' shall be tax including applicable surcharge and cess.** However, the tax will not include any interest thereon, except where chargeability of interest itself is in dispute. In case the chargeability of interest is the issue under dispute, the amount of interest shall be the tax effect. In cases where returned loss is reduced or assessed as income, the tax effect would include notional tax on disputed additions. In case of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against.

5. The Assessing Officer shall calculate the tax effect separately for every assessment year in respect of the disputed issues in the case of every assessee. If, in the case of an assessee, the disputed issues arise in more than one assessment year, appeal can be filed in respect of such assessment year or years in which the tax effect in respect of the disputed issues exceeds the monetary limit specified in para 3. No appeal shall be filed in respect of an assessment year or years in which the tax effect is less than the monetary limit specified in para 3. In other words, henceforth, appeals can be filed only with reference to the tax effect in the relevant assessment year. However, in case of a composite order of any High Court or appellate authority, which involves more than one assessment year and common issues in more than one assessment year, appeals shall be filed in respect of all such assessment years even if the tax effect is less than the prescribed monetary limits in any of the year(s), if it is decided to file appeal in respect of the year(s) in which tax effect exceeds the monetary limit prescribed. In case where a composite order/ judgement involves more than one assessee, each assessee shall be dealt with separately.

6. Further, where income is computed under the provisions of section 115JB or section 115JC, for the purposes of determination of 'tax effect', tax on the total income assessed shall be computed as per the following formula-

$$(A - B) + (C - D)$$

where,

A = the total income assessed as per the provisions other than the provisions contained in section 115JB or section 115JC (herein called general provisions);

B = the total income that would have been chargeable had the total income assessed as per the general provisions been reduced by the amount of the disputed issues under general provisions;

C = the total income assessed as per the provisions contained in section 115JB or section 115JC;

D = the total income that would have been chargeable had the total income assessed as per the provisions contained in section 115JB or section 115JC was reduced by the amount of disputed issues under the said provisions:

However, where the amount of disputed issues is considered both under the provisions contained in section 115JB or section 115JC and under general provisions, such amount shall not be reduced from total income assessed while determining the amount under item D.

7. In a case where appeal before a Tribunal or a Court is not filed only on account of the tax effect being less than the monetary limit specified above, the Pr. Commissioner of Income-tax/ Commissioner of Income Tax shall specifically record that "even though the decision is not acceptable, appeal is not being filed only on the consideration that the tax effect is less than the monetary limit specified in this Circular". Further, in such cases, there will be no presumption that the Income-tax Department has acquiesced in the decision on the disputed issues. The Income-tax Department shall not be precluded from filing an appeal against the disputed issues in the case of the same assessee for any other assessment year, or in the case of any other assessee for the same or any other assessment year, if the tax effect exceeds the specified monetary limits.

8. In the past, a number of instances have come to the notice of the Board, whereby an assessee has claimed relief from the Tribunal or the Court only on the ground that the Department has implicitly accepted the decision of the Tribunal or Court in the case of the assessee for any other assessment year or in the case of any other assessee for the same or any other assessment year, by not filing an appeal on the same disputed issues. The Departmental representatives/counsels must make every effort to bring to the notice of the Tribunal or the Court that the appeal in such cases was not filed or not admitted only for the reason of the tax effect being less than the specified monetary limit and, therefore, no inference should be drawn that the decisions rendered therein were acceptable to the Department. Accordingly, they should impress upon the Tribunal or the Court that such cases do not have any precedent value and also bring to the notice of the Tribunal/ Court the provisions of sub section (4) of section 268A of the Income-tax Act, 1961 which read as under:

"(4) The Appellate Tribunal or Court, hearing such appeal or reference, shall have regard to the orders, instructions or directions issued under sub-section (1) and the circumstances under which such appeal or application for reference was filed or not filed in respect of any case."

9 As the evidence of not filing appeal due to this Circular may have to be produced in courts, the judicial folders in the office of Pr.CsIT/ CsIT must be maintained in a systemic manner for easy retrieval.

10. Adverse judgments relating to the following issues should be **contested on merits** notwithstanding that the tax effect entailed is less than the monetary limits specified in para 3 above or there is no tax effect:

- (a) Where the Constitutional validity of the provisions of an Act or Rule is under challenge, or
- (b) Where Board's order, Notification, Instruction or Circular has been held to be illegal or ultra vires, or
- (c) Where Revenue Audit objection in the case has been accepted by the Department, or
- (d) Where the addition relates to undisclosed foreign assets/ bank accounts.

11. The monetary limits specified in para 3 above shall not apply to writ matters and Direct tax matters other than Income tax. Filing of appeals in other Direct tax matters shall continue to be governed by relevant provisions of statute and rules. Further, in cases where the tax effect is not quantifiable or not involved, such as the case of registration of trusts or institutions under section 12A/12AA of the IT Act, 1961 etc., filing of appeal shall not be governed by the limits specified in para 3 above and decision to file appeals in such cases may be taken **on merits** of a particular case.

12. It is clarified that the monetary limit of Rs. 20 lakhs for filing appeals before the ITAT would apply equally to cross objections under section 253(4) of the Act. Cross objections below this monetary limit, already filed, should be pursued for dismissal as withdrawn/ not pressed. Filing of cross objections below the monetary limit may not be considered henceforth. Similarly, references to High Courts and SLPs/ appeals before Supreme Court below the monetary limit of Rs. 50 lakhs and Rs. 1 Crore respectively should be pursued for dismissal as withdrawn/ not pressed. References before High Court and SLPs/ appeals below these limits may not be considered henceforth.

13. This Circular will apply to SLPs/appeals/cross objections/references to be filed henceforth in SC/HCs/Tribunal and it shall also apply retrospectively to pending SLPs/appeals/cross objections/references. **Pending appeals below the specified tax limits in para 3 above may be withdrawn/ not pressed.**

14. The above may be brought to the notice of all concerned.

15. This issues under Section 268A of the Income-tax Act 1961.

16. Hindi version will follow.

Sd/-

(Neetika Bansal) Director (ITJ),

CBDT, New Delhi.

Copy to:

- 1. The Chairman, Members and all other officers in CBDT of the rank of Under Secretary and above.
- 2. All Pr. Chief Commissioners of Income Tax and All Directors General of Income Tax with a request to bring to the attention of all officers.

3. ADG (PR, PP& OL), Mayur Bhawan, New Delhi for printing in the quarterly Tax Bulletin and for circulation as per usual mailing list.
4. The Comptroller and Auditor General of India.
5. ADG (Vigilance), Mayur Bhawan, New Delhi.
6. The Joint Secretary & Legal Advisor, Ministry of Law & Justice, New Delhi.
7. All Directorates of Income-tax, New Delhi and DGIT (NADT), Nagpur.
8. ITCC (3 copies).
9. The ADG (System)-4, for uploading on the Department's website.
10. Data Base Cell for uploading on irsofficeronline.gov.in.
11. njrs_support@nsdl.co.in for uploading on NJRS.
12. Hindi Cell for translation.
13. Guard file.

Director (ITJ)

CBDT, New Delhi"

The Id. AR submitted that as per CBDT Circular No. 3/2018, F. No. 279/Misc.142/2007-ITJ (Pt) dated 11th July, 2018 issued by Central Board of Direct Taxes, Department of Revenue, Ministry of Finance, Government of India, no appeal shall be filed by the Revenue in respect of an assessment year or years in which the tax effect is less than the monetary limit specified in para 3 of the circular .

Para 3 of the Circular No. 3/2018

S No.	Appeals in Income tax matters	Monetary Limit (in Rs)
1	Before Appellate Tribunal	20,00,000/-
2	Before High Court	50,00,000/-
3	Before Supreme Court	10,00,000/-

In the said circular vide para 13, it is stipulated that this instruction will apply retrospectively to pending appeals and appeals to be filed henceforth in Hon'ble High Courts/Tribunals. Thus, it is stipulated that pending appeals below the specified tax limits may be withdrawn/not pressed.

The tax effect in this appeal filed by Revenue is undisputedly below Rs. 20 lacs and thus keeping in view CBDT circular no. 3/2018 dated 11-07-2018, we are inclined to dismiss this appeal filed by Revenue due to low tax effect involved in this appeal which is below Rs. 20 lacs . Moreover, it is not also brought to our notice by learned DR that this appeal is covered by any of the exceptions to said circular dated 11.07.2018 as notified by CBDT. Thus, since both the parties have concurred before the Bench that this appeal is covered by CBDT circular no. 3./2018 dated 11.07.2018, we are inclined to dismiss this appeal filed by Revenue on the grounds of tax effect being less than Rs. 20 lacs. While disposing of this appeal filed by Revenue due to low tax effect vide CBDT Circular no. 3/2018 dated 11.07.2018, we clarify that we have not commented on the merits of the issue in this appeal. However, at the same time we are granting liberty to Revenue that if at any stage Revenue wants to agitate the matter/issue in this appeal in accordance with the clauses as are contained in the afore-stated circular number 3/2018 dated 11.07.2018, the Revenue is hereby granted liberty to file miscellaneous application praying for recall of this order in accordance with law. Since, the Revenue is dismissed due to low tax effect vide CBDT circular dated 11.07.2018, the corresponding C.O. filed by the assessee arising out of Revenue's appeal has now become infructuos which also stood dismissed. Thus, both Revenue's appeal in ITA No. 4154/Mum/2015 and assessee's C.O.No. 147/Mum/2015 arising out of Revenue's appeal, for AY 2007-08 stood dismissed. We order accordingly.

4. In the result, the appeal filed by the Revenue in ITA no. 4154/Mum/2015 as well Cross Objections filed by the assessee being C.O.No. 147/Mum/2015 arising out of Revenue's both for AY 2007-08, are dismissed as indicated above.

ITA NO. 4337/Mum/2015-AY 2007-08-Assessee's Appeal

5. The assessee has raised following grounds of appeal in memo of appeal filed with the tribunal in ITA no. 4337/Mum/2015 for AY 2007-08, as under:-

1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that the entire goodwill of the assessee is the excess of the price paid over net asset value of the business unit taken over.

2. Further on the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that purchase cost paid for the entire business unit and it not relatable to any particular assets, intangible or otherwise.

3. Further on the facts and circumstances of the case and in law, the learned CIT(A) has erred in upholding the disallowance of depreciation on intangible assets (other than Goodwill) amounting to Rs. 6,92,15,625/- claimed by the Appellant.

4. Without prejudice to above grounds, on the facts and circumstances of the case and in laws, the learned CIT(A) has erred in disallowing depreciation on Goodwill amounting to Rs. 2,30,71,875/- as claimed by the Appellant before CIT(A).

5. On facts and circumstances of the case and in law., the learned CIT(A) has erred in confirming the disallowances made by the AO for provision for warranty and liquidated damages amounting to Rs. 78,33,288.

6. On facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the disallowances under section 40(a)(ia) of the Act amounting to Rs. 1,32,52,500/- by the AO on account of provision made for management fees."

6. At the outset learned counsel for the assessee has submitted before the Bench that the assessee does not want to persue ground no. 5 and 6 raised by assessee in memo of appeal filed with the tribunal and it is prayed that the same may be dismissed as not been pressed. The learned DR did not raise any objections if ground no. 5 and 6 are dismissed as not being pressed. After hearing both the parties, we are of the considered view that ground number 5 and 6 be dismissed as not being pressed. We order accordingly.

7. This leaves us with only one effective ground which concerns itself with claim of depreciation made by the assessee on intangible assets and goodwill, which are elaborated by the assessee in ground no. 1 to 4 raised by the assessee in memo of appeal filed with tribunal. The brief facts are that the assessee company is engaged in the business of Engineering, Procurement and Construction(EPC) of Food, Dairy, Chemical and Pharma Plants.The assessee company was incorporated in the year 1992 as an joint venture company with L&T Limited, India and Niro A/s, Denmark as its JV partners. However, in the year 2005, the JV was discontinued and the entire stake of L & T in the assessee company was taken over by Niro A/s, Denmark. Thereafter, name of the assessee company was changed and it became the wholly owned subsidiary of Niro A/s, Denmark. The assessee had acquired Food and Pharma division of L&T vide agreement dated 26.05.2005. The assessee vide this agreement dated 26.05.2005 took over assets and liabilities of Food and Pharma division of L&T. The net assets of this division of L&T was at the time of acquisition by the assessee was a negative figure of Rs. 26.49 crores, whereas the sale consideration paid by the assessee to L&T for aforesaid acquisition of its Food and Pharma division was Rs. 22.74 crores. The differential between the two or the balancing figure of Rs. 49.22 crores being difference between sale consideration paid by the assessee to L&T for acquisition of its Food and Pharma division T and the net asset value of the said divisions as on the date of takeover, was recognized in the books of accounts of the assessee, after the takeover, as goodwill. The assessee also submitted valuation list dated 20.12.2010 to quantify the valuation of intangible assets. The assessee has placed reliance on the decision of Hon'ble Supreme Court in the case of CIT v. Smifs Securities Limited (2012) 348 ITR 302(SC) before learned CIT(A).The contentions of the assessee did not found favour with both the authorities below i.e. learned Assessing officer as well learned CIT(A) who rejected the claim of the

assessee towards depreciation on Goodwill and intangibles being excess of sale consideration paid by the assessee towards acquisition cost of acquiring Pharma and Food division of L&T over the net asset value of said divisions on the date of takeover.

8. Now the assessee being aggrieved by the dismissal of its first appeal by learned CIT(A) on this ground of denial of claim of depreciation on Goodwill and intangibles being excess of consideration paid for acquisition of Pharma and Food division of L&T is before the tribunal. The assessee has placed its reliance on the decision of Hon'ble Supreme Court in the case of CIT v. Smifs Securities Limited(supra). It was submitted that the assessee brought to the notice of learned CIT(A) the aforesaid decision of Hon'ble Supreme Court in the case of CIT v. Smifs Securities Limited(supa) but the claim of the assessee for depreciation on goodwill was not allowed by learned CIT(A). It was submitted by learned counsel for the assessee that for AY 2010-11, the AO itself has allowed the claim of the assessee. The assessment order passed by the AO for AY 2010-11 is placed on record and is now placed in file. It was submitted that consideration paid by the assessee over and above the net assets of Food and Pharma division of L&T taken over by the assessee was infact goodwill which is in the form of commercial and business rights and depreciation is allowable on the said differential as held by Hon'ble Supreme Court in the case of CIT v. Smifs Securities Limited(supra). The reliance was further placed by learned counsel for the assessee on the decision of Hon'ble Delhi High Court in the case of Triune Energy Services Private Limited v. DCIT reported in (2016) 237 Taxman 230(Delhi HC) The reliance was further placed by learned counsel for the assessee on the decision of Mumbai-tribunal in the case of DCIT v. Toyo Engineering India Limited in ITA no. 3279/Mum/2008, order dated 13.10.2014. . Further reliance is placed on the decision of Chennai tribunal in the case of Hinduja Foundries limited v. ACIT reported in (2016) 178 TTJ 88(Chennai-trib.). The courts/tribunal in the aforesaid decisions cited by the assessee has taken a consistent stand of allowing depreciation on Goodwill being excess of consideration paid over and above net asset value on the date of takeover. The learned DR on the other hand has relied upon order of authorities below and has prayed that denial of depreciation on goodwill and intangibles be upheld.

9. We have considered rival contentions and perused the material on record including cited case laws. We have observed that the assessee company is engaged in the business of Engineering, Procurement and Construction(EPC) of Food, Dairy, Chemical and Pharma Plants. The assessee company was incorporated in the year 1992 as an joint venture with L&T Limited, India and Niro A/s, Denmark. However, in the year 2005, the JV was discontinued and the entire stake of L & T in the assessee company was taken over by Niro A/s, Denmark. Thereafter, name of the assessee company was changed and it became the wholly owned subsidiary of Niro A/s, Denmark. The assessee had acquired Food and Pharma division of L&T vide agreement dated 26.05.2005. The assessee vide this agreement dated 26.05.2005 took over assets and liabilities of Food and Pharma division of L&T. The net assets of these divisions namely Pharma and Food division of L&T was at the time of acquisition by the assessee was a negative figure of Rs. 26.49 crores whereas the sale consideration paid by the assessee for aforesaid acquisition was Rs. 22.74 crores. The differential between the two or the balancing figure of Rs. 49.22 crores being difference between sale consideration paid by the assessee to L&T towards acquiring these divisions and net asset value of these divisions on the date of takeover, was recognized in the books of accounts of the assessee ,after the takeover, as Goodwill under the head 'intangibles'. Hon'ble Supreme Court in the case of CIT v. Smifs Securities Limited(supra) has dealt with this issue elaborately and then came to conclusion that the excess consideration paid over and net asset value of the business acquired shall be goodwill being 'any other business or commercial rights of similar nature' and will be entitled for depreciation u/s 32 of the 1961 Act. The Hon'ble Supreme Court elaborately discussed Explanation 3 to Section 32(1) of the 1961 Act in the case of CIT v. Smifs Securities Limited(supra), wherein Hon'ble Supreme Court held as under:

"2. *It was further explained that excess consideration paid by the assessee over the value of net assets acquired of YSN Shares and Securities Private Limited [Amalgamating Company] should be considered as goodwill arising on amalgamation. It was claimed that the extra consideration was paid towards the reputation which the Amalgamating Company was enjoying in order to retain its existing clientele.*

3. *The Assessing Officer held that goodwill was not an asset falling under Explanation 3 to Section 32(1) of the Income Tax Act, 1961 ['Act', for short].*

We quote hereinbelow Explanation 3 to Section 32(1) of the Act:

"Explanation 3.-- For the purposes of this sub-section, the expressions 'assets' and 'block of assets' shall mean-- [a] tangible assets, being buildings, machinery, plant or furniture;

[b] intangible assets, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature."

4. *Explanation 3 states that the expression 'asset' shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature. A reading the words 'any other business or commercial rights of similar nature' in clause (b) of Explanation 3 indicates that goodwill would fall under the expression 'any other business or commercial right of a similar nature'. The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3(b).*

5. *In the circumstances, we are of the view that 'Goodwill' is an asset under Explanation 3(b) to Section 32(1) of the Act.*

6. *One more aspect needs to be highlighted. In the present case, the Assessing Officer, as a matter of fact, came to the conclusion that no amount was actually paid on account of goodwill. This is a factual finding. The Commissioner of Income Tax (Appeals) ['CIT(A)', for short] has come to the conclusion that the authorised representatives had filed copies of the Orders of the High Court ordering amalgamation of the above two Companies; that the assets and liabilities of M/s. YSN Shares and Securities Private Limited were transferred to the assessee for a consideration; that the difference between the cost of an asset and the amount paid constituted goodwill and that the assessee-Company in the process of amalgamation had acquired a capital right in the form of goodwill because of which the market worth of the assessee- Company stood increased. This finding has also been upheld by Income Tax Appellate Tribunal ['ITAT', for short]. We see no reason to interfere with the factual finding.*

7. *One more aspect which needs to be mentioned is that, against the decision of ITAT, the Revenue had preferred an appeal to the High Court in which it had raised only the question as to whether goodwill is an asset under Section 32 of the Act. In the circumstances, before the High Court, the Revenue did not file an appeal on the finding of fact referred to hereinabove.*

8. *For the afore-stated reasons, we answer Question No.[b] also in favour of the assessee."*

We have also observed that Hon'ble Delhi High Court in the case of Triune Energy Services Private Limited v. DCIT(supra) has also taken the similar view, by holding as under:

"9. *We have heard the learned counsel for the parties.*

10. *The issue whether depreciation is allowable on goodwill is no longer res integra. In Smifs Securities Ltd. (supra), the Supreme Court had answered the question "Whether goodwill is an asset within the meaning of section 32 of the Income-tax Act, 1961, and whether depreciation on 'goodwill' is allowable under the said section" in favour of the Assessee.*

11. *The Supreme Court had further held as under:—*

'We quote hereinbelow Explanation 3 to section 32(1) of the Act:

"Explanation 3. - For the purposes of this sub-section, the expressions 'assets' and 'block of assets' shall mean-

(a) tangible assets, being buildings, machinery, plant or furniture ;

(b) intangible assets, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature :"

10. Explanation 3 states that the expression "asset" shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature. A reading of the words "any other business or commercial rights of similar nature" in clause (b) of Explanation 3 indicates that goodwill would fall under the expression "any other business or commercial right of a similar nature". The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3(b).

11. In the circumstances, we are of the view that "goodwill" is an asset under Explanation 3(b) to section 32(1) of the Act.'

12. In the present case the 'Business Identification Schedule' appended to the Agreement specified the business of TPPL, which was sold to the Assessee. Apart from the tangible assets the said Schedule also included the following:—

"(3) TPPL Contracts:

The benefits and liabilities of TPPL's ongoing contracts as well as any other letters of intent/contracts/orders related to the Business up to the 22nd September 2006 and any revenue to be still received on 22nd September 2006.

The ongoing TPPL contracts are listed in Appendix 4 to this Schedule. A copy of each of the contracts listed in Appendix 4 as well as any other letters of intent/contracts/orders related the business upto 22nd September 2006 shall be provided within 22nd September 2006.

(4) TPPL Business Records and Know-How:

Know-how, expertise, capabilities, references, track records related to clients and/or suppliers, agents, distributors, business and production plans, forecast, correspondence, orders, inquiries, proprietary information, patent, data, archives, design specification, manuals, research data, instructions, all past and present information and whatever can be directly or indirectly referred to the Business etc, including the books, records and material embodying the above.

(5) TPPL Employees:

All the Employees of TPPL as on 22.09.2006 as listed in Appendix 5B to this Schedule. Any modification in the number or substitution of any employees as well as any modification to their respective employment contracts between as on 31.03.2006 as listed in Appendix 5A shall be subject the previous written approval of Saipem, BJ and TPPL. A copy of each of the employment contracts for the employees listed in Appendix 5B shall be available by 22nd September, 2006.

(9) Goodwill:

Goodwill includes the goodwill in relation to the name associated to the Business."

13. Goodwill is an intangible asset providing a competitive advantage to an entity. This includes a strong brand, reputation, a cohesive human resource, dealer network, customer base etc. The expression "goodwill" subsumes within it a variety of intangible benefits that are acquired when a person acquires a business of another as a going concern.

14. In *CIT v. B.C. Srinivasa Setty* [1981] 128ITR 294/5 Taxman 1 (SC), the Supreme Court had explained that:—

*"Goodwill denotes the benefit arising from connection and reputation. The original definition by Lord Eldon in *Cruttwell v. Lye* [1810] 17 Ves 335 that goodwill was nothing more than 'the probability that the old customers would resort to the old places' was expanded by Wood V. C. in *Churton v. Douglas* [1859] John 174 to encompass every positive advantage that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the*

business was previously carried on or with the name of the old firm, or with any other matter carrying with it the benefit of the business."

The Court had further explained that:

"A variety of elements goes into its making, and its composition varies in different trades and in different businesses in the same trade, and while one element may preponderate in one business, another may dominate in another business. And yet, because of its intangible nature, it remains insubstantial in form and nebulous in character. Those features prompted Lord Macnaghten to remark in IRC v. Muller and Co.'s Margarine Limited [1901] AC 217 (HL) that although goodwill was easy to describe, it was nonetheless difficult to define. 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 predicate 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."

15. *From an accounting perspective, it is well established that 'goodwill' is an intangible asset, which is required to be accounted for when a purchaser acquires a business as a going concern by paying more than the fair market value of the net tangible assets, that is, assets less liabilities. The difference in the purchase consideration and the net value of assets and liabilities is attributable to the commercial benefit that is acquired by the purchaser. Such goodwill is also commonly understood as the value of the whole undertaking less the sum total of its parts. The 'Financial Reporting Standard 10' issued by Accounting Standard Board which is applicable in United Kingdom and by Institute of Chartered Accountants of Ireland in respect of its application in the Republic of Ireland, explains that "the accounting requirements for goodwill reflect the view that goodwill arising on an acquisition is neither an asset like other assets nor an immediate loss in value. Rather, it forms the bridge between the cost of an investment shown as an asset in the acquirer's own financial statements and the values attributed to the acquired assets and liabilities in the consolidated financial statements".*

16. *The abovementioned Financial Reporting Standard 10 also provides for accounting of purchased goodwill as "the difference between the cost of an acquired entity and the aggregate of the fair values of that entity's identifiable assets and liabilities. Positive goodwill arises when the acquisition cost exceeds the aggregate fair values of the identifiable assets and liabilities. Negative goodwill arises when the aggregate fair values of the identifiable assets and liabilities of the entity exceed the acquisition cost."*

17. *At this stage, it is also relevant to refer to Accounting Standard 10 as issued by the Institute of Chartered Accountants of India. The relevant extract of which reads as under:—*

"16.1 Goodwill, in general, is recorded in the books only when some consideration in money or money's worth has been paid for it. Whenever a business is acquired for a price (payable either in cash or in shares or otherwise) which is in excess of the value of the net assets of the business taken over, the excess is termed as 'goodwill'. Goodwill arises from business connections, trade name or reputation of an enterprise or from other intangible benefits enjoyed by an enterprise."

18. *It is also relevant to note that Smifs Securities Ltd. (supra) was a case where assets of company - YSN shares and Securities (P.) Ltd. were transferred to Smifs Securities Ltd. under a scheme of amalgamation. And, the excess consideration paid by the Assessee therein over the value of net assets of YSN Shares and Securities (P.) Ltd. acquired by the Assessee, was accounted as goodwill.*

19. *In view of the above, we are inclined to accept the contention advanced on behalf of the Assessee that the consideration paid by the Assessee in excess of its value of tangible assets was rightly classified as goodwill.*

20. *In the facts of the present case, the ITAT has rejected the view that the slump sale agreement was a colourable device. Once having held so, the agreement between the parties must be accepted in its totality. The Agreement itself does not provide for splitting up of the intangibles into separate components. Indisputably, the transaction in question is a slump sale which does not contemplate separate values to be ascribed to various assets (tangible and intangible) that constitute the business undertaking, which is sold and purchased. The Agreement itself indicates that slump sale included sale of goodwill and the balance sheet drawn up on 22nd September, 2006 specifically recorded goodwill at Rs. 40,58,75,529.40/-. As indicated hereinbefore Goodwill includes a host of intangible assets, which a person acquires, on acquiring a business as a going concern and valuing the same at the excess consideration paid over and above the value of net tangible assets is an acceptable accounting practice. Thus, a further exercise to value the goodwill is not warranted.*

21. *In view of the aforesaid, the question framed is answered in the negative, that is, in favour of the Assessee and against the Revenue. The Assessee's appeal (ITA 40/2015) is, accordingly, allowed."*

We have observed that the assessee while acquiring Food and Pharma division of L& T vide agreement dated 26.05.2005 had paid consideration in excess of net asset value of the said divisions of L&T as on the date of takeover and consequently, the excess was reflected as Goodwill in the books of accounts of the assessee under the head „Intangibles’ and we are of the considered view that the assessee will be entitled for claiming depreciation on the said excess consideration being Goodwill as the same being „any other business or commercial rights of similar nature’ as defined in Explanation 3 to Section 32(1) of the 1961 Act, keeping in view ratio of decision of Hon’ble Supreme Court in the case of CIT v. Smifs Securities Limited(supra). This disposes of ground no. 1 to 4 of the assessee’s appeal. We order accordingly.

10. In the result appeal of the assessee in ITA no. 4337/Mum/2015 for AY 2007-08 is partly allowed as indicated above.

11. In the result appeal of the assessee in ITA no. 4337/Mum/2015 for AY 2007-08 is partly allowed as indicated above, while appeal of Revenue in ITA no. 4154/Mum/2015 and C.O. No. 147/Mum/2015 arising out of appeal in ITA No. 4154/Mum/2015, for AY 2007-08 are dismissed.

Order pronounced in the open court on 03.01.2019.

Customized Notes

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