

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'J' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI M.BALAGANESH, ACCOUNTANT MEMBER**

**ITA No.1727/Mum/2017
(Assessment Year :2012-13)**

M/s. Merck Specialities Pvt. Ltd. Godrej One, 8 th Floor Pirojshanagar Eastern Express Highway Vikhroli (E) Mumbai – 400 079	Vs.	The Asst. Commissioner of Income Tax, Circle-7(2)(1) Room No.573, 5 th Floor Aayakar Bhavan M.K.Road, Mumbai – 400 020
PAN/GIR No.AAECM2634B		
(Appellant)	..	(Respondent)

Assessee by	Ms. Arati Vissanji & Ms. Astha Shah
Revenue by	Shri Manoj Kumar
Date of Hearing	12/01/2023
Date of Pronouncement	31/01/2023

आदेश / O R D E R

PER M. BALAGANESH (A.M.):

This appeal in ITA No.1727/Mum/2017 for A.Y.2012-13 preferred by the order against the final assessment order passed by the Assessing Officer dated 'Nil' u/s.143(3) r.w.s. 144C(13) of the Income Tax Act, hereinafter referred to as Act, pursuant to the directions of the Id. Dispute Resolution Panel (DRP in short) u/s.144C(5) of the Act dated 13/12/2016 for the A.Y.2012-13.

2. The ground No.1 raised by the assessee is general in nature and does not require any specific adjudication.

3. The ground Nos.2-2.4 raised by the assessee was stated to be not pressed. The same is reckoned as a statement made from the Bar and hence dismissed as not pressed.

4. The ground No.2.5 raised by the assessee is challenging the transfer pricing adjustment made in respect of payment of technical consultancy fee in the sum of Rs.2,22,51,661/- by the assessee to its Associated Enterprise (AE).

4.1. We have heard rival submissions and perused the materials available on record. The assessee is incorporated on 18/04/2005 and is subsidiary of M/s. Merck Holding GmbH, Germany which in turn was wholly owned subsidiary of M/s. Merck KGaA, Germany (MKGaA). The assessee is engaged in trading and manufacturing of chemical and related products extensively used in quality control, research and development, pathological laboratories, testing of water, food, beverages etc. The assessee had entered into international transaction for various Associated Enterprises which are listed in pages 2 & 3 of the order of the Id. TPO u/s. 92CA(3) of the Act dated 11/01/2016. The disputed issue to be decided is with regard to international transaction representing payment of technical consultancy fee of Rs.2,22,51,663/-. During the year, the assessee company has made payment of technical consultancy fee of Rs.2,22,51,663/- to its AE namely MKGaA. This transaction was benchmarked on aggregate basis under trading segment by the assessee using Transactional Net Margin Method (TNMM). The assessee submitted that this payment of technical consultancy charges of Rs.2.22 Crores is

made as per the consultancy agreement entered between the assessee and MKGaA wherein the agreement provides for package of services provided to the assessee as and when required and that the option to avail the services lies with the assessee. For availing the said services, the assessee has made the payment of this technical consultancy services of Rs.2,22,51,663/-. The assessee submitted that this is more of a retainer fee paid to AE which would be getting revised from time to time. The copy of the consultancy agreement dated 31/03/2011 is placed on record which is enclosed in pages 182-188 of the paper book. The various nature of services provided by the AE to the assessee are listed in page 186 of the paper book as under:-

- a. Support of engineering technology, of production and quality control with regard to technical and analytical background;
- b. Selection of right equipment, sourcing of supplies internationally;
- c. Training to employees on engineering and scientific trends and International trends on Finance and Administration as per Merck International guidelines;
- d. Advising on new trends on information technology its implementation;
- e. Assisting/Advising in the launching of new products.

4.2. In response to the show-cause notice issued by the Id. TPO, during the course of assessment proceedings on the impugned issue, the assessee apart from furnishing the agreement dated 31/03/2011, furnished various documents in the form of e-mail communications exchanged between assessee and its AE and various officials involved in the group, sample of which are enclosed in pages 194-220 of the paper book. From the perusal of the said documents, the assessee proved the

fact that it had indeed received various services as mandated in the agreement from its AE.

4.3. The Id. TPO observed that assessee had not demonstrated the potential need for the services; that the assessee had not demonstrated the advantage of having services on-call; that assessee had further not demonstrated that on-call services could not have been obtained promptly and rightly from other sources without need for stand by arrangements; that the assessee had not proved with evidences despite making such heavy payments over the years, the benefit derived by on-call arrangements and that the assessee other than providing agreement, emails and the description of services discussed above has not provided any evidence for such services have been rendered. The Id. TPO also observed that the documents submitted by the assessee could not demonstrate that any tangible and direct benefit was derived by the assessee by making payment of technical consultancy fee to its AE.

4.4. The Id. TPO also observed that benchmarking done by the assessee using TNMM was to be rejected and since no independent comparable enterprises was provided to show the comparable circumstances to incur such stand by charges and justify the ALP, the Id. TPO by applying the Comparable Uncontrolled Price Method (CUP) determined the ALP of this international transaction at Rs. 'Nil'. This action of the Id. TPO was upheld by the Id. DRP.

4.5. We find that assessee has been making this payment of technical consultancy fee to its AE over the years and the very same issue was subject matter of adjudication by this Tribunal in assessee's own case in the A.Y.2009-10 in ITA No. 1947/Mum/2014 dated 11/11/2019 wherein the transfer pricing adjustment made by the Id. TPO was deleted by this

Tribunal by placing reliance on the order passed by this Tribunal in assessee's group concern case of Merck Ltd. for A.Y.2009-10 in ITA No.1946/Mum/2014 dated 31/03/2016. Further this order passed by the Tribunal in ITA No.1946/Mum/2014 dated 31/03/2016 in the case of Merck Ltd., was subject matter of appeal by the Revenue before the Hon'ble Jurisdictional High Court and the Hon'ble Jurisdictional High Court in Income Tax Appeal No.272 of 2014 dated 08/08/2016 refused to admit substantial question of law on this issue. The relevant operative portion of the order passed by the Hon'ble Jurisdictional High Court is reproduced hereunder:-

(II) Technical knowhow/Consultancy Fee:-

- (a) *The Respondent-Assessee had entered into an agreement with its AE to provide technical knowhow/consultancy in 12 fields as indicated therein for a consideration of Rs. 1.57 Crores. During the subject Assessment Year, the Respondent-Assessee availed services of its AE during the subject Assessment Year only in three out of twelve fields listed in the agreement. The TPO, therefore, proceeded to hold that the entire consideration of Rs. 1.57 Crores is attributable to the three technical services which the Respondent-Assessee availed of and held that no consideration was payable in respect of nine services provided for in the agreement. Thus the entire payment of Rs. 1.57 Crores was attributable only to the three services availed out of the twelve listed out in the Agreement. It further held that only Rs. 40 lakhs could be considered as ALP attributable to three services and made adjustment of Rs. 1.17 Crores resulting in its addition to the taxable income. In appeal, the CIT (A) upheld addition of Rs. 1.17 Crores made and taxable income consequent to the adjustment made on the account of technical knowhow/consultancy agreement.*
- (b) *On further appeal, the impugned order of the Tribunal upheld the submission of Respondent-Assessee that in terms of the Agreement, the AE was obliged to provide technical assistance in the 12 areas listed in the Agreement. There was no obligation upon the Respondent-Assessee to obtain technical assistance in all the 12 areas listed in the Agreement. The Respondent-Assessee could ask for assistance in the areas required and the AE was obliged to give it. It is for the availability of the assistance in all twelve areas that the consideration was paid. Thus, no adjustment was required. It further held that the entire Transfer Price Adjustment was done by the Revenue without having been applied any of the methods prescribed under Section 92C of the Act to determine at the ALP. Consequently, the determination of ALP done by the Assessing Officer/TPO could not be justified. It further recorded the fact that no*

transfer pricing exercise was done by the Assessing Officer/TPO to determine the value of the services received by the Respondent-Assessee in respect of the three services which it had availed of from its AE before holding that the ALP in this case is Rs. 40 lakhs. This was because no exercise to bench mark it with comparable cases was done. Therefore, the consideration payable for the services availed of by the Respondent-Assessee to determine the ALP was not carried out. In the above view, the Tribunal allowed Respondent-Assessee's appeal on the above issue.

- (c) *The grievance of the Revenue before us is that services only in three areas had been availed of by the Respondent-Assessee from its AE out of the twelve areas listed in the Agreement. Therefore, the consideration paid to the AE is only attributable to the services received/availed.*
- (d) *The finding of the Tribunal that the TPO has not applied any of the method prescribed under Section 92C of the Act to determine the ALP in respect of fees for technical knowhow/consultancy fee paid by the Respondent-Assessee to its AE is not disputed before us. Further, the finding of the Tribunal that even in respect of three fields where Respondent-Assessee had availed the services, no exercise to bench mark the same with similar transactions entered into between independent parties was carried out before holding that the ALP in the three areas availed is Rs. 40 lakhs, is not disputed. The finding of the Tribunal that the agreement for technical knowhow/consultancy was in respect of all the twelve services and Respondent-Assessee could avail of all or any one of these twelve areas listed out in the agreement as and when the need arose. We find the Agreement is similar to a retainer agreement. Consequently, the finding of the Assessing Officer attributing nil value to nine of the services listed in the agreement which were not availed of by the Respondent-Assessee in the present facts was not justified. Moreover, not adopting one of the mandatorily prescribed methods to determine the ALP in respect of fees of technical services payable by the Respondent-Assessee to its AE, makes the entire Transfer Pricing Agreement unsustainable in law.*
- (e) *In view of the above, the finding of fact arrived at by the Tribunal that Rs. 1.57 Crores paid by it to its AE is in respect of its right to avail and the obligation of the AE to provide technical assistance in any of the twelve services listed out in the technical knowhow agreement entered into between Respondent-Assessee with its AE is not shown to be perverse. The view taken by the Tribunal in the present facts is a possible view.*
- (f) *Accordingly, question as framed for our consideration, does not give rise to any substantial question of law. Thus, not entertained.”*

4.6. It is not in dispute that the facts prevailing in the case of group concern i.e. Merck Ltd. and facts of the assessee company are identical. No contrary evidence has been brought on record by the Revenue to suggest that the aforesaid ruling is not applicable to the facts of the

assessee's case herein. Accordingly, we direct the Id. TPO to delete the addition made on account of TP adjustment in respect of payment of consultancy fee of Rs.2,22,51,663/-. Accordingly, the ground No.2.5 raised by the assessee is allowed.

5. The ground No.3 raised by the assessee is challenging disallowance of depreciation on intangible assets of Rs.3,89,90,479/-.

5.1. We have heard rival submissions and perused the materials available on record. Since this is a recurring issue, we find that this issue was subject matter of adjudication by this Tribunal in A.Y.2007-08 and 2008-09 in ITA No.3943 & 3944/Mum/2013 respectively dated 25/01/2017 wherein it was held as under:-

“2.3.We have heard the rival submissions and perused the material on record. We find that the assessee had purchased A&R business from its sister concern for Rs.81.67 crores,that it had merged the assets and liabilities of the erstwhile business with the newly acquired assets and liabilities, that it had shown an addition to the block of intangible assets amounting to Rs. 65.50 crores, that it had also shown addition of Rs.3.18 crores with regard to other fixed assets, that it had obtained a valuation report of the intangibles, that as per the valuation report value of the intangibles was Rs.50 crores(app.),that it assigned Rs.15 crores to Goodwill, that depreciation at the rate of 25% was claimed on intangibles, that the AO rejected the claim made by it under the head depreciation, that he invoked the provisions of section 43(6)of the Act ,that the FAA upheld the order of the AO .

We further find that issue of assigning value to intangibles had arisen the case of the Merck Limited also, though the issue was about the head under which the amount, received from the assessee by the sister concern ,was to be taxed. The matter had travelled up to the Tribunal and it decided the issue on 02.08.2013 (ITA/8120/ Mum/ 2011, AY.2007-08.)We would like to refer the relevant portion of the said order and it reads as under:

13. Ground No.1.4 of the appeal taken by the assessee reads as under :

"1.4.Taxing the long term capital gain of Rs.65,50,00,000/- realized and received by the appellant upon sale of A&R Business during the

impugned assessment year as "business profits" u/s 28(iv) of the Act instead and in place of long term capital gain as computed by the appellant u/s 45 of the Act and the exemption claimed in respect thereof u/s 54EC of the Act".

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18. At the time of hearing, ld. AR, besides reiterating the submissions made before the authorities below referred agreement dated 17.4.2006, copy placed at pages 21 to 41 of the paper book and submitted that the assessee transferred its A & R Business as a going concern to MSPL for Rs.81.67 crores. Ld. AR referred [Article 4](#) of the said agreement and submitted that net book value of current assets and current liabilities as on 31.3.2006 as per books of account of the assessee was Rs.16,16,46,433/- and Rs.65,50,00,000/- being the value of intangibles relating to the A&R Business. Ld. AR submitted that the fixed assets relating to A&R Business are specifically listed in "Ex-A" to the said agreement and referred pages 32 to 39 of the paper book. Ld. AR submitted that the AO/DRP have held that there is no intangible assets of the assessee which have been transferred and the amount received of Rs.65,50,00,000/- have been assessed u/s 28(iv) of the Act.

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Ld. AR further referred pages 86 to 110 of the paper book and submitted that the assessee also obtained valuation reports from two valuers for transfer of the said assets. Ld. AR submitted that the department has no right to re-write the agreement and to consider that the consideration of Rs.65,50,00,000/- received by the assessee is on account of non- compete fee.

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Ld. AR submitted that the consideration of Rs.65,50,00,000/- received by the assessee is on account of transfer of intangible assets. Therefore it is a capital receipts which cannot be taxed u/s 28 of the Act.

19. Ld. DR referred the valuation report and submitted that in the said valuation report and also in the sale agreement dated 17.4.2006, there is no reference of the valuation report on the basis of which the assessee has stated to have transferred intangibles assets to MSPL for Rs.65,50,00,000/- . He submitted that there is no document placed on record that the assessee has transferred any technical know-how.

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20. We have carefully considered the orders of the AO/DRP along with the submissions of ld. Representatives of the parties. We have also carefully considered relevant Articles of the agreement for sale entered into between the assessee and MSPL and also decisions cited before us

(supra). It is a fact that the assessee as well as the purchaser of A&R Business viz MSPL, both are sister concern and their parent company is M/s Merck KGaA, Germany. We also observe that the trade mark "MERCK" belongs to German Parent Company and assessee has been admittedly paying royalty to the parent company with regard to it. Therefore, the said "trade mark", for which the assessee has valued Rs.24.77 crores actually belongs to German Parent Company and not to the assessee. Further, we also observe that if "MERCK" is the brand and is transferred, it is also a brand name of the parent company and not of the assessee company. We also observe that the assessee has also bifurcated sum of Rs.65,50,00,000/- towards contract, that related to contracts with toll manufacturers and earmarked Rs.10,45,40,000 towards its valuation. However, we observe that no documentary evidence is on record to support the existence of the said assets, therefore what AO has stated in para 7.1.2 (c) has merits and the same cannot be ignored. Similar is the case in respect of the valuation "earmarked" by the assessee for the technical know-how Rs.3,75,90,000, no documentary evidence is on record to establish that any secret formulae for the production process etc has been transferred by the assessee to MSPL. We also observe that AO in para 7.1.2 (e) has also considered the fact that the assessee "earmarked" Rs.5,37,70,000/- towards dealer value chain and the AO has stated that many of the customers, toll manufacturers are common to both the transferor as well transferee. The AO has also stated that same set of dealers were also working for the transferee company prior to the transfer of the business by the assessee to MSPL. At the time of hearing, ld. AR has not been able to controvert the said fact. In respect of valuation "earmarked" at Rs.10,90,000/- towards ISO certificate, the AO has stated that the expenses for the same have actually been claimed by the assessee as revenue expenses in the earlier years and if it is so we agree with the ld.DR that if any consideration is received on transfer 3943-44/M/13(07-08&08-09) Merck Specialities of that benefit i.e. ISO certificate, it cannot be considered as capital receipt on transfer of the business. Not only this, we observe from "EX-A", the annexure to the sale agreement, (copy placed at pages 30 to 39 of the paper book No.2) the assessee has given individual value of the assets and whereas in the case of "slump sale", as per section 2(42C), the term "slump sale" has been defined as the transfer of one or more undertakings as a result of sale for a lumpsum consideration without valuation being assigned to the individual asset and liability of such sales. Considering the said facts in the light of explanation, we are of the considered view that the condition as provided in the case of "slump sale" for considering the consideration received on sale of an assets is not satisfied to consider it as a capital gain u/s 50B of the Act. Further, we also find merits in the contention of ld. DR that no basis of break up of the capital asset has been stated in the agreement and/or in the valuation report on which the assessee has placed reliance before us. Besides, we also observe that Article 9.2 of the sale agreement provides that the assessee undertakes for a period of 7 years after the execution

of this agreement not to engage in/or carry out any business anywhere, which would compete with A&R Business except to the extent permitted under this agreement. On consideration of Article 9.2 of the sale agreement, it shows that the assessee has entered into a non- compete covenant with the transferee..... Considering the facts, however, we do agree with ld. AR that section 28(iv) is applicable where benefit/perquisites are received in kind and is not applicable where money is involved. Therefore, reliance placed by ld. AR on the decision of Hon'ble Bombay High Court in the case of Mahindra And Mahindra Ltd (supra) has substance. We also agree with the ld. AR that it is not for the revenue to rewrite the terms of agreement but at the same time, the AO is entitled to consider the nature of the receipt and the circumstances in which the amount has been received by the assessee under the agreement entered into.

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21. Considering the facts of the case, and the reasons stated hereinabove that the assessee has not been able to place any material on record on the basis of which the assessee has valued intangible assets and whether the amount of Rs.65,50,00,000/- may be considered as the amount received towards not compete fee or for other consideration, we are of the considered view that the said issue be restored to AO to consider nature of receipt in the light of evidence afresh. Therefore, we restore to AO to decide the issue afresh in the light of the observations made by us hereinabove and consider such material as may be placed before him by a reasoned order. Hence, Ground No.1.4 is allowed for statistical purposes by restoring the matter to AO for fresh consideration."

The Tribunal has observed that the assessee had argued in the case of Merck Ltd that the transferor company had obtained valuation reports from two valuers. We are not aware as to what is the details bifurcation of the intangibles is given in those reports. In case there is difference in the values appearing in the valuation reports of the assessee and Merck, provisions of section 43 (6) may be applicable in deciding the issue. All these developments have taken place after the FAA decided the appeal. In our opinion, these facts will be some bearing on the final outcome of the appeal.

We further find that the alternate ground raised by the assessee about allowing the entire expenditure as revenue expenditure has not been adjudicated upon by the FAA, though a specific ground was raised before him.

Considering the above, we are of the opinion that in the interest of justice matter should be restored back to the file of the FAA for fresh adjudication. He is directed to decide the issue 3943-44/M/13(07-08&08-09) Merck Specialities afresh after affording a reasonable opportunity of

hearing to the assessee. First ground of appeal is decided in favour of the assessee, in part.

5.2. This issue is recurring as stated supra and the effect of allowing depreciation for the year under consideration would be dependent on the Id. AO deciding the issue of grant of depreciation on intangible assets in earlier years. In these circumstances, it would be appropriate to restore the matter to the file of the Id. AO for giving consequential effect on the allowability of depreciation for the year under consideration. Accordingly, the ground No.3 is restored to the file of the Id. AO and allowed for statistical purposes.

6. The ground No.4 raised by the assessee is challenging the disallowance of depreciation on goodwill of Rs.4,12,40,842/-.

6.1. We have heard rival submissions and perused the materials available on record. This issue is also a recurring issue and the same was subject matter of adjudication by this Tribunal in assessee's own case for A.Y.2011-12 in IT(TP)A No.2056/Mum/2016 dated 14/10/2022 wherein it was held as under:-

24. We have considered the rival submissions and perused the material available on record. In the present case, the wholly owned subsidiary company of assessee i.e. Bangalore Genei (India) Private Ltd was amalgamated with the assessee in terms of the Scheme of Amalgamation as approved by the Hon'ble jurisdictional High Court vide order dated 16/04/2010, as per provisions of section 391 to 394 and other applicable provisions of the Companies Act, 1965 from the appointed date i.e. 01/04/2010. In accordance with the said scheme, all assets and liabilities of the amalgamating subsidiary company were transferred to and invested with the assessee company with effect from 01/04/2010 and have been recorded at their fair values in accordance with the scheme. As per the assessee, while recording the assets and liabilities upon amalgamation, purchase method of accounting as per Accounting Standard-14 and generally accepted accounting principles in India was followed. While recording the accounting entries upon amalgamation, the inter-company balances were cancelled and the investments of the assessee in shares of the subsidiary company were also cancelled against the assets acquired upon amalgamation. From the perusal of financials of Bangalore Genei (India) Private Ltd, forming part of the paper book from page 102 – 151, we find that the value of fixed assets was at Rs. 3,02,41,601 and intangible assets were at Nil. Pursuant to the amalgamation, the tangible and intangible assets acquired from the amalgamating

company were revalued in the books of the assessee and the excess cost of investment over net value of assets, amounting to Rs. 21,99,51,156, was debited to the goodwill account. Accordingly, assessee made a fresh claim for depreciation in respect of goodwill during the course of assessment proceedings. The AO denied the said claim of the assessee by placing reliance upon decision of Hon'ble Supreme Court in Goetze (India) Ltd. (supra). The learned DRP, inter-alia, upheld the conclusion of the AO.

25. As per the assessee, goodwill arose upon amalgamation representing the excess consideration discharged by the assessee company over the net worth of the amalgamating company and thus the same is eligible for depreciation. Reliance has been placed on the addition of Hon'ble Supreme Court in CIT v. Smifs Securities Ltd., 348 ITR 302 (SC). During the course of hearing, assessee placed on record audited accounts of assessee as well as order of Hon'ble jurisdictional High Court approving the scheme of amalgamation. Further, reference was also made to balance sheet of amalgamating subsidiary company as well as other documents forming part of the paper book in support of its claim. From the record it is evident that none of these documents were examined by the lower authorities and assessee's claim was rejected at the threshold by placing reliance upon Hon'ble Supreme Court decision in Goetze (India) Pvt. Ltd. (supra). Vide our interim order dated 02/06/2022, remand report of the AO was sought in respect of the documents on which reliance was placed by the assessee in support of its claim of depreciation on goodwill. Further, the assessee was also directed to appear before the AO along with all the documents in support of its claim. The AO vide its remand report dated 07/07/2022, inter-alia, raised doubts on the valuation report submitted by the assessee. The AO also agreed that the opportunity is being given in remand proceedings to verify the case on merits, however, prayed that matter be remanded to the AO to decide the case on merits, as it cannot disallow the goodwill during the remand proceedings.

26. At this stage, it is also relevant to note that assessee in its revised return of income made claim of depreciation on certain assets viz. intangibles acquired upon amalgamation of Bangalore Genei (India) Private Ltd with the assessee. The details of intangible assets are as under:

(i)	Trademark	Rs. 1,07,74,700
(ii)	Technical know-how	Rs. 2,55,83,700
(iii)	Brands	Rs. 46,77,300
(iv)	Customers data	Rs. 1,70,25,800

27. As noted above, in the books of Bangalore Genei (India) Private Ltd, the intangible assets were at nil for the year ending 31/03/2010 and the aforesaid intangibles were acquired only upon amalgamation of subsidiary company with the assessee and thereafter same were revalued. We find that the AO vide final assessment order accepted the claim made by the assessee in its revised return of income and granted depreciation @25% on intangible assets. It is only in respect of depreciation claimed on goodwill, the AO did not grant the relief to the assessee.

28. We find that Hon'ble Delhi High Court in Triune Energy Services Private Limited vs DCIT: [2016] 237 Taxmann 230 (Delhi), by referring to Accounting Standard 10, held that consideration paid in excess of value of tangible assets is classifiable as goodwill eligible for depreciation. We further find that the coordinate bench of the Tribunal in Altimetrik India (P) Ltd vs DCIT, [2022] 194 ITD 124 (Bangalore-Trib.) held that consideration paid by the amalgamated company over and above the net

assets of the amalgamating company should be considered as goodwill arising on amalgamation.

*29. Thus, once the AO has allowed the claim of depreciation on intangible assets acquired by the assessee upon amalgamation of subsidiary company, which were also revalued subsequent to the amalgamation, we are of the considered view that there is no basis to reject the claim of the assessee in respect of depreciation on goodwill. Particularly, when all the intangibles including the goodwill were nil in the books of the amalgamating subsidiary company for the year ending 31/03/2010. During the course of hearing, learned DR placed reliance upon decision of Hon'ble Supreme Court in *Techno-Shares and Stocks Ltd vs CIT*, [2010] 193 Taxmann 248 (SC) and submitted that assessee has to establish that goodwill as licensed/franchise. We find that in the aforesaid decision the Hon'ble Supreme Court was dealing with the issue of depreciation on BSE membership card under section 32(1)(ii) of the Act. Therefore, same is not applicable to the facts of the present case. Before concluding, it is relevant to note that the Hon'ble Supreme Court in *Smifs Securities Ltd. (supra)* has held that goodwill will fall under the expression 'or any other business or commercial rights of similar nature' and, hence, qualifies for depreciation under section 32(1) of the Act. In the present case, the AO as well as learned DRP did not entertain the claim of the assessee in view of decision of Hon'ble Supreme Court in *Goetze (India) Ltd. (supra)*, however, it is now well settled that there is no bar on the appellate authority to entertain a fresh claim of the assessee, if the relevant fact for deciding such issue are available on record. Further, it is pertinent to note that on one hand in the remand proceedings, the AO for the first time raised doubts about the valuation report, however, on the other hand AO has allowed depreciation on intangible assets @ 25%, which were also acquired by the assessee and were also revalued in the books of the assessee upon amalgamation. Therefore, in view of the above, we find merit in the claim of the assessee and accordingly we direct the AO to grant depreciation on goodwill arising on account of amalgamation of subsidiary company with the assessee. As a result, ground No. 4 raised in assessee's appeal is allowed.*

6.2. In view of the aforesaid decision, the Ground No. 4 raised by the assessee is allowed.

7. The ground No.5 raised by the assessee is challenging the levy of interest u/s.234D of the Act and seeking interest u/s.244A of the Act. This would be consequential in nature in view of our decision taken in the aforesaid grounds. Hence, it does not require any specific adjudication.

8. The ground No.6 raised by the assessee is challenging the initiation of penalty proceedings u/s.271(1)(c) of the Act. This would be premature for adjudication at this stage and hence, dismissed.

9. The ground No.7 & 8 raised by the assessee are general in nature and does not require any specific adjudication.

10. In the result, appeal of the assessee is partly allowed for statistical purposes.

Order pronounced on 31/01/2023 by way of proper mentioning in the notice board.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Mumbai; Dated 31/01/2023
KARUNA, *sr.ps*

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

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Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai