

आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई  
**IN THE INCOME-TAX APPELLATE TRIBUNAL 'C' BENCH, CHENNAI**  
श्री वी दुर्गा राव, न्यायिक सदस्य एवं डॉ. मनीष बोराड, लेखा सदस्य के समक्ष  
**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER AND  
DR. MANISH BORAD, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.922/Chny/2022  
निर्धारण वर्ष/Assessment Year: 2017-18

Olympia Tech Park (Chennai)  
Private Limited, No. 1, SIDCO  
Industrial Estate, Guindy,  
Chennai 600 032.

Vs. The Principal Commissioner of  
Income Tax, Chennai-4,  
Chennai.

**[PAN:AABCO8102F]**

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से / Appellant by : Shri N.V. Balaji, Advocate  
प्रत्यर्थी की ओर से/Respondent by : Shri M. Rajan, CIT  
सुनवाई की तारीख/ Date of hearing : 20.04.2023  
घोषणा की तारीख /Date of Pronouncement : 27.04.2023

**आदेश /O R D E R**

**PER V. DURGA RAO, JUDICIAL MEMBER:**

This appeal filed by the assessee is directed against the order of the Id. Principal Commissioner of Income Tax, Chennai -4, Chennai, dated 25.03.2022 relevant to the assessment year 2017-18 passed under section 263 of the Income Tax Act, 1961 ["Act" in short].

2. The appeal of the assessee has been filed with a delay of 161 days in filing the appeal before the Tribunal. The assessee has filed condonation petition in the form of an affidavit, wherein, the reasons for

the delay in filing the appeal has been stated as under:

***“Reasons for delay in filing Appeal:***

7. *The said order under section 263 was passed on 25.03.2022 and the Appellant aware that under section 253 of the Act, appeal should have been filed within 60 days from the date of receipt of said order. Therefore, the due date to file the Appeal is 24.05.2022.*
8. *The said order under section 263 was not served physically on the Appellant and was served on Appellant through an email which was marked as spam and thereby the said order has not been noticed.*
9. *Further the Deputy Commissioner of Income Tax, Corporate Circle 5(1), Chennai has not initiated giving effect to order proceedings.*
10. *During the internal review of pending appeal assessment proceedings and appeals, the management of the Appellant and Authorized representative noticed that, this order was hosted in the income tax portal and the email has been marked as spam.*
11. *The Appellant was vigilant in filing the appeal with in the said due date under section 253 of the Act.*
12. *It is submitted that if the delay in filing the appeal is not condoned and the appeal is dismissed at the threshold, it will be put to great hardship to the Appellant and no hardship will be caused to the Respondent and department, if the delay in filing appeal is condoned and the appeal is taken up on merits.*
13. *It is therefore prayed that the delay of 162 days may be condoned and thus render justice.”*

3. By referring to the above affidavit, the Id. Counsel for the assessee has submitted that there is reasonable cause and the delay in filing the appeal is neither wilful nor wanton and prayed for condonation of delay and to admit the appeal for adjudication. Against the above submissions, the Id. DR has not raised any serious objection. In view of the above submissions, we are of the considered opinion that the assessee was

prevented by reasonable cause for delay in filing the appeal before the Tribunal. Accordingly, we condone the delay in filing the appeal and admit the appeal for adjudication.

4. Facts are, in brief, that the assessee company filed its return of income on 30.10.2017 and revised return of income on 31.03.2018 admitting NIL income on both the returns. Subsequently, the case was selected for scrutiny and assessment under section 143(3) of the Act was completed on 30.12.2019, wherein, the Assessing Officer made an addition of ₹.49,16,47,488/- towards disallowance under section 80IA of the Act and demand of ₹.6,51,09,932/- was raised.

5. Subsequently, by exercising the powers conferred under section 263 of the Act, after examining the assessment records, the Id. PCIT has noticed that the assessee has claimed depreciation of ₹.17,41,16,411/- @ 25% on opening WDV of ₹.69,64,65,644/- towards intangible asset which represents goodwill created on amalgamation. The depreciation on goodwill claimed by the amalgamated company i.e., the assessee amounting to ₹.17.41 crores (approx.) is inadmissible as it is evidenced in the Notes on accounts, where, it can be seen that the amalgamating company had not claimed any depreciation on goodwill and the depreciation claimed on goodwill to the tune of ₹.17.41 crores by the

amalgamated company is only on the goodwill created due to amalgamation. The Id. PCIT has noted that the goodwill has been artificially created one as it represents difference between the fair value of net assets taken over and the value of new optionally convertible/ redeemable preference shares to be issued to the shareholders are fully paid up. Thus, the Id. PCIT came to a conclusion that the order passed by the Assessing Officer dated 30.12.2019 is erroneous and prejudicial to the interest of Revenue for the reason that the Assessing Officer has not at all examined the artificially created goodwill. Therefore, a show-cause notice was issued and posted the case for hearing. The assessee filed its reply stating as under:

*“The Hon’ble High Court while approving the Scheme of amalgamation, has approved that, Amalgamated Company shall record all the assets and liabilities of amalgamating companies.*

*The Hon’ble High Court approved that, difference between the net asset value of amalgamating companies and the value of preference shares credited by assessee shall be debited to Goodwill account.*

*Accordingly, the Company debited the excess consideration paid over and above the net assets of the amalgamating company to Goodwill account and has claimed depreciation on the same.*

*Pursuant to the above referred order of Hon’ble High Court, the company has allotted shares and has recognized all the assets and liabilities of the Amalgamating companies at its book value as stipulated under the provisions of the Act.*

*The excess of consideration over and above the net book value, represented by reputation which the Amalgamating company was enjoying in order to retain its existing clientele, is credited to the account of Goodwill.*

***Depreciation of Goodwill:***

*Section 32 of the Act allow depreciation on tangible assets and intangible*

assets including business or commercial rights of similar nature acquired after 1.4.1998.

Further, Explanation 3 of the said section defines "assets" as – tangible assets, being buildings, machinery, plant or furniture, intangible assets, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature”.

Further, the assessee company has relied upon the Hon'ble Supreme Court of India in Commissioner of Income Tax, Kolkata vs. Smifs Securities Ltd. (2012 24 taxmann.com 222) wherein it has considered the similar issue of allowance of depreciation on Goodwill acquired upon amalgamation of company. In view of the above, the assessee company has claimed depreciation on the said Goodwill.

6. The Id. PCIT has considered the explanations given by the assessee and observed as under:

“7. The Assessment order, written submissions of the assessee company and the argument of the AR of the assessee company were carefully considered. At the onset it is to be clarified here that the Hon'ble Supreme Court in the case of M/s. Smifs Securities Limited decided on the question of whether goodwill is an asset under explanation 3(b) of section 32(1) and whether it, is eligible for depreciation. However, an entirely different question was involved in the assessment under question i.e., value of goodwill to be recorded in the books of an amalgamated company and what is the value of depreciation one can claim on such goodwill in the hands of amalgamated company.

8. Under this scheme of amalgamation, all the assets and liabilities of the amalgamating companies were transferred to the assessed for a consideration payable to the shareholders of the amalgamating companies. Assessee claims that all the assets and liabilities of the amalgamating companies were recorded by it in its books at their respective fair values. The excess consideration paid, over and above the value of net assets recorded in the books of the amalgamating companies, was recorded as goodwill in the books of the assessee company. Accordingly, in the books of the assessee company a goodwill of Rs. 69,64,65,644/- was recorded and depreciation thereon @ 25% amounting to Rs.17,41,16,411/- was claimed.

9. It is pertinent to mention here that there was no goodwill admitted in the hands of amalgamating companies. However, in the hands of the amalgamated company goodwill of Rs.69.64 crores was claimed. Now, explanation 7 to section 43(1) of the Income-tax Act states that in a scheme of amalgamation, where any capital asset is transferred by the amalgamating company to the amalgamated company and the amalgamated company is an Indian company, the actual cost of the transferred capital asset to the

*amalgamated company shall be taken to be the same as it would have been if the amalgamating company had continued to hold the capital asset for the purposes of its own business.*

10. *It is apparent that as per this explanation, the cost of a capital asset to be recorded in the books of amalgamated company should be the same as written down value in the in the books of the amalgamating. Now, in the in instant case, WDV of goodwill in the books of amalgamating companies was zero. Therefore, as per this explanation, the actual cost of goodwill to be recorded in the books of amalgamated company should also be zero.*

11. *Now, in view of the above explanation, it is apparent that the cost of the goodwill recorded by the assessee in its books is incorrect and so is the claim of depreciation on it.*

12. *Besides, 6th proviso to Section 32(1)(ii) of the Act states that, the aggregate deduction, in respect of depreciation of tangible or intangible assets allowable to the amalgamating and amalgamated company in the case of amalgamation, shall not exceed in any previous year the deduction calculated at the prescribed rates as if the amalgamation had not taken place, and such deduction shall be apportioned between the amalgamating company and the amalgamated company.*

13. *Here again, the Act restricts the amount of depreciation on capital asset to be claimed by the amalgamated company i.e. to the extent it was to be claimed in the hands of amalgamating company, as if no such amalgamation had taken place. It is interesting to note here that in the hands of amalgamating companies the value of the goodwill itself was zero and therefore, no depreciation was claimed. Accordingly, as per the 6<sup>th</sup> proviso to section 32(1), the claim of depreciation in the hands of assessee company cannot exceed zero.*

14. *In other words, the allowance of depreciation to the successor/amalgamated company in the year of amalgamation would be on the written down value of the assets in the books of the amalgamating company and not on the cost as recorded in the books of amalgamated company. The case of amalgamation is not regarded as transfer for the purpose of capital gain as provided under section 47(vi) and therefore such cases are exempted from capital gain which is otherwise chargeable to tax on transfer of assets. In the case on hand the business of other two companies were transferred to the assessee by way of amalgamation and therefore it would not be regarded as transfer of asset for the purpose of capital gain. Hence the claim of depreciation on the assets acquired under the scheme of amalgamation is restricted only to the extent if such amalgamation has not taken place.*

15. Accordingly, as per the 6<sup>th</sup> proviso to section 32(1)(ii), the aggregate deduction in respect of depreciation on any tangible or intangible assets allowable to amalgamating company and the amalgamated company shall not exceed the deduction calculated at the prescribed rates as if the amalgamation had not taken place and such deduction shall be apportioned between these companies in the ratio of period of usage of assets. Reliance is placed on the decision of the Hon'ble ITAT, Bangalore in the case of United Breweries Ltd. Vs. Additional Commissioner of Income-tax (76 taxmann.com 103).

16. Therefore, both as per the explanation 7 to section 43(1) and as per the 6th proviso to section 32(1), the depreciation claimed to the extent of Rs. 17,41,16,411/- on goodwill is not admissible and requires to be added back to the total income.

17. Therefore, the assessment order passed under section 143(3) was completed on 30.12.2019 by the Assessing Officer for the assessment year 2017-18 is considered to be erroneous as it is prejudicial to the interests of revenue, within the meaning of Sec. 263 of the Act, 1961. The same is hence **set aside**, with the direction to the Assessing Officer to pass the order afresh as per the discussions above after providing the assessee, an opportunity of being heard.”

7. On being aggrieved, the assessee carried the matter in appeal before the Tribunal. The Id. Counsel for the assessee has submitted that the issue involved in this appeal is depreciation on goodwill which is covered by the decision of the Hon'ble Supreme Court in the case of CIT v. Smifs Securities Limited [2012] 348 ITR 302 (SC) and once the issue is covered by the decision of the Hon'ble Supreme Court, the Assessing Officer need not make enquiry as even after enquiry is made, the result will be the same. Therefore, the order passed by the Assessing Officer is neither erroneous nor prejudicial to the interest of Revenue. It was also submitted that once two views are possible and the view taken by the Assessing Officer has to be considered as permissible view, no 263 can

lie. It was further submission that for the assessment years 2015-16 and 2016-17, the Assessing Officer has considered same issue and passed the assessment orders and now, for these two assessment years, the Assessing Officer has issued notice for reopening of the assessments and thus submitted that the revision order passed under section 263 of the Act is invalid. Further, the Id. Counsel has relied on the following judgements:

1. Malabar Industrial Co. Ltd. vs. CIT [2000] 243 ITR 83(SC)
  2. CIT vs. Max India Ltd. [2007] 295 ITR 282(SC)
  3. CIT vs. Smifs Securities Ltd. [2012] 348 ITR 302 (SC)
  4. Keva Fragrances Ltd. vs. DCIT ITA No. 334/M/2020 (Mumbai)
  5. Bodal Chemical Ltd. vs. ACIT (Ahmedabad)
  6. Hinduja Foundries vs. ACIT [2017] 83 taxmann.com 52 (Chennai-Trib.)
8. On the other hand, the Id. DR has submitted that as per section 142(1) of the Act, it is obligation on part of the Assessing Officer to examine the issue, particularly, in this case, artificial goodwill has been created by the assessee and the Assessing Officer has failed to make enquiry as to whether the goodwill created is in accordance with law or not. So far as merits of the case is concerned, by relying upon the decision of the Bangalore Benches of the ITAT in the case of United Breweries Ltd. Vs. Addl. CIT (76 taxmann.com 103), the Id. DR has submitted that without examining the issue and without application of mind, the assessment order passed by the Assessing Officer is erroneous and prejudicial to the interest of Revenue. It was further submission that

the Id. PCIT has rightly exercised the powers conferred under section 263 of the Act.

9. We have heard both the sides, perused the materials available on record and gone through the orders of authorities below including paper books filed by the assessee. In this case, the assessee is a amalgamated company and claimed depreciation of ₹.17,41,16,411/- @ 25% on opening WDV of ₹.69,64,65,644/- towards intangible asset which represents goodwill created on amalgamation. In this case, the amalgamating company has not claimed depreciation on goodwill. The assessee company, which is amalgamated company only created goodwill to the tune of ₹.124,88,25,256/- due to amalgamation. Under these facts and circumstances of the case, the Assessing Officer ought to have examined as to how the depreciation is claimed by the amalgamated company, whether the depreciation claimed by the amalgamated company is in accordance with law or not and the Assessing Officer should have been issued notice under section 142(1) of the Act and called for the details and should have examined the issue. One more important aspect in this case is that the amalgamating company has not claimed any depreciation. In these peculiar circumstances of the case, the burden cast upon the Assessing Officer to

call for the details and examine the same. However, the Assessing Officer has totally ignored the artificial creation of goodwill for claiming depreciation to the tune of ₹.17.41 crores. By examining entire records of the assessee and after considering the explanations, the Id. PCIT came to the conclusion that the Assessing Officer has not at all examined the artificially created goodwill by amalgamating company and thus, we are of the opinion that the assessment order passed by the Assessing Officer is erroneous and prejudicial to the interest of Revenue.

10. With regard to the argument of the Id. Counsel for the assessee that the issue is covered by the decision of the Hon'ble Supreme Court and the Assessing Officer need not examine, we are unable to agree with the arguments of the Id. Counsel. When the Assessing Officer is passing assessment order under section 143(3) of the Act, it is bounden duty to examine all the issues. After examination, if the Assessing Officer is satisfied with the explanation of the assessee then he need not make any addition. Unless and until there is an examination of the details of the assessee by the Assessing officer as to whether it is covered by the decision of the Hon'ble Supreme Court or any other Courts, the Assessing Officer will not come to know that. Therefore, it is a bounden duty of the Assessing Officer to call for complete details and examine the

facts and issue involved in this case and he has to conclude the assessment order accordingly. In this case, neither the Assessing Officer called for any explanation from the assessee nor examined the issue. It is totally failure on the part of the Assessing Officer. Therefore, the Id. PCIT has rightly set aside the assessment order passed under section 143(3) of the Act.

11. So far as case law relied on by the Id. Counsel for the assessee are concerned, in those cases, the Assessing Officer has called for the details and examined the issue at length, whereas, in the present case, neither the Assessing Officer has called for the details nor examined the issue involved. Thus, the case law have no relevance to the facts of the present case and the same are distinguishable.

12. With regard to the next argument of the Id. Counsel that for assessment years 2015-16 and 2016-17, the Assessing Officer issued notice for reopening, it is the bounden duty of the Assessing Officer to examine the facts, each and every aspects of the details as may be filed by the assessee for each assessment year and it does not mean that since the Assessing Officer has issued notice for reopening of the assessments for the assessment years 2015-16- and 2016-17, the Id.

PCIT cannot pass the revision order under section 263 of the Act for the assessment year 2017-18.

13. Since the assessment order passed under section 143(3) of the Act is erroneous and prejudicial to the interest of Revenue, we uphold the order passed by the Id. PCIT under section 263 of the Act and dismiss the ground raised by the assessee.

14. In the result, the appeal filed by the assessee is dismissed.

Order pronounced on 27<sup>th</sup> April, 2023 at Chennai.

Sd/-  
(MANISH BORAD)  
ACCOUNTANT MEMBER

Sd/-  
(V. DURGA RAO)  
JUDICIAL MEMBER

Chennai, Dated, 27.04.2023

Vm/-

आदेश की प्रतिलिपि अग्रेषित/Copy to: 1. अपीलार्थी/Appellant, 2. प्रत्यर्थी/ Respondent,  
3. आयकर आयुक्त (अपील)/CIT(A), 4. आयकर आयुक्त/CIT, 5. विभागीय प्रतिनिधि/DR &  
6. गार्ड फाईल/GF.