IN THE INCOME TAX APPELLATE TRIBUNAL
"C", BENCH MUMBAI

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND SHRI AMARJIT SINGH, JUDICIAL MEMBER.

S.No.	I.T.A. No.	Asstt. Year.
1.	6681/Mum/2018	1999-2000
2.	6682/Mum/2018	2000-2001
3.	6683/Mum/2018	2001-2002
4.	6684/Mum/2018	2002-2003
5.	6685/Mum/2018	2003-2004
6.	6686/Mum/2018	2004-2005
7.	6687/Mum/2018	2005-2006
8.	6688/Mum/2018	2006-2007
9.	6689/Mum/2018	2008-2009
10.	6690/Mum/2018	2009-2010
11.	6691/Mum/2018	2011-2012
12.	6692/Mum/2018	2012-2013
13.	2470/Mum/2017	2010-2011

M/s PIK Studios P. Ltd. (Formerly known as PIK Pens P.Ltd., 7, Parsian Building, V.P.Road, Andheri (West), Mumbai-4000-59.	Vs.	Dy. Commissioner of Income-tax-8(2)/ Income-tax Officer-8(2) Mumbai.
PAN No. : AABCPO512A		
(Appellant)	..	**(Respondent)**

Assessee by	Dr. Shivram, Shri Rahul Hakani and Shri Saurabh Mehta. (A.R.)
Revenue by	Shri Somnath Wajale (D.R.)
Date of Hearing	**06-01-2020.**
Date of Pronouncement	**5 / 3 /2020**

O R D E R

PER SHAMIM YAHYA, A.M.

These are appeals by the assessee against the orders of learned CIT(Appeals) pertaining to the relevant assessment years.

2. In the case of ITA No. 2470/Mum/2017, there is delay of 1336 days. The reasonable cause for the delay has been attributed to the fact that the company is a sick company and to save time and cost of litigation it was advised to pursue a rectification petition u/s 154 of the Act for assessment year 2010-11 based on the order of ITAT if it was in its favour. However, since the final order from the Tribunal did not come and the statutory period of rectification of assessment order as per provision of section 154 expired on 31-03-2017 it was decided by the assessee company to file appeals for the concerned assessment years.

3. On consideration of the reasonable cause of delay, we condone the said delay.

4. Since the issues are common and connected, the appeals were heard together. These are being consolidated and hence disposed of together by this common order.

5. We note that for assessment years 1999-2000 to 2009-10 (except assessment year 2007-08) are appeals which were already adjudicated by the Tribunal vide order dated 11-12-2015 and the matter was remanded. The Tribunal had noted that the core issue raised in all these appeals related to the allowability of depreciation on the actual cost of the assets arrived at by virtue of revaluation of the trade mark. The Tribunal had referred to the facts of 1999-2000 which was the first year. The Tribunal had also noted that these matters had also travelled to the ITAT earlier also

6. In this regard it may be gainful to refer to the said order of the ITAT dated 11-12-2015 which dealt with the issue as under :

> "3. Firstly, we shall take up the issues raised in appeal ITA No.7230/M/2012 the AY 1999-2000. Briefly stated relevant facts of the case are that the assessee came into existence in the form of a firm named „Veekay Industries" and the same is succeeded by the assessee-company and the trademark "PIK" was acquired by the assessee for a sum of Rs. 5.25 Crs. The said trademark was originally registered by M/s. Balaji Pen Pvt. Ltd. Subsequently, on 1.4.1992, the said trademark was purchased by the firm M/s. Veekay Industries for a sum of Rs. 100/-. The said trademark was valued by an approved valuer, who quantified the value of the trademark at

Rs. 5.52 Crs vide its Valuation Report dated 17.11.1998, relevant for the AY 1999-2000. The said amount was credited to the investment reserve account in the books of account of the said firm on 31.1.1999. The firm is then succeeded by the assessee-company on 1.2.1999. Assessee started claimed depreciation u/s 32 of the Act on the said revalued trademark worth of Rs. 5.25 Crs.

4. In the background of these facts, during the scrutiny assessment proceedings, Assessing Officer did not allow the claim of depreciation on the said revalued trademark amounting to Rs. 5.25 Crs. In the process, AO invoked the provisions of Explanation-3 to section 43(1) of the Act. This issue travelled to the ITAT in the first round of the second appellate proceedings. Before the Tribunal, assessee raised additional legal grounds and the same are extracted in page 3 of the order of the Tribunal in ITA No.2218/M/2006 (AY 1999-2000), dated 29.7.2009 and the said additional grounds read as under:

> "1. The Ld AO erred on facts and in law in not obtaining the approval of the Joint Commissioner of Income Tax before substituting the value of brand acquired by the appellant while applying Explanation-3 to section 43(1).
> 2. The Ld AO failed to appreciate that without obtaining the approval of the JCIT, he could not have substituted the value of brand as per Explanation-3 to section 43(1) as the mandatory condition of approval not being complied with the order passed by the AO substituting the cost is bad in law."

4. After considering the said additional grounds as well as the original grounds, the Tribunal set aside the issue relating to the allowability of the depreciation on the revalued cost of the trademark to the file of the CIT (A). Para 7 of the said Tribunal"s order (supra) is relevant in this regard. In the additional grounds, extracted above, it is evident that the assessee questioned the applicability of Explanation-3 to section 43(1) of the Act. It is the claim of the assessee that the Assessing Officer has not obtained the approval of the JCIT, which is the statutory requirement specified in the said Explanation-3 the consequence of the same is that the assessee"s claim of depreciation should be allowed without any substitution on the cost. In the set aside proceedings, CIT (A) considered the above additional grounds raised by the assessee and called for the relevant records for ascertaining the fact of obtaining the approval of the JCIT. It appears that relevant records are not available for his perusal. Consequently, CIT (A) decided the issue by inference and the relevant lines from para 1.7 of his order are extracted as follows:-

> "1.7. .... In the instant case, the AO has clearly mentioned in the last sentence of the first para on page 8 that the main purpose of such valuation was for reduction of liability to tax. However, in the absence of complete records it cannot be said that the AO had obtained prior approval of the JCIT. Hence, the disallowance of claim of depreciation under this section is also not correct."

5. Basing on the above conclusion drawn by the CIT (A), Shri Dr. K. Shivram, Ld Counsel for the assessee submitted that the AO failed to obtain the prior approval of the JCIT before the revalued cost is substituted. In such circumstances, the order of the AO on this issue becomes nullity. In this regard, Ld Counsel for the assessee brought our attention to Ground no.2 of the original grounds of appeal which reads as under:-

> "2. The Ld CIT (A) failed to appreciate that when he has given finding that there was no approval of JCIT, he ought to have allowed the depreciation as claimed by the assessee."

6. Improving the said Ground no.2, Ld Counsel for the assessee also filed an additional ground and the same reads as under:-

> "6. The Ld CIT (A) failed to appreciate that when he has given a finding that there was no approval of the JCIT, he ought to have held that Explanation-3 of section 43(1) cannot be invoked as adjustment being nullity in law, disallowance of depreciation by the Assessing Officer is bad in law and may be deleted."

7. Further, Dr. Shivram submitted that having given a finding on the absence of approval of the JCIT as specified in Explanation-3 to section 43(1) of the Act, disallowing the claim of depreciation on the revalued cost of asset, as claimed by the assessee, is bad in law. Further, bringing our attention to the order of the Tribunal in the first round of the proceedings (supra), Ld Counsel for the assessee submitted that the CIT (A) failed to adjudicate the Ground no.2 by passing a speaking order as to how the claim of depreciation is validly substituted by the AO without having taken the approval of the JCIT. On this issue, Ld Representatives of both the parties in the litigation submitted that this issue requires remanding of the matter to the file of the CIT (A) for second time for fresh adjudication by passing a speaking order.

8. Further, Ld Counsel for the assessee submitted that the Assessing Officer merely rejected the valuation report dated 17.11.1998 furnished by the assessee without referring the asset to the DVO for his valuation, if any, on the trademark. Assessing Officer is not an expert on this issue and

therefore, the rejection of the valuation report furnished by the assessee is not correct. For this proposition, Ld Counsel for the assessee relied on the decision of the ITAT, Ahmedabad in the case of Unimed Technologies Ltd vs. DCIT [2000] 73 ITD 150 (Ahd.) and the judgment of the Hon‟ble Gujarat High Court in the case of Ashwin Vanaspati Industries vs. CIT [2002] 255 ITR 26 (Guj). These decisions suggest for accepting the valuation report furnished by the assessee and depreciation should be granted on the enhanced cost of the asset.

9. Further, Ld Counsel for the assessee brought our attention to the fact that the CIT (A) erroneously invoked the 5th proviso to section 32(1) of the Act, when such proviso came into statute only from the AY 2000-01. The amended provision do not apply to the trademark valued vide the valuation report dated 17.11.1998.

10. On hearing Ld Representatives of both the parties on the issues raised before us for the AY 1999-2000, we find the CIT (A) in the second round has left so many gaps with regard to the fact of AO‟s failure to obtain prior approval of the JCIT and the consequences of not obtaining such approval on the claim of the assessee. The CIT (A) did not consider the fact whether the provisions of Explanation-3 to section 43(1) of the Act actually apply to the facts of the present case; whether AO merely ignored the claim of depreciation on the revalued cost of the trademark. Further, CIT (A) has also not considered whether there is any substitution of valuation at all when the AO considered the value of the trademark at “zero”. CIT (A) is directed to pass a speaking order as to how the Explanation-3 to section 43(1) OF THE Act applies to the facts of the present case from all angles if the conditions specified in the said Explantion-3 are fully satisfied or not. He is also directed to pass an order on how the AO is permitted to reject the valuation report furnished by the assessee when the AO does not have any other report on hand from the DVO or otherwise. Further, CIT (A) is also directed to examine the applicability of the cited judgment of the Hon‟ble Gujarat High Court in the case of Ashwin Vanaspati Industries (supra) and others. Further also, CIT (A) should examine the applicability of the 5th proviso to section 32(1) of the Act and give reasons in writing on how the amended provisions apply to the facts of the present case. Thus, we remand the whole of the issue relating to the claim of depreciation on the trademark to the file of the CIT (A) for third round of the proceedings before him. This time, the CIT (A) is directed to examine each of the issues discussed above in a time bound manner attending to all the arguments raised by the Ld Counsel for the assessee before him in the set aside proceedings. It is needless to mention that the assessee shall be granted reasonable opportunity of being heard to the assessee as per the set principles of natural

justice. Accordingly, all the issues raised in the original grounds as well as additional grounds are allowed for statistical purposes.

11. In the result, appeal of the assessee for the AY 1999-2000 is allowed for statistical purposes.

II

I.T.A. No.7231/M/2012 (Assessment Year: 2000-2001)
I.T.A. No.7232/M/2012Assessment Year: 2001-2002)
I.T.A. No.7233/M/2012 (Assessment Year: 2002-2003)
I.T.A. No.7234/M/2012 (Assessment Year: 2003-2004)
I.T.A. No.7235/M/2012 (Assessment Year: 2004-2005)
I.T.A. No.7236/M/2012 (Assessment Year: 2005-2006)
I.T.A. No.4385/M/2013 (Assessment Year: 2008-2009)
I.T.A. No.4384/M/2013 (Assessment Year: 2006-2007)
I.T.A. No.4386/M/2013(Assessment Year: 2009-2010)

12. These 9 appeals are filed by the assessee and the common issue is raised in all the appeals relates to the quantification of allowable depreciation u/s 32 of the 6 Act. The same is dependent on the WDV of the asset, therefore, Block of Asset. If the value of the asset varies in the year of acquisition and in amount, the consequence shall be there in all the subsequent years. It is an admitted fact that the issue raised in the allowability of depreciation is always with reference to the WDV of the trademark at the end of each of the AY. Accordingly, considering the commonality of the issues involved in all the 9 appeals with that of the one adjudicated by us in the above paragraphs of this order (appeal for the AY 1999- 2000), our decision given therein squarely applies to the present 9 appeals too. Accordingly, all the grounds as well as the additional grounds raised in all the 9 appeals are allowed for statistical purposes.

13. In the result, 9 appeals of the assessee are allowed for statistical purposes.

14. Conclusively, all the 10 appeals of the assessee are allowed for statistical purposes. ”

7. In the set aside assessment the learned CIT(Appeals) referred to the remand report obtained. The learned CIT(Appeals) noted that the appeal is to be strictly decided within

the boundary ear marked by the ITAT vide order dated 11-12-2015. He noted the following aspects :

1. Approval of the JCIT which is required under Explanation 3 to Section 43(1) of the Act.
2. Can the AO reject the valuation report without any further report from the DVO and the applicability of the judgement of the Hon'ble Gujarat High Court in the case of Ashwin Vanaspati (supra).
3. Applicability of the 5th Proviso to section 32(1) of the Act with the reasons, should be amended provision apply to the facts of the present case.

The learned CIT(Appeals) concluded as under :

" Final Conclusion :

From the above analysis of facts and circumstances of the assessment years related to core issue i.e. disallowance of depreciation on revalued trade mark, following conclusions can be summarized.

i. The issue of approval of JCIT for invocation of Explanation 3 to section 43(1) of the Act was raised for the first tie before the Hon'ble ITAT in first round of appeal. It has been submitted by the AO through remand report dt. 17.10.2011 that disallowance has not b een done under Explanation 3 to Section 43, rather it has been done under the main provision of section 32(1) of the Act.

ii. The Hon'ble ITAT has admitted the plea of the appellant and directed the revenue to submit the copy of approval received from the Jt.C.I.T. From the remand report, it is clear that the crucial assessment folder for .Y. 1999-2000 was missing whereas, folders of all other assessment years are available with the department.

iii. The revenue has not been able to produce the copy of approval from the Jt.C.I.T. for invocation of Explanation 3 to Section 43(1) of the Act. However,**at no point of time, it has been conceded that approval *has not b*een taken** from the **Jt.CI.T. if at all the Explanation 3 to Section 43(1) *has been* invoked**
to disallow the depreciation on enhanced value of trade mark.

iv. On the issue of applicability of judgment of Hon'ble Guj'arat High Court, in case of Ashw/n Vanaspati Industries (Supra), it has been distinguished by the CIT(A) as well as AO during earlier appellate proceedings or remand report. Thus, it does not have universal application.

v. There is no requirement of the law that enhanced value of an asset during business re-organisation can be altered only by bringing another valuation report. The AO

has elaborately examined and discussed the reasons for not accepting the valuation done by the appellant company in the order of A.Y.2001-02.

vi The 5th Proviso to section 32(1)(ii) is clearly applicable in the instant case. This provision includes clause (xiii) of section 47 i.e. conversion of a Partnership firm into a company, which is the issue in instant appeal.

vii. The 5th Proviso to section 32(1)(ii) has to two limbs. Firstly, it explicitly makes clear that depreciation in the hands of transferee and transferor should be computed as if there is no succession. The second limb is with respect to apportionment of claim of depreciation depending on the number of days, the transferred assets have been utilized by the transferor/transferee entity.

viii. From the background and expert committee report, before amendment of section 43(xiii), it is clear that tax incentive given for corporatization was limited to exemption from the capital gain u/s.45 of the Act. Allowance of depreciation on revalued assets will tantamount to tax abuse.

ix. The appellant's case is squarely covered by the decision of Hon'ble ITAT, Bangalore, in case of United Breveries (Supra). In this case, the disallowance was made under Explanation 3 to section 43(1) of the Act. The rejection of revaluation was the dispute before the Hon'ble Tribunal. The Hon'ble Tribunal has elaborated the various provisions and held that even without invoking Explanation 3 to Section 43(1), the depreciation on enhanced value of assets due to revaluation is prohibited expressly by the 5th Proviso to section 32(1) (ii) of the Act.

x. The other alternative arguments such as cost paid by the transferee or allowance of depreciation on enhanced value in succeeding years are fallacious in the background of threadbare analysis given under respective paras.

Thus in view of the above discussion and analysis in the background of directions of Hon'ble /TAT, relevant case laws, relevant sections /sub sections/proviso/clauses , it is clear beyond doubt that depreciation shall be calculated at prescribed rate, as if no succession has taken place. As per proviso 5 to section 32(1), depreciation allowable in case of transferee company on business organisation from the firm cannot exceed the depreciation allowable, had the succession not taken place. In other words, the allowance of depreciation to the appellant company in the year of succession and subsequent years would be on the written down value of the assets in the bocks of the appellant firm and not the cost recorded in the books of appellant company. The case of appellant company is not regarded as a transfer for the **purpose** of capital gain u/s.47(xiii). Thus, the claim of depreciation on assets acquired under such transfer is restricted only to the extent as if no transfer h taken place, ft is absolutely clear that under 5th Proviso **to** section 32(1)(ii), the appellant company is not eligible for depreciation on enhanced value **of trade** mark. Once the claim of depreciation **is** restricted under the 5th Proviso to section 32(1)(ii) of the Act, then, valuation as per Explanation to Section 43(1) becomes irrelevant

It is therefore, held that AO's have justifiably disallowed the claim of depreciation on revalued trade marks in the Asstt.year 1999-2000 to 2006-0" and 2008-09 and 2009-10 and thus the disallowances are confirmed and the appeals filed by the appellant company on this ground are dismissed."

Similar orders by learned CIT(Appeals) for other assessment years are also in appeal before us.

8. Against the above order the assessee has filed appeals before us. The submissions of the learned counsel of the assessee in this regard are as under :

Proposition and case laws :

1) Circular No. 762 dated 18th February, 1998 (1998) 230 ITR (St) 26 explaining the amendment specifies in paragraph 23.2 as under (Refer page 109 of Paper Book):

"23.2 *The third proviso to sub-section (I) of section 32 provides that the depreciation allowance will be restricted to fifty per cent, of the amount calculated at the prescribed rates in cases where assets acquired by an assessee during the previous year are put to use for the purpose of business or profession for a period of less than one hundred and eighty days in that previous year.* ***Thus, in the cases of succession in business and amalgamation of companies, the predecessor in business and*** *the* ***successor or amalgamating company and amalgamated company,*** *as tht* ***case may be, are entitled to depreciation allowance on the same*** *assets* ***which in the aggregate may exceed the depreciation allowance admissible for a previous year at the rates prescribed in Appendix I of the*** *Income* ***tax Rules, 1962. An amendment has, therefore, been made to restrict th aggregate deduction for this allowance in a year in such cases to the amount computed at the prescribed rates.*** *It has also been provided that the allowance shall be apportioned in the ratio of the number of days j\ which the asset is put to use in such cases. "*

2) From the underlined portion it is clear that the legislature wanted to address the issue/mischief of depreciation claim being made of more than 100%. This m happen where one company uses the asset for say 181 days then it will claim 100% depreciation and the successor company having used the Asset for less than 180 days will claim depreciation of 50%. Thus total depreciation claim will exceed 100%.

3) Thus, if the Bold portion is read in the context of underlined portion then it becomes clear that 5th Proviso has got no role in determination of actual cost but its purpose is to only allocate the depreciation between 2 companies on the basis of actual days for which the asset is held by them and not on the basis of holding

Assets for more or less than 180 days which could result in granting of depreciation more than 100%.

4) The above view is further fortified by the Scheme of Section 43(1) as under :

(i) Explanation 7 and 7A to section 43(1) specify that the "actual cost" in case of amalgamation or demerger would be the cost in the hands of the transferee company or the demerged company. In absence of a similar provision for succession u/s. 47(xiii), the firm could revalue the assets before conversion and the company would be entitled to depreciation on the revalued figures.

ii Similarly, Explanation 2B to section 43(6) provides that the written down value of the assets in the hands of resulting company would be the same as that would have been in the hands of the demerged company. In absence of similar provisions in case of conversion of a firm into a company u/s. 47(xiii), the firm can revalue its assets and the company would be entitled to depreciation on revalued figures.

iii. Explanation 12 to section 43(1) provides that where a capital asset is acquired under a scheme of corporatization of recognized stock exchange, he actual cost shall be demed to be the amount which would have been regarded as actual cost had there been no such corporatization. In absence of a similar provision in case of conversion u/s. 47(xiii), the value at which the asset is taken over would be the actual cost.

5) Thus, if the 5th Proviso to Section 32(1) provided for determination of actual cost then there was no need of Explanation 7,7A, 2B and 12 to section 43(1).

6) Hence, if the A.O. disputes the actual cost being the revalued amount of the Asset then the only option available with the A.O. is to dispute the value by invoking Explanation 3 to Section 43(1).

7)) Thus, as per 5th Proviso AO can allow depreciation on actual cost (ie revalued amount) to the successor company ie Assessee but only for the no of days for which it is held by the Assessee. As far as the predecessor firm is concerned it will get

B) **Without prejudice to above, 5th Proviso to Section 32(1) is not applicable in the facts of the present case.**

1) 5th Proviso states "Provided also that the aggregate deduction in respect of depreciation..... allowable to the predecessor and the successor in the case of succession refereed to in clause (xiii)..... ....."

2) Thus, for 5th Proviso to be applicable both the predecessor and the successor company should be capable/eligible for claiming depreciation. In the facts of the present case, predecessor company could not have claimed depreciation on the revalued amount. Hence, 5th proviso to section 32(1) cannot apply.

C) In the facts of the present case, Actual cost cannot be altered by invoking Explanation 3 to section 43(1).

1) It is an undisputed fact that even in the third round, revenue has not been able to produce the copy of sanction granted by the Joint Commissioner. Hence, invocation of Explanation 3 to Section 43(1) is not in accordance with law.

Sanction is mandatory

i. Reliable Finhold Ltd. vs. UOI (2014) 369 ITR 419 (A11.)(HC)(423) No Sanction was obtained order was bad in law.

ii. Dhadda Exports vs. ITO (2015) 377 ITR 347 (Raj.)(HC) (353)

Failure to obtain sanction is not a curable defect u/s. 292B, hence notice is invalid.

iii. Jaswant Sugar Mills vs. I..T.C. (1973) Tax LR 1336 (A11.)(HC)

Brief Note - (C) unless the I.T.O. after giving the assesse an opportunity to establish the genuineness of the transfer, was objectively satisfied that the

acquisition of assets involved a transfer for the purpose of reduction of tax liability, depreciation on the acquired assets has to be allowed on the actual price paid for it be the assesse. Such objective satisfaction should not be inferred from the mere fact that the I.T.O had obtained the approval of the inspecting Assistant Commissioner to have recourse to the proviso to section 10(5)(a) of the Act.

2) There is no evidence to prove that the main object of transfer was reduction of tax liability as Assessee had losses.

3) No alternate valuation has been given by the A.O.

4) Unimed Technologies Ltd. vs. Dy. CIT (2000) 73 ITD 150 (Ahd.)(Trib.).

Valuation report submitted by the assessee must be accepted.

5) Ashwin Vanaspati Ind. Vs. CIT (2002) 255 ITR 26 (Guj.)(HC) (37) Pg. No. 93-99

Valuation was on the basis of approval valuer - Entitled depreciation on enhanced value.

D) Case Laws.

1) In following cases of succession of firm by a company as per Section 47(xiii), depreciation has been allowed on revalued amount:

a) DCIT v Suyash Laboratories Ltd (2016) 65 taxmann.com 217(Mum)(Trib) follow Gujrat High Court 255 ITR 26 Pg. No. 100-105

b) Modular Infotech (P.) Ltd. v. DCIT (2010) 131 TTJ (Pune)(Trib) 172 Pg. No. 106-112.

c) Chitra Publicity Co (P) Ltd v ACIT (2010) 127 TTJ 1 (Ahd)(Trib) (TM) (Pg. No.113-144 (120) Para 6.1

d) Ashwin Vanaspati Industries v. CIT [2002] 255 ITR 26 (GUJ)(HC).

2) In the following cases, it has been held that depreciation is allowable on revalued figures :

a) CIT v. Mira Exim Ltd. (2013) 359 ITR 70 (Del) - there is transfer on amalgamation. Hence, assesse entitled to depreciation on asset acquired under amalgamation, though depreciation was not allowable to amalgamating company.

b) CIT v. Manipal Universal Learning Pvt. Ltd. (2013) 359 ITR 369 (Karn) - assesse entitled to depreciation on revalued amount.

c) In De Nora India Ltd. vs. CIT (2015) 370 ITR 391 (Delhi)(HC)

Acquisition of entire business including assets and liabilities for a lump sum amount. Depreciation is allowable on the basis of valuation.

3) Decision relied upon by the CIT(A) in United Breweries Ltd v ACIT (2016) 76 taxmann.com 103 (Bang)(Trib) is not applicable for the following reasons :

(i) The decision dealt with the issue of Amalgamation. In case of amalgamation Explanation 7 to Section 43(1) defines Actual cost. Whereas present case deals with succession of firm by company for which no separate Explanation is provided u/s 43(l).

(ii) It is contrary to the following decisions of Mumbai, Pune and Ahmedabad tribunal

Which have been passed after considering decision of Gujarat High court in Ashwin Vanaspati Industries v. CIT [2002] 255 ITR 26 (GUJ)(HC):

a) DCIT v Suyash Laboratories Ltd (2016) 65 taxmann.com 217(Mum)(Trib)
b) Modular Infotech (P.) Ltd. v. DCIT (2010) 131 TTJ (Pune)(Trib) 172
c) Chitra Publicity Co (P) Ltd v ACIT (2010)127 TTJ (Ahd)(Trib) 1

(iii) **CIT vs. Sun Engineering Works P. Ltd.** (1992) 198 **ITR** 297 (SC) (320)

The Judgement to be read on the basis of question before the Court.

4) Decisions relied on by the AO are not applicable to the facts of the case. This is dealt with hereunder :

a) In CIT v. Messrs. Harveys Ltd. (1940) 8 ITR 307 (Mad) the value of assets

were inflated at the time of transfer. It was in the said circumstances, it was held that Income Tax Authorities could go behind sale deed and ascertain real value. In the present case, there is no allegation of inflated valuation. Hence,this decision is not applicable.

b) Kungundi Industrial Works (Pvt.) Ltd. Vs. CIT (1965) 57 ITR 540 (AP) - this decision is in the context of Proviso to section 10(5)(a) which is similar to Explanation 3 to section 43(1). As hon'ble CIT(A) has stated that AO was not justified in disallowing the appellant's claim as per Explanation 3, this decision is not applicable in the present situation.

c) In Nagammal Cotton Mills (Pvt.) Ltd. v. CIT (2002) 258 ITR 390 Mad) the i firm had valued the assets at the time of takeover at much higher value than its market value. It was in these circumstances, Explanation 3 to section 43(1) was applied. As the hon'ble Commissioner of Income Tax (Appeals) has held that AO was not justified in disallowing depreciation applying Explanation 3 to section 43(1), this decision has not relevance to the facts of the appellant's case.

d) In Jogta Coal Co. Ltd. v. CIT (1965) 55 ITR 89 (Cal) the assets transferred were inflated. It was in this circumstances the hon'ble Court held that Income Tax Authorities could look into the value. In the present case, there is no allegation that the trademark does not exist or its value is inflated. Hence, this decision does not apply to the facts of the case.

e) The decision in CIT v. The Mazagaon Dock Ltd. (1938) 6 ITR 124 (Bom) was in the context of entirely different facts. In the said case, The Mazagaon Dock Ltd. was assessed on the income of the predecessor as Successor. While assessing the income of the predecessor, it was held that depreciation had to be valued on the value in the hands of the predecessor. As the facts of this case are totally different, the said case does not apply to the present case.

f) The facts of Kamlapat Moti Lal (1939) 7 ITR 374 (All) was also in context of income of predecessor i.e. similar to that of Mazagaon (supra). Hence, the said case is not applicable to the facts of the present case.

g) In CIT Vs. Alagappa Cotton Mills (1984) 149 ITR 640 (Mad) there was a change in constitution of the firm. It was in this context, the hon'ble High Court held that assesse is not entitled to claim depreciation on revalued figure. As there is not change in constitution but a sucession of a firm by a company, the said decision is not applicable to the facts of the case.

(iv) Decision in the case of Mascot (India) Tools & Forgings (P.) Ltd. v. ITO (1987) 23 ITD 274 (Del) is in the context of Explanation 3 to section 43(1). The hon'ble CIT(A) having held that the disallowance of depreciation as per Explanation 3 o section 43(1) was not justified, erred in relying on said

decision.

In view of the above, appellant prays that AO may be directed to allow depreciation
claimed.

5. Without prejudice to above, when specific direction is given by the Tribunal. It is binding on the lower authorities. As the CIT(A) has not followed the direction the Tribunal. The disallowance of depreciation confirmed by the CIT(A) may be directed to be deleted.

9. Learned D.R. has submitted that valuation was done in a very inflated manner showing very inflated sales ad the same has been dealt wit by the AO in the assessment year 2010-11.

10. In rejoinder, learned counsel of the assessee submitted that valuation has not been challenged by asking for remand to DVO. Learned counsel further submitted that the decision of ITAT, Bengalore is not applicable.

11. Regarding the case laws referred by the learned counsel of the assessee, learned D.R. objected as to how they are applicable when this is a set aside assessment pursuant to remand of the Tribunal and the matter is confined to the remand.

12. We have carefully considered the submissions and perused the records. We find that the main issue in these appeals relate to the disallowance of depreciation on the value of trade mark. Originally it was a firm in the name of Veeky Industries. On 01-04-1992 a trade mark "PIK" which was originally registered by M/s Balaji Paints P. Ltd. was purchased by the firm i.e. M/s Veeky Industries for a sum of Rs.100/- The said trade mark was valued by an approved valuer who quantified the value of a trade mark at Rs.5.52 crores vide its valuation report dated 17-11-1998 relevant for assessment year 1999-2000. The said amount was credited to the investment reserve account in the books of account of the said firm on 31-01-1999. The firm was then succeeded by this assessee company on 01-02-1999. The assessee company claimed depreciation u/s 32 of the Act on the said revalued trade mark worth Rs.5.52 crores. The AO had denied the claim of depreciation on this figure. The matter had proceeded twice to the ITAT. In the latest remand by the ITAT, the matter was remanded for the following purposes :

1) Approval of JCIT which was required under Explanation 3 to section 43(1) of the Act.
2) Can the AO reject the valuation report without any further report from the DVO and the applicability of the judgment of Hon'ble Gujarat High Court in the case of Ashwin Vanaspati Inds. (supra).
3) Applicability of the 5th proviso to section 32 of the Act.

13. The learned CIT(Appeals) has given a finding that the Revenue has not been able to produce the copy of approval from Joint CIT for invocation of Explanation 3 to section 43(1) of the Act.

14. In our considered opinion, once there is a categorical finding in this regard, the invocation of Explanation 3 to section 43(1) fails. Accordingly we hold that that the disallowance of depreciation by invocation of Explanation 3 to section 43(1) in this regard fails on account of lack of jurisdiction.

15. The other issue which remains for adjudication is the applicability of 5th proviso to section 32(1). In this regard we may gainfully refer to the said proviso :

> " Provided also that the aggregate deduction, in respect of depreciation of buildings, machinery, plant or furniture, being tangible assets or know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets allowable to the predecessor and the successor in the case of succession referred to in [clause (xiii), clause (xiiib) and clause (xiv) of section 47 or section 170 or to the amalgamating company and the amalgamated company in the case of amalgamation, or to the demerged company and the resulting company in the case of demerger, as the case may be, shall not exceed in any previous year the deduction calculated at the prescribed rates as if the succession or the amalgamation or the demerger, as the case may be, had not taken place,and such deduction shall be apportioned between the predecessor and the successor, or the amalgamating company and the amlgmated company,, or the demerged company and the resulting company, as the case may be, in the ratio of the number of days for which the assets were used by them."

A bare reading of the above proviso reveals that even in case as the present one where the firm is succeeded by a company falling u/s 47(xiii), the Act mandates that the

aggregate deduction in respect of the concern asset shall not exceed in any previous year, the deduction calculated at the prescribed rates as if the succession has not taken place and such deduction shall be apportioned between the predecessor and successor in the ratio of the number of days for which the assets were used by them.

16. Now we examine the present issue on the touch stone of above said provision of law. In the present case the predecessor is the firm M/s Veeky Industries. The trade mark "PIK" standing in its books had a cost of Rs.100/- It had a revaluation figure of Rs.5.52 crores and the amount of revaluation was transferred to reserve account. As per the provisions of Law, the firm cannot claim depreciation on any revaluation figure. The depreciation has to be claimed on the cost incurred by it. By no stretch of imagination Rs.5.52 crores less Rs.100/- was the cost incurred by the assessee firm. Hence the assessee firm was not entitled to depreciation on the revaluation figure of Rs.5.52 crores. Now the firm i.e. the predecessor has been succeeded by assessee company on 01-02-1999 and the company has claimed depreciation on the value of trade mark in its books at Rs.5.52 crores. Now the above said 5th proviso provides that depreciation in such case is to be computed at the prescribed rates as if the succession had not taken place. This means that the rate and amount of depreciation which was applicable for the predecessor be the amount of depreciation allowable on the said item. That it also means that the total amount of depreciation cannot exceed the depreciation which the assessee firm would be entitled as if the succession had not taken place. If the succession had not taken place, there would not have been any depreciation allowance on the revaluation figure. In other words, the revaluation of Rs.5.52 crores (less Rs.100/-) cannot be taken into account for granting depreciation to the successor i.e. the assessee company.

17. In this view of the matter, as per the plain reading of the Law, the 5th Proviso to section 32(1) debars the assessee company to claim depreciation on the amount which was represented by revaluation in the books of the predecessor. The various arguments given by the learned counsel of the assessee are not at all sustainable on the plain meaning of the provision of the statute. It is settled Law that when the language of the Act is simple and clear, the same should be applied. As evident from the above, Act clearly provides that the total depreciation shall be limited to the depreciation that would have occurred to the predecessor as if the transfer has not taken place. Even at the cost

of repetition , we may state that the predecessor i.e. the firm was not entitled to depreciation on the revaluation figure. In view of the specific 5th proviso to section 32, the succeeding entity cannot take advantage of the figure of revaluation which was done in the books of predecessor. Since the predecessor could not have claimed depreciation on the revaluation figure, this proviso specifically debars successor also to that effect. The various interpretation submitted by the learned counsel of the assessee are not at all applicable as the provision of Law is very clear. The language of the Act is simple. No further extrapolation is required. Accordingly on the invocation of 5th proviso of section 32 the depreciation claimed on the value of trade mark represented by revaluation figure is not permissible and accordingly we uphold the order of learned CIT(Appeals). The submission of the learned counsel of the assessee with regard to amalgamation and demerger are clearly irrelevant as the present case is the succession of the firm by a company. This by no stretch of imagination can be equated with amalgamation of companies and demerger thereof. The submission that the said 5th proviso deals with depreciation in the hands of assessee company at revalued figure for the number of days, it has been used by the assessee company, is totally unsustainable in view of our discussion as above. A provision of law has to be considered in its entirety. As already explained that in situation such as in the present case where a firm has been successed by the company the depreciation is to be provided as if the succession has not taken place. As the depreciation is to be allowed in the same manner as it would have been allowed in the hands of the predecessor firm. Since the predecessor firm was not entitled to depreciation on the amount of trade mark presented by revaluation reserve, depreciation to that extent is also not available in the hands of the assessee company also. The scheme of the Act in this regard does not require any valuation report to be obtained by the Revenue. As a matter of fact, learned counsel of the assessee in his submissions in item No. B above is mentioning that "Thus for 5th proviso to be applicable both the predecessor and the successor company should be capable/eligible for claiming depreciation. In the facts of the present case, the predecessor company could not have claimed depreciation on the revalued amount. Hence 5th proviso to section 32(1) cannot apply." We find that the above is a distortion of the proviso. No where the proviso mentions that the predecessor has always to be a company. It specifically covers

transfer under section 47(xiii). This section deals with succession of a firm by a company. When learned counsel of the assessee is himself admitting that the predecessor could not have claimed on the revalued amount, there is no question of the assessee company getting depreciation on the revalued amount.

18. In this view of the matter, in our considered opinion, the submissions of the learned counsel of the assessee are not at all sustainable.

19. The reliance by the learned counsel of the assessee on Ashwin Vanaspati Industries (supra) is not at all applicable as the said case was not with respect to 5th proviso to section 32(1).

20. As regards the case laws wherein revaluation by professionals have been found to be in order are in the context of invocation of section 43(6), hence they are inapplicable in the facts of the present case. The case laws in the case of ITAT, Bengalore Bench in the case of United Breveries vs. ACIT 77 taxmann.com. 103 supports the proposition as in that case it is found that by virtue of 5th proviso to section 32(1), the assessee being amalgamated company, could not claim or be allowed to claim, depreciation on assets acquire in a scheme of amalgamation more than depreciation that was allowable to amalgamating company. This ratio duly applies to the present case inasmuch as here we have a succession of firm by the assessee company and hence the claim of depreciation by the assessee company has to be the same as would have been in the hands of the predecessor firm.

21. Once it is clear that the assessee company was not entitled to any depreciation on the revaluation figure, the WDV of subsequent years have to be computed accordingly. In other words, it has to be the value represented by the cost of the trade mark of the predecessor firm in its books without any addition in the revaluation. Hence in the present case as the facts indicated that the said trade mark was acquired at a cost of Rs.100/-, no further addition on account of revaluation for the purpose of depreciation is allowable in the hands of the assessee.

22. Since the issue raised in all the subsequent appeals are common, our above said adjudication applies protanto to all these appeals.

23.. The issues raised in all the appeals are similar. The adjudication as above applies protanto.

24. In the result, these appeals by the assessee stand dismissed.

Order pronounced in the open Court on 5th March, 2020

Sd/-	Sd/-
(AMARJIT SINGH)	(SHAMIM YAHYA)
JUDICIAL MEMBER.	ACCOUNTANT MEMBER.

Mumbai; Dated : 5th March, 2010.

Wakode, Sr.P.S.

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, Mumbai