

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

**BEFORE JUSTICE (RETD.) C.V. BHADANG, PRESIDENT AND
SHRI B R BASKARAN, ACCOUNTANT MEMBER**

ITA NO.5446/MUM/2024 : A.Y. : 2017-18

Dow Chemical International Pvt. Ltd. Vs. National Faceless Appeal Centre
Unit No.801, 8th Floor, Bldg. No.9, Delhi/Assistant Commissioner of
Gigaplex TTC Industrial Area, MIDC, Income Tax- 14(1)(2), Mumbai
Airoli S.O., Navi Mumbai 400 708. (Respondent)
PAN : AAACD4467B (Assessee)

**Assessee by : Shri Pranay Gandhi
Respondent by : Smt. Sanyogita Nagpal, CIT DR**

**Date of Hearing : 03/12/2024
Date of Pronouncement : 03/12/2024**

ORDER

PER JUSTICE (RETD.) C.V. BHADANG, PRESIDENT :

By this appeal, the appellant-assessee is challenging the order dated 26.08.2024 passed by the learned Commissioner of Income Tax (Appeals), NFAC, Delhi ('CIT(A)' for short). The appeal relates to assessment year 2017-18.

2. The brief facts are that the appellant-assessee is a private limited company incorporated in India. The appellant is engaged in the business of manufacturing and trading of diversified chemicals used in a variety of segments such as water, food, pharmaceuticals, paints, packaging and personal care products.

3. The appellant filed its Return of Income (RoI) for the assessment year 2017-18 declaring a total income of Rs.286,62,42,450/- on 29.11.2017. The RoI was

subsequently revised on 30.08.2018 without any modification in the quantum of income disclosed. The return was selected for scrutiny and during the course of assessment proceedings, the claim of depreciation on certain intangible assets was taken up for consideration.

4. The appellant claimed that pursuant to amalgamation of Rohm and Haas (India) Pvt. Ltd. (RHIPL) with the appellant, all the assets and liabilities of RHIPL were transferred to the appellant. The difference between the fair market value of the assets transferred and the consideration paid was recognized as intangibles in form of (i) goodwill, (ii) distribution network and (iii) customer relations, in the books of account of the appellant. The appellant claimed depreciation allowance @ 32% on the same.

5. The Assessing Officer gave finding that since these assets were not shown in the books of account of the transferor/amalgamating company, same could not be allowed to the appellant. The Assessing Officer thus invoking the 6th proviso to Section 32(1)(ii) of the Income Tax Act, 1961 ('Act' for short), disallowed the claim of depreciation on the intangible assets.

6. The learned CIT(A) concurred with the view taken by the Assessing Officer. The assessee challenged the same before this Tribunal in ITA No. 1201/Mum/2023, which was decided on 11.09.2023 and the matter was restored to the file of the learned CIT(A) for *de novo* adjudication on the following issues :-

- (i) Disallowance of depreciation of Rs.12,66,12,592/- on goodwill;
- (ii) Disallowance of depreciation of Rs.74,27,651/- on distribution network; and,
- (iii) Disallowance of depreciation of Rs.7,42,04,775/- on customer relations.

7. The learned CIT(A), after rehearing the parties, has again made the disallowance on the ground that the claim of depreciation is untenable in view of Explanation 7 to

Section 43(1) of the Act. The net result is that the order passed by the Assessing Officer under Section 143(3) r.w.s. 144B of the Act on 17.08.2021 stands confirmed. Hence, this appeal.

8. We have heard the learned counsel for the appellant and the learned DR for the Revenue. With their assistance we have gone through the record.

9. At the outset, the learned counsel for appellant, on instructions, has not pressed ground no. 1 relating to alleged violation of principles of natural justice by the learned CIT(A). Thus, we are not called upon to dwell or to adjudicate upon the same. The consideration is, therefore, confined to the merits of the disallowance made.

10. On behalf of the appellant strong reliance is placed on the decision of Hon'ble Supreme Court in *CIT vs Smifs Securities Ltd.*, 348 ITR 302 (SC) in order to submit that the authorities below were in error in finding that the goodwill does not fall within "commercial rights of similar nature" used in Section 32 of the Act. It is submitted that the finding recorded by the learned CIT(A) is contrary to the decision of the Supreme Court in the case of *Smifs Securities Ltd. (supra)*.

11. It is submitted that similarly disallowance of claim of depreciation on distribution network and customer relations also cannot be sustained.

12. The learned counsel has taken us through the observations and the findings recorded by the learned CIT(A) from para 5 onwards in order to submit that it is *ex facie* against the decision of Hon'ble Supreme Court in *Smifs Securities Ltd. (supra)*.

13. The learned DR has supported the impugned order. It is submitted that the claim of depreciation has rightly been disallowed in view of Explanation 7 to Section 43(1) of

the Act, as there was no goodwill recorded in the books of account of the transferor/amalgamating company, viz. RHIPL.

14. We have carefully considered the circumstances and the submissions made. The learned CIT(A) has dealt with the rival contentions in para 5 onwards of the order. At the outset, it is necessary to note that even the learned CIT(A) has considered the fact that, on the claim of depreciation on distribution network and on customer relations, similar principles, parameters and conditions as laid down in respect of claim of depreciation on goodwill will apply. It is necessary to note that distribution network and customer relations can also be said to be intangible assets. However, according to the learned CIT(A), the claim of depreciation on goodwill, distribution network and customer relations will not be available in view of provisions of Section 32(1) of the Act read with Explanation 7 to Section 43(1) of the Act. The learned CIT(A) has found that the intangible assets in the form of goodwill or distribution network or customer relations were not possessed by the amalgamating company RHIPL before the amalgamation. Thus, the learned CIT(A) has found that these intangibles got self-generated as a result of the amalgamation, which cannot be allowed in the teeth of Explanation 7 to Section 43(1) of the Act.

15. The learned CIT(A) has thereafter in para 8 found that the case of slump sale (as against the case of amalgamation in the present case) would stand on a different footing. It is not necessary to go into the issue of slump sale as discussed in para 8.

16. We find that what is relevant is the decision of Supreme Court in case of *Smifs Securities Ltd. (supra)*, which has been followed by this Tribunal in several decisions which were brought to the notice of the learned CIT(A). While dealing with the reliance placed on *Smifs Securities Ltd. (supra)*, the learned CIT(A) has observed in para 6.3 to 6.6 as under :-

“6.3 The appellant has relied on the decision of the Hon’ble Supreme Court rendered in the case of Smifs Securities Ltd., 348 ITR 302 and a host of other decisions rendered by various tribunals to drive its point that the claim of depreciation on goodwill created as a result of amalgamation is logical. However, with due respect to all the Hon’ble Judicial forums it is submitted, that the Legislative Intent and the provision of law under the statute is paramount and supreme and therefore when the law is propounded in a manner not to allow, any depreciation allowance, on the value of asset in excess of the actual cost, it is found incongruent to allow the claim of depreciation allowance on such goodwill created as a result of amalgamation.

6.4 As the provisions of section 32(1) rws 43 of the Income Tax Act, depreciation allowance is provided on the “Actual Cost” as defined in section 43(1). Various Explanations to Section 43(1) defined the meaning of Actual Cost in different situations and Explanation 7 to section 43(1) pertains to the determination of actual cost in a scheme of amalgamation. For easier comprehension the relevant content of Explanation 7 to section 43(1) is captured and provided below :

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

6.5 It is pertinent to highlight that this indispensable provision of law which determines the course of claim of depreciation allowance consequent to the scheme of amalgamation has not been appreciated in the decisions rendered and relied upon and that whilst remaining respectful of their positions, I respectfully disagree, since it is a universally accepted principle of interpretation that the extant statutory provision of law overrides the decisions rendered by the courts of law. Moreover, if a decision is made in a case where a particular point was not noticed and was not argued, a rule formed in such a case shall not be binding since, had that point been appropriately argued, which in the cases relied upon happen to be Explanation 7 to section 43(1), the decision of the court in that case could have been overturned in favour of the revenue.

6.6 At the risk of repetition, it is humbly submitted with due respect, the decisions cited by the appellant, which did not notice the enforceability of Explanation 7 to section 43(1) vis-à-vis the amalgamation process are per incuriam, and hence not considered, for the purpose of this adjudication, as the said decisions are in conflict with the relevant and extant positions of law.”

17. The reasoning articulated by the learned CIT(A) cannot be approved. The learned CIT(A) could not have overlooked the binding decision of Supreme Court in *Smifs Securities Ltd. (supra)*.

18. It is further necessary to note that the Tribunal in assessee's own case in ITA Nos. 3772/Mum/2023 and 1200/Mum/2023 for assessment years 2016-17 and 2018-19 respectively had allowed the claim of depreciation on goodwill, distribution network and customer relations resulting on amalgamation. This is what is held in para 40 of the order dated 25.11.2024 :-

"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."

19. Considering the overall circumstances, the impugned order cannot be sustained. The appeal is accordingly allowed. The Assessing Officer is directed to allow the claim of depreciation on goodwill, distribution network and customer relations. The appeal is disposed of in the aforesaid terms.

Order pronounced in the open court on 03/12/2024.

Sd/-
(B.R. BASKARAN)
ACCOUNTANT MEMBER

Sd/-
(JUSTICE (RETD.) C.V. BHADANG)
PRESIDENT

Mumbai; Dated : 03/12/2024

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Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(Judicial)
4. PCIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai