

आयकर अपीलीय अधिकरण “सी” न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH, CHENNAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखक सदस्य के समक्ष।
BEFORE HON’BLE SHRI MAHAVIR SINGH, VP AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं. ITA No.382/Chny/2022
(निर्धारण वर्ष / Assessment Year: 2017-18)

M/s. NTC Logistics India (P) Ltd New No.97 (Old No.47), NTC Towers Linghi Chetty Street, Parris, Chennai-600 001.	बनाम / Vs.	PCIT Chennai-4.
स्थायी लेखासं./जीआइआरसं./PAN/GIR No. AACCN-7806-N		
(पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकी ओरसे/ Appellant by	:	Shri Raghunathan. S, (Advocate)- Ld.AR
प्रत्यर्थीकी ओरसे/ Respondent by	:	Shri R. Clement Ramesh Kumar (CIT)- Ld. DR

सुनवाईकी तारीख/Date of Hearing	:	05-07-2023
घोषणाकी तारीख /Date of Pronouncement	:	08-09-2023

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member)

1. By way of this appeal, the assessee assails the invocation of revisionary jurisdiction u/s 263 by Ld. Pr. Commissioner of Income Tax, Chennai-4 (Pr. CIT) vide impugned order dated 30-03-2022 in the matter of an assessment framed by Ld. AO u/s.143(3) of the Act on 18-12-2019 accepting the returned income of the assessee. The grounds taken by the assessee are as under:-

1. The Assistant Commissioner of Income-tax, Corporate Circle -4(2), Chennai ['ACIT' or 'AO'], passed Assessment Order vide dated 18th December 2019 (Original Assessment Order") after making proper enquiry. Setting aside the said Original Order on the basis that "AO has failed to undertake even an attempt to examine the correctness of the claim of depreciation allowance" is blatantly incorrect and the order passed by the Principal Commissioner of Income Tax (PCIT") under section 263 is without any jurisdiction, bad on facts and in law, hence liable to be rejected.
2. Ld PCIT has grossly erred. in assuming jurisdiction u/s 263 of the Act, on account of difference of opinion and allowance of depreciation on goodwill by the AO under no circumstances can be considered as "erroneous" or "prejudicial to the interest of the revenue". Thus, the order passed by the Principle Commissioner of Income Tax (PCIT") under section 263 is without any jurisdiction, bad on facts and in law, hence liable to be rejected.
3. The order passed by Ld PCIT, erred in not appreciating the facts and legal position and therefore not maintainable.
4. Ld PCIT is into some sort of enquiring basis, it is not a fool proof of finding that the Original Assessment Order passed by the Ld AO is "erroneous" or order is "prejudicial to the interest of the revenue".
5. Ld PCIT without appreciating the facts has set aside the Original Assessment Order on the basis that the Goodwill resulted on account of the amalgamation was not enquired into, whereas the full facts with regard to "Goodwill" has been enquired by the AO during the regular hearing and passed the order.
6. Ld PCIT not considered the submission made by the Assessee that "how the AO has made inquiry during the course of the Assessment", therefore Ld PCIT do not have any LOCUS STANDI to do further inquiry.
7. Without prejudice to the above grounds, Ld PCIT not appreciated the fact that the goodwill represents actual consideration paid over the value of assets taken over from amalgamating company and is an intangible asset which comes within the definition provided u/s 32 r.w.s 43(1) of the Act and depreciation is allowance should be automatically granted for the assessment year under consideration.
8. Additional ground: Without prejudice to our above submission, the goodwill being an expenditure incurred in the course of business, we plead an alternate claim that the same is allowable as deduction at 100% under section 37 as well."

2. The Ld. AR advanced arguments supporting the case of the assessee. Reliance has been placed on many judicial decisions to support the submissions that the depreciation would be admissible on goodwill. The copies of the same have been placed on record. The Ld. AR also submitted that the assessment was framed with due application of mind. The Ld. CIT-DR, on the other hand, submitted that the impugned issue as flagged by Ld. Pr. CIT was not examined by Ld. AO during the course of original assessment proceedings and therefore,

jurisdiction u/s 263 was validly exercised. Having heard rival submissions and upon perusal of case records, our adjudication would be as under.

Revisionary Proceedings

3.1 The Ld. Pr. CIT, in the revisionary order, noted that the assessee had undergone a scheme of amalgamation effective from 01-04-2016 with the approval of Hon'ble NCLT. As per the scheme, there was demerger of logistic business of the assessee into NTC consultancy Services P. Ltd. (NTC-CSPL) which subsequently got merged with the assessee. The merger of NTC-CSPL resulted into transfer of assets and liabilities as per scheme giving rise to goodwill of Rs.138.54 Crores. On this amount, the assessee claimed depreciation @25%. The Ld. Pr. CIT further noted that claim of depreciation arises on account of slump sale by way of payment of actual consideration and hence depreciation claim is provided on it treating it as a capital asset. However, sixth proviso to Sec.32(1) restrict the claim of depreciation and provide that such claim as allowable to the successor and predecessor shall not exceed the deduction calculated at prescribed rates if amalgamation had not taken place. In the present case, the goodwill did not exist in the hands of the amalgamating company and therefore, the corresponding value was zero which was to be adopted in computing the depreciation allowance. Further, the Explanation 7 to Sec. 43(1) provide that where any capital asset is transferred by the amalgamating company to amalgamated company and the amalgamated company is an Indian company, the actual cost of transferred asset to the amalgamated company shall be taken to the same as it would have been if the amalgamating company

had continued to hold the capital asset for the purpose of its business. The goodwill that had arisen is on account of revaluation of assets which is notional. Therefore, the same has to be excluded from the value of fixed assets which would be eligible for depreciation. Hence the claim made by the assessee was held to be incorrect as held by Bangalore Tribunal in United Breweries Ltd. for AY 2008-09 considering the decision of Hon'ble Supreme Court in the case of Smiff Securities Ltd.

3.2 The Ld. Pr. CIT further noted that Ld. AO failed to undertake even an attempt to examine the correctness of the claim of the depreciation allowance. An incorrect allowance has been allowed which is prejudicial to the interest of the revenue. The order was passed without making due enquiries or a verification which should have ordinarily been made. The order was passed allowing excessive relief without enquiring into the correctness of the claim. Accordingly, the assessee was put to show-cause notice.

3.3 The assessee submitted that goodwill represents actual consideration paid over the value of assets taken over from amalgamating company and the same is an intangible asset. Accordingly, the same is eligible for depreciation. Alternatively, the claim would be fully allowable u/s 37(1).

3.4 The assessee further submitted that the scheme was combination of demerger of business of assessee into NTC-CSPL on a slump sale basis and amalgamation of that entity with the assessee. The amalgamation was in accordance with AS-14 Accounting for Amalgamation issued by ICAI.

3.5 However, rejecting assessee's submissions, Ld. Pr. CIT held that the decision of Hon'ble Apex Court in Smiff Securities Ltd. only dealt with whether the Goodwill is an asset which is eligible for depreciation. However in the present case, the issue was the value of goodwill to be recorded in the books of amalgamated company and what is the value of depreciation one can claim on such goodwill in the hands of the amalgamated company. No goodwill was admitted in the hands of amalgamating company and Explanation 7 to Sec.43(1) as well as Sixth proviso to Sec.32(1)(ii) would apply. The decision of Bangalore Tribunal in United Breweries Ltd. vs. Addl. CIT (76 Taxmann.com 103) was also referred to support the same. Finally, the assessment order was held to be erroneous and prejudicial to the interest of the revenue and Ld. AO was directed to pass fresh assessment order considering this aspect of the matter. Aggrieved as aforesaid the assessee is in further appeal before us. Pursuant to aforesaid directions of Ld. Pr. CIT, an assessment has been framed on 30-03-2023 denying depreciation claim of Rs.34.71 Crores to the assessee.

Our findings and Adjudication

4. Upon perusal of assessment order dated 18-12-2019, it could be seen that the assessment has been made after making addition of interest income and sundry balances written-off. There is no discussion on impugned issue as flagged by Ld. Pr. CIT in the revisionary order. The assessment order also shows that hearing took place on 4 occasions. Nothing has been shown to us that the impugned issue was ever examined / verified by Ld. AO during the course of original assessment proceedings. Even no query was raised in this regard in any

of the notices. On the basis of the same, it could be concluded that the impugned issue was never examined or verified by Ld. AO and this is not a case where a view was taken by Ld. AO on the impugned issue.

5. We find that as per the provisions of Section 263 of Income Tax Act, 1961, the revenue authorities namely Pr. Commissioner of Income Tax / Commissioner of Income Tax is vested with the supervisory powers of suo-motu revision of any order passed by the Assessing Officer [AO]. For the said purpose, the appropriate authority may call for and examine the record of any proceedings under the Act and may proceed to revise the same provided two conditions are satisfied-(i) the order of the assessing officer sought to be revised is erroneous; and (ii) it is prejudicial to the interest of the revenue. If one of the condition is absent i.e. if the order of the Income-tax Officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but it is prejudicial to the revenue - recourse cannot be had to Section 263 of the Act as held by Hon'ble Supreme Court in **Malabar Industrial Co. Ltd. V/s CIT [243 ITR 83 10/02/2000]**. The Hon'ble Supreme Court in **Malabar Industrial Co. Ltd. V/s CIT (supra)** has held that the phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interest of the revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to

the interest of the revenue, unless the view taken by the Income-tax Officer is unsustainable in law. As a natural corollary, when no view has been taken by Ld. AO, this would be a case where twin conditions of Sec.263 would get satisfied. In the present case, as noted by us in preceding para, no view has been taken by Ld. AO on the impugned issue. Even, no query has been raised in this regard. Therefore, the prescribed conditions to invoke jurisdiction u/s 263 have duly been satisfied.

6. The Ld. AR has cited certain decisions to support the case of the assessee on merits. However, at this juncture, we are concerned to examine the validity of revisionary proceedings and nothing more. It could also be observed that it is not a case of simple slump sale but a case of demerger followed by merges of same entity. The factual matrix of the issue needs to be brought on record to properly adjudicate the impugned issue.

7. Therefore, considering the facts and circumstances of the case, the impugned revisionary jurisdiction could not be interfered with. However, our aforesaid adjudication would not be construed as any expression on the merits of the case. The assessee is free to advance any argument as well as rely on various case laws before lower authorities to support its case.

8. The appeal stands dismissed.

Order pronounced on 8th September, 2023

Sd/-
(MAHAVIR SINGH)
उपाध्यक्ष / **VICE PRESIDENT**

Sd/-
(MANOJ KUMAR AGGARWAL)
लेखा सदस्य / **ACCOUNTANT MEMBER**

चेन्नई Chennai; दिनांक Dated : 08-09-2023
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आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

- 1.अपीलार्थी/Appellant
- 2.प्रत्यर्थी/Respondent
3. आयकर आयुक्त/CIT
- 4.विभागीय प्रतिनिधि/DR
- 5.गार्ड फाईल/GF