

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G' NEW DELHI**

**BEFORE SHRI G.D. AGARWAL, VICE PRESIDENT
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA No.779/Del/2016
Assessment Year: 2012-13**

ACIT, Circle 6(2),
New Delhi

Vs Cyrobanks International India P Ltd.
F-27, Okhla Industrial Area, Phase-1
New Delhi.
PAN: AACCC6069Q

**Assessee by Shri Adesh Kumar Jain, CA
Revenue by Sh.S.S. Rana, CIT DR**

**Date of Hearing 06.3.2019
Date of Pronouncement 15.3.2019**

ORDER

PER K. NARASIMHA CHARY, JM

Challenging the order dated 20.11.2015 in Appeal No.637/14-15 passed by the Id. Commissioner of Income-tax (Appeals)-2, New Delhi (for short 'Ld. CIT(A)'), Revenue preferred this appeal.

2. Brief facts of the case are that the assessee, a private limited company, filed its return of income on 30.9.2012. The company is engaged in the business of storage and preservation of stem cells and umbilical cord. During the year under consideration, the assessee credited goodwill in its books of accounts and claimed depreciation on the same. Assessee explained that during the year under consideration, the assessee has purchased 9900 equity shares of Reviva Cell Research and Therapies Pvt. Ltd. from Ravikant Jaipuria & Sons (HUF). M/s. Reviva Cell Research and Therapies Pvt. Ltd. had been

carrying on the similar Laboratory business as the assessee had been carrying on. The assessee initially made the said company as its 100% subsidiary and acquired all its assets, liabilities, licenses, obligations, liberties, benefits, advantages etc. belonging to the said company and which was in the control of the said company. For acquiring all such intellectual property rights through the mode of amalgamation, the assessee acquired these shares along with the net worth of the company which works out to Rs.11,285/- which was treated as goodwill in the books of the company. The scheme of amalgamation was duly approved by the Hon'ble High Court of Delhi vide Company Petition No.513 of 2011, a copy of which has already been filed before the Ld. AO vide letter dated 6th February, 2015. The amount paid by the assessee for acquiring the company through the medium of amalgamation has been treated as goodwill in the books of the company and the difference between the net assets/liabilities and the price paid for amalgamating the company represents invaluable intangible rights to do business which has been treated as goodwill in the books of the assessee company. The depreciation has been claimed on the same u/s.32 of the Income-tax Act, as goodwill is one of the intangible assets on which depreciation is available.

3. Learned AO did not accept the contention of the assessee that the difference between the assets/liabilities and the price paid for amalgamating the company represents the invaluable intangible rights to do business which has been treated as goodwill in the books of the assessee company. Finding of the Ld. AO is that the assessee failed to substantiate as to what commercial rights the assessee had acquired under the scheme of amalgamation with Reviva Cell Research and Therapies P. Ltd., which was a loss making firm as is apparent from the Balance Sheet as on 31.3.2011 and the assessee had not made a case that the excess consideration was paid towards the reputation of the existing clientele and on the other hand, the only asset adopted while computing the net worth of the amalgamating company in this case is capital work in progress of

Rs.3.42 crores. According to the learned AO, the assessee had neither acquired nor had produced any evidence of acquisition of any intangible right or asset, clientele, technology, know-how etc of the amalgamating company which would help the assessee in increasing its market share.

4. Learned AO further recorded that one director of the assessee company namely Mr. Ravi Kant Jaipuria was also one of the two directors in Reviva Cell Research and Therapies Pvt. Ltd. since its very inception; that the shares of Reviva Cell Research and Therapies Pvt. Ltd. were purchased from RK Jaipuria & Sons (HUF); that it can be safely assumed that it is a clear case of circulation of own funds where the consideration paid for the purchase of the shares from RK Jaipuria & Sons is hugely in excess of the actual net worth of Reviva, which is supported by the fact that Reviva was incorporated only for a period of over a year and even the net worth on merger was Rs.11,285/-; that it cannot be said that the company had built a reputation and goodwill over years of experience which could benefit the assessee since Reviva was only incorporated in January 2010; that a consideration of Rs.4 crore for a company whose net liability is Rs.11,285/- and has been in existence for just over a year is not justified; that the entire circulation of funds between the assessee and its group company appears to be nothing but a scheme and a colourable device to avoid incidence of taxes; that the higher price paid towards the shares of a group company that results into goodwill in the hands of the assessee has brought about increased claim of depreciation and diminishing of taxes, which is nothing but a stage show to reduce the rightful amount of taxes to the exchequer. Learned AO, therefore, concluded that the assessee had not acquired any rights or information or other commercial or business while valuing the goodwill and therefore, the depreciation claimed by the assessee at Rs.1 crore was to be disallowed. Accordingly, learned AO added back the said amount of Rs.1 crore to the income of the assessee, by order dated 10.2.2015 u/s 143(3) of the Income-tax Act, 1961 (“the Act”).

5. Assessee preferred appeal before the learned CIT(A) and argued that consideration of Rs.4 crore was paid on acquisition of shares of M/s Reviva Cell Research and Therapies Ltd. from one Mr. Ravikant Jaipuria & Sons (HUF) and immediately thereafter, the said company became 100% subsidiary of the assessee; that the said amalgamation through the scheme of amalgamation was duly approved by the Hon'ble Delhi High Court on 20.12.2011; that when a business is acquired, all intangible rights, licences/obligations, liabilities, benefits belonging to the acquired business also come to the buyer; that such treatment has been claimed to be as per the Accounting Standards issued by the Institute of Chartered Accountants of India; that as has been claimed by the assessee that the valuation of business was also got done from an independent valuer and a report of which was filed with the AO through acknowledged letter dated 20.2.2015, yet the ld. AO has neither considered such valuation report nor the submissions of the assessee; that the letter dated 20.2.2015 refers to the hearing held on 10.2.2015 and has reiterated the facts pertaining to the transaction of acquisition of business by the assessee and has also relied upon the judgment of the Hon'ble Supreme Court in the case of CIT vs Smifts Securities Ltd., 2012-TIOL-53-SC-IT.; and that it has also been clarified that when the assessee purchased the shares from Ravikant Jaipuria & Sons (HUF), appropriate taxes had been paid by the said HUF on sale of these shares to the assessee company.

6. On consideration of the contentions raised by the assessee, learned CIT(A) found that the assessee has got the business of Reviva Cell Research & Therapies P. ltd. valued from a Chartered Accountant, who had valued the business more than what it was actually transacted at. From the valuation report of M/s O.P. Bagla & Co. Ld. CIT(A) found that the business based on average contribution multiple, has been valued at Rs.4.72 crores and based on discounted future contributions method, the business has been valued at Rs.4.45 crores. On this premise and in view of the decision of the Hon'ble jurisdictional

high Court in the case of Hindustan Coca Cola Beverages P. Ltd., 331 ITR 192 and the decision of the Hon'ble Supreme Court in the case of Smifs Securities Ltd. (supra), learned CIT(A) held that goodwill that arises on amalgamation of a company on account of extra consideration paid towards acquiring the intangible rights is entitled to depreciation and directed the AO to delete the addition.

7. Revenue is, therefore, in this appeal before us stating that the entire circulation of funds between the assessee and its group company was nothing but a colorable device to avoid incidence of taxes through which higher price was paid towards the shares of a group company that resulted into goodwill in the hands of the assessee and has brought about increase in claim of depreciation and diminishing of taxes.

8. It is the submission of the learned DR that the assessee failed to substantiate the commercial rights acquired by them under the scheme of amalgamation, and they failed to make out a case that the excess consideration was paid towards the reputation of the existing clientele. He justified the finding of the learned AO that the assessee had not acquired any intangible right or assets, clientele, technology, know-how etc, as such, the learned AO is right in his approach to make the addition. Learned DR further submitted that the learned CIT(A) considered the letter dated 20.2.2015 said to have been filed by the assessee before the learned AO after passing of the assessment order on 10.2.2015 and in all fairness, learned have sought the remarks of the learned AO when he was considering the material that was not before the learned AO at the time of the passing of the assessment order and by doing so, learned CIT(A) violated the principle of natural justice and on this ground, the impugned order cannot be sustained. Learned DR drew our attention to the contents of para 4.14 of the assessment order in which the fact of the transaction between the related parties is referred to by the learned AO and submitted that a cumulative effect

of all these facts show an amount of doubt to the genuineness of the transaction of the assessee paying exorbitant amounts to their related concerns and to create goodwill for claiming depreciation. He, therefore, prayed that the impugned order may be quashed and the order of the learned AO may be restored.

9. Per contra, it is the submission of the learned AR that as is evident from the impugned order vide para 3.2.5 at page 10, the assessee established on record that on sale of shares of Rs.4 crore from Ravikant Jaipuria & Sons (HUF) to the assessee, the said HUF had paid taxes due thereon and as per copy of ITR of Ravikant Jaipuria & sons (HUF) filed, the said HUF had paid total taxes of Rs.7.33 crores and capital gains of Rs.3.99 crores has been shown to have been earned by the said HUF from the sale of shares of Reviva Cell Research & Therapies (P) Ltd. which is the company that has amalgamated with the assessee during the year under consideration, as such, the contention of the ld. AO that this was a colourable device to avoid the payment of taxes is required to be dismissed because tax due as per law has been paid by the said HUF on sale of shares of M/s Reviva Cell Research & V Therapies P. Ltd. He further submitted that considering the totality of the facts and circumstances, learned CIT(A) reached a conclusion that the denial of depreciation on the amount of goodwill which had arisen in the books of accounts of amalgamation of business of M/s Reviva Cell Research and Therapies and learned CIT(A) rightly followed the decision of the Hon'ble jurisdictional High Court in the case of Hindustan Coca Cola Beverages P. Ltd. (supra) and Smifs Securities Ltd. (supra).

10. We have gone through the record in the light of the submissions made on either side. Here the question is not whether the depreciation is allowable on goodwill or not, but what the revenue is disputing is the value of the goodwill in the facts and circumstances of the case. It is a fact borne on record that as on the date of merger M/s Reviva Cell Research & Therapies Ltd. was a loss

making company and the liabilities are exceeding the assets by Rs.11,285/-. The goodwill paid by the assessee is Rs.4 crore and it is submitted on behalf of the assessee that this amount was paid towards the purchase of shares of Reviva Cell Research & Therapies Ltd. from R.K. Jaipuria & Sons (HUF) and then transferred to goodwill account.

11. Basing on record, we find strength in the submissions of the learned DR that the learned CIT(A) considered the letter dated 20.2.2015, which was found in the assessment folder. This letter was filed subsequent to the passing of the assessment order though the assessment order was dispatched on 21.2.2015. The order of the learned CIT(A) clearly speaks that the valuation of business was got done from an independent valuer and the report of the valuer was filed before the learned AO from letter dated 20.2.2015. It was submitted by the assessee before the learned CIT(A) that ld. AO failed to consider the valuation report and the submissions made by the assessee vide letter dated 20.2.2015. When the letter with valuation report was filed subsequent to the date of the assessment order dated 10.2.2015, it is but natural that such an important piece of evidence must not have been within the notice of the learned AO as on 10.1.2015.

12. Basing on the valuer's report, learned CIT(A) proceeded to observe that the business of Reviva Cell & Research Therapies Ltd. based on average contribution multiple was to be valued at Rs. 4.72 Cr and basing on discounted future³ contribution method it would at Rs.4.45 crore and thereby the average comes to Rs.4.58 crore. Basin on this, learned CIT(A) held that the amount of Rs.4 crore paid by the assessee cannot be considered as excessive and in any case, the assessee had paid the appropriate taxes on the transaction.

13. It is evident from the impugned order that when learned CIT(A) was considering the report of the valuer along with other submissions incorporated by the assessee in the letter dated 20.2.2015, which is obviously not considered

by the learned AO since such a material might not have been before the learned AO as on the date of the assessment order. In all fairness, learned CIT(A) should have given an opportunity to the learned AO to offer comments on such evidence which was not considered by him. However, since the learned CIT(A) considered the same to reach a conclusion that payment of Rs.4 crore by the assessee for purchase of shares of M/s Reviva Cell & Research Therapies Ltd. was not excessive or exorbitant without giving an opportunity to the learned AO to offer comments, we are of the considered opinion that there is violation of principle of natural justice and the matter requires consideration by the ld. AO in the light of the report of the valuer.

14. With this view of the matter, we set aside the impugned order and remand the issue to the file of the learned AO to consider it afresh in the light of the report of the valuer and also the other submissions filed by the assessee vide letter dated 20.2.2015 after giving an opportunity to the assessee of being heard.

15. In the result, appeal of the Revenue is allowed for statistical purposes.

Order pronounced in the Open Court on 15th March, 2019.

**Sd/-
(G.D. AGARWAL)
VICE PRESIDENT**

**sd/-
(K. NARASIMHA CHARY)
JUDICIAL MEMBER**

Dated: 15th March, 2019
VJ

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

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