आयकर अपीलीय अधिकरण,'सी' न्यायपीठ, चेन्न
IN THE INCOME TAX APPELLATE TRIBUNAL'C' BENCH, CHENNAI
श्री जॉर्ज जॉर्ज के, उपाध्यक्ष एवंश्री जगदीश,लेखा सदस्य के समक्ष
BEFORE SHRI GEORGE GEORGE K, VICE PRESIDENTAND
SHRI JAGADISH, ACCOUNTANT MEMBER

आयकर अपीलसं/.ITA Nos.: 2670, 2671, 2672 & 2698/CHNY/2024
निर्धारण वर्ष/Assessment Years: 2016-17, 2017-18, 2018-19, & 2020-21

ADP India Private Limited, Thamarai Tech Park, 6th Floor, SP Plot No. 16 to 20 & 20A, Thiru Vi Ka Industrial Estate, Inner Ring Road, Guindy Industrial Estate SO, Guindy, Chennai 600 032. **[PAN: AADCM-5547-J]**	Vs.	The Deputy Commissioner of Income Tax, Corporate Circle 1(1), Chennai.
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by	:	Shri Sandeep Bagmar, Advocate
प्रत्यर्थी की ओर से/Respondent by	:	Shri V. Justin, CIT & Ms. R. Anita, Addl. CIT
सुनवाई की तारीख/Date of Hearing	:	08.05.2025
घोषणा की तारीख/Date of Pronouncement	:	21.05.2025

आदेश/ O R D E R

PER GEORGE GEORGE K, VICE PRESIDENT:

These four appeals filed at the instance of the assessee are directed against four separate orders of the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi (all dated 21.08.2024) passed under section 250 of the Income Tax Act, 1961 (hereinafter called 'the Act'). The relevant assessment years are 2016-17, 2017-18, 2018-19 & 2020-21.

2. Common issues are raised in these appeals; hence, they were heard together and are being disposed off by this consolidated order. By the consent of both the parties, the appeal in I.T.A. No. 2670/Chny/2024 for assessment year 2016-17 is taken as lead case for adjudication.

3. The first common ground raised in the appeals of the assessee for the assessment years 2016-17, 2017-18, 2018-19 & 2020-21 is with regard to the confirmation of disallowance of depreciation claimed on goodwill.

4. Brief facts of the case are as follows:

5. The assessee is a Private Limited Company incorporated under the Companies Act, 1956, engaged in the business of providing payroll processing and related services. M/s. ADP Solutions Private Limited was amalgamated with the assessee vide order of NCLT dated 19.06.2017 in TP(HC)/37 & 38/CAA/2017 with retrospective effect from 01.04.2015. The assessee filed its original return of income for the assessment year 2016-17 on 30.11.2016 and revised their return of income on 30.11.2017, claiming a loss of ₹.4,19,19,623/-. The return of income was processed under section 143(1) of the Act. Subsequently, the case was selected for scrutiny through CASS and notice under section 143(2) of the Act dated 13.08.2018 was issued and served on the assessee manually also. Notice under section 142(1) of the Act dated 19.10.2019 was also issued on the assessee.

6. On perusal of the depreciation schedule, the Assessing Officer has noted that the assessee has claimed depreciation of ₹.6,12,70,621/- on goodwill amounting to ₹.24,50,82,483/- as an intangible asset. The goodwill has resulted by the amalgamation of M/s. ADP Solutions Private Limited with the assessee. Before the Assessing Officer, the assessee filed the valuation report for both the companies, wherein, the Assessing Officer noted the share price arrived at ₹.193/- for the transferee company (M/s. ADP India private Limited) and ₹.910/- for the transferor company (M/s. ADP Solutions Private Limited), thereby, the assessee arrived at a goodwill value of ₹.24,50,82,483/-. Accordingly, the Assessing Officer show-caused the assessee as to why the depreciation on goodwill should not be disallowed. The Assessing Officer, after considering the submissions of the assessee and also taking note of provisions of section 32 of the Act, observed that there is no justification of the valuation of the goodwill when the assessee has not acquired any intangible asset from M/s. ADP Solutions Private Limited. The Assessing Officer has the power to examine the valuation of the assets acquired by the assessee if these assets were already in use for business purpose and if the Assessing Officer is satisfied that the main purpose of transfer of such assets was the reduction of the liability to income tax, then, the actual cost of the asset to the assessee shall be such an amount as the Assessing Officer determines. Since there is an amalgamation of the associate concern with the assessee, all the

assets which came to the assessee are already in use by the associate concern and consequently the valuation of the assets are subject to the verification of the Assessing Officer as per Explanation 3 of section 43(1) of the Act. However, the Assessing Officer chose to examine the valuation of goodwill alone in order to disallow the claim of depreciation on the ground that value of goodwill is enhanced. Accordingly, the Assessing Officer disallowed the claim of depreciation on goodwill amounting to ₹.6,12,70,621/- under section 32 of the Act and added to the total income of the assessee.

7. Aggrieved by the assessment order, the assessee carried the matter in appeal before the CIT(A). The assessee filed detailed written submissions and relevant extract of the submissions are reproduced at pages 17 to 33 of the impugned order. Before the CIT(A), the assessee challenged the addition made towards disallowance of depreciation on goodwill in light of the judgement of the Hon'ble Supreme Court in the case of CIT v. Smifs Securities Ltd. (2012) 348 ITR 302 (SC) and argued that depreciation arising on account of amalgamation is in the nature of an intangible asset and the same is eligible for depreciation under section 32 of the Act. The CIT(A), referring to the orders of the Tribunal as well as considering the Memorandum to Finance Bill, 2021 and amendments in Finance Act, 2021, confirmed the disallowance of claim of depreciation on goodwill amounting to ₹.6,21,70,621/- under section 32 of the Act.

8. The ld. Counsel for the assessee, Shri Sandeep Bagmar, Advocate has submitted that the facts with regard to the scheme of amalgamation, approved by the NCLT, vide order dated 19.06.2017, placed at pages 52 to 59 of paper book set II, came into effect from the appointed date of 01.04.2015 was not disputed by the Assessing Officer. Further, before the approval of scheme of amalgamation, the NCLT has issued statutory notices as per the provisions of the Companies Act, 2013 to the statutory authorities and there were no objection to the scheme under reference. Further, as per the scheme of amalgamation approved by the NCLT, the same has been treated as 'purchase method' in terms of AS-14 issued by ICAI/Accounting for amalgamation and as per said method, difference between assets and liabilities in case of excess liabilities, the same shall be treated as goodwill and further in case of excess assets, the same shall be credited to capital reserve account. The assessee, while giving effect to NCLT order has accounted all assets and liabilities of the transferor company in the books of accounts of the assessee company, which resulted in excess liabilities taken over to the extent of ₹.24,50,82,483/- and the same has been treated as goodwill and depreciation @ 25% has been claimed. Further, the Assessing Officer never disputed the fact that the assessee company has taken over excess liabilities, by virtue of amalgamation and the same needs to be accounted as goodwill in terms of AS-14, but disallowed the depreciation claimed on goodwill, only on the

ground that the assets which came to the assessee are already in use by the associate concern and the assessee has not been put to use, as required under section 32 of the Act. The ld. Counsel for the assessee has further submitted that there is no dispute with regard to the fact that the goodwill is an intangible asset within the meaning of section 32(1)(ii) of the Act and this fact has been reiterated by the Hon'ble Supreme Court in the case of CIT Vs. Smifs Securities Ltd.(supra). Therefore, from the ratios laid down by the Hon'ble Supreme Court, it is very clear that goodwill is an intangible asset in nature of any other business or commercial rights of similar nature, which is eligible for depreciation under section 32(1)(ii) of the Act. The ld. Counsel for the assessee vehemently argued that the CIT(A) erroneously upheld the addition in view of the exclusion of the provisions of section 32(1)(ii) of the Act by way of amendment by the Finance Act, 2021 w.e.f. 01.04.2021. It is amply clear that the said amendment by Finance Act, 2021 is prospective and not retrospective and also demonstrates that depreciation on goodwill was allowable before the amendment. In this regard, the ld. Counsel for the assessee relied upon the orders of ITAT Chennai in the case of Stahl India Pvt. Ltd. v. DCIT in IT(TP) A No. 52/Chny/2024 dated 10.12.2024, ITO v. SunEdison Solar Power India Private Limited in ITA No. 1028/Chny/2024 dated 24.07.2024, V.V.V. & Sons Edible Oils Ltd. v. ACIT in ITA No. 2275/Chny/2019 & Ors dated 05.08.2022, order of ITAT Hyderabad in the case of S&P Capital IQ (India)

Private Limited Vs. ACIT in ITA-TP No.463/Hyd/2022 dated 26.12.2023 and the order of ITAT Bangalore in the case of I & B Seeds (P.) Ltd. v. DCIT in ITA No. 3415(Bang.)/2018 dated 15.06.2022.

9. The ld. DR Ms. R. Anita, Addl. CIT has submitted that the claim of depreciation on goodwill, created on account of balancing accounting entry i.e., the difference between net assets and liabilities taken over, in pursuance to amalgamation as goodwill, has been claimed as eligible for depreciation under section 32(1)(ii) of the Act as intangible asset. The ld. DR further submitted that as per section 32 and 5th proviso (now 6th proviso), depreciation on any asset including 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 of the Act 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, 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, as the case may be, in the ratio of the number of days for which the assets were used by them. Therefore, claiming depreciation on balancing charge, arising on account of accounting under assets and

liabilities taken over from the transferor company in pursuant to amalgamation cannot be treated as goodwill and depreciation under section 32(1)(ii) of the Act cannot be allowed. The ld. DR strongly relied on the order of the ITAT Bangalore in the case of United Breweries Limited. The ld. DR also submitted that the intention of the amendments is to put a rest to the long pending litigation and provide clarity on tax treatment of depreciation claimed on goodwill as could be evident from the Budget Speech and Memorandum to Finance Bill, 2021 that the Government intends to avoid excessive benefits claimed by the taxpayers. Thus, the ld. DR has submitted that the additions made by the Assessing Officer and confirmed by the CIT(A) should be sustained.

10. We have heard both the parties, perused the material on record and gone through the orders of the authorities below. We have also carefully considered the relevant case laws referred to by both the parties in support of their arguments. There is no dispute with regard to the fact that the assessee has claimed deprecation on goodwill which was arisen, on account of amalgamation of M/s ADP Solutions India Private Limited with the assessee company, by virtue of an order of NCLT dated 19.06.2017 w.e.f appointed date 01.04.2015, by which, all assets and liabilities of the transferor company has been taken over by the transferee company. The purpose and the terms of the scheme have been specified in documents submitted before the NCLT. In fact, the NCLT has approved and

sanctioned the scheme of amalgamation vide order dated 19.06.2017. Further, the Assessing Officer has not raised any objection for the scheme of amalgamation. As per the scheme of amalgamation approved by the NCLT, all assets and liabilities of the transferor company becomes the assets and liabilities of the transferee company from the appointed date and upon sanction of the scheme, the amalgamation has been accounted for under the purchase method as prescribed by Accounting Standard (AS)-14 notified by Ministry of Corporate Affairs under the relevant sections 230 to 240 of the Companies Act, 2013 and the specific provisions of the scheme. Accordingly, all the assets and liabilities of the amalgamating company as on 1st April, 2015 have been recorded by the assessee company at their respective fair market value (FMV). The assessee company discharged the purchase consideration equivalent to the fair market value of the assets of ADP Solutions India Pvt. Ltd. based on the valuation report obtained by the assessee company from an independent valuer. In nutshell, the net asset value of ADP Solutions India Pvt. Ltd. was at ₹.20,97,38,667/- as on the appointed date (01.04.2015). The purchase consideration was valued by an independent valuer at ₹.45,48,21,150/- and paid by the assessee by issuing equity shares to the shareholders of ADP Solutions India Pvt. Ltd., which was valued at ₹.193.13 per share having face value of Rs.10 each and premium of ₹.183.13 per share. Accordingly, the assessee issued 23,55,000 equity shares to the shareholders of ADP

Solutions India Pvt. Ltd., resulting in excess payment of ₹.24,50,82,483/- over the assets and liabilities taken over by the assessee and the same has been treated as goodwill in terms of AS-14, on which the assessee has claimed depreciation @ 25%.

11. With regard to the legal objection of the CIT(A) at page 38 of the impugned order, in light of provisions of section 32(1)(ii) and 6th Proviso (now), provided therein, it has to be examined, whether 5th proviso to section 32(1) of the Act restrict depreciation on goodwill, arising on account of amalgamation or it only restricts goodwill to the predecessor or successor company in case of amalgamation or demerger etc. The 5th proviso to section 32(1) of the Act, has been inserted by the Finance Act, 1996, to restrict claim of aggregate deduction, which is evident from memorandum of Finance Bill of 1996, as per which, in case of succession in business and amalgamation of companies, predecessor of companies, predecessor of business and successor of amalgamating company and amalgamated company, as the case may be, are entitled to depreciation allowance on same assets, which in aggregate cannot exceed depreciation allowance, in any previous year at prescribed rates. Therefore, it is proposed to restrict aggregate deduction in a year, depreciation at the prescribed rate and apportion the same allowance in the ratio of number of days for which said assets were used by them. From the memorandum explaining Finance Bill, and purpose of introduction of 5thproviso to section

32(1) of the Act, it is very clear, as per which predecessor and successor in a scheme of amalgamation should not claim depreciation over and above normal depreciation allowable on a particular asset. In other words, in a scheme of amalgamation where existing assets of amalgamating company are acquired by amalgamated company, then while claiming depreciation after amalgamation, amalgamated company can claim depreciation only on the basis of number of days, a particular asset were used by them. Therefore, in our considered opinion, said proviso only determines amount of depreciation to be claimed in the hands of predecessor / amalgamating company and in hands of the successor or amalgamated company, only in the year of amalgamation based on the date of such amalgamation. However, it does not in any way restrict claim of depreciation on assets acquired after amalgamation or during the course of amalgamation. Therefore, it is very clear from 5thproviso to section 32(1) of the Act, that once any asset, to the respective block of asset including intangible asset, more particularly, goodwill is added to the respective block of assets of the amalgamated company, in the context of claim of depreciation in the hands of amalgamated company and such addition to the block of assets would not fall within the purview of the 5th proviso to section 32(1) of the Act. Effectively, scope of the said proviso is narrow as could be culled out for the purpose, for which said proviso was inserted in the statute as reflected in the Memorandum to the Finance Bill. To further clarify, 5th proviso to

section 32(1) of the Act, with regard to depreciation on goodwill is restricted to assets, which belongs to amalgamating company and its application cannot be extended to the assets, which arise in the course of amalgamation to the amalgamated company. The intention of law was to extend the benefit available to the amalgamated company on succession and not to restrict depreciation on assets which generated in the course of succession. It is very clear from the proviso that it refers to depreciation allowable to the predecessor and successor in the case of succession and this should be understood as reference to the assets that belong both to the predecessor and successor and which can only once belonged to the predecessor company and it does not apply to the assets which were generated in the hands of amalgamated company for the first time, as a result of amalgamation as approved by the High Court. In our opinion, 5th proviso applies only to those assets which commonly exist between predecessor and successor, however, it does not apply to asset, which has been created or acquired after amalgamation. Thus, we make it clear that 5th proviso to section 32(1) of the Act has no application in the event of creation of new asset, by virtue of amalgamation like goodwill and accordingly, the contention of the CIT(A) stands rejected.

12. In the present case, there is no dispute with regard to the fact that goodwill does not exist in the books of account of the amalgamating company. Further, depreciation on goodwill claimed by the assessee was

first time recognized in the books of account of amalgamated company, in a scheme of amalgamation approved by the NCLT. As per said scheme of amalgamation, accounting treatment in the books of transferee company has been specified, as per which, transferee company shall account for merger in its books of account as per 'purchase method' of accounting prescribed under AS-14 issued by ICAI. As per AS-14 issued by the ICAI, all assets and liabilities recorded in the books of account of transferor company shall stand transferred and vested in the transferee company, pursuant to scheme and shall be recorded by the transferee company at their book value. The excess of or deficit in net asset value of the transferee company, after reducing aggregate face value of shares issued by the transferee company to the members of the transferor company, pursuant to the scheme and cost of investment in the books of the transferee company for the shares of transferor company held by it on the effective date be either credited to the capital reserve or debited to the goodwill account, as the case may be in the books of transferee company. Such resultant goodwill, if any shall be amortized in the books of Transferee Company as per principles laid down in AS-14. Therefore, from the scheme of amalgamation and AS-14 issued by the ICAI, it is very clear that once amalgamation is in the nature of 'purchase method', then excess consideration paid over and above net asset value of transferor company shall be treated as goodwill and can be amortized in the books of accounts

of the transferee company. In this case, net asset value of the transferor company (amalgamating company) was at ₹.20,97,38,667/-. Further, value of investments of transferee company i.e., in the present case, the assessee in the shares of transferor company (in the present case amalgamating company) was at ₹.45,48,21,150/-. The value of investments held by the assessee company in the shares of amalgamating company extinguishes after amalgamation and consequently difference between net asset value of amalgamating company and value of investment held by amalgamated company would become goodwill in the books of account of Transferee Company. In the present case, difference between net value of assets of amalgamating company and value of investments held by amalgamated company is at ₹.24,50,82,483/- and same would become goodwill in the books of account of amalgamated company. Therefore, in our opinion, accounting of goodwill and consequent depreciation claim on such goodwill in the books of account of the assessee company is nothing but purchase of goodwill and thus, the assessee has rightly claimed depreciation on said goodwill in terms of section 32(1) of the Act. This legal principle is supported by the decision of Hon'ble Supreme Court in the case of Smifs Securities Ltd. (supra). This principle is also supported by the recent orders of the ITAT., Hyderabad Benches in the case of DCIT v. East India Petroleum Limited in ITA No. 1087/Hyd/2024 dated 06.02.2024 as well as Mumbai Benches order in the case of Gati Kintetesu Express Pvt.

Ltd. v. DCIT in ITA Nos. 2829 to 2833/Mum/2023 dated 13.05.2024. The sum and substance of ratios laid down by the Hon'ble Supreme Court and various Benches of the Tribunal are that goodwill arising on amalgamation is entitled for depreciation under section 32(1) of the Act. The relevant observations and findings of the Hon'ble Supreme Court in the case of Smifs Securities Ltd. (supra) are reproduced herein below for clarity:

> *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?"*
>
> *Answer: In the present case, the assessee had claimed deduction of Rs. 54,85,430 as depreciation on goodwill. In the course of hearing, the explanation regarding the origin of such goodwill was given as under:*
>
> > *"In accordance with the scheme of amalgamation of YSN Shares and Securities (P.) Ltd. with Smifs Securities Ltd. (duly sanctioned by the Hon'ble High Courts of Bombay and Calcutta) with retrospective effect from 1st April, 1998, assets and liabilities of YSN Shares and Securities (P) Ltd. were transferred to and vest in the company. In the process goodwill has arisen in the books of the company."*
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> *2. It was further explained that excess consideration paid by the assessee over the value of net assets acquired of YSN Shares and Securities P. Ltd. (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 ("the 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 trademarks, licences, set, being know-how, patents, copyrights, 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) ("the 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 P. Ltd. 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 the Income-tax Appellate Tribunal ("the 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 the Income-tax Appellate Tribunal, 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.

13. Further, the case law relied on by the CIT(A) at page 35 of the impugned order in the case of DCIT Vs United Breweries Ltd. (TS-553-ITAT-2016 (Bang) of ITAT, Bangalore Bench is distinguishable from facts of the present case, for the reason that in the case of DCIT Vs United Breweries Ltd.(supra), before amalgamation there was a goodwill in the books of account of amalgamating company. Further, in a scheme of amalgamation, goodwill has been revalued and shown higher value. The amalgamated company on succession has claimed higher depreciation on goodwill arose out of amalgamation. Under those facts, the Tribunal came

to the conclusion that in terms of 5th proviso to section 32(1) of the Act, predecessor and Successor Company can claim depreciation on proportionate basis for number of days assets used by them, however, they cannot claim depreciation over and above normal depreciation allowable on a particular asset.

14. In the present case, there was no goodwill in the books of account of the amalgamating company and further, goodwill has been acquired by amalgamated company by paying consideration over and above net value of assets of amalgamating company. Therefore, in our considered view, case of the assessee squarely comes under ratio laid down by the Hon'ble Supreme Court in the case of Smifs Securities Ltd. (supra). The ITAT, Bangalore Bench in the case of Altimetrik India Pvt. Ltd, Vs. DCIT (2022) 137 taxmann.com 9 had considered an identical issue and after considering decision of the United Breweries Ltd. (supra) held that consideration paid by the amalgamated company over and above net assets of amalgamating company should be considered as goodwill arising on amalgamation and such goodwill is a capital asset eligible for depreciation. Therefore, from the above facts and circumstances, it is very clear that in the given facts and circumstances of the case, the 5thproviso to section 32(1) of the Act have no application.

15. With regard to the observations in para 5.4 at page 4 & 5 of the assessment order, the Assessing Officer disallowed depreciation, mainly on the ground that the asset was not put to use in the business of the assessee and the conditions prescribed for claiming depreciation as per section 32(1) of the Act are not satisfied. According to the Assessing Officer, in order to claim depreciation, the assessee must be owner of the asset and further, the asset must be used for the purpose of business operation in the previous year. In the instant case, amalgamation order has been passed on 19.06.2017, though comes into effect from the appointed date i.e. 01.04.2015, the so-called goodwill cannot actually be called to have at all been used in the business in the F.Y.2015-16, relevant to A.Y.2016-17. Since the condition referred to under section 32 of the Act is not satisfied, the claim of depreciation on such goodwill is not as per the provisions of section 32 of the Act. We find that the goodwill in the present case is not self-generated or taken over from third person. The goodwill is created on account of amalgamation of two companies, by virtue of order of NCLT, by which all assets and liabilities of transferor company has been taken over by the transferee company and by giving effect to the said order of NCLT, the assessee has taken excess liabilities to the tune of ₹.24,50,82,483/- and the same has been treated as goodwill. In other words, the goodwill is arisen for the first time, on account of amalgamation between two companies. Therefore, the term “owned” under section 32 of

the Act should be interpreted in the context of intangible assets. The word "owned" shall have a wider meaning in the context of intangible assets. The existence of goodwill arising from the amalgamation tantamounts to user. The intangible assets are creation of human mind and do not have physical existence like plant, building, machinery etc. In the context of intangible assets, the word "owned" has to be interpreted in a practical manner and if we go by the facts in the present case, the goodwill comes into existence w.e.f. 01.04.2015, by order of NCLT, amalgamating two companies from the appointed date. Section 32 of the Act in the form of depreciation confers the benefit to the assessee and the word "owned" should be interpreted in such a manner, which will enable the assessee to obtain the benefit intended by the legislature. And in this behalf, it is relevant to refer to the judgement of the Hon'ble Supreme Court in the case of Mysore Minerals Limited v. CIT 239 ITR 775(SC). Therefore, we are of the opinion that the reason given by the Assessing Officer to disallow the depreciation is totally incorrect, devoid of merit and thus, rejected.

16. The assessee had also relied upon the decision of ITAT Chennai in the case of Trivitron Healthcare P. Ltd. Vs. CIT (supra). The ITAT in the context of goodwill arising on account of amalgamation has considered the issue in light of provisions of section 32(1)(ii) and 6th proviso, provided therein and after considering the relevant facts held as under:

> *11. The 5th proviso to section 32(1) of the Act, has been inserted by the Finance Act, 1996, to restrict claim of aggregate deduction which is evident from*

memorandum of Finance Bill of 1996, as per which, in case of succession in business and amalgamation of companies, predecessor of business and successor of amalgamating company and amalgamated company, as the case may be, are entitled to depreciation allowance on same assets which in aggregate cannot exceed depreciation allowance in any previous year at prescribed rates. Therefore, it is proposed to restrict aggregate deduction in a year depreciation at the prescribed rate and apportion the same allowance in ratio of number of days for which said assets were used by them. From the memorandum explaining Finance Bill, and purpose of introduction of 5th proviso to section 32(1) of the Act, it is very clear, as per which predecessor and successor in a scheme of amalgamation should not claim depreciation over and above normal depreciation allowable on a particular asset. In other words, in a scheme of amalgamation where existing assets of amalgamating company are acquired by amalgamated company, then while claiming depreciation after amalgamation, amalgamated company can claim depreciation only on the basis of number of days a particular asset were used by them. Therefore, in our considered view, said proviso only determines amount of depreciation to be claimed in the hands of predecessor / amalgamating company and in hands of the successor or amalgamated company only in the year of amalgamation based on the date of such amalgamation. However, it does not in any way restrict claim of depreciation on assets acquired after amalgamation or during the course of amalgamation. Therefore, it is very clear from 5th proviso to section 32(1) of the Act, that once any asset, including intangible asset, more particularly, goodwill is added to the respective block of asset of the amalgamated company, in the context of claim of depreciation in the hands of amalgamated company and such addition to the block of assets would not fall within the purview of the 5th proviso to section 32(1) of the Act. Effectively, scope of the said proviso is narrow as could be culled out for the purpose for which said proviso was inserted in the statute as reflected in the Memorandum to the Finance Bill. To further clarify, 5th proviso to section 32(1) of the Act, with regard to depreciation on goodwill is restricted to assets which belong to amalgamating company and its application cannot be extended to the assets which arise in the course of amalgamation to the amalgamated company. The intention of law was to extend benefit available to the amalgamated company on succession and not to restrict depreciation on assets which generated in the course of succession. It is very clear from the proviso that it refers to depreciation allowable to the predecessor and successor in the case of succession and this should be understood as reference to the assets that belong both to the predecessor and successor and which can only once belonged to the predecessor company and it does not apply to the assets which were generated in the hands of amalgamated company for the first time, as a result of amalgamation as approved by the High Court. In our considered view, 5th proviso applies only to those assets which commonly exist between predecessor and successor, however, it does not apply to asset which has been created or acquired after amalgamation. The creation of new asset by virtue of amalgamation like goodwill completely go out of reckoning of said proviso and thus, in our considered view, basis of the PCIT to invoke his jurisdiction u/s.263 of the Act is incorrect.

12. xxxxx

13. In this case, there was no goodwill in the books of account of the amalgamating company and further, goodwill has been acquired by amalgamated company by paying consideration over and above net value of assets at amalgamating company. Therefore, in our considered view, case of the assessee squarely comes under ratio

laid down by the Hon'ble Supreme Court in the case of M/s.Smifs Securities Ltd.(supra). In any way, in a subsequent decision, ITAT ., Bangalore Bench in the case of M/s. Altimetrik India Pvt. Ltd, Vs. DCIT (2022) 137 taxmann.com 9 had considered an identical issue and after considering decision of the United Breweries Ltd. (supra) held that consideration paid by the amalgamated company over and above net assets of amalgamating company should be considered as goodwill arising on amalgamation and such goodwill is a capital asset eligible for depreciation. Therefore, from the above facts, it is very clear that in the given facts & circumstances of the case, the 5th proviso to section 32(1) has no application and further, in absence of any other possible view, view taken by the Assessing Officer while allowing depreciation on goodwill in the assessment proceedings, cannot be held to be erroneous or unsustainable under the law. Since, foundation for assuming jurisdiction u/s.263 of the Act, is completely erroneous on account of wrong assumption of applicability of 5th proviso to section 32(1) of the Income Tax Act, 1961, to the facts of the present case, assessment order passed by the Assessing Officer needs no revision, as there is no error committed by the Assessing Officer in claim of depreciation on purchase of goodwill. It is well settled principle of law by decisions of various Courts, including decision of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Vs. CIT 243 ITR 83 (SC), where it has been clearly held that the PCIT cannot assume jurisdiction to revise assessment order, unless the PCIT satisfies that assessment order passed by the Assessing Officer is erroneous, insofar as it is prejudicial to the interests of the Revenue. In this case, on the issue of depreciation on goodwill, the Assessing Officer has taken one possible view with which the PCIT does not agree, however, it cannot be treated as erroneous & prejudicial to the interests of the Revenue, unless view taken by the Assessing Officer is erroneous and unsustainable in law. This legal principle is also laid down by the Hon'ble Supreme Court in the case of CIT Vs. Max India Ltd. 295 ITR 282. In our considered view, view taken by the Assessing Officer on the issue of depreciation on goodwill is a possible view, because when 5th proviso to section 32(1) of the Act, has no application to the given facts and circumstances of the case, the Assessing Officer cannot take any view, which is contrary to provisions of section 32(1) of the Act. Since, the Assessing Officer has taken one of the possible view for which the PCIT may not agree, however, this may not be a reason for the PCIT to assume jurisdiction to revise assessment order passed by the Assessing Officer.

17. In view of this matter and considering the facts and circumstances of the case, we are of the considered opinion that the assessee is eligible for depreciation on goodwill created on account of amalgamation. The Assessing Officer without appreciating relevant facts, simply disallowed depreciation on goodwill, which was confirmed by the CIT(A). Thus, we set aside the order of the CIT(A) and the addition made by the Assessing Officer stands deleted for all the assessment years under consideration.

18. The next ground raised by the assessee in ground Nos. 3.1 to 3.6 for the assessment year 2016-17 is relating to addition under section 56(2)(viib) of the Act.

19. As per the Note No. 25 of their financials, the assessee had allotted 23,55,000 equity shares of face value of ₹.10/- per share at premium of ₹.193/- to M/s. ADP Solutions India Private Limited on their merger with the assessee. The assessee claimed that the share premium is based on the valuation as on 1st April, 2015 performed by an independent valuer. The Assessing Officer show-caused the assessee to provide the valuation report based on which share premium fixed. After considering the submissions of the assessee, the Assessing Officer fixed the fair market value of shares under Rule 11UA of the Income Tax Rules, 1962 at ₹.69.58/- only. Thus, the Assessing Officer disallowed the difference of share premium of ₹.123.42 [₹.193 – ₹.69.58] per share under section 56(2)(viib) of the Act in respect of 23,55,000 equity shares at ₹.29,06,54,100/- and added to the total income of the assessee. On appeal, the CIT(A) confirmed the addition.

20. On being aggrieved, the assessee is in appeal before the Tribunal. The ld. Counsel for the assessee, by filing FC-GPR filed with Reserve bank of India for allotment of shares to the overseas shareholders in pages 176 to 186 of paper book set II, submitted that the provisions of section

56(2)(viib) of the Act is not applicable in assessee's case for the reason that the shares were issued to the non-resident shareholders of ADP Solutions Private Limited. Further, by filing valuation report at page 60 of the paper book set II, the ld. Counsel for the assessee has submitted that the value of the shares has been determined by a Chartered Accountant as per discounted cash flow method [DCF method] which is one of the methods prescribed under Rule 11UA of the Income Tax Rules. By relying upon various case law, the ld. Counsel for the assessee prayed to delete the addition towards disallowance made under section 56(2)(viib) of the Act.

21. The ld. DR relied on the orders of the authorities below.

22. We have heard both the sides, perused the materials available on record. M/s. ADP Solutions India Private Limited was amalgamated with assessee company by a scheme of amalgamation sanctioned by the NCLT vide order dated 19.06.2019 with effect from the appointed date of 1st April, 2015. According to the Assessing Officer at para 8.1 of the assessment order, the assessee had allotted 23,55,000 equity shares of face value of ₹.10/- per share at premium of ₹.193/- to M/s. ADP Solutions Private Limited on their merger with the assessee. However, the Assessing Officer determined the fair market value of shares at ₹.69.58/- and the difference of ₹.123.42 per share was brought to taxation by making disallowance

under section 56(2)(viib) of the Act in respect of 23,55,000 equity shares. It is not in dispute that the assessee issued shares to non-resident as per FC-GPR filed with Reserve bank of India for allotment of shares to the overseas shareholders placed on record [pages 176 to 186 of paper book set II]. Thus, the point at issue is whether the provisions of section 56(2)(viib) of the Act applies to non-resident or not. For ready reference, the relevant clause (viib) to section 56(2) of the Act is reproduced hereinbelow:

*(viib) "where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a **resident**, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:*

23. A plain reading of the above clause (viib) to section 56(2) of the Act, it is amply clear that the above provision applies to only a resident. In the present case, the assessee issued shares to the non-resident shareholders of ADP Solution India Private Limited as could be evident from FC-GPR filed with Reserve Bank of India for allotment of shares to the overseas shareholders is evident from pages 176 to 186 of paper book set II. In view of this fact, it is amply clear that the provisions of section 56(2)(viib) of the Act have no application to the case of the assessee in the assessment year under consideration.

24. In fact, in order to bring the non-residents under the provisions of section 56(2)(viib) of the Act, clause (viib) to section 56(2) of the Act has

been amended vide Finance Act, 2023 w.e.f. 01.04.2024. Therefore, it is clear that prior to amendment vide Finance Act, 2023, the provisions of section 56(2)(viib) of the Act have no application to the non-resident shareholders to whom the shares were issued by the taxpayers.

25. Under the above facts and circumstances, the addition made by the Assessing Officer and confirmed by the CIT(A) is unwarranted. Accordingly, we delete the addition made by the Assessing Officer and allow the grounds raised by the assessee for the assessment year under consideration.

26. The next ground raised by the assessee in ground Nos. 4.1 to 4.4 for the assessment year 2016-17 is relating to addition of ₹.95,57,391/- made towards disallowance of expenses under section 40(a)(i) of the Act.

27. The Assessing Officer required the assessee to submit the party-wise foreign payments made with tax deducted at source. Accordingly, on perusal of the details furnished by the assessee, the Assessing Officer has noted that the assessee deducted tax at source under section 195 of the Act for the payments of ₹.4,85,00,041/-. But, as per clause 34a, Form 3CD, the assessee's statutory Chartered Accountant has certified that the assessee deducted tax at source under section 195 of the Act to an extent of ₹.3,89,42650/-. The assessee was asked to reconcile the same. Since the assessee could not furnish any supporting document, the Assessing

Officer disallowed the differential amount of ₹.95,57,391/- [₹.4,85,00,041 - ₹.3,89,42650] and added to the total income of the assessee.

28. On appeal, before the CIT(A), the assessee furnished the reconciliation of the difference between the foreign currency payments as per the financial statements and Form 3CD along with Form 27Q as well as tax payment challan and prayed for grant of relief. However, without acknowledging the details furnished by the assessee of party-wise break up of foreign currency payments made, the CIT(A) simply confirmed the disallowance made by the Assessing Officer under section 40(a)(i) of the Act.

29. Before us, by filing the reconciliation of the difference between the foreign currency payments as per the financial statements and Form 3CD along with Form 27Q as well as tax payment challan from page 189 to 216 of the paper book set II, the ld. Counsel for the assessee prayed for grant of relief.

30. The ld. DR fairly conceded that the matter may be remanded to the file of the Assessing Officer for verification.

31. Having heard both the parties and upon perusal of page 30 of the impugned order, we find that the assessee has submitted the reconciliation of the difference between the foreign currency payments as per the financial statements and Form 3CD along with Form 27Q as well as tax

payment challan as Annexure 5 before the CIT(A) and prayed for grant of relief and the CIT(A) has not acknowledged the same and confirmed the addition made by the Assessing Officer. Accordingly, we set aside the order of the CIT(A) on this issue and remand the matter to the file of the Assessing Officer for fresh adjudication after verification of the details as may be filed by the assessee. The assessee is also directed to furnish the details as was furnished before the Tribunal. Thus, the grounds raised by the assessee are allowed for statistical purposes.

32. In the result, the appeal in ITA No. 2670/Chny/2024 is partly allowed for statistical purposes and the appeals in ITA Nos. 2671, 2672 & 2698/Chny/2024 are allowed.

Order pronounced in the open court on 21st May, 2025 at Chennai.

Sd/-	**Sd/-**
(जगदीश)	**(जॉर्ज जॉर्ज के)**
(JAGADISH)	**(GEORGE GEORGE K)**
लेखा सदस्य/ACCOUNTANT MEMBER	उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,
दिनांक/Date: 21.05.2025

Vm/-

आदेशकीप्रतिलिपिअग्रेषित/Copy to:
1. अपीलार्थी/Appellant,
2.प्रत्यर्थी/ Respondent,
3. आयकरआयुक्त/CIT, Chennai/Madurai/Coimbatore/Salem
4. विभागीयप्रतिनिधि/DR &
5. गार्डफाईल/GF.