

**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**“E” Bench, Mumbai**  
**Before Shri Ravish Sood, Judicial Member**  
**and Shri N.K. Pradhan, Accountant Member**

**ITA No. 6035/Mum/2009**  
**(Assessment Year: 2003-04)**

Tam Media Research Pvt. Ltd.  
9<sup>th</sup> Floor, Hincon House, Tower-B,  
247 Park, L.B.S. Marg, Vikhroli (W)  
Mumbai 83

ITO- 5(3)(3),  
Aayakar Bhavan ,  
Vs. Churchgate,  
Mumbai.

PAN – AAAC4953G

**(Appellant)**

**(Respondent)**

Appellant by : Shri Nitesh Joshi, A.R  
Respondent by : Shri Amit Pratap Singh, D.R

Date of Hearing: 14.10.2019  
Date of Pronouncement: 10.01.2020

**ORDER**

**PER RAVISH SOOD, JM**

The present appeal filed by the assessee was recalled by the Tribunal vide its order passed in M.A. No.374/Mum/2017, dated 19.07.2019 for the limited purpose of adjudicating 'Ground of appeal No. III' which had inadvertently remained omitted to be disposed off by the Tribunal while disposing off the appeal of the assessee for A.Y. 2003-04, vide its order passed in ITA No. 6035/Mum/2009, dated 20.03.2017. As such, we restrict ourselves to the adjudication of the 'Ground of appeal No. III' that was raised by the assessee before the Tribunal and read as under:

“III (i). The CIT(A) erred in upholding the disallowance of depreciation on the cost of know how and intangibles acquired by the Appellant from ORG of their division of Adex Business purchased alongwith all assets and liabilities for Rs.11,44,77,378/-, merely because the amount was shown in the balance sheet under the compendious heading of goodwill.

(ii) The CIT failed to appreciate that-

- (a) The note No.3 on financial statements which formed part of the audited accounts clearly stated that the business comprised the television and press advertisement expenses data monitoring business alongwith its assets, know, intangibles, goodwill, customers, marketing, sales and distribution capabilities, employees and other interest. Therefore, the balance amount from the consideration paid after deducting fixed assets, debtors and current liabilities represented know-how, intangibles and goodwill, out of which, the know-how and intangibles were eligible for depreciation at 25% as per I.T. Rules.
- (b) Even as per definition of “Acquired Assets” as per the purchase agreement and the annexure thereto, the Appellant had purchased also the know-how and intangibles from the Vendors in

addition to goodwill and the Appellant should have allowed depreciation on the 2/3<sup>rd</sup> value of the consideration taken by the Appellant or in any event such amount as determined by the A.O.

- (c) Depreciation was allowable even on the goodwill, being 1/3<sup>rd</sup> value of the net consideration of Rs.11,44,77,378/- or such value as may be determined by the A.O as per the decision of the Tribunal in recent cases.
- (d) The mere fact that there is not bifurcation of the payment made by the appellant to M/s ORG in the Business Transfer Agreement does not mean that the Appellant has acquired only the goodwill of the business and not the know-how and intangibles like the customers, marketing, sales and distribution capabilities, employees and other interest, as the expression, goodwill the Note No.3 giving full description of the assets acquired as per Schedule I and interpretation clause of the Agreement.

The appellant craves, leave to add, amend or alter the grounds of Appeal at the time of hearing.”

2. Briefly stated, we restrict ourselves to the facts of the case to the extent they are relevant for the disposal of the aforesaid “Ground of appeal No III” raised by the assessee in its appeal before us. The assessee company which is engaged in the business of providing television audience measurement services had during the year under consideration acquired one unit of M/s A.C. Nielson ORG-Marg Research Pvt. Ltd. known as “Adex Business” along with all its assets and liabilities for a total consideration of Rs.12,10,31,250/-. The assessee company had made a payment of Rs.11,44,77,378/- to M/s A.C. Nielson ORG-Marg Research Pvt. Ltd. over and above the value of the ‘net assets’ of “Adex Business”. As the value of the ‘net assets’ over the liabilities amounted to Rs.65,53,872/-, therefore, the excess amount of Rs.11,44,77,378/- [Rs.12,10,31,250/- (-) Rs.65,53,872/-] was claimed by the assessee company to have been paid towards ‘goodwill’ in its books of account. On a perusal of the ‘financial statements’ for the year under consideration, it was gathered by the A.O that the auditor of the assessee company had capitalised the excess payment of Rs.11,44,77,378/- as ‘goodwill’ in its books of account. However, the assessee company had by way of a ‘Note No. 2’ forming part of its computation of income stated that the aforesaid amount of Rs.11,44,77,378/- was paid for (i) know how; (ii) intangibles; and (iii) goodwill on account of purchase of ‘Adex Business’ from M/s A.C. Nielson ORG – Marg Research Pvt. Ltd. Also, in the aforesaid ‘note’ it was claimed that the depreciation thereon as may be admissible be determined at the time of hearing.

3. During the course of the assessment proceedings the assessee company vide its letter dated 31.01.2006 furnished with the A.O the bifurcated details of the aforesaid payment of Rs.11,44,77,378/-, therein claiming viz. (i) that, 1/3<sup>rd</sup> of the payment was paid for the cost of goodwill: Rs.3,81,59,126/-; and (ii) the balance 2/3<sup>rd</sup> of the payment was paid for the cost of “know-how” and “intangibles” of the “Adex Business”: Rs.7,63,18,252/-. On the basis of the aforesaid bifurcated details, it was the claim of the assessee that depreciation be allowed @ 25% on the cost of the “know-how” and “intangibles” which were acquired by the assessee from M/s A.C. Nielson ORG – Marg Research Pvt. Ltd. However, the A.O was not persuaded to subscribe to the aforesaid claim of the assessee. It was observed by the

A.O that the assessee had not provided any basis for attributing 1/3<sup>rd</sup> of the total payment of Rs.11,44,378/- towards cost of “goodwill” and the remainder 2/3<sup>rd</sup> of the aforesaid amount towards cost of “know-how” and “intangibles”. Rather, it was observed by the A.O that no such bifurcated details were discernible from the business transfer “agreement” dated 17.09.2002 of the assessee with M/s A.C. Nielson ORG – Marg Research Pvt. Ltd. On the contrary, it was observed by the A.O that the auditor of the assessee company had certified that the excess payment of Rs.11,44,77,378/- was towards ‘goodwill’ which was capitalised in the schedule of ‘fixed assets’, without any claim of depreciation on the same. Accordingly, on the basis of his aforesaid observations the A.O declined the assessee’s claim of treating any part of the excess payment of Rs. 11,44,77,378/- as having been made towards acquisition of “know-how” and “intangible assets” and consequently rejected the claim of depreciation that was raised by the assessee before him.

4. Aggrieved, the assessee assailed the assessment framed by the A.O before the CIT(A). It was observed by the CIT(A) that in the business transfer “agreement”, dated 17.09.2002 on the basis of which the assessee had acquired the “Adex Business”, there was no mention of any bifurcation of the consideration that was paid by the assessee towards various assets. In fact, it was noticed by the CIT(A) that in the aforesaid ‘agreement’ only the value of the ‘fixed assets’ and ‘receivables’ of the “Adex Business” were mentioned. On the basis of the aforesaid facts, the CIT(A) held a conviction that the amount paid by the assessee over and above the value of ‘net assets’ of “Adex Business” was to be treated to have been paid towards ‘goodwill’. Apart from that, it was observed by the CIT(A) that the consideration paid by the assessee was not only for acquiring intangible assets, as claimed, but was also paid to M/s A.C. Nielson ORG – Marg Research Pvt. Ltd. for its agreeing for not carrying out the same business which was earlier carried out by it in its “Adex Business”. Also, it was noticed by the CIT(A) that M/s A.C. Nielson ORG – Marg Research Pvt. Ltd. had not bifurcated the payment which was received from the assessee and had shown the gain on the transfer of its “Adex Business” under the head “Capital Gain”. On the basis of his aforesaid observations, the CIT(A) was of the view that though the assessee was claiming that the amount paid for acquiring “Adex Business” should be bifurcated towards 7 assets, but it had not given any basis in support of its said claim. Lastly, it was observed by the CIT(A) that the auditor of the assessee company had also treated the payment of the amount of Rs.11,44,77,378/- in excess of the value of the ‘net assets’ as ‘goodwill’ and capitalised the same as such in its ‘books of account’. Observing, that as no depreciation was allowable on ‘goodwill’, the CIT(A) did not find any infirmity in the declining of the assessee’s claim of depreciation by the A.O and upheld his view.

5. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. As observed by us hereinabove, we are restricting ourselves to the adjudication of the 'Ground of appeal No. III' which had inadvertently remained omitted to be adjudicated upon by the Tribunal while disposing off the appeal of the assessee, vide its order passed in ITA No. 6035/Mum/2009, dated 20.03.2017 for A.Y 2003-04. As observed by us hereinabove, the assessee company on acquisition of "Adex Business" of M/s A.C. Nielson ORG-Marg Research Pvt. Ltd had made a payment of Rs.11,44,77,378/- over and above the value of the 'net assets' of the business so acquired. On a perusal of the 'financial statements' of the assessee company, it was gathered by the A.O, that the auditor of the assessee company had capitalised the excess payment of Rs.11,44,77,378/- [Rs.12,10,31,250/- (-) Rs.65,53, 872/-] as 'goodwill' in the schedule of 'fixed assets' without raising any claim of depreciation on the same. At the same time, the assessee company had by way of a 'Note No. 2' forming part of its computation of income stated that the aforesaid amount of Rs.11,44,77,378/- was paid for (i) know-how; (ii) intangibles; and (iii) goodwill on account of purchase of 'Adex Business' from M/s A.C. Nielson ORG – Marg Research Pvt. Ltd. Also, in the aforesaid 'note' it was claimed that the depreciation thereon as may be admissible be determined at the time of hearing. As noticed by us hereinabove, the assessee company in the course of the assessment proceedings had vide its letter dated 31.01.2006 furnished with the A.O the bifurcated details of the aforesaid payment of Rs.11,44,77,378/-, which was claimed to have been paid towards viz. (i) 1/3<sup>rd</sup> of the payment was towards cost of goodwill: Rs.3,81,59,126/-; and (ii) the balance 2/3<sup>rd</sup> of the payment was towards the cost of "know-how" and "intangibles" of the "Adex Business": Rs.7,63,18,252/-. However, as no basis for the aforesaid bifurcation was either discernible from the business transfer "agreement" nor any material in support thereof was furnished by the assessee in the course of the assessment proceedings, therefore, the A.O declined to accept the said claim of the assessee. Accordingly, the A.O declined to attribute any part of the excess payment of Rs. 11,44,77,378/- made by the assessee towards acquisition of "know-how" and "intangible assets" and rejected its claim of depreciation on the same.

6. As observed by us hereinabove, the CIT(A) on appeal was of the view that the amount paid by the assessee over and above the value of 'net assets' of "Adex Business" was to be treated to have been paid towards 'goodwill'. Apart from that, it was also observed by the CIT(A) that the consideration paid by the assessee was not only for acquiring intangible assets, as claimed, but was also paid to M/s A.C. Nielson ORG–Marg Research Pvt. Ltd. for its agreeing for not carrying out the same business which was earlier carried out by it in its "Adex Business". Observing, that the auditor of the assessee company had treated the excess payment of Rs. 11,44,77,378/- as 'goodwill', the CIT(A) being of the

view that no depreciation was allowable on 'goodwill', therefore, did not find any infirmity in the declining of the assessee's claim of depreciation by the A.O. The CIT(A) while concluding as hereinabove, had observed as under:

"3.4 I have considered the submissions of the appellant and have gone through the business transfer agreement dated 17.9.09 between the appellant and M/s ORG. As per this agreement, the appellant acquired Adex Business' which was being carried on by M/s ORG. In accordance with this agreement, the appellant acquired certain assets which have been defined as Acquired assets" in the agreement. The details of these acquired assets is as per Schedule 1 of the agreement. These assets are fixed assets, receivables, client list, self generated softwares and marketing sales network, historical datas and intellectual property and general know how with respect to operating the business. The appellant has given lumpsum consideration of Rs.12,10,31,250/-. There is no bifurcation of the consideration paid by the appellant towards various assets. In the agreement, only the value of fixed assets and receivables of the Adex Business is mentioned. Therefore, excess amount paid by the appellant over and above the net assets of Adex Business is to be treated as goodwill. The consideration paid by the appellant is not only for acquiring intangible assets as claimed, it is also paid for having agreed by M/s ORG not to carry the same business which has been carried out so far by in Adex Business. This is clear from Clause 9A of the Business Transfer Agreement which states that M/s ORG shall not compete directly or indirectly with the appellant by conducting business covering spending on advertisement, displayed solely in India Media. It is also relevant to mention here that not only there is no bifurcation of the payment made by the appellant to M/s ORG in the business transfer agreement, M/s ORG has treated the same as lumpsum consideration and gain of the transfer of 'Adex Business' has been shown as Capital gain. This shows that there was no attempt to determine the nature of the assets required by the appellant and amount paid by the appellant towards each assets/intangible rights. Had this been the case, M/s ORG should not have treated the entire consideration as having been received on transfer of business. In such a case, M/s ORG would have computed the income under the head "Business Income" in respect of the amount received for transferring depreciable intangible assets. The appellant is claiming the amount should be bifurcated towards 7 assets but has not given any basis for the same. Further, there is no provision in the agreement which shows that the appellant acquired only 7 assets. As already stated, M/s ORG has agreed not to do the same business which was earlier carried on by 'Adex Business'. This amount can be for this purpose also. Further, the auditor of the appellant company has treated the amount of Rs.11,44,77,378/- as goodwill. Since no depreciation is allowable on goodwill, the Assessing Officer was justified in not allowing any depreciation to the appellant. The action of the Assessing Officer is upheld. This ground of appeal is not allowed."

7. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. Admittedly, the assessee company on acquisition of "Adex Business" of M/s A.C. Nielson ORG-Marg Research Pvt. Ltd had made a payment of Rs.11,44,77,378/- over and above the value of the 'net assets' of business so acquired. Although, it was claimed by the assessee that the aforesaid excess payment of Rs. 11,44,77,378/- was paid towards viz. (i). 1/3<sup>rd</sup> of the amount was paid for cost of goodwill: Rs.3,81,59,126/-; and (ii) the balance 2/3<sup>rd</sup> of the amount was paid for the cost of "know-how" and "intangible assets" of the "Adex Business": Rs.7,63,18,252/-, but the said claim was declined by the lower authorities, for the reason, that no basis for such allocation could be gathered

from the business transfer “agreement”, dated 17.09.2002. In the backdrop of the fact that the auditor of the assessee company had capitalised the excess payment of Rs.11,44,77,378/- [Rs.12,10,31,250/- (-) Rs.65,53,872/-] as ‘goodwill’ in the schedule of ‘fixed assets’, the CIT(A) being of the view that no depreciation was allowable on ‘goodwill’ had upheld the declining of the assessee’s claim of depreciation on the excess payment of Rs. 11,44,77,378/-.

8. We have deliberated at length on the issue under consideration and are unable to persuade ourselves to subscribe to the view taken by the lower authorities. As observed by us hereinabove, the assessee’s claim for depreciation on the excess payment of Rs. 11,44,77,378/- was declined by the A.O, which thereafter was upheld by the CIT(A), for the reason, that no depreciation was allowable on ‘goodwill’. The aforesaid view of the CIT(A) is not found to be in conformity with the judgment of the **Hon’ble Supreme Court** in the case of **CIT, Kolkata Vs. Smifs Securities Limited (2012) 348 ITR 302 (S.C)**. In its aforesaid judgment, the Hon’ble Apex Court had held that ‘goodwill’ is an asset under ‘Explanation 3(b)’ to Sec. 32(1) of the Act. It was observed by the Hon’ble Apex Court that a reading of the words ‘any other business or commercial rights of similar nature’ in clause (b) of ‘Explanation 3’ indicates that ‘goodwill’ would fall under the expression ‘any other business or commercial right of a similar nature’. It was observed by the Hon’ble Court that the principle of ejusdem generis would strictly apply while interpreting the aforesaid expression which finds place in ‘Explanation 3(b)’ to Sec. 32(1) of the Act. In the case before the Hon’ble Apex Court, pursuant to the scheme of amalgamation of M/s YSN Shares and Securities (P) Ltd. with M/s Smifs Securities Ltd. which was duly sanctioned by the Hon’ble High Courts of Bombay and Calcutta with retrospective effect from 01.04.1998, the assets and liabilities of M/s YSN Shares & Securities Pvt. Ltd. were transferred to and stood vested with M/s Smifs Securities Ltd. In the process ‘goodwill’ had arisen in the books of M/s Smifs Securities Ltd. It was the claim of the assessee that the excess consideration paid over the value of ‘net assets’ acquired of M/s YSN Shares & Securities (P) Ltd [amalgamating company] should be considered as ‘goodwill’ arising on amalgamation. In fact, it was the claim of the assessee that the extra consideration was paid towards the reputation which the amalgamating company i.e. M/s YSN Shares & Securities Pvt. Ltd. was enjoying in order to retain its existing clientele. However, the A.O declined the assessee’s claim for depreciation for two fold reasons viz (i) that, the ‘goodwill’ as per him was not an asset falling under ‘Explanation 3’ to Sec. 32(1) of the Act; and (ii) that, no amount was actually paid by the assessee on account of ‘goodwill’. As observed by us hereinabove, the Hon’ble Apex Court had negated the first observation of the A.O and had held that ‘goodwill’ is an asset under ‘Explanation 3(b)’ to Sec. 32(1) of the Act. As regards the second observation of the A.O, the Hon’ble Apex Court did not find any infirmity with the view taken by the lower authorities which had approved the claim of the assessee that the

difference between the cost of the assets and the amount paid constituted 'goodwill' which the assessee company had acquired in the process of amalgamation. In sum and substance, the Hon'ble Apex Court had approved the assessee's claim for depreciation on 'goodwill'. Also, the Hon'ble Apex Court had not found any infirmity with the view taken by the lower authorities that the excess consideration paid by the assessee over and above the value of 'net assets' acquired of the amalgamating company i.e. M/s YSN Shares & Securities Pvt. Ltd. was to be considered as the value of 'goodwill' arising on amalgamation.

10. On the basis of our aforesaid observations, we find, that the assessee's claim of depreciation on 'goodwill' in the case before us falls within the four corners of the judgement of the **Hon'ble Supreme Court** in the case of **CIT, Kolkata Vs. Smifs Securities Limited (2012) 348 ITR 302(S.C)**. As is discernible from the financial statements of the assessee company before us, the excess consideration of Rs. 11,44,77,378/- paid by the assessee company over and above the value of the 'net assets' on acquisition of "Adex Business" of M/s A.C. Nielson ORG-Marg Research Pvt. Ltd had been considered as 'goodwill' by the assessee company in its books of account. Be that as it may, the assessee's claim of depreciation on the excess payment of Rs. 11,44,77,378/- had been declined by the CIT(A), for the reason, that no depreciation was allowable on 'goodwill'. We are of the considered view that pursuant to the judgment of the **Hon'ble Supreme Court** in the case of **CIT, Kolkata Vs. Smifs Securities Limited (2012) 348 ITR 302(S.C)** the issue as regards allowability of depreciation on 'goodwill' is no more res integra. As such, the claim of depreciation raised by the assessee on the amount of excess payment of Rs. 11,44,77,378/- which was capitalised in its 'books of account' as 'goodwill', is found to be in order. Accordingly, we direct the A.O to allow depreciation on the 'goodwill' of Rs. 11,44,77,378/- that was capitalised by the assessee in its financial statements. On the basis of our aforesaid observations we 'set aside' the order of the CIT(A) and restore the matter to the file of the A.O for the limited purpose of giving effect to our aforesaid observations. The '**Ground of appeal No. III**' raised by the assessee before us is allowed.

11. Resultantly, the "**Ground of appeal No.III**" for the limited purpose of adjudication of which the appeal of the assessee was recalled by the Tribunal vide its order passed in M.A. No.374/Mum/2017, dated 19.07.2019 is allowed.

Order pronounced in the open court on 10.01.2020

Sd/-

(N.K.Pradhan)  
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक 10.01.2020

PS. Rohit

Sd/-

(Ravish Sood)  
JUDICIAL MEMBER

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,  
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)**

**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**