आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,
'' D'' BENCH, AHMEDABAD
(CONDUCTED THROUGH VIRTUAL COURT AT AHMEDABAD)

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA Nos. 67-68/AHD/2021**
निर्धारण वर्ष/**Asstt. Years: 2016-2017 & 2017-2018**

M/s. Suzlon Global Services Limited, 5 Suzlon, Shrimali Society, Near Shree Krishna Centre, Nr. Judges Bunglow Cross Road, Ahmedabad-380009. **PAN: AAICS1406R**	Vs.	Principal Commissioner of Income-tax, Ahmedabad.

(Applicant)		**(Respondent)**

Assessee by :	Shri T.P. Hemani Sr.Advocate, & Shri Parimal Sinh Parmar, A.R
Revenue by :	Shri Mohd Usman, CIT.D.R

सुनवाई की तारीख/**Date of Hearing : 09/07/2021**
घोषणा की तारीख /**Date of Pronouncement: 16/09/2021**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeals have been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax, Ahmedabad, dated 31/03/2021 arising in the matter of assessment order passed under s. 263 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Years 2016-2017 & 2017-18.

2. The assessee has raised the following grounds of appeal:

1. *The order u/s.263 of the Act has been passed beyond the period of limitation prescribed u/s.263(2) of the Act and is thus illegal and bad in law.*

2. *The subject order u/s. 263 of the Act is absolutely erroneous and bad in law as notice u/s. 263 was issued for the assessment order passed in erstwhile Suzlon Global Services Limited (PAN AAJCS0174R) whereas the order u/s. 263 has been passed with direction to do afresh assessment in case of appellant which is having PAN AAICS1406R and therefore the subject order is null and void and needs to be set aside in the interest of natural justice and equity.*

3. *The Id. PCIT has grossly erred in law and on facts in not appreciating that since the assessment order dated 29.10.2018 has been passed in the name of the amalgamating company (PAN AAJCS0174R), the same is non-existent and resultant revision proceedings are void ab initio.*

4. *The Id. PCIT has grossly erred in law and on facts in assuming jurisdiction u/s.263 of the Act on the erroneous ground that the impugned assessment order u/s 143(3) of the Act dated 29.10.2018 is erroneous in so far as it is prejudicial to the interest of the revenue when there was no claim of depreciation on goodwill arising on amalgamation was subject matter of said assessment order.*

5. *The Id. PCIT grossly erred in assuming jurisdiction u/s.263 of the Act, merely on account of difference of opinion when AO has followed one of the probable legal opinion which under no circumstances can be considered as erroneous or prejudicial to the interest of revenue.*

6. *The Id. PCIT grossly erred in not appreciating that in order to invoke s.263, two conditions must be fulfilled viz. the impugned assessment order must be erroneous and that error must be prejudicial to the interest of the revenue. In the present case, Id. AO has passed the reasoned assessment order after analyzing all details and therefore there was no error in the impugned assessment order so as to justify action u/s.263 of the Act. Under the circumstances, the very assumption of power u/s.263 of the Act is unjustified and bad in law and therefore, order u/s.263 of the Act deserves to be quashed.*

7. *The Id. PCIT ought to have appreciated that the said goodwill represents actual consideration paid over the value of assets taken over from amalgamating company and is an intangible asset which comes within the definition provided u/s.32 r.w.s. 43(1) of the Act. The Id. PCIT further erred I in law in holding that the appellant followed the pooling of interest method and not purchase method which is absolutely erroneous.*

8. *The subject order u/s.263 passed by the Id. PCIT is illegal and bad in law in absence of any finding of the Id. PCIT how the alleged error of the AO has resulted in loss of revenue particularly when depreciation on goodwill is allowable u/s.32 of the Act and claim of depreciation in accordance with provisions of law and judicial pronouncements of higher appellate authorities.*

9. *The Id. PCIT has further erred in law in not coming to any concrete conclusion and without conducting any inquiry or investigating the issue, merely directed the AO to frame the assessment order afresh. Without there being any positive finding about order*

being erroneous and prejudicial to the interest of the revenue, the action of the Id. PCIT is without jurisdiction and illegal and hence deserves to be deleted.

10. *The Id. PCIT has erred in not considering various facts and in not appreciating the facts and law in their proper perspective.*

11. *The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal.*

3. The solitary issue raised by the assessee is that the learned Principal CIT under section 263 of the Act erred in holding that the assessment framed under section 143(3) of the Act as erroneous insofar prejudicial to the interest of revenue.

4. Before we touch the issue raised by the assessee, it is pertinent to take a brief note on the history of the facts of the case which goes like this. M/s Suzlon Global Services Limited (PAN: AAJCS0174R) has acquired a division of its holding company namely Operation & Maintenance on slum sale basis vide agreement dated 29th March 2014. The net assets value of the division acquired by the assessee were worth of Rs. 77,0750,308/- against the purchase consideration of ₹ 2000 crores which resulted in excess payment of Rs. 1922,92,49,674/- which was treated as intangible asset being goodwill in the books of M/s Suzlon Global Services Limited (PAN: AAJCS0174R). Accordingly, M/s Suzlon Global Services Limited (PAN: AAJCS0174R) claimed depreciation on such goodwill every year starting from the AY 2014-15 being the 1st year of depreciation. The details of the depreciation claimed by M/s Suzlon Global Services Limited (PAN: AAJCS0174R) on the goodwill generated on the purchase of Operation and Maintenance division stand as under:

S. No.	A. Year	Opening(Rs.)	Addition (Rs.)	Depreciation(Rs.)	Closing(Rs.)
1.	2014-15	-	1,922.92 Cr	240.43 cr	1683.03 cr
2.	2015-16	1683.03 cr	-	420.77 cr	1262.26 cr

Subsequently, the company M/s Suzlon Global Services Ltd (for short M/s SGSL) was amalgamated with the M/s Suzlon Structures Ltd (for short M/s SSL) with effect

from 31st March 2016 by virtue of the order of Hon'ble Gujarat High Court dated 14th October 2016.

4.1 In consequence to the amalgamation, the depreciation for the year under consideration on the amount of goodwill as discussed above was claimed by M/s SGSL and M/s SSL for Rs. 314.71 crores and Rs. 0.855 respectively which was calculated based on the number of days the goodwill was enjoyed. In other words, M/s SGSL claimed the depreciation for Rs. 314.71 crores for 364 days whereas M/s SSL claimed the depreciation only for one day i.e. 31-3-2016 for Rs. 0.855 crores.

4.2 Besides the goodwill acquired by M/s SSL from M/s SGSL as discussed above, there was unabsorbed depreciation of ₹ 724.46 crores on above goodwill in the books of M/s SGSL which was also added to the amount of goodwill in pursuance to the provision of explanation 2 to section 43(6) of the Act. Thus, M/s SSL claimed depreciation for one day of Rs. 0.50 crores on said unabsorbed deprecation.

4.3 The above facts relates to SGSL which was acquired by the M/s SSL by virtue of the judgment of Hon'ble Gujarat High Court dated 14th October 2016 with effect from 31st March 2016.

4.4 Moving further, M/s SSL as a result of amalgamation has created goodwill in the books of accounts for Rs. 1427.90 crores only.

4.5 As the amalgamation has taken place by virtue of the Judgment of Hon'ble Gujarat High Court dated 14th October 2016 effective from 31st March 2016, M/s SGSL prepared its financial statements till 30th March 2016. Likewise M/s SSL prepared its financial statement as on 31st March 2016 after incorporating the net assets acquired on amalgamation which were held only for one day by it. In other words, M/s SGSL claimed the depreciation on its assets in its financial statement prepared on 30th March 2016 which were transferred to M/s SSL and thereafter M/s SSL claimed depreciation on the assets acquired from M/s SGSL only for one day in

the year ending as on 31-3-2016. As such the depreciation on the assets acquired by M/s SSL from M/s SGSL were claimed proportionately on the basis of number of days.

4.6 Going further, M/s SSL claimed depreciation on the goodwill which was generated in its books of accounts in the scheme of amalgamation by virtue of the judgment of Hon'ble Gujarat High Court dated 14th October 2016 at the rate of 12.5% being the asset held for less than 180 days. The amount of depreciation on such goodwill works out at 178.48 crores only which was claimed by the assessee for the year ending as on 31 March 2016.

4.7 The amount of depreciation claimed by M/s SGSL in its balance sheet prepared as on 30 March 2016 and M/s SSL in its balance sheet prepared as on 31 March 2016 with respect to the intangible assets being goodwill stand as under:

a. Depreciation on goodwill claimed by M/s SGSL

Opening balance as on 01.04.2015	Depreciation for the period 01.04.2015 to 30.03.2016	Closing balance as on 30.03.2016
Rs. 1262.26 crores	Rs. 314.71 crores	Rs. 947.60 crores

b. Depreciation on goodwill claimed by M/s SSL

Op. balance as on 31.03.2016	Addition of unabsorbed depreciation of M/s SGSL on goodwill	Addition on account of amalgamation	Depreciation for 1 day i.e. 31.03.2016	Cl. Balance on 31.03.2016
Rs. 947.60 cr	Rs. 724.46 cr	Rs. 1427.90 cr	Rs. 179.85 cr	Rs. 2920.13 cr

4.8 Successively, M/s SGSL and M/s SSL filed their respective returns of income for the previous year 2015-16 corresponding to assessment year 2016-17.

4.9 M/s SGSL claimed the depreciation on the intangible assets amounting to 314.71 crores. In the case of M/s SGSL, there was an assessment framed under section 143(3) of the Act vide order dated 29th October 2018.

4.10 However, there was no assessment framed in the case of M/s SSL but it was processed under section 143(1) of the Act vide dated 31st December 2016. The M/s SSL claimed the depreciation on the intangible assets amounting to 179.85 crores which was arising in the impugned scheme of amalgamation.

4.11 However, the learned Principal CIT subsequently found that the assessment framed under section 143(3) of the Act dated 29th October 2018 in the case of M/s SGSL is erroneous insofar prejudicial to the interest of revenue. It was pointed out by the learned Principal CIT that the assessee is not eligible for claiming depreciation on the goodwill arising out of amalgamation in view of 6th proviso to section 32(1), section 49(1)(iii)(e), explanation 7 to section 43(1), explanation 2(b) to section 43(6)(c) and section 55(2)(a)(ii) of the Act.

4.12 Likewise, the Principal CIT also pointed out that the amalgamation between M/s SGSL and M/s SSL was in the nature of merger as provided under accounting standard 14 issued by ICAI which prohibits to record the goodwill in such scheme of amalgamation i.e. amalgamation in the nature of merger. As per the learned Principal CIT the above facts were not verified by the AO during the assessment proceedings.

4.13 In view of the above, the learned Principal CIT sought an explanation from the assessee by issuing a show cause notice dated 22nd March 2021 proposing to disallow the depreciation claimed by the assessee on the goodwill as discussed above.

4.14 In response to such show cause notice, the assessee vide letter dated 30th March 2021 submitted that the assessee has claimed depreciation on the goodwill

for the year under consideration for 314.71 crores on the opening WDV as on 1 April 2015 for 364 days. The depreciation was claimed for 364 days for the reason that the assessee got amalgamated with the M/s. SSL with the approval of the Hon'ble Gujarat High Court dated 14th October 2016 effective from 31st March 2016. As such, the amount of depreciation was claimed on the intangible assets which were acquired in the year 2014 in a scheme of slum sale. In other words there was no goodwill generated to the M/s SGSL as a result of amalgamation as discussed above and thus no question of disallowing the deprecation on such goodwill arises. Therefore, there was no depreciation claimed by SGSL pertaining to the goodwill generated in the hands of M/s SSL in the scheme of amalgamation.

4.15 Likewise, the assessee also submitted that the method adopted in the scheme of amalgamation was in the nature of purchase which can be verified from the scheme of amalgamation. Such scheme of amalgamation was subsequently approved by the Hon'ble Gujarat High Court. The assessee further submitted that, the transfer of the assets from the amalgamated company namely M/s SGSL to the amalgamated company namely M/s SSL was done on the fair market value and not the book value. The fair market value was valued by the valuer namely Duff & Phleps. One of the precondition for holding the amalgamation the nature of merger was that the assets has to be transferred at the book value but it has not been done in the present case. Therefore it cannot be said that the amalgamation was in the nature of merger.

5. However, the learned Principal CIT, agreed to the submission of the assessee that the erstwhile company namely M/s SGSL was not in existence after 30th March 2016 as it got merged with M/s SSL with effect from 31st March 2016 by virtue of the order of the Hon'ble Gujarat High Court as discussed above. But the Principal CIT noticed that the depreciation claimed by the successor company for one day for ₹ 179.85 crores requires to be considered. As per the learned Principal CIT, the assessee has followed pooling of interest method which is an amalgamation in the nature of merger specified under the Accounting Standard 14 issued by the ICAI.

As per the AS there cannot be any goodwill if the amalgamation is in the nature of merger and if any difference arises between the purchase consideration viz a viz the net assets acquired by the amalgamated company, the same has to be treated/adjusted against the reserves. In holding so the learned principal CIT, placed reliance on various judgments which are incorporated in his order.

5.1 The learned Principal CIT further observed that even if the goodwill is created in the scheme of amalgamation in the books of the amalgamated company, then also the same is not eligible for deduction under the provisions of Income Tax Act. In this connection the learned Principal CIT has made references to the various provisions of section as detailed below:

i. 6th Proviso to section 32(1) of the Act
ii. Section 49(1)(iii)(e) of the Act
iii. Explanation 7 to section 43(1) and explanation 2(b) to section 43(6)(c) of the Act
iv. Section 55(2)(a)(ii) of the Act

5.2 In view of the above, the learned Principal CIT concluded that the facts as discussed in details above have not been considered by the AO during the assessment proceedings. Therefore, the order passed by the AO under section 143(3) of the Act is erroneous insofar prejudicial to the interest of Revenue. The relevant extract of the order of the learned Principal CIT reads as under:

> *19. All these issues were required lo be examined before the claim of depreciation on the goodwill was allowed by the A.O. However as seen from the assessment records, the issue of goodwill is on account of amalgamation was not examined by the A.O. A query on this issued was raised by the A.O. vide notice u/s. 142(1) 22-09-2018. In this notice the A.O. asked general questions pertaining to the claim of depreciation but no specific question with regard to the issue of amalgamation and the resultant claim of goodwill was generated of this amalgamation on which the asssessee had claimed deprecation was asked by the A.O. The issue of amalgamation was therefore not verified by the A.O. during the course of assessment proceedings. The A.O. did not examine the issue whether the amalgamation in the assessee's case would lead to create goodwill at all and whether the claim of depreciation on this goodwill created on account of amalgamation was in accordance with the provisions of the law. The A.O. failed to make any inquiry on this issue and without verifying the legality of the claim of depreciation on goodwill allowed the same. The order passed by*

> *20. Therefore, after having considered the position of law and facts and circumstances of the instant case, I am of the considered opinion that the assessment order u/s. 143(3) of the Act dated 29.10.2018 passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of revenue in accordance with the Explanation 2(a) below section 263(1) of the Act. Accordingly, the impugned assessment order is set aside with a direction to the Assessing Officer to make requisite inquiries and proper verification with regard to the issue mentioned above and redo the assessment de-novo after due consideration of the facts and law in this regard. The assessee is at liberty to adduce the facts as deemed relevant before the assessing officer at the time of assessment proceedings in consequence to this order and the Assessing Officer shall allow the assessee adequate opportunity of being heard and to make relevant submissions. It may be ensured that the fresh assessment order is passed within the prescribed time as stipulated under section 153(3) of the Act.*

6. Being aggrieved by the order of the learned principal CIT, the assessee is in appeal before us.

7. The learned AR before us filed a paper book running from pages 1 to 330 and assailed the order of the learned Principal CIT on various grounds. It was contended by the learned AR that the erstwhile company namely SGSL bearing PAN AAJCS 0174 R has not claimed any depreciation which is in dispute. As such the goodwill which was generated in the hands of SSL as a result of amalgamation after getting the approval from the Hon'ble Gujarat High Court, the erstwhile SGSL did not claim any depreciation on such goodwill. Thus the question of disallowing the same in the revisionary proceedings does not arise. The erstwhile company SGSL has claimed the depreciation on the goodwill which was brought in its books from the earlier years pertaining to the acquisition of a division under a slum sale scheme.

7.1 The learned AR further submitted that the successor company has claimed the depreciation arising in the scheme of amalgamation which was also allowed by the Revenue in the intimation issued under section 143(1) of the Act vide dated 30 December 2016. The copy of intimation is placed on pages 51-58 of the paper book.

7.2 The learned AR further contended that the assessment order dated 29 October 2018 has been framed in the case of non-existing company and therefore the same cannot be revised by the learned PCIT under the provisions of section 263 of the Act.

7.3 The learned AR further submitted that the claim of the successor company for the depreciation has to be allowed on merit as it was generated in the scheme of amalgamation which was in the nature of purchase. The conditions as specified under Accounting Standard 14 issued by the ICAI as applicable for the amalgamation in the nature of merger were not complied. In other words all the assets were transferred at the fair market value whereas all the liabilities were transferred at the book value. Thus, the difference arising between the net assets acquired viz a viz the consideration paid was treated as goodwill.

7.4 The learned AR also submitted that the assessment was framed under section 143 (3) of the Act dated 29 October 2018 after necessary verification and therefore the same cannot be revised under the provisions of section 263 of the Act.

7.5 It was also contended that issue of claiming depreciation on the goodwill in the scheme of amalgamation is a debatable issue. In other words where 2 views are possible then the revisions under 263 is not justified.

7.6 On the other hand the Ld. DR submitted that the notice under section 143(2) of the Act in the name of the erstwhile company. At the assessment, the fact was not disputed by the assessee. Therefore, the notice issued under section 143(2) of the Act was valid and consequent assessment in the name of the erstwhile company under section 143(3) of the Act was also valid.

7.7 The learned DR further submitted that the scheme of amalgamation is tax neutral exercise and therefore there cannot be any question of goodwill arising in such a scheme. Therefore, the AO without the application of mind has allowed the depreciation to the assessee. The ld. DR in this connection has made reference to the 6th proviso to section 32(1) of the Act, section 49(1)(iii)(e) of the Act,

explanation 7 to section 43(1) and explanation 2(b) to section 43(6)(c) of the Act and section 55(2)(a)(ii) of the Act.

7.8 The learned DR before us vehemently supported the stand of the authorities below by reiterating the findings contained in the respective orders which we have already adverted to in the preceding paragraph. Therefore we are not repeating the same for the sake of brevity.

8. **We have heard** both the parties and perused the materials available on record before us, especially the impugned orders and the case law cited therein and also cited by the learned AR of the assessee. The facts of the case are not in dispute which have already been elaborated in detail in the preceding paragraph. Therefore, we are not inclined to repeat the same for the sake of brevity, repetition and convenience. In the present case, the learned principal CIT has revised the order of the assessment framed in the case of M/s SGSL dated 29th October 2018. Admittedly, M/s SGSL got amalgamated with M/s SSL with effect from 31st March 2016 by virtue of the order of Hon'ble Gujarat High Court dated 14th October 2016. Once, a company is amalgamated with another company, it remains no longer in existence. The amalgamating company namely M/s SGSL prepared its balance sheet as on 30th March 2016 showing all its assets and liabilities which were transferred to the amalgamated company namely M/s SSL with effect from 31st March 2016. As a result of amalgamation, M/s SGSL transferred net assets worth of Rs. 1271.82 crores against the purchase consideration incurred by M/s SSL for Rs. 2699.72 crores. The difference of Rs. 1427.90 crores between the net assets and the consideration was treated as goodwill by the successor company namely M/s SSL and claimed depreciation on such goodwill in its books of accounts. In other words, M/s SGSL did not claim any depreciation in its books of accounts qua to such goodwill. As such, the successor company namely M/s SSL claimed depreciation on such goodwill. This fact was also admitted by the learned principal CIT in his order

dated 31st March 2021. The relevant finding of the learned principal CIT these as under:

> *9. I have carefully considered the facts on records and the submission of the assessee. As submitted by the assessee the earstwhile Suzlon Global Services Ltd. was no more in existence after 30-03-2016 and as such there was no consequential effect of amalgamation carried out as per the Hon'ble High Court order with a appointed date as 31-03-2016 on the claim of depreciation by the said company. However, the claim of depreciation by the successor company i.e. Suzlon Global Services Ltd. for one day i.e. on 31-03-2016 amounting to Rs. 179.85 cr. is still 1o be considered as this is consequential to the effect of amalgamation between the assessee Suzlon Global Services Ltd. and Suzlun Structures Ltd. The assessee has contended that this claim of depreciation in the hands of earstwhile Suzlon Global Services Ltd. {now named as Suzlon Structure Ltd - PAN AA1CS 14096R is in accordance with the provisions of law*

8.1 From the above, there remains no ambiguity to the fact that the depreciation on the goodwill arising in the scheme of amalgamation as discussed above was not claimed by the assessee being M/s SGSL. Thus, there is no question of disallowing the same under the revisionary proceedings under section 263 of the Act in the case of M/s SSGL.

8.2 However, we note that the learned principal CIT has proceeded to verify the amount of depreciation claimed by the successor company namely M/s SSL on the amount of goodwill generated in the scheme of amalgamation in the revisionary proceedings under section 263 of the Act in the assessment of the erstwhile company i.e. M/s SSGL order dated 29th October 2018. In this regard we note that the learned principal CIT has proceeded to verify the depreciation of the successor company on the wrong assumption of facts. In fact, if at all the learned principal CIT was to proceed with the revisionary proceedings, he could have done it by initiating such proceedings against the intimation generated under section 143(1) of the Act dated 30-12-2016 in the case of successor company namely M/s SSL. It is for the reason that it was the successor company which claimed the depreciation for ₹ 179.85 crores with respect to the goodwill generated to it in the scheme of amalgamation as discussed above subject to the time limit as specified under section 263 of the Act. The time as specified under section 263(2) of the Act is for 2 years from the end of financial year in which intimation under section 143(1) of the Act

was issued i.e. 2 years from 31st March 2017 was issued. Admittedly, the intimation was issued under section 143(1) of the Act dated 30th December 2016 and the time limit of revising the same has expired on 31st March 2019 which is much before the relevant time i.e. notice issued under section 22-3-2021. In holding so we draw support and guidance from the judgment of Hon'ble Bombay High Court in the case of CIT vs. Lark Chemicals Ltd reported in 55 taxman.com 446 wherein it was held as under:

> ***12.*** *We have considered the rival submissions. It is not disputed that save and except the issue of non-genuine purchases all other issues dealt with by the Commissioner of Income-tax in the order dated March 30, 2009, were not a subject matter of the assessment order passed on June 28, 2006, under section 143(3)/147 of the Act. All the other issues on which the Commissioner of Income-tax is seeking to exercise the jurisdiction under section 263 of the Act were concluded by virtue of an intimation under section 143(1) of the Act which admittedly was done beyond a period of two years prior to the notice dated March 17, 2009, issued under section 263 of the Act. Section 263(2) of the Act provides that no order would be made in exercise of the jurisdiction under section 263(1) of the Act after the expiry of two years from the end of the financial year in which the order sought to be revised was passed. It is an admitted position that the Commissioner of Income-tax has not exercised the revisional jurisdiction in respect of the order/intimation passed section 143(1) of the Act within two years of it being passed. Therefore, exercise of jurisdiction on those issues under section 263 of the Act is time barred as held by this court in CIT v. Anderson Marine & Sons (P.) Ltd. [2004] 266 ITR 694/139 Taxman 16.*

8.3 In view of the above, we hold that the learned Principal CIT cannot revised the intimation issued under section 143(1) of the Act in the case of M/s SSL as it is barred by time as provided under section 263 of the Act.

8.4 Without prejudice to the above, the question also arises whether the assessment framed under section 143(3) of the Act dated 29th October 2018 is maintainable under the provisions of law as it was made by the AO in the name of non-existent company. In this regard we note that the assessee M/s SGSL got amalgamated by virtue of approval of the Hon'ble Gujarat High Court vide order dated 14th October 2016 with effect from 30th March 2016. However, the erstwhile company filed the original return of income dated 28th November 2016 after the passing the order of the Hon'ble Gujarat High Court. Thereafter, the case of the assessee was selected for limited scrutiny by issuing notice under section 143(2) of the Act dated 23rd August 2017 in the name of M/s SGSL. Finally the assessment

was framed in the name of the erstwhile company by the AO vide order dated 29th October 2018. The fact about the scheme of amalgamation was duly communicated by the assessee vide letter dated 16-02-2018. The relevant extract of the communication is placed on pages 233 of the paper book which reads as under:

> ***Amalgamation or Demerger during the year***
>
> *During the year under consideration Assessee Company is amalgamated with effect from 31.03.2016 with company namely Suzlon Structures Limited {'SSL') pursuant to order of Hon'ble High Court of Gujarat dated 14.10.2016. Accordingly assesses company had filed its return of income after giving effect to the subject scheme of amalgamation. The said fact has already been intimated to your good office vide our letter dated: 06.01.2017 copy of letter is enclosed herewith as Annexure-7.*

8.5 However we find that, the assessment has been framed by the AO in the name of erstwhile company dated 29th October 2018 which was not in existence. In other words, the assessment has been framed in the name of the person who was not in existence at the relevant point of time. In this connection we would like to take a note of the position of law laid down by the Hon'ble Supreme in the case PCIT Vs. Maruti Suzuki India Limited reported in 416 ITR 613. The facts in the case was that Suzuki Motors Corporation, and Maruti Suzuki India limited (in short MSIL) created a joint venture with shareholding of 70% and 30%. Such joint venture was incorporated as Suzuki Metal India Ltd. Subsequently w.e.f. 8th June 2005 its name was changed to SPIL. On 28th November 2012 SPIL has filed its return of income. Upto this date no amalgamation had taken place. On 29th January 2013 a scheme for amalgamation of SPIL and MSIL was approved by the Hon'ble High Court w.e.f. 1st April 2012. The terms of approval scheme provided that all liability and duties of the transferor company shall stand transferred to the transferee company. On scheme being coming into effect, the transferor company was to stand dissolved without winding up. The scheme postulated that the order of amalgamation will not be construed as an order granted exemption from the payment of stamp duty or taxes, or any other charges, if any payable in accordance with law. The AO has initiated the assessment proceedings by issuance of notice under section 143(2) on 26th September 2013 followed by a notice under section 142(1) of the Act to the amalgamating company. MSIL participated in the assessment proceedings of

erstwhile amalgamating entity i.e. SPIL through its authorized representative and officers. The assessment was framed. Thereafter during the appellate proceedings before the Tribunal the assessee took an objection that final assessment order was passed on 31st October 2016 in the name of SPIL which was amalgamated with MSIL. The assessee took an objection that the assessment order has been passed in the name of company which ceased to exist and therefore, the assessment order is void ab initio. This plea of the assessee was acknowledged by the Tribunal. This order of the Tribunal was upheld by the Hon'ble High Court. Ultimately issue travelled upto Hon'ble Supreme Court. While taking cognizance of the submissions, and the proposition laid down in various High Courts' decisions, the Hon'ble Supreme Court made the following observations:

> *"19. While assessing the merits of the rival submissions, it is necessary at the outset to advert to certain significant facets of the present case:*
> *(i) Firstly, the income which is sought to be subjected to the charge of tax for AY 2012-13 is the income of the erstwhile entity (SPIL) prior to amalgamation. This is on account of a transfer pricing addition of Rs. 78.97 crores;*
>
> *(ii) Secondly, under the approved scheme of amalgamation, the transferee has assumed the liabilities of the transferor company, including tax liabilities;*
>
> *(iii) Thirdly, the consequence of the scheme of amalgamation approved under Section 394 of the Companies Act 1956 is that the amalgamating company ceased to exist. In Saraswati Industrial Syndicate Ltd., (supra) the principle has been formulated by this Court in the following observations: "5. Generally, where only one company is involved in change and the rights of the shareholders and creditors are varied, it amounts to reconstruction or reorganisation of scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or 'amalgamation' has no precise legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending company become substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly 'amalgamation' does not cover the mere acquisition by a company of the share capital of other company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. See: Halsbury's Laws of England (4th edition volume 7 para 1539). Two companies may join to form a new company, but there may be absorption or blending of one by the other, both amount to amalgamation. When two companies are merged and are so joined, as to form a third company or one is absorbed into one or blended with another, the amalgamating company loses its entity."*
>
> *(iv) Fourthly, upon the amalgamating company ceasing to exist, it cannot be regarded as a person under Section 2(31) of the Act 1961 against whom assessment proceedings can be initiated or an order of assessment passed;*

(v) Fifthly, a notice under Section 143 (2) was issued on 26 September 2013. To the amalgamating company, SPIL, which was followed by a notice to it under Section 142(1);

(vi) Sixthly, prior to the date on which the jurisdictional notice under Section 143 (2) was issued, the scheme of amalgamation had been approved on 29 January 2013 by the High Court of Delhi under the Companies Act 1956 with effect from 1 April 2012;

(vii) Seventhly, the assessing officer assumed jurisdiction to make an assessment in pursuance of the notice under Section 143 (2). The notice was issued in the name of the amalgamating company in spite of the fact that on 2 April 2013, the amalgamated company MSIL had addressed a communication to the assessing officer intimating the fact of amalgamation. In the above conspectus of the facts, the initiation of assessment proceedings against an entity which had ceased to exist was void ab initio.

20. In Spice Entertainment, (supra) a Division Bench of the Delhi High Court dealt with the question as to whether an assessment in the name of a company which has been amalgamated and has been dissolved is null and void or, whether the framing of an assessment in the name of such company is merely a procedural defect which can be cured. The High Court held that upon a notice under Section 143 (2) being addressed, the amalgamated company had brought the fact of the amalgamation to the notice of the assessing officer. Despite this, the assessing officer did not substitute the name of the amalgamated company and proceeded to make an assessment in the name of a non-existent company which renders it void. This, in the view of the High Court, was not merely a procedural defect. Moreover, the participation by the amalgamated company would have no effect since there could be no estoppel against law :

"11. After the sanction of the scheme on 11th April, 2004, the Spice ceases to exit w.e.f. 1st July, 2003. Even if Spice had filed the returns, it became incumbent upon the Income tax authorities to substitute the successor in place of the said 'dead person'. When notice under Section 143 (2) was sent, the appellant/amalgamated company appeared and brought this fact to the knowledge of the AO. He, however, did not substitute the name of the appellant on record. Instead, the Assessing Officer made the assessment in the name of M/s Spice which was non existing entity on that day. In such proceedings an assessment order passed in the name of M/s Spice would clearly be void. Such a defect cannot be treated as procedural defect. Mere participation by the appellant would be of no effect as there is no estoppel against law.

12. Once it is found that assessment is framed in the name of non-existing entity, it does not remain a procedural irregularity of the nature which could be cured by invoking the provisions of Section 292B of the Act."

Following the decision in Spice Entertainment, (supra) the Delhi High Court quashed assessment orders which were framed in the name of the amalgamating company in:

- *(i) Dimension Apparels (supra);*
- *(ii) Micron Steels; and (supra)*
- *(iii) Micra India (supra).*

21. In Dimension Apparels, (supra) a Division Bench of the Delhi High Court affirmed the quashing of an assessment order dated 31 December 2010. The Respondent had amalgamated with another company and thus, ceased to exist from 7 December 2009. The Court rejected the argument of the Revenue that the assessment was in substance and effect in conformity with the Act by reason of the fact that the assessing officer had used

correct nomenclature in addressing the Assessee; stated the fact that the company had amalgamated and mentioned the correct address of the amalgamated company. It was the Revenue's contention that the omission on the part of the assessing officer to mention the name of the amalgamated company is a procedural defect. The Delhi High Court rejected this contention. In doing so, it relied on the holding in Spice Entertainment, (supra) where the High Court expressly clarified that "the framing of assessment against a non-existing entity/person" is a jurisdictional defect. The Division Bench also relied on the holding in Spice Entertainment (supra) that participation by the amalgamated company in proceedings does not cure the defect as "there can be no estoppel in law", to affirm the quashing of the assessment order.

22. In Micron Steels, (supra) a notice was issued to Micron Steels Pvt Ltd (original assessee) after it had amalgamated with Lakhanpal Infrastructure Pvt Ltd. A Division Bench of the Delhi High Court upheld the setting aside of assessment orders, noting that Spice Entertainment (supra) is an authority for the proposition that completion of assessment in respect of a non-existent company due to the amalgamation order, would render the assessment a nullity.

23. In Micra India, (supra) the original assessee Micra India Pvt. Ltd had amalgamated with Dynamic Buildmart (P) Ltd. Notice was issued to the original assessee by the Revenue after the fact of amalgamation had been communicated to it. The Court noted that though the assessee had participated in the assessment, the original assessee was no longer in existence and the assessment officer did not the take the remedial measure of transposing the transferee as the company which had to be assessed. Instead, the original assessee was described as one in existence and the order mentioned the transferee's name below that of the original assessee. The Division Bench adverted to the judgment in Dimension Apparels (supra) wherein the High Court had discussed the ruling in Spice Entertainment (supra). It was held that this was a case where the assessment was contrary to law, having been completed against a non-existent company."

8.6 Hon'ble Supreme Court thereafter took note of the judgment in the case of Sky Light Hospitality vs. ACIT, 259 taxman 390 (SC). This judgment was pressed in service by the Revenue to point out that if an order was framed in accordance with law in the name of amalgamating company, then it would amount to error, defect or omission which is curable under section 292B of the Income Tax Act. Hon'ble Supreme Court has dealt with this judgment and explained its impact. Hon'ble Supreme Court ultimately upheld the judgment of Hon'ble Delhi High Court in the case of Maruti Suzuki (supra) and held that assessment order passed subsequently in the name of non-existing company would be without jurisdiction and a nullity. Concluding paragraph of the judgment of Hon’ble Supreme Court are worth to note which reproduced hereunder:

"33. In the present case, despite the fact that the assessing officer was informed of the amalgamating company having ceased to exist as a result of the approved scheme of amalgamation, the jurisdictional notice was issued only in its name. The basis on which jurisdiction was invoked was fundamentally at odds with the legal principle that the

> *amalgamating entity ceases to exist upon the approved scheme of amalgamation. Participation in the proceedings by the appellant in the circumstances cannot operate as an estoppel against law. This position now holds the field in view of the judgment of a co-ordinate Bench of two learned judges which dismissed the appeal of the Revenue in Spice Enfotainment (supra) on 2 November 2017. The decision in Spice Enfotainment has been followed in the case of the respondent while dismissing the Special Leave Petition for AY 2011-2012. In doing so, this Court has relied on the decision in Spice Enfotainment (supra).*
>
> *34. We find no reason to take a different view. There is a value which the court must abide by in promoting the interest of certainty in tax litigation. The view which has been taken by this Court in relation to the respondent for AY 2011- 12 must, in our view be adopted in respect of the present appeal which relates to AY 2012-13. Not doing so will only result in uncertainty and displacement of settled expectations. There is a significant value which must attach to observing the requirement of consistency and certainty. Individual affairs are conducted and business decisions are made in the expectation of consistency,uniformity and certainty. To detract from those principles is neither expedient nor desirable."*

8.7 Thus in view of the above we hold that the assessment in itself is not valid under the eyes of law as it was made in the name of non-existent company. Consequently, such assessment cannot be made subject to revision under section 263 of the Act. In holding so we draw support and guidance from the judgment of Hon'ble Gujarat High Court in case of Pr. CIT vs. Kaizen Products (P.) Ltd. reported in [2018] 406 ITR 311 (Delhi) where it was held as under:

> ***14.** In the present case, it is not in dispute that KPPL ceased to exist as a result of the order dated 8th October, 2010 passed by this Court whereby its merger with Ventura stood approved. Ventura was later renamed as ARSPL. These facts were known to the AO in the course of the assessment proceedings. The statement of the Director of KPPL formed part of the assessment record. Consequently, the issuance of the notice dated 23rd March, 2016 by the PCIT under Section 263 of Act and consequential order dated 31st March, 2016 were in respect of a non-existent entity and were clearly void ab initio, as correctly held by the ITAT. This, by itself, was sufficient for the ITAT to set aside the impugned order dated 31st March, 2016.*

8.8 Even on merit, we find that it was alleged by the learned principal CIT that the assessee has adopted the pooling of interest method in the scheme of amalgamation. As per the learned principal CIT in the scheme of amalgamation under pooling of interest method, the difference if any arises between the net assets acquired by the successor company viz a viz the consideration paid to the amalgamating company, the same needs to be adjusted against the capital reserve. In this regard, it is important to refer Accounting standard-14, issued by the ICAI, which recommends two method of accounting for the transaction carried out in the

scheme of amalgamation namely pooling of interest method and purchase method. If scheme of the amalgamation satisfies the condition of para 3(e) of the Accounting standard-14 then pooling of interest method should be followed otherwise purchase method of accounting should be applied. The relevant extract of accounting standard reads as under:

> *(e) Amalgamation in the nature of merger is an amalgamation which satisfies all the following conditions:*
>
> *(i) All the assets and liabilities of the transferor company become, after amalgamation, the assets and liabilities of the transferee company.*
>
> *(ii) Shareholders holding not less than 90% of the face value of the equity shares of the transferor company (other than the equity shares already held therein, immediately before the amalgamation, by the transferee company or its subsidiaries or their nominees) become equity shareholders of the transferee company by virtue of the amalgamation.*
>
> *(iii) The consideration for the amalgamation receivable by those equity shareholders of the transferor company who agree to become equity shareholders of the transferee company is discharged by the transferee company wholly by the issue of equity shares in the transferee company, except that cash may be paid in respect of any fractional shares.*
>
> *(iv) The business of the transferor company is intended to be carried on, after the amalgamation, by the transferee company.*
>
> *(v) No adjustment is intended to be made to the book values of the assets and liabilities of the transferor company when they are incorporated in the financial statements of the transferee company except to ensure uniformity of accounting policies.*

8.9 Under pooling of interest method the difference between purchase considerations and the net assets taken over by the amalgamated company is adjusted with reserve. On the other hand in case of purchase method if purchase consideration surpasses net value of assets taken over then such difference is to be as recognized as goodwill or vise-versa as capital reserve.

8.10 Further Para 19 of AS-14 describes that goodwill arising in a scheme of amalgamation is an extra amount paid in anticipation of future income and recommend to treat the same as an assets, hence provide for systematic amortization of same over the period of useful life. The para 19 of AS-14 reads as under:

> *19. Goodwill arising on amalgamation represents a payment made in anticipation of future income and it is appropriate to treat it as an asset to be amortised to income on a systematic basis over its useful life. Due to the nature of goodwill, it is frequently difficult to estimate*

its useful life with reasonable certainty. Such estimation is, therefore, made on a prudent basis. Accordingly, it is considered appropriate to amortise goodwill over a period not exceeding five years unless a somewhat longer period can be justified.

8.11 In the case on hand, the M/s SSL taken over the business of M/s SGSL with all the assets, liabilities and reserve. However all the assets of transferee company i.e. M/s SGSL were taken at fair market value which was valued by independent valuer namely 'Duff and Phelps'. The M/s SSL discharged purchase consideration by cancelling investment in the books of account instead of issuing equity share capital. Thus condition specified under sub clause (iii) and (iv) of para 3(e) of AS-14 did not comply with. Hence the scheme of amalgamation in the case on hand is in the nature of purchase method which recognizes goodwill where the purchase consideration surpasses the net assets value taken over.

8.12 Admittedly the assesse paid purchase consideration by cancelling the investment of Rs. 2699.72 against net assets value acquired of Rs. 1271.90 crores. Accordingly excess amount recorded as goodwill. Admittedly all these information was part of scheme of amalgamation which was approved the jurisdictional High Court as discussed above. Thus the finding of the learned principal CIT to this extent that the scheme of amalgamation is in the nature of merger is based on wrong assumption of facts.

8.13 Moving further we find the learned Principal CIT alleged that depreciation on goodwill generated in the scheme of amalgamation is not allowable under the provision of the Act. In this connection the learned Principal CIT referred various section which has been recorded in previous paragraph. At this juncture, we are inclined to refer those provisions of law in the context of the scheme of amalgamation as provided under section 2(1B) of the Act as detailed under:

Depreciation.
[19]***32.*** *(1)* [20]*[In respect of depreciation of—*

(i) XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

(ii) know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998,

owned[21], wholly or partly, by the assessee[21] and used for the purposes of the business[21] or profession, the following deductions shall be allowed—]

[22][(i) XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

(ii) [24][in the case of any block of assets, such percentage on the written down value thereof as may be prescribed[25]:]

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

*[38][**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) 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 amalgamated 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.]*

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*Explanation 2.—For the purposes of this [40][sub-section] "written down value of the block of assets" shall have the same meaning as in clause *(c) of sub-section †(6) of section 43.]*

[41][Explanation 3.—For the purposes of this sub-section, the expressions "assets" and "block of assets" shall mean—

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

(b) intangible assets, being know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature.

8.14 The above provision of section 32 of the Act requires allowing the depreciation to the amalgamated company in the same manner which would have been allowed to the amalgamating company in the event had there not been any amalgamation.

8.15 Similarly, the actual cost of the assets acquired in the scheme of amalgamation in the hands of the amalgamated company will continue to be the same as it would have been in the hands of the amalgamating company in the event, had there not been any amalgamation. The relevant extract of the explanation 7 to section 43(1) reads as under:

Definitions of certain terms relevant to income from profits and gains of business or profession.

43. *In sections 28 to 41 and in this section, unless the context otherwise requires[3]—*

[4](1) "actual cost" means the actual cost[3] of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met3 directly or indirectly by any other person or authority:

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

[14][Explanation 7.—Where, in a scheme of amalgamation, any capital asset is transferred by the amalgamating company to the amalgamated company and the amalgamated company is an Indian company, the actual cost of the transferred capital asset to the amalgamated company shall be taken to be the same as it would have been if the amalgamating company had continued to hold the capital asset for the purposes of its own business.]

8.16 We further note that the WDV of the assets acquired in the scheme of amalgamation in the hands of the amalgamated company will remain to be the same as it would have been in the hands of the amalgamating company in the event, had there not been any amalgamation. The relevant extract of the explanation 2 to section 43(6)(c) of the Act reads as under:

(6) "written down value" means—

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

[42][Explanation 2.—Where in any previous year, any block of assets is transferred,—

(a) XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

(b) by the amalgamating company to the amalgamated company in a scheme of amalgamation, and the amalgamated company is an Indian company,

then, notwithstanding anything contained in clause (1), the actual cost of the block of assets in the case of the transferee-company or the amalgamated company, as the case may be, shall be the written down value of the block of assets as in the case of the transferor-company or the amalgamating company for the immediately preceding previous year as reduced by the amount of depreciation actually allowed in relation to the said preceding previous year.]

8.17 As per section 32(1) of the IT Act 'depreciation' is to be computed on 'actual cost'/'written down value of the block of assets' ascertained in accordance with the provision section 43 of the Act. Further, a reading of the above provision shows that in respect of 'capital assets' transferred by the amalgamating company to the amalgamated company, the cost/written down value of the transferred capital asset to the amalgamated company *shall be taken to be the same* as it would have been had the amalgamating company continued to hold the capital asset for the purposes of its own business.

8.18 A collective reading of the above provisions reveals that the intention of the legislature behind the introduction of the amalgamation scheme was to achieve tax neutrality. Besides the above, the intention of the legislature is also reflecting from the following provisions:

i. There is no capital gain in the hands of the amalgamating company on the transfer of capital assets in the scheme of amalgamation under the provisions of section 47(vi) of the Act.

ii. The cost of stock-in –trade in the hands of amalgamated company shall remain the same as in the hands of amalgamating company either as capital asset or stock in trade as provided under section 43C of the Act.

iii. Provisions relating to carry forward and set off of accumulated loss and unabsorbed depreciation allowance in amalgamation or demerger, etc under the provisions of section 72A of the Act.

iv. Exemption of capital gains in the hands of shareholders of amalgamating company on transfer of shares of amalgamating company in the scheme of amalgamation under the provisions of section 47 (vii) of the Act.

v. Cost of capital assets to be the same as in the hands of previous owner where capital assets became the assets of the successor as a result of transfer under section 47(*vi*) r.w.s. 49(1)(iii)(e) of the Act.

vi. Cost of shares of amalgamated company in the hands of shareholders, received as consideration for transfer of shares of amalgamating company, to be **same** as the cost of shares of amalgamating company under section 49(2) of the Act.

8.19 From the above, it would appear that the intent of the Legislature is to make amalgamation a tax neutral scheme for companies as well as for the shareholders and not to provide a tax planning mechanism to either of them. Furthermore, the 6th proviso to section 32 of the Act has restricted the amount of depreciation available to the amalgamated company post amalgamation to the extent of the amount of depreciation which would have been available to the amalgamating company, had there not been any amalgamation. However, we note

that all these relevant provisions of the Act as discussed above deal with respect to the assets available/recorded in the books of the transferor/amalgamating company. In other words, the assets which have been acquired by the assessee in the scheme of amalgamation would continue at the book value in the books of the amalgamated company. As such, these provision are not related to the goodwill arising in the hands of amalgamated company in the scheme of amalgamation which rises due to the difference between the purchase consideration and the NAV acquired by it. Thus the provisions of the Act i.e. 6 proviso to section 32, explanation 7 to section 43(1), explanation 2 to section 43(6)(c)of the Act cannot be applied to the goodwill emerged in the scheme of amalgamation approved by the Jurisdictional High Court.

8.20 The succeeding question arises whether such goodwill acquired by the assessee is eligible for depreciation under the provisions of section 32 of the Act. In this connection, we are inclined to refer to the provisions of section 32(1) of the Act which reads as under:

> ***32.*** *(1) In respect of depreciation of—*
>
> *(i) buildings, machinery, plant or furniture, being tangible assets;*
>
> *(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998,*
>
> *owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed—*

8.21 On perusal of the above provisions, we note that the word goodwill has nowhere been mentioned. However we note that, the Hon'ble Supreme Court in the case of CIT vs. Smifs Securities Ltd reported in 348 ITR 302 has held that the goodwill falls within the definition of the intangible assets under the category of any other business or commercial rights of similar nature. The relevant extract of judgment of Hon'ble apex court reads as under:

> *Explanation 3 to section 32(1) states that the expression 'asset' shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature. 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 rights of a similar nature'.*

> *The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3 (b). (Para 4)*
> *In view of the above, it is opined that 'Goodwill' is an asset under Explanation 3(b) to section 32(1). (Para 5)*

8.22 In view of the above judgment, there remains no ambiguity that goodwill is part and parcel of intangible assets. Hence, the assessee is eligible for depreciation on the goodwill.

8.23 Moving further, we note that for claiming the depreciation, among other conditions as provided under section 32 of the Act, one of the condition is that the assessee can claim depreciation on the goodwill being intangible asset if acquired on or after 1st day of April 1998. In other words, the assessee can claim depreciation on the goodwill acquired by it. Thus the controversy arises whether the goodwill generated in the scheme of amalgamation is acquired by the transferee company. Such controversy has been answered by the Hon'ble Supreme Court in the case of Smifs securities Ltd *(supra)* by holding as under:

> *One more aspect needs to be highlighted. In the present case, the Assessing Officer, as a matter of fact, came to the conclusion that no amount was actually paid on account of goodwill. This is a factual finding. The Commissioner (Appeals) has come to the conclusion that the assessee had filed copies of the orders of the High Court ordering amalgamation of the above two companies; that the assets and liabilities of 'Y' Ltd. were transferred to the assessee for a consideration; that the difference between the cost of an asset and the amount paid constituted goodwill and that the assessee-company in the process of amalgamation had acquired a capital right in the form of goodwill because of which the market worth of the assessee-company stood increased. This finding has also been upheld by Tribunal. There is no reason to interfere with the factual finding. (Para 6)*

8.24 From the above, there remains no ambiguity that the goodwill created in the scheme of amalgamation is acquired by the assessee. Thus, in our considered view the assessee has complied all the conditions provided under section 32 of the Act. Accordingly, we hold that the order passed by the ld. CIT under section 263 of the Act is not sustainable and therefore we quash the same. Hence, the ground of the assessee is allowed.

8.25 In the result, the appeal of the assessee is allowed.

Coming to the ITA number 68/Ahd/2021 for the assessment year 2017-18

9. The assessee has raised the following grounds of appeal:

1. *The Id. PCIT has grossly erred in taw and on facts in assuming jurisdiction u/s.263 of the Act on the erroneous ground that the impugned assessment order u/s 143(3) of the Act dated 30.03.2019 is erroneous in so far as it is prejudicial to the interest of the revenue.*

2. *The id. PCIT has grossly erred in law and on facts in assuming jurisdiction u/s. 263 of the Act for disallowing depreciation on goodwill arising on amalgamation when there was neither amalgamation nor addition to the block of intangible assets for any goodwill arising on amalgamation during the year under consideration and depreciation was claimed on the opening WDV of the block of assets.*

3. *The Id. PCIT grossly erred in not appreciating that in order to invoke s.263, the impugned assessment order must be erroneous and that error must be prejudicial to the interest of the revenue. In the present case, the Id. AO did not dispute the claim of depreciation on goodwill arising on amalgamation in view of the judicial precedents of Hon'ble Supreme Court, jurisdictional Hon'ble Gujarat High Court and jurisdictional Hon'ble ITAT Ahmedabad bench and therefore there was no error on the part of AO in following judicial discipline.*

4. *The Id. PCIT grossly erred in assuming jurisdiction u/s.263 of the Act, merely on account of difference of opinion when AO has followed one of the probable legal opinion which under no circumstances can be considered as erroneous or prejudicial to the interest of revenue.*

5. *The Id. PCIT grossly erred in not appreciating that in order to invoke s.263. two conditions must be fulfilled viz. the impugned assessment order must be erroneous and that error must be prejudicial to the interest of the revenue. In the present case, Id. AO has passed the reasoned assessment order after analyzing all details and therefore there was no error in the impugned assessment order so as to justify action u/s.263 of the Act. Under the circumstances, the very assumption of power u/s.263 of the Act is unjustified and bad in law and therefore, order u/s.263 of the Act deserves to be quashed.*

6. *The Id. PCIT ought to have appreciated that the said goodwill represents actual consideration paid over the value of assets taken over from amalgamating company, and is an intangible asset which comes within the definition provided u/s.32 r.w.s. 43(1) of the Act and therefore there was no error on the part of Id. AO while allowing the depreciation thereon. The Id. PCIT further erred in law in holding that the appellant followed the pooling of interest method and not purchase method.*

7. *The subject order u/s.263 passed by the Id. PCTT is illegal and bad in law in absence of any finding of the Id. PCIT how the alleged error of the AO has resulted in loss of revenue particularly when depreciation on goodwill is allowable u/s.32 of the Act and claim of depreciation in in accordance with provisions of law and judicial pronouncements of higher appellate authorities.*

8. *The Id. PCIT has further erred in law in not coming to any concrete conclusion and without conducting any inquiry or investigating the issue, merely directed the AO to frame the assessment order afresh. Without there being any positive finding about order being erroneous and prejudicial to the interest of the revenue, the action of the Id. PCIT is without jurisdiction and illegal and hence deserves to be deleted.*

9. *The Id. PCTT has erred in not considering various facts* ***and in*** *not appreciating the facts and law in their proper perspective.*

> *10. The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal.*

10. At the outset we note that, the issue raised by the assessee in the present appeal has already been allowed in its favour by us in ITA No. 67/AHD/2021 vide paragraph No. 8 of this order. For the detailed discussion, please refer the relevant paragraph.

10.1 Before parting, it is important to note that the facts of the case have been elaborated in previous paragraph of this order while dealing with the issue in ITA number 67/Ahd/2021 for the assessment year 2016-17. Therefore we are not inclined to repeat the same for the sake of brevity and convenience. However, the additional issue arises for our consideration is that whether the depreciation can be disallowed/disturbed claimed on the opening written down value of the intangible assets being goodwill. In this regard, we note that the assessee has claimed depreciation on the goodwill which was brought forward from the immediate preceding assessment years. Thus the depreciation on the goodwill originated in the earlier year cannot be disturbed in the year under consideration without disturbing the year in which it was instigated. In fact, the claim of the assessee for the amount of depreciation on the goodwill should be allowed based on consistency in the given facts and circumstances.

10.2 In holding so, we draw support and guidance from the order of of this Tribunal in the case of Bodal Chemicals Vs. ACIT reported in 180 ITD 313 wherein it was held as under:

> *"Before parting, we are conscious to the fact that the assessee was allowed for depreciation in respect of such goodwill in the 1st year of amalgamation i.e. AY 2006-07. There was no action either under section 263 or 147 of the Act by the revenue. Therefore we can safely presume that the claim of the depreciation of the assessee in the 1st year has attained finality. Admittedly the 1st year is the base assessment year from where the issue of depreciation is emanating.*
>
> ***13.** The question arises once the depreciation has been allowed in the 1st year then the same can be disturbed in the subsequent year without having any change in the facts and circumstances. In our considered view, in such a case the principles of consistency shall be*

applied as held by the Hon'ble Bombay High Court in the case of Pr. CIT v. Quest Investment Advisors Ltd. [2018] 96 taxmann.com 157/257 Taxman 211/409 ITR 545 wherein it was held as under:

> *"Once this principle was accepted and consistently applied and followed, the revenue was bound by it. Unless of course it wanted to change the practice without any change in law or change in facts therein, the basis for the change in practice should have been mentioned either in the assessment order or atleast pointed out to the Tribunal when it passed the impugned order. None of this has happened. In fact, all have proceeded on the basis that there is no change in the principle which has been consistently applied for the earlier assessment years and also for the subsequent assessment years. Therefore, the view of the Tribunal in allowing the respondent's appeal on the principle of consistency cannot in the present facts be faulted with, as it is in accord with the Apex Court decision in Bharat Sanchar Nigam Ltd. v. Union of India [2006] 282 ITR 273. [Para 9]"*

In view of the above, the assessee succeeds on the principle of consistency. Accordingly we set aside the order of the learned CIT (A) and direct the AO to allow the depreciation to the assessee. Hence the ground of appeal of the assessee is allowed."

10.3 In view of the above and after considering the facts in totality, we hold that the order passed by the ld. CIT under section 263 of the Act is not sustainable and therefore we quash the same. Hence, the ground of the assessee is allowed.

10.4 In the result, the appeal of the assessee is allowed.

11. In the combined results, both the appeal of the assessee are **allowed.**

Order pronounced in the Court on 16/09/2021 at Ahmedabad.

Sd/-	**Sd/-**
(RAJPAL YADAV)	**(WASEEM AHMED)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 16/09/2021

Manish