

THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "B" BENCH

**Before: Shri P.M. Jagtap, Vice President
And Shri Siddhartha Nautiyal, Judicial Member**

**ITA Nos. 304 & 305/Ahd/2020
Assessment Year 2015-16 & 2016-17**

Aculife Healthcare Pvt. Ltd. B-505, Commerce House-5 Prahladnagar Corporate S.G. High Way, Ahmedabad-380051 PAN: AAMCA8542G (Appellant)	Vs	DCIT, Circle 1(1)(1), Ahmedabad (Respondent)
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**Assessee by: Shri Hemanshu C. Shah, A.R.
& Shri S.N. Soparkar, Sr. A.R.
Revenue by: Shri James Kurian, CIT-D.R.**

Date of hearing : 26-07-2022
Date of pronouncement : 14-10-2022

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

These two appeals filed by the assessee are against the order of the ld. Principal Commissioner of Income Tax-1, Ahmedabad vide order dated 06/03/2020 passed for the assessment years 2015-16 & 2016-17.

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

ITA No. 304/Ahd/2018 A.Y. 2015-16

“1. In law and in facts and circumstances of the Appellant's case, the Learned Pr. Commissioner of Income-tax- 1 Ahmedabad has grossly erred in points of law and facts.

2. In law and in facts and circumstances of the appellant's case, the Learned Pr. Commissioner of Income-tax- 1 Ahmedabad has grossly erred in passing revision order u/s.263 of Income-tax Act.

3. In law and in facts and circumstances of the appellant's case, the Learned Pr. Commissioner of Income-tax- 1 Ahmedabad has grossly erred in passing revision order u/s.263 of Income-tax Act, though assessment order dt.23-12-2017 is neither erroneous nor prejudicial to the interest of revenue. In the circumstances, revision order passed u/s.263 of I.T. Act is null and void and held to be quashed.

4. In law and in facts and circumstances of the appellant's case, the Learned Pr. Commissioner of Income-tax-1 Ahmedabad has grossly erred in passing revision order u/s.263 of I.T. Act in connection with claim of depreciation on goodwill though the very issue was raised during the course of assessment proceedings for which the appellant submitted written reply. Having considered the issue at length by Id. Assessing Officer, Id. Pr. Commissioner of Income-tax has no jurisdiction u/s.263 of I.T. Act on the very issue.

5. *In law and in facts and circumstances of the appellant's case, the Learned Pr. Commissioner of Income-tax- 1 Ahmedabad has grossly erred in passing revision order u/s.263 of Income-tax Act, though in the assessment order dt. 23-12-2017 the income assessed was as per returned loss of Rs.104,49,70,098/-.*

6. *In law and in facts and circumstances of the appellant's case, the Learned Pr. Commissioner of Income-tax- 1 Ahmedabad has grossly erred in holding that depreciation amounting to Rs.68,84,94,588/- on goodwill is not allowable for deduction.*

7) *In law and in facts and circumstances of the appellant's case, the Learned Pr. Commissioner of Income-tax-1 Ahmedabad has grossly erred in directing the Ld. Assessing Officer to pass fresh Assessment Order on the claim of depreciation on the goodwill.*

8) *Your appellant reserves the right to add, alter, amend all or any of the above grounds of appeal as may be advised from time to time.”*

ITA No. 305/Ahd/2018 A.Y. 2016-17

“1) *In law and in facts and circumstances of the Appellant's case, the Learned Pr. Commissioner of Income-tax-1 Ahmedabad has grossly erred in points of law and facts.*

- 2) *In law and in facts and circumstances of the appellant's case, the Learned Pr. Commissioner of Income-tax-1 Ahmedabad has grossly erred in passing revision order u/s.263 of Income-tax Act.*

- 3) *In law and in facts and circumstances of the appellant's case, the Learned Pr. Commissioner of Income-tax-1 Ahmedabad has grossly erred in passing revision order u/s.263 of Income-tax Act, though assessment order dt.21-12-2018 is neither erroneous nor prejudicial to the interest of revenue. In the circumstances, revision order passed u/s.263 of I.T. Act is null and void and held to be quashed.*

- 4) *In law and in facts and circumstances of the appellant's case, the Learned Pr. Commissioner of Income-tax-1 Ahmedabad has grossly erred in passing revision order u/s.263 of I.T. Act in connection with claim of depreciation on goodwill though the very issue was raised during the course of assessment proceedings for which the appellant submitted written reply. Having considered the issue at length by Id. Assessing Officer, Id. Pr. Commissioner of Income-tax has no jurisdiction u/s.263 of I.T, Act on the very issue.*

- 5) *In law and in facts and circumstances of the appellant's case, the Learned Pr. Commissioner of Income-tax-1 Ahmedabad has grossly erred in passing revision order u/s.263 of Income-tax Act, though in the assessment order dt. 21-12-2018 the income assessed was as per returned loss of Rs.42,86,16,101/-.*

- 6) *In law and in facts and circumstances of the appellant's case, the Learned Pr. Commissioner of Income-tax-1 Ahmedabad has grossly erred in holding that depreciation amounting to Rs.51,63,70,941/- on goodwill is not allowable for deduction.*
- 7) *In law and in facts and circumstances of the appellant's case, the Learned Pr. Commissioner of Income-tax-1 Ahmedabad has grossly erred in directing the Ld. Assessing Officer to pass fresh Assessment Order on the claim of depreciation on die goodwill.*
- 8) *Your appellant reserves the right to add, alter, amend all or any of the above grounds of appeal as may be advised from time to time.”*
3. Since the common issues are involved in both the appeals, the same are being disposed of by way of a common order. We shall first take up the appeal for assessment year 2015-16.
4. The brief facts of the case are that the assessee company has filed return of income for assessment year 2015-16 declaring total loss of Rs. 1,04,49,70,098/-. The case was selected for complete scrutiny and assessment was completed u/s. 143(3) of the Act vide order dated 23-12-2017 accepting the return of income filed by the assessee. Subsequently, the Pr. CIT noticed that pursuant to the order of Hon'ble High Court of Gujarat dated 20-04-2015 sanctioning the composite scheme of arrangement in the nature of amalgamation or demerger, the Healthcare Division of M/s. Nirma Limited got demerged and was transferred to and vested in the

assessee company M/s. Aculife Healthcare Pvt. Ltd. effective from 15-06-2015. The appointed date for the said demerger was 01-10-2014. According to the said scheme all “assets and liabilities” of the healthcare division of M/s. Nirma Ltd. as on the appointed dated was transferred to and vested in the assessee company M/s. Aculife Healthcare Pvt. Ltd. The Pr. CIT observed that in the process of demerger, goodwill amounting to Rs. 275 crores being difference between net assets and shares to be issued was credited by the assessee company on which depreciation amounting to Rs. 68,84,94,588/- was claimed for the year under consideration i.e. assessment year 2015-16. The Pr. CIT observed that on the perusal of details, no goodwill is reflected in the balance sheet of the demerged entity prior to the demerger. This indicates that the aforesaid goodwill is a self acquired asset, the actual cost of which in the hands of the demerged company is “Nil”. Since, the actual cost of the goodwill in the hands of the demerged company is “Nil”, which should naturally follow that the WDV of the same would also be “Nil” in its hands. Therefore, after demerger, WDV of the same has to be taken “Nil” in the hands of the assessee company, being the resulting company in view of the explanation to section 43(6) of the Act which provides that the WDV of the block of the assets in the hands resulting company (assessee company) shall be the WDV of the block of assets of the demerged company immediately before the demerger. Further, the Pr. CIT observed that 6th Proviso to section 32(1) of the Act makes it clear that the depreciation in the hands of the resulting company is to be calculated at the prescribed rates on the WDV of the assets in the books of the demerged company, which in this case would be “Nil” as the WDV of the corresponding assets itself is “Nil” as discussed above. Thus, the Pr. CIT

was of the view that the depreciation amounting to Rs. 68,84,94,588/- claimed on the aforesaid goodwill is not allowable under the Act to the assessee company. However, according to Ld. Pr. CIT, the ld. Assessing Officer wrongly accepted the claim of depreciation of Rs. 68,84,94,988/- on goodwill created by virtue of demerger scheme without examining the provisions of explanation 2 to section 43(6) r.w.s. 32 of the Act due to which the assessment order passed u/s. 143(3) of the Act has become erroneous in so far as prejudicial to the interest of the Revenue within the meaning of section 263 of the Act. Accordingly, show cause notice was issued to the assessee, and after taking this submission to the assessee on record, the Pr. CIT set aside the assessment order with the following observations:-

“4. In the light of discussions elaborated in preceding paras, it emerges that the Assessing Officer ought to have considered that the aforesaid claim of depreciation of Rs.68,84,94,588/- on goodwill created by virtue of demerger is not eligible for deduction under the extant provisions of the statute and should have disallowed such claim made by the assessee. Therefore, the order passed u/s 143(3) of the Act dated 23.12.2017 is held erroneous insofar as prejudicial to the interest of revenue.

5. In the light of the aforementioned discussions and bearing in mind the entirety of the case, I am of the opinion that the assessment order passed by the A.O. 143(3) of the I.T. Act, 1961 on 23.12.2017 is erroneous insofar as prejudicial to the interest of the revenue, as discussed in preceding paras, since the order has been passed without making adequate examination of the assessee's eligibility for claim of

the depreciation on goodwill. By virtue of the powers vested in me u/s. 263 of the I T Act, I hereby set-aside the order passed u/s 143(3) of the I.T. Act, 1961 on 23.12.2017 and direct the Assessing Officer to pass a fresh assessment order after allowing adequate opportunities of being heard to the assessee, in accordance with the law following prescribed procedure and duly examining the aforementioned issue in the light of the above discussion.”

5. The assessee in appeal before us against the order passed by the Pr. CIT u/s. 263 of the Act setting aside the assessment order passed by Id. Assessing Officer of the impugned assessment order. Before going into the merits of the case, we observe that there is delay of 31 days in filing of appeal before us (for both assessment years 2015-16 and 2016-17). We observe that the orders sought to be appealed was served on the assessee on 09-03-2020. The Ld. Counsel for the assessee submitted that delay is caused due to the fact that the appeal has been filed during the Covid pandemic period and accordingly, the delay was caused by circumstances beyond the control of the assessee. We note that the assessee company received the order of Ld. CIT(Appeals) on 09-03-2020. However, in view of the nation-wide lockdown from 24th March 2020, the Apex Court in **Cognizance for Extension of Limitation, In re[2021] 127 taxmann.com 72 (SC)**, took *suo motu* cognizance of the situation arising out of the challenge faced by the country on account of COVID-19 Virus and resultant difficulties that could be faced by the litigants across the country. Consequently, it was directed vide order dated 23-3-2020 that the period of limitation in filing petitions/applications/suits/appeals/all other proceedings, irrespective of the

period of limitation prescribed under the general or special laws, shall stand extended with effect from 15-3-2020 till further orders. The *suo motu* proceedings were, disposed of issuing the directions as to in computing the period of limitation for any suit, appeal, application or proceeding, the period from 15-3-2020 till 14-3-2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15-3-2020, if any, shall become available with effect from 15-3-2021. In view of the above, since the delay of 75 days in filing appeal is falling within the Covid pandemic period, the delay is hereby being condoned.

6. On merits, before us, the counsel for the assessee submitted that the order passed by the Assessing Officer is correct since the Id. Assessing Officer has relied upon the Supreme Court case in the case of **Smifs Securities Pvt. Ltd. 348 ITR 302 (SC)** and also for the reason that the Assessing Officer had made detailed inquiries on this aspect before passing the assessment order. The counsel for the assessee drew our attention to page 18 of the paper book- “fixed assets schedule” of the assessee company for the impugned assessment year, in which goodwill on demerger has been duly reflected and same was produced and examined by the Id. Assessing Officer during the course of assessment proceedings. The counsel for the assessee then drew our attention to notice u/s. 142(1) of the Act dated 06-10-2017 issued by the Assessing Officer and pointed out that at para 10 of the said notice the Id. Assessing Officer had specifically called for details regarding additions to fixed assets during the year and claim of any additional depreciation thereon. Further, the counsel for the assessee drew our attention to page 34 of the paper book which is the submission of the

assessee filed before Id. Assessing Officer dated December 19, 2017 and pointed out that the issue regarding claim of depreciation on goodwill was explained in detail by the assessee before the Id. Assessing Officer. In the said submissions, the assessee placed reliance on the case of **CIT vs. Smifs Securities Pvt. Ltd. 348 ITR 302 (SC)** wherein the Hon'ble Supreme Court has held that goodwill is an asset as per explanation 3 to section 32(1) and depreciation on the same shall be allowed in case of amalgamation/demerger. During the course of assessment, the assessee had submitted that in view of Smifs Securities decision *supra*, the extra consideration paid towards reputation which the amalgamating company was enjoying in order to retain its existing clientele should be considered as goodwill arising on amalgamation and eligible for claiming depreciation on it. Accordingly, the counsel for the assessee submitted that the Id. Assessing Officer has taken an informed and legally plausible view in respect of claim of depreciation by the assessee company and hence the order passed cannot be held to be erroneous or prejudicial to the interest of the revenue. The counsel for the assessee then drew our attention to page 41 of the paper book – extract of resolution passed and the meeting of board of directors held on 13th June, 2015 in which the scheme of demerger was approved by M/s. Nirma Ltd. The counsel for the assessee further drew our attention to valuation report dated 4th October, 2014 prepared in connection with the scheme of demerger and submitted that the same was also filed before the Id. Assessing Officer during the course of assessment proceedings for his consideration. The counsel for the assessee placed reliance on various decisions to the effect that once adequate inquiries has been made

during the course of assessment, and the Assessing Officer has taken legally plausible view, provisions of section 63 of the Act cannot be invoked.

7. In response, the Id. Departmental Representative relied on the order of PCIT passed u/s 263 of the Act.

8. We have heard the rival contentions and perused the material on record. We observe that the issue regarding the claim of depreciation in the hands of the demerged company was inquired during the course of assessment proceedings. Further, we also observe that during the course of assessment, the assessee had furnished various factual and legal submissions in respect of its claim of depreciation on goodwill vide submission dated 19-12-2017, wherein the assessee relied on the case of **Smifs Securities 348 ITR 302 (SC)** in support of its claim for deprecation of goodwill by assessee company. We also observe that the extract of board resolution passed by the meeting of board of directors and order passed by the Hon'ble Gujarat High Court granting approval to the aforesaid said of demerger and also the valuation report prepared by the approved valuer dated 04-10-2014 were all submitted before the Assessing Officer during the course of assessment proceedings, for his consideration. Accordingly, in the light of the above, we are of the considered view that the Assessing Officer had examined the aspect of assessee's claim of depreciation during the course of assessment proceedings, factually as well as legally, while allowing the assessee's claim of depreciation on goodwill .

9. Now, the second issue that arises for our consideration is whether the assessee took a view which is legally plausible/sustainable in law. In this case, we would like the relevant extract of the Supreme Court decision in the case of Smifs Securities 348 ITR 302, wherein the Supreme Court held as under:-

4. Explanation 3 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 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 right of a similar nature'. The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3(b).

5. In the circumstances, we are of the view that 'Goodwill' is an asset under Explanation 3(b) to Section 32(1) of the Act.

*6. 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 of Income Tax (Appeals) ['CIT(A)', for short] has come to the conclusion that the authorised representatives had filed copies of the Orders of the High Court ordering amalgamation of the above two Companies; **that the assets and liabilities of M/s. YSN Shares and Securities Private Limited 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 Income Tax Appellate Tribunal ['ITAT', for short]. We see no reason to interfere with the factual finding.

9.1 Further, we also observe that the High Court of Gujarat in the case of **Pr. CIT vs. Zydus Wellness Ltd. 87 taxmann.com 82 (Gujarat)** has held that assessee company is entitled to claim depreciation on goodwill expended at the time of amalgamation of companies. In the said order, the Hon'ble Gujarat High Court placed reliance on the decision of Supreme Court in the case of CIT vs. Smifs Securities *supra*, while deciding the issue in favour of the assessee. While passing the order, the Hon'ble Gujarat High Court observed as under:-

“6. With respect to the of depreciation, the of Supreme Court in of Securities Ltd. (supra) would squarely apply There is no to by the Assessing Officer to hold that the claim of depreciation was fictitious. If we read his entire in respect, he seems to be suggesting that being an acquisition thereof would not qualify for depreciation. If that be so, the view of the Assessing Officer was opposed to decision of the Supreme Court in case of Smifs Securities Ltd, (supra). On the other hand, if the observations of the Assessing Officer can be seen as his

findings that the claim itself was baseless, there was no discussion or reference to any material to enable him to come to such a conclusion.

7. In the result, tax appeal is dismissed.”

9.2 In view of the above decisions, we are of the considered view that the Ld. Assessing Officer has placed reliance on the case of Smifs Securities supra while allowing the claim of depreciation on goodwill for the impugned assessment year and hence the view taken by Id. Assessing Officer can be held to be legally plausible view. Regarding the scope of enquiry u/s 263 of the Act, it may be useful to refer to jurisdictional Gujarat High Court decision in the case of **Principal Commissioner of Income Tax-3 v. Minal Nayan Shah [2020] 121 taxmann.com 30 (Gujarat)**, which has made the following observations in this regard:

“9.1 As pointed out on behalf of the assessee, two pre-requisites must coexist before the designated authority could exercise the revisional jurisdiction conferred on him namely; the order should be (I) erroneous & (ii) the error must be such that it is prejudicial to the interests of the Revenue. However, an erroneous order does not necessarily mean an order with which the Pr. CIT is unable to agree. The AO while passing an order of assessment, performs judicial functions. An order of assessment passed by the AO cannot be interfered only because an another view is also possible on the issue as held in CIT v. Greenworld Corporation [2009] 181 Taxman 111 (SC). If in given facts and circumstances of the case, two views are possible and one view as legally plausible has been adopted by

the AO then existence of other possible view alone would not be sufficient to exercise powers under s.263 of the Act, by the Pr. CIT/CIT concerned. Hence, there can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the AO. It is only when an order is erroneous and causing prejudice, that the Section will be attracted. An incorrect assumption of facts or incorrect application of law will satisfy the requirements of the order being erroneous.

.....

9.3 An inquiry on the issue contemplated under section 263 r.w. Explanation 2 of the Act has its limits implicit in it. It is only a very gross case of inadequacy in inquiry or where inquiry is per se mandated on the basis of record available before AO and such inquiry was not conducted which resulted an error fatal to the interest of the Revenue, the revisional power so conferred can be exercised to invalidate the action of the AO. The AO is not expected to chase will of the wisp to find out something adverse to the assessee on each and every transaction. What is significant is the lack/inadequacy of inquiry should result in a substantive error or a visible abnormality resulting in loss of Revenue

9.3 In view of the above observations, we are of the view that Id. Pr. CIT has erred in facts and in law invoking the provisions of section 263 in the instant set of facts. Accordingly, we direct that the order passed by the Pr. CIT u/s. 263 of the Act may be set aside.

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

ITA No. 305/Ahd/2018 A.Y. 2016-17

11. Since the facts and issues for assessment year 2016-17 are identical to assessment year 2015-16, the observations made by us for assessment year 2015-16 would apply to assessment year 2016-17 as well.

12. In the result, the appeal of the assessee is allowed for AY 2016-17.

13. In the combined result, both the appeals of the assessee for A.Y. 2015-16 & 2016-17 are allowed.

Order pronounced in the open court on 14-10-2022

Sd/-

(P.M. JAGTAP)
VICE PRESIDENT

Ahmedabad : Dated 14/10/2022

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

Sd/-

(SIDDHARTHA NAUTIYAL)
JUDICIAL MEMBER

By order/आदेश से,
उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद