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**[2022] 141 taxmann.com 129 (Mumbai - Trib.)[16-06-2022]**

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**TRANSFER PRICING : Where Assessee-company had undertaken three international transactions with its AE viz. import related transactions, receipt of commission transaction and receipt of fee for supervising assistance transaction; TPO could not have treated all transactions inter-related to apply TNMM at entity level**

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**[2022] 141 taxmann.com 129 (Mumbai - Trib.)**

**IN THE ITAT MUMBAI BENCH 'K'**

**Deputy Commissioner of Income-tax**

**v.**

**Gea Process Engineering (India) (P.) Ltd.\***

**BASKARAN BR, ACCOUNTANT MEMBER  
AND KULDIP SINGH, JUDICIAL MEMBER  
IT APPEAL NOS. 4155 & 4338 (MUM.) OF 2015  
CO. NO. 148 (MUM.) OF 2015  
[ASSESSMENT YEAR 2008-09]  
JUNE 16, 2022**

**Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparability factors - Segmental result) - Assessment year 2008-09 - Assessee-company was engaged in business of undertaking capital intensive projects for erection and commissioning of projects - Assessee-company had undertaken three international transactions with its AE viz. import related transactions, receipt of commission transaction and receipt of fee for supervising assistance transaction - Assessee in order to benchmark these three international transactions adopted different methods - TPO took view that all transactions were inter-related and rejected TP study undertaken by assessee and proceeded to apply TNMM at entity level - Whether on facts both segments i.e. receipt of commission and receipt of fee for supervisor assistance were to be grouped together to benchmark same on basis of their functions - Held, yes - Whether thus TP issue was required to be decided afresh by TPO by grouping commission income and supervisory income together and remaining international transactions were to be benchmarked independently by going into functionality of same - Held,**

## **CASES REFERRED TO**

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*Dy. CIT v. Gea Process Engineering India (P.) Ltd.* [IT Appeal Nos. 4154 & 4337 (Mum.) of 2015, dated 3-1-2019] (para 11), *CIT v. Smifs Securities Ltd.* [2012] 24 taxmann.com 222/210 Taxman 428/348 ITR 302 (SC) (para 12), *CIT v. Vineet Cement Ltd.* [2007] 213 CTR 268 (SC) (para 25), *CIT v. Ghatge Patil Transports Ltd.* [2015] 53 taxmann.com 141/228 Taxman 340/[2014] 368 ITR 749 (Bom.) (para 25) and *CIT v. Alom Extrusions Ltd.* [2009] 185 Taxman 416/319 ITR 306 (SC) (para 25).

**Rajesh Mishra**, D.R. *for the Appellant*. **Sunil M. Lala**, A.R. *for the Respondent*.

## **ORDER**

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**Kuldip Singh, Judicial Member.** - For the sake of brevity aforesaid cross appeals and cross objections bearing common question of law and facts are being disposed of by way of composite order.

2. Appellant DCIT/ITO, Mumbai (hereinafter referred to as the Revenue) and the appellant/cross objector M/s. Gea Process Engineering (India) Pvt. Ltd. (hereinafter referred to as the assessee) by filing the present appeal and cross objections sought to *set aside* the impugned order dated 6-4-2015 passed by the Principal Commissioner of Income-tax (OSD) [hereinafter referred to as the PCIT] on the grounds *inter alia* that:

*ITA No. 4155/M/2015 (Revenue's appeal)*

"1. On the fact and in circumstances of the case and in law, the Ld. CIT (A) erred in deleting the ALP adjustment amounting to Rs. 2,19,74,033/- without appreciating the fact that the segmental account and the net segmental margins filed by the assessee are not reliable as the same is based on proportionate allocation of indirect expenses with the sales .

2. On the fact and in circumstances of the case and in law, the Ld. CIT (A) erred in deleting the ALP adjustment amounting to Rs. 2,19,74,033/- and holding that the benchmarking at entity level using TNMM by the TPO is not correct without appreciating the fact that all transactions are closely linked.

3. On the fact and in circumstances of the case and in law, the Ld. CIT(A) erred in deleting the ALP adjustment amounting to Rs. 2,19,74,033/- without appreciating the fact that different international transactions with the AE are closely linked and overlooked various judicial pronouncement.

4. On the fact and in circumstances of the case and in law, the Ld. CIT (A) erred in deleting the disallowance of expenditure incurred on license fees/royalty holding it to be business expenditure without appreciating the fact that the assessee had not justified the basis and purpose of the expenditure without documentary evidence during the course of assessment proceedings.

5. On the fact and in circumstances of the case and in law, the Ld. CIT (A) erred in deleting the disallowance u/s.36(1)(va) of the Act of belated payments towards employees' contribution to EPF holding that the amendment to Section 43B by the Finance Act 2003 is applicable without appreciating the fact that the Employees' Contribution to EPF is governed by Section 36(1)(va) and not Section 43B of the Act.

6. On the fact and in circumstances of the case and in law, the Ld. CIT (A) erred in deleting the disallowance u/s.36(1)(va) of the Act without appreciating that the Employees' Contribution to EPF is deemed to be income u/s. 2(24)(x) and deduction is allowable u/s. 36(1)(va) only if payment is made on or before the due date for payment ignoring the decision of the Gujarat High Court in the case of Gujarat State Road Transport Corporation reported in 366 ITR 170."

*ITA No. 4338/M/2015 (Assessee's appeal)*

"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 is 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. 5,19,11,719/- 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. 1,73,03,906/- 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 contingencies or onerous expenses amounting Rs. 1,26,96,905/-

The Appellant craves leave to add, alter, amend, delete, modify or withdraw all or any ground or grounds of appeal herein and to submit such statements, documents and papers as may be considered necessary either all or before the appeal hearing."

*CO No. 148/M/2015 (Assessee's):*

"1. The learned CIT(A) has erred in not adjudicating the ground preferred by the Respondent/Cross-Objector, that the learned TPO has legally erred by denying the Appellant Company an opportunity to justify its treatment of 'Foreign Exchange fluctuation loss' and 'Provision for Credit balances written back' for the purpose of determining the operating margin while applying Transactional Net Margin Method ('TNMM') at the entity level, for the reason that the said ground became academic in nature pursuant to the decision rendered by the learned CIT(A).

2. Without prejudice to any other ground/objection, on the facts and circumstances of the case, the learned CIT(A) has erred in not adjudicating the ground preferred by the Respondent/Cross-Objector that the learned TPO has factually and legally erred in not excluding 'Foreign exchange fluctuation loss' amounting to Rs. 9,58,104 while determining the operating margin for applying TNMM at the entity level, for the reason that the said ground became academic in nature pursuant to the decision rendered by the learned CIT(A).

3. Without prejudice to any other ground/objection, on the facts and circumstances of the case, the learned CIT(A) has erred in not adjudicating the ground preferred by the Respondent/Cross-Objector that the learned TPO has factually and legally erred in excluding 'Provision for Credit balances written back' amounting to Rs. 61,25,707 as Non-Operating income while determining the operating margin for applying TNMM at the entity level, for the reason that the said ground became academic in nature pursuant to the decision rendered by the learned CIT(A).

4. Without prejudice to any other ground/objection, on the facts and circumstances of the case, the learned CIT(A) has erred in not adjudicating the ground preferred by the Respondent/Cross-Objector that the learned TPO has factually and legally erred in not excluding 'Depreciation on Goodwill' amounting to Rs. 4,92,00,000 while determining the operating margin for applying TNMM at the entity level, for the reason that the said ground became academic in nature pursuant to the decision rendered by the learned CIT(A).

The Respondent Company craves leave to alter, add, amend or delete all or any of the grounds/objection raised hereinabove."

3. Briefly stated facts necessary for adjudication of the controversy at hand are : the assessee company a Gea Process Engineering Pvt. Ltd. was incorporated in 1992 as a joint venture between L&T Ltd., India and Niro A/s, Denmark. The said joint venture was discontinued and the entire stake of L&T in the assessee company was bought over by Niro. Later on the name of the assessee company was changed to Jewel Process Engineering India Pvt. Ltd. and it became a wholly owned subsidiary of Niro A/s, Denmark. During the year under assessment the assessee company was into the business of undertaking capital intensive projects for erection and commissioning of projects. While executing these Erection, Procurement and Commissioning (EPC) contracts the assessee company designs the installation, procures the necessary materials, erects the plants as per the agreed design and ensures commissioning of same, which is engaged primarily in the execution of EPC turnkey projects in the food, dairy and chemical and pharma sectors. During the year under assessment assessee company entered into international transactions with its Associate Enterprise (AE) as reported in form 3CEB as under:

Sl.	Nature of transaction	F.Y. 2007-08 (Rs)	Method Used
1	Purchase of Components & Spares	6,80,75,380	Resale Price Method
2	Payment of Design & Engineering Fees	1,86,83,436	Resale Price Method
3	Receipt of Commission	1,19,51,956	Transactional Net Margin Method
4	Receipt for Supervisory Assistance	51,85,376	Transactional Net Margin Method
5	Contribution to Common Costs	1,10,08,756	Not Applicable

Total	11,49,04,904
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**3.1** In its return of income assessee company claimed a net loss of Rs. 23,32,26,686/-. The assessee company in order to benchmark its international transactions had adopted different methods to determine arms length price. However, the Transfer Pricing Officer (TPO) has taken the view that the transactions are inter related and the assessee company was called upon to show cause as to why the segmental profit and loss should not be rejected and Transactional Net Margin Method (TNMM) be applied at the entity level. The assessee company sought to justify that the working of profit earned from purchases made from AE and that from non AE are different as the OP/sales in case of purchase transactions from AE was 22.80% whereas OP/sales in case of purchases from non AE was minus 32.31%. The assessee company also advanced the argument that it earns a segmental greater margin from the sales made by procuring components & spares from AE and that overall profitability has improved because of the procurement of components & spares from the AE. Declining the contentions raised by the assessee the Ld. TPO rejected the segmental profit and loss computed by the assessee company and applied the TNMM at the entity level.

**4.** Assessee's contention that its expenses to the extent of Rs. 20.85 crores were not operating expenses and as such the same ought not to be considered for determining the PLI of the assessee company. It has also brought on record that said expenses primarily consisted of interest of Rs. 7.65 crore and depreciation on goodwill amounting to Rs. 4.92 crores. Declining the contentions raised by the assessee the Ld. TPO also held that goodwill is the integral part of business, depreciation on goodwill cannot be ignored while determining the Profit Level Indicator (PLI) and thereby determined the PLI of the assessee company as under:

Sl. No.	Particulars	Amount (Rs)	Amount (Rs)
1	Sales		49,78,46,018
2	Other Income	1,93,87,483	
	Less: Non Operating Income		
	Interest	4,24,079	
	Provision for credit balances written back	61,25,707	
	Miscellaneous Income	8,85,740	
	Total Other Operating Income		1,19,51,956
2	Total Expenses	74,21,53,308	
3	Less. Extraordinary/Non Recurring and Non Operating Exp		
	Interest	7,65,69,636	
	Unrealised loss on Projects	56,41,382	
	Inventory written off	64,18,458	
	Warranty & Liquidated damages	1,35,92,495	
	Bad Debts written off	2,47,796	
	Purchases wrongly recorded	52,73,925	

	Extraordinary costs	5,05,40,000	
	Total Operating Costs		58,38,69,616
4	Operating Profit/(Loss)		(7,40,71,642)
5	PLI (Operating Profit/Sales) (%)		-14.53

5. In order to benchmark the international transactions assessee company chosen 12 comparables having arithmetic mean of 6.62% which the Ld. TPO has accepted. Accordingly, the PLI of assessee company is computed at loss of 4.87% resulting into a difference of 11.49% and consequently the Ld. TPO proposed the adjustment on account of ALP at Rs. 2,19,74,033/-.

6. Pursuant to the TP adjustment made by the Ld. TPO, the AO made addition of Rs. 2,19,74,033/- to the total income of the assessee. The AO also disallowed the claim of depreciation of the assessee company to the tune of Rs. 5,19,11,719/- on opening WDV of intangible assets of Rs. 20,76,46,875/- by following A.Y. 2006-07. The AO also disallowed an amount of Rs. 1,13,20,000/- debited by the assessee as provision for warranty and liquidated damages on the ground that its very nature suggests that this is a contingent in nature hence not allowable. The AO also made disallowance on account of provision for contingency/owners contract to the tune of Rs. 1,26,96,905/- debited by the assessee in the P&L account again on the ground that this is contingent in nature hence not allowable. The AO also made disallowance of Rs. 95,67,696/- being the payment shown in the nature of license fee/royalty recorded in schedule 1 under the head operating expenses in P&L account. The AO also disallowed an amount of Rs. 22,06,711/- under section 36(1)(va) of the Act being the employees' contribution to the PF having not been paid within due dates. Accordingly, the AO framed the assessment under section 143(3) read with section 144C(4) of the Act at total income of Rs. 12,27,95,897/-.

7. Assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has partly allowed the same. Feeling aggrieved the assessee company as well as Revenue have come up before the Tribunal by way of filing present cross appeals/objections.

8. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

*ITA No. 4338/M/2015 (assessee's appeal)*

*Ground Nos.1, 2, 3 & 4*

9. Undisputedly, the assessee company had acquired food and pharma division of L&T Ltd. by virtue of agreement dated 26-5-2005 with net assets and liability of this division being a negative figure of Rs. 26.49 crores. However, sale consideration paid by the assessee to L&T for acquisition was Rs. 22.74 crores. The assessee company has claimed depreciation of Rs. 5,19,11,719/- on certain intangible assets including non computing fee, rights, patents, trademarks etc. @ 25% of the opening WDV of Rs. 20.6 crore, which the AO has disallowed on the ground that in the schedule of fixed assets the assessee had shown an aggregate amount of Rs. 49.92 crores as goodwill of loan and under the head "intangible assets" no other intangible assets were shown to have been held by assessee in the balance sheet.

**10.** The Ld. CIT(A) also upheld the disallowance made by the AO on the ground that the claim of the assessee for allowance of depreciation on its so called unidentifiable intangible assets including goodwill based on valuation report prepared much after the acquisition of the concerned business unit is without any factual or legal basics.

**11.** The Ld. A.R. for the assessee challenging the impugned disallowance made by the AO as well as the Ld. CIT(A) on account of depreciation on intangible assets contended that this issue has already been decided in favour of the assessee in its own case for A.Y. 2007-08 *vide* order dated 3-1-2019 in *Dy. CIT v. Gea Process Engineering India (P.) Ltd.* [IT Appeal Nos. 4154 & 4337 (M) of 2015 & CO No. 147/M/2015] and facts of the case under consideration *vis-à-vis* A.Y. 2008-09 are identical. This factual position has not been controverted by the Ld. D.R. who has otherwise relied upon the order passed by the Ld. CIT(A) to support his argument.

**12.** We have perused the order passed by the co-ordinate Bench of the Tribunal in assessee's own case for A.Y. 2007-08 (*supra*) which is on identical facts and CIT(A) after thrashing the facts in the light of the law laid down by Hon'ble Supreme Court in *CIT v. Smifs Securities Ltd.* [2012] 24 taxmann.com 222/210 Taxman 428/348 ITR 302 decided the issue in favour of assessee by returning following findings:

'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, Diary, 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 26-5-2005. The assessee *vide* this agreement dated 26-5-2005 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 assesseeCompany 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 22-9-2006 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 31-3-2006 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] 128 ITR 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 26-5-2005 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.'

13. So following the order passed by the co-ordinate Bench of the Tribunal in assessee's own case *qua* the identical issues, we are of the considered view that when undisputedly the assessee has acquired food and pharma division of L&T by virtue of agreement dated 26-5-2005 by paying excess consideration of net asset value, the excess was reflected as goodwill in the books of accounts of the assessee under the head "intangibles and as such assessee is entitled for claiming depreciation on the said intangible assets/goodwill as held by Hon'ble Supreme Court in case of *Smifs Securities Ltd. (supra)*. Consequently, ground Nos.1, 2, 3 & 4 raised by the assessee are allowed.

*Ground No. 5*

14. This ground has not been pressed by the Ld. A.R. for the assessee during the course of argument, hence the same is dismissed.

*ITA No. 4155/M/2015 for A.Y. 2008-09 (Revenue's appeal) Ground Nos.1, 2 & 3*

&

*CO No. 148/M/2015 for A.Y. 2008-09 (Assessee's objections) Ground Nos.1, 2, 3 & 4*

15. Undisputedly, the assessee company has undertaken three international transactions with its AE *viz.* import related transactions, receipt of commission transaction and receipt of fee for

supervising assistance transaction. The assessee company in order to benchmark these three international transactions adopted different methods in all the three transactions *viz.* for import related transactions it has applied resale price method, for receipt commission; it has applied segmental TNMM and for supervisor assistance it has applied segmental TNMM.

**16.** However, the Ld. TPO rejected the TP study undertaken by the assessee and proceeded to apply TNMM at the entity level which the assessee company has objected to. The Ld. TPO retained 12 comparables chosen by the assessee company in EPC business having arithmetic mean of 6.62% as against PLI of assessee company at loss of 4.87% thereby resulting a difference of 11.49% and thereby proposed the adjustment of Rs. 2,19,74,033/-.

**17.** At the very outset the Ld. D.R. for the Revenue contended that out of three transactions commission income and supervisor income cannot be taken as entity level by applying TNMM and both are required to be grouped together for benchmarking the transaction to arrive at a logical conclusion and their source of income is the same and are required to be decided on the basis of their functions. This argument has not been controverted by the Ld. A.R. for the assessee and Bench is also inclined to agree that both the segments *i.e.* receipt of commission and receipt of fee for supervisor assistance are to be grouped together to benchmark the same on the basis of their functions. As such to benchmark the same TNMM at the entity level as applied by Ld. TPO is not sustainable.

**18.** Even the Ld. TPO has not brought on record any material to prove if the transactions under consideration were inter linked because numerous international transactions could be clubbed together for the purpose of benchmarking only if it is shown that they are closely linked transactions. So the benchmarking made by the Ld. TPO is challenged both by assessee as well as Revenue.

**19.** We have perused the order passed by the Ld. CIT(A) particularly para 9 which is cryptic in nature and fails to lead to the specific conclusions as to why the TP adjustment made by the TPO are being deleted. Merely on the basis of generic observations without going into the functionality of the particular segments/international transactions TP adjustment cannot be deleted.

**20.** In these circumstances it is agreed by the authorized representatives of the parties to the appeal that TP issue is required to be decided afresh by the TPO by grouping commission income and supervisory income together and the remaining international transactions are to be benchmarked independently by going into the functionality of the same. So grounds No. 1 to 3 of Revenue's appeal and grounds No. 1 to 4 of assessee's cross objection are remitted back to the Ld. TPO to decide afresh after providing opportunity of being heard to the assessee.

#### *Ground No. 4 of Revenue's appeal*

**21.** The AO made disallowance of Rs. 95,67,696/- on account of license fee/royalty. In the P&L account in schedule No. 1 under the head "Operating expenses" the AO noticed that there is a payment shown in the nature of license fee/royalty. The AO disallowed the same by returning following findings:

"(i) The company has failed to provide any justification of this expense and whether any

income was generated during this year by the above mentioned project is not brought clearly by the assessee. Thus, this claim of expense goes against the very nature of matching principle of accountancy.

(ii) The very heading of this expense suggests that it is in the nature of a one time payment in the nature of a non compete agreement. Even if assessee is claiming this expense, this expense is in the nature of a capital expense which cannot be allowed for the instant year as revenue expense."

**22.** On the other hand, the Ld. CIT(A) allowed the same by treating the same in the nature of territorial commission paid by the assessee irrespective of its numerical uses in the P&L account being the expenses wholly and exclusively incurred for the purpose of earning its business income from the execution of EPC project and thereby allowed the same under section 37(1) of the Act.

**23.** However, we are of the considered view that facts on the issue are not completely brought out, neither discussed by the AO nor by the Ld. CIT(A). No findings have been returned if the same is a license fee or royalty. Even no detail of commission or royalty paid has been brought on record. So this issue is required to be remitted back to the AO to decide afresh after providing opportunity of being heard to the assessee.

#### *Ground No. 5 & 6 of Revenue's appeal*

**24.** The AO made a disallowance of Rs. 22,06,711/- under section 36(1)(va) of the Act on the ground that the amount in question being employees contribution to PF has been paid late after the due date as per the provisions of the PF Act. However, the Ld. CIT(A) decided the issue by returning following findings:

"19. The eighth ground of appeal is against the disallowance by the AO of the belated payment of employees contribution to EPF of Rs. 22,06,711/-. The AO had disallowed such employees contribution to PF on the ground that the same had been paid beyond the due dates mentioned in the provisions of the Provident Fund Act. However, in this context, it is seen that the second proviso to section 43B of the Act that had mandated such a condition had been deleted by the Finance Act, 2003 with effect from 1-4-2004. The first proviso to section 43B had also been appropriately modified by the same Finance Act. Such condition having been removed from the statute, insistence of the AO in the meeting of that condition by the assessee would no longer be valid for the period under consideration. It is also seen that the Hon'ble ITAT in the assessee's own case for A.Y.2005-06 had deleted a similar addition made in that year by placing reliance on the Apex Court decision in the case of *CIT v. Vinay Cement Ltd.* (213 CTR 68). The concerned payment had been made by the assessee | well before the due date of filing of return of this year as permissible under the existing provisions of section 43B, Accordingly, disallowance by the AO of the belated payments of EPF is found to be not justified as per the statute relevant to the period presently under consideration. The AQ is hereby directed to delete this disallowance made in the assessment order and the appeal filed by the assessee on this ground is accordingly allowed."

**25.** We have perused the findings returned by the Ld. CIT(A) which need no inference as the assessee has deposited the employees contribution prior to the filing of the income tax return. In

A.Y. 2005-06 the co-ordinate Bench of the Tribunal in assessee's own case deleted the same addition by relying upon the decision rendered by Hon'ble Apex Court in case of *CIT v. Vineet Cement Ltd.* [2007] 213 CTR 268. Hon'ble Bombay High Court in case of *CIT v. Ghatge Patil Transports Ltd.* [2015] 53 taxmann.com 141/228 Taxman 340/[2014] 368 ITR 749 also decided the identical issue in favour of the assessee by upholding the Tribunal order that payment of employees contribution on account of PF before filing of income tax return is allowable deduction and the Hon'ble Supreme Court has also decided the identical issue in case of *CIT v. Alom Extrusions Ltd.* [2009] 185 Taxman 416/319 ITR 306. So in view of the matter, we find no illegality or perversity in the impugned findings delivered by the Ld. CIT(A), hence ground No. 5 & 6 are determined against the Revenue.

**26.** In view of what has been discussed above the appeal and the cross objection filed by the assessee are partly allowed for statistical purposes. The appeal filed by the Revenue is also partly allowed for statistical purposes.

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\*Matter remanded.