आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'A' BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री ए. मोहन अलंकामणी, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA Nos.1590, 1591, 1592 & 1593/Mds/2015**

निर्धारण वर्ष / Assessment Years : 2006-07, 2007-08, 2009-10 & 2010-11

M/s Hinduja Foundries Ltd., (formerly known as M/s Ennore Foundries Ltd.), Kathivakkam High Road, Ennore, Chennai - 600 057.	v.	The Assistant Commissioner of Income Tax, Corporate Circle 2, Chennai - 600 034.
PAN : AAACE 1078 K (अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Sh. R. Vijayaraghavan, Advocate
प्रत्यर्थी की ओर से/Respondent by : Sh. Pathlavath Peerya, CIT

सुनवाई की तारीख/Date of Hearing : 06.01.2016
घोषणा की तारीख/Date of Pronouncement : 19.02.2016

आदेश /O R D E R

PER N.R.S. GANESAN, JUDICIAL MEMBER:

All the appeals of the assessee are directed against the common order of the Commissioner of Income Tax (Appeals)-6, Chennai, dated 13.02.2015, for the assessment years 2006-07, 2007-08, 2009-10 and 2010-11. Since common issues arise for

consideration, we heard all these appeals together and disposing of the same by this common order.

2. The first issue arises for consideration is with regard to disallowance of depreciation on goodwill in connection with takeover of unit from Ashok Leyland Limited.

3. Sh. R. Vijayaraghavan, the Ld.counsel for the assessee, submitted that the goodwill taken over by the assessee would include marketable, manufacturing right as well as trade name. Therefore, the surplus amount paid by the assessee would represent the payment made for commercial rights required by the assessee in connection with taking over of the unit from Ashok Leyland Limited. Therefore, according to the Ld. counsel, the assessee is entitled for depreciation on the goodwill in connection with takeover of the unit by the assessee. The Ld.counsel placed his reliance on the judgment of Apex Court in CIT v. SMIFS Securities Ltd. ((2012) 348 ITR 302. According to the Ld. counsel, goodwill is like intangible asset, therefore, entitled for depreciation at the rate of 25%.

4. On the contrary, Sh. Pathlavath Peerya, the Ld. Departmental Representative, submitted that the assessee purchased the unit called “Ductron Castings Unit” during the financial year 2005-06 relevant to assessment year 2006-07, as going concern from Ashok Leyland Limited, for a total consideration of ₹62 Crores. The assessee-company apportioned the said payment of ₹62 Crores between tangible and intangible assets. The assessee has apportioned ₹147.57 lakhs towards goodwill, other than net current asset of ₹2237.15 lakhs. All other items were taken as current assets in the books of account of the assessee. Referring to the order of the CIT(Appeals), more particularly, pages 9 and 10, the Ld. D.R. submitted that the assessee itself recognized two types of intangible assets acquired from the purchase of the Ductron Castings Unit of M/s Ashok Leyland Ltd. The assessee claimed before the lower authorities that technical knowhow was ₹618.96 lakhs and the goodwill was ₹147.57 lakhs. These are the two forms of intangible assets admitted and accounted by the assessee in its books of account. According to the Ld. D.R., the term “goodwill” includes variety of rights and things. Though all the items included in the goodwill are intangible items, however, everything is not automatically entitled for depreciation. Under the

provisions of Income-tax Act, certain intangible assets are entitled for depreciation. They are: (1) know-how, (2) patents, (3) copyright, (4) trademark, (5) licence, (6) franchise (7) any other business or commercial rights of similar nature. According to the Ld. D.R., only those assets, which were included in the above list, would be eligible for exception under Section 32(1)(ii) of the Income-tax Act, 1961 (in short 'the Act').

5. Referring to the contention of the assessee, the Ld. Departmental Representative submitted that “commercial right” means a residual right found in the expression like know-how, patents, copyrights, licences, franchises, etc. According to the Ld. D.R., the goodwill said to be acquired by the assessee would not fall within the expression of “any other business or commercial rights” which are in the nature similar to know-how, patent, copyright, etc. The Ld. D.R. further submitted that depreciation on intangible asset is allowable under Section 32(1)(ii) of the Act. However, the goodwill does not find place in the provisions of Section 32(1)(ii) of the Act. Hence, according to the Ld. D.R., the CIT(Appeals) has rightly confirmed the order of the Assessing Officer.

6. We have considered the rival submissions on either side and perused the relevant material available on record. We have carefully gone through the judgment of Apex Court in SMIFS Securities Ltd. (supra). In the case before Apex Court, the assessee claimed deduction towards depreciation on goodwill. The assessee claimed that the excess consideration paid by the assessee over the value of net asset to be considered as goodwill arising on amalgamation. However, the Assessing Officer found that the goodwill is not an asset. However, the Apex Court found that the assessee had acquired a capital right in the form of goodwill because of which the market worth of the assessee-company stood increased. In those circumstances, the Apex Court found that the assessee is entitled for depreciation on the goodwill which is in the nature of commercial asset. In the case before us, it is not in dispute that the assessee has purchased Ductron Castings Unit from M/s Ashok Leyland Ltd. The assessee has paid over the value of net asset to the extent of ₹147.57 lakhs and claimed the same as cost of the goodwill. However, the Assessing Officer disallowed the claim of the assessee on the ground that the payment does not fall within the meaning of know-how, patent or copyright. The Assessing Officer has not considered the judgment of Apex Court in

SMIFS Securities Ltd. (supra). The Apex Court, after considering the provisions of Explanation 3 to Section 32(1) of the Act found that the word “any other business or commercial rights of similar nature” in clause (b) of Explanation 3 indicates that goodwill will fall under the expression “any other business or commercial rights of similar nature”. In view of the above judgment of Apex Court in SMIFS Securities Ltd., we are unable to uphold the orders of the lower authorities. Accordingly, we set aside the orders of the lower authorities. The Assessing Officer is directed to allow depreciation at the applicable rate on the payment relatable to goodwill.

7. The next issue arises for consideration is with regard to disallowance of expenditure which was capitalized in the books of account.

8. Sh. R. Vijayaraghavan, the Ld.counsel for the assessee, submitted that the assessee incurred expenditure in connection with set up of unit for expanding its business. The expenditure was capitalized in the books of account. However, the assessee claimed the expenditure as revenue expenditure while computing the taxable income. According to the Ld. counsel, the expenditure incurred by the assessee was towards salary, wages, professional

and consultancy charges, travelling and conveyance expenses and loan processing fee. According to the Ld. counsel, the new unit set up by the assessee also engaged in the same business of iron castings. Therefore, the new unit set up by the assessee is only an expansion of existing business. The new unit is also under the same management. Therefore, the expenditure claimed by the assessee has to be allowed as revenue expenditure. The Ld.counsel placed his reliance on the judgments of Madras High Court in CIT v. Rane (Madras) Ltd. (2007) 293 ITR 459 and in CIT v. Sakthi Sugars Ltd. (2011) 339 ITR 400.

9. On the contrary, Sh. Pathlavath Peerya, the Ld. Departmental Representative, submitted that the assessee's balance sheet showed the capital work-in-progress at ₹1543/- lakhs which included the fixed assets schedule. According to the Ld. D.R., the new units established by the assessee at Sriperumbudur and Hyderabad are new industrial undertakings independent from the existing undertaking. The Ld. D.R. further clarified that the business of the existing unit of the assessee may be in the same line of business / manufacturing activity. However, the existing unit and new units are totally independent from each other. Once the

new units at Sriperumbudur and Hyderabad came into operation, they will operate differently and their income will be a separate source of income being independent undertakings. The Ld. D.R. further submitted that the new units at Sriperumbudur and Hyderabad were only in a formative stage and yet to become operational, therefore, the expenditure incurred by the assessee in the nature of salary, wages, professional and consultancy charges, travelling and conveyance expenditure will be in the nature of capital expenditure or pre-operative expenditure which will be capitalized. At the best, the assessee may claim the same over a period of five years at the rate of 1/5th per year under Section 35D of the Act. According to the Ld. D.R., the expenditure said to be incurred by the assessee is not for the business of the assessee. It is for setting up of new industrial undertakings. The new units established by the assessee may earn profit in the future. Therefore, there is no provision in the Income-tax Act to allow the expenditure incurred by the assessee in connection with setting up of new industrial undertaking. According to the Ld. D.R., the expenditure incurred by the assessee in setting up of new industrial undertakings should not be allowed as expenditure in the year in which the business activity or the new industrial undertaking is yet

to become operational. Therefore, according to the Ld. D.R., the CIT(Appeals) has rightly confirmed the order of the Assessing Officer.

10. We have considered the rival submissions on either side and perused the relevant material available on record. It is not in dispute that the assessee admittedly manufacturing iron castings. The new unit said to be established by the assessee is also admittedly manufacturing iron castings. When the assessee set up a new unit for manufacturing the same production, whether the expenditure incurred by the assessee is for expansion of the existing business or not? This question was considered by the Madras High Court in Rane (Madras) Ltd. (supra). In the case before the Madras High Court, the assessee was engaged in the production of recirculating ball type steering gears in the units situated at Velachery and Mysore. The assessee started a new unit at Pondicherry for manufacturing rack and pinion steering gears and incurred expenditure. The expenditure incurred in the new industry was claimed as revenue expenditure. The Assessing Officer treated the same as capital in nature holding that the Pondicherry unis is entirely a new unit. The Commissioner and the Tribunal,

however, found that the expenses as revenue in nature. On appeal before the High Court, the High Court found that the production and manufacturing in the new unit was one and the same. The industry set up at Pondicherry is nothing but extension of existing business at Velacherry and Mysore. Therefore, even though it is independent, because of the interconnection of management, financial, administrative and production aspects of each expenditure has to be construed as revenue in nature and therefore, deductible while computing the taxable income. This judgment of Madras High Court was followed in CIT v. Sakthi Sugars Ltd. (supra). In view of the above judgment of Madras High Court, this Tribunal is of the considered opinion that the expenditure claimed by the assessee has to be allowed as revenue expenditure. By respectfully following the judgments of Madras High Court in Rane (Madras) Ltd. (supra) and in Sakthi Sugars Ltd. (supra), the orders of the lower authorities are set aside and the Assessing Officer is directed to allow the expenditure incurred by the assessee in connection with the expansion of the units at Sriperumbudur and Hyderabad as revenue expenditure.

11. For the assessment years 2007-08, 2009-10 and 2010-11, the assessee has raised one more ground with regard to additional depreciation.

12. We have heard Ld.counsel for the assessee and the Ld. Departmental Representative. It is not in dispute that new machinery was installed during the year under consideration and the Assessing Officer has allowed 10% of depreciation since the machinery was put in use for less than six months. The assessee is claiming balance of 20% as depreciation in the year under consideration. Now the question arises for consideration is whether the additional depreciation which could not be allowed in the earlier year can be allowed during the year under consideration or not? This issue was examined by the Cochin Bench of this Tribunal in Apollo Tyres Ltd. v. ACIT (2014) 64 SOT 203. The Cochin Bench found that the additional depreciation can be allowed in the next year in case the same cannot be allowed in the earlier year. In fact, the Cochin Bench has observed as follows:-

> "9. We have considered the rival submissions on either side and also perused the material available on record. Section 32(1)(iia) reads as follows:
>
> "32(1)(iia) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed

after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing, a further sum equal to twenty per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii):

Provided that no deduction shall be allowed in respect of

(A Any machinery or plant which, before its installation by the assessee, was used either within or outside India by any other person; or

(B) Any machinery or plant installed in any office premises or any residential accommodation, including accommodation in the nature of a guest-house; or

(C) Any office appliances or road transport vehicles; or

(D) Any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any one previous year."

10. We have also carefully gone through the Second Proviso to section 32(1)(ii) of the Act, which reads as follows:

"Provided further that where an asset referred to clause (i) or clause (ii) or clause (iia), as the case may be, is acquired by the assessee during the previous year and is put to use for the

purpose of business or profession for a period of less than one hundred and eighty days in that previous year, the deduction under this sub-section in respect of such asset shall be restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under clause (i) or clause (ii) or clause (iia) as the case may be."

11. A bare reading of this section 32(1)(iia) clearly says that in case a new machinery or plant was acquired and installed after 31-03-2005 by an assessee, who is engaged in the business of manufacture or produce of article or thing, then, a sum equal to 20% of the actual cost of the machinery and plant shall be allowed as a deduction. It is not in dispute that the assessee has acquired and installed the machinery after 31-03- 2005. It is also not in dispute that the assessee is engaged in the manufacture of article or thing. Therefore, the assessee is eligible for additional depreciation which is equivalent to 20% of the actual cost of such machinery. The dispute is the year in which the depreciation has to be allowed. The assessee has already claimed 10% of the depreciation in the earlier assessment year since the machinery was used for less than 180 days and claiming the balance 10% in the year under consideration. Section 32(1)(iia) does not say that the year in which the additional depreciation has to be allowed. It simply says that the assessee is eligible for additional depreciation equal to 20% of the cost of the machinery provided the machinery or plant is acquired and installed after 31-03-2005. Proviso to section 32(1)(iia) says that if the machinery was acquired by the assessing during the previous year and has put to use for the purpose of business less than 180 days, the deduction shall be restricted to 50% of the amount calculated at the prescribed rate. Therefore, if the machinery is put to use in any particular year, the assessee is entitled for 50% of the prescribed rate of additional depreciation. The Income-tax Act is silent about the allowance of the balance 10% additional depreciation in the subsequent year. Taking advantage of this position, the assessee now claims that the year in which the machinery was put to use the assessee is entitled for 50% additional depreciation since the machinery was put to use for less than 180 days and the balance 50%

shall be allowed in the next year since the eligibility of the assessee for claiming 20% of the additional depreciation cannot be denied by invoking Second Proviso to section 32(1)(ii) of the Act.

12. This issue was considered by the Delhi Bench of this Tribunal in the case of Cosmo Films Ltd (supra). The revenue has taken a similar ground as taken before this Tribunal that the assessee cannot carry forward the additional depreciation to be allowed in the subsequent assessment year. The Delhi Bench of this Tribunal after considering the provisions of section 32(1)(iia) and proviso to section 321)(ii) of the Act found that when there is no restriction in the Act to deny the benefit of balance 50%, the assessee is entitled for the balance additional depreciation in the subsequent assessment year. In fact, the Delhi Bench of this Tribunal has observed as follows at pages 641 and 642 of the ITD:

" Thus, the intention was not to deny the benefit to the assessees who have acquired or installed new machinery or plant. The second proviso to section 32(1)(ii) restricts the allowances only to 50% where the assets have been acquired and put to use for a period less than 180 days in the year of acquisition. This restriction is only on the basis of period of use. There I no restriction that balance of one time incentive in the form of additional sum of depreciation shall not be available in the subsequent year. Section 32(2) provides for a carry forward set up of unabsorbed depreciation. This additional benefit in the form of additional allowance u/s 32(1)(iia) is one time benefit to encourage the industrialization and in view of the decision of Hon'ble Supreme Court in the case of Bajaj Tempo Ltd. v. CIT [1992] 196 ITR 188, the provisions related to it have to be construed reasonably, liberally and purposive to make the provision meaningful while granting the additional allowance. This additional benefit is to give impetus to industrialization and the basic intention and purpose of these provisions can be reasonably and liberally held that the assessee deserves to get the benefit in full when there is no restriction in the statute to deny the benefit of balance of 50% when the new machinery and plant were

acquired and used for less than 180 days. One time benefit extended to assessee has been earned in the year of acquisition of new machinery and plant . It has been calculated @15% but restricted to 50% only on account of usage of these plant & machinery in the year of acquisition. In section 32(1)(iia), the expression used I "shall be allowed". Thus, the assessee had earned the benefit as soon as he had purchased the new machinery and plant in full but it is restricted to 50% in that particular year on account of period usages. Such restrictions cannot divest the statutory right. Law does not prohibit that balance 50% will not be allowed in succeeding year. The extra depreciation allowable u/s 32(1)(iia) in an extra incentive which has been earned and calculated in the year of acquisition but restricted for that year to 50% on account of usage. The so earned incentive must be made available in the subsequent year. The overall deduction of depreciation u/s 32 shall definitely not exceed the total cost of machinery and plant . In view of this matter, we set aside the orders of the authorities below and direct to extend the benefit. We allow ground no.2 of the assessee's appeal. Since we have decided ground no.2 in favour of assessee, there is no need to decide the alternate claim raised in ground no.3. The same is dismissed."

13. This issue was also considered by another bench of this Tribunal at Delhi in SIL Investment Ltd (supra). At page 233 of the TTJ, the Tribunal has observed as follows:

"40. There is nothing on record to show that the directions given by the learned CIT(A) are not proper. The eligibility for deduction of additional depreciation stands admitted, since 50 per cent thereof had already been allowed by the AO in the asst.yr.2005-06, i.e. the immediately preceding assessment year. Therefore, obviously, the balance 50 per cent of the deduction is to be allowed in the current year, i.e. asst. yr. 2006-07. The learned CIT(A) has merely directed the verification of the contentions of the assessee and to allow the balance additional depreciation after such factual verification. Accordingly, finding no merit therein, ground No.3 raised by the Department is rejected."

> 14. A similar view was taken by Mumbai Bench of this Tribunal in MITC Rolling Mills (P.) Ltd. (supra). In view of the above decisions of the co-ordinate benches of this Tribunal on identical set of facts this Tribunal is of the considered opinion that the balance 50% of the depreciation has to be allowed in the subsequent year, therefore, the orders of the lower authorities on this issue are set side and the assessing officer is directed to allow the claim of balance 50% additional depreciation in the year under consideration."

In view of the above, this Tribunal is of the considered opinion that the assessee is eligible for additional depreciation. Accordingly, the orders of the lower authorities are set aside and the Assessing Officer is directed to allow the additional depreciation.

13. The next issue arises for consideration is with regard to depreciation on the amount paid to SIPCOT towards development of infrastructure. This issue arises for consideration for the assessment years 2009-10 and 2010-11.

14. Sh. R. Vijayaraghavan, the Ld.counsel for the assessee, submitted that the assessee has paid ₹6.2 Crores to SIPCOT for land development. The assessee claimed depreciation at the rate of 10%. However, the Assessing Officer disallowed the claim of the assessee on the ground that the assets obtained by the assessee as a result of payment is only a land. The Assessing Officer allowed the claim in respect of the building. The Assessing

Officer disallowed the claim of depreciation on the land. According to the Ld. counsel, the land development charges were paid for developing the area by laying roads, constructing culverts, providing electrical lines and other amenities required for setting up of industrial unit for which the land was allotted. According to the Ld. counsel, the roads, bridges, etc. are on par with the factory buildings, therefore, the assessee is eligible for depreciation at 10%. Therefore, according to the Ld. counsel, the assessee is eligible for depreciation at the rate of 10% which is applicable for building.

15. On the contrary, Sh. Pathlavath Peerya, the Ld. Departmental Representative, submitted that for claiming depreciation, the assessee should be the owner of the land and the building. In this case, the assets said to be established by SIPCOT are not owned by the assessee. The assessee has neither developed asset such as roads, bridges, etc. nor owned them. The amount collected from the assessee was to create certain infrastructural facilities for common use by the Government in the area so that the individual plots become fit for residential or industrial use, as the case may be. These infrastructural facilities like roads, electrical lines, drainage, etc. will not form part of any

tangible or intangible assets in the hands of the assessee. These infrastructures created by the SIPCOT may facilitate the SIPCOT or other Government agency and provide common facilities to the assessee. Therefore, according to the Ld. D.R., the land development charges paid by the assessee cannot form part of the cost of the capital asset.

16. Referring to the assessment order, the Ld. D.R. submitted that the assessee claims depreciation at the rate of 10%. The assessee has included ₹5,58,00,000/- in the building component which is getting a depreciation benefit of 10%. What was disallowed by the Assessing Officer is only in respect of the land part of the SIPCOT project. Therefore, the assessee cannot have any grievance at all.

17. We have considered the rival submissions on either side and perused the relevant material available on record. The assessee has contributed to SIPCOT for creation of common facilities such as roads, bridges, electrical lines, drainage, etc. These facilities are owned by the SIPCOT / Government and not by the assessee. Merely because the assessee contributed for establishment of common infrastructural facilities, it cannot be construed that the

assessee owned those facilities. For claiming depreciation under Section 32 of the Act, the assessee should be the owner of the property / asset and the same should be used for business of the assessee. In the case before us, the common infrastructural facilities may be assets of the SIPCOT or Government agency to provide certain infrastructural facilities to the assessee. It is not the case of the assessee that those amenities are tools for carrying out the business of the assessee. Unless and until the capital asset is used as a tool for carrying out the business of the assessee and the assessee becomes the owner, this Tribunal is of the considered opinion that the assessee may not be eligible for depreciation. Therefore, this Tribunal do not find any reason to interfere with the order of the lower authority. Accordingly, the order of the CIT(Appeals) is confirmed.

18. In the result, I.T.A. Nos.1590 and 1591/Mds/2015 are allowed and I.T.A. Nos.1592 and 1593/Mds/2015 are partly allowed.

Order pronounced on 19th February, 2016 at Chennai.

Sd/-	Sd/-
(ए. मोहन अलंकामणी)	(एन.आर.एस. गणेशन)
(A. Mohan Alankamony)	(N.R.S. Ganesan)
लेखा सदस्य/Accountant Member	न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,
दिनांक/Dated, the 19th February, 2016.
Kri.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)-6, Chennai
4. आयकर आयुक्त/CIT-II, Chennai
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.