

IN THE INCOME TAX APPELLATE TRIBUNAL

"D" BENCH, MUMBAI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No. 3772/Mum./2023

(Assessment Year: 2016-17)

ITA No. 1200/Mum./2023

(Assessment Year: 2018-19)

Dow Chemical International Private Ltd.

Unit No.801, 8th Floor, Bldg No.9,
Gigaplex TTC Industrial Area, MIDC,
Airoli S.O. Navi Mumbai
Thane - 400708
PAN – AAACD4467B

..... Appellant

v/s

DCIT – 14(1)(2),

Mumbai
Maharashtra

..... Respondent

Assessee by : Shri Rajan Vora

Shri Pranay Gandhi

Revenue by : Ms. Rajeshwari Menon, Sr. AR /

Smt. Sanyogita Nagpal, CIT-DR

Date of Hearing – 22/11/2024

Date of Order - 25/11/2024

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeals have been filed by the assessee challenging the separate impugned orders dated 25/09/2023 and 14/02/2023, passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre,

Delhi, ["learned CIT(A)"], for the assessment years 2016-17 and 2018-19, respectively.

2. Since both appeals pertain to the same assessee and involve similar issues arising out of a similar factual matrix, these appeals were heard together for the sake of convenience and are being decided by way of this consolidated order. With the consent of the parties, the assessee's appeal for the assessment year 2016-17 is taken up as a lead case and the decision rendered therein shall be applicable *mutatis mutandis* to the appeal for the assessment year 2018-19.

ITA No. 3772/Mum./2023
Assessee's appeal – A.Y. 2016-17

3. In this appeal, the assessee has raised the following grounds: -

"Based on the facts and circumstances of the case, the Appellant respectfully craves to prefer an appeal against the order dated 25 September 2023 passed under section 250 of the Income Tax Act, 1961 (the Act'), by the Commissioner of Income-tax (Appeals), National Faceless Appeal Centre, Delhi ['CIT(A)] in the appeal filed against the assessment order dated 26 December 2019 passed under section 143(3) r.w.s 144B of the Act, on the following grounds, each of which are without prejudice to one another.

1. Disallowance of depreciation of INR 16,88,16,789 on goodwill

1.1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the disallowance of depreciation of INR 16,88,16,789 on goodwill.

1.2. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the disallowance of depreciation of INR 16,88, 16,789 on goodwill made by the Assessing Officer holding that goodwill does not fall within "any other business or commercial rights of similar nature" used in section 32 of the Act contrary to the decision of Supreme Court in the case of Smifs Securities Ltd (2012) (348 ITR 302).

1.3. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the contention of the Assessing Officer that the Appellant has not incurred any cost for acquiring goodwill in the scheme of merger.

2. Disallowance of depreciation of INR 99,03,534 on distribution network

2.1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the disallowance of depreciation of IN 99,03,534 on distribution network.

2.2. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the contention of the Assessing Officer that the Appellant has not incurred any cost for acquiring distribution network in the scheme of merger.

3. Disallowance of depreciation of INR 9,89,39,700 on customer relations

3.1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the disallowance of depreciation of INR 9,89,39,700 on customer relations.

3.2 On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the contention of the Assessing Officer that the Appellant has not incurred any cost for acquiring customer relations in the scheme of merger.”

4. The issue arising in ground no.1, raised in assessee's appeal, pertains to the disallowance of depreciation claimed on goodwill.

5. The brief facts of the case pertaining to this issue, as emanating from the record, are: The assessee is a private company incorporated in India and is engaged in the business of manufacturing and trading in diversified chemicals offering a broad range of products and services in various segments such as water, food and pharmaceuticals to paints, packaging and personal care products. For the year under consideration, the assessee filed its return of income on 30/11/2016 declaring a total income of Rs.167,20,25,790 as per the normal provisions of the Act. The return filed by the assessee was selected for scrutiny and statutory notices under section 143(2) and section 142(1) of the Act were issued and served on the assessee. During the assessment proceedings, from the perusal of the profit and loss account filed by the assessee for the year under consideration, it

was observed that the assessee has claimed depreciation of Rs.27,76,60,023 (Rs.16,80,16,789 @25% on goodwill value of Rs.67,52,67,147, Rs.99,03,534 @ 25% on the distribution network of Rs.3,96,14,137, Rs.9,89,39,700 @25% on customer relations of Rs.39,57,58,800). The assessee submitted that pursuant to the order dated 22/01/2016 passed by the Hon'ble Bombay High Court approving the Scheme of Amalgamation of Rohm and Hass (India) Private Ltd (hereinafter referred to as "*the amalgamating company*") with the assessee (i.e. the amalgamated company) with the appointed date being 01/04/2015, the assessee paid consideration for the amalgamation in the form of its equity shares at a swap ratio of 1:336, which was determined by the independent merchant banker. As per the assessee, the amalgamation was recorded as per the "*Purchase Method*" prescribed under Accounting Standard-14. Accordingly, the difference between the fair value of assets taken over including the identified assets and the consideration was recognised as intangibles in the books of the assessee. As a result, the intangible assets such as goodwill, distribution network and customer relations were transferred to the assessee apart from the tangible assets taken over like land, factory building, plant and machinery, etc. Since the amount claimed as goodwill is the difference in the consideration during the amalgamation, the assessee was asked to substantiate its claim on the following points: –

- "*Justification if these were assets in the nature of goodwill, Distribution network, and Customer relations in the book as on the date of demerger.*"
- "*Assessee was also asked to justify the claim made by the assessee with regard to the goodwill, Distribution network, Customer relations& why it*"

is not a fictitious asset and justify as to why these goodwill, Distribution network,

- *Customer relations is an asset falling under explanation 3 to section 32(1) of the I.T. Act, 1961.*

- *Assessee was further Moreover, kindly make detailed submissions on what are the underlying assets for the above goodwill and justify how these underlying assets are real and depreciable.*

- *5th proviso to section 32(1) of the I.T. Act, 1961, which is reproduced below, is clearly attracted in your case. " Provided also that the aggregate deduction, in respect of depreciation of buildings, machinery, plant or furniture, being tangible assets or know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets allowable to the predecessor and the successor in the case of succession referred to in clause (xiii), clause (xiiib) and clause (xiv) of section 47 or section 170 or to the amalgamating company and the amalgamated company in the case of amalgamation, or to the demerged company and the resulting company in the case of demerger, as the case may be, shall not exceed in any previous year the deduction calculated at the prescribed rates as if the succession or the amalgamation or the demerger, as the case may be, had not taken place, and such deduction shall be apportioned between the predecessor and the successor, or the amalgamating company and the amalgamated company, or the demerged company and the resulting company, as the case may be, in the ratio of the number of days for which the assets were used by them." In view of the above proviso, the assessee would not be eligible for depreciation on the value of Goodwill/business development rights, which have come into existence solely on account of purchase consideration being more than the value of net assets."*

6. In response, the assessee submitted that the intangible assets in the form of goodwill, distribution network and customer relations are not fictitious but real assets which were recognised by the amalgamated company. The assessee further submitted that the fact that these are the real assets is also substantiated by the fact that out of the total consideration paid by the assessee for taking over the business of the amalgamating company, these assets have been paid for by the assessee and the valuation of such assets is backed by the report of an independent valuer. Further, the assessee submitted that it has greatly benefited from these assets in its future business activities. The assessee by referring to the

Accounting Standard-14 submitted that it has allocated the consideration to the identified individual assets and liabilities at the fair values. In support of the submission that the intangible assets that have been recognised in the course of amalgamation are depreciable assets, which squarely fall under the last phrase of Explanation 3 to section 32(1) of the Act, i.e. "*any other business or commercial rights of similar nature*", the assessee placed reliance upon various judicial pronouncements including in the case of CIT v/s Smifs Securities Ltd., reported in [2012] 348 ITR 302 (SC). The Assessing Officer ("AO") vide order dated 26/12/2019 passed under section 143(3) of the Act disagreed with the submissions of the assessee and held that goodwill is included in the definition of intangible assets being any other business or commercial rights of similar nature has been settled by the Hon'ble Supreme Court in Smifs Securities Ltd. (supra). However, the question that has been answered by the Hon'ble Supreme Court is whether goodwill is included in the definition of intangible assets and the Hon'ble Court has refrained from answering any other issue of law or fact in this regard and has strictly decided only upon the question before it. The AO held that the question of allowability of depreciation on goodwill arising out of valuation done for the purpose of the merger was not posed before the Hon'ble Supreme Court. The AO further held that what is transferred is the net assets, which consist of existing tangible assets as well as other existing intangible assets and there are no intangible assets shown in the books of accounts of the amalgamating company. It was further held that it may be true that the goodwill is to be recognised in the books of the assessee company as per the prescribed accounting standards, however, this

accounting treatment itself does not entitle the assessee to claim depreciation in its books of accounts. Thus, it was held that the claim of depreciation to be allowed under the Act is governed by the provisions of the Act. By referring to the provisions of the sixth proviso to section 32(1)(ii) of the Act, the AO held that the assessee is not eligible for depreciation on goodwill. Further, by referring to the provisions of Explanation (7) to section 43(1) of the Act, the AO held that there is no actual cost of the intangibles in the hands of the amalgamating company as the same is not reflected in the balance sheet since they are self-acquired assets. Therefore, the AO rejected the submissions of the assessee, inter-alia, for the following reasons: –

"1. The claim of the assessee is untenable as section 32 dealing with allowability of depreciation specifically consists of tangible and intangible assets for allowability of depreciation. In terms of allowability of depreciation on intangible assets, section 32 states intangible assets are "knowhow, patents, copy rights, trademarks, licenses, franchises or whether business or commercial rights of similar nature" but not the word goodwill.

2. No credible evidence or material has been produced by the assessee to show that it has incurred any cost for acquiring goodwill in the scheme of demerger.

3. From the reply of the assessee, it is clear that the difference of assets and liabilities has been treated as goodwill. This means that the assessee made accounting the goodwill account the scheme of demerger became effective and not on account of making any payment for goodwill (intangible assets) specifically. As per standard accounting practices, in the cases of demerger, if the assets side is greater than the liability side then the difference is credited to the capital reserve account and in a case where the liability side is greater than the asset side then the difference is accounted as 'Goodwill' account in the hands of the demerged company. This practice is followed to balance the asset and liability sides by making accounting entries and by making such book entries, no real asset as goodwill in fact comes into existence. That was how the accounting treatment has been given, which is also supported by the auditors remark as stated in foregoing para.

4. It was also not submitted along with any evidence by the assessee that on the appointed date, the undertaking did have any asset and property as goodwill or such intangible asset in its accounts which could become a

subject matter of transfer or vesting of the asset to the transferee company, i.e. the assessee. It, therefore, could not be accepted that the assessee incurred any additional cost on account of goodwill (intangible asset).

5. In making the assessment of Demerger Company, namely, the assessee, it could be allowed the depreciation on the depreciable assets of the demerging company or on the assets on which it had incurred actual cost. No such asset under the head goodwill (intangible asset) on which demerging company had ever claimed any depreciation or held as an asset was shown to have vested in the assessee nor any actual cost shown to have been incurred subsequently by the assessee. The same is covered by the decision of the Bangalore Bench of the Hon'ble ITAT in United Breweries Ltd. Vs. ACIT [ITA No. 722/Bang/2014 and TS-553-ITAT-2016 (Bang)].

6. Mere accounting entries do not give rise to the assessee to claim depreciation on goodwill (intangible asset) contrary to the provisions of law. Under the Income-tax Act the total income of a company is chargeable to tax under section 4. The total income has to be computed in accordance with the provisions of the Act. The standard accounting practices might have taken some other view but such accounting practices were not necessarily a good law, these practices cannot override the specific provisions contained in the scheme of the Income-tax Act with respect to the actual cost for allowing depreciation to the assessee.

7. In view of the matter that there being no goodwill (intangible asset) on which depreciation could be said to have been allowed to the undertaking in the scheme of demerger nor any actual cost having been incurred by the demerging company as well as by demerged company, the claim made by the assessee in the return of income for the year under consideration with regard to goodwill (intangible asset) which had been found only a fictitious asset in the hands of the assessee and also the claim of depreciation is neither bona fide nor tenable."

7. Accordingly, the AO held that the assessee has failed to substantiate the nature and elements of "goodwill" that it has acquired from the amalgamating company upon amalgamation. Therefore, depreciation of Rs.16,80,16,789 @25% on goodwill value of Rs.67,52,67,147 claimed by the assessee under section 32(1)(ii) of the Act was disallowed by the AO.

8. The learned CIT(A), vide impugned order, dismissed the ground raised by the assessee on this issue and held that there is no evidence on record nor any evidence being adduced by the assessee to even suggest that under the Scheme of Amalgamation approved by the Hon'ble High Court, there

was any whisper of transfer of any goodwill from the amalgamating company to the assessee in exchange of shares. The learned CIT(A) further held that the differential amount which the assessee has sought to term as "*goodwill*" was actually accounted as a balancing factor while merging the accounts of the amalgamating company into the accounts of the assessee. It was held that there was no determination of any goodwill that would have been held by the amalgamating company prior to the amalgamation. The learned CIT(A) held that on account of amalgamation, the assets come to vest in the hands of the assessee and there is no cost of assets in the form of "*goodwill*" to the assessee on such vesting. Accordingly, the learned CIT(A) upheld the action of the AO in denying the claim of depreciation on goodwill. Being aggrieved, the assessee is in appeal before us.

9. We have considered the submissions of both sides and perused the material available on record. Before dealing with submissions of both parties on this issue, it is relevant to note certain basic facts of the present case. Rohm and Hass Company, USA along with all its subsidiaries was acquired by Dow Chemical, USA on 01/04/2019. As a part of the global legal entity rationalisation project of the Dow group, to rationalise a number of legal entities, as well as to derive synergies in operation, it was proposed to merge Rohm and Hass (India) Pvt. Ltd. into the assessee. As per the assessee, the merger enabled the consolidation of business of the amalgamating company and the assessee in one entity benefiting all the shareholders of the entity and also gave a common operating platform and an opportunity to leverage combined assets to build a stronger sustainable

business for the amalgamated entity. The Hon'ble Bombay High Court vide order dated 22/01/2016 approved the Scheme of Amalgamation of Rohm and Hass (India) Pvt. Ltd. with the assessee under section 391 - 394 of the Companies Act, 1956 with the appointed date being 01/04/2015. The following clauses of the Scheme of Amalgamation throw some light on the various assets and liabilities transferred from the amalgamating company to the assessee company: -

"5.2 - The entire business of the Transferor Company as going concerns and all the properties whether movable or immovable, real or personal, corporeal or incorporeal, present or contingent including but without being limited to all assets, authorized capital, fixed assets, capital work-in-progress, current assets and debtors, investments, rights, claims and powers, authorities, allotments, approvals and consents, reserves, provisions, permits, ownerships rights, lease, tenancy rights, occupancy rights, incentives, claims, rehabilitation schemes, funds, quota rights, import quotas, licenses, registrations, contracts, guarantees, bank guarantees, engagements, arrangements, brands, logos, patents, trade names, trademarks, copy rights, all other intellectual property rights, other intangibles of the Transferor Company whether registered or unregistered or any variation thereof as a part of its name or in a style of business otherwise, other industrial rights and licenses in respect thereof, lease, tenancy rights, flats, telephones, telexes, facsimile connections, e-mail connections, internet connections, websites, installations and utilities, benefits of agreements and arrangements, powers, authorities, permits, allotments, approvals, permissions, sanctions, consents, privileges, liberties, easements,. other assets, special status and other benefits that have accrued or which may accrue to the Transferor Company on and from the Appointed Date and prior to the Effective Date in connection with or in relation to the operation of the undertaking and all the rights, titles, interests, benefits, facilities and advantages of whatsoever nature and where ever situated belonging to or in the possession of or granted in favour of or enjoyed by the Transferor Company as on the Appointed Date and prior to the Effective Date shall, pursuant to the provision of Section 394(2) of the Act, without any further act, instrument or deed, be and stand transferred to and vested in or deemed to be transferred to and vested in the Transferee Company.

a. With effect from the Appointed Date, all the equity shares, debentures, bonds, notes, guarantees, bank guarantees or other securities held by the Transferor Company, whether convertible into equity or not and whether quoted or not shall, without any further act or deed, be and stand transferred to the Transferee Company as also all the movable assets including cash in hand, if any, of the Transferor Company shall be capable of passing by manual delivery or by endorsement and delivery, as the case may be, to the Transferee Company to the end and intent that the

property therein passes to the Transferee Company on such manual delivery or by endorsement and delivery.

b. In respect of movable properties of the Transferor Company other than specified in Clause 5.2 (a) above, including sundry debtors, outstanding loans and advances, if any recoverable in cash or in kind or for value to be received, bank balances and deposits, if any, with government, semi government, local and other authorities and bodies, the Transferee Company may, at any time after the coming into effect of this Scheme in accordance with the provisions hereof, if so required; under any law or otherwise, give notice in such form as it may deem fit and proper to each person, debtor or depositor, as the case may be, that pursuant to the High Court having sanctioned the Scheme, the said debts, loans, advances or deposits be paid or made good or held on account of the Transferee Company as the person entitled thereto to the end and intent that the right of the Transferor Company to recover or realize all such debts, deposits and advances including the debts payable by such persons, debtor or deposit to the Transferor Company) stands transferred and assigned to the Transferee Company and that appropriate entries should be passed in their respective books to record the aforesaid changes.

5.3 With effect from the Appointed Date, all the debts, unsecured debts, liabilities, duties and obligations of every kind, nature and description of the Transferor Company shall also under the provision of Sections 391 to 394 of the Act, without any further act or deed be transferred to or be deemed to be transferred to the Transferee Company so as to become as and from the Appointed Date, the debts, liabilities duties and obligations of the Transferee Company on the same terms and conditions as were applicable to the Transferor Company and further that it shall not be necessary to obtain the consent of any third party or other person who is a party to the contract or arrangement by virtue of which such debts, liabilities, duties and obligations have arisen, in order to give effect to the provisions of this clause.

5.4 It is clarified that all debts, loans and liabilities, duties and obligations of the Transferor Company as on the. Appointed Date and all other liabilities which may accrue or arise after the Appointed Date but which relate to the period on or upto the day of the Appointed Date shall be the debts, loans and liabilities, duties and obligations of the Transferee Company including any encumbrance on the assets of the Transferor Company or on any income earned from those assets.

5.5 With effect from the Appointed Date all debts, liabilities, dues, duties and obligations including all income tax, wealth tax, central sales tax, value added tax, service tax, excise duty, custom duty, fringe benefit tax, dividend distribution tax and other Government and Semi-Government and Statutory liabilities of the Transferor Company shall pursuant to the applicable provisions of the Act and without any further act or deed be also transferred or be deemed to be transferred to and vest in and be assumed by the Transferee Company so as to become as from the Appointed Date the debts, liabilities, duties and obligations of Transferee Company on the same terms and conditions as were applicable to the Transferor Company.

5.6 The Transferee Company may at any time after the coming into effect of the Scheme in accordance with the provisions of the Scheme, if so required, under the law or otherwise, execute Deeds of Confirmation, in favour of the secured creditors of the Transferor Company or in favour of any other party to any contract or arrangement to which the Transferor Company is a party or any writings as may be necessary to be executed in order to give formal effect to the above provisions. The Transferee Company shall under the provisions of the Scheme be deemed to be authorized to execute any such writings on behalf of the Transferor Company and to implement or carry out all such formalities or compliance referred to above on the part of the Transferor Company to be carried out or performed.

5.7 With effect from the Appointed Date and upon the Scheme becoming effective all development rights, statutory licenses, permissions, approvals or consents to carry on the operations and business of the Transferor Company shall stand vested in or transferred to the Transferee Company without any further act or deed and shall be appropriately mutated by the statutory authorities concerned in favour of the Transferee Company. The benefit of all statutory and regulatory permissions, environmental approvals and consents, registrations or other licenses and consents shall vest in and become available to the Transferee Company pursuant to this Scheme. In so far as the various incentives, subsidies, rehabilitation Schemes, special-status and other benefits or privileges enjoyed, granted by any Government body, local authority or by any other person, or availed of by the Transferor Company, are concerned, the same shall vest with and be available to the Transferee Company on the same terms and conditions.”

10. Further from the perusal of the Scheme of Amalgamation approved by the Hon'ble High Court, forming part of the paper book from pages 136-165, we find that as a consideration for the aforesaid transfer and vesting of the undertaking of the amalgamating company in the assessee, the assessee agrees to allot one equity share of Rs.10 each to the shareholders of the amalgamating company for 336 equity shares of the face value of Rs.10 each held by the shareholders of the amalgamating company. We find that the aforesaid consideration was paid on the basis of the valuation report dated 27/08/2015, which forms part of the paper book from pages 246-264. For the aforesaid valuation, the valuer considered the Discounted Cash Flow ("DCF") and Net Asset Value ("NAV") method and assigned 80% weight to DCF and 20% weight to NAV for the valuation of the assessee and the

amalgamating company. Accordingly, the equity value of the assessee and the amalgamating company was estimated at Rs. 13827.0 million and Rs. 5376.7 million, respectively. Accordingly, the value of the assessee was arrived at Rs. 5545.6 per equity share of Rs.10 each fully paid-up and the value of the amalgamating company was arrived at Rs. 16.5 per equity share of Rs.10 each fully paid-up. Accordingly, the fair exchange ratio of equity shares for the merger was arrived at 1:336. Further, as per the aforementioned Scheme of Amalgamation, the parties agreed that the amalgamation of the amalgamating company with the assessee shall be accounted for in the books of the assessee company in accordance with "Purchase Method" in compliance with the Accounting Standard-14 as notified under the provisions of the Companies Act, 1956 read with relevant provisions of the Companies Act, 2013. It was further agreed that any excess of the fair value of shares issued by the assessee company as consideration over the value of net assets of the amalgamating company shall represent goodwill and be treated as such in the assessee's financial statement prepared consequent upon such amalgamation. The clauses of the Scheme of Amalgamation pertaining to the aforesaid accounting treatment are reproduced as follows: –

"14.3 Since the Transferee Company intends to adjust book values of assets and liabilities of the Transferor Company when they are incorporated in the financial statements of the Transferee Company, amalgamation of the Transferor Company with the Transferee Company shall be accounted for in the books of account of the Transferee Company in accordance with 'Purchase Method' in compliance with the Accounting Standard 14 notified under the provisions of the Companies Act 1956 read with the relevant provisions of the Companies Act 2013.

14.4 Any excess of the fair value of shares issued by the Transferee Company as consideration over the value of net assets of the Transferor Company

acquired by the Transferee Company on amalgamation shall represent goodwill and be treated as such in the Transferee Company's financial statement prepared consequent upon such amalgamation. If the fair value of shares issued by the Transferee Company is lower than the value of net assets acquired, the difference shall be treated as capital reserve."

11. Since the parties to the amalgamation agreed that the assessee shall account for the amalgamation in its books in accordance with the "Purchase Method", the relevant provisions of the Accounting Standard-14 pertaining to the "Purchase Method" are reproduced as follows: -

"12. Under the purchase method, the transferee company accounts for the amalgamation either by incorporating the assets and liabilities at their existing carrying amounts or by allocating the consideration to individual identifiable assets and liabilities of the transferor company on the basis of their fair values at the date of amalgamation. The identifiable assets and liabilities may include assets and liabilities not recorded in the financial statements of the transferor company.

13. Where assets and liabilities are restated on the basis of their fair values, the determination of fair values may be influenced by the intentions of the transferee company. For example, the transferee company may have a specialised use for an asset, which is not available to other potential buyers. The transferee company may intend to effect changes in the activities of the transferor company which necessitate the creation of specific provisions for the expected costs, e.g. planned employee termination and plant relocation costs.

.....

17. If the amalgamation is an 'amalgamation in the nature of purchase', the identity of the reserves, other than the statutory reserves dealt with in paragraph 18, is not preserved. The amount of the consideration is deducted from the value of the net assets of the transferor company acquired by the transferee company. If the result of the computation is negative, the difference is debited to goodwill arising on amalgamation and dealt with in the manner stated in paragraphs 19-20. If the result of the computation is positive, the difference is credited to Capital Reserve.

.....

26. For amalgamations accounted for under the purchase method, the following additional disclosures are considered appropriate in the first financial statements following the amalgamation:

(a) consideration for the amalgamation and a description of the consideration paid or contingently payable; and

(b) the amount of any difference between the consideration and the value of net identifiable assets acquired, and the treatment thereof including the period of amortisation of any goodwill arising on amalgamation.

.....

The Purchase Method

36. In preparing the transferee company's financial statements, the assets and liabilities of the transferor company should be incorporated at their existing carrying amounts or, alternatively, the consideration should be allocated to individual identifiable assets and liabilities on the basis of their fair values at the date of amalgamation. The reserves (whether capital or revenue or arising on revaluation) of the transferor company, other than the statutory reserves, should not be included in the financial statements of the transferee company except as stated in paragraph 39.

37. Any excess of the amount of the consideration over the value of the net assets of the transferor company acquired by the transferee company should be recognised in the transferee company's financial statements as goodwill arising on amalgamation. If the amount of the consideration is lower than the value of the net assets acquired, the difference should be treated as Capital Reserve.

.....”

12. We find that following the provisions of the Accounting Standard-14 pertaining to the “*Purchase Method*”, the assessee sought another valuation report dated 04/07/2016 to estimate the fair value of identified intangible assets, i.e. Dealer Network and Customer Relationships (“*Identified Intangible Assets*”) and major tangible fixed assets i.e. land, buildings and plant and machinery (“*Specified Tangible Fixed Assets*”) as per the Indian Accounting Standards for the purpose of purchase price allocation exercise as at 31/03/2015, i.e. the valuation date. Further, the excess amount of consideration over the value of net assets of the amalgamating company acquired by the assessee was recognised in assessee’s financial statements as goodwill. Therefore, as per Accounting Standard-14 issued by The Institute of Chartered Accountants of India, the assets and liabilities

transferred were recorded at fair value, as determined by an independent valuer, as follows: –

Particulars	Amount in Rs.
<i>Fair value of assets and liabilities acquired:</i>	
Assets	
<i>Fixed assets (net)</i>	
- Tangible assets	2,130,969,046
- Intangible assets	435,781,962
	<u>2,566,751,008</u>
<i>Capital work-in progress</i>	45,145,664
<i>Long Term loans and advances</i>	128,692,174
<i>Net current assets</i>	1,980,320,516
<i>Long term provisions</i>	(17,155,252)
<i>Sub Total</i>	<u>4703754110</u>
<i>Less: Fair value of shares issues</i>	5,379,021,267
<i>Goodwill</i>	<u>675,267,157</u>

13. Thus, the difference between the fair value of assets taken over and consideration was recognised as goodwill along with other intangibles in the books of the assessee as follows: –

- Goodwill – Rs. 67,52,67,157
- Distribution network – Rs. 3,96,14,137
- Customer relationships – Rs. 39,57,58,800

14. Accordingly, in the return of income, the assessee based on the report from the independent valuer had claimed depreciation at the rate of 25% applicable to the block of intangible assets under section 32(1)(ii) of the Act as follows: –

- Depreciation on Goodwill – Rs. 16,88,16,789
- Depreciation on Distribution Network – Rs. 99,03,534
- Depreciation on Customer Relationships – Rs. 9,89,39,700

15. There is no dispute regarding the fact that the amalgamation was accounted by the assessee in its books as per the "Purchase Method" as prescribed by Accounting Standard-14. We find that due disclosure in this

regard was also made by the assessee in its audited financial statements for the year under consideration as noted on page 118 of the paper book. The lower authorities disallowed the depreciation claim by the assessee on the aforementioned intangible assets and accordingly, the assessee is in appeal before us. The primary contention of the assessee is that the goodwill recognised by the assessee in the process of amalgamation of the amalgamating company with the assessee company falls within the ambit of the expression "*business or commercial rights of similar nature*" under section 32(1)(ii) of the Act. In this regard, the assessee placed reliance upon the decision of the Hon'ble Supreme Court in Smifs Securities Ltd. (supra).

16. From the perusal of the decision in Smifs Securities Ltd. (supra), we find that the following question, inter-alia, came up for consideration before the Hon'ble Supreme Court: -

"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?"

17. While answering the question in favour of the assessee, the Hon'ble Supreme Court in Smifs Securities Ltd. (supra), observed 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.

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.

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."

18. Thus, from the perusal of the aforesaid findings of the Hon'ble Supreme Court, we find that in the facts of Smifs Securities Ltd. (supra), the excess consideration paid by the taxpayer over the value of net assets acquired of the amalgamating company was considered as goodwill arising

on account of amalgamation. It is further evident that the AO in the aforesaid decision concluded that no amount was actually paid on account of goodwill. However, in further appeal, the learned CIT(A) concluded that the difference between the cost of an asset and the amount paid constituted goodwill and the taxpayer in the process of amalgamation has acquired a capital right in the form of goodwill because of which the market worth of the taxpayer stood increased. It is evident from the perusal of the aforesaid decision that the aforesaid finding of the learned CIT(A) was upheld by the Tribunal and in further appeal, the Revenue restricted its challenge only qua the question as to whether the goodwill is an asset under section 32 of the Act and whether depreciation on "goodwill" is allowable under the said section. Therefore, it is evident from the record that the method of calculation of goodwill on which depreciation was claimed in Smifs Securities Ltd. (supra), i.e. the difference between the value of net assets acquired and consideration paid, is similar to the instant case. Thus, at the outset, we are of the considered view that the Revenue having once accepted the computation of goodwill in one case and not challenged its correctness, it will not be opened to the Revenue to challenge its correctness in the case of the other assessee without just cause. In support of the aforesaid conclusion, gainful reference can be made to the decision of the Hon'ble Supreme Court in Berger Paints India Ltd. v/s CIT, reported in (2004) 266 ITR 99 (SC).

19. As regards the submission of the Revenue that the amount of Rs. 67,52,67,157 is merely the difference between the purchase consideration

and the net assets acquired of the amalgamating company and the goodwill was nothing but a balancing factor while merging the accounts of the amalgamating company into the accounts of the assessee, we find that the "*Purchase Method*" of accounting for amalgamation as per Accounting Standard-14 requires the amalgamated company to account for the amalgamation by incorporating the assets and liabilities at their existing carrying amounts or by allocating the consideration to individual identifiable assets and liabilities of the amalgamating company on the basis of their fair values at the date of amalgamation. As noted in the foregoing paragraphs, the identifiable assets and liabilities may include assets and liabilities not recorded in the financial statements of the amalgamating company. Thus, following the "*Purchase Method*" of accounting for amalgamation as per Accounting Standard-14, the assessee sought a valuation report dated 04/07/2016 to estimate the fair value of identified intangible assets, i.e. Dealer Network and Customer Relationships ("*Identified Intangible Assets*") and major tangible fixed assets i.e. land, buildings and plant and machinery ("*Specified Tangible Fixed Assets*") as per the Indian Accounting Standards for the purpose of purchase price allocation exercise as at 31/03/2015, i.e. the valuation date. As noted in the foregoing paragraphs, Accounting Standard-14 further requires that any excess of the amount of the consideration over the value of net assets of the amalgamating company acquired by the amalgamated company should be recognised in the amalgamated company's financial statements as goodwill on amalgamation. Therefore, even though there is no intangible asset under the head "*goodwill*" in the books of the amalgamating company on the date of

acquisition by the assessee and the goodwill was not already recorded in the books of the amalgamating company which was valued by the independent merchant banker, it is pertinent to note that the value of the goodwill arose in light of the principles of Accounting Standard-14 followed by the assessee to account for the amalgamation in its accounts. Further, it is reiterated that in the Scheme of Amalgamation, approved by the Hon'ble High Court, both parties agreed that any excess of the fair value of shares issued by the assessee company as consideration over the value of net assets of the amalgamating company shall represent goodwill and be treated as such in the assessee's financial statement prepared consequent upon such amalgamation. Thus, once goodwill has been recognised by the assessee in its financial statement, pursuant to the amalgamation, we are of the considered view that it is entitled to claim depreciation on the same under section 32(1)(ii) of the Act in light of the decision of the Hon'ble Supreme Court in Smifs Securities Ltd. (supra).

20. As regards the anticipated advantages/benefits/profitability to its business which is attributable to the goodwill, the assessee vide submission dated 15/04/2024 placed on record the sales and profitability of the assessee, pre-amalgamation and post-amalgamation, along with relevant extracts of the balance sheet and profit and loss account for the relevant period, which are summarised as follows: –

Sales & Profitability of DCIPL pre-merger is as under:

<i>Assessment Year</i>	<i>Sales (Rs. in mn)</i>	<i>EBITDA (Rs. in mn)</i>
<i>2015-16</i>	<i>19,564.80</i>	<i>1,820.79</i>
<i>2014-15</i>	<i>18,845.05</i>	<i>1,623.57</i>
<i>2013-14</i>	<i>16,430.82</i>	<i>1,439.92</i>

Sales & Profitability of DCIPL (amalgamated entity) post-merges is as under:

<i>Assessment Year</i>	<i>Sales (Rs. in mn)</i>	<i>EBITDA (Rs. in mn)</i>
2018-19	42,168.63	4,023.65
2017-18	36,342.78	3,509.68
2016-17	28,981.43	2,461.71

21. Therefore, from the aforementioned comparative analysis of sales and profitability of the assessee, pre-amalgamation and post-amalgamation, it is clearly evident that the sales as well as EBITDA of the assessee increased in the assessment years 2016-17, 2017-18 and 2018-19, i.e. post-amalgamation.

22. As regards the reliance placed by the Revenue upon the sixth proviso to section 32(1) of the Act, we are of the considered view that the sixth proviso to section 32(1) of the Act presupposes that there exists a depreciable asset in the block of the amalgamating company which is transferred on amalgamation and depreciation is allowable to both the amalgamating company and the amalgamated company on the same asset. Accordingly, the said proviso provides a mechanism for splitting depreciation on such asset transferred by the amalgamating company between the amalgamating and amalgamated company, in a manner that the aggregate depreciation should not exceed the threshold provided in the said proviso. We find that the Hon'ble Karnataka High Court in Padmini Products (P.) Ltd. v/s DCIT, reported in [2020] 121 taxmann.com 237 (Karnataka) held that fifth proviso (now sixth proviso) to section 32(1)(ii) of the Act restricts aggregate deduction by the predecessor and successor and if in a particular year there is no aggregate deduction, the provisions of the proviso shall not

be applicable. It was further held that until and unless it is the case of aggregate deduction, the proviso has no role to play. Thus, adverting to the facts of the instant case, since the amalgamating company did not have any goodwill recorded in its books of accounts or as part of a block of depreciable assets, prior to amalgamation, therefore the question of claim of depreciation on goodwill by the amalgamating company does not arise in the instant case. Accordingly, we are of the considered view that the provisions of the sixth proviso to section 32(1) of the Act are not applicable to the facts of the present case since the goodwill did not exist in the books of the amalgamating company but has arisen in the process of amalgamation.

23. Further, the Revenue has placed reliance upon the provisions of Explanation 7 to section 43(1) of the Act which provides that when a capital asset is transferred by an amalgamating company to the amalgamated company, the actual cost of the transferred capital asset in the hands of the amalgamated company is to be taken to be the same as it would have been if the amalgamating company had continued to hold the capital asset for the purpose of its own business. Further, reliance has also been placed upon the provisions of Explanation 2(b) to section 43(6) of the Act, which lays down a similar principle as Explanation 7 to section 43(1) of the Act and provides that actual cost of the block of assets in the case of amalgamated company shall be the Written Down Value of the block of assets in the case of 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. Thus, from the careful perusal of the aforesaid

provisions, it is evident that the same pre-supposes either the existence of a block or the value of goodwill forming part of such block or the asset has actual cost to the amalgamating company. However, in the instant case, as noted above, the goodwill arising on account of amalgamation was neither reflected as an asset nor was part of the block of assets belonging to the amalgamating company. We find that while considering the applicability of the provisions of the sixth proviso to section 32(1), Explanation 7 to section 43(1) and Explanation 2(b) to section 43(6) of the Act in a similar factual matrix wherein the goodwill as claimed by the taxpayer represents the difference between the purchase consideration and value of the net assets acquired on amalgamation, the coordinate bench of the Tribunal in *Urmin Marketing (P.) Ltd. v/s DCIT*, reported in [2020] 122 taxmann.com 40 (Ahd.-Trib.) held that since the taxpayer had not acquired any goodwill from the amalgamating company, therefore these provisions are not applicable. The relevant findings of the coordinate bench, in the aforesaid decision, are reproduced as follows: –

"32.4 From the above, it would appear that the intent of the Legislature is to make amalgamation a tax neutral scheme for companies as well as for the shareholders and not to provide a tax planning mechanism to either of them. However, a conjoint reading of the above provisions reveal that the assets which were transferred by the amalgamating company to the amalgamated company in the process of amalgamation were not made subject to the capital gain tax. Furthermore, the 6th proviso to section 32 of the Act has limited the amount of depreciation available to the amalgamated company post amalgamation to the extent of the amount of depreciation which would have been available to the amalgamating company, had there not been any amalgamation. Indeed there was no entry in the books of the transferor/amalgamating company for the intangible assets/goodwill being self-generated assets. However, we note that all the relevant provisions of the Act as discussed above deal with respect to the assets available/recorded in the books of the transferor/amalgamating company. In other words, the assets which have been acquired by the assessee in the scheme of amalgamation would continue at the book value in the books of the

amalgamated company. The question arises whether the goodwill shown by the assessee as discussed above was acquired in the scheme of amalgamation from the amalgamating company. The answer stands in negative. It is because there was no entry in the books of accounts of the amalgamating/transferor company reflecting the value of the goodwill. As such, the amount of goodwill as claimed by the assessee represents the difference between the purchase consideration and the NAV acquired by it. The purchase consideration paid by the assessee was based on the valuation report as discussed above after considering the various factors. Thus the assessee has not acquired any goodwill from the amalgamating/transferor company as alleged, accordingly the provisions of the Act i.e. 6 proviso to section 32, explanation 7 to section 43(1), explanation 2 to section 43(6)(c) of the Act cannot be applied to the case on hand."

24. Therefore, respectfully following the aforesaid decision of the coordinate bench of the Tribunal in Urmin Marketing (P.) Ltd. (supra), we are of the considered view that provisions of the sixth proviso to section 32(1), Explanation 7 to section 43(1) and Explanation 2(b) to section 43(6) of the Act have no applicability to the facts of the present case.

25. As regards the reliance placed by the Revenue on the provisions of section 49(1)(iii)(e) and section 55(2)(a)(ii) of the Act, it is pertinent to note that these provisions form part of the Chapter dealing with "Capital Gains" and section 47 of the Act specifically excludes transfer of capital assets, pursuant to a scheme of amalgamation, from the purview of section 45 of the Act. Therefore, we are of the view that these provisions have no relevance to the facts of the present case.

26. The Revenue, vide its written submissions, has relied upon certain judicial pronouncements, which have been dealt with hereunder: -

- (a) We find that the decision in Borkar Packaging Pvt. Ltd. v/s ACIT, reported in (2010) 131 TTJ 99 (Panaji), was rendered by the coordinate bench of the Tribunal prior to the decision of the

Hon'ble Supreme Court in Smifs Securities Ltd. (supra), and therefore the same is no longer a good law.

- (b) From the perusal of the paragraph of the decision of the coordinate bench of the Tribunal in Pfizer Ltd, in ITA no. 2108/Mum./2018, dated 22/09/2023, placed reliance upon by the Revenue, we find that the coordinate bench restored the issue to the file of the AO to examine the actual cost of the goodwill and to allow the depreciation on it if the same is allowable in accordance with law. Further, apart from merely quoting the paragraph from the aforesaid decision, the Revenue has not placed any submission as to how the same is relevant to the present case. In any case, we have already dealt with the issue of applicability of the provisions of Explanation 7 to section 43(1) of the Act in the foregoing paragraphs.
- (c) In Millennium Engineers and Contractors Ltd. v/s DCIT, in ITA No.668/Pun/2022, the resultant consideration paid/payable by the taxpayer under the approved scheme was even much less than the value of net assets acquired by it. Therefore, the coordinate bench vide order dated 30/10/2023 concluded that there was no scope for the purchase of goodwill by excess payment of purchase consideration. Thus, it is clearly evident that the facts of the aforesaid case are completely different from the facts under consideration before us.
- (d) The decision in the case of Dosti Reality Ltd., in ITA No. 2043/Mum/2022, dated 13/04/2023, is also distinguishable on

facts as the “*pooling of interest*” method was followed to account for the amalgamation in the books of the amalgamated entity as compared to “*Purchase Method*” adopted in the present case.

- (e) Lastly, the decision in the case of United Breweries Ltd. v/s Addl. CIT, reported in [2016] 76 taxmann.com 103 (Bang.), relied upon by the lower authorities, the value of goodwill in the books of the amalgamating company was only Rs.7.45 crore which has been shown by the taxpayer at Rs.62.30 crore and accordingly, it was held that the taxpayer has failed to justify the valuation of goodwill at Rs.62.30 crore. However, there is no dispute regarding the value of goodwill in the present case. We find that for a similar reason the coordinate bench of the Tribunal in Aricent Technologies (Holdings) Ltd. v/s DCIT, in ITA No.90/Del/2013 distinguished the aforesaid decision in United Breweries Ltd. (supra). Thus, we are of the considered view that the reliance placed on the aforesaid decision is misplaced.

27. Further, the reference in the impugned order to the amendment made vide Finance Act, 2021 is also of no help to the Revenue as the said amendment in relation to the allowance of depreciation on goodwill is effective from 01/04/2021 and would accordingly apply to the assessment year 2021-22 and subsequent assessment years. This aspect is evident from page 71 of the Memorandum Explaining the Provisions in the Finance Bill, 2021. Even the decision of the coordinate bench of the Tribunal in I&B Seeds (P) Ltd v/s DCIT, reported in [2022] 142 taxmann.com 274 (Bang-Trib.) held

that amendment in section 32(1) by Finance Act, 2021 to the effect that no depreciation was allowable on goodwill would take effect from 01/04/2021 and would be applicable from assessment year 2021-22 and subsequent years.

28. Therefore, in view of the facts and circumstances of the present case, legal position and judicial pronouncements as noted above, we are of the considered view that the assessee is entitled to claim depreciation on goodwill arising on account of amalgamation under section 32 of the Act. Accordingly, the AO is directed to allow the claim of the assessee. As a result, the impugned order on this issue is set aside and ground no.1 raised in assessee's appeal is allowed.

29. The issue arising in grounds no.2 and 3, raised in assessee's appeal, pertains to the disallowance of depreciation on the distribution network and customer relations.

30. We have considered the submissions of both sides and perused the material available on record. The AO, vide order passed under section 143(3) of the Act, disallowed the depreciation of Rs.99,03,534 @ 25% on the distribution network of Rs.3,96,14,137 and Rs.9,89,39,700 @25% on customer relations of Rs.39,57,58,800 claimed by the assessee. The learned CIT(A), vide impugned order, adopting its reasoning applied for denial of depreciation on goodwill held that from the details of assets and liabilities taken over during amalgamation, there exists no separate asset under the head of assets by the name "*customer relationship*" or "*distribution network*"

in the books of the amalgamating company. The learned CIT(A) further held that just like "*goodwill*", the two intangible assets on which depreciation is being claimed by the assessee are actually the balancing figures while merging the accounts of the amalgamating company. Accordingly, the learned CIT(A) upheld the denial of depreciation claimed on "*customer relationship*" and "*distribution network*".

31. As per the assessee, the amalgamating company had a strong distribution network and had established relationships with the distributors who had a nationwide presence. The distributor network is critical to ensure the widespread geographical presence of products and access to retailers and end customers, without whom the assessee could not have established a direct relationship. As per the assessee, the amalgamating company has contractual relationships with the distributors in the form of yearly renewable and mutually terminable contracts and these contracts were in existence over a fairly long period of time.

32. As noted above, following the provisions of the Accounting Standard-14 pertaining to the "*Purchase Method*", the assessee sought a valuation report dated 04/07/2016 to estimate, inter-alia, the fair value of identified intangible assets, i.e. Dealer Network and Customer Relationships as per the Indian Accounting Standards for the purpose of purchase price allocation exercise as at 31/03/2015, i.e. the valuation date. From the perusal of the valuation report dated 04/07/2016, forming part of the paper book from pages 169-245, we find that the independent valuer also noted the fact that the amalgamating company has 6 main dealers for coating business and 5

main dealers for AFM business spread across the country. Further, these agreements with the dealers are of an exclusive nature and are valid for a period of 2-3 years, which are renewed thereafter and have been in existence for a substantial period of time. The valuer further acknowledged the fact that it may not be very difficult to establish a dealer network for a large player like the assessee, but establishing a dealer network across the country is a time-consuming exercise for any market participant as it involves undertaking various steps such as assessing the creditworthiness of the dealers before associating with them, establishing the infrastructure associated with the establishing dealer network, etc. Accordingly, the valuer considered that it would take approximately 2-3 years and effort to replicate the distribution network similar to the amalgamating company.

33. Similarly, the independent valuer notes that the amalgamating company has long-standing business relationships with some of the major players in the paint and packaging industries. Further, it has a diversified customer base of over 400 customers. Even though there are no long-term contracts with these customers, however, the amalgamating company receives substantial repeat business from them based on their long-standing relationship. As per the assessee, the acquisition of the existing customer base has saved the time and cost that the assessee would have spent on the creation of such a network as this network of existing contracts would facilitate the business of the assessee by enabling it to provide the services and distribute products, thereby increasing the turnover of the assessee. Further, the said acquisition has also given ready business to the assessee

during its initial stages of acquisition. Thus, as per the assessee, both “customer relationship” and “distribution network” are critical for the running and growth of the business of the assessee. As noted elsewhere, Accounting Standard-14 provides that the identifiable assets and liabilities may include assets and liabilities not recorded in the financial statement of the transferor company. Thus, similar to our findings rendered in respect of the claim of depreciation on goodwill, we find no merits in the findings of the lower authorities that no separate asset under the head of assets by the name of “customer relationship” or “distribution network” was existing in the books of the amalgamating company. Further, we also do not find any merits in the findings of the learned CIT(A) that the aforementioned two intangible assets are actually the balancing figures while merging the accounts of the amalgamating company, as the fair value of these assets was specifically computed by the independent valuer vide valuation report dated 04/07/2016.

34. We find that while explaining the meaning of the phrase “any other business or commercial rights of similar nature” in section 32(1)(ii) of the Act, the Hon’ble Delhi High Court in *Areva T & D India Ltd. v/s DCIT*, reported in (2012) 345 ITR 421 (Del.), observed as follows: –

“13.The fact that after the specified intangible assets the words “business or commercial rights of similar nature” have been additionally used, clearly demonstrates that the Legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets, which were neither feasible nor possible to exhaustively enumerate. In the circumstances, the nature of “business or commercial rights” cannot be restricted to only the aforesaid six categories of assets, viz., knowhow, patents, trademarks, copyrights, licenses or franchises. The nature of “business or commercial rights” can be of the same genus in which all the aforesaid six assets fall. All the above fall in the genus

of intangible assets that form part of the tool of trade of an assessee facilitating smooth carrying on of the business. In the circumstances, it is observed that in case of the assessee, intangible assets, viz., business claims; business information; business records; contracts; employees; and knowhow, are all assets, which are invaluable and result in carrying on the transmission and distribution business by the assessee, which was hitherto being carried out by the transferor, without any interruption. The aforesaid intangible assets are, therefore, comparable to a license to carry out the existing transmission and distribution business of the transferor. In the absence of the aforesaid intangible assets, the assessee would have had to commence business from scratch and go through the gestation period whereas by acquiring the aforesaid business rights along with the tangible assets, the assessee got an up and running business. This view is fortified by the ratio of the decision of the Supreme Court in Techno Shares & Stocks Ltd. (supra) wherein it was held that intangible assets owned by the assessee and used for the business purpose which enables the assessee to access the market and has an economic and money value is a "license" or "akin to a license" which is one of the items falling in Section 32(1)(ii) of the Act.

14. In view of the above discussion, we are of the view that the specified intangible assets acquired under slump sale agreement were in the nature of "business or commercial rights of similar nature" specified in Section 32(1)(ii) of the Act and were accordingly eligible for depreciation under that Section."

35. Further, we find that the coordinate bench of the Tribunal in SKS Micro Finance Ltd. v/s DCIT, reported in [2013] 37 taxmann.com 192 (Hyd. - Trib.) held that where the taxpayer was engaged in the business of micro-financial lending services and it had acquired entire microfinance business of another company 'S', which included the acquisition of rights over more than 1.10 lakhs existing clients of 'S', the amount paid by the taxpayer to 'S' for acquisition of its aforesaid clients was for an intangible asset eligible for depreciation. The relevant findings of the coordinate bench, in the aforesaid decision, are reproduced as follows: –

"11. It is not disputed that the assessee has acquired the entire business and commercial asset of SKS on payment of lumpsum consideration which included the cost of acquisition of the existing customer base of SKS Society. It is also a fact that, the customer base acquired by the assessee has provided an impetus to the business of the assessee as the customers acquired are with proven track record since they have already been trained,

motivated, credit checked and risk filtered. They are source of assured economic benefit to the assessee and certainly are tools of the trade which facilitates the assessee to carry on the business smoothly and effectively. Therefore, by acquiring the customer base the assessee has acquired business and commercial rights of similar nature.

.....

14.Therefore, the facts of the case considered in the light of the ratio laid down by various judicial precedents referred to hereinabove, in our view, the client acquisition cost paid by the assessee is towards acquiring an intangible asset and therefore eligible for depreciation u/s 32(1)(ii) of the Act."

36. Therefore, in view of the facts and circumstances of the present case and judicial pronouncements as noted above, we find merit in the claim of the assessee and accordingly we direct the AO to grant the depreciation on "customer relationship" and "distribution network" arising on account of amalgamation under section 32 of the Act. As a result, grounds no.2 and 3 raised in assessee's appeal are allowed.

37. In the result, the appeal by the assessee for the assessment year 2016-17 is allowed.

ITA No. 1200/Mum./2023
Assessee's appeal – A.Y. 2018-19

38. In this appeal, the assessee has raised the following grounds: -

"Based on the facts and circumstances of the case, the Appellant respectfully craves to prefer an appeal against the order dated 14 February 2023 passed under section 250 of the Income Tax Act, 1961 (the Act'), by the Commissioner of Income-tax (Appeals), National Faceless Appeal Centre, Delhi [CIT(A)] in the appeal filed against the assessment order dated 7 April 2021 passed under section 143(3) r.w.s. 143(3A) & 143(3B) of the Act, on the following grounds, each of which are without prejudice to one another.

1. Validity of the assessment order

1.1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in dismissing the ground that the Assessing Officer erred in passing the order dated 7 April 2021 under section 143(3) read with sections 143(3A) & 143(3B) of the Act instead of passing the order under section 143(3) read

with section 144B of the Act. Therefore, the assessment order dated 7 April 2021 passed is bad in law and should be quashed.

1.2 On the facts and in the circumstances of the case and in law, the CIT(A) erred in holding that error in mentioning procedural section does not make the assessment order invalid in light of the provisions of section 292B of the Act contrary to the decision of the Delhi High Court in case of Gurgaon Realtech Limited W.P.(C) 5849/20211.

2. Denial of natural justice

On the facts and in the circumstances of the case and in law, the CIT(A) erred in not appreciating that the Assessing Officer passed an assessment order without providing reasonable and adequate opportunity to furnish detailed submission against show cause notice dated 01 April 2021, thereby, violating the principles of natural justice

3. Disallowance of depreciation of INR 9,49,59,444 on goodwill

3.1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the disallowance of depreciation of INR 9,49,59,444 on goodwill.

3.2. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the disallowance of depreciation of INR 9,49,59,444 on goodwill made by the Assessing Officer holding that goodwill does not fall within the "any other business or commercial rights of similar nature* used in section 32 of the Act contrary to the decision of Supreme Court in the case of Smifs Securities Ltd (2012) (348 ITR 302)

3.3. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the contention of the Assessing Officer that the Appellant has not incurred any cost for acquiring goodwill in the scheme of merger.

4. Disallowance of depreciation of INR 55,70,738 on distribution network

4.1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the disallowance of depreciation of INR 55,70,738 on distributed network.

4.2. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the contention of the Assessing Officer that the Appellant has not incurred any cost for acquiring distribution network in the scheme of merger.

5. Disallowance of depreciation of INR 5,56,53,581 on customer relations

5.1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the disallowance of depreciation of INR 5,56,53,581 on customer relations.

5.2. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the contention of the Assessing Officer that the Appellant

has not incurred any cost for acquiring customer relations in the scheme of merger.

6. Upholding the adjustments made under section 143(1) of the Act

On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding that the addition of INR 1,08,01,691 made under section 36(1)(va) of the Act by the Centralized Processing Center, Bangalore ('CPC') in the intimation under section 143(1) of the Act, which was considered by the AO while assessing the total income of the Appellant, is not beyond the scope of adjustments permitted under section 143(1)(a) of the Act.

7. Addition of INR 1,08,01,691 under section 36(1)(va) of the Act

On the facts and in the circumstances of the case and in law, the addition of INR 1,08,01,691 under section 36(1)(va) of the Act should not have been made.

8. Considering book profits at INR 3,51,76,17,729 instead of INR 3,50,05,44,158

On the facts and in the circumstances of the case and in law, the CIT(A) erred in disposing the said ground on the same terms as vide order DIN No. ITBA/NFAC/S/250/2022-23/1048335817(1) dated 29 December 2022 passed against intimation under section 143(1) in the case of Appellant, even though the said ground was not raised in the appeal against intimation under section 143(1) of the Act.

9. Refund of excess Dividend Distribution Tax ('DDT') paid

9.1 On the facts and in the circumstances of the case and in law, the CIT(A) erred in rejecting the claim of the appellant that the dividend paid by the appellant to Dow Chemical Pacific Singapore Private Limited, a non-resident shareholder ought to be charged at the rate of 10% prescribed under Article 10 of the Double Taxation Avoidance Agreement ('DTAA') between India and Singapore as against the rate as per the provisions of section 115-0 of the Act and thereby rejecting the claim of refund of excess tax paid on dividend distribution.

9.2. On the facts and in the circumstances of the case and in law, the CIT(A) erred in rejecting the claim of the appellant that the dividend paid by the appellant to Dow Chemical Singapore Holding Private Limited, a non-resident shareholder ought to be charged at the rate of 15% prescribed under Article 10 of the DTAA between India and Singapore as against the rate as per the provisions of section 115-0 of the Act and thereby rejecting the claim of refund of excess tax paid on dividend distribution.

9.3 On the facts and in the circumstances of the case and in law, the CIT(A) erred in rejecting the claim of the appellant that the dividend paid by the appellant to Rohm and Haas India Investments Aps, a non-resident shareholder ought to be charged at the rate of 15% prescribed under Article 11 of the DTAA between India and Denmark as against the rate as per the

provisions of section 115-0 of the Act and thereby rejecting the claim of refund of excess tax paid on dividend distribution."

39. The learned Authorised Representative ("*learned AR*") at the outset wishes not to press grounds no.1 and 2 raised in assessee's appeal. Accordingly, these grounds are dismissed as not pressed.

40. The issue arising in grounds no.3, 4 and 5, raised in assessee's appeal, pertains to the denial of depreciation claimed on goodwill, distribution network and customer relations. In the absence of any allegation of change in facts and law, since we have already allowed a similar issue in favour of the assessee in the assessee's appeal for the assessment year 2016-17, our findings/conclusions as rendered therein shall apply *mutatis mutandis* to the present appeal. Accordingly, the AO is directed to grant the depreciation on goodwill, distribution network and customer relations under section 32 of the Act. As a result, grounds no.3, 4 and 5 raised in assessee's appeal are allowed.

41. Grounds no.6 and 7 pertaining to the adjustment made under section 143(1) of the Act were not pressed in view of the Tribunal's order in the appeal arising from the order passed under section 143(1) of the Act. Therefore, grounds no.6 and 7 are dismissed as not pressed.

42. Further, ground no.8 raised in assessee's appeal was not pressed during the hearing. Accordingly, the same is dismissed as not pressed.

43. The issue arising in ground no.9, raised in assessee's appeal, pertains to the claim of refund of excess tax paid on dividend distributed by the

assessee to its non-resident shareholder. We find that this issue is covered in favour of the Revenue by the decision of the Special Bench of the Tribunal in DCIT v/s Total Oil India Private Ltd, reported in [2023] 149 taxmann.com 332 (Mumbai - Trib.) (SB). Accordingly, respectfully following the aforesaid decision of the Special Bench of the Tribunal, ground no.9 is dismissed.

44. In the result, the appeal by the assessee for the assessment year 2018-19 is partly allowed.

45. To sum up, the appeal for the assessment year 2016-17 is allowed, while the appeal for the assessment year 2018-19 is partly allowed.

Order pronounced in the open Court on 25/11/2024

Sd/-
NARENDRA KUMAR BILLAIYA
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 22/11/2024
Prabhat

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The PCIT / CIT (Judicial);
- (4) The DR, ITAT, Mumbai; and
- (5) Guard file.

By Order

Assistant Registrar
ITAT, Mumbai