

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'A' BENCH,
NEW DELHI**

**BEFORE SHRI SAKTIJIT DEY, VICE PRESIDENT, AND
SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER**

ITA No. 2058/DEL/2022 [A.Y. 2016-17]

ITA No. 2059/DEL/2022 [A.Y. 2017-18]

Bestech India Pvt Ltd
Unit No. 5D, JW Marriot Hotel
5th Floor, Aria Signature Offices
Delhi Aerocity Hospitality
District Assets Area - 4, New Delhi

Vs.

The Dy. C.I.T.,
Central Circle 1
Faridabad

PAN - AABCB 6551 B

(Applicant)

(Respondent)

Assessee By : Shri R.S. Ahuja, CA
Shri Pushpdeep Singh, Adv

Department By : Shri Kanv Bali, Sr. DR

Date of Hearing : 21.12.2023

Date of Pronouncement : .12.2023

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

The above captioned two separate appeals by two different assesseees are preferred against two separate orders of the ld. CIT(A) - 3, Gurgaon dated 26.06.22 and 30.06.2022 pertaining to A.Y. 2016-17 and 2017-18.

2. Since common grievances are involved in both the appeals, they were heard together and are disposed of by this common order for the sake of convenience and brevity.

ITA No. 2058/DEL/2022

3. First grievance is in respect of disallowance made u/s 14A of the Income-tax Act, 1961 [the Act, for short] r.w.r 8D of the ITAT Rules.

4. During the course of scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has shown non-current investment of Rs. 15.64 crores. The assessee was asked to explain why disallowance should not be made u/s 14A of the Act r.w.r. 8D of the Rules.

5. In its reply, the assessee stated that it has not incurred any expenditure since it has not earned any exempt income.

6. Explanation of the assessee was dismissed by the Assessing Officer who was of the firm belief that disallowance u/s 14A r.w.r 8D is mandatory in light of CBDT Circular No. 5/2014 dated 11.02.2014. Accordingly, the Assessing Officer made addition of Rs. 30,35,223/-.

7. The assessee carried the matter before the Id. CIT(A) but without any success.

8. Proceeding further, the Assessing Officer has also made disallowance of depreciation claimed on goodwill amounting to Rs. 47,85,205/- on the ground that depreciation u/s 32(1) of the Act on good will is not allowable.

9. This was also challenged before the Id. CIT(A) but without any success.

10. Before us, the Id. counsel for the assessee vehemently stated that since no exempt income was earned, there was no question of any disallowance u/s 14A of the Act r.w.r 8D.

9. In so far as the claim of depreciation on good will is concerned, it is the say of the Id. counsel for the assessee that the same is covered in favour of the assessee and against the Revenue by the decision of the Hon'ble Supreme Court in the case of Smifs Securities Limited 13 SCC 488.

10. The Id. DR, on the other hand, strongly supported the findings of the Assessing Officer and in so far as disallowance u/s 14A is concerned, strong reliance was placed on the CBDT Circular.

11. We have carefully considered the orders of the authorities below. It is an undisputed fact that during the year under consideration, the assessee has earned NIL exempt income. Therefore, no disallowance can be made u/s 14A r.w.r of the Act 8D of the Rules as held by the Special Bench of ITAT in the case of Cheminvest Ltd 121 ITD 318 affirmed by the Hon'ble High Court of Delhi and Kotak Energy 372 ITR 97.

12. In so far as applicability of CBDT Circular is concerned, its application has been held to be prospective by the Hon'ble Delhi High

Court in the case of M/s Era Infrastructure [India] Ltd ITA 204/2022 wherein the Hon'ble High Court held that:

“The court is of the view that the amendment of section 14A, which is for “removal of doubts” cannot be presumed to be retrospective even where such language is used, it is alters or changes the law as it earlier stood”.

13. In so far as claim of depreciation on goodwill is concerned, facts on record show that the assessee had entered into the Scheme of Amalgamation which came to be sanctioned by the Hon'ble High Court of Delhi vide its order dated 29.03.2016 and the difference between the amount recorded as share capital of transferee company issued and the amount of assets and liabilities of transferor companies taken over by the transferee company has been accounted for as below:

Goodwill arising from merger of Parkview Apartments Pvt. Ltd.	Rs. 1,44,033/-
Goodwill arising from merger of Parkview Apartments Pvt. Ltd.	Rs. 25,38,000/-
Goodwill arising from merger of Parkview Buildhome Pvt. Ltd.	Rs. 64,24,080/-
Goodwill arising from merger of Solid Build well Pvt. Ltd.	Rs. 86,001/-
Capital Reserve arising from merger of Night angle Properties Pvt. Ltd.	Rs. 48,50,960/-
Goodwill arising from merger Babylon Builders Pvt. Ltd.	Rs. 2,13,93,549/-

Capital Reserve arising from merger of Bestech Estate Developers Pvt. Ltd.	Rs. 2,52,620/-
Goodwill arising from merger of Navyug Infrastrucutre Pvt. Ltd.	Rs. 2,11,010/-
Net Goodwill arising from merger is amortized over a period of five years	Rs. 2,55,21,092/-

14. Depreciation was claimed on net good will arising from merger. On identical facts, the Hon'ble High Court of Delhi in the case of Eltek SGS Pvt Ltd 475-476/2022 has held as under:

"3. The Assessment Officer had added a sum of Rs.6,17,30,352/- on account of disallowance of depreciation on goodwill that was created as a result of amalgamation. Aggrieved by the aforesaid, the respondent had preferred an appeal before the CIT (Appeals). The CIT (Appeals) found that since goodwill had come to be created by virtue of the merger in terms of the Scheme approved by the Court, depreciation on goodwill to the extent of Rs. 6,17,30,352/- was correctly claimed by the assessee. It was this decision of the CIT (Appeals) which was assailed by the appellants.

4. The ITAT while dealing with the aforesaid challenge has held as follows: -

"5. As per the scheme of amalgamation, where value of liabilities and amount of equity capital allotted /payment to the equity shareholders exceeds the value of assets of the transferor company taken over, such excess shall debited

to the goodwill account. Accordingly, the assessee claimed on depreciation on goodwill which claim was denied by the AO.

6. Assessee assailed the addition before the CIT(A) and reiterated its claim of depreciation strongly contended that the goodwill has enumerated from the decision of the Hon'ble High Court and not out of accounting principles. It was brought to the notice of the CIT(A) that goodwill being a non tangible assets is eligible for depreciation u/s. 32 of the Act."

5. It ultimately proceeded to negate the challenge as raised resting its decision on the judgment of the Supreme Court in Commissioner of Income Tax, Kolkata vs. Smifs Securities Limited, the principal question which stood raised was whether goodwill is an asset within the meaning of Section 32 of the Income Tax Act, 1961 and whether depreciation is allowable on the same. While answering that question, the Supreme Court in Smifs held as follows: -

"8. We quote hereinbelow Explanation 3 to Section 32(1) of the Act:

"Explanation 3.—For the purposes of this sub-section, the expressions „assets" and „block of assets" shall mean—

(a) tangible assets, being buildings, machinery, plant or furniture;

(b) intangible assets, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial

rights of similar nature." Explanation 3 states that the expression "asset" shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature. A reading of the words "any other business or commercial rights of similar nature" in clause (b) of Explanation 3 indicates that goodwill would fall under the expression "any other business or commercial right of a similar nature". The principle of *ejusdem generis* would strictly apply while interpreting the said expression which finds place in Explanation 3(b).

9. In the circumstances, we are of the view that "goodwill" is an asset under Explanation 3(b) to Section 32(1) of the Act.

10. One more aspect needs to be highlighted. In the present case, the assessing officer, as a matter of fact, came to the conclusion that no amount was actually paid on account of goodwill. This is a factual finding. The Commissioner of Income Tax (Appeals) ["CIT (A)", for short] has come to the conclusion that the authorized representatives had filed copies of the orders of the High Court ordering amalgamation of the above two companies; that the assets and liabilities of M/s YSN Shares and Securities (P) Ltd. Were transferred to the assessee for a consideration; that the difference between the cost of an asset and the amount paid constituted goodwill and that the assessee Company in the process of amalgamation had acquired a capital right in the form of goodwill because of which the market worth of the assessee Company stood

increased. This finding has also been upheld by the Income Tax Appellate Tribunal ("ITAT", for short). We see no reason to interfere with the factual finding."

6. As is manifest from the aforesaid judgment, it was categorically held that goodwill is an intangible asset which would clearly fall within the ambit of Explanation 3 to Section 32(1) of the Act. It was in the aforesaid backdrop that it ultimately upheld the depreciation claimed in terms of Section 32.

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The judgment rendered by the Supreme Court in Smifs clearly recognizes goodwill to be an intangible asset and on which depreciation can clearly be claimed in terms of Section 32(1) of the Act.

9. Accordingly and for all the aforesaid reasons, we find no merit in the instant appeals. They shall consequently stand dismissed."

15. In light of the above, the Assessing Officer is directed to delete both the disallowances.

16. Appeal of the assessee is, accordingly, allowed.

ITA No. 2059/DEL/2022

17. Ground No. 2 is in respect of disallowance made u/s14A r.w.r 8D of the Rules amounting to Rs. 24,56,697/-.

18. Facts are identical to the facts considered by us hereinabove in ITA No. 2058/DEL/2022 [supra] qua Ground No. 1 of that appeal. For our detailed discussion therein, addition is directed to be deleted.

19. First ground is in relation to addition of Rs. 66,29,964/- made u/s 36(1)(iii) of the Act.

20. Briefly stated, the facts of the case are that during the course of scrutiny assessment proceedings, the Assessing Officer noticed that the assessee company has paid advance for purchase of property to the tune of Rs. 60,69,68,000/-, which majorly consists of collaboration security and advances for purchase of property given by the assessee in the normal course of its real estate business.

21. The Assessing Officer was of the firm belief that such advances are liable for proportionate disallowance of interest expenses and disallowed Rs. 6,06,96,800/-.

22. The assessee challenged the addition before the ld. CIT(A) and after considering the facts and submissions, the ld. CIT(A) restricted the disallowance to Rs. 10,73,50,000/-.

23. Before us, the ld. counsel for the assessee vehemently stated that advances were given for business purposes in normal course of real estate business. It is the say of the ld. counsel for the assessee that total interest free funds available with the assessee is the tune of Rs. 11,63,25,31,471/-. Therefore, it can be safely said that the advances have been given out of interest free funds.

24. Per contra, the ld. DR strongly supported the findings of the Assessing Officer.

25. We have given thoughtful consideration to the orders of the authorities below. The only reason given by the ld. CIT(A) for restricting the disallowance to Rs. 10,73,50,000/- is that interest has been paid to parties for the purpose of collaboration and the said amounts were paid out of over draft account drawn from the bank. This reasoning of the ld. CIT(A) is not acceptable when considered in light of funds available with the assessee which are as under:

Share Capital	Note 2	65,78,81,510/-
Reserves & Surplus	Note 3	3,11,38,00,053/-
Total Owned funds (A)		3,77,16,81,563/-
Interest free loans from its Directors	Note 4	47,18,23,133/-
Interest free advances from Customers	Note 8	7,38,90,26,775/-
Total Interest free funds (B)		7,86,08,49,908/-
Total Interest free funds available (A+B)		11,63,25,31,471/-

26. On the above facts, the ratio laid down by the Hon'ble Supreme Court in the case of Reliance Industries Ltd 410 ITR 466 squarely applies wherein the Hon'ble court has held that:

“Where there is finding of fact that interest free funds are available to the assessee were sufficient to meet its investment, it will be presumed that investments were made from such interest free funds.”

27. In light of the above, the Assessing Officer is directed to delete the impugned addition.

28. In the result, the appeals of the assessee in ITA Nos. 2058/DEL/2022 and 2059/DEL/2022 are allowed.

The order is pronounced in the open court on 27.12.2023.

Sd/-

[SAKTIJIT DEY]
VICE PRESIDENT

Sd/-

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated: 27th DECEMBER, 2023

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
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