

IN THE INCOME TAX APPELLATE TRIBUNAL
“F” BENCH, MUMBAI

BEFORE SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER &
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA No.5509/Mum/2019

(A.Y: 2016-17)

ACIT, Circle – 9(3)(1) Room No. 215, 2 nd Floor, Aayakar Bhavan, MK Road, Mumbai – 400020.	Vs.	M/s. FedEx Express Transportation & Supply Services (I) Pvt Ltd., A-Wing, Boomerang Bldg., Chandivali Farm Road, Andheri (E) Mumbai - 400072
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCF6516A		
Appellant	..	Respondent

Appellant by :	Smt. Usha Gaikwad. DR
Respondent by :	Shri Dhanesh Bafna. AR

Date of Hearing	31.08.2021
Date of Pronouncement	02.09.2021

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The revenue has filed the appeal against the order of the Commissioner of Income Tax (Appeals)-16, Mumbai, passed u/s 143(3) and 250 of the Income Tax Act, 1961. The revenue has raised the following grounds of appeal.

“1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the

disallowance of Rs. 22,54,09,535/- on account of depreciation on goodwill?

2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating the fact that the goodwill acquired by the assessee enhances the value of the entire FedEx brand?

3. The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the AO be restored.

4. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.

2. The brief facts of the case are that the assessee company is engaged in the business of door to door delivery of goods/documents by road and air within India, surface distributaries services within India, supply chain management and warehousing within the territory of India. The assessee has filed the return of income electronically for the A.Y 2016-17 on 29.11.2016 declaring a total income(loss) of Rs.96,62,90,483/-. Subsequently the case was selected for scrutiny and notice u/s 143(2) and 142(1) of the Act along with questionnaire was issued. In compliance, the assessee has furnished the details and information. The A.O on perusal of the financial statements found that the assessee has acquired a warehouse, transportation services and express delivery undertaking AFL Pvt Ltd as a going concern and on slump sale basis during the F.Y 2010-11.

The assessee has raised the goodwill in the books of accounts being difference between the tangible value of assets and liabilities taken over. It was explained that the same was paid for acquiring intangible assets like business information, business records, marketing network etc. The A.O. on verification of audited financial statements for the A.Y 2015-16 found that the assessee has claimed depreciation on goodwill Rs. 30,05,46,046/- and to examine the allow ability of quantum of goodwill, the assessee was issued a notice. In compliance, the assessee has filed a detailed reply on the claim of depreciation on goodwill vide letter dated 07.12.2017 referred at Para 4.2 of the AO order. The assessee has substantiated the claim of depreciation on the goodwill with judicial decisions. But the A.O. has observed that the goodwill has to be apportioned as in earlier year. Where the goodwill claim was apportioned between the assessee company and its ultimat parent company FedEx Corporation including its global affiliates and subsidiaries in the ratio of 25% and 75%. The A.O. considering the facts has apportioned the goodwill of the company @25% and made disallowance of 75% of depreciation on goodwill of Rs. 22,54,09,535/- and also disallowed the unpaid provision of leave encashment and assessed the

total income(loss) of Rs. 82,19,77,638/- and passed the order u/s 143(3) of the Act dated 22.12.2018.

3. Aggrieved by the order, the assessee has filed an appeal before the CIT(A). The CIT(A) has considered the grounds of appeal, submissions of the assessee, findings of the A.O and assessee's own case for the A.Y 2011-12 where the Hon'ble Tribunal has decided in favour of the assessee. The CIT(A) relied on the Tribunal decision and directed the A.O to delete the addition. The CIT(A) on the issue of short credit of TDS has directed the A.O to verify the claim and partly allowed the assessee appeal. Aggrieved by the CIT(A) order, the revenue has filed an appeal before the Honble Tribunal.

4. At the time of hearing the Ld. DR submitted that the CIT(A) has erred in deleting the addition of depreciation on goodwill, whereas the A.O has apportioned the goodwill in the ratio of 25% and 75% to the holding company and relied on the order of the A.O.

5. Contra, the Ld. AR supported the order of the CIT(A) and further substantiated his submissions relying on the decision of the Hon'ble Tribunal in assessee's own case for the A.Y 2011-12, 2014-15 & 2015-16.

6. We heard the rival submissions and perused the material on record. The sole crux of the disputed issue as envisaged by the Ld. DR is with respect to CIT(A) erred in deleting the addition made by the A.O in respect of depreciation on goodwill. We find the Ld. AR supported the order of the CIT(A) and emphasizing on the assessee's own case for the A.Y 2011-12, 2014-15 & 2015-16. At this juncture, we considered it appropriate to refer to the observations of the CIT(A) at page 7 Para 5.1.4 of the order read as under:

"5.1.4 As discussed in Para 4.3 and 4.4 of assessment order while making disallowance the Ld. AO had merely relied upon the discussions and reasoning given in appellants own case for A.Y. 2011-12. While deciding appeal of the assessee against order u/ s. 263 the honorable ITAT Mumbai Bench F', Mumbai ITA No. 3621/M/2016 for A.Y. 2011 - 2012 held as under:

'With respect to ground no. 3 dealing with depredation on goodwill, assessee in the course of the hearing brought to our notice the order giving effect to 263 order passed by the AO on 30th December, 2016 wherein the AO has accepted the valuation of the goodwill and also accepted the claim of depreciation on the goodwill. In the light of these subsequent facts, what survives to the adjudicated is Whether the CIT was justified in giving a direction in para 10.5 of his order on apportionment of goodwill between the assessee and its affiliates. The assessee relied upon the decision of the Bombay High Court in the case of Herdillia Chemicals reported in 221 IT tt 194 and based on this decision submitted that since there is a specific direction on merits by the CIT to the AO, the Tribunal ought to adjudicate this issue. On perusal of

the CITs order and applying the decision of the jurisdictional High Court, the assessee is justified in raising this issue before us. The direction of the CIT on this issue is without any material on record and based on surmises and conjectures. The agreement the business of AFL and UFL is between the Assessee and AFL/LJFL. None of the affiliates of the FedEx group are a party to this agreement. Therefore, it cannot be said that the affiliates have acquired the goodwill along with the assessee. Provisions of section 43(1) which defines "cost" also do not provide for such an apportionment of cost. Section 38 of the Income Tax Act which empowers the revenue to disallow items specified therein also does not deal with apportionment of cost. It is also important to note that goodwill is not covered by provisions of section 38(2) of the Act. The Hon'ble Supreme Court in the case of Vodafone International reported in 341 E112 has in detail explained the relationship between parent and subsidiary and its economic independence. The Honble Supreme Court has categorically stated that parent and subsidiary are totally independent tax payers and they are subjected to income tax on standalone basis irrespective of their actual degree of economic independence and regardless of whether profits are reserved or distributed to shareholders."

5.1.5. From the judgement of Hon'ble Tribunal "F" Bench it is evident that the Hon'ble Mumbai Tribunal has quashed the order of the CIT passed under section 263 of the Act dated 21.02.2016 on the ground that the directions of the CIT on the issue of apportionment of goodwill is without any material on record and based on surmises and conjectures. The legal and the factual position of AY 2016-17 is similar to that of AY 2011-12. Since the findings of the CIT for A.Y. 2011-12 were quashed, the order of the Id. A.0 on this ground for AY 2016-17 based on A.Y. 2011-12 does not survive. Accordingly, these grounds raised by the appellant are allowed and the Id. A.0 is directed to delete the disallowance."

7. Further, we find the Hon'ble Tribunal in assessee's own case for the A.Y 2014-15 & 2015-16 in ITA No. 6872/Mum/2018 & 848/Mum/2019 dated 24-02-2021 has considered the decision of the Hon'ble Tribunal for the A.Y 2011-12 and has observed at page 4 Para 7 of the order as under:

"7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. As is discernible from the orders of the lower authorities, the A.O relying on the order passed by the Pr. CIT under Sec. 263 of the Act, dated 21.02.2016, wherein the latter had observed that if some goodwill had been acquired by the assessee then, partially such goodwill was for the business of the international affiliates of the assessee company and only a reasonable part of the same would be relatable to the assessee company, had thus, adopting the same line of action attributed 25 % of the value of goodwill to the assessee and disallowed the balance 75% of its value. Admittedly, the order passed by the Pr. CIT under Sec. 263, for A.Y. 2011-12, dated 21.02.2016 had been quashed by the Tribunal vide its order passed in ITA No. 3621/Mum/2016, dated 17.11.2017 . As observed by us hereinabove, the Tribunal while quashing the order passed by the Pr.CIT under Sec. 263 had categorically observed that as the agreement for acquiring the business of AFL and UFL was between the assessee and AFL/UFL and none of the affiliates of the FedEx Group were a party to the same thus, it cannot be said that the affiliates had acquired the goodwill along with the assessee. For the sake of clarity the observations recorded the Tribunal while disposing off the appeal in the assessee's own case for A.Y. 2011-12 in ITA No. 3621/Mum/2016, dated 17.11.2017 are culled out as under:

“12. With respect to ground no.3 dealing with depreciation on goodwill, assessee in the course of the hearing brought to our notice the order giving effect to 263 order passed by the AU on 30th December 2016 wherein the AO has accepted the valuation of the goodwill and also accepted the claim of depreciation on the goodwill. In the light of these subsequent facts, what survives to the adjudicated is whether the CIT was justified in giving a direction in para 10.5 of his order on apportionment of goodwill between the assessee and its affiliates. The assessee relied upon the decision of the Bombay High Court in the case of Herdillia Chemicals reported in 221 ITR 194 and based on this decision submitted that since there is a specific direction on merits by the CIT to the AU, the Tribunal ought to adjudicate this issue. On perusal of the CITs order and applying the decision of the jurisdictional High Court, the assessee is justified in raising this issue before us. The direction of the CIT on this issue is without any material on record and based on surmises and conjectures. The agreement for acquiring the business of AFL and UFL is between the assessee and AFL/LJFL. None of the affiliates of the FedEx group are a party to this agreement. Therefore, it cannot be said that the affiliates have acquired the goodwill along with the assessee. Provisions of section 43(1) which defines "cost" also do not provide for such an apportionment of cost. Section 38 of the Income Tax Act which empowers the revenue to disallow items specified therein also does not deal with apportionment of cost. It is also important to note that goodwill is not covered by provisions of section 38(2) of the Act. The Hon'ble Supreme Court in the case of Vodafone International reported in 341 ETR I at pg 34 has in detail explained the relationship between parent and subsidiary and its economic independence. The Hon'ble Supreme Court has categorically stated that parent and subsidiary are totally independent tax payers and they are subjected to income tax on standalone basis irrespective of their actual degree of economic independence and regardless of whether profits are reserved or distributed to shareholders.

13. The Hon'ble Delhi High Court in the case of Maruti Suzuki reported in 381 ITR 117 while dealing with transfer pricing adjustment on AMP expenses incurred by Indian company has negative the contention that such expenses, in the absence of any understanding with AE empower the revenue to make adjustment. It is also important to note that if there are any transactions between the assessee and its affiliates that would be a subject matter of transfer pricing regulation. In our view, the CIT was not justified in giving a direction for apportionment of goodwill and the said direction is without any material or any basis and therefore the directions given by the CIT on apportionment of goodwill between the assessee company and its affiliates are contrary to law and hence such a finding is quashed.

Observing, that the controversy in hand had its genesis in A.Y. 2011-12, we find, that the CIT(A) had rightly, observed that now when the order of the Pr.CIT under Sec. 263, dated 21.02.2016 had been quashed by the Tribunal, therefore, the disallowance of depreciation on goodwill made by the A.O by relying on the order passed by his predecessor under Sec. 143(3) r.w.s 263, dated 30.12.2016, cannot survive on a standalone basis and was liable to be vacated. Accordingly, finding no infirmity in the view taken by the CIT(A), we herein uphold his order."

8.The appeal filed by the revenue is dismissed.

8. The Ld.DR could not controvert the observations of the CIT(A) with any new material or evidences and relied on the order of the A.O. We find the CIT(A) in the present case has relied on the decision of the Hon'ble Tribunal for the A.Y 2011-12 and granted the relief. Further, the Ld. AR has supported his submissions relying on the decision of the Hon'ble Tribunal for the A.Y 2014-15 and 2015-16

where the Tribunal has dismissed the revenue appeal and we follow the judicial precedence. Accordingly, we do not find infirmity in the order of the CIT(A) and uphold the same and dismiss the grounds of appeal of the revenue.

9. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 02.09.2021.

Sd/-
(MANOJ KUMAR AGGARWAL)
ACCOUNTANT MEMBER

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 02.09.2021

KRK, PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai

6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

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आदेशानुसार/ BY ORDER,

(Asst. Registrar)
ITAT, Mumbai