

THE INCOME TAX APPELLATE TRIBUNAL
"G" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. No. 5479/Mum/2017 (Assessment Year 2012-13)

Grindwell Norton Ltd. C/o. Kalyaniwalla & Mistry LLP Esplanade House 2 nd Floor, 29, Hazarimal Somani Marg, Fort Mumbai-400 001 (Appellant)	Vs.	JCIT-1(1) Room No. 538 Aayakar Bhavan M.K. Road Mumbai-400 020. (Respondent)
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I.T.A. No. 5531/Mum/2017 (Assessment Year 2012-13)

DCIT-9(3)(2) Room No. 418 Aayakar Bhavan M.K. Road Mumbai-400 020 (Appellant)	Vs.	Grindwell Norton Ltd. C/o. Kalyaniwalla & Mistry LLP Esplanade House 2 nd Floor, 29, Hazarimal Somani Marg, Fort Mumbai-400 001 (Respondent)
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PAN : AAACG8725B

Assessee by	Shri Akram Khan
Department by	Shri Chaudhary Arun Kumar Singh
Date of Hearing	9.1.2019
Date of Pronouncement	2.4.2019

ORDER

Per Shamim Yahya (AM) :

These are cross appeals by the Revenue and assessee arising out of the order of learned CIT(A) dated 31.5.2017 and they pertain to A.Y. 2012-13.

2. First we take up the assessee's appeal :-

Grounds of appeal read as under :

This Appeal is against the Order of the Commissioner of Income-tax (Appeals)-56, Mumbai and relates to the Assessment Year 2012-2013.

1. *Both the lower authorities erred in applying Section 14A in respect of investments held by the appellant, when the income received thereon is not tax-free income.*
 2. *Without prejudice, both the lower authorities erred in rejecting the Appellant's contention that the disallowance of expenditure under Rule 8D(2)(iii) should be restricted to Rs.68,764/-.*
 3. *Both the lower authorities erred in rejecting the Appellant's contention that no disallowances under section 14A r.w.r. 8D lies in respect of investments which have not earned exempt dividend income.*
 4. *The Assessing Officer be directed to reduce the investments on which no dividend has been received while computing the average value of investments for the purpose of disallowing expenditure under Rule 8D(2)(iii).*
 5. *Having regard to the relevant facts and circumstances of the case it is submitted that the disallowance of expenditure under Rule 8D(2)(iii) is highly excessive and needs to be reduced substantially.*
3. At the outset, learned Counsel of the assessee stated that he shall not be pressing the ground number one. Hence, the same is dismissed as not pressed.
4. Rest of the grounds raised by the assessee relate to the assessee's claim that in making disallowance u/s. 14A Rule 8D(2)(iii) , only those investments should be considered which have yielded exempt income.
5. Upon hearing both the Counsel and perusing the records, we find that this issue is covered in favour of the assessee by the decision of the ITAT (Special Bench) in the case of Vireet Investments. Accordingly, respectfully following the above Special Bench decision, we allow this claim of the assessee. Accordingly we direct that in making disallowance u/s. 14A rule 8D(2)(iii) only those investments should be considered which have yielded exempt income.
6. Revenue Appeal :
- Grounds of appeal :-
- i) *"Whether on the facts and in the circumstances of the case, the Ld.CIT(A) erred in directing the AO to allow depreciation on intangible*

assets relying on the decision of the Supreme Court in the case of CIT V/s Smifs Securities Ltd. 348 ITR 302 (SC), the facts of which are distinguishable from the acts of the assessee's case."

ii) *"Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in directing the AO to allow depreciation on intangible assets as appearing in audited books of accounts of the assessee without appreciating the fact that unlike in the case of Smifs Securities Ltd, where the claim for depreciation on goodwill was made in the return of income, the assessee made the claim for depreciation by filing a letter during the course of assessment proceedings and not in a return of income".*

iii) *"Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in ignoring the fact while allowing the depreciation that a revised claim can be filed only by way of filing revised return of income and not otherwise as cited in High Court's decision in the case of Goetze (India) Ltd. Vs. CIT(2006) 157 Taxman 1(SC):.."*

The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the DCIT 9(3)(2) be restored.

The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary.

7. At the outset, learned Counsel of the assessee stated that the issue is squarely covered in favour of the assessee by the ITAT decision in assessee's own case for earlier years.

8. Upon hearing both the counsel and perusing the records we find that on the issue of depreciation on intangibles learned CIT(A) has decided the issue in favour of the assessee by referring to ITAT decision in assessee's own case for earlier years as under :-

This issue now stands covered in favour of the assessee by the decision of the Hon'ble Income-tax Appellate Tribunal in the Appellant's own case for the Assessment Years 2007-2008 and 2008-2009 and subsequently the Tribunal order for the Assessment Year 2009-2010 and also by the order of Commissioner of Income-tax (Appeals) for Assessment Year 2011-2012. Respectfully following the decision of the Income-tax Appellate Tribunal and Commissioner of Income-tax (Appeals), I hold that the Appellant is entitled to depreciation on the Intangibles assets acquired as part of acquisition of the grinding wheels business of Orient Abrasives Ltd.

In view of the same these grounds are allowed.

9. Upon careful consideration we find that the issue involved is squarely covered in favour of the assessee by the decision of ITAT in assessee's own case. We may refer to the ITAT decision in assessee's own case for A.Y. 2010-11 in ITA no. 3589/Mum/2018 :-

9. Insofar as Grounds of appeal no. 5 to 9 are concerned, they relate to a singular issue relating to allowance of depreciation on the intangible assets, namely Trademark - Rs.2,00,00,000/-, Technical know-how - 3,50,00,000/-, Marketing network - Rs.3,75,00,000/- and Non-compete fees - Rs.4,02,50,000/- totalling to Rs.13,27,50,000/-.

10. On this aspect, it was a common point between the parties that the said controversy has been dealt with by the Tribunal in assessee's own case for Assessment Years 2007-08 and 2008-09 vide order dated 27.7.2016 (supra). In this context, the relevant discussion in the order of Tribunal reads as under :-

"5.7. We have gone through the orders of the lower authorities and judgments relied upon before us. The solitary issue involved here is about the allowability of the depreciation on the amount of intangible assets acquired by the assessee as part of deal of acquisition of Grinding Wheel Business of OAL in terms of the Business Transfer Agreement dated 18.04.2006 entered by the assessee with the said company. It is noted by us that from the perusal of the business agreement enclosed at paper book no. 27 to 87 that assessee acquired Grinding Wheel Business of OAL along with its tangible and intangible assets including Goodwill, intellectual property rights e.g. patents, copyrights, past and present R & D works, brands, trademark, service marks, registered design etc. and all other rights available to prevent the misuse or disclosure of trade secrets. The assessee also submitted valuation report from M/s. Anmol Sekhri and Associates, the Registered Valuers (enclosed at page no. 10 to 192 of the paper book) for ascertaining valuation of the business giving values of each and every fixed assets and other intangible assets acquired by the assessee under the aforesaid deal. It is noted by us that the lower authorities have granted the benefit of depreciation on the amount of fixed assets acquired i.e. plant and machinery etc. Thus, genuineness of transaction has not been doubted, but what has been doubted merely is the 'valuation' of intangible assets acquired under the deal. It is to be noted here that factum of acquisition of intangible assets has also not been

disputed. Thus, under these circumstances, case made out by the lower authorities is that the amount paid by the assessee for its business is more than the appropriate value of its intangible assets. The assessee has also admitted this position that the assessee has paid an amount which is more than the amount of its tangible assets because of numerous intangible assets acquired by the assessee which were quite valuable in the opinion of the assessee. Under these circumstances, we can say that since the assessee had purchased the Grinding Wheel Business from OAL as a going concern, therefore, amount of consideration paid in excess of value of tangible assets would be accounted for in its books of accounts as 'Goodwill'. Under these circumstances, no further exercise would be required to make precise valuation of the amount of 'Goodwill'. There are no doubts about the legal position that as per law, the assessee is eligible to claim depreciation on the amount of Goodwill. It is worth noting that this legal position has been accepted by Ld. CIT(A) in the subsequent year i.e. A.Y. 2008-09 wherein claim of depreciation on Goodwill was accepted and order of CIT(A) has been accepted by the revenue also as no appeal has been filed against the said decision. Our view finds support from the judgment of Hon'ble Delhi High Court in the case of TRIUNE ENERGY SERVICES PRIVATE LIMITED v. DCIT 65 taxmann.com 288(Delhi) wherein identical issue was involved, in similar facts and circumstances. Hon'ble Delhi High Court relied upon the judgment of Apex Court in the case of CIT vs. Smifs Securities Ltd. (348 ITR 302) and held as under:

"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. 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 asset, 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 the 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.

In view of Accounting Standard 10 as issued by the [CAI the assessee's contention was right that the consideration paid by the assessee in excess of value of tangible assets was rightly classified as goodwill.

In the facts of the present case, the Tribunal 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 specifically recorded goodwill at Rs. 40.58 crore. 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."

5.8. In the case before us also the facts are identical. The Grinding Wheel Business has been acquired under a slump sale, under a Business Transfer Agreement with OAL. The said agreement has not been held to be bogus or sham. It can neither be rewritten or nor has been written by the lower authorities. The AO had made direct inquiries with OAL wherein it was confirmed that the assessee had paid sales consideration as per the terms of the agreement and the tangible assets were acquired as stated in the said agreement and accepted by the AO and depreciation was allowed on the same as per facts brought before us. Under these circumstances, any amount of consideration paid over and above the value of tangible assets would be classified as amount of Goodwill on which the assessee would be entitled for depreciation in view of judgment of Hon'ble Supreme Court in the case of [CIT vs Smifs Securities Ltd](#), (supra). Similar view has been taken by Hon'ble Pune Bench in the case of [Cosmos Co-op Bank Ltd. v. DCIT](#) (64 SOT 90) and coordinate Bench of Mumbai in the case of [DCIT vs. Worldwide Media](#)

Pvt Ltd 153 ITD 162. It is further noted by us that Delhi Bench of ITAT in the case of [Thyssenkrup Elevator \(India\) Pvt. Ltd. v. ACIT 167 TTJ 131](#) also held that where the assessee had acquired business of another company on slump sale basis, excess consideration paid by it over and above the value of net asset acquired, was to be considered as Goodwill u/s 32(1)(ii) which was eligible for depreciation.

5.9. In addition to the above, on facts also, it is noted by us that the assessee brought on record ample evidences in support of its claim to justify the acquisition of various other intangible assets and the justification of their valuation as well as admissibility of depreciation on these assets. It is noted that the Business Transfer Agreement was quite exhaustive having elaborate schedules and annexures containing item wise description of each and every tangible and intangible assets acquired by the assessee. The assessee acquired entire plant and machinery, various trademarks, commercial list of customers and dealers, entire data and information in relation to sales and distribution network, of technical know-how, Goodwill of Grinding Wheel Business, rights of non-competition etc were described in the said agreement. It is further noted that proper break-up and justification for the consideration has been narrated in the said agreement. The said agreement also contains lists of employees of OAL to be taken-over by the assessee company. It also containing the list of trademarks, particulars of goodwill of business of the OAL in the form of business data, customer details, specifications and quality requirement for the products, trade secrets and other confidential information, software process and similar other intangible assets. There was a proper valuation report specifying separate value of each and every asset of tangible or intangible nature. It is also noted that the AO made direct inquiries with OAL in response to which proper reply was given by the OAL confirming the transactions. The OAL submitted letter dated 21.02.2009 to the AO wherein it was inter alia confirmed that the said company transferred its abrasive division situated at Bhiwadi (Rajasthan) to the assessee company for a total consideration of Rs.26.17 crores. It is also brought to our notice that subsequent to the take-over, the assessee company filed petitions with the concerned departments for registration of trademarks in the name of Assessee Company. It is further noted by us from the perusal of the order of Ld. CIT(A) wherein it has been accepted that the assessee had produced before him (i.e. CIT(A)) more than 26 files containing evidences with regard to acquisition of technical know-how. Under these circumstances, we find that there was no basis with the lower authorities to hold that no intangible assets were acquired by the assessee. Thus, viewed from any angle, the assessee is eligible for the claim of depreciation u/s 32(1)(ii) on the amount of intangible assets acquired by it as per Business Transfer Agreement, and thus action of lower authorities was not factually or legally justified while making disallowance of the

depreciation on the intangible assets. The AO is directed to grant the benefit of depreciation in terms of section 32(1)(ii) upon the intangible assets acquired by the assessee. Thus, these grounds are allowed in favour of the assessee."

11. Following the aforesaid precedent, which has been rendered by the Tribunal in assessee's own case on a similar issue, we allow the plea of assessee and direct the Assessing Officer to allow depreciation on the aforestated intangible assets, as per law. Thus, on this aspect also, assessee succeeds.

10. Upon careful consideration we find that the issue involved is squarely covered in favour of the assessee by the decision of the ITAT in assessee's own case. No. distinguishing feature operating for the year under appeal has been brought to our notice. It is not the case that Hon'ble Hon'ble Jurisdictional High Court has reversed the order of ITAT.

11. Hence, respectfully following the above precedent we uphold the order of learned CIT(A).

12. We find that reference has been raised by the Revenue that learned CIT(A) has allowed the assessee's claim despite the issue not being raised by revised return.

13. On this issue upon hearing both the counsel and perusing the records we find that Hon'ble Apex Court in the case of Goetze India itself had expounded that the Hon'ble Apex Court decision in that case would not impinge upon ITAT's power to adjudicate grounds raised otherwise than by revised return.

14. Moreover, learned Counsel of the assessee has referred to the decision of Hon'ble Bombay High Court in the case of CIT Vs. Pruthvi Brokers and Shareholders Pvt. Ltd. (349 ITR 336) for the proposition that appellate authority have powers to adjudicate due claim not made in return.

15. The decisions referred by learned DR on the issue of depreciation by the other ITAT Benches, are not applicable on the facts of the present case, as the issue has been decided by the ITAT in assessee's own case in assessee's favour, wherein reliance has inter alia placed upon Hon'ble Supreme Court decision in CIT Vs. Smif Securities Ltd. (348 ITR 302).

16. In the result, assessee's appeal is partly allowed and Revenue's appeal is dismissed.

Order has been pronounced in the Court on 2.4.2019.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 2/4/2019

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Senior Private Secretary)
ITAT, Mumbai

PS