

IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH KOLKATA

BEFORE SHRI S. S. GODARA, JM & Dr. A. L. SAINI, AM

आयकर अपीलसं./I.T.A No.881/Kol/2019

(निर्धारण वर्ष / Assessment Year: 2012-13)

ACIT, Circle-11(2), Kolkata.	Vs.	M/s. Shristi Infrastructure Pvt. Ltd. Plot No.X-1,2 and 3, Block-EP, Sector-V, Salt Lake City, Kolkata – 700091.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AABCP5074F		
(Appellant)	..	(Respondent)

Appellant by : Smt. Ranu Biswas, Addl. CIT

Respondent by : Shri Sunil Surana, FCA

सुनवाईकीतारीख/ Date of Hearing : 16/12/2019

घोषणाकीतारीख/Date of Pronouncement : 31/12/2019

आदेश / O R D E R

Per Shri S. S. Godara:

This assessee's appeal for assessment year 2012-13 arises against the Commissioner of Income Tax (A) - 4, Kolkata dated 26.12.2018 passed in Case No.738/CIT(A)-4/2015-16 involving proceedings u/s 143(3) of the Income Tax Act, 1961 (in short 'the Act').

Heard both the parties. Case file perused.

2. The Revenue' sole substantive grievance raised in the instant appeal seeks to reverse the CIT(A)'s action deleting disallowance of depreciation on goodwill amounting to Rs.187,50,000/- made by the Assessing Officer in his regular assessment framed on 31.03.15. The CIT(A)'s detailed discussion to this effect reads as under:

“4. GROUND NO. 3:

This ground is directed against the action of the A.O. in disallowing depreciation on goodwill for an amount of INR 187;50,000/-. The goodwill in subject was acquired during merger of two companies i.e. the erstwhile Shristi Infrastructure Development Corporation Limited with Peerless Abasan Finance Limited in accordance with the orders of the Delhi High Court & Calcutta High Court. Subsequently, the name of Peerless Abasan Finance Limited was changed to Shristi Infrastructure Development Corporation Limited. The difference between the cost of net assets and the amount paid by the transferee company, in terms of scheme of Amalgamation, was recorded as goodwill, i.e. for Rs. 10,00,00,000/-.

4.1. AO'S CASE:

The AO has made the following comments in his assessment order:-

In the submission made by the AR of the assessee company that a sum of Rs. 10 crores has been recorded as goodwill in the books of Shristi Infrastructure Development Corporation Ltd during F.Y. 2006-07. But on-going through the tax audit report and profit & loss A/c and balance sheet of the assessee company Shristi Infrastructure Development Corporation Ltd. filed for the Financial Year 2006-07 filed along with the return of income for the A.Y. 2007-08, it is revealed that there was no goodwill reflected as an asset. Therefore, the claim of the assessee company is baseless that goodwill to the tune of Rs. 10 crores was recorded as an asset in the F.Y. 2006-07. Therefore the depreciation of Rs.1,87,50,000/- claimed on goodwill is disallowed and added back to the total income.

4.2. ASSESSEE'S CASE:

The Ld. A/R of the appellant has made the following submissions in support of its grounds of appeal:-

At the outset reference is invited to the provisions of section 32(1) of the Act, which reads as follows-

"32. (1) [In respect of depreciation of -

(i) buildings, machinery, plant or furniture, being tangible assets;

(ii) know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed

For the purposes of this section, the term assets has been defined in Explanation 3 to the provision. The relevant extract of the explanation is given below for your kind perusal-

.....Explanation 3.-For the purposes of this sub-section, {the expression "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

1.2 Therefore on a bare reading of the provisions of section 32(1) of the Act read with Explanation 3, it is clear that depreciation is allowable on any other business or commercial rights of similar nature'.

1.3 To understand whether goodwill can be considered as any other business or commercial rights of similar nature attention of your goodself is invited to the decision of the Hon'ble Supreme Court

in the ease of the Commissioner of Income Tax vs. Smifs Securities Ltd [2012] 24 taxmann.com 222 (SC). The Hon'ble Apex Court held that depreciation is allowable on 'goodwill' arising pursuant to a merger.

1.4 The decision of the Apex Court has also been followed in the judicial pronouncements mentioned below wherein it was held that depreciation is allowable on goodwill arising on merger:

- DCIT vs Worldwide Media (2014) (43 Taxmann.com 18 - Mum ITAT

-Triune Energy Services (P) Ltd. us DCIT (2016) (65 taxmann.com 288 – Del HC)

-Cyber India Online Ltd. vs ACIT (2014)(42 Taxmann.com 108)

1.5 In light of the above, it is apparent that the depreciation is allowable on goodwill.

1.6 The Ld. AO in its order has also not contested that the depreciation on goodwill is not allowable u/ s 32(1)(ii) of the Act. The Ld. AO has disallowed the depreciation on goodwill merely on the contention that the goodwill is not reflected in the post-merger audited financial statement and the tax audit report.

1.7 In this regard, it is humbly submitted that post approval of merger by the Hon'ble High Court of Delhi and Hon'ble Calcutta High Court, the audited financial statement for FY 2006-07 clearly reflected the amount of goodwill for a sum of Rs. 1 00,000,000/- that arose pursuant to the merger. The same was also filed with the Ld. AO vide letter dated 27 February 2015. Copy of the relevant extract of the audited financial statement for FY 2006-07 of the Appellant is enclosed and marked as Annexure 3.

1.8 The Appellant had claimed the depreciation @ 25% on the sum o/ Rs. 100,000,000/- during the A.Y. 2011-12 in accordance with the provisions of section 32(1)(i), of the Act read with section 43(6) of the Act which provides that depreciation is allowed on the actual cost of the asset less the depreciation actually allowed. Accordingly, during the A.Y. 2012-13, the Appellant had claimed depreciation on the Written down value of goodwill amounting to Rs. 750,00,000/-.

1.9 Reference in this regard is invited to the revised return of income filed by the Appellant where the Appellant has clearly reflected the amount of goodwill and Depreciation claimed thereof.

1.10 In this regard, it is also submitted that the claim of depreciation on Goodwill was allowed

For the previous year i.e. A.Y. 2011-12 by your predecessor in this office vide the order passed u/s 250 of the Act by CIT(A)-IV dated 7th June, 2016 (Appeal No. 1128 of 2014-15). Copy of order enclosed as Annexure - 4. Since the depreciation of Rs. 250,00,000/- was allowed in the A.Y. 2011-12, the written down value of Goodwill as on the beginning of the year i.e. 1st April 2011 was Rs. 750,00,000/- on which the depreciation was claimed by your appellate during the gear under consideration.

1.11 It is humbly submitted that the Ld. AO, without considering the submission of the Appellant and without giving proper cognizance to the post-merger financials for the financial year 2006-07 filed in course o/ assessment, merely remarked that the value of goodwill is not available from the financing for financial gear 2006-07 and disallowed the depreciation claimed by the Appellant. The disallowance made by the Ld. AO is grossly erroneous and not justified and is liable to be deleted.

1.12 It is humbly submitted that it is a well-established fact that decisions of the Supreme Court, is law of the land and binding on all Courts/ Tribunals and other authorities.

1.13 Reference in this regard is drawn to the decision in the case of CIT vs Vallabhdas Vitaldas (1985) 253 ITR 543, wherein it has been held that where there is a judicial pronouncement by the highest court of the land, the same is binding on all courts.

1.14 Also, as aforesaid, the claim of depreciation on Goodwill was allowed for the previous year i.e. A.Y.2011-12 by your predecessor in this office, it is humbly submitted before your goodself that the claim of depreciation on goodwill should be allowed as deduction on the principle of res judicata.

4.3. DECISION :

On careful examination of assessment order and documentary evidences filed by the Ld. A/R, it has been observed that the AO made a remark that value of goodwill is not available from the financial statements of F.Y. 2006-07, without giving due cognizance to the relevant financial statements and without considering the submission of the appellant.

Furthermore, it is not the case of AO that the depreciation on goodwill is not allowable u/s 32(1)(ii) of the Act. The AO has disallowed the depreciation on goodwill merely on the contention that the goodwill is not reflected in the post-merger profit & loss account and Balance sheet for the financial year 2006-07 and the tax audit report. In this regard, the Ld. A/R filed copy of audited financial statement for FY 2006-07, wherein the amount of goodwill for Rs. 10,00,00,000/- has been clearly reflected, which was also filed with the AO during the assessment proceedings.

It is also seen that there remains no ambiguity on plain reading of the provisions of section 32(1) of the Act read with Explanation 3, that depreciation is allowable on 'any other business or commercial rights of similar nature'. The Ld. A/R also contended that 'goodwill' can be considered as 'any other business or commercial rights of similar nature' and this view is supported by the decision of Hon'ble Supreme Court in the case of the Commissioner of Income Tax vs Smifs Securities Ltd [2012] 24 taxmann.com 222 (SC), where the Apex Court held that depreciation is allowable on 'goodwill' arising pursuant to a merger. The decision of the Apex Court has also been followed in other cases, cited by the Ld. A/R.

It has been observed that the similar ground (for the A.Y.2011-12, i.e. immediately preceding year) was allowed by my predecessor in this office vide order dated 07.06.2016 (Appeal No. 1128 of 2014-15). Following the same ground of the appellant in this behalf is ALLOWED.

3. Suffice to say, it has come on record that the CIT(A) has followed his order on the very issue in preceding assessment year 2011-12 whilst deleting the impugned disallowance claim on goodwill in question. Learned authorized representative has placed on record this tribunal's coordinate bench's order in ACIT vs. M/s Shristi Infrastructure Development Corporation Ltd. in ITA No.1663/Kol/2016 dated 25.09.19 in the said earlier assessment year upholding the CIT(A)'s action to this effect as follows:

"8. Ground Nos. 2, 3 and 4 raised by the Revenue relates to depreciation on goodwill.

9. Brief facts qua the issue are that on perusal of submission made by the assessee company on 14.03.2014 and also going through the computation of income filed with the revised return of income on 09.01.2013, it was noted that assessee has claimed depreciation on goodwill of Rs.2,50,00,000/-. During the course of assessment proceedings, the assessee furnished written

submission on 14.03.2014 regarding claim of depreciation on goodwill, which is reproduced below:

As informed in our earlier hearings, the erstwhile Shristi Infrastructure Development Corporation (having its registered office at Delhi) had merged into Peerless Abasan Finance Limited (PAFL) as per order of both Hon'ble High Court at Delhi & Hon'ble High Court at Kolkata and then the name PAFL was changed to Shristi Infrastructure Development Corporation Ltd. As per the amalgamation scheme, the difference between the cost of the net assets and the amount paid by the transferee company, pursuant to amalgamation, has been recorded as goodwill. Hence, based on the aforesaid, a sum of INR 100,000,000 has been recorded as goodwill in the books of SIDCL during F. Y. 2006-07. The Hon'ble SC has, in the case of SMIFS Securities (2012)24 taxmann.com 222(SC) held that goodwill in the form of difference between the amount paid and the cost of the net asset acquired from the amalgamating company is an asset eligible for depreciation under the Act. The ruling of SMIFS securities has also been followed by the Bombay High Court in the case of Birla Global Asset Finance Co. Ltd (Income Tax Appeal No. 6835 of 20 10) and Toyo Engineering India Ltd (TS-811-HC-20 12BOM). Goodwill has arisen in the books of SIDCL in the FY 2006-07. The company has not claimed depreciation on goodwill in any Assessment Year prior to A. Y. 11-12.

Section 43(6) of the Act provides as follows: "writ en down value" means

- a. In the case of assets acquired in the previous year, the actual cost to the assessee;*
- b. In the case of assets acquired before the previous year, the actual cost to the assessee less all depreciation actually allowed to him under this Act, or under the Indian Income-tax Act, 1922(11 of 1922) or any Act repealed by that Act, or under any executive orders issued when the Indian Income Tax Act 1886(2 of 1886), was in force."*

Hence, we had claimed depreciation on actual cost of goodwill (intangible asset) i.e. INR 10 crores during AY 2011-12 at the rate of 25% by filing a revised return. The claim for depreciation in this year is INR 2.5 crores."

However, the assessing officer rejected the claim of the assessee and noted that the tax audit report and profit & loss account and balance sheet of the assessee company Shristi Infrastructure Development Corporation Ltd. filed for the FY 2006-07 filed along with the return of income for the AY 2007-08, it is revealed that there was no goodwill reflected as an asset. Therefore, the claim of the assessee company is baseless that goodwill to the tune of Rs. 10 crores was recorded as an asset in the FY 2006-07. Therefore, the depreciation of Rs. 2.5 crore claimed on goodwill was disallowed.

10. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the ld. CIT(A) who has deleted the addition made by the Assessing Officer. Aggrieved by the order of the ld. CIT(A) the revenue is in appeal before us.

11. The ld. DR has primarily reiterated the stand taken by the Assessing Officer which we have already noted in our earlier para and the same is not being repeated for the sake of brevity. On the other hand, the ld. Counsel for the assessee defended the order passed by ld CIT(A).

12. We have heard both the parties and perused the material available on record. We note that pursuant to scheme of amalgamation approved by the Hon'ble High court of Delhi on 22nd May, 2007 and Hon'ble Calcutta High Court on 20th June, 2007, the erstwhile Shristi Infrastructure Development Corporation Ltd. merged with Peerless Abasan Finance Ltd. (PAFL). Post-merger, the name of Peerless Abasan Finance Ltd. was changed to Shristi Infrastructure Development Corporation Ltd. In terms of the Scheme of amalgamation, the purchase consideration paid by PAFL to erstwhile Shristi Infrastructure Development Corporation Ltd. exceeded the cost of net assets taken over. Consequently, a sum of INR 100,000,000 was recorded as goodwill in the books of the assessee during the FY 2006-07. For the assessment year under consideration, the assessee filed a revised return of income and claimed depreciation on goodwill recorded in books at the rate of 25% being an eligible asset in terms of section 32(1) of the Act.

We note that by going through the provisions of section 32(1) of the Act there remains no ambiguity that depreciation is allowable on Goodwill which can be classified under the category of 'any other business or commercial rights of similar nature'. This view is supported by the decision of the Hon'ble Supreme court in the case of the CIT vs. Smits Securities Ltd. [2012] 24 taxmann.com 222 (SC). We note that the decision of Supreme Court has also been followed in the following decisions wherein it was held that depreciation is allowable on goodwill arising on merger:

- DCIT vs. Worldwide Media [2014] 43 Taxmann.com 18-Mum ITAT
- Triune Energy Services (P) Ltd.-vs DCIT, [2016] 65 Taxmann.com 288-Del HC)
- Cyber India online ltd. vs ACIT [2014] 42 Taxmann. Com 108

We note Assessing Officer has disallowed the depreciation on goodwill merely on the ground that the goodwill is not reflected in the post-merger audited financial statement and the tax audit report of the assessee. In this regard, the assessee has submitted that post approval of merger by the Hon'ble High Court of Delhi and Hon'ble Calcutta High court, the audited financial statement for FY 2006-07 clearly reflected the amount of goodwill for a sum of Rs. 100,000,000/- that arose pursuant to the merger. The same was also filed with the A.O. vide letter dated 21st March, 2014. Though in the tax audit report the tax auditor has not considered the depreciation on goodwill, but the same cannot be the basis of disallowance. We find that such disallowance made by the Assessing Officer is erroneous. On appeal by assessee, ld CIT(A) has appreciated the facts of the assessee company and deleted the addition. That being so, we decline to interfere in the order passed by the ld. CIT(A), his order on this issue, is hereby upheld and the grounds of appeal raised by the revenue are dismissed."

4. We therefore adopt judicial consistency since the Revenue has failed to pinpoint any distinction on facts and in law qua the issue of assessee's depreciation claim on goodwill. We accordingly uphold the CIT(A)'s findings under challenge deleting the impugned disallowance.

5. This Revenue's appeal is dismissed.

Order is pronounced in the open court on 31.12.2019.

Sd/-
(A. L. Saini)
ACCOUNTANT MEMBER

Sd/-
(S. S. Godara)
JUDICIAL MEMBER

कोलकाता /Kolkata;
दिनांक/ Date:31/12/2019
(RS, Sr.PS)

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. The Appellant - ACIT, Circle-11(2), Kolkata.
2. The Respondent- M/s. Shristi Infrastructure Pvt. Ltd.
3. आयकरआयुक्त(अपील) / The CIT(A), Kolkata [sent through email]
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, **कोलकाता**/ DR, ITAT, Kolkata [sent through email]
6. गार्डफाईल / Guard file.
सत्यापितप्रति

True Copy

By Order

Assistant Registrar,
I.T.A.T, Kolkata Benches,
Kolkata.