

**IN THE INCOME TAX APPELLATE TRIBUNAL  
[ DELHI BENCH "I-1" : NEW DELHI ]**

**BEFORE SHRI G.S. PANNU, PRESIDENT  
AND  
SHRI AMIT SHUKLA, JUDICIAL MEMBER  
(Through Video Conferencing)**

ITA. No. 462/Del/2021  
(Assessment Year: 2016-17)

GBT India Pvt. Ltd., G-21, Ground Floor, Salcon Rasvilas, Plot No. D-1, Saket District Centre, New Delhi – 110 017. <b>PAN: AAFCG5409D</b>	Vs.	National E-Assessment  Centre,  New Delhi.
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**AND**

Stay App. No. 51/Del/2021  
[ in ITA. No. 462/Del/2021 ]  
(Assessment Year: 2016-17)

GBT India Pvt. Ltd., G-21, Ground Floor, Salcon Rasvilas, Plot No. D-1, Saket District Centre, New Delhi – 110 017. <b>PAN: AAFCG5409D</b>	Vs.	National E-Assessment  Centre,  New Delhi.
(Appellants)		(Respondents)

Assessee by :	Shri Himanshu Sinha, Adv. & Shri Bhuwan Dhooper, Adv.;
Department by :	Shri Surendra Pal, [CIT] – D.R.;
Date of Hearing :	08/10/2021
Date of pronouncement :	06/01/2022

**ORDER**

**PER AMIT SHUKLA, J. M.**

The aforesaid appeal has been filed by the assessee against final assessment order 30.03.2021 passed by the ld. Assessing Officer for the quantum of assessment passed under Section 143(3) read with

Section 144C(13) of the Income Tax Act, 1961 (the Act) on the directions given by the ld. DRP vide order dated 30.09.2020 for assessment year 2016-17.

2. In various grounds of appeal the assessee has challenged following additions/adjustments:-

(a) transfer pricing adjustment at Rs.24,33,04,705/- on account of Intra Group Services paid to AE for failing transfer support services;

(b) disallowance of depreciation claimed on goodwill of Rs.8,20,48,398/-; and

(c) disallowance of expenses in respect of bad debts written off amounting to Rs.22,96,719/-.

3. At the outset, the ld. Counsel for the assessee submitted that, all the three issues involved are covered by the decision of the Tribunal in assessee's own case for the assessment year 2015-16 vide judgement order dated 31<sup>st</sup> January, 2020. This fact he pointed out, has also been noted by the ld. DRP in its order, wherein DRP has clearly held that all the issues involved are squarely covered by the decision of the Tribunal for assessment year 2015-16 and in fact directed the TPO / AO to verify from the record whether any appeal has been preferred against the order of the Tribunal for assessment year 2015-16; and if no appeal has been preferred then in case the ITAT's order has not been challenged before the Hon'ble High Court, then additions should be deleted.

4. This fact was confronted to the ld. DR vide order sheet entry dated 24.05.2021 during hearing of Stay Application filed by the assessee, which for the sake of ready reference is reproduced hereunder:-

**“ 24.05.2021**

*Appellant by : S/Shri Himanshu S. Sinha, Adv.& Bhuwan  
Dhoopar, Adv.*

*Department by: Shri Surender Pal, CIT (DR)*

*Both sides have been heard at some length. The preliminary point articulated by the appellant is that on all the three points of dispute, the Tribunal in the earlier assessment year 2015-16 vide order dated 31.1.2020 has decided the issues in favour of the assessee. To buttress this, our attention has also been drawn through the final assessment order dated 30.3.2021 wherein the directions of the Ld. DRP have been noted. On each of the points, the Ld. DRP vide its order dated 30.9.2020 directed the Assessing Officer to ascertain as to whether any appeal has been preferred against the order of the Tribunal (Supra). The Ld. DRP further directed the Assessing Authority to retain the addition proposed in the draft assessment order if "this order of ITA for AY 2015-15 has been challenged before the Hon'ble High Court or the Hon'ble Supreme Court as the case may be". Thus, the retention of the proposed addition was sine qua non to the filing of the appeal by the Department before the Hon'ble High Court or Hon'ble Supreme Court, as the case may be, against the order of the Tribunal for AY 2015-16 (Supra).*

*It is noted that on each of the points, the final assessment order retains the addition proposed in the draft assessment order by noting the averments of the Assessing Officer in some email dated 27.11.2020 (referred in para no. 4 of the final assessment order) informing that the process of filing of appeal before the Hon'ble High Court against the order of the Tribunal is "under process". It is further observed that since "filing of further appeal has been recommended" and the same being under process, the addition has been retained.*

*The Ld. CIT (DR) has not controverted the factual matrix, but reiterated the detailed arguments made before the Coordinate Bench which decided the Appeal in AY 2015-16 (Supra) and attempted to justify the stand of the Revenue.*

*Be that as it may, it is imperative to ascertain the sustenance of three additions on the touchstone as to whether or not, any appeal has been preferred by the Revenue against the order of the Tribunal for AY 2015-16, as is the uncontroverted direction of the Ld. DRP in its order dated 30.09.2020. The Ld. Counsel for the appellant also made a statement at the Bar that till now no appeal has been preferred by the Revenue in the Hon'ble High Court.*

*In order to impart certainty and finality to the litigation and noting the submissions of the parties, it is desired that the status of the process of filing of appeal of the Revenue before the Hon'ble High Court against the order of the Tribunal for AY 2015-16 (Supra) is brought on record. For this purpose, the Ld. CIT (DR) seeks time to ascertain the position from the Field Office. Accordingly, the Department is allowed time to ascertain the status of the process of filing of appeal for AY 2015-16 , before the next date of hearing i.e. 11.06.2021.*

*In the meanwhile, the status quo on the recovery of the demand be maintained and the accompanying Stay Application shall also come up on 11.06.2021 alongside the Appeal. The Registry is directed to post the matters for 11.06.2021 as Part Heard.*

*The above decision was pronounced in the presence of both the parties in the Open Court through virtual hearing on 24.05.2021.*

**Sd/-  
( AMIT SHUKLA )  
JUDICIAL MEMBER**

**Sd/-  
( G.S. PANNU )  
VICE PRESIDENT “**

5. Thereafter same directions were reiterated from time to time as ld. DR sought time to verify the date on which the order of the Tribunal was served and whether any appeal has been filed. On 30<sup>th</sup> July, 2021 the ld. DR had received report from the Assessing Officer dated 27.05.2021 which is placed on record, wherein it has been stated that no appeal has been filed before the Hon'ble High Court against the order of the Tribunal for assessment year 2015-16.

6. However, ld. CIT DR made his submissions on the test of his observations on the findings of the TP and AO and strongly relied upon.

7. After considering the relevant findings given in the impugned order as well as the facts on record, we find that the issues involved are squarely covered by the decision of the Tribunal in assessee's own case for AY 2015-16 which fact has also been noted by the ld. DRP. The facts in brief are that, the assessee is a wholly owned subsidiary of GBT III BV, Netherlands and engaged in the business of arranging travel for domestic customers (within India and outside) by facilitating services entailing booking of air tickets, accommodation, cab, conference rooms, catering services, management of corporate events, public relation services etc. GBT III BV is a joint venture between American Express Company, USA (**Amex**) and Certares LP (investment group) effective from 1 July 2014, with each group holding 50% share in it. Prior to 1 July 2014, Global Business Travel (GBT), which is a travel management company, was part of the business of Amex.

7.1 In March 2014, as per a Master Reorganization agreement entered between Amex and GBT III BV. Amex spun off its corporate travel business segment and transferred GBT assets, operations, employees and shares of certain Amex affiliates to GBT III BV. A local business transfer agreement was entered between American Express India Pvt. Ltd. (AEIPL) and the assessee on 1 June, 2014 under which the corporate travel business division in India was transferred to the assessee vide a slump sale on a going concern basis for which the assessee had paid a consideration of Rs.45,48,85,303/-.

8. During the relevant year the assessee had undertaken various international transactions as noted in the TP's order. In so far as

international transaction of availing of decision of support services of Rs. 24,33,04,705/-, the TPO had proposed adjustment of the entire amount on account of intra group services paid to the AE by applying CUP method to determine the NIL mainly on the following reasons:-

- The assessee has failed to provide any cogent evidence to demonstrate that services were received by the Applicant and it is only a clandestine methodology adopted for collusion to shift the profits from Indian territory.
- He held that the assessee has failed to establish any direct nexus between increase in business and profitability as a result of availing of these services.
- It was held that the assessee did not gain any advantage or benefit as a result of availing of these services, therefore the whole purpose of receiving these services is defeated.
- TPO further held that the Applicant itself was performing these services, hence there was no need for the Applicant to avail services from its AEs.

9. Regarding the issue of depreciation of claim of goodwill the Assessing Officer had simply followed his predecessor's order for the immediately preceding assessment year 2015-16 which has been depreciation of Rs.8,20,48,398/- on the goodwill applying in the books of accounts as a result of sales transaction. The assessee had purchased corporate transfer business from AEIPL vide Agreement dated 1<sup>st</sup> June, 2014 for which assessee had paid total consideration of Rs.45,48,85,303/- which comprised of net asset value of Rs.1,72,93,846/-. The difference between the considerations and the net asset required was recognized as goodwill and depreciation was claimed following the accounting standard laid down by the Hon'ble

Supreme Court. The reason given by the Assessing Officer for the depreciation following the earlier order of the Tribunal was as under:-

- The goodwill was not valued in the valuation report as per DCF and the claim of the Applicant that goodwill is the difference between the consideration and NAV is baseless and without any scientific basis.
- The transfer of business from AEIPL to assessee took place on June 1, 2014 and on the date of transfer both entities were under the same parent Amex. Thus, even if there is any goodwill, it is self-generated.
- AO alleged that since the purchase consideration was paid on June 26, 2014 and valuation report of local Valuers was dated July 25, 2014, the entire exercise of recognizing the goodwill and claiming depreciation is an afterthought.
- There was no value addition in lieu of the transfer as the work of the corporate travel business division remained the same even after the transfer of the business.

10. Lastly, with regard to the claim of disallowance of bad debts written off amounting to Rs.1,22,96,711/-, the assessee had written off bad debt in the books of accounts during the year under consideration. It is also not in dispute that such bad debts were considered in computing the income of the preceding assessment year. The Assessing Officer has disallowed such expenses mainly on the ground that firstly, no supporting evidence in relation to bad debts was furnished and secondly, quantum of bad debts is un-reasonable considering it is to be the second year of operations.

11. As noted above, now on all the issues are covered by the decision of the Tribunal in assessee's own case for the earlier year (supra). Even the DRP has noted and acknowledged this fact. For the sake of ready reference, the observations and the findings of the DRP are reproduced hereunder wherein the DRP has taken note of the Tribunal in assessee's own case for the earlier year:-

**“ Decision and Directions of the DRP**

3. The Panel has very carefully considered the grounds of objections and written and oral arguments made on behalf of the assessee. The decision of the Panel on various objections is as follows:

**3.1 Ground no 1 to 6** relate to the transfer pricing adjustment of Rs.243,304,705 in respect of transaction of availing of transitional support services. It was submitted that as part of a spin off exercise in the group, a number of functions that supported the travel business altogether, shifted from Amex to GBT, whereas some of those continued to operate under Amex. Due to the fact that certain expertise supporting the travel business shifted out of Amex and other remained therein, Amex and GBT BV entered into a master TSA transition services agreement ('Master TSA') wherein Amex agreed to provide certain transition services to GBT BV, and correspondingly, agreed to received certain services from GBT BV to ensure that continuity of business was maintained even after the spin-off, till the time when both organizations reconstructed such expertise in-house.

3.1.1 The TPO, however, after a detailed analysis of the transitional support services came to the conclusion that none of the benefits stated to have been received were tangible or real and that a facade was created to give an impression that some vital benefit had passed on to the taxpayer, which was not the case in reality. According to the TPO, related parties were quite likely to give a form that would give an impression that a real service was being rendered by one to another. He, accordingly, purported to lift the veil and came to hold that the payment of service fee for intra-group services was only an arrangement to change tax base

without any economic substance in the transactions. This practice, according to him, was internationally not accepted. He placed reliance on **Savia.no v Commissioner 765F. 2d 643,654 (7<sup>th</sup> Cir. 1985)** for the proposition that 'the freedom to arrange one's affairs to minimize taxes did not include the right to engage in .financial fantasies with the expectation that the Internal Revenue Service and the Courts will play along/ Support was also drawn from **Frank Lyon Co v US 435, US 561,573(1978)** on the application of the doctrine of substance over form. He, accordingly, made an adjustment of Rs. 243,304,705/- on account of transition support service charges, taking it to be nil using CUP Method, as the assessee company had failed to demonstrate as to how/why a third party would pay for such services under uncontrolled conditions to satisfy the arm's length principles. Further, the assessee failed to submit necessary documentation and evidence to show that the services were actually rendered by the AE to the taxpayer.

3.1.2 The Panel has considered the rival arguments. This issue had travelled to the ITAT for AY 2015-16 and the ITAT had decided the issue in favour of the assessee. The observations of the ITAT are as follows:

**"15. We have given thoughtful consideration to the orders of the authorities below and the rival contentions. There is no dispute that TNMM has been accepted as the most appropriate method. It is equally true that the TPO has singled out one transaction and applied CUP as most appropriate method.**

**16. The Hon'ble High Court of Delhi in the case of Magneti Marelli Powertrain India (P.) Ltd. v. Dy. CIT [2016] 75 taxmann.com 213/389 ITR 469 has held that when intra group services are linked to the main business activity of the company, they should be bench marked by adopting TNMM. The relevant findings of the Hon'ble High Court read as under:**

**17. As far as the second question is concerned, the TPO accepted TNMM applied by the assessee, as the most appropriate method in respect of all the international**

transactions including payment of royalty. The TPO, however, disputed application of TNMM as the most appropriate method for the payment of technical assistance fee of Rs. 38,58,80,000 only for which Comparable Uncontrolled Price ("CUP") method was sought to be applied. Here, this court concurs with the assessee that having accepted the TNMM as the most appropriate, it was not open to the TPO to subject only one element, i.e payment of technical assistance fee, to an entirely different (CUP) method. The adoption of a method as the most appropriate one assures the applicability of one standard or criteria to judge an international ITA 350/2014 Page 20 transaction by. Each method is a package in itself, as it were, containing the necessary elements that are to be used as filters to judge the soundness of the international transaction in an ALP fixing exercise. If this were to be disturbed, the end result would be distorted and within one ALP determination for a year, two or even five methods can be adopted. This would spell chaos and be determined to the interests of both the assessee and the revenue. The second question is, therefore, answered in favour of the assessee; the TNMM had to be applied by the TPO/AO in respect of the technical fee payment too."

17. In our considered opinion, the lower authorities erred in questioning the need and benefit arrived by the assessee from payment in respect of availing of services from its AE. All that is required to be seen is as to whether there was actual rendition of services or not. We have carefully gone through the emails and invoices placed in the paper book vis a vis TSA Agreement. In our considered opinion, these documentary evidences clearly show the rendition of services by the AE to the appellant company. Moreover, the TPO himself has accepted the fees received by the assessee from rendering these services. We fail to understand why the payments have been subjected to different treatments.

18. The Hon'ble High Court of Delhi in the case of *CIT v. EKL Appliances Ltd.* [2012] 24 taxmann.com 199/209

**Taxman 200/345 ITR 241 has held that the TPO does not have power to adjudicate the allowance/disallowance of expenditure incurred by the assessee thereby demolishing the need and benefit derived by the assessee. *The relevant findings of the Hon'ble High Court read as under:***

**"15. It seems to us that the decision taken by the Tribunal is the right decision. The TPO applied the CUP method while examining the payment of brand fee/royalty. The CUP method which in its expanded form is known as "comparable uncontrolled price" method is provided for in Rule 10B(1)(a) of the Income-tax Rules, 1962. It is one of the methods recognised for determining the ALP in relation to an international transaction. Rule 10B(1) says that for the purposes of Section 92C(2), the ALP shall be determined by any one of the five methods, which is found to be the most appropriate method, and goes on to lay down the manner of determination of the ALP under each method. The five methods recognized by the rule are (i) comparable uncontrolled price method (CUP), (ii) re-sale price method, (iii) cost plus method, (iv) profit split method and (v) transactional net marginal method (TNMM). The manner by which the ALP in relation to an international transaction is determined under CUP is prescribed in clause (a) of the sub-rule (1) of Rule 10B.**

**The following three steps have been prescribed: -**

**“(a) comparable uncontrolled price method, by which,**

**(i) the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions, is identified.**

**(ii) such price is adjusted to account for differences, if any, between the international transaction and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market;**

**(iii) the adjusted price arrived at under sub-clause (ii) is taken to be an arm's length price in respect of the property transferred or services provided in the international transaction;"**

**16. The Organization for Economic Co-operation and Development ("OECD", for short) has laid down "transfer pricing guidelines" for Multi-National Enterprises and Tax Administrations. These guidelines give an introduction to the arm's length price principle and explains article 9 of the OECD Model Tax Convention. This article provides that when conditions are made or imposed between two associated enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises then any profit which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, if not so accrued, may be included in the profits of that enterprise and taxed accordingly. By seeking to adjust the profits in the above manner, the arm's length principle of pricing follows the approach of treating the members of a multi-national enterprise group as operating as separate entities rather than as inseparable parts of a single unified business. After referring to article 9 of the model convention and stating the arm's length principle, the guidelines provide for "recognition of the actual transactions undertaken" in paragraphs 1.36 to 1.41. Paragraphs 1.36 to 1.38 are important and are relevant to our purpose. These paragraphs are reproduced below: -**

**"1.36 A tax administration's examination of a controlled transaction ordinarily should be based on the transaction actually undertaken by the associated enterprises as it has been structured by them, using the methods applied by the taxpayer insofar as these are consistent with the methods described in Chapters II and III. In other than exceptional cases, the tax administration should not disregard the actual transactions or substitute other transactions for them. Restructuring of legitimate business transactions would be a wholly arbitrary created where the other tax administration**

does not share the same views as to how the transaction should be structured.

1.37 However, there are two particular circumstances in which it may, exceptionally, be both appropriate and legitimate for a tax administration to consider disregarding the structure adopted by a taxpayer in entering into a controlled transaction. The first circumstance arises where the economic substance of a transaction differs from its form. In such a case the tax administration may disregard the parties' characterization of the transaction and re-characterise it in accordance with its substance. An example of this circumstance would be an investment in an associated enterprise in the form of interest-bearing debt when, at arm's length, having regard to the economic circumstances of the borrowing company, the investment would not be expected to be structured in this way. In this case it might be appropriate for a tax administration to characterize the investment in accordance with its economic substance with the result that the loan may be treated as a subscription of capital. The second circumstance arises where, while the form and substance of the transaction are the same, the arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner and the actual structure practically impedes the tax administration from determining an appropriate transfer price. An example of this circumstance would be a sale under a long term contract, for a lump sum payment, of unlimited entitlement to the intellectual property rights arising as a result of future research for the term of the contract (as previously indicated in paragraph 1.10). While in this case it may be proper to respect the transaction as a transfer of commercial property, it would nevertheless be appropriate for a tax administration to conform the terms of that transfer in their entirety (and not simply by reference to pricing) to those that might reasonably have been expected had the transfer of property been the subject of a transaction involving independent enterprises. Thus, in the case

described above it might be appropriate for the tax administration, for example, to adjust the conditions of the agreement in a commercially rational manner as a continuing research agreement.

1.38 In both set of circumstances described above, the character of the transaction may derive from the relationship between the parties rather than be determined by normal commercial conditions as may have been structured by the taxpayer to avoid or minimize tax. In such cases, the totality of its terms would be the result of a condition that would not have been made if the parties had been engaged in arm's length dealings. Article 9 would thus allow an adjustment of conditions to reflect those which the parties would have attained had the transaction been structured in accordance with the economic and commercial reality of parties dealing at arm's length."

17. The significance of the aforesaid guidelines lies in the fact that they recognise that barring exceptional cases, the tax administration should not disregard the actual transaction or substitute other transactions for them and the examination of a controlled transaction should ordinarily be based on the transaction as it has been actually undertaken and structured by the associated enterprises. It is of further significance that the guidelines discourage re-structuring of legitimate business transactions. The reason for characterisation of such re-structuring as an arbitrary exercise, as given in the guidelines, is that it has the potential to create double taxation if the other tax administration does not share the same view as to how the transaction should be structured.

18. Two exceptions have been allowed to the aforesaid principle and they are (i) where the economic substance of a transaction differs from its form and (ii) where the form and substance of the transaction are the same but arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational

**manner.**

**19. There is no reason why the OECD guidelines should not be taken as a valid input in the present case in judging the action of the TPO. In fact, the CIT (Appeals) has referred to and applied them and his decision has been affirmed by the Tribunal. These guidelines, in a different form, have been recognized in the tax jurisprudence of our country earlier. It has been held by our courts that it is not for the revenue authorities to dictate to the assessee as to how he should conduct his business and it is not for them to tell the assessee as to what expenditure the assessee can incur. We may refer to a few of these authorities to elucidate the point. In Eastern Investment Ltd. v. CIT, (1951) 20 ITR 1, it was held by the Supreme Court that "there are usually many ways in which a given thing can be brought about in business circles but it is not for the Court to decide which of them should have been employed when the Court is deciding a question under section 12(2) of the Income-tax Act". It was further held in this case that "it is not necessary to show that the expenditure was a profitable one or that in fact any profit was earned". In CIT v. Walchand & Co. etc., (1967) 65 ITR 381, it was held by the Supreme Court that in applying the test of commercial expediency for determining whether the expenditure was wholly and exclusively laid out for the purpose of business, reasonableness of the expenditure has to be judged from the point of view of the businessman and not of the Revenue. It was further observed that the rule that expenditure can only be justified if there is corresponding increase in the profits was erroneous. It has been classically observed by Lord Thankerton in Hughes v. Bank of New Zealand, (1938) 6 ITR 636 that "expenditure in the course of the trade which is unremunerative is none the less a proper deduction if wholly and exclusively made for the purposes of trade. It does not require the presence of a receipt on the credit side to justify the deduction of an expense". The question whether an expenditure can be allowed as a deduction only if**

**it has resulted in any income or profits came to be considered by the Supreme Court again in CIT v. Rajendra Prasad Moody, (1978) 115 ITR 519, and it was observed as under: -**

**"We fail to appreciate how expenditure which is otherwise a proper expenditure can cease to be such merely because there is no receipt of income. Whatever is a proper outgoing by way of expenditure must be debited irrespective of whether there is receipt of income or not. That is the plain requirement of proper accounting and the interpretation of Section 57(in) cannot be different. The deduction of the expenditure cannot, in the circumstances, be held to be conditional upon the making or earning of the income."**

**It is noteworthy that the above observations were made in the context of Section 57(iii) of the Act where the language is somewhat narrower than the language employed in Section 37(1) of the Act. This fact is recognised in the judgment itself. The fact that the language employed in Section 37(1) of the Act is broader than Section 57(iii) of the Act makes the position stronger.**

**20. In the case of Sassoon J. David & Co. Pvt. Ltd. v. CIT (1979) 118 ITR 261 (SC), the Supreme Court referred to the legislative history and noted that when the Income Tax Bill of 1961 was introduced, Section 37(1) required that the expenditure should have been incurred "wholly, necessarily and exclusively" for the purposes of business in order to merit deduction. Pursuant to public protest, the word "necessarily" was omitted from the section.**

**21. The position emerging from the above decisions is that it is not necessary for the assessee to show that any legitimate expenditure incurred by him was also incurred out of necessity. It is also not necessary for the assessee to show that any expenditure incurred by him for the purpose of business carried on by him has actually resulted in profit or**

**income either in the same year or in any of the subsequent years. The only condition is that the expenditure should have been incurred "wholly and exclusively" for the purpose of business and nothing more. It is this principle that inter alia finds expression in the OECD guidelines, in the paragraphs which we have quoted above.**

**22. Even Rule 10B(1)(a) does not authorise disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same or that in the view of the Revenue the expenditure was unremunerative or that in view of the continued losses suffered by the assessee in his business, he could have fared better had he not incurred such expenditure. These are irrelevant considerations for the purpose of Rule 10B. Whether or not to enter into the transaction is for the assessee to decide. The quantum of expenditure can no doubt be examined by the TPO as per law but in judging the allowability thereof as business expenditure, he has no authority to disallow the entire expenditure or a part thereof on the ground that the assessee has suffered continuous losses. The financial health of assessee can never be a criterion to judge allowability of an expense; there is certainly no authority for that. What the TPO has done in the present case is to hold that the assessee ought not to have entered into the agreement to pay royalty/brand fee, because it has been suffering losses continuously. So long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purposes of business, it is no concern of the TPO to disallow the same on any extraneous reasoning. As provided in the OECD guidelines, he is expected to examine the international transaction as he actually finds the same and then make suitable adjustment but a wholesale disallowance of the expenditure, particularly on the grounds which have been given by the TPO is not contemplated or authorized.**

**23. Disallowance of the entire brand fee/royalty payment was not warranted. The assessee has furnished copious material and valid reasons as to why it was suffering losses**

continuously and these have been referred to by us earlier. Full justification supported by facts and figures have been given to demonstrate that the increase in the employees cost, finance charges, administrative expenses, depreciation cost and capacity increase have contributed to the continuous losses. The comparative position over a period of 5 years from 1998 to 2003 with relevant figures have been given before the CIT (Appeals) and they are referred to in a tabular form in his order in paragraph 5.5.1. In fact there are four tabular statements furnished by the assessee before the CIT (Appeals) in support of the reasons for the continuous losses. There is no material brought by the revenue either before the CIT (Appeals) or before the Tribunal or even before us to show that these are incorrect figures or that even on merits the reasons for the losses are not genuine.

24. We are, therefore, unable to hold that the Tribunal committed any error in confirming the order of the CIT (Appeals) in deleting the disallowance of the brand royalty payment while determining the ALP. Accordingly, the substantial questions of law are answered in the affirmative and in favour of the assessee and against the Revenue. The appeals are accordingly dismissed with no order as to costs.

19. Considering the facts of the case in totality in light of the judicial decisions referred to hereinabove, we do not find any merit in the TP adjustment of Rs. 33,10,68,560/-. The Assessing Officer/TPO is, accordingly, directed to delete the same. Grounds relating to TP adjustments with all its sub-grounds are allowed."

**3.1.3 The Panel, accordingly, directs the TPO/AO to verify from their records and see whether any appeal has been preferred against the aforesaid ITAT order for AY 2015-16 in assessee's own case and exclude the said addition on account of transitional support services, if no appeal has been preferred. The TPO/Assessing Officer -however will retain the addition, if this order of the ITAT for AY 2015-16 has been challenged**

**before the High Court or the Supreme Court as the case may be.**

3.2 **Ground no** 7 relates to the disallowance of Rs.82,048,398 on account of depreciation on goodwill acquired / purchased and capitalized in books of account on acquiring of Corporate Travel ('CT') division of American Express India Pvt. Ltd. ('AEIPL') on 'slump sale' as a going concern basis vide Local Business Transfer Agreement ('LTBA') dated June 1, 2014.

3.2.1 According to the Assessing Officer, depreciation claimed by the assessee on goodwill was not an allowable deduction since the goodwill recognized was self generated. According to him, the assessee and AEIPL were under the same ultimate parent company and therefore, goodwill recognized by the assessee was self-generated

3.2.2 The assessee, however, submitted that the ultimate holding company of the assessee (i.e. GBT III BV) was a Joint Venture between Amex and an investor group led by Certares (an unrelated group to Amex) and the relationship between the assessee and AEIPL was of buyer and seller for acquisition of CT division for which purchase consideration was paid by assessee to AEIPL. As AEIPL was a separate legal entity and was independent to the assessee for tax purposes, goodwill acquired by the assessee could not be said to be self-generated. The assessee had acquired the CT division on a slump sale and the consideration paid for acquiring the CT division was determined by independent valuers. The consideration paid by the assessee over and above the value of net assets acquired was recognized as goodwill in the books of accounts, on which depreciation had been claimed as per the provisions of section 32 of the Act.

3.2.3 The Panel has considered the submission. This issue had also travelled to ITAT for AY 2015-16 and was decided in favour of the assessee in the following words:

31. In so far as the depreciation of goodwill is concerned, this issue is by now well settled by the decision of the Hon'ble Supreme Court in the case of *CITv. Smifs Securities Ltd.* [2012] ^

*taxmann.com* 222/210 Taxman 428/348 ITR 302 wherein the Hon'ble Apex Court has held that goodwill acquired on amalgamation [being the difference between cost of assets and consideration paid] is a capital right and thus eligible for depreciation u/s 32 of the Act.

3.2.3.1 Considering the facts of the case in totality, in the light of decision of the Hon'ble Supreme Court **Smifs Securities [supra]**, we direct the Assessing Officer to allow claim of depreciation. This ground is, accordingly, allowed."

**3.2.3.1 The Panel, accordingly, directs the AO to verify from its records and see whether any appeal has been preferred against the aforesaid IT AT order for AY 2015-16 in assessee's own case and exclude the said addition on account of depreciation on goodwill, if no appeal has been preferred. The AO, however, will retain the addition, if this order of the TTAT for AY 2015-16 has been challenged before the High Court or the Supreme Court as the case may be.**

**3.3 Ground no 8** relates to the disallowance of bad debts of Rs.12,296,711.

3.3.1 The assessee had written off bad debts amounting to Rs.12,296,711 as irrecoverable in its books of account during the previous year. Such bad debts were taken into account in computing the income of the previous year and earlier previous year. The AO had held that deduction of such bad debts would not be allowed to the assessee, inter-alia on the ground that supporting evidence in relation to bad debts were not furnished and the quantum of bad debts was unreasonable considering that it was the second year of operations.

3.3.2 The Panel has considered the submission. This issue had also travelled to ITAT for AY 2015-16 and was decided in favour of the assessee in the following words:

"33. Next disallowance relates to claim of bad debts amounting to Rs. 2,25,26,524/-.

34. Facts relating to this grievance show that in the acquisition of corporate travel division, the assessee had also acquired receivables of Rs. 37.04 crores besides other assets and liabilities. Out of these receivables, the assessee was unable to recover Rs. 2.25 crores from certain parties. The same was written off as bad debts in the profit and loss account.

35. During the course of scrutiny assessment proceedings, the Assessing Officer noticed that the bad debts are related to very brand conscious entities, which by no stretch of imagination can be made as bad debts. The Assessing Officer further observed that the assessee has not furnished convincing explanation for considering these entities as bad debts. The Assessing Officer issued notice u/s 133(6) of the Act to Amex and on receiving no reply, disallowed the claim of bad debts which was upheld by the DRP.

36. There is no dispute that on the acquisition of Corporate Travel Division, the appellant company also acquired receivables. It is also not in dispute that out of the receivables, the receivables amounting to Rs. 2.25 crores from certain parties could not be recovered. It is a settled proposition of law that to claim bad debt, all that is required for the assessee is to actually write off the debts in his books of account. The receivables written off by the appellant company were erstwhile receivables to Amex duly reflected in their balance sheet and, therefore, it can be safely presumed that the receivables were part of business profits of the Amex.

37. In our considered opinion, the assessee has successfully discharged its onus and has fulfilled the conditions laid down u/s 36 of the Act. We, therefore, do not find any reason why the write off of bad debts should not be allowed. We, accordingly, direct the Assessing Officer to allow the claim of bad debts. “

[Emphasis Supplied]

**3.3.2.1 The Panel, accordingly directs the AO to verify from its records and see whether any appeal has been preferred against the aforesaid ITAT order for AY 2015-16 in assessee's own case and exclude the said addition on account of bad debts, if no appeal has been preferred. The AO, however, will retain the addition, if this order of the ITAT for AY 2015-16**

**has been challenged before the High Court or the Supreme Court as the case may be. “**

12. From the perusal of the above observations as highlighted us in bold, it is an undisputed fact that all the issues involved are covered by the decision of the Tribunal in assessee's own case. In fact the ld. DRP has categorically directed the Assessing Officer to verify from the record if no appeal has been preferred by the Department before the Hon'ble High Court against the order of the Tribunal for assessment year 2015-16, then no addition should be made and it was only subject to the fact that if any appeal has been filed before the Hon'ble High Court then only addition should be sustained. Now it has been brought on record that no appeal has been preferred by the Department before the Hon'ble High Court and, therefore, the order of the direction of the DRP to delete the addition as the decision of the Tribunal is upheld. Accordingly, all the additions which have been challenged before us stand deleted.

13. In so far as the ground of charging of interest under Section 234B and 234C are concerned, these are consequential and, therefore, no action is required.

14. In the result, the appeal of the assessee is allowed and Stay application is accordingly held to be infructuous.

Order pronounced in the open court on : **06/01/2022.**

**Sd/-**  
**(G. S. PANNU)**  
**PRESIDENT**

**Sd/-**  
**( AMIT SHUKLA )**  
**JUDICIAL MEMBER**

Dated : 06/01/2022.

\*MEHTA\*

Copy forwarded to

1. Appellant;
2. Respondent;
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi.

Date of dictation	4.01.2022
Date on which the typed draft is placed before the dictating member	5.01.2022
Date on which the typed draft is placed before the other member	6.01.2022
Date on which the approved draft comes to the Sr. PS/ PS	6.01.2022
Date on which the fair order is placed before the dictating member for pronouncement	6.01.2022
Date on which the fair order comes back to the Sr. PS/ PS	6.01.2022
Date on which the final order is uploaded on the website of ITAT	6.01.2022
date on which the file goes to the Bench Clerk	6.01.2022
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	