

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "K", MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND  
SHRI RAJESH KUMAR, HON'BLE ACCOUNTANT MEMBER**

**ITA NO.347/MUM/2017 (A.Y: 2011-12)**

A.C.I.T – 9(3)(2) 418, 4 <sup>th</sup> Floor, Aayakar Bhavan, M.K. Road, Mumbai-400 020	v.	M/s Grindwell Norton Ltd., Leela Business Park, 5 <sup>th</sup> Level, Andheri Kurla Road Mumbai – 400 099  <b>PAN: AAACG 8725 B</b>
<b>(Appellant)</b>		<b>(Respondent)</b>

**ITA NO.404/MUM/2017 (A.Y: 2011-12)**

M/s Grindwell Norton Ltd., Kalyaniwalla & Mistry LLP, Army & Navy Building, 3 <sup>rd</sup> Floor, 148 M.G. Road, Fort, Mumbai – 400 001  <b>PAN: AAACG 8725 B</b>	v.	Dy. Commissioner of Income-tax -1(3)(2) Room No. 535, 5 <sup>th</sup> Floor, Aayakar Bhavan, M.K. Road, Mumbai-400 020
<b>(Appellant)</b>		<b>(Respondent)</b>

**Assessee by** : **Shri Akram Khan**  
**Department by** : **Shri Kiran Unavekar**  
  
**Date of Hearing** : **28.01.2019**  
**Date of Pronouncement** : **12.04.2019**

**ORDER****PER C.N. PRASAD (JM)**

1. These two appeals are filed by the assessee and Revenue against the order of the Learned Commissioner of Income-tax(Appeals)-56, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 30.09.2016 for the Assessment year 2011-12 arising out of the assessment order passed u/s.143(3) r.w.s 144C of the Act.

2. Assessee in its appeal challenged the order of the Ld.CIT(A) in not excluding the investments which did not yield dividend income while computing the disallowance u/s. 14A of the Act read with Rule 8D(2)(iii) of I.T. Rules.

3. Ld. Counsel for the assessee submitted that the contention of the assessee was rejected by the Ld. CIT(A) for the reason that assessee made its claim only during the course of assessment proceedings and not by way of filing revised return. Therefore, Ld.CIT(A) referring to the decision of the Hon'ble Supreme Court in the case of Goetze (India) Ltd v. CIT [284 ITR 323], rejected the claim of the assessee. Ld. Counsel for the assessee submits that any such additional claim can be raised before the appellate authorities even though assessee not filed revised return making its claim and this view is supported by the Hon'ble Bombay High Court in the case of CIT v. Pruthvi Brokers and Shareholders Pvt. Ltd.,

[349 ITR 336]. On merits, Ld. Counsel for the assessee submits that, this issue is covered in favour of the assessee by the Special Bench of ITAT, Delhi in the case of ACIT v. Vireet Investments Private Limited [165 ITD 27].

4. We have heard the rival submissions, perused the orders of the Authorities below. The Hon'ble Bombay High Court in the case of CIT v. Pruthvi Brokers and Shareholders Pvt. Ltd., (supra) considering the decision of the Hon'ble Supreme Court in the case of Goetze (India) Ltd v. CIT (supra) held that the appellate authority has the power to entertain any fresh claim, even though the assessee has not made such claim in the return of income. In view of this decision, the Ld. CIT(A) should have entertained the claim of the assessee.

5. Coming to the merits of the case, we find that the issue is squarely covered by the decision of the Special Bench in the case of ACIT v. Vireet Investments Private Limited (supra), wherein it has been held that only those investments are to be considered for computing average value of investment which yielded exempt income during the year. Thus, respectfully following the said decision, we hold that the investments which yielded dividend income/exempt income only have to be considered while computing the disallowance under Rule 8D(2)(iii) of I.T. Rules.

Thus, we direct the Assessing Officer to recompute the disallowance in the light of the decision of the Hon'ble Special Bench by excluding the investments which does not yield any exempt income. Grounds raised by the assessee on this issue are partly allowed.

6. Coming to the appeal of the Revenue, Ground No.1 of grounds of appeal is in respect of depreciation of intangible assets. The Ld. CIT(A) directed the Assessing Officer to allow depreciation on intangible assets.

7. At the outset, Ld. Counsel for the assessee submits that the issue has been decided by the Tribunal in assessee's own case for the A.Ys. 2007-08 & 2008-09 in ITA.No. 528/Mum/2012 & ITA.No. 5800/Mum/2013 dated 27.07.2016 and subsequently this has been followed by the Tribunal for the A.Ys. 2009-10 & 2010-11 in ITA.No. 523/Mum/2014 dated 30.09.2016 & ITA.No. 3589/Mum/2016 dated 30.08.2018 and allowed the claim for depreciation on intangible assets in favour of the assessee.

8. Ld. DR vehemently supported the orders of the Assessing Officer.

9. We have heard the rival submissions, perused the orders of the Authorities below, and the decisions of the ITAT referred by the Ld. Counsel. On a perusal of the ITAT orders, we find that the Tribunal decided this issue in the A.Ys. 2007-08 & 2008-09 directing the Assessing

Officer to grant benefit of depreciation in terms of section 32(1)(ii) on intangible assets acquired by the assessee observing 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 noncompetition 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 takeover, 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."*

10. Following this order, similar view has been taken by the Tribunal for the A.Ys. 2009-10 & 2010-11 in ITA.No. 523/Mum/2014 dated 30.09.2016 & ITA.No. 3589/Mum/2016 dated 30.08.2018. Thus, following the above said precedents which have been rendered in the assessee's own case on similar issue, we dismiss the ground raised by the Revenue and direct the Assessing Officer to allow depreciation on intangible assets.

11. Ground No.2 of grounds of appeal is in respect of disallowance u/s.14A of the Act. The Revenue contended that, Ld. CIT(A) erred in granting relief to assessee u/s. 14A of the Act holding that no exempt

income was earned during the year. Ld. Counsel for the assessee submits that this ground of appeal does not arise from the order of the Ld.CIT(A) since no such relief was granted by the Ld.CIT(A) on the ground that no exempt income was earned by the assessee during the year, when in fact the assessee earned exempt income during this year. On a perusal of the order of the Ld.CIT(A), we find that this ground does not arise from the order of the Ld.CIT(A), hence the same is dismissed as not arising out of the order of the Ld.CIT(A).

12. Coming to the Ground No.3 of the Revenue's appeal, the Revenue challenged the order of the Ld.CIT(A) in directing to delete the transfer pricing adjustment in respect of corporate guarantee commission.

13. Ld. Counsel for the assessee submits that identical issue has been decided in assessee's own case for the A.Y. 2009-10 by the Tribunal in ITA.No. 523/Mum/2014 dated 30.09.2016. Ld. Counsel for the assessee referring to Page No. 19, Para 22 of the Tribunal order submitted that the assessee provided corporate guarantee to Bank of Bhutan for its AE M/s. Saint-Gobain Ceramic Materials Bhutan Pvt. Ltd., and charged 1% corporate guarantee fee from its AE. However, the TPO determined the arm's length price of such transaction @3.35%. The Tribunal considering the submissions of the assessee and taking note of the facts of the case

accepted the corporate guarantee fee charged @1% by the assessee and held that no transfer pricing adjustment is required in the facts of the case. Ld. Counsel for the assessee submits that this year similar corporate guarantee was provided to its AE M/s. Saint-Gobain Ceramic Materials Bhutan Pvt. Ltd., and assessee charged 1% of corporate guarantee fee from its AE. However, the TPO computed the arm's length rate @2.3%, therefore, facts and circumstances being identical the transfer pricing adjustment made by the Assessing Officer was rightly deleted by the Ld. CIT(A).

14. Ld. DR vehemently supported the orders of the Assessing Officer.

15. We have heard the rival submissions, perused the orders of the Authorities below. On a perusal of the order of the Tribunal for the A.Y.2009-10, we find that assessee charged 1% of the Corporate Guarantee fee from its AE on the corporate guarantee provided on behalf of its AE M/s. Saint-Gobain Ceramic Materials Bhutan Pvt. Ltd. However, the Transfer Pricing Officer determined the arm's length price of such transaction @3.3.5. The Tribunal held that Corporate Guarantee fee charged by the assessee @1% is well founded and does not require any Transfer Pricing Adjustment. The Ld. CIT(A) following the order of the Tribunal for A.Y. 2009-10 deleted the transfer pricing adjustment made on

account of corporate guarantee observing that facts remained identical to that in the A.Y. 2009-10. The Tribunal while coming to the conclusion that there shall not be any Transfer Pricing Adjustment, held as under:

“22. We have carefully considered the rival submissions. In the present case, AE of the assessee, M/s. Saint-Gobain Ceramic Materials Bhutan Pvt. Ltd., which is based in Bhutan, raised a term loan from Bank of Bhutan Ltd., Bhutan in the month of January, 2009 and the amount outstanding as on 31st March was Rs. 6,29,32,450/-. The assessee company provided Corporate Guarantee to the Bank of Bhutan in connection with the said borrowing on behalf of its AE. The provision of such Corporate Guarantee is quite well understood and it means that if the AE was to default in the repayment of loan availed from the Bank, assessee would step in and make good the dues owned to the Bank. The assessee-company has charged Corporate Guarantee fee @ 1% from its AE and such transaction has been considered as an ‘international transaction’ within the meaning of Sec. 92B of the Act. Accordingly, the arm’s length price of such transaction has been determined by the TPO at 3.35%, which has resulted in enhancement of assessee’s income by a sum of Rs. 2,12,937/-. The issue before us is restricted to whether the arm’s length rate of the Corporate Guarantee is to be taken at 1%, which has been charged by the assessee, or the rate of 3.35% determined by the income-tax authorities.

23. Notably, the TPO has benchmarked the instant transaction of provision of Corporate Guarantee on the basis of respective abilities of the assessee and AE to raise Bonds in the Indian domestic market. The TPO asserted that based on the debt-equity ratio the credit rating of the assessee-company was higher in comparison to that of the AE and, therefore, the rate of interest payable by the AE to raise Bonds in the Indian market would be higher than the rate payable by the assessee company. Such differential has been used to determine the Corporate Guarantee fee that should have been charged by the assessee-company from its AE so as to determine the arm’s length price of the instant transaction. In our considered opinion, the aforesaid approach of the TPO is clearly inconsistent with the ratio laid down by the Hon’ble Bombay High Court in the case of Everest Kanto Cylinder Ltd. (supra). Notably, in the case of Everest Kanto Cylinder Ltd. (supra), the dispute was relating to the adjustment made by the TPO in the matter of Guarantee commission earned for providing a Corporate Guarantee to the Bank in connection with the borrowings made by the AE of the assessee therein. The TPO determined the arm’s length price of such transaction based on the instances of commercial banks providing Guarantee on behalf of their clients. The Hon’ble High Court held that the considerations which apply for issuance of Corporate Guarantee were distinct and separate from that of Guarantee provided by the banks and, therefore, the two transactions were incomparable. In our considered opinion, similar parity of reasoning is applicable in the present case too because the considerations which weigh for raising of Bonds, that too in Indian market, are quite distinct and incomparable with the instance of providing of Corporate Guarantee to a bank abroad in connection with raising of loan from such bank by the AE of assessee outside India. Therefore, in our considered opinion, the exercise carried out by the TPO to arrive at the arm’s length rate of 3.35% suffers from an inherent misconception as the benchmarking has been done between two incomparable situations. Therefore, we are unable to uphold the said stand of the income-tax authorities.

24. Insofar as the adequacy of 1% rate charged by the assessee is concerned, we find enough reasonableness in the same. In this context, the learned representative for the assessee referred to various decisions of the Tribunal, viz.,

*Hindalco Industries Ltd. v. ACIT (62 taxmann.com 181) (Mum Trib.), Thomas Cook (India) Ltd. v. ACIT (69 taxmann.com 443) (Mum Trib.) and Godrej Consumer Products Ltd. v ACIT (69 taxmann.com 436) (Mum Trib.), wherein the arm's length rate of 0.5% has been approved in the matter of benchmarking Guarantee commission fee chargeable from Associated Enterprises. On this aspect, we may observe that each case would have to be decided in the light of the prevailing facts and circumstances. In the present case, a point which has been consistently made by assessee is to the effect that there is no concept of credit rating in Bhutan and that the banks charge a uniform rate of interest on the term loans, which is 12%. Secondly, it is pointed out with reference to the Balance-sheet of AE that it has adequate debt-equity ratio to raise such loan from the Bank of Bhutan. In fact, it has also been pointed out, and which is reflected from the Notes in the Balance-sheet of AE, that the Corporate Guarantee has been advanced by the assessee-company only for 35% of the sanctioned loan. Under these circumstances, it can be safely inferred that providing of Corporate Guarantee was not a 'critical mass', which enabled the AE to raise term loan from Bank of Bhutan Ltd. Moreover, the savings to the assessee-company in the shape of lower production costs on procurement of material from the AE is also a relevant factor. Thus, considering the entirety of the facts and circumstances of the case, in our view, Corporate Guarantee fee charged by the assessee @ 1% is well-founded and does not require any Transfer Pricing adjustment. Thus, we set-aside the order of CIT(A) and direct the Assessing Officer to delete the addition of Rs.2,12,937/-. Thus, Grounds of appeal no. 13 & 14 are allowed."*

16. Facts being identical, respectfully following the order of ITAT for the A.Y. 2009-10, we uphold the order of the Ld.CIT(A) in deleting the Transfer Pricing Adjustment on account of Corporate Guarantee Commission and reject the grounds raised by the Revenue.

17. In the result, appeal of the assessee is partly allowed and appeal of the Revenue is dismissed.

Order pronounced in the open court on the 12<sup>th</sup> April, 2019

Sd/-  
**(RAJESH KUMAR)**  
**ACCOUNTANT MEMBER**  
Mumbai / Dated 12/04/2019  
Giridhar, Sr.PS

Sd/-  
**(C.N. PRASAD)**  
**JUDICIAL MEMBER**

**Copy of the Order forwarded to:**

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

//True Copy//

BY ORDER

(Asstt. Registrar)  
**ITAT, Mum**