आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,
'' B'' BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER

आयकर अपील सं**./ITA No. 432/AHD/2022**

निर्धारण वर्ष/Asstt. Year: 2016-2017

Sara Suppliers Private Limited, 6, Patel Avenue, Near Gurudwara S.G Highway, Ahmedabad-380054. **PAN: AASCS1052K**	Vs.	The Asst. Commissioner of Income Tax, Circle-4(1)(1), Ahmedabad.
(Applicant)		(Respondent)

Assessee by	:	Shri Tushar Hemani, Sr. Advocate with Shri Parimalsinh B. Parmar, A.R
Revenue by	:	Shri Sudhendu Das, CIT.D.R

सुनवाई की तारीख**/Date of Hearing : 11/01/2024**
घोषणा की तारीख **/Date of Pronouncement: 21/02/2024**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax (Appeals), Ahmedabad, arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2016-2017.

2. The assessee has raised the following grounds of appeal:

1. The Ld.CIT(A), has erred in law by agreeing with the Ld.AO's order in disallowing depreciation under section 32(1) of the Act on goodwill recognised pursuant to amalgamation sanctioned by Hon'ble High Court of Gujarat and also in rejecting precedents including that of Hon'ble Supreme Court, Jurisdictional Gujarat High Court and Jurisdictional ITAT, wherein it has been held that goodwill is a depreciation asset under Explanation 3(b) to section 32(1) of the Act. It is therefore prayed that depreciation on goodwill may kindly be granted.

2. The Ld.CIT(A), has erred in facts and circumstances of the case and in law, the ld.AO has erred in passing the assessment order in the name of Sara Suppliers Private Limited (SSPL) which was a non-existent entity as on the date of passing the Appellant's reliance on various judicial precedents including that of Hon'ble Supreme Court, Jurisdictional Gujarat High Court and Jurisdictional ITAT. Assessment Order passed by the Ld.AO as well as Appellate Order passed by CIT(A) of non-existing entity is bad in law and liable to be quashed.

3. Your appellant craves liberty to add, to alter, modify, to amend or to withdraw/delete any of the grounds of appeal at any time, on or before the hearing of appeal.

3. The first issue raised by the assessee is that the learned CIT(A) erred in confirming the disallowance of depreciation on goodwill created in the scheme of amalgamation.

4. The necessary facts are that the assessee, a private limited company, is engaged in the business of manufacturing Decorative Lamination Sheet and Power Generation through windmill. One company namely, M/s Olympic Lamination Pvt Ltd (here after M/s OLPL) merged with the assessee company with effect from 1st April 2015 in a scheme of amalgamation approved by the Hon'ble High Court of Gujarat vide order dated 29-01-2016. Subsequently, the assessee company converted into limited liability partnership with effect from 16-03-2016. On the date of amalgamation, the book value of the net assts (assets - liabilities) of the amalgamating company i.e. M/s OLPL stood at Rs. 56,49,86,034/- only. The entire assets and liabilities of the amalgamating company were transferred to the assessee company at their book value. Further, the amalgamating company M/s OLPL had total issued share capital at 16.5 lakh shares, which was valued at Rs. 1500 per share for the purpose of amalgamation and shares of assessee company valued at Rs. 100 per share. Thus, the purchase consideration was decided at 15 share of assessee company for 1 share of the amalgamating company i.e. M/s OLPL. Accordingly, the assessee company issued 2,47,50,000 equity shares to the

shareholders of the amalgamated company at Rs. 100 per share (premium of Rs. 90/share). In other words, the assessee company paid purchase consideration of Rs. 247.5 crores. Consequently, the assessee company paid purchase consideration more than net assets acquired by Rs. 191,00,13,965/- (247,50,00,000 minus 56,49,86,034/-) and treated the excess amount as goodwill. The assessee in return of income filed for the year under consideration claimed depreciation @ 25% for Rs. 47,75,03,492/- on goodwill created in the scheme of amalgamation.

4.1 The assessee during the assessment proceeding submitted that the depreciation on goodwill was claimed in view of the judgment of Hon'ble Supreme Court in the case of Smifs Securities Ltd reported in 348 ITR 302. The assessee further submitted that the accounting standard 14 also recognizes the amount paid in excess to net assets transferred as goodwill and permits to amortize the same over the period. The assessee with regard to provision of proviso 6 to section 32(1) of the Act submitted that the same are applicable in case where amalgamation takes place between the year and where both the amalgamating and successor company claim deprecation for part of the year in part. Likewise, the provisions of explanation 7 to section 43(1) and explanation 6 to section 43(6) of the Act regarding the actual cost and written down value of the assets acquired in the scheme of amalgamation are also not applicable in the present facts as the goodwill on which depreciation claimed is not an asset transferred from the amalgamating company to amalgamated company. As such, the impugned goodwill arises in its books as per the scheme of amalgamation duly approved by the Hon'ble High Court. Therefore, the claim of depreciation by it is justifiable and needs to be allowed as depreciation on intangible assets.

4.2 The AO disagreed with the contention of the assessee. As per the AO, the scheme of amalgamation duly approved by the Hon'ble High Court is not in dispute, but such approval does not give right to claim deduction or allowance in

the return of income filed under the Act which is otherwise not allowable under the provision of this Act. The AO also found that the facts of the case of Smifs Securities Ltd (supra) are distinguishable from the facts of the present case. As such, in the case of Smifs Securities Ltd (supra) the question before the Hon'ble Supreme Court was limited to whether the goodwill is an intangible asset eligible for depreciation under the provision of section 32(1) of the Act or not. In the case of Smifs Securities Ltd (supra), two independent entities were merged whereas in the case of the present assessee both the company i.e. the amalgamated and the amalgamating have same shareholders and directors/ keyperson. As such, two companies of the same group company merged with a view to synergies the group resources.

4.3 The amalgamated company, (the assessee company) and the amalgamating company i.e. M/s OLPL was not having any business activity since the last 2 financial years. In the books of amalgamating company, the majority assets were in the form of land and building which have no capacity to synergize the business of the group companies in future.

4.4 The scheme of amalgamation was designed in such a way which produces premium and goodwill without the involvement of cash flow. Furthermore, there were certain inconsistency/contradiction in the valuation report prepared by SSPA & Co. Chartered Accountant in the determination of fair value of shares of M/s OLPL which suggest that the valuation report was made at the whims of management which is common in order to create goodwill in the books of the assessee. As such, the amalgamation scheme was nothing but a colorable device.

4.5 Subsequent to the amalgamation, the assessee company i.e. amalgamated company was converted into limited liability partnership (LLP) with effect from 16-03-2016. Accordingly, the shareholders become the partners in the LLP in whose

accounts huge partner's capital amount was credited in the books of accounts of LLP in place of share capital and premium without involving any cash flow.

4.6 There was no goodwill either in the books of the assessee company or in the books of M/s OLPL. As such, whatever goodwill arose, in the scheme of the amalgamation, was based on revaluation of shares of M/s OLPL and consideration was also paid in the form of fresh share capital, hence no cost was incurred by the assessee for such goodwill. Therefore, the assessee was not entitled for depreciation on the impugned goodwill in pursuance of the provisions of section 32 of the Act. Further, proviso 6 to section 32(1) of the Act restricts depreciation on amalgamated assets to the extent it was available to the amalgamating company. Similarly, the provision of explanation 7 to section 43(1) and explanation 2(b) to section 43(6)(c) of the Act mandate that actual cost and WDV of assets transferred in the scheme of amalgamation should be equal to what was in the books of amalgamating company. Similarly, the provisions of section 55(2)(a)(iii) of the Act provide that the value of an asset which has been acquired without incurring any cost should be taken at NIL. Thus, there would not be any possibility of allowing the deduction for the depreciation on the assets resulting on account of revaluation of assets.

4.7 The AO Further observed that as per AS-14, there are two methods of accounting namely pooling of interest method and purchase method which are applied for recording the transaction arising in the scheme of amalgamation of companies. In case the condition, in a scheme of amalgamation prescribed under para 3(e) of AS 14 are fulfilled, then pooling of interest method of accounting should be applicable. Under the pooling of interest method any difference between purchase consideration and book value of assets & liabilities should be recognized as an amalgamation reserve. As such no concept of goodwill is available in this method of accounting. On the contrary, in the event if any of the condition prescribed under para 3(e) is not fulfilled, in such case, the assets and

liabilities are transferred at revalued price and any difference between purchase consideration and market value of assets & liabilities is to be recognized as goodwill in the books of resultant company.

4.8 Further, para 8 of appendix-C of Ind AS -103 mandates pooling of interest method for amalgamation of commonly control entities. Similarly, para 9 of Ind AS-103 mandates that all the assets and liabilities should be transferred at the carrying amount. Likewise, para 12 of Ind AS-103 mandates that any difference between purchase consideration and book value of assets & liabilities should be recognized as capital reserve. The relevant finding of the AO is summarized as under:

1. The transferee company is a paper company with no worthwhile activities.

2. The transferor company is an established company with revenues and assets.

3. The role of the employees benefit expenses, cost of material consumed & other expenses, clearly indicating that company was driven by its promoter/Management who is common.

4. Both the companies belong to the same group (Royal Group).

5. The ultimate shareholding is within group through family members.

6. The directors remain unchanged.

7. No cash payout is involved in the amalgamation. Only shares are issued by valuing the transferor company at exorbitant premium.

8. The control effectively vests with the directors of the transferor company itself.

9. There is no change in effective ownership or control.

10. In this manner, the goodwill is artificially created and depreciation is claimed to reduce the taxable income and avoid paying taxes. Thus, the assessee is able to achieve what it otherwise cannot do, i.e. instead of revaluation which is a tax-neutral exercise and wherein depreciation is not allowable, a roundabout way of claiming depreciation through the route of amalgamating with a paper company of same group is resorted to.

11. The valuation is done in a manner which is suitable to the company to aid tax evasion.

4.9 In view of the above observation, the AO held that the assessee has not incurred any cost to acquire goodwill. Also, such goodwill was not transferred from amalgamating company. Therefore, the value of the same for the purpose of

taxation is to be taken at NIL. Thus, depreciation on such goodwill is not allowable in the year under consideration and in subsequent years.

5. Aggrieved by the order of the AO, the assessee preferred an appeal before learned CIT (A) who confirmed the disallowance of depreciation on goodwill by observing that the AO has given detailed finding in length highlighting the claim of the assessee which was not allowable. As such, no contrary material was brought on record by the assessee during appeal.

6. Being aggrieved by the order of the learned CIT(A), the assessee is in appeal before us.

7. The learned AR before u filed a paper book running from pages 1 to 336 and case laws compilation running from pages 1 to 121 along with the summary of the arguments running into 7 pages. It was contended by the ld. AR that the goodwill is arising in the scheme of amalgamation which was approved by the Hon'ble Gujarat High Court and therefore the same should be eligible for depreciation. It was also pointed out by the learned AR that consideration paid by the assessee to the amalgamating company was based on the valuation report which was duly discharged by way of issuing shares. The learned AR also submitted that all the facts about the scheme of amalgamation relating to the amalgamated and amalgamating companies were available with the revenue authorities but there was no objection raised by the revenue before the approval of the Hon'ble Gujarat High Court.

8. On the other hand, the learned DR before us submitted that the amalgamated company was a paper company, and it was not carrying out any activity. Likewise, there was no goodwill in the books of the amalgamating company prior to the amalgamation and therefore it cannot be said that goodwill has been transferred to the assessee in pursuance of the scheme of amalgamation. The learned DR vehemently supported the order of the authorities below.

9. We have heard the rival contentions of both the parties and perused the material available on record. At the outset, we note that the facts of the present case are identical to the facts involved in the case of KIFS International LLP vs. DCIT in ITA 557/AHD/2022 for the AY 2016-17. As such, in the case of KIFS International LLP, the two companies of a group were merged in the scheme of amalgamation approved by the Hon'ble High Court. The purchase consideration was paid by the amalgamating company by issuing shares to the shareholder of amalgamated company based on valuation report without involving any cash payments. The purchase consideration more than the net assets transferred by the amalgamating company was treated as goodwill by the amalgamated company and the depreciation was claimed on such goodwill. The AO and the learned CIT(A) disallowed the claim of depreciation on identical reasoning as in the case of present assessee. The issue came up before this Tribunal in the assessee's appeal and the bench vide order dated 15th September 2023 decided the issue in favour of the assessee. The detailed findings of the Tribunal are extracted as under:

14. We have heard the rival contentions of both the parties and perused the materials available on record. It is provided under the provisions of section2(1B)of the Act that in a scheme of amalgamation all the properties &liabilities of the amalgamating company would become the assets and liabilities of the amalgamated company. Similarly, it was also provided that the shareholders holding not less than 75% in value of the shares in the amalgamating company should become the shareholders of the amalgamated company. The provision of section 2 (1B) of the Act reads as under:

(1B) "amalgamation", in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company) in such a manner that—

(i) all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation;

(ii) (ii) all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation;

(iii) (iii) shareholders holding not less than three-fourths in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation,

otherwise than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first-mentioned company;

14.1 In the scheme of amalgamation, two or more companies merged and forma new company, or one or more companies merged into an existing company. As a result of amalgamation, the amalgamating company gets dissolved and its business along with assets and liabilities is taken over by the amalgamated company. In return the amalgamated company pays purchase consideration to the shareholder of amalgamating company by way of issuing its equity share, other securities or by paying cash. Normally, the companies opt for amalgamation for numerous reasons/objectives which may include the elimination of the competition, better/effective utilization of the resources, better/effective control over the market etc.

14.2 The purchase consideration paid by the amalgamated company to the shareholders of the amalgamating company may be more than the value of the net assets taken over or some time it may be lower than the net assets taken over. As such purchase consideration to be paid to the amalgamating company by the amalgamated company is determined after considering various internal and external factors which may affect future profitability and growth. Such factors include previous earnings, future possible earnings, location, technical know-how, customer base, marketing network etc. Thus, it leads to a difference between the net value of assets taken over and purchase consideration paid.

14.3 Accounting standard-14, issued by the ICAI prescribes two methods of accounting for the transaction carried out in the scheme of amalgamation namely pooling of interest method and purchase method. If the scheme of the amalgamation fulfils the conditions of para 3(e) of the Accounting Standard-14, then pooling of interest method should be followed otherwise purchase method of accounting should be applied. The relevant extract of accounting standard reads as under:

7. There are two main methods of accounting for amalgamations:

(a) the pooling of interests method; and

(b) the purchase method

8. The use of the pooling of interests method is confined to circumstances which meet the criteria referred to in paragraph 3(e) for an amalgamation in the nature of merger.

14.4 Under the pooling of interest method the difference between purchase considerations and the net assets taken over by the amalgamated company is adjusted with reserve. On the other hand, in the case of purchase method if purchase consideration exceeds net value of assets taken over then such difference is to be as recognized as goodwill or vise-versa as capital reserve.

14.5 Goodwill may be described as the aggregate of those intangible assets of a business which contributes to its superior earning capacity over a normal return on investment. It may arise from such attributes as favourable locations, the ability and skill of its employees and management, quality of its products and services, customer satisfaction etc.

14.6 Para 19 of AS-14 describes goodwill arising in a scheme of amalgamation as extra amount paid in anticipation of future income and suggests treating the same as an asset, hence provide for systematic amortization of same over the period of useful life. The para 19 of AS-14 reads as under:

19. Goodwill arising on amalgamation represents a payment made in anticipation of future income and it is appropriate to treat it as an asset to be amortised to income on a systematic basis over its useful life. Due to the nature of goodwill, it is frequently difficult to estimate its useful life with reasonable certainty. Such estimation is, therefore, made on a prudent basis. Accordingly, it is considered appropriate to amortise goodwill over a period not exceeding five years unless a somewhat longer period can be justified.

14.7 In the case in hand, the assessee company has taken over the business of one of the group companies, namely KSPL, with all the assets, liabilities, and reserves. In return the

assessee company issued its 2 shares for one share of KSPL as purchase consideration. Accordingly, the assessee companyissued2,54,54,560 new shares for 1,27,27,280/- shares of KSPL @Rs. 235/- having face value of Rs. 10 each and premium of Rs. 225/- each. Thus, the assessee company paid purchase consideration of Rs. 598.18 crores only (2.54 crore x Rs. 235/-) against the net book value of the assets and liabilities taken over by it at Rs.298,30,45,656/- only leading to a difference between NAV and purchase consideration of Rs. 308,87,75,944/-. The assessee, by following the pooling of interest method of accounting as prescribed under AS-14 recognized such difference as Goodwill in the books of account. The scheme of amalgamation was approved by the Hon'ble Gujarat High Court vide order dated 21st December 2015which was effective from 1-4-2015. Subsequently, the assessee at the time of filing return of income claimed depreciation on such goodwill by treating the same as intangible asset which was disallowed by the AO and confirmed by the learned CIT (A) by holding it at NIL value for the purpose of taxation.

14.8 Undeniably, the purchase consideration paid by the assessee to the shareholders of the transferor/ amalgamating company stands at Rs. 598.18 crores as evident from the scheme of amalgamation. The relevant clause of the scheme of the amalgamation stands as under:

> *23.1 Upon this Scheme becoming effective, Transferee Company-2 shall without any further application or deed, issue and allot Equity . Shares at par, credited as fully paid up, to the extent indicated below to the shareholders of Transferor company, holding shares in Transferor company and whose name appear in the Register of Members on the Appointed Date or to such of their respective heirs, executors, administrators or other legal representative or other successors in title as may be recognized by the respective Board of Directors in the following manner:*
>
> *2 (Two) fully paid Equity Shares of Rs. 1Q/- each of Transferee. Company-2 shall be issued and allotted, for every 1 (.One) Equity Shares of Rs. 10/- each held in Transferor Company.*
>
> *XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX*
>
> *23.5 Upon Scheme being effective and on allotment of new Equity Shares by Transaction Company-2, the share certificate representing shares held in Transferor Company shall stand automatically cancelled. The new Equity Shares shall be issued by Transferee Company-2 to the shareholders of Transferor Company at a premium of Rupees two hundered and twenty five per share. Approval of this Scheme by the shareholders of transferee company2 shall be deemed to be the due compliance of the provisions of Section 62 and Section 42 of the Companies Act, 2013 and other relevant and applicable provisions of the Act for the issue and allotment of Equity Shares by TransfereeCompany-2 to the shareholders of Transferor company, as provided in this Scheme.*

14.9 Hence, the purchase consideration exceeds the book value of net assets acquired by it by Rs. 308,87,75,944/- as discussed above. The excess amount was recorded as goodwill in the books of the assessee. Admittedly, that the assessee incurred the cost more than the net book value of assets acquired by it in the scheme of amalgamation which has also been approved by the Hon'ble Gujarat High Court vide order dated 21st December 2015 w.e.f. 01st April 2015.Therelevant portion of the judgment reads as under:

> *The petitioner companies are further directed to lodge a copy of this order, the schedule of immovable assets of the undertaking being transferred under the slump saletotheTransferee-1 and that of the remaining undertaking of the Transferee-2, as on the date of this order and the scheme duly authenticated by the Registrar, High court of Gujarat with concerned superintendent of stamps, for the purpose of adjudication of stamp duty, if any, on the same within 60 days from the date of the order.*

The Petitioner companies are directed to file a copy of this order along with a copy of the scheme with the concerned Registrar of Companies, electronically, along withINC-28inaddition to a physical copy as per relevant provisions of the Act.

Filing and issuance of drawn up order is hereby dispensed with.

All concerned authorities to act on a copy of this order along with the Scheme duly authenticated by the Registrar, High Court of Gujarat. The Registrar, High Court of Gujarat shall issue the authenticated copy of this order along with the Scheme of expeditiously as possible.

14.10 Furthermore, it was mentioned in the scheme of amalgamation that the difference if any between the value of the assets acquired by the amalgamated company and the consideration paid shall be recorded either as capital reserve or goodwill. The relevant portion of the scheme reads as under:

The difference (excess or deficit), between the net value of assets over aggregate face value and premium amount for the Equity Shares issued by Transferee Company-2totheshareholders of Transferor company pursuant to this Scheme and after giving effect to Clause 24.3 be adjusted to Capital Reserve or Goodwill, as the case may be in books of Transferee Company-2.

14.11 At this juncture, it is also important to note that the Hon'ble Gujarat High Court in the impugned scheme of amalgamation while approving has also observed that the Regional Director, Ministry of Corporate affairs vide letter dated 3rd December 2015, has invited objections from the Income Tax Department if any in the scheme of amalgamation. But the Income Tax Department did not reply within the time limit of 15 days, hence it was assumed that the Income Tax Department has no objection in connection with the impugned scheme of amalgamation. This fact can be verified from the order of the Hon'ble High Court, the relevant finding is reproduced as under:

The next observation of the Regional Director vide paragraph 2(e), pertains to the letter dated 3 rd December 2015 sent by the Regional Director to the Income Tax Department to inviting their objections, if any. Since the statutory period of 15 days, as envisaged by the relevant circular of the Ministry of Corporate Affairs is over, it can be presumed that the Income Tax Department has no objection to the proposed Scheme of arrangement. The petitioner companies have agreed to comply with the applicable provisions of the Income Tax Act and rules. In view of the same, no direction are required to be issued to the petitioner companies in this regard.

14.12 In this connection, we further note that the scheme for the amalgamation was presented before the Hon'ble Gujarat High Court for the approval in pursuance to the provisions of section 391 to 394A of the Companies Act. But on perusal of the provisions of section 391 to 394A of the Companies Act, we note that there is a requirement for inviting the objection from the central government about the proposed scheme of amalgamation. The relevant extract of the section reads as under:

394A. NOTICE TO BE GIVEN TO CENTRAL GOVERNMENT FOR APPLICATIONSUNDER SECTIONS 391 AND 394 The 1 [Tribunal] shall give notice of every application made to it under section 391 or 394 to the Central Government, and shall take into consideration the representations, if any, made to it by that Government before passing any order under any of these sections. 1. Substituted for `Court' by the Companies (Second Amendment) Act, 2002 (w.e.f. a date yet to be notified)

14.13 Accordingly, we find that there was no requirement to invite objections from the Income Tax Department. However, we find that the MCA has issued a circular No. 1/2014 dated 15.01.2014 directing regional directors of Ministry of Corporate Affair to invite comments and inputs from the Income Tax Department as well as from other regulatory department before the amalgamation. The relevant copy of the circular recess under:

General Circular No 1/2014

F.No 2/1/2014

Dated 15th January 2014

Subject: Report u/s 394A of the Companies Act, 1956- Taking accounts of comments/inputs from Income Tax Department and other sectoral Regulators while filing reports by RDs.

Section 394A of the Companies Act, 1956 requires service of a notice on the Central Government wherever cases involving arrangement/compromise (under Section 391) or reconstruction / amalgamation (under Section 394) come up before the Court of competent jurisdiction. As the powers of the Central Government have been delegated to the Regional Directors (RDs) who also file representations on behalf of the Government wherever necessary.

2. It is to be noted that the said provisions is in addition to the requirement of the report to be received respectively from the Registrar of Companies and the Official Liquidator under the first and second provisos to Section 394(1). A joint reading of Sections 394 and 394A makes it clear that the duties to be performed by the Registrar and Official Liquidator under Section 394 and of the Regional Director concerned acting on behalf of the Central Government under Section 394A are quite different.

3. An instance has recently come to light wherein a ***Regional Director did not project the objections of the Income Tax Department in a case under Section 394.*** *The matter has been examined and it is decided that while responding to notices on behalf of the Central Government under Section 394A, the Regional Director concerned shall invite specific comments from Income Tax Department within 15 days of receipt of notice before filing his response to the Court. If no response from the Income Tax Department is forthcoming, it may be presumed that the Income Tax Department has no objection to the action proposed under Section 391 or 394 as the case may be. The Regional Directors must also see if in a particular case feedback from any other sectoral Regulator is to be obtained and if it appears necessary for him to obtain such feedback, it will also be dealt with in a like manner.*

4. It is also emphasized that it is not for the Regional Director to decide correctness or otherwise of the objections/views of the Income tax Department or other Regulators. While ordinarily such views should be projected by the Regional Director in his representation, if there are compelling reasons for doubting the correctness of such views, the Regional Director must make a reference to this Ministry for taking up the matter with the Ministry concerned before filing the representation under Section 394A.

5. This Circular is effective from the date of issue.

14.14 The above circular issued by the MCA was circulated by the CBDT among its officers vide F. No. 279/MISC./M-171/2013-ITJ, dated 11th April 2014whichreads as under:

F.NO.279/MISC./M-171/2013-ITJ, Dated- 11"' April, 2014

Government of India, Ministry of Finance, Department of Revenue, C.B.D,T., New Deihl

Subject: Merger/Amalgamation/de-merger Objections entertained by High Courts -reg.

I am directed to refer to the above mentioned subject.

2. In a recant case of proposed amalgamation, it was noted that the scheme of amalgamation was designed seeking amalgamation with retrospective dates so as to claim set off of losses of loss-making Companies against the profits of profit making Companies of the group and thus impacting adversely the much needed public revenue.

This fact of proposed amalgamation was not brought to the notice of Income Tax Department either by the Ministry of Corporate Affairs (MCA) or Registrar of Companies (ROC). The Deportment had to file an intervention application opposing such amalgamation before the High Court which was rejected on the ground that the Department had no locus standi in the matter and that Regional Director, MCA has been delegated power in this regard.

3. In this connection ***Circular No 1/2014 dated 15.01.2014*** *has been issued by MCA to Regional Directors which lays down that while furnishing any report regarding reconstruction or amalgamation of companies under the Companies Act, comments and inputs from the Income Tax Department may invariably be obtained so as to ensure that the proposed scheme of reconstruction or amalgamation has not been designed in such a way as to defraud the Revenue and consequently being prejudicial to public interest. It has further been said that the Regional Directors would invite specific comments from the Income Tax Department within 15 days of receipt of notice before filing response to the Court. It is emphasised that this is the only opportunity with the Department to object to the scheme of amalgamation if the some is found prejudicial to the interest of Revenue and therefore, it is desired that the comments/objections of the Department are sent by the concerned CIT to Regional Director, MCA for incorporating them in its response to the Court, immediately after receiving information about any scheme of amalgamation or reconstruction etc.*

4. This issues with approval of Member (A&J).

14.15 From the above circular, it is transpired that the Revenue was conscious about the fact that there was the possibility of misusing the provisions of the income tax Act in the name of the scheme of amalgamation as provided under section 2(1B) causing prejudice to the Revenue. But the Revenue, despite having the opportunity in its hand did not raise any objection within the time allowed by the MCA or subsequently by raising the objection in the impugned scheme of amalgamation. Thus, from the conduct of the Revenue, it is revealed that there was no grievance in the impugned scheme of amalgamation. Had there been any grievance to the Revenue, the same could have been brought to the notice of the regional director of the MCA, then suitable action should have been initiated against the impugned scheme of the amalgamation. In this regard, we note that recently the Mumbai bench of NCLT in one of the petitions for amalgamation in case of Gabs Investment Pvt Ltd (Transferor) and Ajanta Pharma limited (Transferee) in CPS No. 995 and 996/2017 has not approved the scheme of amalgamation on the objection raised by the revenue. The relevant extract of the order reads as under:

36. The rationale given in the scheme among others things are the proposed amalgamation of the transferor company into Transferee Company by the scheme, as a result of which the shareholders of the transferor company viz. the promoters of the transferor company (who are also the promoters of the transferee company)shall directly hold shares in the transferee company and the promoters would continue to hold the same percentage of shares in the Transferee company pre and post merger.

37. The above rationale presented by the petitioner company is without any Justification. Petitioner has to comply with all applicable laws. By this scheme of amalgamation and arrangement Gabs/shareholders of Gabs are avoiding full tax liability which is strenuously objected by the Income Tax Department as discussed Supra. Any transfer of property from one entity to other has to be treated as sale/transfer and the same has to comply with applicable provisions of law including applicable tax liability, stamp duty. In the instant case, the transferor is a private Ltd. company which is a separate legal entity and any transfer of shares to other entity including individuals from the legal entity would attract applicable tax liability. Therefore, we are of the considered view that the Bench can sanction/approve the scheme only if it complies with all applicable provisions of the Act, Rules and if the

scheme is in the interest of public, shareholder etc. However, the petitioner companies did not provide details with regard to compliance of tax liability raised by the Income Tax Department, their undertaking to pay the huge tax liability as pointed out by the income department etc.

38. From the above analysis of the financials of Gabs, the bench noted that with an equity share capital of only 1,91,100 the promoters/shareholders of Gabs who are also the common promoters of APL, by way of this proposed scheme of amalgamation and arrangement would get the shares of APL worth?1477.50Crores (market value as on 31.03.2017) and that too without paying any Income Tax, Stamp Duty etc. for which the bench is of the considered view that the same is not in the public interest, thousands of shareholders of Transferee company especially retail shareholders. The market value of the same number of shares as at 31.03.2016 was 1,182.59 Crores.

39. Since Income Tax department (IT) has raised strong objections about tax benefit, tax avoidance, tax loss as discussed above, we are of the opinion that it would be www.taxguru.in advisable to settle the important/crucial issue of huge tax liability before sanctioning the scheme by the Tribunal rather than disputing the same at a later stage after the scheme is sanctioned by the Tribunal. It is mandatory as per section 230 (5) of the Companies Act, 2013, a notice under sub section (3) along with all the documents in such form shall also be sent to central government, Income Tax Authorities, RBI, SEBI, ROC, stock exchanges, OL, CCI and other Sectoral regulators or Authorities for their representations. In response to the notice received as per above section the Income Tax Department has raised valid observation/objections as detailed above, we find merit in the objections raised by Income Tax Department and we are also inclined to agree with the objections raised.

14.16 From the above, it is inferred that the Income Tax Department, being aggrieved with the scheme of amalgamation, raised the objection, which was duly accepted by the NCLT and accordingly, the scheme of amalgamation was disapproved in the above case.

14.17 Now, the question arises whether the scheme once approved by the Hon'ble Gujarat High Court after receiving no objection from the IncomeTax Department, the AO/revenue has authority to challenge the same. What is the inference that flows from a cumulative consideration of all the aforesaid contending facts is that the revenue cannot object to the impugned scheme of amalgamation. It is because, it is implied that the revenue has given its consent in the impugned scheme of amalgamation by raising no objection in response to the letter issued by the regional director of the MCA as discussed above. Furthermore, had there been any grievance to the revenue, then it should have approached the Hon'ble High Court through the regional director of the MCA. But it did not do so. As such the revenue on one hand is issuing circulars to its officers to object the scheme of amalgamation if it is found prejudicial to the interest of revenue but on the other hand it remains silent when such opportunity was afforded to it and raising the same issue during the assessment proceedings which in our considered view is not desirable.

14.18 Moving ahead, there is also no dispute in the amount of the purchase consideration and the NAV determined between the companies, as available in the scheme of amalgamation, which was approved by the Hon'ble Gujarat High Court as well. However, the lower authorities held the value of goodwill at NIL for the purpose of taxation during the assessment proceedings for the reasons as discussed above in their respective orders. But, in the backdrop of the above discussion, we are not convinced with the orders of the authorities below on this preliminary issue.

15. Now, the next question arises for our consideration whether the value of goodwill should be taken at NIL under the provision of Income Tax Act in the books of amalgamated company as no such goodwill was available in the books of amalgamating company prior to amalgamation and such goodwill emerged in the books of amalgamated company on account of valuation and revaluation of business as no cost incurred by the amalgamated company for such goodwill. In this connection, we are inclined to refer

certain provisions of the Act in the context of the scheme of amalgamation as provided under section 2(1B) of the Act as detailed under:

Depreciation.

*[19]**32.** (1) [20][In respect of depreciation of—*

(i) XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

(ii) know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998,

owned [21], wholly or partly, by the assessee [21] and used for the purposes of the business[21] or profession, the following deductions shall be allowed—]

[22][(i) XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

(ii) [24][in the case of any block of assets, such percentage on the written down value thereof as may be prescribed[25]:]

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*[38][**Provided also** that the aggregate deduction, in respect of depreciation of buildings, machinery, plant or furniture, being tangible assets or know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets allowable to the predecessor and the successor in the case of succession referred to in clause (xiii) and clause (xiv) of section 47 or section 170 or to the amalgamating company and the amalgamated company in the case of amalgamation, or to the demerged company and the resulting company in the case of demerger, as the case may be, shall not exceed in any previous year the deduction calculated at the prescribed rates as if the succession or the amalgamation or the demerger, as the case may be, had not taken place, and such deduction shall be apportioned between the predecessor and the successor, or the amalgamating company and the amalgamated company, or the demerged company and the resulting company, as the case may be, in the ratio of the number of days for which the assets were used by them.]*

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*Explanation 2.—For the purposes of this [40][sub-section] "written down value of the block of assets" shall have the same meaning as in clause *(c) of sub-section †(6) of section 43.]*

[41][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, trade marks, licences, franchises or any other business or commercial rights of similar nature.

15.1 The above provision of section 32 of the Act provides allowing the depreciation to the amalgamated company in the same manner which would have been allowed to the amalgamating company in the event had there not been any amalgamation.

15.2 Similarly, the actual cost of the assets acquired in the scheme of amalgamation in the hands of the amalgamated company will continue to be the same as it would have been in the hands of the amalgamated company in the event, had there not been any amalgamation. The relevant extract of the explanation 7 to section 43(1) reads as under:

Definitions of certain terms relevant to income from profits and gains of business or profession.

43. *In sections 28 to 41 and in this section, unless the context otherwise requires[3]—*

[4](1) "actual cost" means the actual cost[3] of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met3 directly or indirectly by any other person or authority:

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[14][Explanation 7.—Where, in a scheme of amalgamation, any capital asset is transferred by the amalgamating company to the amalgamated company and the amalgamated company is an Indian company, the actual cost of the transferred capital asset to the amalgamated company shall be taken to be the same as it would have been if the amalgamating company had continued to hold the capital asset for the purposes of its own business.]

15.3 We further note that the WDV of the assets acquired in the scheme of amalgamation in the hands of the amalgamated company will continue to be the same as it would have been in the hands of the amalgamating company in the event, had there not been any amalgamation. The relevant extract of the explanation 2 to section 43(6)(c) of the Act reads as under:

(6) "written down value" means—

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[42][Explanation 2.—Where in any previous year, any block of assets is transferred,—

(a) XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

(b) by the amalgamating company to the amalgamated company in a scheme of amalgamation, and the amalgamated company is an Indian company,

then, notwithstanding anything contained in clause (1), the actual cost of the block of assets in the case of the transferee-company or the amalgamated company, as the case may be, shall be the written down value of the block of assets as in the case of the transferor-company or the amalgamating company for the immediately preceding previous year as reduced by the amount of depreciation actually allowed in relation to the said preceding previous year.]

15.4 As per section 32(1) of the IT Act 'depreciation' is to be computed on 'actual cost'/'written down value of the block of assets' ascertained in accordance with the provisions of section 43 of the Act. Further, a reading of the above provision shows that in respect of 'capital assets' 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 asset for the purposes of its own business.

15.5 A combined reading of the above provisions reveals that the intention of the legislature behind the introduction of the amalgamation scheme was to achieve tax neutrality. Besides the above, the intention of the legislature is also reflecting from the following provisions:

i. There is no capital gain in the hands of the amalgamating company on the transfer of capital assets in the scheme of amalgamation under the provisions of section 47(vi) of the Act.

ii. The cost of stock-in –trade in the hands of the amalgamated company shall remain the same as in the hands of the amalgamating company either as capital asset or stock in trade as provided under section43Cofthe Act.

iii. Provisions relating to carry forward and set off of accumulated loss and unabsorbed depreciation allowance in amalgamation or demerger, etc under the provisions of section 72A of the Act.

iv. Exemption of capital gains in the hands of shareholders of amalgamating company on transfer of shares of amalgamating company in the scheme of amalgamation under the provisions of section47(vii)of the Act.

v. Cost of capital assets to be the same as in the hands of previous owner where capital assets became the assets of the successor as a result of transfer under section 47(vi) r.w.s. 49(1)(iii)(e) of the Act.

vi. Cost of shares of amalgamated company in the hands of shareholders, received as consideration for transfer of shares of amalgamating company, to be same as the cost of shares of amalgamating company under section 49(2) of the Act.

15.6 From the above, the intent of the Legislature is to make amalgamation a tax neutral scheme for companies as well as for the shareholders and not to provide a tax planning mechanism to either of them. However, a conjoint reading of the above provisions reveals that the assets which were transferred by the amalgamating company to the amalgamated company in the process of amalgamation were not made subject to the capital gain tax. Furthermore, the6thproviso to section 32 of the Act has limited the amount of depreciation available to the amalgamated company post amalgamation to the extent of the amount of depreciation which would have been available to the amalgamating company, had there not been any amalgamation. Indeed, there was no entry in the books of the transferor/amalgamating company for the intangible assets/ goodwill being self-generated assets. However, we note that all the relevant provisions of the Act as discussed above deal with respect to the assets available/recorded in the books of the transferor/amalgamating company. In other words, the assets which have been acquired by the assessee in the scheme of amalgamation would continue at the book value in the books of the amalgamated company. The question arises whether the goodwill shown by the assessee as discussed above was acquired in the scheme of amalgamation from the amalgamating company. The answer stands in negative. It is because there was no entry in the books of accounts of the amalgamating/transferor company reflecting the value of goodwill. As such, the amount of goodwill as claimed by the assessee represents the difference between the purchase consideration and the NAV acquired by it. The purchase consideration paid by the assessee was based on the valuation report as discussed above after considering the various factors. Thus, the assessee has not acquired any goodwill from the amalgamating/transferor company as alleged, accordingly the provisions of the Act i.e. 6 proviso to section 32, explanation 7 to section 43(1), explanation 2 to section 43(6)(c) of the Act cannot be applied to the case on hand.

15.7 Normally, the issue/question of goodwill arises when one company is acquired by another company. In other words, when one company transfers its business to another company against the consideration, the difference between the net value of the assets acquired and the purchase consideration paid by the transferee is regarded as goodwill. The succeeding question arises whether such goodwill acquired by the assessee is eligible for depreciation under the provisions of section 32 of the Act. In this connection, we are inclined to refer to the provisions of section 32(1) of the Act which reads as under:

32. *(1) In respect of depreciation of—*

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

(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998,

owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed—

15.8 On perusal of the above provisions, we note that the word goodwill has nowhere been mentioned. However, we note that, the Hon'ble Supreme Court in the case of CIT vs. Smifs Securities Ltd reported in 348 ITR 302 has held that the goodwill falls within the definition of

the assets under the category of any other business or commercial rights of similar nature. The relevant extract reads asunder:

> *Explanation 3 to section 32(1) 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 rights of a similar nature'. The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3 (b). (Para 4)*
>
> *In view of the above, it is opined that 'Goodwill' is an asset under Explanation3(b)to section 32(1). (Para 5)*

15.9 In view of the above judgment, there remains no ambiguity that goodwill is part and parcel of intangible assets. Hence, the assessee is eligible for depreciation on goodwill.

15.10 Moving further, we note that for claiming the depreciation, among other conditions as provided under section 32 of the Act, one of the conditions is that the assessee can claim depreciation on the goodwill being in tangible asset if acquired on or after 1st day of April 1998. In other words, the assessee can claim depreciation on the goodwill acquired by it. Thus, the controversy arises whether the goodwill generated in the scheme of amalgamation is acquired by the transferee company. Such controversy has been answered by the Hon'ble Supreme Court in the case of Smifs securities Ltd (supra) by holding as under:

> *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 (Appeals)has come to the conclusion that the assessee had filed copies of the orders of the High Court ordering amalgamation of the above two companies; that the assets and liabilities of 'Y' 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 Tribunal. There is no reason to interfere with the factual finding. (Para 6)*

15.11 We also find that the Hon'ble Delhi High Court, involving identical facts and circumstances, in the case of CIT Vs. M/s Eltek SGS Pvt. Ltd. in ITANo. 475-476/2022 has decided the issue in favour of the assessee by observing as under:

> *7. Before us, learned counsel appearing in support of the appeal contended that it would be the provisions of Section 49 of the Act which would apply and that both the CIT(Appeals) as well as the ITAT have clearly erred in holding otherwise. Learned counsel referred to the definition of "cost of acquisition" as spelt out in Section 55(2) of the Act and which had defined that expression to also include goodwill of a business or profession or a trademark or brand name associated with the business or profession or any other intangible asset. It is in the aforesaid context that learned counsel for the appellant had sought to rely upon Section 49 and more particularly Section 49(1)(e) thereof. 8. The aforesaid submission, however, clearly loses sight of the fact that Section 47 in express terms excludes the transfer of a capital asset in terms of a scheme of amalgamation. We further find that the provisions of the Act referred to by learned counsel for the appellant are placed in a Chapter dealing with the "Capital Gains". That Chapter itself pertains to profits or gains arising from the transfer of a capital asset. However, it is well settled that a transfer in terms of a scheme of amalgamation which is sanctioned is accomplished by operation of law as opposed to an act of parties. It is in that backdrop that the decision in Smifs assumes significance. The judgment rendered by the Supreme Court in Smifs clearly recognises 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.*

15.12 From the above, there remains no ambiguity that the goodwill generated in the scheme of amalgamation is acquired by the assessee. Thus, in our considered view the assessee has complied with all the conditions provided under section 32 of the Act. Accordingly, we are not convinced by the findings of the authorities below.

16. The next allegation of the AO is that there was contradiction and inconsistency in the valuation report filed by the assessee. Admittedly the valuation report was prepared by the SSPA & CO, a firm of chartered accountants. The valuation of the business being a technical matter, in our view, the assistance of the expert is required. The AO himself cannot determine such value. If he was not satisfied with the valuation report, then the only recourse available to the AO is to refer the matter to the technical person. In holding so we draw support and guidance from the judgment of this tribunal in case of Synbiotics Ltd vs. ACIT reported in [2016] 48 ITR(T) 210 (Ahd) where it was held as under:

> *Assessing Officer has adopted the value of Rs. 250 per sq. mtr. On the basis of the sale instances related to residential areas situated 2 to 3 kms. away from the property in question. There is no dispute with regard to the fact that property in question is an industrial land which cannot be compared with the residential properties. Admittedly, neither the Assessing Officer nor the Commissioner (Appeals) called for report from the Departmental Valuation Officer and proceeded to make their own estimation. It is incumbent upon the assessing authority to call for report from Departmental Valuation Officer for ascertaining the fair market value of the asset, in the event he is not satisfied about the claim of the assessee. Both the authorities below are not justified in adopting the rate as the assessee had furnished a report from an expert, i.e., Government approved valuer.*

16.1 The subsequent allegation of the AO is that both the companies i.e. amalgamated and the amalgamating companies were controlled and managed by the same group of person pre and post amalgamation. Thus, the issue arises whether it was a colourable device adopted by the assessee to create goodwill in the books of accounts and claim such huge amount of depreciation. In this regard we note that both the companies, namely KSPL and KIPL were registered on 27th January 1995 and 27th December 2007 respectively with the Ministry of corporate affairs. These 2 companies were filing separate income tax returns. Both the companies being body corporate have a separate legal identity. All these details were duly disclosed in the scheme of amalgamation which was duly approved by the Hon'ble Gujarat High Court vide order dated 21st December 2015.

16.2 We also note that vide letter dated 3rd December 2015 the regional director of ministry of corporate affair (MCA) has also invited comment or objection from the Income Tax Department, but the department did not raise any objection with respect to scheme of amalgamation. This fact can be verified from para 7(III) of the order of the Hon'ble High Court which is placed on record and discussed above.

16.3 It is also pertinent to mention here that all the necessary details about the management of both companies were disclosed in the scheme of amalgamation and nothing was hidden. The scheme contained all the information related to purchase consideration, its valuation, mode of payment and accounting treatment. The Hon'ble High Court approved such scheme after inviting observation and comment from ROC, MCA, and official liquidator including the income tax department. Thus, in the given fact and circumstances the reasonableness of the scheme cannot be doubted. Accordingly, no inference can be drawn that the assessee has employed colorable device in order to record high value of purchase consideration which is resulting goodwill.

16.4 Without prejudice to the above, we also note that the Revenue has to consider certain facts before arriving at a finding whether a particular series of the transactions is a colourable device or not as the primary onus is on the AO to find out:

(i) Whether the parties to the transactions have concealed or hidden any fact and/or whether what is shown to be done could have actually happened in different time or at different place:

Ans: Regarding the facts of the transactions, we note that all the necessary facts were duly disclosed by the assessee in the scheme of amalgamation. The following facts were duly disclosed:

a) The purchase consideration by the amalgamated company to the shareholders of the amalgamating company was duly disclosed in the scheme of amalgamation.

b) The valuation of the business of the amalgamating company was based on the approved valuation report.

c) The fact of the common control and management of both the amalgamated and amalgamating companies were disclosed in the scheme of amalgamation which was also noted by the Hon'ble Gujarat High Court and this fact was also in the knowledge of Revenue.

Thus, we are of the view no facts were concealed or hidden.

(ii) Whether it could be a normal business practice:

Ans: In today's time the activity of amalgamation is verycommonand prevailing in the corporate world for synergizingresources,control, eliminate the competition etc.

(iii) Even where individual transactions of the device are legal/ legitimate, whether combination of these steps creates an effect which is abnormal in the business world and could not have been otherwise undertaken in normal circumstances:

Ans. In the present case there was no reference made by the authorities below suggesting that the transaction is carried out illegally. As the transactions in the instant case were within the ambit of the law as per the provision of section 2(1B) of the Act.

(iv) These individual transactions create an effect which is contrary to human probabilities:

Ans. The transactions carried out by the parties were very much normal transaction.

(v) Whether actions of the parties finally are at variance with the terms of the agreement:

Ans. There was no variance in the impugned transaction with regard to the terms of the agreement.

16.5 It is also important to highlight the fact that there is no prohibition under the Act for disallowing the depreciation on the goodwill generated in the scheme of amalgamation. There are certain kinds of transactions, prejudicial to the interest of Revenue, which may fall under the purview of the provisions of General Anti-Avoidance rule (GAAR), POEM, and BEPS provided under section 95 to 102, section 6(3) of the Act respectively under which the impugned transaction (depreciation on the goodwill in a scheme of amalgamation) can be denied. But such provisions are not applicable for the year under consideration.

16.6 There is no dispute about the fact that the payment was made by the assessee to the shareholders of the amalgamating company in the form of shares and not through the cash payment. But the payment through the shares is a valid mode of payment. In this regard we draw support and guidance from the judgment of Hon'ble Delhi High Court in the case of CIT vs. Mira Exim Ltd reported in 359 ITR 70 wherein it was held as under:

In terms of the order passed under section 394 of the Companies Act, 1956therespondent company acquired the imported motor cars. The cars were not acquired and the respondent assessee was not owner of the motor cars prior to the said date. On merger of the three concerns with the respondent assessee, shares were issued as consideration to the proprietors of the business concerns. The shares issued were consideration for the transfer of the assets. It is immaterial, whether there was transfer of an undertaking, including the block of assets, which also included the imported motor cars. [Para 15]

It is clear that the respondent assessee had acquired the asset, i.e., imported cars, after the cut off date, i.e., 1-4-2001 and, therefore, is entitled to depreciation and the bar/prohibition in clause (a) to proviso to section 32(1) would not apply. The Tribunal

has rightly decided the issue in favour of the respondent assessee and against the revenue. [Para 16]

16.7 It is also pertinent to note that scheme of the amalgamation can be approved under the provisions of section 2(1B) of the Act where shareholders holding not less than 75% in the value of shares of the amalgamating company become the shareholders of the amalgamated company. It is possible only when the shares are issued to the shareholders of the amalgamating company. Accordingly, we are not impressed with the finding of the AO that there was no cash payment for the acquisition of the goodwill by the assessee, rather it was recognized in the books of accounts by way of accounting entries. Thus, we hold that the impugned transaction cannot be regarded as colorable device merely on the reasoning that the assessee claimed the depreciation on the goodwill in the scheme of amalgamation.

16.8 We also note that this Tribunal in case of Urmin marketing (P) Ltd. Vs. DCIT reported in 122 taxmann.com 40 has already decided the issue in favor of assessee on the similar facts and circumstances.

16.9 It is important to note that there was an amendment to section 32, section 2(11) of the Act and other relevant sections of the Income Tax Act from the Finance Act 2021, effective from AY 2021-22. The amendment was brought into section 32 of the Act to exclude goodwill from depreciable assets. The relevant portion of the amendments in section 32 is reproduced as under:

32. (1) 97[In respect of depreciation of—

(i)xxxxxxxx

(ii)know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, [not being goodwill of a business or profession,]

Explanation 3.—For the purposes of this sub-section, 23 [the expression "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 nature2425 [, not being goodwill of a business or profession].

16.10 Therefore, no depreciation is allowable on goodwill from the AY2021-22onwards. However, goodwill is not excluded from capital assets. The purpose of exclusion of goodwill from the depreciable assets is that it is seen that Goodwill, in general, is not a depreciable asset and in fact depending upon how the business runs; goodwill may see appreciation or in the alternative no depreciation to its value. Therefore, there may not be a justification of depreciation on goodwill. Accordingly, there is no need to provide for depreciation on goodwill of business/profession like other intangible assets or plant & machinery. But such an amendment is not applicable for the year under consideration.

16.11 In view of the above and after considering the facts in totality, we reverse the order of the authorities below and direct the AO to allow the claim of the assessee for the depreciation on the impugned goodwill. Hence, the ground of appeal of the assessee is allowed.

9.1 Before us, no material has been placed on record by the Revenue to demonstrate that the decision of Tribunal in the case discussed above has been set aside/stayed or overruled by the Higher Judicial Authorities. Before us, no material was placed on record pointing out any distinguishing feature in the facts of the case of case discussed above and the facts of the case of the present assessee. Thus, respectfully following the order of the Tribunal discussed above, we hereby set aside the finding of the learned CIT(A) and direct the AO to allow

the claim of the assessee. Thus, the ground of appeal raised by the assessee is hereby allowed.

10. **The second** issue raised by the assessee is that the assessment framed by the AO is in the name of non-existent assessee, therefore the same needs to be quashed as invalid.

11. The necessary facts are that M/s OLPL was amalgamated with the group company namely Sara Suppliers Pvt Ltd (hereafter M/s SSPL) with effect from 1st April 2015 in a scheme approved by the Hon'ble High Court of Gujarat vide order dated 29-01-2016. Subsequently, M/s SSPL after amalgamation converted into limited liability partnership namely Sara Supplier LLP with effect from 16-03-2016. The assessee, however, was subject to scrutiny assessment under section 143(3) of the Act. The AO framed the assessment vide order dated 27-12-2018 in the name of erstwhile company namely M/s SSPL.

12. The Ld. AR for the assessee before us has challenged the validity of the assessment order framed by the AO under section 143(3) of the Act dated 27th December 2018 on the reasoning that it was framed in the name of erstwhile company which was a non-existent entity at that point of time. It was also pointed out by the learned AR that the fact about the conversion of the status of the assessee from private limited company to LLP was very much known to the AO which is evident from the assessment order.

13. On the other hand, the learned DR vehemently supported the order of the authorities below.

14. We have heard the rival contentions of both the parties and perused the materials available on record. Regarding the legality of the order framed by the AO under section 143(3) the Act vide dated 27th December 2018, we note that the

AO on the first page of his order has mentioned the name of the assessee M/s SSPL which was erstwhile company. Thus, the assessment order was framed in the name of non-existent entity (M/s. SSPL), as M/s SSPL was converted into Limited Liability Partnership w.e.f. 16th March 2016. This fact has been recognized by the AO himself in his order dated 27th December 2018. The relevant finding of the AO is reproduced here-under:

> *After amalgamation the amalgamated company was coverted in to Limited Liability Partnership(LLP) with effect from 16.03.2016 and shareholders were converted in to partners. The share capital and reserve and surplus has been divided on the basis of shareholding patter into the partners capital account. From the books of the partnership firm manifold due to conversion of company into LLP, but the actual cash flow is Nil to create such a huge capital creation in the books of company converted into LLP.*

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> *It is interesting to see that after amalgamation of OLPL with SSPL, the company was converted into Limited Liability Partnership. While conversion of company in to LLP the assessee has credited the entire security premium in the ratio of profit share ratio in the capital account of partners of LLP and such capital is created only on account of amalgamation. Hence the story of the assessee company that goodwill was genuine and was a bonafide creation of amalgamation holds little credibility.*

14.1 In view of the above, it is seen that the assessment has been framed by the AO in the name of amalgamated company which ceased to exist and eventually converted to LLP.

14.2 The Hon'ble Supreme Court has observed and agreed in the case PCIT Vs. Maruti Suzuki India Limited reported in 416 ITR 613 to the ratio laid down in the case of Saraswati Industrial Syndicate Ltd. v. CIT [1990] 53 Taxman 92/186 ITR 278(SC), wherein the Hon'ble Apex court observed that once the amalgamation is sanctioned, the amalgamating company is dissolved without winding up, in terms of Section 394 of the Companies Act, 1956. The amalgamating company ceases to exist in the eyes of law, thus becomes non-existent. Since it does not exist in the eyes of law, it cannot be regarded as a 'person' under Section 2(31) of the Act against whom assessment proceedings can be initiated or an order passed. Therefore, the assessing officer does not have jurisdiction to issue such notice or pass any order against a non-existent entity. The rationale can also be applied to

a dead individual. Since a deceased would not be considered as a 'person' under the Act, thus any such notice/ order issued in that name will be invalid or void.

14.3 Before parting, it is important to note that the assessee undeniably has filed the return of income in the name of erstwhile company only and not in the name of the LLP even though such erstwhile company was not in existence. Likewise, the appeal was also preferred by the assessee before the learned CIT-A and the ITAT against the assessment order and learned CIT-A order in the name of non-existing company. However, the assessee on the subsequent date revised form 36 i.e. memo of appeal with the name of existing LLP. Apparently, the assessee was at fault for filing the return of income and the appeal papers before the respective authorities in the name of the erstwhile company. Thus, the question arises whether the assessment order can be held as null and void as it was made in the name of non-existent company in a situation where the assessee itself has filed the return of income, appeals in the name of non-existent company. The Hon'ble Gujarat High Court in the case of P.V. DOSHI Vs CIT reported in 113 ITR 22 has answered the above question in the manner as detailed below:

> *for the simple reason that as one could not confer jurisdiction by consent, similarly one could not by agreement waive exclusive jurisdiction of the rent courts over the buildings in question. It is true that section 254(4) in terms provides that save as providedinsection256 (which provides for the reference to the High Court), orders passed by the Appellate Tribunal on appeal shall be final. That finality or conclusiveness could only arise in respect of orders which are competent orders with jurisdiction and if the proceedings of reassessment are not validly initiated at all, the order would be avoid order as per the settled legal position which could never have any finality or conclusiveness. If the original order is without jurisdiction it would be only a nullity confirmed in further appeals. If the essential distinction is borne in mind in such cases when there is such defect of jurisdiction because the conditions to found jurisdiction are absent, the Tribunal also would be suffering from the same defect and it could not confer any jurisdiction on the Income-tax Officer by making the remand order, because of the settled legal principle that consent could not confer jurisdiction when jurisdiction could be created only by fulfilment of the condition precedent as in the present case. Therefore, no question of finality of the remand order could ever arise in the present context, if the mandatory conditions for founding jurisdiction for initiating reassessment proceeding were absent.*

14.4 Thus, the mistake committed by the assessee does not empower the Revenue to also commit the same mistake especially in a situation where the fact about the scheme of amalgamation and conversion of the assessee into LLP was

known by the AO which is evident from the assessment order discussed above. In other words, the department was aware of the complete fact that the company was no longer in existence, yet the AO has framed the assessment in the name of non-existing company. Therefore, in the given facts and circumstances, the contention of the learned DR fails on this count that the assessee has also made a mistake in filing the returns of income and appeal papers in the name of non-existing company.

14.5 We also note that this Tribunal in case of Urmin marketing (P) Ltd. Vs. DCIT reported in 122 taxmann.com 40 has already decided the identical issue in favor of assessee on the similar facts and circumstances. In view of the above, we hold that the assessment framed under section143(3) of the Act is not sustainable. Hence the ground of appeal of the assessee is allowed.

15. In the result, appeal of the assessee is hereby allowed.

Order pronounced in the Court on 21/02/2024 at Ahmedabad.

Sd/-	**Sd/-**
(SIDDHARTHA NAUTIYAL)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 21/02/2024

Manish