आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

BEFORE SHRI RAMA KANTA PANDA, VICE PRESIDENT
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

आयकर अपील सं. / **ITA No.981/PUN/2024**
निर्धारण वर्ष / **Assessment Year: 2016-17**

Rexel India Private Limited, Office No. 407-414, 4th Floor, Insignia, 46, Sasoon Road, Pune-411001 Maharashtra PAN AAFCR6724C	**Vs.**	DCIT, PUNE
Appellant/Assessee		**Respondent/Revenue**

Assessee by	Shri Nikhil Pathak
Department by	Shri Mallikarjun Utture, CIT
Date of hearing	05/02/2025
Date of Pronouncement	05/05/2025

आदेश / ORDER

PER MS. ASTHA CHANDRA, JM

The appeal filed by the assessee is directed against the order dated 12.03.2024 of the Ld. Commissioner of Income Tax- Appeals, National Faceless Appeal Centre, Delhi **["CIT(A)"]** pertaining to Assessment Year **("AY")** 2016-17.

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

"1. Disallowance of depreciation on goodwill arising pursuant to amalgamation of Yantra Automation Private Limited ('YAPL') and AD Electronics Private Limited ('ADEPL') with the Appellant

1.1 On the facts and circumstances of the case and in law, the Hon'ble NFAC has erred in disallowing depreciation amounting to INR 14,98,78,251 on goodwill arising pursuant to the scheme of amalgamation of YAPL and ADEPL with the Appellant.

1.2 On the facts and circumstances of the case and in law, the Hon'ble NFAC has erred in concluding that the depreciation on goodwill as a result of amalgamation is not allowable in light of sixth proviso to section 32(1) and explanation (3) thereof; read with explanation (7) of section 43(1) and explanation 2 of Section 43(6)

without taking into consideration the detailed technical submissions filed by the Appellant.

1.3 On the facts and circumstances of the case and in law, the Hon'ble NFAC failed to appreciate that the appellant had followed purchase method for accounting the amalgamation and the consideration paid in excess of net value of the assets and liabilities taken over of the amalgamating companies was rightly treated by the appellant as goodwill and hence, the depreciation on the same ought to have been allowed.

1.4 On the facts and circumstances of the case and in law, the Hon'ble NFAC has erred in not following the decisions of the Hon'ble Supreme Court of India in the case of Smifs Securities Limited [2012] 348 ITR 302 (SC) and the Jurisdictional Bombay High Court in the case of Chowgule & Company Private Limited (2016) (95 CCH 21) (Bom)

2. Allowance of brought forward business loss and unabsorbed depreciation not granted

2.1 On the facts and circumstances of the case and in law, the Hon'ble NFAC has erred in not adjudicating on the ground taken by the Appellant for grant of allowance of brought forward business loss and unabsorbed depreciation aggregating to INR 4,74,83,007 incurred by the Appellant in earlier years.

3. Credit of advance tax paid by YAPL and ADEPL not granted to the Appellant

3.1 On the facts and circumstances of the case and in law, the Hon'ble NFAC has erred in not adjudicating on the ground taken by the Appellant for grant of credit of advance tax paid by YAPL and ADEPL amounting to INR 1,65,00,000/- and INR 86,00,000/- respectively to the Appellant.

4. Tax Deducted at Source ('TDS') credit of YAPL and ADEPL not granted to the Appellant

4.1 On the facts and circumstances of the case and in law, the Hon'ble NFAC has erred in not adjudicating on the ground taken by the Appellant for grant of TDS credit of YAPL and ADEPL amounting to INR 18,88,630 and INR 7,74,946 respectively to the Appellant."

3. Briefly stated the facts are that the assessee is a company incorporated under the Companies Act, 1956 on 24.01.2012. It is a subsidiary of Relex Holdings Netherlands B.V. and is primarily engaged in the business of automation products and services. For A.Y. 2016-17, the assessee filed its return of income on 21.11.2016 on a consolidated basis declaring a loss of Rs. 9,02,23,322/-. The case of the assessee was selected for scrutiny under CASS. Accordingly statutory notice(s) u/s 143(2) and 142(1) of the Income Tax Act, 1961 **(the "Act")** alongwith

questionnaire were issued and served upon the assessee asking the assessee to furnish certain details contained therein. The assessee submitted its reply in response to the said notice(s) which were verified by Ld. Assessing Officer **("AO")** and placed on record. The Ld. AO noted that during the year under consideration, the assessee acquired Yantra Automation Private Limited **("YAPL")** and A D Electronics Private Limited **("ADEPL")** pursuant to the scheme of amalgamation approved by the Hon'ble Bombay High Court vide order dated 16.04.2016. The appointed date of the scheme was 01.04.2015. The Financials for Financial Year 2015-16 were prepared for the merged entity. The assessee accounted for intangible assets credited out of the said scheme of amalgamation as "Goodwill" (being the difference between the aggregate value of net assets taken over by the Company and the consideration paid i.e. aggregate of fair value of equity shares issued) and claimed depreciation allowance @ of 25% on the Goodwill amounting to Rs. 14,98,78,251/- on Goodwill of Rs. 59,95,13,004/- under the provisions of section 32(1) of the Act. The Ld. AO completed the assessment by passing the assessment order u/s 143(3) of the Act dated 20.12.2018 disallowing the claim of depreciation of Rs. 14,98,78,251/- on the Goodwill of Rs. 59,95,13,004/-.

4. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) against the said disallowance of depreciation claim of the assessee made by the Ld. AO. After considering the arguments submitted by the assessee and the case laws cited by the assessee in support of its claim, mainly the decision of the Hon'ble Apex Court in the case of CIT, Kolkata v. Smifs Securities Limited [2012] 348 ITR 302 (SC), in the light of provisions of section 32 1) of the Act, upheld the decision of the Ld. AO and dismissed the appeal of the assessee for the reasons recorded in Para 7.2 to 7.2.5 of his appellant order which are reproduced below:-

"7.2 Grounds of appeal number 4:

In this ground of appeal the appellant has assailed the disallowance of Rs. 14,98,78,251/- as depreciation on goodwill arising from the amalgamation of Yantra Automation Private Limited ('YAPL') and AD Electronics Private Limited ('ADEPL') with the Appellant. In this regard, the appellant has given detailed explanation underlining the series of events about the amalgamation of YAPL and ADEPL with the appellant as per the Hon'ble Bombay High Court order dated 16.04.2016 in support of their claims. During the appellate proceedings also, the appellant has submitted further explanation alongwith several case laws to support their claim.

7.2.1 On perusal of the records, it is seen that the appellant company had e-filed its ITR for A.Y. 2016-17 on 21.11.2016 at loss of Rs. 9,02.23,322/. The assessment proceedings were started in appellant's case for A.Y. 2016-17 in pursuant to CASS selection and the appellant has participated in it in response to the AO's notices Issued in it. The AO has disallowed the claim of Rs. 14,98,78,251/- as depreciation on goodwill as there was no goodwill appearing in the books of amalgamating company prior to the amalgamation. Further, the AO has also held that as per the provisions of section 47 of the Act, when the merger qualifies as amalgamation, there would neither be capital gains nor depreciation on goodwill. The AO had cited various Judicial pronouncements in support of the stand taken by him in the assessment order.

7.2.2 The appellant company in its submission during appellate proceeding has submitted that as per Hon'ble Bombay High Court order dated 16 April 2016 YAPL and ADEPL were amalgamated into the appellant company with effect from 1.04.2015. As per the approved scheme of amalgamation, all the assets and liabilities at their respective fair market value as on 1 April 2015 of the amalgamating companies were taken over by the appellant company and the difference between the net assets acquired and the consideration paid by the appellant company resulted in Goodwill of Rs. 59,95,13,004/-. Mainly, the appellant has relied upon the judgment of the Hon'ble Supreme Court in the case of CIT, Kolkata v. Smifs Securities Limited [2012] 348 ITR 302 (SC) in support of the arguments made by him in this appeal.

7.2.3 The arguments submitted by the appellant and all the case laws cited by him has been considered in the light of provisions of Act in this regard. The provisions regulating the depreciation have been given in Section 32 of the Act, which reads as follows:

"Depreciation.

32. (1) In respect of depreciation of-

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

(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, 92[not being goodwill of a business or profession,] owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed"

In this regard, it is observed that the words "Inot being goodwill of a business or profession, were inserted vide Finance Act 2021. Prior to this, the term Goodwill was not explicitly excluded from the list of intangible assets eligible for depreciation, In absence of this clarity, there were divergent views on the issue.

7.2.4 Since there were divergent views of the Hon'ble Courts on the issue, therefore, to end this ambiguity the necessary amendments in section 32(1) of the Income Tax Act, 1961 has been brought in the Finance Act, 2021

w.e.f. 01.04.2021 and the word Goodwill of business or profession is excluded for claiming depreciation.

7.2.5 Even though the Supreme Court in the case of Smifs Securities (supra) has decided that goodwill is depreciable asset, it is observed that the contention before the court was not as to whether difference arising out of amalgamation was goodwill eligible for depreciation. It is further observed that accounting of any transaction is relevant only to the extent they are not in conflict with express provisions of the IT Act. In case of merger and acquisition, the IT Act expressly requires recording of capital assets at the price appearing in the books of target company. Accordingly, sixth proviso to section 32(1) and Explanation (3) thereof, read with Explanation (7) of section 43(1) and Explanation-2 of Section 43(6) of the IT Act 1961 establishes that the depreciation on goodwill as a result of amalgamation is not allowable.

Resultantly, the claims made by the appellant in support of this ground do not have any merit. Therefore, the addition made by assessing officer on account of disallowance of claim of depreciation on goodwill as a result of Amalgamation amounting to Rs. 14,98,78,251/- for A.Y. 2016-17 is upheld. Accordingly, this ground of appeal is dismissed."

4.1 Before the Ld. CIT(A), the assessee also challenged non-granting of brought forward business loss allowance and unabsorbed depreciation aggregating to Rs. 4,74,83,007/- incurred by the assessee in earlier years. The assessee also preferred an appeal against the action of the Ld. AO in not granting the advance tax credit to the assessee of Rs. 1,65,00,000/- and Rs. 86,00,000/- paid by YAPL and ADEPL respectively and non-granting of TDS credit of Rs. 18,88,630/- and Rs. 7,74,946/- of YAPL & ADEPL respectively to the assessee. With respect thereto, the Ld. CIT(A) observed that the assessee had made application for rectification u/s 154 of the Act which was pending before the Ld. AO at the time of appellant proceedings before him. He therefore directed the Ld. AO to dispose of the said rectification application after due verification thereby allowing these grounds of appeal raised by the assessee for statistical purposes.

5. Dissatisfied the assessee is in appeal before the Tribunal and all the grounds of appeal of the assessee relates thereto.

6. In respect of Ground no.1 (with its sub-ground nos. 1.1 to 1.4) relating to deprecation claim on Goodwill arising on amalgamation, the Ld. AR argued that the Ld. AO has erred in observing that the assessee has incurred no actual cost for acquisition of Goodwill. He submitted that the appellant has in fact incurred cost for acquisition by issuing shares to the shareholders of the amalgamating company amounting to Rs.

81,51,94,350/- which was in excess of the net value of assets acquired in the scheme of amalgamation of Rs. 21,56,81,346/- He submitted that such excess consideration paid by the assessee represents cost incurred by it towards acquisition of Goodwill as defined u/s 43(1) of the Act.

6.1 Referring to page Nos. 216 to 226 of the Paper Book containing the valuation report prepared by Deloitte India LLP whereinthe fair equity share exchange ratio for the purpose of the proposed amalgamation of YAPL and ADEPL into Relex India Private Limited (assessee company) has been recommended, the Ld. AR submitted that the said valuation report has been accepted by the Ld. AO and there has been no dispute regarding the valuation of the equity shares of the companies as at the valuation date i.e. 31.3.2015.

6.2 The Ld. AR submitted that the claim of depreciation on Goodwill made by the assessee in subsequent AY 2017-18 has been allowed by the Ld. AO. He referred to page No. 337 of the Paper Book containing assessment order for A.Y. 2017-18 dated 24.03.2021 passed u/s 143(3) of the Act wherein the Ld. AO after the detailed verification has accepted the claim of the assessee by drawing no adverse inference in respect thereof.

6.3 The Ld. AR submitted that the assessee's claim of depreciation on Goodwill arising on amalgamation is squarely covered by various decisions of the Hon'ble Jurisdictional Bombay High Court and Pune Tribunal wherein such claim of the assessee has been allowed following the law laid down by the Hon'ble Supreme Court in the case of CIT, Kolkata Vs. Smifs Securities Limited (2012) (348 ITR 302) (SC) (Page No. 213 of the Paper Book refers). He cited the following cases in support:

(i) Chowgule & Company Private Limited vs. Addl. CIT (2016) 95 CCH 21 (Bombay High Court)

(ii) Cosmos Co-op Bank Ltd. vs. DCIT (2014) 45 taxmann.com 13 (Pune Tribunal)

6.4 The Ld. AR further placed before us the following case laws supporting the above contention of the assessee:

(i) Disney Broadcasting (India) (P.) Ltd. Vs. Principal Commissioner of Income Tax [2024] 163 taxmann.com 40 (Mumbai-Trib)

(ii) Dow Chemical International (P.) Ltd. Vs. Deputy Commissioner of Income Tax [2024] 169 taxmann.com 290 (Mumbai-Trib.)

(iii) Principal Commissioner of Income-tax-1 Vs. Eltek SGS (P.) Ltd. [2023] 153 taxmann.com 263 (Delhi)

)iv) S&P Capital IQ (India) (P.) Ltd. Vs. Assistant Commissioner of Income-tax [2024] 158 taxmann.com 12 (Hyderabad - Trib.)

7. As regards the other grounds raised by the assessee relating to non-granting of allowance of unabsorbed depreciation and brought forward business losses (Ground no. 2) and non-granting of credit of advance tax (Ground no. 3) and credit of TDS (Ground no. 4) to the assessee, the Ld. AR requested the Bench that these issues may be set aside to the file of the Ld. AO with the direction to allow the claim of the assessee as per fact and law after due verification thereof .

8. The Ld. DR supported the order of the Ld. AO/CIT(A).

9. We have heard the Ld. Representative of the parties, perused the material on record, various decisions cited by the Ld. AR as well as the Paper Book filed by the Ld. DR before us on behalf of the assessee. The facts of the case are not in dispute. As regards the first issue (Ground No.1 along with its sub-grounds) relating to disallowance of the claim of depreciation on goodwill arising to the assessee pursuant to the amalgamation of YAPL and ADEPL with the assessee is concerned, we find that the impugned issue is covered in favour of the assessee by catena of decisions of various judicial forums including the Jurisdictional Bombay High Court as well as Jurisdictional Mumbai and Pune ITAT. On perusal of the cases (supra) cited by the Ld. AR, we find that the courts have consistently allowed the depreciation claim on goodwill arising on amalgamation to the assessee following the law laid down by the Hon'ble Supreme Court in the case of Smifs Securities Ltd. (supra) under the similar set of facts.

10. In the recent case of Dow Chemical international (P.) Ltd. (supra) dated 25.11.2024, the Mumbai Tribunal allowed the depreciation claim of the assessee u/s 32 of the Act in the similar set of facts. The relevant observations and findings of the Tribunal are reproduced below:

> *"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), ie. 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 Lid. v. Commissioner of Income-tax [2004] 135 Taxman 586/266 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, Le Dealer Network and Customer Relationships ("Identified Intangible Assets") and major tangible fixed assets le 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, Le. 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:

Assessment Year	*Sales (Rs. in mn)*	*EBITDA (Rs. in mn)*
2015-16	*19,564.80*	*1,820.79*
2014-15	*18,845 05*	*1,623.57*
2013-14	*16,430.82*	*1,439.92*

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

Assessment Year	*Sales (Rs. in mn)*	*EBITDA (Rs. in mn)*
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 aforenoted comparative analysis of sales and profitability of the assessee pre-amalgamation and post-amalgamation, it is clearly evident that the sales and 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. Deputy Commissioner of Income Tax, Circle 12(2). Bengaluru [2020] 121 taxmann.com 237/277 Taxman 22 (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(6) 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. Deputy Commissioner of Income Tax. Cir 4(1)(1). Ahmedabad [2020] 122 taxmann.com 40 (Ahmedabad - 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 ie. 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.) Lid. (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 (P.) Ltd. v. Assistant Commissioner of Income-tax [2010] [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 ACIT v. Pfizer Ltd. [IT Appeal No. 2108 (Mum.) of 2018, dated 22-9-2023], 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. Dy. CIT [IT Appeal No. 668 (Pun.) of 2022, dated 30-10-2023], 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 ACIT v. Dosti Reality Ltd. [IT Appeal No. 2043 (Mum.) of 2022, dated 13-4-2023], 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. Additional Commissioner of Income-tax, Range-12, Bangalore [2016] 76 taxmann.com 103 (Bangalore Trib.), 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. Deputy Commissioner of Income-tax, Circle-1 (1), New Delhi ITA No.90/Del/2013/[2019] 109 taxmann.com 47 (Delhi - Trib.) 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 / & B Seeds (P.) Ltd. v. Deputy Commissioner of Income-tax [2022] 142 taxmann.com 274 (Bangalore -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."

11. We find that similar view has been taken by the Mumbai Tribunal in the case of Disney Broadcasting (India) (P) Ltd. dated 24.04.2024 (supra) wherein the Tribunal decided the impugned issue in favour of the assessee by observing 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. Smifs Securities Ltd. [2012] 24 taxmann.com 222/210 Taxman 428/348 ITR 302 in which case also one company amalgamated with the assessee company and the excess consideration paid by it over value of net assets amounted to goodwill on which depreciation was claimed and was allowed. The Hon'ble Supreme Court inter alia was concerned with the following substantial question of law:

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

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

> *"Answer: In the present case, the assesses 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 c* 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(6) 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 I assessee-Company stood increased. This finding has also been upheld by Income Tax Appellate Tribunal ['ITAT, for short]. We see no reason to interfere with the factual finding.

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

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

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

12. The assessee's claim also finds support by the decision(s) of the Hon'ble Bombay High Court in the case of Chowgule & Company Private Ltd. (supra) and Hon'ble Delhi High Court in the case of Eltek SGS (P.) Ltd. (supra) and coordinate Bench of the Hyderabad Tribunal in S&P Capital IQ (India) (P.) Ltd.'s case (supra) as well.

13. In light of the factual and legal position set out above, we set aside the order of the Ld. CIT(A) on the impugned issue and direct the Ld. AO to allow the claim of depreciation on Goodwill to the assessee. Ground no. 1 alongwith its sub-grounds no. 1.1 to 1.4 raised by the assessee are accordingly allowed.

14. In ground No. 2.1, the assessee's grievance is that the Ld. AO while passing the assessment order has not granted the allowance of brought forward business losses and unabsorbed depreciation of Rs. 4,74,83,007 pertaining to earlier years, to the assessee as per the provisions of section 72 & 32(2) of the Act respectively. The fact on record reveals that the assessee had disclosed the brought forward loss and unabsorbed depreciation in the ITR for the year 2016-17 (Page 73 to 118 of the Paper Book refers) and also the said disclosure was made in the tax audit report under clause 32(a) thereof evidencing the same (Pages 38 to 72 of the Paper Book refers). In this view of the matter, we hereby direct the Ld. AO to grant the allowance for unabsorbed depreciation and brought forward loss pertaining to earlier AYs 2013-14, 2014-15 and 2015-16 carried forward by the assessee totaling to Rs. 4,74,83,007/- after due verification thereof as per fact and law.

15. In ground No. 3.1, the assessee is aggrieved by non-granting of credit of advance tax to the assessee amounting to Rs. 1,65,00,000/- and Rs. 86,00,000/- paid by YAPL and ADEPL (amalgamating companies) respectively. The assessee has placed on record copies of Form 26AS of YAPL and ADEPL evidencing the payment of the advance tax by them which were also furnished before the Ld. CIT(A). It is an admitted fact that the scheme of amalgamation was approved w.e.f. 01.04.2015 i.e. from FY 2015-16 and therefore the ITR was filed on a consolidated basis on 21.11.2016 declaring tax loss of Rs. 9,02,23,322/- and claiming credit of Rs. 2,51,00,000/- (Rs. 1,65,00,000/- + 86,00,000/-) on account of advance tax payments made by YAPL and ADEPL respectively based on

approved scheme of amalgamation. Ground no. 4.1 relates to the assessee's grievance for non-granting of TDS credit of Rs. 18,88,630/- and 7,24,946/- by the Ld. AO pertaining to YAPL and AEDPL respectively, claimed by the assessee in its ITR for the year under consideration corresponding to the income tax offered to tax by the assessee. We find that there are decisions in favour of the assessee on the impugned issue(s) wherein the Tribunal has allowed the credit of the corresponding advance tax and TDS to the assessee. In the case of Modipon Ltd. (1995) 54 ITD 433 (Delhi), the Delhi Tribunal held that , since the income of the transferor company was assessed on a consolidated basis in the hands of the assessee, the credit of corresponding TDS and advance tax payment made should also be available to the assessee. We are, therefore of the considered view that while assessing the quantum of tax liability on the consolidated income of YAPL, ADEPL and the assessee, the Ld. AO ought to have considered the taxes which have already been paid by YAPL and ADEPL and subsequently deemed to be paid by the assessee pursuant to the scheme of amalgamation. We therefore direct the Ld. AO to grant the credit of advance tax and TDS claimed by the assessee after due verification thereof as per fact and law. Accordingly, Ground No. 3 and 4 of the assessee are allowed for statistical purposes.

16. In the result, appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 05th May, 2024.

Sd/-	**sd/-**
(R.K. PANDA)	**(ASTHA CHANDRA)**
VICE PRESIDENT	**JUDICIAL MEMBER**

पुणे/Pune; दिनांक /Dated : 05th May, 2024
Neeta

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to:</u>

1. अपीलार्थी /Appellant
2. प्रत्यर्थी / Respondent
3. The DCIT, Pune.
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "B" बेंच, पुणे/DR, ITAT, "B" Bench, Pune.
5. गार्ड फाइल/Guard File

आदेशानुसार/BY ORDER

//True Copy// Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune