

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
MS. KAVITHA RAJAGOPAL (JUDICIAL MEMBER)

ITA No. 1760/MUM/2023
Assessment Year: 2011-12

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ITA No. 1779/MUM/2023
Assessment Year: 2012-13

&

ITA Nos. 1761 to 1763/MUM/2023
Assessment Year: 2013-14 to 2015-16

&

ITA Nos. 1780 & 1781/MUM/2023
Assessment Year: 2016-17 & 2017-18

&

ITA No. 1764/MUM/2023
Assessment Year: 2018-19

ACIT-2(2)(1),
Room No. 545, 5th floor,
Aayakar Bhavan,
Mumbai-400020.

Appellant

M/s Jics Logistic Ltd.,
403, 4th floor, Classic Pentagon,
Andheri (E),
Mumbai-400069.

Vs.

PAN No. AACCCJ 2178 F
Respondent

CO No. 105/Mum/2023
(Arising out of ITA No. 1763/MUM/2023)
Assessment Year: 2015-16

M/s Jics Logistics Ltd.,
403, 4th floor, Classic
Pentagon, Andheri (E),
Mumbai-400069.

PAN No. AACCCJ 2178 F
Appellant

ACIT-2(2)(1),
Room No. 545, 5th floor, Aayakar
Bhavan,
Mumbai-400020.

Vs.

Respondent



Assessee by : Mr. Satyaprakash Singh
Revenue by : Mr. Ujjawal Kumar Chavan, DR

Date of Hearing : 19/10/2023
Date of pronouncement : 29/11/2023

ORDER

PER OM PRAKASH KANT, AM

These appeals by the Revenue are directed against separate orders passed by the learned commissioner of Income-tax(Appeals)-National Faceless Appeal Centre, Delhi [in short the ld 'CIT(A)'] for assessment years 2011-12 to 2018-19. In assessment year 2015-16, the assessee has preferred cross objection against the order of the Ld. CIT(A). The issue in dispute involved in these appeals and cross objection being similar, same have been heard together and disposed off by way of this consolidated order for convenience and avoid repetition of facts.

2. At the outset, the Ld. Departmental Representative (DR) submitted that there was a delay of six days in filing the appeals. The learned DR referred to the application for seeking condonation of delay and submitted that during the relevant period, due to excessive workload of filing appeals before the Tribunal and Hon'ble Bombay High Court as well as preparing scrutiny report for filing SLP and other tasks involving limitation, the Assessing could not file the appeals within the limitation period provided under the Act.



According to the learned DR, the delay was not intentional and was due to bonafide reasons, and therefore say might be condoned. The learned counsel for the assessee also did not seriously object for admission of the appeals. After considering submission of the parties, we are of the opinion that there exists a sufficient cause for not complying the limitation period for filing the appeals by the Assessing officer, and therefore, in the interest of substantial justice, we admit the appeals for adjudication.

3. Firstly, we take up the appeal of the Revenue for assessment year 2011-12. The grounds raised in the appeal are reproduced as under:

1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of depreciation of Rs. 3,38,42, 112/-relying on the decision of the Hon'ble Gujarat High Court without appreciating that he AO had adequately refuted the working of the value of the business rights and goodwill by the registered valuer and the relied upon case in therefore distinguishable?

2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of the depreciation of Rs. 79,36,017/-made relying on the decision of the Hon'ble Kerala High Court in the case of CIT us. Poulouse and Mathern (Put.) Ltd. without appreciating the facts in the said case is squarely applicable to the assessee's case without explicitly pointing out how the decision of Padmini Products Put Ltd v/s DCIT 277 taxmen 22 Karnataka 2020 is more close to the facts of the case, when the facts of application of Explanation 3 to s. 43(1) was decided on different ground of non-approval by the Joint CIT when the impugned assessment order was passed by the JCIT itself?

4. Briefly stated facts of the case are that the assessee, a closely held public limited company, has been incorporated on 01/09/2009 by way of converting a partnership firm namely M/s



‘Jhawar’ Ice and Cold Storage. The assessee company also acquired business of a partnership firm namely M/s **‘JICS logistics’**, Mumbai on 01/11/2010 and acquired another proprietorship concern namely M/s **JICS laboratories**, having prop. Mr Pranav Jhawar (who is also director of the assessee company) on 31/03/2011.

4.1 The assessee filed its return of income for the year under consideration electronically on 29/09/2011 declaring total income at ₹8,41,44,630/-. During the year under consideration, the assessee was engaged in the business of providing warehousing and allied services including financing/refinancing against warehoused goods to trading members of National commodity and derivative exchange Ltd (NCDEX), farmers et cetera.

4.2 The return of income filed by the assessee was selected for scrutiny assessment and statutory notices under the Income-tax Act, 1961 (in short ‘the Act’), were issued and complied with. In the assessment completed under section 143(3) of the Act on 10/03/2014, the Assessing Officer made two additions. **Firstly**, addition was made disallowing depreciation amounting to ₹3,38,42,112/- claimed on intangible assets in the form of ‘business right’ and ‘goodwill’ generated due to acquisition of propriety concern namely M/s JICS Laboratories. **Second** addition has been made disallowing depreciation amounting to ₹79,36,017/-, which



was claimed by assessee due to enhancement of cost of asset after revaluation of assets of M/s Jhawar Ice and Cold Storage/-. On further appeal, the Ld. CIT(A) has deleted both the additions. Aggrieved, the Revenue is in appeal before the Income-tax Appellate Tribunal (in short the 'Tribunal'), raising grounds as reproduced above.

5. In ground no. 1, the Revenue has challenged disallowance of depreciation amounting to ₹3,38,42,112/- deleted by the Ld. CIT(A).

5.1 The brief facts qua the issue in dispute are that during the year under consideration, the assessee acquired ongoing business of M/s JICS laboratories, a proprietary concern, which was established in 2007. M/s JICS laboratories was an approved laboratory of NCDEX and 'ACE' derivatives and commodity exchange Ltd and was engaged in the 'commodity testing' business of agro-based and non-agro-based products. As per the balance sheet dated 31/03/2011, the book value of the assets of M/s JICS laboratories was of ₹43,44,359/-. The assessee obtained a valuation report of the assets of M/s JICS laboratories from a chartered engineer M/s Anmol Sekri Consultants P Ltd. (in short **M/s Anmol consultant**), who was approved by Government. On the basis of the valuation report of the valuer, the assessee took over the business alongwith all the assets and liabilities of M/s JICS laboratories for a total consideration of ₹39,77,99,955/-. After adjusting the book



value of the assets of ₹34,55,641/-, intangible assets in the form of business rights and goodwill of ₹39,34,55,641/- was determined in the books of account of assessee for business of the M/s JICS laboratories, and corresponding amount of equity shares of assessee company were issued to proprietor of JICS Laboratories, who happened to be director of the assessee company i.e. related party. The assessee accordingly recognised business rights and goodwill amounting to Rs.39,34,55,641/- as intangible asset in its books of account and claimed depreciation u/s 32 of the Act amounting to Rs. 4,91,81,955/-.

5.1.1 The Government approved valuer M/s Anmol Consultants worked out valuation of business of JICS Laboratories by way of two methods, **firstly**, by way of Discounted Cash Flow (DCF) method at Rs. 4287.30 lakhs and secondly, by way of Private Equity (PE) method at Rs. 3669.25 lakhs and then average of valuation of both method was worked out to Rs. 3978.28 lakhs. The AO and CIT(A) has reproduced the detailed working of valuation of DCF and PE method provided on behalf of the assessee in the impugned orders.

5.1.2 For 'DCF' method, the Valuer has projected the cash flow for next four years and then after applying discounting factor at 10.72% computed discounted cash flow at Rs. 1310 lakhs and after adding the terminal value of Rs. 2977 lakhs, estimated the business



value at Rs. 4287 lakhs. The Assessing Officer rejected the valuation for the reasons, that **firstly**, no basis for either cash flow for future years or terminal value was disclosed by the valuer, **secondly**, no deduction on account of investment in capital expenditure in future cash flow has been given, **thirdly**, discount factor of 10.72% was not explained. For PE valuation method, the valuer has taken PE ratio of M/s JICS Laboratories at 14 on the ground that average PE ratio of listed quality testing laboratories was around 32.13 and JICS Laboratories being unlisted small size company, the PE ratio of 14 was appropriate. The AO rejected the PE valuation for the reason that **firstly**, the PE valuation has been done on 31/3/2011 where as PE ratio as on 5/03/2011 had been considered by the valuer, **secondly**, another company namely M/s Chokasi Laboratories, engaged in identical quality testing services and listed and large company as compared to JICs Laboratories, but PE ratio of said company was only 2.4. Those discrepancies were confronted to the assessee but assessee sought more time for getting comments from the valuer, however, the limitation of assessment proceedings was approaching near, the AO adjusted the valuation of the approved valuer and determined the potential market value of the business carried on by JICS laboratories at Rs. 12,70,63,110/- as on the date of merger i.e. 31/03/2011. The adjustment made to DCF method and PE method and consequent addition made is reproduced as under for ready reference:



“5.7 Valuation as per DCF method:- From the income tax returns of M/s. JICS Laboratories, for A.Y. 2010-11 and 2011-12 it was found that the net profit of the business of M/s. JICS Laboratories has increased from Rs. 86,44,370/- in A.Y. 2010-11 to Rs. 1,51,49,463/- in A.Y. 2011-12. Thus the compounded average growth rate (CAGR) is 75%. Considering that its income should grow at a constant growth rate of at least at one half of the speed of calculated CAGR of 75%, cash flow for next five years is calculated in the following table:-

A.Y.	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
JICS Lab.Income	15,149,463	20,830,512	28,641,953	39,382,686	54,151,193/	74,457,891/-
CAGR @ 37.50%	56,81,049	78,11,442	10,740,733	14,768,507	20,306,697-	2,79,21,709/-
Cash Flow	20,830,512	28,641,953	39,382,686	54,151,193	74,457,891/	10,23,79,600/

5.8 While estimating the above cash flow it is presumed that the business will require capital expenditure that is equal to depreciation rates. Therefore, neither depreciation has been added back nor capital expenditure has been deducted while estimating the cash low. The above calculated cash flow should be discounted by as acceptable interest rate which is estimated at 13.25% considering 8.25% per annum risk free interest rate plus 5% risk premium. Therefore, present value of for future cash flows is being calculated as under:-

A.Y.	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
JICS Lab.Income	1,51,49,463	2,08,30,512	2,86,41,953	3,93,82,686	5,41,51,193/	7,44,57,891/-
CAGR @ 37.50%	56,81,049	78,11,442	1,07,40,733	1,47,68,507	2,03,06,697-	2,79,21,709/-
Cash Flow	20,830,512	28,641,953	39,382,686	54,151,193	74,457,891/	10,23,79,600/-
Discounted rate @ 13.25%		0.8675	0.7526	0.6529	0.5664	0.4914
Present Value		2,84,46,894	2,96,39,409	3,53,55,314	4,21,72,949	5,03,09,335

5.9 Market value of business in terms of future cash flows is being calculated as per formula given here below:-

(Business income for 2011-12/Capitalization rate) + (Future cash flow of next five years)

$$= (1,51,49,463/3.25) + (18,23,23,903) = (46,61,373/-) + (18,23,23,903/-) = 18,69,85,276/-$$

{Where capitalization rate = Risk free rate (8.25%) - Risk Premium (5%) = 3.25%}. Thus present value of business of M/s. JICS Laboratories as on 31/03/2011 comes to Rs. 18.70 Crore in place of 42.87 Crore as estimated by the Valuer according to the DCF method.



5.10 Valuation as per PE method:- Choksi Laboratories Ltd., Indore is working in similar line of business, which is a listed company, which has more experience, larger set up and infrastructure as well as man power strength in comparison to M/s. JICS Laboratories and which has PE ratio of 2.04 only as on 31/03/2011 which is evident from its audited annual accounts for the year ended on 31/03/2011. As Choksi Laboratories Ltd. CL.I is a listed company and founded 1982 with 26 locations means wide experienced whereas M/s JICS Laboratories was founded in 2007 (25 Yrs. After CLL.) is not a listed company and it is a very small size compared to the size and volumes of the listed companies, PE ratio of M/s JICS Laboratories cannot be greater than PE ratio of Choksi Laboratories Ltd. Therefore, business value of M/s JICS Laboratories is being worked out as per PE Method after taking PE ratio of 2.04 as under:

Total discounted cash flow	197473366/-
Average discounted cash flows	32912227/-
PE Multiple	2.04
Business value	67140943/-

5.11 In view of recalculated value of business as per DCF & PE Method average value of the business is being worked out as under:-

Method	Value
DCF Method	18,69,85,276/-
PE Method	67140943/-
Average	127063110/-

5.12 Goodwill Calculation: In view of recalculated value of business, value attributable to goodwill is being worked out as under:

Particular	Amount
Business Value (as calculated above)	127063110
Goodwill Contribution to the business value (%)	0.05
Value attributable to goodwill	53,53,156

5.13 In view of discussion made in para 5.1 to 5.12, it is inferred that the potential market value of the business carried on by M/s JICS Laboratories was Rs. 12,70,63,110/- as on the date of its merger i.e. 31.03.2011 with M/s JICS Logistics Ltd. Therefore, in the books of M/s JICS Logistics Ltd. (apart from assets, transferred at book value of Rs. 43,44,359/-) intangible assets in the form of business right and goodwill should have been recognized at Rs. 12,27,18,751/-(business right of Rs. 11,63,65,595/- and goodwill of Rs. 63,53,156/-) instead of Rs. 39,34,55,641/- (business right of Rs. 37,34,55,641/- and goodwill of Rs. 2,00,00,000/-). Due to excess recognition of value of intangible assets in the form of business right and goodwill of Rs. 27,07,36,890/- (difference of 393455641-122718751) in books of M/s



JICS Logistics Ltd. excess depreciation of Rs. 3,38,42,112/- (difference of 49181955-15339843 calculated @12.5%) was claimed which was not allowable. Accordingly claim of depreciation of Rs. 3,38,42, 112/- hereby disallowed and added back to the total income of assessee. Penairy proceedings u/s 271(1)(c) initiated separately for furnishing inaccurate particulars of income and concealment thereon.”

5.1.3 Thus, for ‘DCF’ method calculation, the AO observed that the net profit of the business of JICS Laboratories has increased from Rs. 86,44,370/- in 210-11 to Rs.1,51,49,463/- in AY 2011-12, thus the compounded average rate of growth (CAGR) was 75% and if the income of JICS Laboratories would have increased at a constant growth rate of at least one half of the speed of calculated CAGR of 75%, cash flow of next five years would be less than what valuer had determined. The AO was of the view that business would require capital expenditure which will be equal to depreciation rates, therefore, neither depreciation has been added back nor capital expenditure has been deducted while estimating the cash flow. The AO further discounted the cash flow calculated by an estimated rate of 13.25% considering 8.25% per annum risk free interest plus 5% risk premium.

5.1.4 Under ‘PE’ method valuation, he took PE ratio of 2.04 and arrived at valuation of business at Rs. 6,71,40,943/-. After taking average of both method of valuation, he worked out average valuation of business at Rs. 12,70,63,110/-.

5.1.5 The Ld AO accordingly held that in the books of account of JICS Laboratories (apart from assets transferred at book value of



Rs. 43,44,359/-) intangible assets in the form of business rights and goodwill should have been recognized at Rs. 12,27,18,751/- instead of Rs.39,34,55,641/- (business rights of Rs. 37,34,55,641/- and goodwill of Rs. 2,00,00,000/-) in the books of JICS laboratories.

5.2 Before the Ld. CIT(A) the assessee filed comments of the approved valuer on the defects which were pointed out by the Assessing Officer in the valuation report. The approved valuer justified his valuation report. The Ld. CIT(A) admitted the comments of the approved valuer and sent the same to the Assessing Officer calling for a remand report. The Assessing Officer in his remand report adhered to his earlier viewpoint. In the remand report the Assessing Officer rejected the contention of the assessee with respect to the investment agreement entered into a Mauritius company, Tara Holdings which was claimed to be duly approved by the Reserve Bank of India (RBI), for the reason that genuineness and creditworthiness of the investor was doubtful because same was not verified through the Foreign Tax and Tax Research (FT & TR) division (i.e. a division specified for verifying information in relation to foreign investment) of Central Board of Direct Taxes. After considering the remand report and rejoinder of the assessee, the Ld. CIT(A) deleted the depreciation in view of following reasonings:

What remains for adjudication is the amount of depreciation that is to be allowed. Whether it should be based on the amount of value of assets calculated by the appellant or by the AO?



In this respect, the following are seen:

- a. *The valuation of assets is done by an independent registered valuer.*
- b. *It is a fact that consideration of Rs.39.78 crores has been paid to the seller in the form of equity shares (plus small unsecured loan), which again is on the basis of another valuation report.*
- c. *As regards the finding of the AO regarding the projected cash flows, the valuer has stated that the same is based on the information and data made available by the management. Besides, various other specific factors including (i) small scale but high margins (ii) high growth potential (iii) booming commodity markets (iv) entry barriers etc have been cited. The AO has reiterated in the remand report that the estimation is based on inflated projections and no supporting evidence has been given. However, it is seen that the AO has not given the basis for arriving at his decision of estimating the cash flows at half of the speed of calculated CAGR of 75%.*
- d. *As regards the discount rate of 10.72%, the valuer has given a detailed justification in terms of Weighted Average Cost of Capital (WACC) in both the original valuation report and clarifications issued by it. It appears that the AO has accepted this rate in the remand report. In any case, the rate cannot be questioned by the AO by considering risk premium of 5% without providing any factual basis for arriving at such a conclusion. Wherever the specific computation made by the registered valuer is to be substituted, it is imperative that it has a factual foundation. In the absence of such an exercise by the AO, in my humble view, the report of the valuer would gain precedence, particularly since the valuation report has the basis for arriving at WACC.*
- e. *As regards the PE adopted, the appellant has pointed out that Vimta Laboratories which had a market capitalization of Rs.37 crores had a PE of 45.3. While the AO has opted to compare with a single entity, the valuer has adopted the average industry PE based on 2 companies and arrived at average of 32.13 of companies in same line of business of testing laboratories (page 67,73 of valuation report). The valuer has eventually adopted a PE of 14 based on the industry PE of companies in infrastructure field. A PE of 2 indicates a very short payback period of just 2 years. In the listed market space, several companies command huge valuation (particularly start-ups) even though they suffer from huge losses on account of future growth potential. Thus, valuation on a PE basis is more of an art and less of a science. One cannot fault the valuer for eventually adopting a nominal PE of 14, which is much higher than the average PE of the indices of the listed entities in the stock exchanges. Comparing the PE with a group of entities or the market as adopted by the Registered Valuer, as against benchmarking the PE against a single entity as made by the AO, is in my view, a better proposition.*



f. As regards the AO's questioning of the inclusion of Vimta Laboratories on the ground that it is a much larger entity, it supports the case of the appellant that this is a high growth high potential segment.

In view of the detailed discussion as above, in my considered view, the valuation report in this case has adequate factual basis. The Valuation Report has not been assailed by way of compelling contrary evidences or by demonstrating that any of the assumptions made by the Registered Valuer / Appellant are divested of reality.

In the case of *Ashwin Vanaspati Industries vs CIT*, 255 ITR 26 (Guj HC), the Hon'ble Gujarat HC has held as follows: "The valuation report is by a registered" valuer. Neither in the assessment order nor in the Tribunal's order is there any whisper that the valuation report by the registered valuer is incorrect in any manner whatsoever. **Once there is a report by the registered valuer, it is incumbent upon an authority to dislodge the same by bringing adequate material on record in the form of departmental valuation report, because in absence of the same, a technical expert's opinion (Registered Valuer's report) cannot be dislodged by any authority by merely ignoring the same.** In the present case, that is what has happened. Neither the Assessing Officer nor the Tribunal have even attempted to state that the valuation report and the values put on the assets are incorrect in any manner whatsoever.

They have simply ignored the valuation report". Although the valuation report could be questioned by the AO if any of the specific defects had been pointed out, the same is not the case here.

In view of the above facts and position of law, the appellant is entitled to recognition of value of intangible assets in the form of business rights and goodwill of Rs.27,07,36,890/- which has been disallowed by the AO. The consequential depreciation of Rs.3,38,42,112/- is allowable to the appellant. This ground stands allowed."

6. Before us, the Ld. Departmental Representative (DR) referred to the finding of Id CIT(A), wherein he following the decision of Hon'ble Gujarat High Court in the case of **Ashwin Vanaspati Industries (supra)** held that *in absence of any valuation report from the Departmental Valuation Officer, the Assessing Officer can't discard the valuation of M/s Jics Laboratories carried out by the registered valuer.* The Ld. DR submitted that when the Ld. CIT(A) noted that there was no report from the Departmental Valuer ,he



within his co-terminus power of Assessing Officer, he could have called for the valuation report from the Departmental Valuer for valuation of JICS Laboratories. The Ld. DR referred to the decision dated 11/03/2015 of the Hon'ble Delhi High Court in the case of Jansampark Advertising and Marketing P ltd (ITA 525/2014) wherein it is held that if the Assessing Officer fails in carrying out any inquiry then it is incumbent upon the appellate authorities to carry out such inquiry for discovery of the true facts of the case. The Ld. DR further submitted that in the case , the assessee has merely acquired proprietary business of director having book value of Rs.43,44,359/-. The Ld. DR further submitted that the proprietor has not reported valuation of the assets of his proprietary concern as valued by the approved valuer and consequent capital gain on sale of the intangible assets containing business rights and goodwill in his return of income. He submitted that no additional business or commercial rights arose or developed in the proprietary concern of the Director merely for the reason that it was transferred to a company in which the proprietor himself is director. The Ld. DR submitted that valuation by the valuer has been made on the basis of the unrealistic projections by management and just for the purpose of reducing tax liability in the hand of the company by way of claiming excess depreciation and no additional asset actually came into existence in the hands of the company by way of acquiring proprietary concern of director of the company. The Ld.



DR in support of his claim relied on the decision of the Tribunal in the case of **M/s Dosti Realty Ltd. in ITA No. 2043/Mum/2022 for assessment year 2016-17** wherein the Tribunal held as under:

“6. As observed by us that scheme of amalgamation not fully observed by assessee by considering reserve and surplus for the purposes of calculation of goodwill. As far as allowability of depreciation/amortization is concerned we have gone through the order of AO, Ld. CIT (A) and assessee’s submissions thereon. In our observation claim of the assessee is not tenable for the following reasons notwithstanding the reduction in amount of goodwill by virtue of our finding (supra) as under:

A) In case of amalgamation amongst the closely held companies, where the owner/promoters and directors are same how the goodwill can emerge by virtue of amalgamation, as no new people/organization came into picture and whatever reflecting in Balance-Sheet is merely a balancing figure to match the Balance Sheet.

B) Assessee is a holding company where all the main owners and directors are promoters and on the board of the company, in that case how is it possible that a smaller entity that is too a subsidiary have more market value/brand value, which can create goodwill in favour of parent entity which is the main power house in terms of finance, decision making and personal reputation in the industry.

C) The assessee had tried to make out a case that the amalgamation of two companies with the transferor company was by a method of merger called 'purchase method' by which it was not necessary that all the shareholders of the erstwhile transferor companies would become shareholders in the same ratio in the transferee company. On the other hand, in the 'pooling of interest' method of amalgamation the transferor's assets, liabilities and reserves are recorded by the transferee at the relevant 'carrying amounts', i.e. points. The criteria applicable was 'pooling of interests method' in para 3(e) of AS-14. All assets and liabilities of the transferor companies had passed on, in totality, to the transferee company, thus, indicating that it was a 'pooling of interest' method of amalgamation and there could not have been accounting for goodwill.

D) No credible evidence or material had been laid on record to show that the assessee incurred any cost for acquiring goodwill in the scheme of amalgamation. The record revealed that the assessee himself in the first instance written off the entire



amount of Rs. 46.05 Crores accounted for as its goodwill in its accounts. That decision taken by the assessee was consistent to the Standard Accounting Practices followed in respect of fictitious assets. From the accounting treatment, it was clear that the assessee made accounting entries to the goodwill account after the scheme of amalgamation became effective and not on account of the order of the High Court to make any payment for goodwill (intangible assets) specifically. As per standard accounting practices, in the cases of amalgamations, if the assets side is greater than the liability side then the difference is credited to the capital reserve account and in a case where the liability side is greater than the asset side then the difference is accounted as 'Goodwill' account in the hands of the amalgamated company. This practice is followed to balance the asset and liability sides by making accounting entries and by making such book entries, no real asset as goodwill in fact comes into existence. That was how the accounting treatment to be given was clearly stated in the scheme and no payment on account of any such asset was made by the assessee in that scheme which stood approved by the order of the High Court. The said order thus, clearly stated that the assets of the transferor company comprised in the undertaking stood transferred and vested in the transferee company as a going concern.

7. In the case of *Smifs Securities Ltd.*, the Supreme Court has held that 'goodwill' is an intangible asset eligible for depreciation under the provisions of section 32 of the IT Act. A decision is only an authority for what it actually decides. Hence, the said case can be said to be an authority only to the extent that goodwill is a depreciable asset. In the case of *U.P. State Industrial Development Corpn. [CIT v. U.P. State Industrial Development Corpn. [1997] 225 ITR 703]*, the Hon'ble Supreme Court held that it is a well-accepted proposition that for the purposes of ascertaining profits and gains the ordinary principles of commercial accounting should be applied, so long as they do not conflict with any express provision of the relevant statute. The said principle was again retreated by the Supreme Court in the case of *Woodward Governor [CIT v. Woodward Governor India (P.) Ltd.[2009] 312 ITR 254]* wherein it held that profits for income-tax purpose are to be computed in accordance with ordinary principles of commercial accounting, unless such principles stand superseded or modified by legislative enactments. In other words, it can be said that accounting treatment of any transaction is relevant only to the extent they are not in conflict with the express provisions of the IT Act. In case of merger and acquisition, the IT Act expressly requires recording of capital assets at the price appearing in the books of Target Company. Accordingly, the recognition of goodwill in accordance with Accounting Standard-14 and amortisation of the same in accordance with Accounting Standard-26 may not be of any help in claiming depreciation under the IT Act in view of the express provisions mentioned therein. Thus, the cost of acquisition of existing goodwill in the hands of the acquirer will be the



cost/written down value in the hands of Target Company. Further, in case of goodwill arising out of amalgamation, the cost in the hands of target company would be NIL by virtue of section 55(2) (a) (ii) and, accordingly, the cost would be NIL in the hands of acquirer-company. It is pertinent to note that decisions favouring the proposition [CIT v. Smifs Securities Ltd.[2012] 348 ITR 302(SC)]that depreciation is available on goodwill arising out of amalgamation, section, viz., 5th proviso to section 32 (1), section 49(1)(iii)(e), Explanation 7 to section 43(1) and/or Explanation 2(b) to section 43(6)(c) and section 55(2)(a)(ii) were not referred.

8. Generally, when someone acquires a business and purchase consideration paid for the business is more than the net assets acquired, the difference is recognized as goodwill in accounting. Here in this case as amalgamation process has been carried out as per the direction of Hon'ble Bombay High Court and assessee clearly followed "pooling of interest" method, there can't be any separate purchase consideration, which assessee is supposed to pay. In the whole scenario the principle of "substance over form" has to be considered. In substance there is no goodwill involved at all and it is simply an accounting entry to balance the accounts of the transferee company by virtue of scheme implementation as per the directions of Hon'ble High Court.

9. Goodwill falls in the category of "Intangible Assets", but its advantages must be tangible and assessee has to establish on record that by virtue of "Goodwill" what are the financial and non-financial gains are accruing to him. In this case what we observed, pre-merger and post-merger is simply a consolidation of figures of entities involved and not a percentage growth in terms of sales, profitability, net worth and customer base etc. post-merger. In view of the above discussion and legal history analysed, we are of the considered view that order of Ld. CIT (A) is not sustainable in law and order of AO is restored as found to be based on sound legal logics. In the result Ground Nos. 1&2 of the Revenue is allowed."

7. On the contrary, the Ld. Counsel for the assessee submitted that the Assessing Officer has rejected the valuation report of the Government approved valuer based on his own presumptions and assumptions. The Ld. Counsel submitted that report of registered valuer being a technical person cannot be substituted without obtaining report from a technical person. The Ld. Counsel submitted that as far as projections in the DCF method are



concerned, same were based on various factors and projections made by the management and following like growth of company, economic/market conditions, business conditions, expected demand and supply, cost of capital and host of other factors. These factors are considered are based on some reasonable approach and they cannot be evaluated purely based on arithmetical precision as value is always worked out based on approximation and catena of underline facts and assumptions. At the time of valuation the potential value of business at that particular time and also keeping in mind underline factors that may change over the period of time and thus the value, which is relevant one might not be relevant after certain period of time.

8. We have heard rival submission of the parties and perused the relevant material on record. It is undisputed that the valuation of the proprietary concern of one of the director of company namely i.e. M/s Jics Laboratories, made by the valuer on DCF method, is based on the various projections of future earning by the management of the assessee company itself. The Assessing Officer altered or revised those projections and computed his own valuation. The Ld. CIT(A) has rejected the revision of valuation done by the Assessing Officer mainly for the reason that he was not authorized to carry out such revision not being expert of valuation and matter should have been referred to the Departmental Valuation Officer. We are of the opinion that duty of the Ld. CIT(A)



does not end merely by saying that the Assessing Officer should have carried out said exercise of referring the valuation to the Departmental Valuation Officer whereas, he himself should have referred the matter to the Department valuation officer as held by the Hon'ble High Court in the case of **Jansampark advertising and Marketing p Ltd Pvt. Ltd. (supra)**. The relevant para of decision is reproduced as under:

“ 42. The AO here may have failed to discharge his obligation to conduct a proper inquiry to take the matter to logical conclusion. But CIT (Appeals), having noticed want of proper inquiry, could not have closed the chapter simply by allowing the appeal and deleting the additions made. It was also the obligation of the first appellate authority, as indeed of ITAT, to have ensured that effective inquiry was carried out, particularly in the face of the allegations of the Revenue that the account statements reveal a uniform pattern of cash deposits of equal amounts in the respective accounts preceding the transactions in question. This necessitated a detailed scrutiny of the material submitted by the assessee in response to the notice under [Section 148](#) issued by the AO, as also the material submitted at the stage of appeals, if deemed proper by way of making or causing to be made a "further inquiry" in exercise of the power under [Section 250\(4\)](#). This approach not having been adopted, the impugned order of ITAT, and consequently that of CIT (Appeals), cannot be approved or upheld.”

8.1 Before us, it has also not been explained that how much amount has been shown by the proprietor in return of income for the purpose of the computation of the capital gain on sale of his proprietary concern and thus it is not clear how the proprietor of JICS Laboratories has reported market value of his business. In the facts and circumstances of the case, we feel it appropriate to restore the matter back to the file of the Assessing Officer for carrying out valuation from an expert department valuer in the field of financial valuation of companies and thereafter decide the issue in



accordance with law. The ground No. 1 of the appeal of the Revenue is accordingly allowed for statistical purposes.

9. The ground No. 2 of the appeal relates to disallowance of excess depreciation amounting to ₹79,36,017/- claimed on the revaluation of assets of partnership firm M/s Jhavar Ice and Cold Storage, which has been deleted by the Ld. CIT(A).

9.1 The brief facts qua the issue in dispute are that the partnership firm M/s Jhavar Ice and Cold Storage comprising of seven partners was converted into the assessee company with effect from 01/09/2009 and assets/liabilities of the firm were taken over at book value in the books of the assessee company, which remained till 31/3/2010. Subsequently, the assessee company w.e.f. from revalued old assets of firm and value of the business of M/s Jhavar Ice and Cold Storage was estimated to ₹ 15 crores and accordingly equity shares of ₹ 10 each amounting to Rs.1,50,00,000 were allotted to those seven partners, who became directors of the assessee company. Name of the partners and shares allotted to them, is reproduced by the Assessing Officer are extracted as under:

Sr. No.	Name	Amount	No. of Shares
1.	Shri Jai Narayan Jhavar S/o Shri Murli Dhar Jhavar	51000000	5100000
2.	Shri Anil Kumar Jhavar S/o Shri Jai Narayan Jhavar	4,95,00,000	4950000
3.	Shri Pranav Jhavar S/o Shri Anil Kumar Jhavar	49440000	4944000
4.	Shri Govind Saboo S/o Shri Gopal Narayan Saboo	15000	1500
5.	Shri Ajay Lakhotiya S/o Shri P.K. Lakhotiya	15000	1500



6.	M/s Creative Tie-up Pvt. Ltd.	15000	1500
7.	Shri Iqbal Singh Gill S/o Late Sardar Preetam Singh	15000	1500
	Total	15,00,00,000	1,50,00,000

9.2 The assessee company with effect from 01/09/2009 onwards taken over the assets and liabilities of the partnership firm at book value and claimed depreciation of ₹ 4, 46, 359/-on the assets acquired from the firm during assessment year 2010-11, which was worked out on the closing WDV of assets of ₹ 50, 55, 098/-acquired from the firm including assets of ₹ 8, 68, 825/-acquired during the year after applying the rate of depreciation as prescribed under the act. The closing WDV of the assets of the company as on 31/03/2010 was amounting to ₹ 84, 77, 564/-.

9.2.1 However during assessment year 2011-12 the assessee company engaged an approved valuer and revalued the assets which were acquired on conversion of the partnership firm at ₹13,76,71,772/- and according claimed inflated/higher depreciation, which amounted to ₹79,36,017/-. In the tax audit report for the year under consideration, the auditor in the notes to account mentioned that two statement of depreciation vide Annexure A-1 and Annexure-A2, were annexed to the audit report. The Annexure:A-1 represented working of depreciation as per Act on the WDV of M/c Jhawar Ice and Cold Storage prior to conversion into assessee company. The Annexure: A-2 represented working of depreciation at the rate prescribed under the Act on revalued cost of assets, in view of the decision of **Chitra Publicity Company P Ltd**



vs ACIT(2010) 127 TTJ (Ahd)(TM) and opinion obtained from tax expert. On being asked to justify by the Assessing Officer, the assessee explained that independent approved valuer being expert of this line, was competent to determine the market value of the old assets and it was claimed on the actual value of the assets for which conversion cost was paid. It was submitted that provisions under the Act do not prohibit for claim of depreciation on revalued assets, because the assessee company is a different entity from the partnership firm which has been acquired on payment of the cost against conversion by way of allotment of shares. The assessee relied on various decisions cited. According to the Assessing Officer, facts of the cases cited by the assessee are at variance, whereas decision of **Hon'ble Kerala High Court in the case of CIT vs Poulouse and Mathera (P) Lts 236 ITR 416** squarely applicable in the case of the assessee. The Assessing Officer was of the view that revaluation of the assets by the assessee was found not motivated with any genuine business need but for claiming inflated depreciation in view of increasing income post conversion of firm into assessee Company and resulting increased tax liability. For ready reference, the relevant finding of the Assessing Officer is reproduced as under:

“6.7 From the depreciation chart annexed with the Tax Audit Report of M/s. havar Ice & Cold Storage for A.Y. 2010-11, it is noticed that the said firm claimed depreciation of only Rs. 2,23,296/- on their assets for the part period of 01/04/2009 to 31/08/2009. On same assets after acquisition the assessee company also claimed depreciation of Rs.



4,46,359/- for the part period of 01/09/2009 to 31/03/2010 relevant to A.Y. 2010-11.

6.8 Before conversion of the partnership firm into Assessee Company, the fixed assets of the partnership firm were revalued as on 31.03.2008 on the basis of valuation report dated 17.03.2008 obtained from V.K. Jain & Co. Assessors Valuers Pvt. Ltd. In the report purpose of valuation has been mentioned as assessment of here open market value of developed land, Building blocks & mercury plant etc. pertaining to running cold storage and Ware house belonging to M/s Jhawar Ice & Cold Storage. Fair open market value was assessed at Rs. 14,29,00,000/- as on March 2008 details of which are as under:-

Particulars	Fair open market value
Developed Land	Rs. 6,62,00,000/-
Building/Civil Structures	Rs. 4,67,00,000/-
Machinery Plant & Equipment	Rs. 3,00,00,000/-
Total	Rs. 14,29,00,000/-

6.9 The Valuer has discussed about the approach to value assessment for building/civil structure and machinery plant & Equipment in his report that (i) As on date fair value of the buildings/ civil structures evaluated adopting built-up area method and considering class/ type of construction, size/built up area and due cognizance of current cost of construction, deducting due depreciation there from towards condition/ maintenance & age etc. (ii) Value assessment of machinery/equipments accordingly arrived on the basis of physical inspection, make size/specification, maintenance/condition and taking into consideration new replacement cost, technological obsolescence, residual economical life together with due deduction for depreciation etc. However it is observed that the valuation has not been done according to the approach in fair manner but was done to show enhanced value of the assets in arbitrary manner which is evident from the fact that the cost of building, machinery plants and equipments was estimated presuming them new and deduction on account of depreciation was allowed only @ of 20% & 25% respectively that too without mentioning that for how many years the above said depreciation has been charged though the firm was in business for a considerable numbers of years as it was incorporated long back on 1st February 1997. It was also presumed that all the building blocks and machinery equipment are well maintained and have residual life of about 40 years and 25 years respectively without any basis and in complete ignorance of the fact that when the building was constructed and machinery equipments were installed. It is also pertinent to mention that in the books of M/s. Jhawar Ice & Cold Storage, an addition of Rs. 5,17,733/- was made in the block of building on 31/03/2009 and after claiming depreciation on it W.D.V. as on 31/03/2009 was worked out 1906 420/- but after revaluation the value of such block of building was enhanced to Rs. 1.61,73.411/- as on 31/03/2008.



6.10 *The assessee company acquired the business of M/s. Jhavar Ice & Cold Storage with effect from 01/09/2009 relevant to A.Y. 2010-11 and the revaluation of the assets of the firm was done as on 31/03/2008 but in A. Y. 2010-11 neither in 11a books of the assessee company nor in the books of M/s. Jhavar Ice & Cold Storage, depreciation was claimed on enhanced cost of the assets after revaluation. The assessee company only in A.Y. 2011-12 onwards started to claim the depreciation on enhanced cost of the assets after revaluation.*

6.11 *Thus, the main purpose of the adoption of enhanced value after revaluation of assets in the hands of the assessee company in A.Y. 2011-12 was claiming of depreciation at enhanced value to reduce the liability of income tax. The assessee has adopted a colorable device to reduce its income tax liability by claiming higher depreciation with reference to enhanced cost of assets. Reliance is placed on in this regard upon the decision in the case of McDowell & Co. Ltd. vs. CTO (1985) 47 CTR(SC) 126 : (1985) 154 ITR 148 (SC).*

6.12 *The contention of the assessee that in the hands of the company cost of assets is re-valued value of the assets as the company on conversion allotted the fully paid equity shares to the partners on the re-valued value, thus the cost of assets in the hands of company is re-valued price; is not acceptable. There is reasonable belief that the main purpose of the revaluation of such assets was to reduce the income tax liability by claiming very high amount of depreciation on the enhanced cost of assets adopted by the assessee company. In this regard it is further observed that the actual cost of any particular assets to the assessee is entirely a question of fact to be determined with reference to the attended material. In this behalf, the Madras High Court has observed in the case of CIT vs. Harveys Ltd. (1940) 88 ITR 307 (Mad) that the mere production of documentary evidence showing that a contract was made for purchase of assets at a certain price does not conclusively establish the correctness of claim made by the assessee particularly where the AO is of the opinion that the deal was a colorable device to avoid tax. Under such circumstances the Andhra Pradesh High Court in the case of Kungundi Industrial Works (P) Ltd. v. CIT [1965] 57 ITR 540 (AP) and the Calcutta High Court in the case of CIT v. Jogta Coal Co. Ltd. [1965] 25 ITR 89 (Cal), and the Supreme Court in the case of Guzdar Kajora Coai Mines Ltd. v. CIT [1972] 85 IR 599 (SC) have upheld the action of the AO in going behind the contract and ascertain the actual cost for the purposes of correct ascertainment of income-tax liability. It is pertinent to mention here that the exercise of revaluation was done according to the sweet wish of the assessee and not on account of any legitimate business need. Had there been any legitimate business need of revaluation the same exercise would have been done in the case of M/s JICS Logistics Mumbai also.”*

9.2.2 The Assessing Officer invoked Explanation-3 to section 43(1) which authorise the Assessing Officer to determine actual cost



of asset in situation of transfer of asset for the purpose of reduction of liability and after relying on the decision of the Hon'ble Supreme Court in the case of **Sunil Siddhartbhai Vs CIT (1985) 156 ITR 509(SC) and Kungundi Industrial Works (P) Ltd Vs CIT (1965) 57 ITR 540(AP)**, rejected the contention of the assessee. The learned Assessing Officer distinguished the decisions relied upon by the assessee and relying on the decision of the **Hon'ble Kerala High Court in the case of CIT Vs Poulsoe and Mthera P Ltd (supra)** disallowed the claim of inflated depreciation of ₹79,36,017/- concluding as under:

“6.24 Under the above said circumstances and discussion made, it can be held that the assessee has adopted enhanced cost and has claimed depreciation with reference to such enhanced cost. It is undeniable that it has resulted in reduction of liability to pay income tax. Thus, all the requisite conditions of explanation 3 stands fulfilled. After considering the facts and circumstances of the case and provisions of the law, I am of the opinion that the closing W.D.V. of the assets acquired from the firm as per the provisions of the I.T. Act for A.Y. 2010-11 should have been taken as the opening .D.V. in the hands of the assessee company for the purpose of computation of depreciation of A.Y. 2011-12 which represents the actual cost of the assets in the hands of the assessee. Accordingly, the claim of inflated depreciation of Rs. 79,36,017/- due to enhancement of the cost of assets after revaluation is hereby disallowed and added back to the total income of assessee. Penalty proceedings u/s 271(1)(c) initiated separately.”

9.3 On further appeal the Ld. CIT(A) deleted the disallowance of depreciation of observing as under:

“In this respect, the following are seen:

- a. The valuation of assets is done by an independent registered valuer.*
- b. It is a fact that consideration of Rs. 15 crores has been paid to the erstwhile partners in the form of equity shares.*



c. As regards the valuation, although the AO has raised objections in para 6.9 of the assessment order, they are generic in nature. As regards the assumption of residual life of 40 years and 25 years for building blocks and machinery equipment respectively adopted by the valuer, the unreasonableness of such assumption has not been brought out with any specific fact.

In the case of *Ashwin Vanaspati Industries vs CIT*, 255 ITR 26 (Guj HC), the Hon'ble Gujarat HC has held as follows: "Once there is a report by the registered valuer, it is incumbent upon an authority to dislodge the same by bringing adequate material on record in the form of departmental valuation report, because in absence of the same, a technical expert's opinion (Registered Valuer's report) cannot be dislodged by any authority by merely ignoring the same." Thus, the valuation report cannot be discarded by generic discussion and without pointing specific defects.

The AO has relied on the decision of *CIT vs Poulse and Mathern P Ltd*, 236 ITR 416 (Ker HC). In this regard, I find that the case of the appellant is more close to that of the recent decision of *Padmini Products P Ltd vs DCIT*, 277 Taxman 22 (Karnataka) [2020] wherein the Hon'ble HC held that the provisions which restrict aggregate depreciation claim both by the predecessor and the successor, will apply only in the year of succession and if in a particular year there is no aggregate deduction then such restrictions will not apply. The appellant has also pointed out how the taxable income of the appellant rose to Rs.8.41 crores during the year under reference.

I also find that a similar issue arose in the case of *DCIT vs Suyash Laboratories*, [2016] 65 taxmann.com 217 (Mumbai - Trib.), wherein the Hon'ble Jurisdictional Tribunal held that where under an arrangement entire assets and liabilities of a firm had been assigned to a company in lieu of shares issued to partners of erstwhile firm, successor company was entitled to depreciation based on cost incurred by company.

In view of the above facts and position of law, in my humble view, the depreciation claim of Rs.79,36,017/- is allowable to the appellant. This ground stands allowed."

9.4 Before us, the Ld. DR submitted that at the time of the conversion of the partnership firm, the assessee has entered the book value of the assets in its books of accounts and the assets of the partnership firms were not revalued. Therefore, the decision relied upon by the CIT(A) of the Karnataka High Court in the case of *Padmini Products Pvt. Ltd. v. DCIT* (supra) cannot be applied over



the case of the assessee. Further, the Ld. DR submitted that assessee has revalued its asset in the subsequent year of conversion mainly for the purpose of reducing its tax liability and therefore, the Assessing Officer is justified in determining the actual cost of asset invoking Explanation-3 to section 43(1) of the Act. The Ld. DR also referred to the decision of the Hon'ble Supreme Court in the case of **CIT v. M/s. Mansukh Dyeing and Printing Mills in Civil Appeal No. 8258 of 2022** and submitted that erstwhile partnership firm/partners would have been responsible for paying tax for the increase in their capital account on account of revaluation of the assets however, the assessee has conveniently twisted the facts and only made the revaluation in the year subsequent to conversion in the firm into the assessee company.

9.5 On contrary, the Ld. Counsel for the assessee relied on the finding of the Ld. CIT(A) and submitted that in view of the decision relied upon by the Ld. CIT(A), no disallowance of the depreciation is warranted in the case of the assessee on the revaluation of the asset.

9.6 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. On perusal of the facts it is evident that assessee has received the assets and liability in its books of accounts on the value which was recorded in the books of accounts of the erstwhile partnership firm which has



got converted into the assessee company. This conversion happened on 01.09.2010, whereas, the assessee has revalued the assets of the erstwhile partnership firm received only on the first day of the next assessment year i.e. 01.04.2011. Thus, it is evident the erstwhile partners have been compensated only at the book value of the assets and liability. In such circumstances, we do not find any justifiable reasons for revaluing the assets of the erstwhile partnership firm that too in the subsequent assessment years on the basis of a valuation report from a registered valuer. We find in the Ground No. 1 we have held that the Ld. CIT(A) was supposed to refer to the matter to the Departmental Valuation Officer for valuation of the assets. Since the revaluation of the assets of the erstwhile partnership firm has also not been determined by Departmental valuation officer and therefore, following our finding in ground No. 1, we feel it appropriate to restore this issue back to the file of the Ld. Assessing Officer for taking appropriate action for referring the matter to the Departmental Valuation Officer and decide the issue in dispute in accordance with law. The ground No. 2 of the appeal of the Revenue is accordingly allowed for statistical purposes.

AY 2012-13

10. The grounds raised by the Revenue in its appeal for assessment year 2012-13 are reproduced as under:



1. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of depreciation of Rs. 5,92,23.694/- relying on the decision of the Hon'ble Gujarat High Court without appreciating that the AO had adequately refuted the working of the value of the business rights and goodwill by the registered valuer and the relied upon case in therefore distinguishable?*
2. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of the depreciation of Rs. 69,45,718/- made relying on the decision of the Hon'ble Kerala High Court in the case of CIT vs. Poulouse and Mathern (Put.) Ltd. without appreciating the facts in the said case is squarely applicable to the assessee's case without explicitly pointing out how the decision of Padmini Products Put Ltd v/s DCIT 277 taxmen 22 Karnataka 2020 is more close to the facts of the case, when the facts of application of Explanation 3 to s.43(1) was decided on different ground of non-approval by the Joint CIT when the impugned assessment order was passed by the JCIT itself?*
3. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting and disallow of Rs. 1,80,167/- made u/s. 14A r.W.s. Rule 8D, ignoring the facts that the amendment made by Finance Act 2022 inserting Explanation was only clarificatory and hence retrospective in effect?*

11. We have heard rival submission of the parties on the issue in dispute. The ground Nos. one and two of the appeal are related to depreciation on business rights and goodwill and revalued assets respectively. In the year under consideration the assessee has claimed depreciation on the same assets, which was claimed in assessment year 2011-12, and therefore following or finding an assessment year 2011-12, the ground Nos. 1(one) and 2(two) of the appeal for assessment year 2012-13 are decided mutasis mutandis.

12. The ground no.3 is in respect of disallowance of ₹1,80,167/- made by the Assessing Officer under section 14A of the Act, which has been deleted by the Ld. CIT(A) for the reason that assessee had



not earned any exempt income during the year under consideration.
The relevant finding of the Ld. CIT(A) is reproduced as under:

“ I have considered the submissions and contentions of the appellant. The Hon'ble Bombay High Court in the case of PCIT Vs. Ballarpur Industries Ltd. (ITA no.51 of 2016) held that in the absence of any exempt income, disallowance u/s 14A of the Act could not be made.

Although the explanation of sec. 14A inserted by the Finance Act, 2022 can be treated to be clarificatory in nature, the Hon'ble Delhi High Court in the case of M/s. Era Infrastructure (India) Ltd. In ITA No.204/2022 & CM APPL.31445/2022 dated 20.07.2022 has held that the provisions cannot be treated to be retrospective. Hence, the claim of the appellant that disallowance u/s 14A cannot exceed the exempt income is backed by judicial precedence and binding in nature.

Therefore, respectfully following the decisions of the Hon'ble High Courts referred above, the disallowance stands deleted and the Ground is allowed.”

12.1 We find that Ld. CIT(A) has followed decision of the Hon'ble Delhi High Court in the case of **Era Infrastructure (India) Ltd (supra)** wherein the amendment to section 14A of the Act by way of Finance Act, 2022 has been held to be prospective. As the Ld. CIT(A) has followed a precedent on the issue in dispute, we do not find any infirmity in the order of the Ld. CIT(A) and accordingly ,we uphold the same. The ground No.3 of the appeal of the Revenue accordingly dismissed.

AY 2013-14 & 2014-15

13. The grounds raised by the Revenue in its appeal for assessment year 2013-14 and 2014-15 are reproduced as under:

Grounds for assessment year 2013-14



1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of depreciation of Rs. 4,44,17,770/- relying on the decision of the Hon'ble Gujarat High Court without appreciating that the AO had adequately refuted the working of the value of the business rights and goodwill by the registered valuer and the relied upon case in therefore distinguishable?
2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of the depreciation of Rs. 60,84,748/- made relying on the decision of the Hon'ble Kerala High Court in the case of CIT us. Poulouse and Mathern (Put.) Ltd. without appreciating the facts in the said case is squarely applicable to the assessee's case without explicitly pointing out how the decision of Padmini Products Put Ltd v/s DCIT 277 taxmen 22 Karnataka 2020 is more close to the facts of the case, when the facts of application of Explanation 3 to s. 43(1) was decided on different ground of non-approval by the Joint CIT when the impugned assessment order was passed by the JCIT itself?
3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting and disallow of Rs. 4,67,065/- made u/s. 14A r.w.s. Rule 8D, ignoring the facts that the amendment made by Finance Act 2022 inserting Explanation was only clarificatory and hence retrospective in effect?

Grounds for assessment year 2014-15

1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of depreciation of Rs. 3,33,13,328/- relying on the decision of the Hon'ble Gujarat High Court without appreciating that the AO had adequately refuted the working of the value of the business rights and goodwill by the registered valuer and the relied upon case in therefore distinguishable?
2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of the depreciation of Rs. 53,35,154/- made relying on the decision of the Hon'ble Kerala High Court in the case of CIT us. Poulouse and Mathern (Put.) Ltd. without appreciating the facts in the said case is squarely applicable to the assessee's case without explicitly pointing out how the decision of Padmini Products Put Ltd v/s DCIT 277 taxmen 22 Karnataka 2020 is more close to the facts of the case, when the facts of application of Explanation 3 to s.43(1) was decided on different ground of non-approval by the Joint CIT when the impugned assessment order was passed by the JCIT itself?
3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting and disallow of Rs. 10,91,530/- made u/s. 14A r.w.s. Rule 8D, ignoring the facts that



the amendment made by Finance Act 2022 inserting Explanation was only clarificatory and hence retrospectives in effect?

14. As the grounds raised in the present appeals for assessment years 2013-14 and 2014-15 are identical to appeal for assessment year 2012-13, and therefore following the same, the grounds for assessment years 2013-14 and 2014-15 are decided mutasis mutandis.

AY 2015-16

15. The grounds raised by the Revenue in its appeal and cross objection raised by the assessee for assessment year 2015-16 are reproduced as under:

Grounds raised by the Revenue :

Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in reducing the addition to 10% on the basis of presumptions bereft of any factual base?

Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in reducing the addition to 10% of the total addition ignoring that the assessee made contradicting statements about its transaction which has not at all supported by any cogent documentary evidences?

Whether on the facts and in the circumstances of the case and in law, the La. CIT(A) erred in allowing substantial relief to the assessee while at the same. time agreeing with the findings of the AO recorded in the assessment order, thus, taking a contradictory stand?

Cross-objections raised by the assessee:

- 1. The Learned AO erred in making addition us 68 of alleged bogus purchases without considering that the provisions of Section 68 deals with Cash credits found in the books of accounts of Assessee whereas the additions are on account of payment for*



2. 2 CONT.purchases which has been alleged to be bogus by the Learned A.O. and hence the addition is illegal. invalid. bad in law and therefore the Appellant Company prays that the said addition u/s.6% may please be deleted.

Additional ground raised in the cross-objection raised by the assessee:

The Learned AO erred in making addition u/s 68 of alleged bogus purchases without considering that the provisions of Section 68 deals with Cash credits found in the books of accounts of Assessee whereas the additions are on account of payment for purchases which has been alleged to be bogus by the Learned A.O. and hence the addition is illegal, invalid, bad in law and therefore the Appellant Company prays that the said addition u/s.68 may please be deleted.

16. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The issue in dispute is in respect of addition of ₹6,07,44,602/- made by the Assessing Officer under section 68 of the Act. The Assessing Officer received information from another officer of the Income-tax department that assessee received accommodation entries from Sh Ashok Kumar Gupta in form of sales to M/s Path International , which was a proprietary concern of sh Anuj Kumar Gupta s/o Sh Ashik Kumar Gupta. During the course of the survey action on Shri Ashik Kumar Gupta, he admitted of having engaged in providing accommodation entries of purchase and sales to various parties. During the course of the assessment proceedings, the Assessing Officer called for relevant sale bill. The assessee had provided copies of bills to prove the sales were carried on by it. The Assessing Officer observed that the bills were incomplete with no description



of grade of goods, per unit rate, quantity supplied, registration details of transport vehicle used, no details of VAT paid / payable etc. Accordingly the Assessing Officer asked the assessee as why the sales credited of ₹6,07,44,602/- against M/s Path International might not be treated as unexplained cash credit under section 68 of the Act. The assessee filed a long list of case laws relied upon by him but the Assessing Officer rejected the same as distinguishable and not having any direct relevance to the facts of the case in hand. The Assessing Officer further observed that the assessee failed to provide details called for and not able to explain his activity by linking his sales with the purchases. The Assessing Officer noted that the assessee failed to furnish evidence in support of import of the goods viz custom house receipt, clearing receipt, transport bill and even failed to furnish purchase/import bills corresponding to sale of goods. In view of the observation, the learned Assessing Officer rejected the contention of the assessee and held the sales credited as unexplained cash credit in terms of section 68 of the Act. On further appeal, the Ld. CIT(A) rejected the contention of the assessee. **Firstly**, the assessee contended that statement recorded under survey of sh Ashok Kumar Gupta, had no evidentiary value in view of the decision of the Hon'ble Supreme Court in the case of Cit Vs S Khader Khan, 352 ITR 480. But the Ld. CIT(A) held that statement was not the sole or primary basis for addition and it was merely a starting point for making addition. **Secondly**, the assessee



contended that transaction had taken place through bank account so it should be allowed. The Ld. CIT(A) however held that merely because the payment was made by cheque, it could not be held as a genuine transaction in view of the decision in the case of (i) CIT Vs Sarvana construction p Ltd 208 Taxman 188(Mag) (ii) CIT Vs Mohankala 161 Taxman 169 (291 ITR 278) and (iii) CIT vs Precisions Finance p Ltd 208 ITR 465. **Thirdly**, the Ld. CIT(A) also distinguished the reliance placed by the assessee on the decision of the Hon'ble Bombay High Court in the case of CIT vs Nikunj Eximp Enterprises Private Limited 35 taxmann.com 384(Bombay). **Fourthly**, the ld CIT(A) also rejected the contention of the assessee for not giving opportunity to cross examine sh Ashok Kumar Gupta. However in his final finding, the Ld. CIT(A) held that procedures were not genuine and therefore he sustained addition to the extent of 10% of the bogus purchases amounting to ₹60,74,460/- only. The relevant finding of the Ld. CIT(A) is reproduced as under:

“16. In view of the detailed discussion above and considering that the evidences of actual delivery of goods has not been demonstrated either before the AO or before the undersigned, and I have no hesitation holding that the purchases are not genuine. This part of the appellant's contentions are rejected.

17. At the same time, it is seen that the appellant has claimed that the material purchased has been consumed. Thus the reasonable conclusion can be drawn that purchases have been made from market in cash at the lower prices and used in its business. The question arises as to what can be the reasonable basis for computing such disallowance. In this respect, I find significant support from the decision of Hon'ble HIGH COURT OF BOMBAY in the case of Principal Commissioner of Income-tax v. Jagdish Thakkar [2022] 145 taxmann.com 414 (Bombay) wherein it was held as under; "In the case at hand, the Assessee statedly had made purchases from the three parties totalling to amount of Rs. 3,



15,72,840/- in respect of which it has been found by both the CIT(A) as well as the Tribunal that the sales in question have not been doubted, that the payments have been made by the Assessee through banking channels and that the Assessing Officer has also accepted the book results shown by the Assessee. It is also finding of fact that the Assessee has produced before the Assessing Officer delivery challans, purchase bills as well as evidence of payments through banking channels. As such, the Assessee has discharged the initial burden or onus of providing the details of the parties; and it was incumbent on the Assessing Officer to rebut the evidence produced by the Assessee. We do not find anything on record controverting the findings of fact of the CIT(A) as well as the Tribunal. Despite uncontroverted findings of fact and keeping in mind that the Assessing Officer had issued 133(6) notices to the three suppliers of goods and the parties had not attended and even though the Assessing Officer did not take any further steps for investigation, in all fairness, the CIT(A) as well as the Tribunal had upheld the dis-allowance in respect of the purchases for the year under consideration to the extent of 10% of such purchases against which admittedly no appeal has been filed by the Assessee."

18. In the case of *PCIT vs Pinaki D Panani*, ITA no.1543 of 2017 dated 08.01.2020, the Hon'ble Bombay HC held as follows:

"Assuming that the Respondent-Assessee the purchasers from whom the purchases were made were bogus, in view of the finding of fact that the material was consumed, the question would be of extending the percentage of net profit on total turnover. This would be a matter of calculations by the concerned authority. In this context, if the Commissioner of Income Tax (Appeals) and the Tribunal chose to follow the percentage arrived by the Settlement Commission in the Respondent-Assessee's own case for the other years, this exercise cannot be considered as irregular or illegal."

19. In view of the above judicial precedents, factual aspects of the case, I hold that the addition of 10% of the bogus purchases of Rs.6,07,44,602/- would suffice as against the entire disallowance of Rs.6,07,44,602/- made by the AO. Thus the net addition sustained in this case on this ground is 10% of Rs.6,07,44,602/- i.e. Rs.60,74,460/-. Therefore, this ground stands partly allowed."

17. Before us the learned counsel for the assessee submitted that no addition could have been made for bogus purchases under section 68 of the Act, whereas the learned departmental representative contested that Assessing Officer has made addition



for the sales credit under section 68 of the Act and it is the Ld. CIT(A) who has restricted the addition to the 10% of the sales amount holding the same as the bogus purchases. He submitted that the Revenue is in appeal against the finding of the Ld. CIT(A).

17.1 In back ground of the above facts and circumstances, we are of the opinion that Assessing Officer has correctly made the addition under section 68 of the Act for entry of the sales credit in the books of accounts of the assessee due bogus sales made by the assessee to M/s Parth International. In order to justify non-genuineness of the sales, the Assessing Officer asked the assessee to substantiate the corresponding purchases but the assessee failed. The Ld. CIT(A) has the accepted that purchases corresponding to the sales are not substantiated by the assessee, however he restricted the addition to the extent of the 10% of the sales credited. In our opinion finding of the Ld. CIT(A) on the issue in dispute is without appreciation of the facts properly. Accordingly, we set aside the same. As the assessee has failed to demonstrate purchase corresponding to the sales credited in its books of accounts, the Assessing Officer is justified in making the addition under section 68 of the Act. The grounds of the Revenue are accordingly allowed whereas cross objection of the assessee is dismissed.



18. We note that in AY 2015-16, revenue has not raised any ground challenging issue of depreciation of business rights/ goodwill and revalued assets.

AY 2016-17, 2017-18 and 2018-19

19. The grounds raised by the Revenue in its appeal for assessment of 2016-17, 2017-18 and 2018-10=9 are reproduced as under:

Grounds for assessment of 2016-17:

- 1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of depreciation of Rs. 1,87,38,748/-relying on the decision of the Hon'ble Gujarat High Court without appreciating that he AO had adequately refuted the working of the value of the business rights and goodwill by the registered valuer and the relied upon case in therefore distinguishable?*
- 2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of the depreciation of Rs. 41,11,831/-made relying on the decision of the Hon'ble Kerala High Court in the case of CIT vs. Poulouse and Mathern (Put.) Ltd. without appreciating the facts in the said case is squarely applicable to the assessee's case without explicitly pointing out how the decision of Padmini Products Put Ltd v/s DCIT 277 taxmen 22 Karnataka 2020 is more close to the facts of the case, when the facts of application of Explanation 3 to s.43(1) was decided on different ground of non-approval by the Joint CIT when the impugned assessment order was passed by the JCIT itself?*
- 3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting and disallow of Rs. 3,51,487/-made u/s. 14A r.w.s. Rule 8D, ignoring the facts that the amendment made by Finance Act 2022 inserting Explanation was only clarificatory and hence retrospective in effect?*

Grounds for assessment of 2017-18:

- 1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of depreciation of Rs. 1,40,54,061/-relying on the decision of the Hon'ble Gujarat High*



Court without appreciating that the AO had adequately refuted the working of the value of the business rights and goodwill by the registered valuer and the relied upon case in therefore distinguishable?

2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of the depreciation of Rs. 36, 14,139/- made relying on the decision of the Hon'ble Kerala High Court in the case of CIT us. Poulose and Mathern (Put.) Ltd. without appreciating the facts in the said case is squarely applicable to the assessee's case without explicitly pointing out how the decision of Padmini Products Put Ltd v/s DCIT 277 taxmen 22 Karnataka 2020 is more close to the facts of the case, when the facts of application of Explanation 3 to s.43(1) was decided on different ground of non-approval by the Joint CIT when the impugned assessment order was passed by the JCIT itself?

Grounds for assessment of 2018-19:

- 1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of depreciation of Rs. 1,05,40,545/- relying on the decision of the Hon'ble Gujarat High Court without appreciating that the AO had adequately refuted the working of the value of the business rights and goodwill by the registered valuer and the relied upon case in therefore distinguishable?*
- 2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of the depreciation of Rs. 31,79,200/- made relying on the decision of the Hon'ble Kerala High Court in the case of CIT us. Poulose and Mathern (Put.) Ltd. without appreciating the facts in the said case is squarely applicable to the assessee's case without explicitly pointing out how the decision of Padmini Products Put Ltd v/s DCIT 277 taxmen 22 Karnataka 2020 is more close to the facts of the case, when the facts of application of Explanation 3 to s.43(1) was decided on different ground of non-approval by the Joint CIT when the impugned assessment order was passed by the JCIT itself?*
- 3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting and disallow of Rs. 31,43,300/- made u/s. 14A r.w.s. Rule 8D, ignoring the facts that the amendment made by Finance Act 2022 inserting Explanation was only clarificatory and hence retrospective in effect?*

20. We find that the grounds raised in the present appeals for assessment years 2016-17 to 2018-19 are identical to grounds raised in assessment year 2012-13, therefore same are undecided mutatis mutandis.



21. In the result, the appeal of the revenue for assessment year 2015-16 stand allowed ; appeals for AY 2011-12 and 2017-18 are allowed for statistical purposes ; appeal of Revenue for remaining assessment years are allowed partly for statistical purposes, whereas cross objection of the assessee for AY 2015-16 is dismissed.

Order pronounced in the open Court on 29/11/2023.

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;
Dated: 29/11/2023
Dragon Legal/Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai