

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "D", MUMBAI**

**BEFORE SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER**

**AND**

**SHRI SUNIL KUMAR SINGH, HON'BLE JUDICIAL MEMBER**

**ITA NO. 1884/MUM/2023 (A.Y: 2017-18)**

Disney Broadcasting (India) Private Limited Star House, Urmi Estate 95 Ganpatrao Kadam Marg Lower Parel (w), Mumbai - 400013  <b>PAN: AACCV4782D</b>	v.	Principal Commissioner of Income – Tax, Circle – 8 Room No. 611, 6 <sup>th</sup> Floor Aayakar Bhavan, M.K. Road Mumbai - 400020
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>Assessee Represented by</b>	<b>:</b>	<b>Shri Porus Kaka &amp; Shri Divesh Chawla</b>
<b>Department Represented by</b>	<b>:</b>	<b>Smt Sanyogita Nagpal</b>
<b>Date of conclusion of Hearing</b>	<b>:</b>	<b>22.04.2024</b>
<b>Date of Pronouncement</b>	<b>:</b>	<b>24.04.2024</b>

**ORDER**

**PER NARENDRA KUMAR BILLAIYA (AM)**

**1.** This appeal by the assessee is preferred against the order of Learned Principal Commissioner of Income-Tax, Mumbai-8, [hereinafter in short "Ld. Pr.CIT"] dated 27.03.2023 framed under section 263 of Income-tax Act, 1961 (in short "Act").

**2.** The sum and substance of the grievance of the assessee is that the Ld. Pr.CIT erred in assuming jurisdiction under section 263 of the Act and further erred in holding that the assessment order dated 18.03.2021 framed under section 143(3) r.w.s. (3A) and 143(3B) is "erroneous" and "prejudicial to the interest of the revenue".

**3.** Representatives of both the sides were heard at length. Case records carefully perused and the relevant documentary evidences brought on record duly considered in the light of Rule 18(6) of ITAT Rules.

**4.** Assessee is an Indian company engaged in the Media and Entertainment Sector. The key business activities of the assessee include broadcasting of television channels, sale of advertisement airtime and content syndication etc.,

**5.** As per the amalgamation scheme approved by the National Company Law Tribunal vide order dated 08.06.2017 United Home Entertainment Pvt., Ltd., [hereinafter in short "UHEPL"] a group company amalgamated with the assessee company. The assets and liabilities of UHEPL were taken over at the respective fair value

accordingly were reflected in the audited financial statements of the assessee company based on a determination by an independent valuer. The consideration was paid / discharged by way of issue of shares of the assessee company to the shareholders of UHEPL. As approved under the scheme of amalgamation the consideration paid in excess of the fair value of net assets taken over is recorded in the audited financial statements of the assessee company as good will.

**6.** Assuming the jurisdiction cast upon him by the provisions of section 263 of the Act, the Ld. Pr.CIT was of the firm belief that the sixth proviso to section 32(1) squarely apply on the facts of the amalgamation and therefore, the depreciation claimed on the goodwill and Trade name by the assessee company cannot be allowed in its hands. Since this aspect was not examined and considered by the Assessing Officer during the course of the assessment proceedings the assessment order is "erroneous" and "prejudicial to the interest of the revenue".

**7.** Moving further, the Ld. Pr.CIT found that the assessee has suomoto disallowed on account of inventory amortization as sum of ₹.14.71 crores instead of ₹.20.88 crores, this has resulted into under

assessment to the tune of ₹.6.17 crores and therefore, the assessment order is "erroneous" and "prejudicial to the interest of the revenue".

**8.** We will first address to the issue of claim of depreciation on goodwill and other intangible assets.

**9.** As per section 32(1) of the Act 'depreciation', in the case of any block of assets, is to be computed on the written down value. According to Explanation 2 of Section 32(1) "written down value of the block of assets" shall have the same meaning as in section 43(6)(c). This section lays down the meaning of the term "written down value", as under:

*43(6) "written down value" means—*

- (a) in the case of assets acquired in the previous year, the actual cost to the assessee;*
- (b) in the case of assets acquired before the previous year, the actual cost to the assessee less all depreciation actually allowed to him under this Act, or under the Indian Income-tax Act, 1922 (11 of 1922), or any Act repealed by that Act, or under any executive orders issued when the Indian Income-tax Act, 1886 (2 of 1886), was in force:*

*Provided that in determining the written down value in respect of buildings, machinery or plant for the purposes of clause (ii) of sub-section (1) of section 32, "depreciation actually allowed" shall not include depreciation allowed under sub-clauses (a), (b) and (c) of clause (vi) of sub-section (2) of section 10 of the Indian Income-tax Act, 1922 (11 of 1922), where such*

*depreciation was not deductible in determining the written down value for the purposes of the said clause (vi);*

- (c) in the case of any block of assets,—*
  - (i) in respect of any previous year relevant to the assessment year commencing on the 1st day of April, 1988, the aggregate of the written down values of all the assets falling within that block of assets at the beginning of the previous year and adjusted,—*
    - (A) by the increase by the actual cost of any asset falling within that block, acquired during the previous year;*
    - (B) by the reduction of the moneys payable in respect of any asset falling within that block, which is sold or discarded or demolished or destroyed during that previous year together with the amount of the scrap value, if any, so, however, that the amount of such reduction does not exceed the written down value as so increased; and*
    - (C) in the case of a slump sale, decrease by the actual cost of the asset falling within that block as reduced—*
      - (a) by the amount of depreciation actually allowed to him under this Act or under the corresponding provisions of the Indian Income-tax Act, 1922 (11 of 1922) in respect of any previous year relevant to the assessment year commencing before the 1st day of April, 1988; and*
      - (b) by the amount of depreciation that would have been allowable to the assessee for any assessment year commencing on or after the 1st day of April, 1988 as if the asset was the only asset in the relevant block of assets, so, however, that the amount of such decrease does not exceed the written down value;*
  - (ii) in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 1989, the written down value of that block of assets in the immediately preceding previous year as reduced by the depreciation actually allowed in respect of that block of assets in relation to the said preceding previous year*

*and as further adjusted by the increase or the reduction referred to in item (i).*

**10.** Thus, if an asset is acquired during the previous year and it falls in a block of asset (like intangible in this case), then the written down value of that block of asset (to which such acquired asset belongs) would be increased by the actual cost of the asset acquired. Now definition of 'actual cost' is given in section 43(1). According to this "actual cost" means the actual cost of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority. Explanation 7 of section 43(1) reads as below:

*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.*

**11.** In the case before us, goodwill was transferred by the amalgamating company UHEPL to the amalgamated company i.e., assessee company. According to the Explanation 7 mentioned hereinabove the actual cost of goodwill to the amalgamated company i.e., the assessee shall be same as it would have been if the

amalgamating company UHEPL had continue to hold the capital assets i.e. goodwill for the purpose of its own business. Since the actual cost of goodwill in the case of amalgamating company is zero the actual cost in the case of amalgamated company i.e. assessee shall also be zero.

**12.** To clarify further, Explanation 2 to clause 43(6)(c) reads as under:-

*Explanation 2. —Where in any previous year, any block of assets is transferred,—*

*(a) by a holding company to its subsidiary company or by a subsidiary company to its holding company and the conditions of clause (iv) or, as the case may be, of clause (v) of section 47 are satisfied; or*

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

**13.** 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.

**14.** Thus the Act clearly lay down that the actual cost of the block of asset (intangible block in this case) in the hand of the amalgamated company (assessee) would be written down value in the immediate preceding year in the case of amalgamating companies. Since, the written down value of the intangible block of asset was zero in the books of the amalgamating compares, the actual cost would remain zero in the hand of amalgamated company (the assessee).

**15.** This interpretation in our understanding of the law is not correct. For the simple reason that by virtue of the scheme of the amalgamation the appellant paid consideration over and above the net assets value of the amalgamating company and therefore the difference has been directly taken as cost of acquisition of goodwill. The Details of the consideration paid and assets taken over are as under: -

Particulars	Amount	Amount
Purchase Consideration (i.e. Fair value of shares issued)		412.5
Fair Value of Assets and liabilities taken over as under:		
Property, Plant, and equipment	2.9	
Inventories	17	
Current assets	118.5	
Current liabilities	(21)	
Tradename	10.3	
Goodwill	284.8	
		412.5

**16.** In the light of the aforementioned discussion, coming back to the

observation of the Ld. Pr.CIT invoking sixth proviso to section 32(1) of the Act, we are of the considered view that if the sixth proviso to section 32(1) is considered the depreciation under this proviso is to be restricted to the amount considered that amalgamation has not taken place and since in the hands of the amalgamating company the depreciation on goodwill would have been zero there cannot be depreciation in the hands of the amalgamated company.

**17.** We have to appreciate the facts of the case in hand in the true prospective. It has to be understood that there was no goodwill in the books of the UHEPL and only after the scheme of amalgamation when the amalgamating company UHEPL amalgamated goodwill came into existence being the difference between the consideration paid by amalgamated company i.e., assessee over and above the net assets value of the amalgamating company. The valuation of the goodwill is as per the valuation report and there is no quarrel in so far as the NAV of the amalgamating company is considered. The same has the sanction of the Hon'ble National Company Law Tribunal.

**18.** Whether the assessee is entitled to claim depreciation on goodwill has been decided by the Hon'ble Supreme Court in the case of CIT v.

Smifs Securities Ltd., [24 taxmann.com 222 (SC)] in which case also one company amalgamated with the assessee company and the excess consideration paid by it over value of net assets amounted to goodwill on which depreciation was claimed and was allowed. The Hon'ble Supreme Court *inter alia* was concerned with the following substantial question of law:

*"Question No.[b]: "Whether goodwill is an asset within the meaning of Section 32 of the Income Tax Act, 1961, and whether depreciation on 'goodwill' is allowable under the said Section?"*

**19.** The Hon'ble Supreme Court answered as under: -

*"Answer: In the present case, the assessee had claimed deduction of Rs. 54,85,430/- as depreciation on goodwill. In the course of hearing, the explanation regarding origin of such goodwill was given as under:*

*"In accordance with Scheme of Amalgamation of YSN Shares & Securities (P) Ltd with Smifs Securities Ltd (duly sanctioned by Hon'ble High Courts of Bombay and Calcutta with retrospective effect from 1st April, 1998. assets and liabilities of YSN Shares & Securities (P) Ltd were transferred to and vest in the company. In the process goodwill has arisen in the books of the company."*

2. *It was further explained that excess consideration paid by the assessee over the value of net assets acquired of YSN Shares and Securities Private Limited [Amalgamating Company should be considered as goodwill arising on amalgamation. It was claimed that the extra consideration was paid towards the reputation which the Amalgamating Company was enjoying in order to retain its existing clientele.*

3. *The Assessing Officer held that goodwill was not an asset falling under Explanation 3 to Section 32(1) of the Income Tax Act, 1961 [Act, for short].*

*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."*

4. *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 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).*

5. *In the circumstances, we are of the view that 'Goodwill' is an asset under Explanation 3(b) to Section 32(1) of the Act.*

6. *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 authorised representatives had filed copies of the Orders of the High Court ordering amalgamation of the above two Companies: that the assets and liabilities of Mis. YSN Shares and Securities Private Limited 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 1 assessee-Company stood increased. This*

*finding has also been upheld by Income Tax Appellate Tribunal [ITAT, for short]. We see no reason to interfere with the factual finding.*

*7. One more aspect which needs to be mentioned is that, against the decision of ITAT, the Revenue had preferred an appeal to the High Court in which it had raised only the question as to whether goodwill is an asset under Section 32 of the Act. In the circumstances, before the High Court, the Revenue did not file an appeal on the finding of fact referred to hereinabove.*

*8. For the afore-stated reasons, we answer Question No. [b] also in favour of the assessee."*

**20.** Since the claim of depreciation has the backing of the Hon'ble Supreme Court by no stretch of imagination the assessment order can be considered as "erroneous" and "prejudicial to the interest of the revenue" in so far as this issue concerned.

**21.** If the Ld. Pr.CIT was of the firm belief that the Assessing Officer has not conducted proper enquires, in so far as the claim of depreciation or good will is concerned. Nothing prevented the Ld. Pr.CIT to conduct enquires as held by the Hon'ble Delhi High Court in the case of DG Housing Projects [343 ITR 329], the relevant findings read as under: -

*"Section 263 has been enacted to empower the CIT to exercise power of revision and revise any order passed by the Assessing Officer, if two cumulative conditions are satisfied. Firstly, the order sought to be revised should be erroneous and secondly, it should be prejudicial to the interest of the Revenue. The expression ^prejudicial to the interest of the Revenue" is of wide import and is not confined to merely loss of tax. The term*

*"erroneous" means a wrong/incorrect decision deviating from law. This expression postulates an error which makes an order unsustainable in law.*

*The Assessing Officer is both an investigator and an adjudicator. If the Assessing Officer as an adjudicator decides a question or aspect and makes a wrong assessment which is unsustainable in law, it can be corrected by the Commissioner in exercise of revisionary power. As an investigator, it is incumbent upon the Assessing Officer to investigate the facts required to be examined and verified to compute the taxable income. If the Assessing Officer fails to conduct the said investigation, he commits an error and the word "erroneous" includes failure to make the enquiry. In such cases, the order becomes erroneous because enquiry or verification has not been made and not because a wrong order has been passed on merits.*

*In cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under Section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. CIT cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the CIT and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in Law. In some cases possibly though rarely, the CIT can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under Section 263 of the Act. In such matters, to remand the matter/issue to the*

*Assessing Officer would imply and mean the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question.*

*This distinction must be kept in mind by the CIT while exercising jurisdiction under Section 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible.*

*An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. We may notice that the material which the CIT can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the CIT [see CIT vs. Shree Manjunathesware Packing Products, 231 ITR 53 (SC)]. Nothing bars/prohibits the CIT from collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous.*

*In the present case, the findings recorded by the Tribunal are correct as the CIT has not gone into and has not given any reason for observing that the order passed by the Assessing Officer was erroneous. The finding recorded by the CIT is that "order passed by the Assessing Officer may be erroneous". The CIT had doubts about the valuation and sale consideration*

*received but the CIT should have examined the said aspect himself and given a finding that the order passed by the Assessing Officer was erroneous. He came to the conclusion and finding that the Assessing Officer had examined the said aspect and accepted the respondents computation figures but he had reservations. The CIT in the order has recorded that the consideration receivable was examined by the Assessing Officer but was not properly examined and therefore the assessment order is "erroneous". The said finding will be correct, if the CIT had examined and verified the said transaction himself and given a finding on merits. As held above, a distinction must be drawn in the cases where the Assessing Officer does not conduct an enquiry; as lack of enquiry by itself renders the order being erroneous and prejudicial to the interest of the Revenue and cases where the Assessing Officer conducts enquiry but finding recorded is erroneous and which is also prejudicial to the interest of the Revenue. In latter cases, the CIT has to examine the order of the Assessing Officer on merits or the decision taken by the Assessing Officer on merits and then hold and form an opinion on merits that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. In the second set of cases, CIT cannot direct the Assessing Officer to conduct further enquiry to verify and find out whether the order passed is erroneous or not."*

**22.** In so far as the second issue is concerned, the assessee in its notes to the revised return of income has specifically mentioned the error as under: -

*"2. computation under normal provisions of the income-tax Act, 1961 (Act).*

*In the revised return of income, an amount of Rs. 14.71 crores was added in respect of inventory amortization as the same was claimed in earlier years but debited to profit and loss account for the financial year ended 31 March 2017. DBIL has inadvertently disallowed an amount of Rs. 14.71 crores instead of ₹.20.88 crores (mentioned in detail in point 10 under content costs).*

*Once the above is rectified in the computation of income and tax liability (attached as Annexure 5), DBIL's business income for AY 2017-18 amounts to Rs. 6.65 crores.*

*Above business income of Rs 6.65 crores is set off against brought forward business loss of AY 2009-10 and balance business loss of AY 2009-10 amounting to Rs. 61.30 crores would lapse."*

**23.** In his submission dated 15.03.2017, during the course of the scrutiny assessment proceedings, the assessee has admitted the inadvertent error and requested the Assessing Officer to disallow ₹.20.88 crores instead of suo moto disallowance of ₹.14.71 crores. From the notes mentioned hereinabove it can be seen that the assessee had substantial loss and the business loss for assessment year 2009-10 amounting to ₹.61.30 crores would have lapsed during the year under consideration. Therefore, the contention of the Ld. Pr.CIT that this error has resulted into under assessment to the tune of ₹.6.17 crores would do no revenue loss and therefore in our considered opinion the twin conditions i.e., order should not only be "erroneous" but also "prejudicial to the interest of the revenue" is not fulfilled.

**24.** Recently, the Hon'ble Supreme Court in the case of CIT v. Paville Projects (P) Ltd. [2023 SCC On Line SC 371], while relying upon Malabar Industrial Co. Ltd., has discussed the sanctity of two-fold conditions for

the purpose of invoking jurisdiction under Section 263 of the Act. The relevant paragraph of the said decision reads as under:-

*"27. Learned counsel appearing on behalf of the assessee has heavily relied upon the decision of this Court in the case of Malabar Industrial Co. Ltd. (supra). It is true that in the said decision and on interpretation of Section 263 of the Income Tax Act, it is observed and held that in order to exercise the jurisdiction under Section 263(1) of the Income tax Act, the Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. It is further observed that if one of them is absent, recourse cannot be had to Section 263(1) of the Act. \*\*\*"*

**25.** Considering the facts of the case in to totality, we are of the considered view that the assessment order dated 18.03.2021 framed by the Assessing Officer under section 143(3) r.w.s. 143(3A) of the Act is neither "erroneous" nor "prejudicial to the interest of the revenue". Therefore, we set-aside the order of the Ld. Pr.CIT dated 27.03.2023 and restore that of the assessment order dated 18.03.2021.

**26.** In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 24<sup>th</sup> April, 2024.

**Sd/-**  
**(SUNIL KUMAR SINGH)**  
**JUDICIAL MEMBER**

Mumbai / Dated 24.04.2024  
Giridhar, Sr.PS

**Sd/-**  
**(NARENDRA KUMAR BILLAIYA)**  
**ACCOUNTANT MEMBER**

**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

(Asstt. Registrar)  
**ITAT, Mum**