

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'E' BENCH,
NEW DELHI
[THROUGH VIDEO CONFERENCE]**

**BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER**

**ITA No. 2245/DEL/2017
[Assessment Year: 2011-12]**

The Dy.C.I.T
Circle - 16(2)
New Delhi.

Vs. Metal One Corporation India Pvt Ltd
5th Floor, Birla Tower,
25, Barakhamba Road, New Delhi

PAN : AAFCM 1225 R

[Appellant]

[Respondent]

Revenue by : Ms. Rakhi Vimal, Sr. DR.

Assessee by : Sh. Shatavik Chakraborty, Adv.

ORDER

PER H.S. SIDHU, JUDICIAL MEMBER,

This appeal by the Revenue is preferred against the order of the Id.
CIT(A) - 39, New Delhi dated 13.12.2016 pertaining to A.Y 2011-12 on the
following grounds:-

1. Whether on facts and in circumstances of the case, Ld.
CIT(A) is legally justified in deleting disallowance of
market to market foreign exchange loss of Rs.

18,26,173/- by ignoring the findings of fact recorded by the Assessing Officer (the AO) that the transaction was speculative loss in nature?

2. Whether on facts and in circumstances of the case, Ld. CIT(A) is legally justified in deleting disallowance of market to market foreign exchange loss of Rs. 18,26,173/- by ignoring CBDT instruction no. 3/2010 dated 23.03.2010 and the decision of the DRP on this issue in the case of the assessee in immediately preceding assessment year?

3. Whether on facts and in circumstances of the case, Ld. CIT(A) is legally justified in deleting disallowance of market to market foreign exchange loss of Rs. 18,26,173/- by relying on judgement of Hon'ble Supreme Court in case of CIT vs. Woodward Governor India Pvt. Ltd. 312 ITR 254 (2009) even when the ratio decidendi of relied upon judgement was not applicable to speculative foreign exchange loss?

4. Whether on facts and in circumstances of the case, Ld. CIT(A) is legally justified in allowing depreciation on goodwill which did not exist in the Balance Sheets for AY 2009-10 to 2012-13 filed along with return of income for these assessment years which included assessment year under consideration?

5. Whether on facts and in circumstances of the case, Ld. CIT(A) is legally justified in allowing depreciation on goodwill value of Rs. 6,09,00,000/- which was not disclosed

in the books of accounts for AY 2009-10 to 2012-13 and there was no basis to value goodwill at Rs. 6,09,00,000/- ?

6. Whether on facts and in circumstances of the case, Ld. CIT(A) is legally justified in allowing depreciation on goodwill by ignoring the decision of Hon'ble Supreme Court in case of Goetze (India) Ltd. vs. CIT 284 ITR 323 as well as the findings of fact recorded by the AO in the remand report?

7. Whether on facts and in circumstances of the case, Ld. CIT(A) is legally justified in deleting disallowance of market to market foreign exchange loss of Rs. 18,26,173/- and allowing depreciation on non-existent goodwill by accepting additions evidence and self-serving claim of the assessee?

8. Whether on facts and in circumstances of the case, Ld. CIT(A) is legally justified in admitting self-serving additional evidence filed by the assessee in respect of foreign exchange loss and goodwill even when the case of assessee did not fall within the exceptions as stipulated under Rule 46A of the Income Tax Rule?

9. That the appellant craves leave to add, amend, alter or forgo any ground/(s) of appeal either before or at the time of hearing of the appeal.

2. The facts narrated by the revenue authorities are not disputed by both the parties, therefore, no need to repeat the same for the sake of convenience.

3. Both the parties filed their adjournment applications requesting some time for arguments on the different grounds. But on pointing out by the Bench that the issues in dispute have already been decided by the ITAT in the Appeal filed by the Department for previous and subsequent year in favour of the Assessee. Both the parties agreed on the query raised by the Bench and requested to withdraw their adjournment applications. Therefore, the adjournment applications filed by both the parties are dismissed as 'withdrawn'.

4. At the time of hearing, Ld. Counsel for the assessee stated that the issues in dispute have already been decided by the ITAT, Delhi 'I.2' Bench, New Delhi in ITA No. 6101/Del/2017 (AY 2012-13) in assessee's own case i.e. DCIT, Circle 16(2), New Delhi vs. Metal One Corporation India Pvt. Ltd. on 28.08.2020. He has also filed the copy of this order. He requested that the issues in dispute have already been decided in favour of the Assessee by the ITAT in its order dated 28.08.2020, as aforesaid, therefore, by following the same, the appeal filed by the Revenue may be dismissed.

5. Ld. DR also agreed on the request of the Ld. Counsel for the assessee and has not filed any contrary decision to the Tribunal's order dated 28.08.2020 passed in assessee's own case.

6. We have heard both the parties and perused the orders passed by the revenue authorities especially the order dated 28.08.2020 passed in ITA No. 6101/Del/2017 (AY 2012-13) in assessee's own case i.e. DCIT, Circle 16(2),

New Delhi vs. Metal One Corporation India Pvt. Ltd. (AY 2012-13). We are of the view that the issues in dispute have already been decided in favour of the assessee in assessee's own case for the assessment year 2010-11 and 2012-13. For the sake of convenience, the relevant portion of the Tribunal's order dated 28-08.2020 for the assessment year 2012-13 on both the issues are reproduced as under:-

“5. We have carefully considered the orders of the authorities below qua the quarrel. We find force in the contention of the ld. counsel for the assessee. Both the issues in the quarrel are settled in favour of the assessee and against the revenue by the Tribunal in assessee's own case in ITA No. 1761/DEL/2015 for A.Y 2010-11.

6. The Tribunal, in A.Y 2010-11 has considered the claim of depreciation on goodwill and adjudicated as under:

“Now, coming to the corporate issues raised by the assessee. The first issue raised vide Ground of appeal Nos. 10 & 11 is against the disallowance of depreciation on Goodwill claimed by the assessee pursuant to the Business Transfer Agreement. The assessee had made no claim of depreciation of goodwill in its return of income and the claim was made for the first time during the course of assessment

proceedings. The Assessing Officer placing ITA No. 1761/Del/2015 Assessment Year: 2010-11 8 reliance on the decision of Hon'ble Supreme Court in Goetze (India) Ltd. [2006] 284 ITR 323 (SC) rejected the claim of the assessee. The said claim was also rejected on merits by the Assessing Officer. The Assessing Officer proposed the addition in the hands of the assessee against which objections were filed before the DRP, who did not adjudicate the issue. The Assessing Officer passed final assessment order, not granting depreciation on goodwill, against which the assessee is in appeal before us. 14. The Ld. AR for the assessee after pointing out to the factual aspects referred to the order of the CIT(A) for Assessment Year 2011-12 and pointed out that after obtaining Remand Report from the Assessing Officer, the said claim was allowed in the hands of the assessee. The Ld.AR for the assessee further pointed out that pursuant to the agreement of slum sale, vide agreement dated 20.06.2008, sum of Rs.34 crores was paid to Mitsubishi and the difference between sale value and book value of the assets was booked and depreciation was claimed, though during the course of assessment proceedings. The Ld. AR for the assessee points out that the Hon'ble Supreme Court in Smifs Securities Ltd.: (2012)

348 ITR 302 has held that goodwill was intangible asset and depreciation is to be allowed on it. Our attention was drawn to the order of the CIT(A) in Assessment Year 2011-12 and the Remand Report of the Assessing Officer which are placed at pages 25 to 29 of the Paperbook. The assessee further pointed out that the Hon'ble Delhi High Court in Triune Energy Services (P.) Ltd. vs DCIT [2016] 237 Taxman 230 (Delhi) observed that in view of Accounting Standard 10, ITA No. 1761/Del/2015 Assessment Year: 2010-11 9 consideration paid in excess of value of tangible assets was rightly classified as goodwill and therefore, further exercise to value goodwill was not warranted. 15. The Ld.DR for the Revenue took us through various covenants of the Business Transfer Agreement and pointed out that no depreciation was claimed in any of the assessment years i.e Assessment Year 2009-10 to 2011- 12. He further pointed that payment of goodwill is not defined anywhere in the agreement. Further, no valuation report of any competent person was available; so, no depreciation is to be allowed on goodwill. 16. We have heard the rival contentions and perused the record. The first issue is whether the claim which has not been made in the Return of income, can the same be allowed in

the hands of the assessee, if subsequently raised during the assessment proceedings. The Hon'ble Delhi High Court in CIT vs Jai Parabolic Springs Ltd. 306 ITR 42 (Del.) and Hon'ble Bombay High Court in CIT vs Pruthvi Brokers & Shareholders Pvt.ltd. 349 ITR 336 (Bom.) has held that "even if a claim made by assessee-company does not form part of original return or even revised return", the same is to be allowed in accordance with law. In such facts and circumstances, we are of the view that the claim of depreciation on goodwill needs to be considered in the hands of the assessee. The Business Transfer Agreement is dated 20.06.2008 and no depreciation on goodwill was claimed in the return of income. The case of the assessee is that the said depreciation on goodwill is allowable in the hands of the assessee. On the other hand, the case of the Revenue is that the ITA No. 1761/Del/2015 Assessment Year: 2010-11 10 payment of goodwill itself is not defined in the agreement and there is no valuation report from any Competent Authorities so the said claim of depreciation on goodwill is not allowable. We are of the view that the claim can be considered in the hands of the assessee subject to verification of the factual aspects in the hands of the assessee. The Assessing Officer was of

the view that the claim was not allowable because of the decision of Hon'ble Supreme Court in Goetz India Ltd. (supra); though he has made some reference to the factual aspects of the case. The DRP has not adjudicated this issue; though the CIT(A) has allowed the claim of the assessee in Assessment Year 2011-12. The present Assessment Year being the year in which agreement was entered into i.e. dated 20.06.2008, it is considered fit to remit this issue of determining resultant amount of goodwill on which depreciation is allowable in the hands of the assessee, consequent to the terms and conditions of the Business Transfer Agreement, back to the file of Assessing Officer. The Assessing Officer is directed to verify the claim of the assessee after allowing reasonable opportunity of hearing. The assessee is also directed to produce all the facts before the Assessing Officer, who shall decide the same in accordance with law”.

7. On finding parity in the facts, respectfully following the decision of the co-ordinate bench Ground no. 1 with its sub grounds is dismissed.

8. In so far as the issue relating to deletion of disallowance of marked to market foreign exchange loss is

concerned, the co-ordinate bench has considered the same in A.Y 2010-11 and has held as under :

“We have heard the rival contentions and perused the record. The issue is raised against the disallowance of Mark to Market foreign exchange loss of Rs. 28,14,307/-. The assessee has booked the said loss on account of reinstatement of forward contract. The Assessing Officer had treated it to be notional and also speculative in nature. The issue stands covered by the decision of Hon’ble Delhi High Court in CIT vs Industrial Finance Corporation of India Ltd. (supra); further Revenue’s SLP(C).CC No.10349 of 2020 against this decision was dismissed by Hon’ble Supreme Court vide order dated 09.07.2020. The Hon’ble Bombay High Court in Pr.CIT vs International Gold Company Ltd. Tax Appeal 1827 of 2016 allowed mark to market loss on revaluation of forward exchange contracts and also held that CBDT Instruction No.3 of 2010 dated 23.03.2010 cannot be applied.

Following the same parity of reasoning, we reverse the orders of Assessing Officer in this regard and direct the Assessing Officer to delete the disallowance made on account of mark to market foreign exchange loss. Ground

of appeal No.12 raised by the assessee is thus allowed”.

7. We have heard both the parties and perused the orders passed by the revenue authorities alongwith the written submissions filed by both the parties. In this Revenue's Appeal there are two issues, one is regarding depreciation on goodwill and the second is relating to foreign exchange loss. The Revenue has raised 09 grounds of appeal, but ground nos. 1-3 is relating to deletion of disallowance of market to market foreign exchange loss amounting to Rs. 18,26,173/-. At the time of hearing, Ld. Counsel for the assessee filed a copy of the ITAT, Delhi I.2 Bench decision dated 28.08.2020 passed in assessee's own case for the assessment year 2012-13 in which the Tribunal has decided this issue in dispute in favour of the assessee. No contrary decision has been brought to our notice by the Ld. DR. After perusing the aforesaid findings of the Tribunal dated 28.08.2020 for the assessment year 2012-13 passed in assessee's own case, the issue regarding deletion of disallowance of market to market foreign exchange loss of Rs. 18,26,173/- is decided in favour of the assessee and against the revenue, by respectfully following the aforesaid decision of the Tribunal and accordingly, the issues involved in ground no. 1-3 raised by the Revenue are dismissed.

7.1 As regards the issue involved in ground no. 4-6 regarding allowing the depreciation on goodwill. At the time of hearing, Ld. Counsel for the

assessee drawn our attention towards the ITAT, Delhi I.2 Bench decision dated 28.08.2020 passed in assessee's own case for the assessment year 2012-13 as reproduced above and stated that the issue of depreciation on the goodwill has been adjudicated and decided in favour of the Assessee by the ITAT in assessee's own case, as aforesaid, and requested that the issue of depreciation of goodwill may be decided in favour of the assessee by dismissing the ground nos. 4 to 6 raised by the Revenue. Ld. DR relied upon the order passed by the Assessing Officer and did not brought to our notice any no contrary decision to the order of the ITAT dated 28.08.2020. She further stated that Ld. First Appellate Authority has given the directions to work-out the appropriate amount on goodwill while giving effect to his order. She further stated that Ld. First Appellate Authority in the impugned order as well as the Tribunal in its order dated 28.08.2020, as aforesaid, has not allowed the depreciation of goodwill, but only set aside the same to AO to work-out the appropriate amount of depreciation of goodwill.

7.1.1 We have heard both the parties and perused the orders passed by the revenue authorities alongwith the orders passed by the ITAT, Delhi I.2 Bench dated 28.08.2020 passed in assessee's own case for assessment year 2012-13 as reproduced above, we are of the view that in the impugned order the Ld. CIT(A) after detailed discussions on the issue in

dispute has set aside the issue in dispute to the AO to work-out the appropriate amount of depreciation of goodwill while giving effect to the impugned order dated 13.12.2016. The relevant portion of the impugned order dated 13.12.2016 mentioned at page No. 31-32, para no. 4.5 is reproduced as under:-

“4.5 in view of the above discussion, the claim of depreciation on Goodwill is rejected on merit also. However, no disallowance is being made as the assessee has not claimed any depreciation on account of Goodwill in the return of income...”

From the entire discussion in the aforementioned paras, the following picture emerges-

- Appellant claims deduction towards depreciation on goodwill on purchase of the running business under slump sale - albeit at assessment stage but without filling a revised return of income (on the basis of a decision of the Apex Court in this regard)*
- Appellant's claim rejected in the assessment due to -*

- *Claim not made in the books of accounts - no claim in financial statements of AYs 2009-10, 2010-11 and 2011-12 - an afterthought*
- *No mention of goodwill / payment in lieu of goodwill in ITA Possibility of excess payment - between two related parties*
- *No market value of assets taken but their book value*
- *No non-compete clause in BTA*
- *No valuation report / no auditor's report regarding quantification of goodwill*
- *Additional amount could be payment of non-compete fees*

During the course of appeal hearing, the appellant filed its submissions' relying on court decisions to shore up its claim of depreciation of goodwill. It is also gathered from available records that the submissions / arguments put forth by the AR of the appellant were borne out from records and in sync with the extant law as promulgated by the Hon'ble Supreme court. (CIT vs. Smifs Securities Ltd 348 ITR 302). Further, I agree with the appellant's contention on: the point

regarding admittance of a fresh claim of deduction by the appellate authorities as it is in, sync with the, extant provisions of the Act. Also, the first appellate authority under the, Income Tax Act, 1961 still retains the character of an Income Tax Officer especially with regard to adherence to the CBDT Circular NO. 14 (XL-35) of 1955 dated 11th April, 1955. Coming to the reasons mentioned by the AO in the impugned order, it is observed that the second and fifth reasons mentioned above for rejecting the appellant's claim are not factually correct based on the copies of the evidences submitted at the appellate stage. Secondly, the third and last reasons mentioned above appear to be mere speculation but definitely cannot be taken as conclusions without further investigation. Finally, taking the book value of assets for valuation of goodwill will hardly impact the valuation adversely and be prejudicial to Revenue. Depreciation is an inherent claim under the Act. Accordingly, I agree with the appellant's contention regarding depreciation on goodwill representing the difference in the purchase price and the fair value of the assets based on the relevant provision of law (Section 32 r w Rule 5 and Appendix I) and in due deference to the decision of the Hon'ble Apex Court in this regard, the

appeal on this point is allowed. The AO is directed to work out the appropriate amount of depreciation on goodwill while giving effect to this order.”

7.1.2 After going through the aforesaid relevant portion of the impugned order of the Ld. First Appellate Authority, we are of the view that Ld. CIT(A) has agreed on the contention raised by the Assessee regarding depreciation of goodwill representing the difference in the purchase price and the fair value of assets based on the relevant provision of law (Section 32 read with Rule 5 and Appendix-I) and in due deference to the decision of the Hon'ble Apex Court in the case of CIT vs. Smifs Securities Ltd. 348 ITR 302 has set aside the issues in dispute to the Assessing Officer with the directions to work out the appropriate amount of depreciation on goodwill while giving effect of the impugned order dated 13.12.2016 i.e. year in dispute. No doubt the ITAT has also set aside this issue to the Assessing Officer to decide the same in accordance with law, after giving opportunity to the assessee in its decision dated 28.08.2020 in assessment year 2012-13. But we are of the view that in the impugned order, Ld. First Appellate Authority has also set aside the issue of depreciation on goodwill to the Assessing Officer to workout the appropriate amount of depreciation on goodwill, therefore, we are of the considered view that no interference is called for in the well reasoned

order passed by the Ld. First Appellate Authority, hence, we uphold the findings of the Ld. First Appellate Authority on the issue of depreciation of goodwill. No other point has been argued by both the parties, therefore, no need to adjudicate the same. Accordingly, the ground no. 4 to 6 are dismissed.

8. In the result, the appeal of the Revenue is dismissed.

The order is pronounced on 10.09.2020.

Sd/-
[O.P. KANT]
ACCOUNTANT MEMBER

Sd/-
[H.S. SIDHU]
JUDICIAL MEMBER

SRB

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi