

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI SANDEEP SINGH KARHAIL, JM

ITA No. 1113/MUM/2022
(Assessment Year 2013-14)

ICICI Bank Ltd. ICIC Bank Towers, North East Wing, Ground Floor, Bandra Kurla Complex, Bandra (E) Mumbai-400051 (Appellant)	Vs.	DCIT 2(3)(1) Aayakar Bhavan, 5 th Floor, Room No. 552, Maharishi Karve Road, Mumbai-400020 (Respondent)
PAN No. AAACI1195H		

Assessee by : Ms. Aarati Visanji, AR
Revenue by : Shri. K. C. Selvamani, DR

Date of hearing: 28.06.2023
Date of pronouncement : 27.09.2023

ORDER

PER PRASHANT MAHARISHI, AM:

01. ITA number 1113/M/2023 is filed by the ICICI bank Ltd (the appellant) for assessment year 2013 – 14 against the appellate order passed by the National faceless appeal Centre (Delhi) (the learned CIT – A) dated 21/3/2022 wherein the appeal filed by the assessee against the assessment order dated 29/3/2019 passed by the Asst Commissioner Of Income Tax – 2 (3) (2), Mumbai (the AO)



giving effect to the order dated 24/1/2019 of the CIT (A) ,
was partly allowed.

02. The assessee is aggrieved and has preferred this appeal raising following grounds.

ITA No. 1113/Mum/2022 A.Y. 2013-14

1. Disallowance of depreciation on goodwill/ Intangible assets acquired on merger ₹ 452,46,93,899
[paras 4 to 6, Pages 4 to 22 of the NFAC order]

On the facts and circumstances of the case and in law, the NFAC erred in disallowing the amount of ₹ 452,46,93,899 being depreciation claimed on the WDV as on April 1, 2012 on the block of assets in the nature of Goodwill/intangible rights acquired by the Appellant on merger with the Bank of Rajasthan Limited and Anagram Finance Limited.

03. Brief facts of the case shows that assessee is aggrieved with the order of the learned CIT – A in disallowance of depreciation on goodwill/intangible assets acquired on merger amounting to ₹ 4,524,693,899 on merger with the Bank Of Rajasthan Limited and Anagram finance limited.
04. Assessee filed its original return of income for assessment year 2013 – 14 on 29/11/2013 declaring the total income of ₹ 85,822,314,680, which was subsequently revised on 31/3/2015 at ₹ 85,705,253,270. In the return of income filed by the assessee, it has claimed depreciation at the rate of 25% on the written down value as on April 1, 2012 on the block of the assets of Goodwill/business commercial rights.



05. According to the assessee, these rights were required by the bank on its merger with the Bank of Rajasthan and Anagram finance limited in the earlier assessment years. The assessee stated that the opening WDV of the asset is 1,809,87,75,594/- on which depreciation at the rate of 25% is claimed by the assessee amounting to ₹ 4,524,693,899. The merger with Bank of Rajasthan took place in assessment year 2010 – 11 wherein assessee paid excess consideration of ₹ 32,025,145,184 over the net assets of Bank of Rajasthan, which was considered as Goodwill for tax purposes, and depreciation at the rate of 25% was claimed on the same. It also claimed depreciation on the business and commercial rights acquired at the time of merger of Anagram finance limited. The assessee also stated that the claim of the depreciation is allowable under section 32 (1) on the basis of the decision of the honourable Supreme Court in case of CIT versus Smifs securities Ltd [348 ITR 302].
06. In the assessment order dated 23/1/2017 passed under section 143 (3) read with section 144C (3) of the act the learned assessing officer has disallowed the above claim of the depreciation for the reason that
- a. In the books of accounts of Bank of Rajasthan there was no goodwill at the time of merger, hence the question of purchase of Goodwill did not arise.
 - b. For assessment year 2011 – 12 assessee has not claimed Goodwill in its return of income and audit report but after the decision of the honourable Supreme Court assessee

- filed revised return of income claiming depreciation on goodwill.
- c. Further while giving direction for amalgamation, honourable High Court was not shown to have ordered to pay any specific amount for such goodwill and therefore it could not be accepted that the assessee incurred any additional cost on account of Goodwill.
 - d. The claim made by the assessee with regard to Goodwill which was only a fictitious assets in the hands of the assessee and also claim of depreciation were neither bona fides nor tenable.
07. Assessee carried the matter before the learned Commissioner of Income Tax (Appeals) – 56, Mumbai who passed an order dated 24/1/2019 wherein as per Para number 55 of that order the issue was discussed. The learned CIT – A
- a. Noted that claim as such is allowed up to and including assessment year 2012 – 13 in favour of the appellant. However, during the course of the assessment proceedings, the learned assessing officer has raised further issues and a detailed submission of the assessing officer was recorded at paragraph number 56. The rejoinder of the assessee was also taken on record. meanwhile on 16/11/2018 the learned assessing officer made a further submission wherein it relied on the decision of coordinate bench in the case of United breweries Ltd [TS – 553 – ITAT – 2016 (Bangalore)] wherein the fifth proviso to section 32 (1) of the act was invoked and it was held that the assessee is not entitled



to the depreciation. The learned assessing officer further made a submission on 24/12/2018 stating that in case of the assessee company relief for assessment year 2011 – 12 and 2012 – 13 was granted on the issue of depreciation on goodwill without taking into consideration the fifth proviso to section 32 of the income tax act.

b. So, The AO was directed to examine bringing on record necessary facts and without wearing any finding for any other assessment year except as permitted by the law in respect of ICICI bank Ltd, specifically with respect to the fifth proviso to section 32 (1) relating to the claim of depreciation on amalgamated company and definition of actual cost as per section 43 (1) and then depreciation on goodwill needed to be allowed in accordance with the law.

08. Pursuant to the direction of the learned CIT – A, the learned assessing officer passed the order giving effect to CIT – A order on 29/3/2019 wherein following the decision of the coordinate bench in case of United breweries Ltd (supra) held that the deduction on account of depreciation claimed by the assessee is in contravention of the fifth proviso to section 32 (1), section 43 (1) of the Act. Accordingly, the disallowance was retained.

09. Assessee aggrieved with that order preferred an appeal before the learned CIT – A (National faceless appeal Centre) who passed an order dated 21/3/2022 wherein after taking the submission of the assessee , decided the issue as per to paragraph number 6 holding that: –

a. No goodwill exists holding as under :-



"6.2 Bank Of Rajasthan was amalgamated with the appellant bank as per the scheme approved by the Reserve Bank of India and as a consequence, the considerations for the said amalgamation was paid are discharged by the exchange of shares only, without any actual cash outflow from the appellant bank, being the amalgamated company here. There is no evidence on record nor any evidence being adduced by the appellant even suggest that under the aforesaid RBI approved scheme of amalgamation, there was even a whisper of transfer of any goodwill from the BOR to the appellant bank by the exchange of shares is approved by the RBI in the ratio of 25: 118. The assets and liabilities of BOR have been accounted at the values at which they were appearing in the books of BOR as on August 12, 2010 and the provisions were made by the appellant for the difference between the book value as appearing in the books of Bank Of Rajasthan and the fair value as determined by the appellant bank. It, thus, reveals that the differential amount which the appellant has sought to term as goodwill was actually accounted as a balancing factor while merging the accounts of the amalgamated company i.e. Bank Of Rajasthan into the accounts of the amalgamated company, i.e. the appellant. The appellant has not established that it had acquired any rights of either commercial or business nature while valuing the so-called goodwill. It was indeed a balancing figure at the time of amalgamation and the RBI approved scheme has ensured compliance on fair exchange ratio for the merger and the allotment of shares of the amalgamated company to the shareholders of the amalgamating company, and



this is imminently evident from the notes in schedule 18 of accounts as reproduced. Except for the fair basis of amalgamation, there was no determination of any goodwill that could have been held by the amalgamated company prior to amalgamation. Both BOR and the appellant bank were in the same line of business of banking and the consideration for the amalgamation did not relate to payment of any kind for acquiring any license, business or commercial rights, except for resulting into expansion of the business of the appellant. Since the impugned goodwill was merely a balancing amount in the scheme of amalgamation after the fair value arrived at for the merger, the attributes of any business or commercial rights are consequential absent in such goodwill simplicity. Thus, the appellant's case of claiming goodwill being generated though the afore discussed amalgamation has to fall flat and so the judgment of the honourable Supreme Court in Smifs securities Ltd's case will be of no moment for appellant's claim of depreciation on impugned goodwill. In such backdrop, I find sufficient force in the assumption of the AO that appellant is not entitled to claim the appreciation on impugned goodwill under section 32 (1) of the act."

- b. With respect to the applicability of explanation 7 to section 43 (1) the learned CIT – A further held that that amalgamation is a tax neutral scheme for companies as well as for the shareholders and not to provide a tax planning mechanism to either of them. He further stated that depreciation is to be computed on actual cost/written down value of the block of assets in accordance with section 43 of the act. He held that in respect of a capital



asset transferred by the amalgamating company to the amalgamated company, the cost/written down value of the transferred capital asset to the amalgamated company shall be taken to be the same as it would have been had the amalgamating company continued to hold the capital assets for the purposes of its own business. Therefore according to explanation 7 of section 43 (1) of the act the assessee is not entitled to say that assessee can claim the book entry of the goodwill in the books of account of the assessee is the cost of acquisition of the same. He held that this is in violation of explanation 7 of section 43 (1) of the act and section 32 (1) of the act.

- c. With respect to the applicability of the fifth proviso to section 32 of the act when the assessee stated that it can be looked into in the first year when the asset is purchased/created and not in the subsequent year relying upon the decision of the honourable Karnataka High Court in case of Padmini products (private limited) (2020) 317 CTR 369, the learned CIT held that the operation of the judgment of the honourable Karnataka High Court has been stayed by the honourable Supreme Court in (2021) 131 taxmann.com 75 and therefore it is not right for the assessee to rely on that judgment.
- d. He further held that the claim of depreciation can be examined even in the assessment years subsequent to the assessment year in which the amalgamation has taken place.
- e. He further held that though for assessment year 2011 – 12 and 2012 – 13, despite the learned assessing officer disallowing the depreciation, the learned CIT – A the



relief against which the revenue has preferred appeal before the coordinate benches.

- f. With respect to the claim of the assessee that the learned assessing officer is not permitted to disturb the written down value of the block of assets in subsequent year, he held that the rule of consistency is neither absolute nor infallible relying on the decision of the honourable Supreme Court in case of Distributors Baroda private limited versus Union of India and others [155 ITR 120] wherein it has been held that if any wrong has been committed, same should not be perpetuated.

010. Accordingly, he upheld the denial of claim of depreciation on the impugned goodwill.

011. Assessee is aggrieved with that and is in appeal before us. Assessee submitted a paper book containing 50 pages wherein assessee submitted the details of depreciation claimed for assessment year 2013 – 14 along with the relevant portion of tax audit report. Assessee also submitted the documents with respect to the scheme of amalgamation of the Bank of Rajasthan with the ICICI bank Ltd as approved by the reserve bank of India and letter submitted for assessment year 2011 – 12 to the assessing officer for claiming the depreciation on the goodwill. In fact, it was stated that the first year of the claim of the depreciation would be assessment year 2011 – 12 and therefore whatever is decided in that particular case will apply for determination of the opening balances of intangible asset for this assessment year. It was stated that, for assessment year 2011 – 12 the appeal is pending before the coordinate



bench in ITA number 7292/M/2016, whatever would be decided in that particular appeal, will result into deriving at opening balances of the block of assets in this case. Therefore, if the issue is set-aside to the file of the learned assessing officer, assessee does not have any grievance.

012. The learned CIT DR also agreed with the above proposition that the written down value would be decided depending on the decision of the coordinate bench in assessee's own case for assessment year 2011 - 12 and therefore the issue may be set-aside to the file of the learned assessing officer to determine the opening WDV in this case in accordance with that. However, he submitted that the reasons given by the learned CIT - A in this case are relevant for even deciding the case for assessment year 2011 - 12.
013. We have carefully considered the rival contention and perused the orders of the lower authorities. Admittedly, in this case first claim of depreciation on goodwill was made by the assessee for assessment year 2011 - 12. The learned assessing officer disallowed such claim in that year. However on the appeal before the learned CIT - A the claim of the assessee was allowed. The learned AO is in appeal before the coordinate bench in ITA number 7292/M/2016. Therefore unless it is decided whether assessee has acquired any intangible asset on merger or not, in the year in which it is claimed to have acquired, claim of allowability of depreciation in subsequent year cannot be decided. Therefore, whatever would be decided in that appeal would have a direct bearing on the claim of depreciation of the assessee for this year. As both the parties do not have any objection if the issue is restored



back to the file of the learned assessing officer, we set-aside the whole issue back to the file of the learned assessing officer to consider as and when the issue for assessment year 2011 – 12 is decided.

014. In the result, ITA number 1113/M/2022 filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on 27.09.2023.

Sd/-
(SANDEEP SINGH KARHAIL)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated:27.09.2023

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to :

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

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai