

आयकर अपील*य अ+धकरण, इंदौर 2यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER

AND

SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No.24/Ind/2024

(Assessment Year: 2020-21)

ACIT Indore	Vs.	Commander Industries Private Limited The Agrawal Corporate House, Bicholi Mardana Main Indore
(Appellant / Revenue)		(Respondent/Assessee)
PAN: AABCC6223		

CO No.12/Ind/2024

(Arising out of ITA No.24/Ind/2024)

(Assessment Year: 2020-21)

Commander Industries Private Limited The Agrawal Corporate House, Bicholi Mardana Main Indore	Vs.	ACIT-Central -II Bhopal
(Appellant / Assessee)		(Respondent/Revenue)

PAN: AABCC6223

Appellant by	Shri Ajay Tulsian & Ms. Ruchira Singhal, ARs
Revenue by	Shri Ram Kumar Yadav, AR
Date of Hearing	02.09.2024
Date of Pronouncement	25.10.2024

ORDER

PER VIJAY PAL RAO, JM :

This appeal by revenue and CO by the Assessee are directed against the order dated 15.11.2023 of the Commissioner of Income Tax (Appeal), National Faceless Appeal Centre (NFAC), Delhi for A.Y.2020-21. The revenue has raised following grounds of appeal:

"1. Whether on the facts and circumstances of the case, the (TRA) is correct in allowing the difference of book value and purchase consideration as goodwill which has neither been purchased nor generated but is merely accounting entry.

2. "Whether on the facts and circumstances of the case and in law, the CIT(A) is correct in placing reliance on the decision of the Hon'ble Supreme Court in the case of CIT Vs Smifs Securities Ltd

3. Any other ground that may be urged during the course of appellate proceedings."

2. The assessee is Private Limited Company and engaged in the business of manufacturing, purchase and sale of various edible food materials like aata, maida, rava, suj, bran & refraction etc. Apart from its manufacturing and trading activities the assessee is also engaged in the business of generation and distribution of power through wind mill situated at Dewas, MP. The assessee has filed its return of income for the year under consideration u/s 139(1) of the Act on 24.12.2020 declaring total income of Rs.5,93,68,577/-. The case was selected for scrutiny through CASS and accordingly notice u/s 143(2) was issued on 29.06.2021. The AO issued show cause notice u/s 142(1) requiring the assessee to submit clarification/show cause as to why disallowance of claim of depreciation on goodwill as

a result of amalgamation/merger should not be made. The assessee filed its reply dated 30.03.2022. The AO noted that the assessee has claimed depreciation @25% of intangible asset of Rs.29,21,05,207/- shown as goodwill representing the payment over and above the net book value of assets of four amalgamating companies merged with the assessee company as per the scheme of amalgamation approved by NCLT vide order dated 21st July 2020. The said payment has been capitalized and shown as goodwill in the books of the assessee. The assessee issued shares to the shareholders of the amalgamating companies in respect of all the assets as well as towards the difference shown as goodwill. The AO denied the claim of depreciation on the goodwill while passing the assessment order in view of 5th proviso to section 32(1) r.w explanation -7 of section 43(1) and explanation -2 to section 43(6)(c) of the Act. The AO has held that when the goodwill was not shown in the books of the amalgamating companies then the claim of depreciation on goodwill is not allowable. On appeal the CIT(A) has allowed the claim of depreciation on goodwill by following various decisions /judgments of Hon'ble Supreme Court as well as this Tribunal. Aggrieved by the impugned order of the CIT(A) the revenue has filed the present appeal.

3. Before us the Ld. DR has submitted that actual cost of assets acquired in the scheme of amalgamation in the hand of amalgamated company will continue the same as it would have been in the hands of amalgamating companies in the event had there not been any amalgamation. The AO has referred to explanation -7 to section 43(1) and observed that it is clear that capital asset will have same value

in the amalgamating and amalgamated company in the scheme of amalgamation. One cannot take such cost in the amalgamated company which is difference from the cost disclosed in the amalgamating companies. The purpose of this provision as provided u/s 43(1) as well as 32(1) is to restrict any unintended claims, particularly when transaction is not treated as transfer under section 47(vi) of the Act. Therefore, the assessee cannot take amount of capital asset different from amalgamating companies because the transactions would not be treated as transfer and cost of asset as to be same in case of successor. The depreciation is allowable only on written down value of block assets considering actual cost and any asset which was not existing in the books of amalgamating company cannot be considered for depreciation. A combined reading of these provisions reveals the intent of the legislature for providing the measures u/s 32(1) 47(vi & vii). He has relied upon the order of the AO.

4. On the other hand, Ld. AR has submitted that the scheme of amalgamation was duly approved by the NCLT vide order dated 21st July 2020 placed at page no.122 to 131 and therefore, it is not an excess payment made by the assessee against taking over of the assets of amalgamating companies but it is based on the valuation by registered valuer placed at page no.155 to 177. Goodwill is generated in the process of amalgamation on account of difference in fair market/intangible value and book value of the net assets acquired by the assessee. The AO has not questioned the fair market value of the assets but denied the claim only on the ground that

goodwill was not in existence in the books of the amalgamating companies. He has submitted that the assessee has incurred actual cost for acquiring the business of the transferor companies which includes the payments made for actual fair market value of the net assets as against the book value of the net assets. Therefore, the goodwill is acquired by the assessee. He has relied upon following decisions:

- (i) CIT vs. Smifs Securities Ltd 348 ITR 302 (SC)*
- (ii) PCIT-4 vs. Zydus Wellness Ltd 113 taxmann.com 154 (SC)*
- (iii) PCIT vs. Zydus Wellness Ltd. 87 taxmann.com 82 (Guj)*
- (iv) CIT vs. RFCL Ltd. 57 taxmann.com 17 (Himachal Pradesh)*
- (v) Triune Energy Services P. Ltd. vs. DCIT 65 taxmann.com 288 (Delhi HC)*
- (vi) B. Raveendran Pillai vs. CIT 194 taxman 477 (Kerala)*
- (vii) Desney Broadcasting (India) (P.) Ltd. vs. Principal Commissioner of Income Tax 163 taxmann.com 40*

4.1 Ld. AR has heavily relied the impugned order of the CIT(A) and submitted that the CIT(A) has allowed the claim of depreciation on goodwill by following the various judgments by the Hon'ble Supreme Court as well as this Tribunal.

5. We have considered the rival submissions as well as relevant material on record. There is no dispute that the assessee has paid an amount of Rs.29,21,05,207/- over and above the net book value of the assets of the amalgamating companies namely Agrawal Coal Industries Pvt. Ltd., M/s Nakhralidhani Hotels Pvt. Ltd., AMC shipping Pvt. Ltd. and Chair Finance & Investment Pvt. Ltd. The

payment made by the assessee over and above net book value of the assets of these companies is determined on the basis of the fair market value of these assets as per valuation report of the registered valuer placed at page no.155 to 177 of the paper book. The said valuation has not been questioned by the AO which is also part of the scheme of amalgamation approved by the NCLT vide order dated 21st July 2020 placed at page no.122 to 131 of the paper book. In the said scheme of merger/amalgamation as approved by the NCLT all the details of assets and liability as well as the payment towards goodwill was duly reported. The AO has referred to the provisions which are measures provided against the misuse of over valuation of the assets in the hand of the amalgamated companies/successor entity for claiming excess depreciation whereas in the case in hand the assessee has acquired the assets along with a going concerns with all rights and advantages attached to the amalgamating companies. The CIT(A) has considered this issue in para no.6 to 6.13 as under:

"6.0 DECISION:

6.1 The appellant has raised 7 grounds of appeal in total. The ground of appeal no. 1 & 2 against the disallowance of depreciation u/s.32 of the Act. The ground no. 3 is against the disallowance of deduction u/s.80JJAA of the Act. The ground no.4 is against the incorrect computation of tax liability. The ground no.5 is against the charge of interest u/s.234B of the Act. The ground of appeal nos.6 & 7 are general in nature and hence do not require adjudication. Accordingly, the grounds of appeal raised by the appellant are taken up for discussion and adjudication in the forthcoming paragraphs of this order.

6.2 CONTENTION OF THE AO

6.2.1 At the outset, the case of the appellant company was selected for scrutiny through CASS. Accordingly, during the course of assessment

proceedings, the AO had issued statutory notices as per the Act calling for submissions from the appellant. In response thereto, the appellant has submitted that the appellant company acquired four companies namely M/s.Agarwal Coal Industries Pvt Ltd. M/s.Nakhrali Dhani Hotels Pvt Ltd, M/s.AMC Shipping Pvt Ltd and M/s.Chair Finance and Investment Pvt Ltd under a scheme of amalgamation approved by the Hon'ble National Company Law Tribunal (NCLT for short), Indore Bench, Ahmedabad vide CP(CAA) No. 8 of 2020 in CA(CAA) No.1/230-232/NCLT/AHM/2020 Dated 20.07.2020. Further, pursuant to the merger of the above companies into the appellant company, the appellant company took over the assets and liabilities of these companies, as recorded in their audited books of accounts. Subsequently, the appellant company has issued shares on the basis of intrinsic value of the net assets to the share holders of the transferor companies which was derived on the basis of market value of the respective assets in the transferor company. Accordingly, the difference between the value of shares issued by the appellant in lieu of the said amalgamation and the book value of assets of the amalgamating companies were recognised in the books of accounts of the appellant as payment for acquiring the goodwill and the same has been recognised as intangible asset & thereafter, depreciation was claimed u/s.32 of the Act in the impugned AY 2020-21. In this regard, the appellant had relied on the decision of the Hon'ble Supreme Court in the case of CIT v. Smifs Securities Ltd. [2012] 210 Taxman 428/24 taxmann.com 222.

6.2.2 However, the AO had disallowed the claim of depreciation made by the appellant on such goodwill arose out of amalgamation in the light of provisions of Sec.43(1) and Sec.43(6) of the Act. Also, the AO held that accounting entry in respect of goodwill can be there but does not mean that for all accounting entries, depreciation is to be allowed. Moreover, the AO is of the view of that depreciation is allowable only on WDV of block of assets considering the actual cost; and any asset which was not existing in the block of assets of demerged companies cannot be considered for depreciation and since the amalgamation transaction was not regarded as transfer of assets, all the corresponding provisions have excluded claim of depreciation on any additional asset received in the scheme of amalgamation.

6.2.3 Furthermore, the AO has held that the intent of the legislature is to make amalgamation a tax neutral scheme for companies as well as shareholders and not to provide tax planning mechanism to either of them. Furthermore, the AO was of the view that the issue under consideration before the Hon'ble Supreme Court in the case of Smiffs(supra) was only limited to the extent that whether goodwill is an asset within the meaning of Sec.32 of the Act and whether depreciation on goodwill is allowable under the said section. Accordingly, the AO has held that appellant was not eligible for depreciation on goodwill, which was not an existing asset or part of block

of asset of the amalgamating companies and held that the impugned transaction for claiming the deduction on account of the depreciation is an arrangement for claiming the higher depreciation which is unwanted under the provisions of the Act.

6.3 Appellant's Submissions

6.3.1 During the course of appellate proceedings, the appellant had filed elaborative written submissions rebutting the contentions of the AO made in the disputed assessment order. For the sake of brevity, the rebuttal of disputed order by the appellant through its written submissions is summarized as under:

a. The scheme of merger of transferor companies was duly approved by the Hon'ble NCLT vide order dated 21.07.2020. Pursuant to the merger the appellant company took over the assets and liabilities of transferor companies, as recorded in audited books of accounts of the transferor entities. The higher amount of purchase consideration was determined on the basis of the market value of the net assets of the erstwhile transferor companies and was paid in the form of share capital of the appellant company. The mode of payment of the consideration to the existing shareholders of the transferor companies by way of issuance of shares in accordance with the scheme approved by the Hon'ble NCLT.

b. The difference between the value of shares issued by the appellant company in lieu of merger and the book value of the assets of the transferor company recognized as such in the books of accounts, being the payment for acquiring the goodwill, was recognised as intangible assets (i.e. goodwill) in the books of accounts of the appellant.

C. The appellant has submitted that in the year under consideration the profitability of the appellant company has increased almost by 25.36%, without considering exceptional items and depreciation on goodwill. The appellant has also achieved substantial growth in profitability in subsequent years and therefore, the merger was advantageous to the appellant company and the consideration paid over the net assets book value is justified. Accordingly, the appellant has contended that the payment made in excess of the book value of assets is therefore rightly considered and recognized as goodwill and acquired goodwill was considered as an intangible assets under the provisions of Accounting Standard 26, Accounting Standard 14.

d. With regard to the provisions of Sec.43(1) of the Act invoked by the AO, it was submitted that the provisions were applicable only in the case of already existing capital assets in the books of accounts of the transferor company which is being transferred to the resulting company on account of amalgamation. In the instant case, the goodwill did not already exist in the

books of the transferor companies. The impugned goodwill was generated in the process of the amalgamation and on account of payment made by the appellant being the difference between the intrinsic value and the book value of the nets assets acquired by the appellant. Accordingly, the appellant company has incurred actual cost of acquisition of business of the transferor companies which includes the payment made for synergies and the aforesaid difference.

e, Further, in respect of the provisions of Sec.43(6) of the Act invoked by the AO, it was submitted that the concept of written down value would not apply in the case of the appellant since the intangible asset was not existing in the books of the transferor companies and it was only generated in the process of the amalgamation.

f. Moreover, the payment made by the appellant company in the form of allotment of shares was not for settlement of liability incurred for any expense or repayment of borrowings, therefore, the consideration payment made ought to be considered as payment for acquisition of capital asset i.e., goodwill. Therefore, the disallowance of depreciation on such goodwill hampers the tax neutrality.

g. In respect of the contention of the AO that the goodwill had NIL value in the books of the amalgamating companies, the same cannot be valued differently in the books of amalgamated company for the purpose of claiming depreciation; the appellant has submitted that as per the accounting standards and settled maxims of law, the consideration paid over and above the net book value of assets acquired in amalgamation is considered as goodwill.

h. ZINGCA Furthermore, the appellant had contended that the AO had orbited around a single theory that the goodwill was not forming part of the books of accounts of the transferor companies and depreciation is not allowable on such goodwill acquired.

i. Lastly, the appellant had submitted that it can't be denied that the goodwill existed in the form of intrinsic value of assets and synergies to be derived from business combination. Moreover, the AO had not disputed the valuation of the assets transfer to the appellant nor disputed the fact that the actual consideration was paid in the form of the share capital. Furthermore, the AO had not raised any contention on the working of the goodwill and on its qualification and mechanism. Accordingly, the appellant has claimed that the asset so acquired in the form of goodwill has been rightly recognized in the hands of the appellant company since the same is for the purpose of the business and depreciation is allowable as per Sec.32 of the Act.

j. The appellant has relied on the decision of the Hon'ble Supreme Court in the case of CIT v. Smifs Securities Ltd. [2012] 210 Taxman 428/24 taxmann.com 222 and other judicial pronouncements.

k. In support of the written submissions & grounds of appeal, the appellant has furnished copy of Hon'ble NCLT Order dated 20.07.2020, Working of goodwill arising on merger, copy of valuation report for valuation of shares and share exchange ratio of the Registered Valuer, copy of the composite scheme of merger and amalgamation amongst four companies and the appellant company & statement of assets of four transferor companies to be merged forming part of the order of Hon'ble NCLT.

6.3.2 I have carefully considered the contentions of the appellant and examined the same in the light of the facts and circumstances of the case as emanating from the assessment order and written submissions & documentary evidences furnished by the appellant.

6.4 Before dealing with the main issue, a discussion on the concept of Goodwill would be necessary to develop a proper perspective. The term 'goodwill' has not been defined in the Act. Gainful reference can be taken from the decision Hon'ble Supreme Court in the case of CIT vs. B.C. Srinivasa Setty [1981] 128 ITR 294/5 Taxman 1 (SC) to understand what goodwill is. In CIT v. B.C. Srinivasa Setty (supra), the Supreme Court:-

"Goodwill denotes the benefit arising from connection and reputation. The original definition by Lord Eldon in Cruttwell v. Lye [1810] 17 Ves 335 that goodwill was nothing more than the probability that the old customers would resort to the old places' was expanded by Wood V. C. in Churton v. Douglas [1859] John 174 to encompass every positive advantage that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on or with the name of the old firm, or with any other matter carrying with it the benefit of the business."

The Court had further explained that:

"A variety of elements goes into its making, and its composition varies in different trades and in different businesses in the same trade, and while one element may preponderate in one business, another may dominate in another business. And yet, because of its intangible nature, it remains insubstantial in form and nebulous in character. Those features prompted Lord Macnaghten to remark in IRC v. Muller and Co.'s Margarine Limited [1901] AC 217 (HL) that although goodwill was easy to describe, it was nonetheless difficult to define. In a progressing business goodwill tends to show progressive increase. And in a failing business it may begin to wane. Its value may fluctuate from one moment to another depending on changes in the reputation of the business. It is affected by everything relating to the business, the personality and

business rectitude of the owners, the nature and character of the business, its name and reputation, its location, its impact on the contemporary market, the prevailing socio-economic ecology, introduction to old customers and agreed absence of competition. There can be no account in value of the factors producing it. It is also impossible to predicate the moment of its birth. It comes silently into the world, unheralded and unproclaimed and its impact may not be visibly felt for an undefined period. Imperceptible at birth it exists enwrapped in a concept, growing or fluctuating with the numerous imponderables pouring into, and affecting, the business."

6.4.1 *The Hon'ble Supreme Court in the case of Srinivasa Setty(supra) had explained that no business commenced for the first time possesses goodwill from the start and it is generated as the business is carried on and may be augmented with the passage of time. The value of goodwill may, therefore, fluctuate from one moment to another depending on changes in the reputation of the business and it is affected by everything related to the business. Further, the Apex Court also held that goodwill denotes the benefit arising from connection and reputation and therefore, undoubtedly, it is an asset of the business,*

6.4.2 *In AP Paper Mills Ltd. v. ACIT, the Hon'ble ITAT Hyderabad had held that "goodwill basically is reputation. There can be no sale of goodwill without the business associated with that goodwill or the name. From that point of view, goodwill has no separate existence apart from business. One cannot sell the goodwill and retain the business that the goodwill represented, nor can one sell the business and retain the goodwill. Goodwill has no independent existence, it cannot subsist by itself. It must be attached to business.*

6.4.3 *In Kotak Forex Brokerage Ltd. v. ACIT, the Hon'ble ITAT Mumbai observed that "goodwill is nothing but positive reputation built by a person /company/ business-house over a period of time which is not manufactured or produced overnight but is brought into existence by experience and reputation."*

6.5 *Concisely, the goodwill is an intangible asset providing a competitive advantage to an entity. This includes a strong brand, reputation, a cohesive human resource, dealer network, customer base, etc. The expression 'goodwill' subsumes within it a variety of intangible benefits that are acquired when a person acquires a business of another as a going concern.*

6.6 *In the light of above discussion on goodwill, the facts of the case & the contentions of the appellant are examined. In the instant case, the appellant had acquired all the assets and liabilities/general reserve/investment allowance reserve/balance of profit and loss account etc at the book value as shown by the amalgamating company in its*

books of account. While doing so, the appellant paid more consideration against the net assets acquired by it from amalgamating company by way of issuing shares and as such, the excess consideration paid by the appellant was treated by it in its books of account as goodwill i.e., the goodwill arose out of amalgamation is a result of excess consideration paid as compared to the net assets of Transferor Companies. Goodwill arising on an amalgamation in the nature of purchase represents a payment made by the acquirer in anticipation of future economic benefits. The future economic benefits may result from synergy between the identifiable assets acquired or from assets that individually do not qualify for recognition in the financial statements. The concept of Goodwill becomes relevant when a business entity which is looking to purchase another entity is willing to pay a premium over the fair market value of its assets.

6.7 In the instant case, there is no dispute with regard to the fact that goodwill did not exist in the books of accounts of the amalgamating company. Further, depreciation on goodwill claimed by appellant was first time recognized in the books of account of amalgamated company in a scheme of amalgamation approved by the Hon'ble NCLT. On perusal of the working of the goodwill furnished by the appellant, it is clear that the appellant had paid consideration over the net assets book value in the form of share capital. The appellant has submitted that this payment made in excess of the book value of assets is therefore rightly considered and recognized as goodwill and acquired goodwill was considered as an intangible assets under the provisions of Accounting Standard 26, Accounting Standard 14. The detailed working of goodwill arising on merger furnished by the appellant is extracted below for ready reference

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6.8 Accounting Standard-14 issued by ICAI lays down the accounting and disclosure requirements in respect of amalgamation of companies, as well as treatment of resultant of goodwill or reserves. As per AS-14 issued by the ICAI, all assets and liabilities recorded in the books of account of transferor company shall stand transferred and vested in the transferee company pursuant to scheme and shall be recorded by the transferee company at their book value. The excess of or deficit in net asset value of the transferee company, after reducing aggregate face value of shares issued by the transferee company to the members of the transferor company, pursuant to the scheme and cost of investment in the books of the transferee company for the shares of transferor company held by it on the effective date be either credited to the capital reserve or debited to the goodwill account, as the case may be in the books of transferee company.

6.8.1 From an accounting perspective, it is well established that 'goodwill' is an intangible asset, which is required to be accounted for when a purchaser acquires a business as a going concern by paying more than the fair market value of the net tangible asset, that is, assets less liabilities. The difference in the purchase consideration and the net value of assets and liabilities is attributable to the commercial benefit that is acquired by the purchaser. In view of Accounting Standard 14 as issued by the ICAI the appellant's contention was right that the consideration paid by the appellant in excess of value of tangible assets was rightly classified as goodwill and doing so is an acceptable accounting practice.

INCOME 6.8.2 Further, it is relevant to note that on perusal of Hon'ble NCLT order, in para 14 it was confirmed that the Accounting treatment as proposed under the scheme are in conformity with the Accounting Standards prescribed under Sec. 133 of the Companies Act, 2013.
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6.9 Moreover, it is also observed that the AO did not have dispute with the accounting treatment of recognition of goodwill in the books of the appellant company as per accounting standards. The AO's main contention is that goodwill, arose out of amalgamation, was not an existing asset or part of block of asset of the amalgamating companies and therefore not eligible for depreciation as per the provisions of Sec.32 of the Act.

6.10 At this juncture, it is worthwhile to go through the provisions of Sec.32 of the Act which deals with depreciation. The relevant portion of Sec.32 of the Act reads as follows.

Depreciation.

632. (1) 7[In respect of depreciation of (1) buildings, machinery, plant or furniture, being tangible assets;

know-how, patents, copyrights, trade marks, licences, franchises or any other (ii) 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-

28 [Explanation 3. For the purposes of this sub-section, 29 [the expression "assets"] shall mean-

(a) tangible assets, being buildings, machinery, plant or furniture; intangible assets, being know-how, patents, copyrights, trade marks, (b) licences, franchises or any other business or commercial rights of similar nature (emphasis supplied)

6.10.1 Section 32 of the Act had been widened by Finance No. (2) Act, 1988 and depreciation was allowable on intangible assets acquired on or after 1st April, 1998. On perusal of the provisions of Sec.32 of the Act, it can be safely stated that the provision allows depreciation on both tangible and intangible assets. It is to be noted that by virtue of clause (ii) of section 32(1) of the Act depreciation is to be out-rightly allowed on the intangibles mentioned therein, but with respect to other intangible assets, depreciation would only be allowed on business or commercial rights which are of 'similar nature' to that of the mentioned intangibles.

6.11 Under the circumstances, the principal question which stood raised was whether goodwill is an asset within the meaning of Section 32 of the Act, and whether depreciation is allowable on the same. The issue of whether depreciation is allowable on goodwill is no longer res integra. The treatment of goodwill in the books as an intangible asset and claim of depreciation thereon under the Act was a contentious issue which caused to be settled through various decisions and particularly the decision of the Hon'ble Supreme Court in the case of CIT v. Smifs Securities Ltd. [2012] 210 Taxman 428/24 taxmann.com 222. The Hon'ble Supreme Court in Smifs (supra) held as follows: -

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.

MEN 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 M/s. 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 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.

6.11.1 The Hon'ble Supreme Court in the case of Smifs (supra) has held that Explanation 3(b) to section 32(1) of the Act states that the expression asset shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature. A reading of the words 'any other business or commercial rights of similar nature' in clause (b) of Explanation 3 indicates that goodwill would fall under the expression any other business or commercial right of a similar nature'. The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3(b). In the circumstances, 'goodwill' is an asset under Explanation 3(b) to section 32(1) of the Act.

6.11.2 As is manifest from the aforesaid judgment of Hon'ble Supreme Court in the case of Smifs(supra), it was categorically held that goodwill is an intangible asset which would clearly fall within the ambit of Explanation 3 to section 32(1) of the Act and therefore, eligible for depreciation u/s.32 of the Act.

6.12 Accordingly, in the instant case, the only remaining question regarding depreciation on goodwill is whether depreciation is allowable on such Goodwill arising on amalgamation. It is pertinent to note that Smifs (supra) was a case where assets of company - YSN shares and Securities (P.) Ltd. were transferred to Smifs Securities Ltd. under a scheme of amalgamation. And, the excess consideration paid by the Assessee therein over the value of net assets of YSN Shares and Securities (P.) Ltd. acquired by the Assessee, was accounted as goodwill. Therefore, in the case of Smifs (supra) before the Hon'ble Supreme Court,

goodwill arose on difference between the cost of asset acquired in amalgamation and the amount paid to the shareholders, on which the assessee claimed depreciation u/s.32(1) of the Act. Hence, it could not be said that goodwill arose out of amalgamation is not eligible for depreciation. Accordingly, case of the appellant company squarely comes under ratio laid down by the Hon'ble Supreme Court in the case of Smifs(supra).

6.12.1 This principle is also supported by the decision of the Hon'ble Supreme Court of India wherein the Apex Court has upheld the decision of Hon'ble High Court of Gujarat in the case of Pr.CIT-4 vs. Zydus Wellness Ltd [2019] 112 taxmann.com 400 (Gujarat)

6.12.2 Various High Courts have followed the decision of Hon'ble Supreme Court in Smifs case (supra) that goodwill would be eligible for depreciation. Reliance is placed on the decisions of the following judicial pronouncements

1. Hon'ble High Court of Karnataka in the case of CIT, Central Circle vs. Manipal Universal Learning (Pvt) Ltd [2013] 34 taxmann.com 9 (Karnataka),

2. Hon'ble High Court of Telangana in the case of Additional/Joint/Deputy/Assistant Commissioner of Incometax/Income- tax Officer vs. Mylan Laboratories Ltd [2022] 137 taxmann.com 178 (Telangana),

3. Hon'ble High Court of Gujarat in the case of Pr.CIT-1 vs. Aculife Healthcare (Pvt) Ltd [2023] 155 taxmann.com 283 (Gujarat),

4. Hon'ble High Court of Delhi in the case of Triune Energy Services (P.)Ltd. vs. Deputy Commissioner of Income-tax. The decision of the

5. Hon'ble Bombay High Court in the case of CIT v. Aditya Birla Nuvo Ltd. [2017] 79 taxmann.com 210/246 Taxman 202 has also held the

6.12.3 The sum and substance of ratios laid down by the Hon'ble Supreme Court and the other courts are that goodwill arising on amalgamation is entitled for depreciation u/s.32(1) of the Act.

6.13 Concisely, in this case, there was no goodwill in the books of account of the amalgamating company and further, goodwill has been acquired by appellant company by paying consideration over and above net value of assets at amalgamating companies. Consideration paid by the appellant company over and above net assets of amalgamating company was treated as goodwill arising on amalgamation and such goodwill is a capital asset eligible for depreciation. Such consideration had been paid for goodwill in pursuance to the scheme of arrangement approved by the Hon'ble NCLT. In the backdrop of aforesaid facts & discussion, and by following above legal ratio set by the Hon'ble Supreme Court in the case of Smifs(supra) and accountancy principles, in my considered opinion, the accounting of goodwill and consequent depreciation claim on such goodwill in the books of account of the appellant company is nothing but purchase of goodwill and thus, the

appellant has rightly claimed depreciation on said goodwill in terms of section 32(1) of the Act. Further, it is not open to the AO to try to evade from the binding effect of a Supreme Court decision by trying to find out 'distinguishing features'. Accordingly, I hereby direct the AO to delete the addition of Rs.7,30,26,302/- made by disallowing the depreciation u/s.32 of the Act. Hence, the grounds of appeal no. 1 & 2 raised on the issue of depreciation on goodwill are allowed.

6.14 The ground no. 3 was against the disallowance of deduction u/s.80JJAA of the Act. Briefly, the appellant had filed ITR for the impugned AY 2020-21 declaring a total loss of Rs.5,93,68,577/- and had claimed a deduction of Rs.5,80,542/- u/s. 80JJAA of the Act, for which, separate form i.e., Form 10DA was duly e-filed on 23.12.2020. Since, the gross income of the appellant as per the return was Nil, the said deduction could not be claimed. During the course of assessment proceedings, due to disallowance of depreciation on goodwill of Rs. 7,30,26,302/-u/s.32 of the Act, the total income of the appellant has become positive i.e., Rs.1,36,57,725/- and the appellant was ought to be allowed deduction u/s.80JJAA of the Act. However, the AO had not given the deduction u/s.80JJAA of the Act.

6.14.1 Be that as it may, in the instant case, the issue of quantum addition i.e.. depreciation on goodwill arose out of amalgamation has been decided in the favour of appellant. Therefore, the total income of the appellant has become Nil and hence, there is no scope for providing deduction u/s.80JJAA of the Act. Accordingly, the ground no.3 is not taken up for adjudication.

6.15 The ground no.4 is against the incorrect computation of tax liability. The appellant has contended that the AO had made the computation of tax liability at basic tax rate of 30% instead of applicable basic tax rate of 22%. During the year under consideration, the appellant company had exercised the option of taxation u/s.115BAA of the Act and accordingly, the company had filed Form 10IC. In this regard, the AO is directed to compute the tax liability, if any, under the provisions of Sec. 115BAA of the Act while giving effect to this order.

Hence, the ground of appeal no.4 is allowed."

5.1 A series of judgment have been relied upon by the CIT(A) while allowing claim of the assessee. We further note that the Hon'ble Delhi High Court in case of Triune Energy Services P. Ltd. vs. DCIT (supra) has considered an identical issue in para 13 to 21 as under:

"13. Goodwill is an intangible asset providing a competitive advantage to an entity. This includes a strong brand, reputation, a cohesive human resource,

dealer network, customer base etc. The expression "goodwill" subsumes within it a variety of intangible benefits that are acquired when a person acquires a business of another as a going concern.

14. In [CIT v. B.C. Srinivasa Setty](#): (1981) 128 ITR 294 (SC), the Supreme Court had explained that:-

"Goodwill denotes the benefit arising from connection and reputation. The original definition by Lord Eldon in [Cruttwell v. Lye](#) [1810] 17 Ves 335 that goodwill was nothing more than 'the probability that the old customers would resort to the old places' was expanded by [Wood V. C.](#) in [Churton v. Douglas](#) [1859] John 174 to encompass every positive advantage ' that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on or with the name of the old firm, or with any other matter carrying with it the benefit of the business."

The Court had further explained that:

"A variety of elements goes into its making, and its composition varies in different trades and in different businesses in the same trade, and while one element may preponderate in one business, another may dominate in another business. And yet, because of its intangible nature, it remains insubstantial in form and nebulous in character. Those features prompted Lord Macnaghten to remark in [IRC v. Muller and Co.'s Margarine Limited](#) [1901] AC 217 (HL) that although goodwill was easy to describe, it was nonetheless difficult to define. In a progressing business goodwill tends to show progressive increase. And in a failing business it may begin to wane. Its value may fluctuate from one moment to another depending on changes in the reputation of the business. It is affected by everything relating to the business, the personality and business rectitude of the owners, the nature and character of the business, its name and reputation, its location, its impact on the contemporary market, the prevailing socio economic ecology, introduction to old customers and agreed absence of competition. There can be no account in value of the factors producing it. It is also impossible to predicate the moment of its birth. It comes silently into the world, unheralded and unproclaimed and its impact may not be visibly felt for an undefined period. Imperceptible at birth it exists enwrapped in a concept, growing or fluctuating with the numerous imponderables pouring into, and affecting, the business."

15. From an accounting perspective, it is well established that 'goodwill' is an intangible asset, which is required to be accounted for when a purchaser acquires a business as a going concern by paying more than the fair market value of the net tangible assets, that is, assets less liabilities. The difference in the purchase consideration and the net value of assets and liabilities is attributable to the commercial benefit that is acquired by the purchaser.

Such goodwill is also commonly understood as the value of the whole undertaking less the sum total of its parts. The 'Financial Reporting Standard 10' issued by Accounting Standard Board which is applicable in United Kingdom and by Institute of Chartered Accountants of Ireland in respect of its application in the Republic of Ireland, explains that "the accounting requirements for goodwill reflect the view that goodwill arising on an acquisition is neither an asset like other assets nor an immediate loss in value. Rather, it forms the bridge between the cost of an investment shown as an asset in the acquirer's own financial statements and the values attributed to the acquired assets and liabilities in the consolidated financial statements".

16.The abovementioned Financial Reporting Standard 10 also provides for accounting of purchased goodwill as "the difference between the cost of an acquired entity and the aggregate of the fair values of that entity's identifiable assets and liabilities. Positive goodwill arises when the acquisition cost exceeds the aggregate fair values of the identifiable assets and liabilities. Negative goodwill arises when the aggregate fair values of the identifiable assets and liabilities of the entity exceed the acquisition cost."

17.At this stage, it is also relevant to refer to Accounting Standard 10 as issued by the Institute of Chartered Accountants of India. The relevant extract of which reads as under:-

"16.1 Goodwill, in general, is recorded in the books only when some consideration in money or money's worth has been paid for it. Whenever a business is acquired for a price (payable either in cash or in shares or otherwise) which is in excess of the value of the net assets of the business taken over, the excess is termed as 'goodwill'. Goodwill arises from business connections, trade name or reputation of an enterprise or from other intangible benefits enjoyed by an enterprise."

18.It is also relevant to note that [Smifs Securities Ltd.](#) (supra) was a case where assets of company - YSN shares and Securities (P.) Ltd. were transferred to Smifs Securities Ltd. under a scheme of amalgamation. And, the excess consideration paid by the Assessee therein over the value of net assets of YSN Shares and Securities (P.) Ltd. acquired by the Assessee, was accounted as goodwill.

19.In view of the above, we are inclined to accept the contention advanced on behalf of the Assessee that the consideration paid by the Assessee in excess of its value of tangible assets was rightly classified as goodwill.

20.In the facts of the present case, the ITAT has rejected the view that the slump sale agreement was a colourable device. Once having held so, the agreement between the parties must be accepted in its totality. The

Agreement itself does not provide for splitting up of the intangibles into separate components. Indisputably, the transaction in question is a slump sale which does not contemplate separate values to be ascribed to various assets (tangible and intangible) that constitute the business undertaking, which is sold and purchased. The Agreement itself indicates that slump sale included sale of goodwill and the balance sheet drawn up on 22nd September, 2006 specifically recorded goodwill at Rs.40,58,75,529.40/-. As indicated hereinbefore Goodwill includes a host of intangible assets, which a person acquires, on acquiring a business as a going concern and valuing the same at the excess consideration paid over and above the value of net tangible assets is an acceptable accounting practice. Thus, a further exercise to value the goodwill is not warranted.

15. *In view of the aforesaid, the question framed is answered in the negative, that is, in favour of the Assessee and against the Revenue. The Assessee's appeal (ITA 40/2015) is, accordingly, allowed.*

5.2 Similar view has been taken in the other decisions relied upon by the assessee cited in the forgoing paras. Following the decision of Hon'ble Supreme Court in case of CIT vs. Smifs Securities Ltd. the Delhi Benches of the Tribunal in case of Disney Broadcasting India Pvt. Ltd. has considered this issue in para 17 to 25 as under:

"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. ITA NO. 1884/MUM/2023 (A.Y: 2017-18) Disney Broadcasting (India) Private Limited 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 interalia 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.

ITA NO. 1884/MUM/2023 (A.Y: 2017-18) Disney Broadcasting (India) Private Limited

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 ITA NO. 1884/MUM/2023 (A.Y: 2017-18) Disney Broadcasting (India) Private Limited 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 ITA NO. 1884/MUM/2023 (A.Y: 2017-18) Disney Broadcasting (India) Private Limited "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 ITA NO. 1884/MUM/2023 (A.Y: 2017-18) Disney Broadcasting (India) Private Limited 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 ITA NO. 1884/MUM/2023 (A.Y: 2017-18) Disney Broadcasting (India) Private Limited 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).*

ITA NO. 1884/MUM/2023 (A.Y: 2017-18) Disney Broadcasting (India) Private Limited Once the above is rectified in the computation of income and tax liability (attached as Annexure 5), DBIL's business income for AY 201718 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 ITA NO.*

1884/MUM/2023 (A.Y: 2017-18) Disney Broadcasting (India) Private Limited 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."

5.3 No contrary judgment or decision has been brought to our notice by the revenue. Accordingly, by following the judgments/decisions as relied upon by the Ld. AR of the assessee, we do not find any error or illegality in the impugned order of the CIT(A) qua this issue, same is upheld.

6. In the Cross Objection the assessee has raised following grounds of appeal:

"1. That on the facts and in the circumstances of the case and in law the assessment order passed u/s 143(3) of the Income Tax Act 1961 being wrong and bad in law is prayed to be quashed.

2. The assessee respondent craves leave to add, alter, modify, constitute and/or withdraw all or any of the grounds of cross objection at any stage of the appellate proceedings."

7. At the time of hearing Ld. Counsel for the assessee has stated at bar the assessee does not press CO and the same may be dismissed

as not pressed. Ld. DR has raised no objection if the CO of the assessee is dismissed as not pressed. Accordingly, the Cross objection filed by the assessee is dismissed being not pressed.

8. In the result, the appeal of the revenue and CO of assessee are dismissed.

Order pronounced under Rule 34(4) of the ITAT, Rules 1963 on
25.10.2024.

Sd/-

(B.M. BIYANI)
Accountant Member

Indore, 25.10.2024

Sd/-

(VIJAY PAL RAO)
Judicial Member

Patel/Sr. PS

Copies to: (1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore 2