

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "D", MUMBAI

Before Shri Saktijit Dey, JM & Shri G Manjunatha, AM

ITA Nos.6645/Mum/2018 for Assessment Year : 2009-10

ITA Nos.6646/Mum/2018 for Assessment Year : 2010-11

ITA Nos.6647/Mum/2018 for Assessment Year : 2011-12

ACIT Circle 7(2)(1), Mumbai.	Vs.	Mahindra Logistics Ltd., Ground Floor, Mahindra Towers, P K Kurne Chowk, Worli, Mumbai 400 018. PAN AAFCM 2530H
(Appellant)		Respondent)

ITA Nos.6453/Mum/2018 for Assessment Year : 2011-12

Mahindra Logistics Ltd., Mumbai 400 018. PAN AAFCM 2530H	Vs.	ACIT Circle 7(2)(1), Mumbai.
(Appellant)		Respondent)

For the Revenue : Shri Kamal Mangal

For the assessee : Shri Devendra Jain

Date of Hearing :16.01.2020	Date of Pronouncement : 05.02.2020
-----------------------------	------------------------------------

**ORDER**

**Per Bench:**

This is a group of four appeals, three by the Revenue and one by the assessee. For assessment years 2009-10 and 2010-11 the appeals are by Revenue only and for assessment year 20011-12 there are cross- appeals. All these appeals arises out of three separate orders, all dated 21.08.2018, of learned Commissioner of Income Tax (Appeals)-13, Mumbai.

2. ITA No. 6645/Mum/2018 (Revenue's appeal for A.Y. 2009-10):

The dispute in this appeal is confined to allowance of assessee's claim of depreciation on intangibles.

3. Briefly facts are, the assessee, a resident company is a subsidiary of Mahindra & Mahindra Ltd. (M&M) and is engaged in logistics business and related activities. For the assessment year under dispute, assessee had filed its return of income on 30.09.2009 declaring total income of Rs 9,25,76,090/- under the normal provisions and book profit of Rs 6,89,96,607/- u/s. 115JB of the Act. M/s. M & M is into diversified activities and it had set up its logistics division in the year 1999-2000 to cater to its complex transportation needs. Whereas, the assessee company was incorporated in the year 2007 and acquired the logistics division of M/s. M&M with all the assets and liabilities as on 01.04.2008 for a consideration of Rs 32 crores. M/s. M & M transferred its logistics division (business) to the assessee on slump sale basis. The sale consideration of Rs 32 crores comprised of following amounts:

Assets & Liabilities acquired	Amount (in crores)
Net Fixed Assets (Including software)	11.86
Net Current Assets	36.01
Loans	-26.14
Congeries of rights (Customer Database and Relationships)- Intangible Assets	9.12
Goodwill- Intangible Assets	1.15
Total	32.00

After acquisition of logistics division, assessee merged the current assets and liabilities of logistics division with its accounts and made addition to the block of intangible asset an amount of Rs 9,21,92,000/- being the congeries of rights. On the aforesaid amount of Rs 9,21,92,000/- assessee claimed

depreciation @25% by treating it as intangible asset. In the course of assessment proceedings, the Assessing Officer called upon the assessee to justify its claim of depreciation on intangible asset. In response, the assessee furnished the agreement and all other supporting evidence including a valuation report to demonstrate that the transaction relating to acquisition of logistics division is a genuine transaction hence, depreciation is allowable. The Assessing Officer, however, did not find the submissions of the assessee acceptable. He observed, the valuation report furnished by the assessee has not at all been referred to in the sale agreement and the plant, machinery and tangible asset appearing in the sale agreement are conspicuously absent from the valuation report. The Assessing Officer observed, in reality, the assessee had not acquired any visible asset but has made an arrangement to claim high depreciation by creating fictitious assets. Therefore, he called upon the assessee to explain why the entire value of the intangibles should not be ignored for computing depreciation by taking recourse to Explanation 3 to section 43(1) of the Act. Though the assessee objected to the proposed action of the Assessing Officer, however, rejecting the objections of the assessee the Assessing Officer ultimately concluded that the entire transaction has been designed by the assessee for claiming high depreciation on fictitious assets. Without prejudice, he observed, even if the transaction is considered to be genuine, there is no rationale behind capitalization of excess consideration paid by the assessee for the intangibles over and above the value of goodwill. He observed, when the assessee had not done the transaction on slump sale and has simply purchased assets at an amount higher than the value of the asset, there is no requirement of capitalization of the excess consideration paid over the net worth. Thus, invoking Explanation 3 to section 43(1) of the Act, the Assessing Officer held that addition to the block of intangible as made by the assessee in the Schedule of Fixed Assets for the year under consideration has to be determined at 'Nil' for the purpose

of depreciation. Accordingly, he disallowed assessee's claim of depreciation amounting to Rs 2,28,80,000/- on the amount of Rs 9.12 crores. The assessee contested the aforesaid disallowance before learned Commissioner (Appeals).

4. After considering the submissions of the assessee in the context of facts and materials on record, learned Commissioner (Appeals) found certain factual inaccuracies in the observations of the Assessing Officer. Firstly, he found that M/s. M & M has treated the sale of its logistics division to the assessee as slump sale and has offered profit of Rs 10,26,74,997/- as income from Long term capital gain in the return on income filed for A.Y. 2009-10. Thus, he found the observation of the Assessing Officer that the transaction has not been treated as slump sale unacceptable. Further, he observed, by purchasing the logistic division of M/s. M & M assessee has not only taken over the business as a going concern along with assets and liabilities, but, has taken over various other rights, licenses, customer base and goodwill of the business, which constitute congeries of rights hence, are in the nature of intangible asset. To support the sale consideration, the assessee has also obtained a valuation report from a technically qualified person. He observed, the value attached to the intangible asset is as per the valuation report and the balancing figure of Rs. 1.15 crore was taken towards goodwill of the business. Without prejudice, he observed, even if the value attached to the intangible asset as per the valuation report is ignored, the excess consideration paid over and above the net value of the assets has to be treated to have been paid towards goodwill, hence, eligible for depreciation. Accordingly, he allowed assessee's claim of depreciation.

5. The learned Departmental Representative, strongly relying upon the observations of the Assessing Officer submitted, the business transfer agreement does not provide for any consideration towards congeries of

rights, therefore, the sale consideration paid cannot be broken down to create intangible asset, when there is no such asset in existence. Thus, he submitted, learned Commissioner (Appeals) was unjustified in allowing assessee's claim of depreciation. Referring to the proviso to section 32(1) of the Act, he submitted the depreciation claimed by the assessee is not allowable.

6. The learned Authorized Representative submitted, the action of the Assessing Officer in determining the value of intangible asset at nil by taking recourse to Explanation 3 to section 43(1) of the Act is without authority of law hence, invalid. He submitted, before determining the actual cost of the asset under Explanation 3 to section 43(1), the Assessing Officer has to obtain prior approval of the Joint Commissioner. Whereas, the Assessing Officer has not done so in the present case. Therefore, for this reason alone the action of the Assessing Officer cannot be supported. Without prejudice, he submitted, the transaction between the assessee and M/s. M & M Ltd is a genuine transaction and M & M Ltd. has offered capital gain arising out of such transaction to tax. He submitted, though, the valuation report may not have been referred to in the sale agreement, however, the assessee has obtained the valuation report to value the assets of the transferred business. He submitted, since the valuer had valued the assets on a scientific basis, the Assessing Officer cannot disregard veracity of such valuation. Learned Authorized Representative submitted, while acquiring the transportation business of the holding company, the assessee has acquired various rights and contracts, which certainly are in the nature of intangible assets. Therefore, the amount paid for acquiring such right is capital asset on which the assessee is eligible to claim depreciation. He submitted, provision to section 32(1) would not be applicable as it is not a case of amalgamation but a case of slump sale. Thus, he submitted learned Commissioner (Appeals) was justified in allowing assessee's claim of depreciation. In support of his

contention, he relied upon the decision of ITAT Chennai Bench in the case of ACIT vs. Droma India Pvt. Ltd. in ITA Nos. 1664 to 1666/Chny/2019 dated 20.11.2019.

7. We have considered rival submissions in the light of the decisions relied upon and perused material on record. Undisputed facts are, during the year under consideration assessee had acquired logistics division of M & M Ltd. by business transfer agreement dated 11.09.2008 for a total sale consideration of Rs 32 crore. On a perusal of the business transfer agreement, a copy of which has been submitted before us, it is noted that the sale is on as is where is basis and the assessee has acquired the business as a going concern with all its assets and liabilities. The assets transferred also included all contracts, deeds, bonds, agreements and all other instruments. Further, all employees of logistics business were also transferred to the assessee. Thus, as could be seen, the entire logistics business was transferred to the assessee on a slump sale basis. Though, it may be a fact that in the business transfer agreement the sale consideration of Rs 32 crore has not been allocated to various assets, however, it is a fact that the assessee has got the assets valued by a technically qualified person and as per such valuation congeries of rights transferred to the assessee was valued at Rs 9,12,00,000/-. The first issue which arises for consideration is, whether the Assessing Officer can determine the value of the aforesaid right at 'Nil' by invoking Explanation 3 to section 43(1) of the Act. On a careful reading of the aforesaid provision it is noticed, Explanation 3 to section 43(1) empowers the Assessing Officer to determine the actual cost of a particular asset if he is of the opinion that the assessee for the purpose of claiming higher depreciation has enhanced the cost of the asset. However, before so determining he has to obtain prior approval of the Joint Commissioner of Income tax. In the facts of the present case, the Assessing Officer apparently has not obtained such approval of the Joint Commissioner before determining the value of the asset

at 'Nil'. Atleast, no such material has been placed before us by the Revenue to show that the Assessing Officer has obtained any approval of Joint Commissioner of Income tax. Even, a reading of paragraph 3.3 of the assessment order reveals that the Assessing Officer by referring to a wrong/incomplete provision has proceeded to exercise his power in determining the value of the asset at 'Nil'. For this reason alone, the disallowance made by the Assessing Officer cannot be sustained.

8. Be that as it may, as rightly observed by learned Commissioner (Appeals), there cannot be any doubt with regard to the genuineness of the transaction as M & M Ltd. has treated the sale as slump sale and offered profit derived therefrom as Long term capital gain in the return of income filed for the impugned assessment year. Even, the business transfer agreement also clearly speaks of transferring not only the physical assets but various other intangible assets such as contractual rights, licenses, customer base etc. Certainly, all these intangible assets transferred to the assessee have a commercial value and a part of sale consideration has to be allocated to such assets. For the purpose of such allocation the assessee has obtained valuation report from a technically qualified person. If the Assessing Officer was not satisfied with the valuation report, he should have got the assets valued through another technically qualified person instead of rejecting the valuation report purely on the basis of conjectures and surmises. Further, the observations of the Assessing Officer that the assessee has designed the transaction in a manner to create fictitious asset is without any material basis. In fact, in the case of ACIT vs. Dorma India Pvt. Ltd. (supra), the co-ordinate Bench while considering a dispute of similar nature has observed, a consolidated payment made by the assessee over and above net assets acquired by it under a composite contract is to be viewed as towards goodwill and has to be treated as intangible asset on which depreciation is allowable. Suffice to say Tribunal's decision in the case of United Breweries Ltd. vs.

Additional CIT in ITA No. 722/Bang/2014 would not be applicable as in the said case the Tribunal was considering a case of amalgamation. Thus, keeping in view the relevant facts we are of the considered opinion that the assessee is eligible to claim depreciation on the intangible assets acquired by way of congeries of rights. Therefore, the order of learned Commissioner (Appeals) on the issue is upheld. The ground raised is dismissed.

9. The next issue raised by the Revenue relates to allowance of depreciation on goodwill. As discussed earlier, the sale consideration paid of Rs 32 crore towards acquisition of the logistics division included Rs 1.15 crore towards goodwill. However, being unsure of allowability of depreciation on such asset, assessee did not claim any depreciation initially. In the appeal filed against the assessment order before learned Commissioner (Appeals), assessee took an additional ground claiming depreciation on goodwill relying upon the decision of Hon'ble Supreme Court in the case of CIT vs. Smif Securities Ltd. [2012] 348 ITR 302 (SC). The learned Commissioner (Appeals) not only admitted the additional ground but also directed the Assessing Officer to allow assessee's claim of depreciation on goodwill.

10. We have considered rival submissions and perused material on record. Undisputedly, the depreciation claimed by the assessee is on goodwill. As held by the Hon'ble Supreme Court in the case of CIT vs. Smif Securities Ltd. (supra), goodwill is an intangible asset as defined u/s. 32(1)(ii) of the Act, hence, eligible for depreciation. In view of the ratio laid down by the Hon'ble Supreme Court as discussed above, assessee's claim of depreciation has been rightly allowed by learned Commissioner (Appeals). Hence, no interference is called for. This ground is also dismissed.

In the result, the appeal is dismissed.

11. ITA No. 6646/Mum/2018 (Revenue's appeal for A.Y. 2010-11):

Ground nos. 1 and 2 are identical to ground nos. 1 and 2 in ITA No. 6645/Mum/2018 dealt with hereinabove. Therefore, our decision therein would apply mutatis mutandis to this appeal as well. Accordingly, these grounds are dismissed.

12. In ground no.3 the Revenue has challenged allowance of fees paid towards valuation report. Briefly facts are, during the assessment proceedings, the Assessing Officer noticed that the assessee has claimed an expenditure of Rs 2,24,720/- towards charges paid for valuation of the business purchased by the assessee from M/s. M & M Ltd. Stating that the said expenditure is capital in nature, the Assessing Officer disallowed the same. While considering assessee's appeal on this issue, learned Commissioner (Appeals) allowed this appeal.

13. We have heard the parties and perused material on record. Though, it may be a fact that expenditure incurred by the assessee was for valuation of the assets, however, such expenditure, per se, is not for acquiring any capital asset. Therefore, in our considered view, learned Commissioner (Appeals) was justified in allowing assessee's claim. This ground is dismissed.

In the result, the appeal is dismissed.

14. ITA No. 6647/Mum/2018 (Revenue's appeal for A.Y. 2011-12):

Ground nos. 1 and 2 are identical to ground nos. 1 and 2 in ITA No. 6645/Mum/2018 dealt with hereinabove. Therefore, our decision therein would apply mutatis mutandis to this appeal as well. Accordingly, these grounds are dismissed.

In the result, the appeal is dismissed.

15. ITA No. 6453Mum/2018 (assessee's appeal for A.Y. 2011-12):

The only issue raised in the present appeal is with regard to disallowance of expenditure amounting to Rs 25,81,000/-.

16. Briefly the facts are, during the assessment proceedings, the Assessing Officer noticed that the assessee has debited an amount of Rs 104,157.27 lacs as expenditure under the head services/operations. After calling upon the assessee to furnish the details of the parties to whom such payments have been made and verifying them the Assessing Officer found that such payments have been made to more than two thousand parties. On the basis of the details furnished by the assessee along with address, the Assessing Officer issued notices u/s. 133(6) of the Act to few parties on random basis for verifying the correctness of the transactions. As observed by the Assessing Officer, in response to notices issued u/s. 133(6), only four parties' responded while most of the notices returned back unserved. Further, he observed, though the assessee was requested to obtain confirmation from the parties, however, the assessee also did not furnish the same from the parties. As per the Assessing Officer, such parties are ten in number representing aggregating payment of Rs 27.81 lacs. Holding that due to non-response to notices issued u/s. 133(6) of the Act, the transaction cannot be considered as genuine, the Assessing Officer treated the amount of Rs 27,81,000/- as unexplained investment u/s. 69 of the Act and added back to the income of the assessee. Though the assessee contested the aforesaid addition before learned Commissioner (Appeals), however, it did not succeed.

17. The learned Authorized Representative submitted, the entire payments has been made in cheque and assessee has furnished all details such as name, address, PAN etc., to prove the genuineness of the transactions. He submitted, wherever applicable the assessee has also deducted tax at source while making such payments. He submitted, merely because notices issued

u/s. 133(6) of the Act issued to the parties have returned back un-served, the transactions cannot be held as non-genuine. He submitted, considering the volume of turnover and the payments made, the assessee would certainly not indulge in any non-genuine activity. Thus, he submitted, the disallowance made should be deleted.

18. The learned Departmental Representative relied on the observations of the Assessing Officer.

19. We have considered rival submissions and perused material on record. It is evident from the assessment order itself that the expenditure incurred towards services/operations involve payments made to more than two thousand parties. To test check the genuineness of said expenditure, the Assessing Officer had issued notices u/s. 133(6) of the Act to some of the parties on random basis. However, in respect of some of the parties the notices issued u/s. 133(6) have returned back un-served. As it appears from the orders of the Assessing Officer as well as learned Commissioner (Appeals) due to non-response to the notices issued u/s. 133(6) of the Act, a part of the expenditure has been disallowed and added back. However, it is a fact on record that all payments have been made by the assessee in cheque and the assessee has furnished the name, address, PAN etc., of all payees. In fact, the assessee has also deducted tax in applicable cases, which is evident from the TDS certificates filed in the paper-book. Non-response to the notices issued u/s. 133(6) of the Act could be for various reasons. However, that itself would not lead to the conclusion that the payments made are non-genuine, particularly, when the payments have been made through banking channels. Moreover, considering the nature of business and the turnover involved, we are of the view that the disallowance made is not justified. Accordingly, we delete the same. This ground is allowed.

In the result, the assessee's appeal is allowed.

20. To sum up, Revenue's appeals are dismissed and assessee's appeal is allowed.

Order pronounced in the open court on this day of 5<sup>th</sup> February 2020.

**Sd/-**

(G Manjunatha)  
ACCOUNTANT MEMBER

Mumbai, Dated : 5<sup>th</sup> February, 2020.

**Sd/-**

(Saktijit Dey)  
JUDICIAL MEMBER

SA

**Copy of the Order forwarded to :**

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai.
4. The CIT
5. The DR, 'D' Bench, ITAT, Mumbai

BY ORDER,

//True Copy//

(Assistant Registrar)  
Income Tax Appellate Tribunal, Mumbai