

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ 'A' अहमदाबाद।  
IN THE INCOME TAX APPELLATE TRIBUNAL  
"A" BENCH, AHMEDABAD

BEFORE DR. B.R.R. KUMAR, VICE-PRESIDENT  
AND  
MS. SUCHITRA R. KAMBLE, JUDICIAL MEMBER

ITA No.2007 & 2008/Ahd/2017  
AND  
ITA No.516/AHD/2018  
Assessment Year : 2012-13, 2013-14 & 2014-15

Nirma Limited, Nirma House, Ashram Road Ahmedabad 380 009 PAN : AAACN 5350 K	Vs	DCIT, Cir.3(1)(1) Ahmedabad.
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ITA No.2224/Ahd/2017  
AND  
ITA No.791/Ahd/2018  
Assessment Year : 2013-14 & 2014-15

DCIT, Cir.3(1)(1) Ahmedabad.	Vs	Nirma Limited, Nirma House, Ashram Road Ahmedabad 380 009 PAN : AAACN 5350 K
(Appellant)		(Responent)

Assessee by :	Shri S.N. Soparkar, Sr.Advocate, Smt.Urvashi Shodhan AR, and Shri Parin Shah, AR
Revenue by :	Shri Alpesh Parmar, CIT-DR

सुनवाई की तारीख/Date of Hearing : 07/05/2025  
घोषणा की तारीख /Date of Pronouncement: 30/06/2025

**आदेश/ORDER**

**PER DR.B.R.R. KUMAR, VICE-PRESIDENT:**

The present set of five appeals comprises three appeals filed by the assessee and two cross-appeals filed by the Revenue. The assessee's appeals are directed against the orders of the learned Commissioner of Income-tax (Appeals)-9, Ahmedabad dated 20.07.2017, 21.07.2017, and 22.01.2018, pertaining to the assessment years 2012-13, 2013-14, and 2014-15, respectively. The Revenue, in turn, has preferred appeals for the assessment years 2013-14 and 2014-15. These impugned appellate orders have

arisen from the assessment orders passed by the Assessing Officer under section 143(3)/144 of the Income-tax Act, 1961.

2. Both the assessee and the Revenue, being dissatisfied with the decision of the learned CIT(A) to the extent it was adverse to them, preferred cross-appeals before us raising following grounds:

3. Grounds raised in Assessee's for Asst. Year 2012-13, 2013-14 and 2014-15 are as follows:

**Asst. Year 2012-13**

1) *In law and in facts and circumstances of the Appellant's case, the learned CIT(A) has grossly erred in the points of law and facts.*

2) *In law and in facts and circumstances of the Appellant's case, the learned CIT(A) has grossly erred in confirming disallowance of delayed payment of Rs.2,10,729/- to ESIC and Rs.2,51,103/- to Provident Fund as per provisions of section 2(24)(x) r.w.s.36(l)(va) of the I.T. Act.*

3) *In law and in facts and circumstances of the Appellant's case, the learned CIT(A) has grossly erred in confirming disallowance of depreciation on goodwill for Rs.23,03,33,7827-*

4) *In law and in facts and circumstances of the Appellant's case, the learned CIT (A) has grossly erred in holding that charging of interest u/ss.234B & 234C of the Act is mandatory.*

5) *In law and in facts and circumstances of the Appellant's case, the learned CIT(A) has grossly erred in dismissing appellant's ground regarding initiation of penalty proceedings u/s.271(l)(c) of Income-tax Act.*

Additional ground raised by the assessee in this appeal for sales tax subsidy has not been pressed by the assessee, the same is dismissed as not pressed.

**Asst. Year 2013-14**

1) *In law and in facts and circumstances of the Appellant's case, the learned CIT(A) has grossly erred in the points of law and facts.*

2) *In law and in facts and circumstances of the Appellant's case, the learned CIT(A) has grossly erred in confirming disallowance of delayed payment of Rs.9,34,222/- to ESIC as per provisions of section 2(24)(x) r.w.s.36(l)(va) of the I.T. Act.*

3) *In law and in facts and circumstances of the Appellant's case, the learned CIT(A) has grossly erred in confirming disallowance of depreciation on goodwill for Rs.17,27,50,337/-*

4) *In law and in facts and circumstances of the Appellant's case, the learned CIT (A) has grossly erred in holding that charging of interest u/ss.234B & 234C of the Act is mandatory.*

5) *In law and in facts and circumstances of the Appellant's case, the learned CIT(A) has grossly erred in dismissing appellant's ground regarding initiation of penalty proceedings u/s.271(l)(c) of Income-tax Act.*

**Asst.Year 2014-15**

1) *In law and in facts and circumstances of the Appellant's case, the learned CIT(A) has grossly erred in the points of law and facts.*

2) *In law and in facts and circumstances of the Appellant's case, the learned CIT(A) has grossly erred in confirming disallowance of depreciation on goodwill for Rs.12,95,62,752/-.*

3) *In law and in facts and circumstances of the Appellant's case, the learned CIT(A) has grossly erred in holding that charging of interest u/s.234B of the Act is mandatory.*

4) *In law and in facts and circumstances of the Appellant's case, the learned CIT(A) has grossly erred in dismissing appellant's ground regarding initiation of penalty proceedings u/s.271(l)(c) of Income-tax Act.*

4. While, the Revenue in its appeals for 2013-14 and 2014-15 aggrieved by the action of the Id. CIT(A) to the extent of relief given by the Id. CIT(A) to the assessee, by raising the following grounds:

**Asst.Year 2013-14**

1. *Disallowance of claim of Sales Tax subsidy as capital receipts of Rs.81.51.84,216/-.*

2. *Disallowance of excess claim of depreciation on intangible assets for Rs.7,31,74,359/-.*

3. *Disallowance of product registration expenses of Rs.35,35,877/-.*

4. *Addition on account of benchmarking of loan u/s 92CA Rs.38,752/-.*

5. *Disallowance u/s 801A Rs.214,95,00,000/-.*

6. *Additional Ground on account of corporate guarantee commission of Rs.166,56,019/given to Bank for financial assistance to wholly owned subsidiary.*

7. On the facts and circumstances of the case, the Ld. Commissioner of Income-tax (A) ought to have upheld the order of the Assessing Officer in respect of above issues.

8. It is, therefore, prayed that the order of the Ld. Commissioner of Income-tax (A) may be set-aside and that of the Assessing Officer be restored.

**Asst.Year 2014-15**

1. The Ld.CIT(A) has erred in law and on facts in deleting the disallowance of Rs.79,42,31,787/- made by A.O. on account of claim of Sales Tax subsidy as capital receipts.

2. The Ld.CIT(A) has erred in law and on facts in deleting the disallowance of Rs.5,48,80,769/- made by A.O. on account of excess claim of depreciation on intangible assets.

3. The Ld.CIT(A) has erred in law and on facts in deleting the addition of Rs.14,81,249/- made by A.O. on account of product registration expenses.

4. The Ld.CIT(A) has erred in law and on facts in deleting the addition of Rs.212,82,47,627/- made by A.O. on account of deduction u/s 80IA.

5. The Ld.CIT(A) has erred in law and on facts in deleting the addition of Rs.64,33,028/- made by A.O. on account of corporate guarantee commission given to banks for financial assistance to wholly owned subsidiary, Karnavati Holding Inc. USA.

6. On the facts and circumstances of the case, the Ld. Commissioner of Income-tax (A) ought to have upheld the order of the Assessing Officer in respect of above issues.:

**ITA No.2007 & 2008/Ahd/2017 and ITA No.516/Ahd/2018**  
**AYs : 2012-13, 2013-14 & 2014-15 – Assessee's appeals**

**I. Disallowance of delayed payment to ESIC & PF (AY 2012-13 & 2013-14)**

5. The Assessing Officer disallowed the employee's contributions to ESIC and PF that were paid after the due dates prescribed under the relevant provisions during the years under consideration, relying on the judgment of the Hon'ble Gujarat High Court in CIT v. GSRTC (Tax Appeal No. 673 of 2010). The Ld. CIT(A) upheld the action of the Assessing Officer, holding that the disallowance was rightly made by the Assessing Officer as the employees' contributions to ESIC and PF were not deposited within the due date specified under the Explanation to Section 36(1)(va) of the Act.

5.1 We find that, in this case, the amount was credited to the relevant account only after the due date. We find that this issue already stands covered by the decision of the Tribunal in assessee's own case for AY 2011-12 in ITA No.1872/Ahd/2016 (Order dated 30.06.2023). Respectfully following the decision of the Tribunal in assessee's own case for AY 2011-12 (supra) and in line with the judgment in the GSRTC (supra), we find no infirmity in the order passed by the learned CIT(A) on this issue. We therefore uphold the order of the Ld. CIT(A) in this regard and the appeal of the assessee on this ground is thus dismissed.

Accordingly, appeal of the assessee on this ground is dismissed.

## **II. Disallowance of depreciation on goodwill (AYs 2012-13 to 2014-15)**

6. The brief facts of the case are that the Saurashtra Chemicals Limited was amalgamated with the assessee company with effect from 01.04.2011 and the scheme was approved by Board for Industrial and Financial Reconstruction (BIFR) vide order dated 22.01.2013. The assessee-company had acquired all the assets and liabilities of Saurashtra Chemicals Limited at the book value in pursuant to the scheme of amalgamation, where net assets has resulted in to goodwill of Rs. 92.14 crores. The assessee company accordingly claimed depreciation at 25% on goodwill, which comes to Rs. 23,03,33,782/- for the AY 2012-13. The Assessing Officer disallowed the claim for depreciation on goodwill by a detailed discussion at paragraph no. 10 of his order as under :-

*"10.1 As per clause D of note no.38 of notes forming part of the financial statements of NL it has been stated that the company has acquired assets of Rs. 755.70 crores and liability of Rs. 823.13 crores of SCL. The company to issue and allot 247080232 preference shares to the equity shareholders of SCL in ratio of 1 (one) 6% Redeemable non-cumulative, non-convertible Shares of Rs. 1 (one) each fully paid up for every 1(one) equity share of Rs. 1 each fully paid up by the members in SCL. This has resulted into Goodwill of Rs. 92.14 crores. Vide letter dated 27.02.2015 the assessee has claimed that depreciation at the rate of 25% which comes to Rs. 23,03,33,782/- may be allowed to the assessee on completion of assessment.*

*10.2 The depreciation on goodwill arising on amalgamation claimed by the assessee company is not allowable for the reasons discussed in subsequent paragraphs. Even before going into the question of allowability of depreciation on Goodwill in this case, first and foremost, it is seen that the assessee has not claimed*

depreciation on goodwill of Rs. 23,03,33,782/- in the return of income. However, the claim has been lodged by the assessee only during the assessment proceedings. Further, no revised return has been filed by the assessee to include claim of depreciation or amortization. In case of *Goetze (India) Ltd [2006] 157 TAXMAN 1 (SC)* Hon'ble Supreme Court of India has laid down that an assessee cannot amend, a return filed by him for making a claim for deduction other than by filing a revised return. Thus, in this case, in the absence of revised return to claim depreciation benefit on alleged goodwill, the same cannot be allowed to the assessee during the assessment proceedings.

10.3 without prejudice to the above, it is seen that even otherwise, the assessee is not entitled to claim depreciation on goodwill for the reasons discussed below:

i. The very genesis of goodwill as a consequence of amalgamation needs to be examined. The accounting treatment is for deciding quantum of the goodwill and should be considered only after the examination of genesis of goodwill. Firstly, it is to be decided in principle whether the amalgamation brings so called "Goodwill" to the assessee company. It is seen that amalgamating company i.e. SCL had collapsed after incurring huge losses financially over a period of time. Consequently, BIFR was approached with a proposal for revival of the company in form of a Rehabilitation Scheme. It is inconceivable that as to how a huge loss making company would, bring the alleged Goodwill to the Amalgamated Company i.e. Nirma Limited.

ii. Goodwill has not been defined in the Income Tax Act, 1961. The Constitutional Bench of the Supreme Court in the case of *Rustoms Cavasjee Cooper v. Union of India [1970] 1 SCO 248* stated that the goodwill of a business is an intangible asset; it is the whole advantage of the reputation and connections formed with the customers together with the circumstances making the connection durable. It is that component of the total value of the undertaking which is attributable to the ability of the concern to earn profits over a course of years or in excess of normal amounts because of its reputation, location and other features.

The Supreme Court in the case of *CIT v. B.C. Srinivasa Shetty [1981] 128 ITR. 294/5 Taxman 1*, observed that "because of its intangible nature it (goodwill) remains insubstantial in form and nebulous in character. Its value may fluctuate from one moment to another depending on the changes in the reputation of business."

In the present case as SCL was held to be a sick company by BIFR, it is difficult to assume that SCL was having Goodwill or reputation as such. Prima facie, in the present case Goodwill has been assigned an arbitrarily high value in order to evade the taxes legitimately payable by the assessee company.

iii. Goodwill is connected to name and fame of a company and it does not work in vacuum and is not available to any unknown entity. In the present case the assessee company is trying to develop so called "goodwill" by creating an accounting facade. Even for the sake of argument, if it is accepted that the

*amalgamating company namely SCL had any Goodwill, the same has already evaporated after incurring huge losses and possession of negative net worth.*

*iv. It is noteworthy that the amalgamated company i.e. Nirma Limited does not contain the name of Saurashtra Chemicals Limited (SCL). SCL has lost its identity. Goodwill attached to name/identity of SCL has vanished after amalgamation with NL and the resultant company is Nirma Limited only.*

*v. The draft scheme as approved by BIFR has generally stated that difference between net assets taken over and purchase consideration (i.e shares allotted by NL to shareholders of SCL i.e. Rs. 24.70 crores) shall be transferred to Goodwill or capital reserve as the case may be. BIFR has not given any specific direction that the difference has to be accounted as goodwill. The so called accounting difference between consideration paid and net assets of SCL needs to be carried to Capital Reserve BIFR has not given any specific direction regarding valuation of goodwill as such.*

*vi. The surplus arising from amalgamation is akin to share premium and hence should be treated as capital reserve. The draft scheme as approved by BIFR postulated that difference between net assets taken over and purchase consideration (i.e shares allotted by NL to shareholders of SCL i.e. Rs. 24.70 crores) shall be transferred to Goodwill or capital reserve as the case may be. In order to claim tax benefits the assessee company has transferred whole of the difference to goodwill instead of taking the amount to capital reserve. In the absence of any real justification for claiming whole of the difference as Goodwill, depreciation on Goodwill cannot be allowed. The excess consideration paid would also be in lieu of tax benefits accruing to the amalgamated company by way of setting off of unabsorbed business losses and depreciation of the amalgamating company and the entire amount cannot be attributed against goodwill.*

*vii. There are specific provisions in the Act such as explanation 2 to sec 43(6) and Explanation 7 to sec 43(1), which require that tax qualifying merger results in amalgamated company stepping into the shoes of the amalgamating company for the purpose of depreciation. Thus depreciation will not be available in case the goodwill is self generated in the hands of the amalgamating company, as the amalgamated company is an entity stepping into the shoes of the transferor.*

*viii. The so-called goodwill has arisen on amalgamation only as an accounting entry, to balance the debit and credit sides of the balance sheet. However, through this exercise, no actual asset has come into existence. Further, no consideration has actually been paid by the assessee company to acquire an asset in the nature of 'goodwill'. Depreciation is governed by the provisions of section 32. Depreciation on any asset or block of assets is to be allowed as a percentage of the 'actual cost' thereof. As per Explanation 7 to section 43 of the Income-tax Act, where in a scheme of amalgamation, any capital asset is transferred by the amalgamating company to the amalgamated company, the actual cost to the amalgamated company shall be taken to be the same as it would have been if the transferor company had continued to hold the capital asset for the purpose of its*

own business. The Amalgamating company SCL was not carrying any 'goodwill' in its balance sheet. Even if it is assumed that the assessee company paid consideration for the goodwill of the amalgamating company, since the goodwill is a self generated asset of the amalgamating company, its cost to the amalgamating company is NIL. Hence the amalgamated company cannot be allowed any depreciation on goodwill, whose cost is NIL.

ix. The assessee company has relied on the decision of the Hon'ble Supreme Court in the case of CIT v/s Smifs Securities Ltd [2012] 348 ITR 302 SC wherein it was held that 'Goodwill' is an asset under Explanation 3(b) to section 32(1) of the Act.

In the aforesaid judgement, the Hon'ble Apex Court has decided the question of law that "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?". However, the Hon'ble Court has not decided the question whether excess consideration paid over net assets would constitute Goodwill on Amalgamation or not? The Hon'ble Supreme Court has also not delved into the question as to whether any amount was actually paid on account of Goodwill in that case. In the case on hand, it is not being disputed that Goodwill is a depreciable asset or not. The issue of contention is that whether there was any goodwill of SCL at all, and even if it is accepted for sake of argument that there was some goodwill attached with SCL, then how will it be valued?

10.4 Without prejudice to the above, the value of Goodwill has been computed as difference between net assets taken over and purchase consideration (i.e. shares allotted by NL to shareholders of SCL i.e. Rs. 24.70 crores). However it is noteworthy that in the AY 2012]-13 no such shares have been allotted by NL to shareholders of SCL. Thus when purchase consideration itself has not been paid in the current AY there is no question of accrual of Goodwill in hands of NL, especially so in the current AY.

10.5 Thus considering the reasons enumerated above the claim of Assessee Company regarding goodwill and consequent depreciation claim of Rs. 23,03,33,782/- on same is being disallowed."

6.1 The Ld. CIT(A) upheld the action of the Assessing Officer on this issue and confirmed the disallowance of depreciation as made by the Assessing Officer. He held that there was no increase in the market worth of the assessee as a result of the amalgamation scheme with SCL. This conclusion was reached through a detailed discussion made by the Ld. CIT(A) in his order vide paragraph No. 10.2 which is reproduced as follows :-

"10.2 I have carefully considered rival contentions, case law relied upon and observations made by the A.O. in the assessment order. The A.O. has observed that the appellants have acquired assets of Rs. 755.70 crores and liability of Rs. 823.13

crores of Saurashtra Chemicals Ltd. (SCL). According to the appellant as per the Scheme of Amalgamation the appellant was required to allot 247083232 preference shares of the appellant to the equity shareholders of SCL, as per the scheme of amalgamation. According to appellant this has resulted into a goodwill of Rs. 92.14 crores. During the assessment proceedings the appellant has claimed the depreciation at the rate of 25% on this goodwill amounting to Rs. 23,03,33,782/- which has been disallowed by the A.O. According to the A.O the appellant has not claimed the said depreciation on goodwill in the return of income. The A.O. has further mentioned that the case of SCL is before BIFR for the purpose of revival in the form of Rehabilitation Scheme and hence there is no question of SCL enjoying any goodwill However, the appellant has submitted before the A.O during the assessment proceeding that the SCL has been engaged in the business of manufacturing of heavy chemicals like Soda Ash, Refined Sodium etc. and it also has five salt works near Jamnagar. SCL also had 11 lime stone mines near Porbandar. The appellant has relied upon the case of CIT vs Smifs Security 348 ITR 302 (SC for its claim of depreciation on goodwill. However, the A.O. has not accepted the contention of the appellant and has proceeded to disallow the quantum of depreciation i.e. Rs. 23,03,33,782/- claimed by the appellant on goodwill.

It is seen that the appellant has claimed depreciation on goodwill of Rs. 92.14 crores resulting out of the amalgamation agreement between itself and SCL. The appellant has relied upon the judgment of Hon'ble Supreme Court in the case of Smifs Securities Ltd. (supra).

The question of law before the Hon'ble Supreme Court in the case of Smifs Security was as follows :-

“Whether the goodwill is an asset within the meaning of sec.32 of the I.T. Act, 1961 and whether depreciation on goodwill is allowable under the said section. In answering the said question the Hon'ble Supreme Court has held that in the present cash the assessee has 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.”

It was further explained that excess consideration paid by the assessee over the value of net assets acquired of YSN Shares and Securities Private Limited (Amalgamating Company) should be considered as goodwill arising on amalgamation. It was claimed that the extra consideration was paid towards the reputation which the Amalgamating Company was enjoying in order to retain its existing clientele.

*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 herein below 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. "*

*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). In the circumstances, we are of the view that 'Goodwill' is an asset under Explanation 3(b) to Section 32(1) of the Act.*

*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 authorized representatives had filed copies of the Orders of the High Court ordering amalgamation of the above two Companies; that the assets and liabilities of IWs. YSN Shares and Securities Private Limited were transferred to the assessee for a consideration; that the difference between the cost of an asset and the amount paid constituted goodwill and that the assessee - Company in the process of amalgamation had acquired a capital right in the form of goodwill because of which the market worth of the assessee - Company stood increased. This finding has also been upheld by Income Tax Appellate Tribunal ['ITAT', for short]. We see no reason to interfere with the factual finding.*

*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.*

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

*It can be seen from the above referred finding of Hon'ble Supreme Court the main argument for claiming depreciation on the goodwill arising on amalgamation was that the extra consideration that was paid towards the reputation that the*

*amalgamated company was enjoying in order to retain its existing clientele. Relying on this main argument, the Hon'ble Apex Court has considered goodwill as an asset under explanation-3(b) to sec.32(1) of the Act. Hon'ble Apex court has further gone in to another aspect that no amount was actually paid on account of goodwill which was a finding of fact. In the case before Hon'ble Supreme Court, the CIT(A) had come to the conclusion that the assets and liabilities of YSN Shares; and Securities (P) Ltd. were transferred to the assessee for a consideration and the difference between the cost of an asset and the amount paid constituted goodwill and the assessee company in the process of amalgamation has acquired a capital right in the form of goodwill because of which the "market worth" of the assessee company stood increased. Hon'ble Supreme Court has also mentioned that the ITAT has upheld this fact and hence there is no reason to interfere with the factual finding. Further the Supreme Court has also mentioned that the only question raised before it was whether goodwill is an asset u/s.32 of the Act or not ? and the revenue had not filed an appeal before the High Court on the finding of fact mentioned earlier. The A.O has also mentioned in the order of assessment that the findings given by the Hon'ble Supreme Court that the only question of law that was raised before it was whether goodwill is a depreciable asset or not? There is no doubt that the judgment of the Apex Court is the law of land. There is also no doubt that 'Goodwill' is an intangible asset eligible for claim of depreciation u/s.32 of the Act.*

*The A.O. has relied upon the judgment of Rustoms Cavasajee Cooper v Union of India (1970) 1 SCC 248 wherein the Constitutional Bench of Supreme Court had stated that the goodwill of business is an intangible asset; it is the whole advantage of the reputation and connection formed with the customers together with the circumstances making the connection durable. It is that component of the total value of the undertaking which is attributable to the ability of the concern to earn profit over a course of years or in excess of normal amounts because of its reputation, location and other features. The A.O has also relied on the judgment of Hon'ble Supreme Court in the case of CIT vs B.C. Srinivasa Shetty 128 ITR 294. It is a matter of fact that SCL was a sick company and had approached BIFR for its rehabilitation. According to the A.O., considering these facts it is difficult to assume that SCL was having any goodwill or reputation as such. According to the A.O the appellant is trying to develop a so called goodwill by creating an accounting facade. In fact because of bankruptcy of SCL whatever goodwill SCL was enjoying had already evaporated after incurring huge loss and was having negative net worth. The name of SCL has also not been used by the appellant after the Scheme of Amalgamation. The A.O has also further mentioned that as per the final draft scheme approved by BIFR, BIFR has loosely stated that difference between the net assets taken over and purchase consideration shall be transferred to goodwill or capital reserves as the case may be. No specific directions have been given by the BIFR that the excess amount paid by the appellant to SCL would amount as goodwill. The A.O has further mentioned that the surplus arising from amalgamation is more akin to share premium and hence should be treated as 'capital reserve'. The A.O has also relied on specific provisions of the Act such as explanation-2 to sec.43(6) and explanation-7 to sec.43(1) that deals with the process of amalgamation and the quantum of depreciation on the cost of assets.*

*As nothing to the effect of goodwill has been mentioned in the agreement, the A.O is of the opinion that in the case of appellant is a self generated goodwill at the time of amalgamation in the hands of amalgamating company and hence the depreciation on the same would not be available to the appellant. I agree with the various contentions made by the A.O. During the assessment process as well as appellate proceedings nowhere the appellant has brought out that how it has acquired a capital right in the form of goodwill by acquiring SCL that has lead to increase in the market worth of the appellant. The payment appears to have been made for acquiring the running business and not for any intangible assets in the form of goodwill that would lead to increase in the market worth of the appellant. The appellant has also relied upon the judgment of CIT vs Aditya Birla Nuvo Ltd. 79 Taxman 290 and in the case of DOT vs Zydus Wellness Centre 76 Taxman 328, Ahmedabad. In the case of Aditya Birla Nuvo Ltd. Hon'ble High Court of Mumbai has followed Hon'ble Supreme Court in the case of Smifs Securities Ltd. In the present case under consideration it is an accepted proposition that goodwill is an intangible asset on which the assessee can claim depreciation. In the case of Zydus Wellness Centre Ltd.(supra) the Hon'ble Tribunal allowed the claim of depreciation on goodwill arising on amalgamation claimed by the assessee during the course of assessment proceedings by filing revised computation of income and without filing revised return of income. In both the cases the authority have relied upon the judgment of Hon'ble Supreme Court in the case of Smifs Securities Ltd. However, it is the finding of fact in the case of Smifs Securities as observed by the Hon'ble Supreme Court that the CIT(A) has held that the Scheme of Amalgamation had lead to increase in market worth of the assessee and the said finding of fact was upheld by the Hon'ble Tribunal. Hon'ble Apex court has refused to interfere with the said factual finding. In the case of the appellant under consideration as mentioned earlier, I am of the considered opinion that there has been no increase in the market worth of the appellant through scheme of amalgamation with SCL. It would be pertinent to also note the observation of A.O. that during A.Y.2012-13 no shares have been allotted by appellant to the shareholder of SCL. Considering all these facts and reason given above, disallowance of the depreciation of Rs.23,03,33,782/- made by the A.O is hereby confirmed and the grounds of appeal is hereby dismissed."*

6.2 We find that the Bangalore Tribunal in the case of United Breweries Ltd. v. Addl. CIT 76 taxmann.com 103 while appreciating the findings of the Supreme Court in the case of Smifs Securities Ltd. (supra), held that goodwill acquired at the time of amalgamation is subject to explanation 3 to section 43(1) of the Act and if the Assessing Officer finds that the assessee has claimed excess depreciation by enhancing the cost of goodwill then actual cost of goodwill can be determined only by considering the actual cost of the other assets so acquired under amalgamation. It further held that the assessee company being amalgamated company cannot claim more depreciation on the assets acquired in the scheme of amalgamation than the depreciation which would

have been allowable to the amalgamating company in view of the sixth proviso to section 32 of the Act.

6.3 We also find that in the case of Aditya Birla Nuvo Ltd., the Hon'ble High Court of Mumbai has followed Hon'ble Supreme Court in the case of Smifs Securities Ltd. In the present case under consideration it is an accepted proposition that goodwill is an intangible asset on which the assessee can claim depreciation. In the case of Zydus Wellness Centre Ltd. Vs. DCIT, the ITAT allowed the claim of depreciation on goodwill arising on amalgamation claimed by the assessee during the course of assessment proceedings by filing revised computation of income and without filing revised return of income. In both the cases the authorities have relied upon the judgment of Hon'ble Supreme Court in the case of Smifs Securities Ltd. In the case of Smifs Securities Ltd. (supra), paras 4 to 7 read as under:

*"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).*

6.4 We find that Section 32(1)(ii) 'Goodwill of a Business or Profession' has been specifically excluded from the definition of assets on which depreciation shall be calculated. Explanation 3(b) of Section 32(1): 'Goodwill of a Business or Profession' has been specifically excluded from the definition of intangible assets.

The Finance Act, 2021 has amended following provisions of the IT Act:

- Section 2(11): Definition of 'Block of Assets' has been amended to specifically provide that 'Goodwill of a Business or Profession' shall not form part of block of assets comprising of 'Intangible Assets'.
- Section 32(1)(ii): 'Goodwill of a Business or Profession' has been specifically excluded from the definition of assets on which depreciation shall be calculated.
- Explanation 3(b) of Section 32(1): 'Goodwill of a Business or Profession' has been specifically excluded from the definition of intangible assets.

- Section 43(6)(c)(ii): Definition of WDV of the block of assets has been amended to provide that written down value of Goodwill is required to be reduced from the Opening WDV in such cases, where the Goodwill is already forming part of Block of Assets.
- Section 50: Computation of capital gains in case of depreciable assets has been amended to provide that where goodwill forms part of block of asset for assessment year 2020-21 and depreciation has been claimed, the written down value of the block and short-term capital gains would be determined in the prescribed manner. Rule 8AC has been prescribed for this purpose.
- Section 55: Meaning of 'Cost of Acquisition' in case of Goodwill of Business or Profession has been amended to provide that
  - in case it is acquired from a previous owner, the cost would be the amount of purchase price paid.
  - in case it is acquired as a result of gift, amalgamation etc. and goodwill was acquired by previous owner, cost will be the cost to the previous owner.
  - all other cases- cost will be NIL.

6.5 The reasoning given in the Memorandum explaining the Finance Bill, 2021 for excluding goodwill from the ambit of intangible assets is that the actual calculation of depreciation of goodwill is required to be carried out in accordance with various other provision of the Act. Once those provisions are applied, in some situations there could be no depreciation on account of actual cost being zero and the WDV of that asset in the hands of the amalgamating company being zero. It is further stated that goodwill, in general, is not a depreciable asset and it depends upon how the business runs, goodwill may see appreciation and in the alternative no depreciation to its value. Hence, for the said reasons assesseees have been barred from claiming depreciation on goodwill.

6.6 Since the above amendments are applicable prospectively from the AY 2021-22, the appeal of the assessee on this issue for the AY 2012-13 is hereby allowed based on the judgment of the jurisdictional High Court in the case of Aculife Healthcare Pvt Ltd

(supra) and judgment of Hon'ble Supreme Court in the case of Smifs Securities Ltd. (supra).

In the result, the appeals of the assessee on this ground are allowed.

### **III. Sales Tax Subsidy – 115JB (AYs 2012-13 to 2014-15)**

7. We note that this issue stands squarely covered in favour of the assessee by the decision of the Tribunal in the assessee's own case for Assessment Years 2006-07 to 2011-12. For facility of reference, the relevant portion of the Tribunal's order for AY 2006-07, which has been consistently followed for AYs 2007-08 to 2011-12, is reproduced below:

*“37. Coming to the additional ground of appeal raised vide letter dated 26-03-2019 and 02-03-2020, it was pleaded by the assessee in the application filed for the admission of the additional ground that the issues raised in the additional grounds of appeal are legal in nature and go to the root of the matter. The necessary facts qua such legal grounds are already available on record as they are arising from the order of authorities below. Accordingly, it was prayed by the learned AR for the assessee that the same should be admitted for adjudication.*

*38. On the other hand, the learned DR opposed admitting the additional grounds of appeal on the reasoning that they were not raised before the authorities below.*

*39. We have heard both the parties and perused the materials available on record. The Hon'ble Supreme Court in the case of National Thermal Power Co. Limited vs. CIT reported in 229 ITR 383 has held as under:-*

*" Under section 254 of the Income-tax Act, 1961, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, there is no reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of the item. There is no reason to restrict the power of the Tribunal under section 254 only to A.Y. 2006-07 decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. The Tribunal should not be prevented from considering questions of law arising in assessment proceedings, although not raised earlier.*

39.1 From the above, it is transpired that the view that the Tribunal is confined only to those issues arising out of the appeal before Commissioner (Appeals) is too narrow a view to describe the powers of the Tribunal. Undoubtedly, the Tribunal has the discretion to allow or not to allow a new ground to be raised. But where the Tribunal is only required to consider the question of law arising from the facts which were on record during the assessment proceedings, there is no reason why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee. Since, the claim of the assessee is purely legal claim and entire facts are available on record, thus, it is not justified in not admitting the purely legal ground raised by the assessee for the first time. Accordingly, we admit the additional grounds raised by the assessee.

40. As far as the issue of exclusion of sales tax benefit of Rs. 92,63,70,395/- from the computation of minimum alternate tax under the provisions of section 115JB is concerned, we note that the AO while assessing the income under normal provisions of the Act treated the benefit of sale tax exemption as revenue receipt and added to the total income of the assessee. On appeal by the assessee, the learned CIT(A) held the same as capital receipt not liable to be taxed under the Act. On second appeal by the Revenue before us in ITA No. 685/AHD/2014, we have confirmed the order of the learned CIT(A) vide paragraph no. 62 of this order i.e. impugned sales tax benefit are in the nature of capital receipt not liable to tax. Thus, the question arises that a receipt which is not taxable under the normal provision of the Act can be made subject to tax under the scheme of MAT as provided under section 115JB of the Act. The question has been answered by the Hon'ble Calcutta High Court in the case of CIT vs. Ankit Metal & Power Ltd reported in 109 taxmann.com 93 wherein the Hon'ble bench held that once any A.Y. 2006-07 receipt which is not income under the provision of section 2(24) of the Act i.e. not liable to be tax then such receipt cannot be included in the book profit under section 115JB of the Act. The relevant observation of the Hon'ble Court is extracted as under:

27. In this case since we have already held that in relevant assessment year 2010-11 the incentives 'Interest subsidy' and 'Power subsidy' is a 'capital receipt' and does not fall within the definition of 'Income' under Section 2(24) of Income Tax Act, 1961 and when a receipt is not on in the character of income it cannot form part of the book profit under Section 115JB of the Act, 1961. In the case of Appollo Tyres Ltd. (supra) the income in question was taxable but was exempt under a specific provision of the Act as such it was to be included as a part of the book profit. But where a receipt is not in the nature of income at all it cannot be included in book profit for the purpose of computation under Section 115JB of the Income Tax Act, 1961. For the aforesaid reason, we hold that the interest and power subsidy under the schemes in question would have to be excluded while computing book profit under Section 115 JB of the Income Tax Act, 1961.

40.1 In view of the above, respectfully following the ratio laid down by the Hon'ble Calcutta High Court in the case discussed above, we hereby direct the AO to exclude the sales tax benefit from the computation of book profit under section

*115JB of the Act. Thus, the additional ground of appeal of the assessee vide letter dated 02-03-2020 is hereby allowed."*

7.1 Respectfully following the above-referred decision of the Tribunal, rendered in the assessee's own case and consistently applied in subsequent years, and in the absence of any material change in facts or legal position, we find no reason to deviate from the earlier view.

Accordingly, the appeals of the assessee on this ground are allowed.

7.2 In the result, the appeals of the assessee for AYs 2012-13 & 2013-14 are partly allowed and the appeal of the assessee for AY 2014-15 is allowed.

**ITA No. 2224/Ahd/2017 - Department's Appeal, AY 2013-14**

**ITA No. 791/Ahd/2018 - Department's Appeal, AY 2014-15**

**A. Disallowance of claim of sales-tax subsidy:-**

8. We find that that this issue stands squarely covered in favour of the assessee by the decision of the Tribunal in the assessee's own case for Assessment Years 2006-07 to 2011-12. For sake of reference, the relevant portion of the Tribunal's order for AY 2006-07, which has been consistently followed for AYs 2007-08 to 2011-12, is reproduced below:

*"59. The assessee during the year received sales tax subsidy aggregating to Rs. 99,19,95,360/- for two units namely Alindrara Unit Broada and Kalatalav Unit Bhavnagar under the backward area development scheme. The impugned subsidy was treated as capital receipt by the assessee. However, the AO found that the impugned subsidy was received in the form of exemption on sales tax on sale and purchases of different products. Hence, the same is directly linked to the turnover of the assessee. Therefore, as per the AO, the same should be treated as revenue receipt. The AO further held that had impugned subsidy been for the investment in plant & machinery, then the same should have been reduced from the original cost of the plant & machinery as prescribed under explanation 10 to section 43 of the Act. The AO accordingly treated the subsidy received by the assessee as revenue receipt and added to the total income of the assessee.*

*60. On appeal by the assessee, the learned CIT(A) deleted the addition made by the AO by observing as under:*

*6.4 It is seen that addition made on account of sales-tax subsidy treating as revenue receipt was deleted by my predecessor in the case of appellant for Asst.Year: 2008-09 vide appellate order No. CIT(A)-XI/94/Cir.5/10-11*

*dtd. 27 th February, 2012 following the order of ITAT of appellant vide ITA No.1245/Ahd/2006 dtd. 13-7-2009 for Aast.Year: 2002-03.*

*Following the above orders, it is held that sales-tax subsidy may be treated as capital receipt Vide this ground, appellant originally claimed Sales-tax benefit of Rs.99,19,95,360/- . Subsequently, vide submission dtd.10 th December, 2013 appellant claimed Sales-tax benefit of Rs.92,63,70,395 as per sales-tax assessment orders for F.Y. 2005-06 in respect of following two units:*

<i>(i) For Alindra unit</i>	<i>Rs.69,74,96,294</i>
<i>(ii) For Kalatalav unit</i>	<i>Rs.22,88,73,471</i>
<i>Total</i>	<i>Rs.92,63,70,395</i>

*I direct the AO to allow the claim of the appellant to the extent of Rs.92,63,70,395 as against original claim made by the appellant vide this ground for Rs.99,19,95,360/- as per the order of sales-tax authorities. This ground of appeal is treated as allowed.*

*61. Being aggrieved by the order of the learned CIT(A), the Revenue is in appeal before us.*

*61.1. The learned DR before us reiterated the findings contained in the assessment order.*

*61.2 On the other hand, the learned AR before us submitted that issue on hand is covered in favour of the assessee by the judgment of Hon'ble Gujarat High Court in its own case bearing Tax appeal No. 226 of 2010. The learned AR before us vehemently supported the order of the ld. CIT-A.*

*62. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset, we note that the issue on hand was also in dispute in earlier year i.e. AY 2004-05 which traveled up-to the Hon'ble Gujarat High in tax appeal No. 226 of 2010 where following question was framed:*

*2. The question of law framed at the time of admitting Tax Appeal No.226 of 2010 reads as under:--*

*"Whether the Appellate Tribunal is right in law and on facts in reversing the order passed by CIT (A) and thereby holding that amount of Sales-tax incentive received by the assessee is a capital receipt?"*

*62.1 The Hon'ble bench answered the above question in favour of the assessee by holding as under:*

*12. We have heard both the learned counsel and perused the record. We have also gone through the decisions cited before us. After considering the material on record, we are of the view that the issues involved in these appeals are squarely covered by the decisions of this Court in Birla VXL Ltd. (supra) and in Munjal Auto Industries Ltd. (supra). Therefore, the questions of law posed for our consideration in these appeals are answered*

*in favour of the assessee and against the department. Accordingly, all these appeals are dismissed.*

*62.2 Respectfully following the finding of the Hon'ble Gujarat High Court in the own case of the assessee, we do not find any reason to interfere in the finding of the learned CIT(A). Hence, the ground of appeal of the Revenue is hereby dismissed."*

8.1 Respectfully following the above-referred decision of the Tribunal, rendered in the assessee's own case and consistently applied in subsequent years, and in the absence of any material change in facts or legal position, we find no reason to deviate from the earlier view.

Accordingly, the appeals of the Revenue on this ground are dismissed.

**B. Disallowance of excess claim depreciation on intangible assets :-**

9. We note that this issue stands squarely covered in favour of the assessee by the decision of the Tribunal in the assessee's own case for Assessment Years 2006-07 to 2011-12. For facility of reference, the relevant portion of the Tribunal's order for AY 2006-07, which has been consistently followed for AYs 2007-08 to 2011-12, is reproduced below:

*"112. At the outset, we note that the assessee has acquired brand/trademark in the A.Y. 2003-04 from Nirma Industries Ltd and this is 5th year of its claim. We also note that there is no dispute other than the value of brand/trademark to be adopted for the purpose of the depreciation to be allowed to the assessee. We are of the view that the value of the brand/trademark on which depreciation should be provided can only be determined in the first year itself i.e. A.Y. 2003-04 and depreciation in subsequent year should be allowed on WDV of first year onwards. We find the value of brand/trade in A.Y. 2003-04, on which depreciation should be allowed to the assessee, has been decided at Rs. 249,07,23,831/- by this ITAT in ITA No. 1599 & 1280/Ahd/2013. The relevant ground and finding of the bench read as under:*

*40. Ground No.5: In this ground of appeal, grievance of the Revenue is that the ld.CIT(A) has erred in law and on facts in holding that correct value of intangible assets of the Nirma Industries was Rs.500 crores and not Rs.53.43 crores as determined by the AO and in directing the AO to allow depreciation on entire written down value of Rs.2,49,07,23,831/-.*

41. With the assistance of the ld.representatives, we have gone through the record carefully. Issue whether brand/trademark of Nirma would be taken at Rs.500 crores or its value is to be taken at Rs.53.43 cores considered by the AO has been disputed in the case of Nirma Industries in the Asstt.Year 2003-04. The ld.AO has made disallowance of Rs.61.8 crores out of depreciation claimed which was deleted by the ld.CIT(A). This issue has been considered by us in ITA No.1738/Ahd/2014 at para 8 of this order. We have followed order of the ITAT in the Asstt.Year 2001-02 wherein value of intangible assets was upheld at Rs.500 crores. Thus, following order in the case of Nirma Industries, para-8 of order onwards, we are of the view that the ld.CIT(A) has rightly taken the value of intangible assets at Rs.500 crores and has rightly allowed depreciation to the assessee. There is no merit in this ground of appeal. It is rejected.

112.1 Thus, in view of the above we uphold the order of the ld. CIT-A and direct the AO to allow the depreciation to the assessee on closing WDV as decided in A.Y. 2003-04. Hence, the ground of appeal of the Revenue is hereby dismissed."

9.1 Respectfully following the above-referred decision of the Tribunal, rendered in the assessee's own case and consistently applied in subsequent years, and in the absence of any material change in facts or legal position, we find no reason to deviate from the earlier view.

Accordingly, the appeal of the Revenue on this ground is dismissed.

### **C. Disallowance of product registration expenses:-**

10. We notice that this issue has also been decided in favour of the assessee by the Tribunal in its orders for AYs 2009-10 to 2011-12 in the assessee's own case. For sake of reference, the relevant portion of the Tribunal's order is reproduced below:-

*"193. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset, we note that issue on hand is covered in favour of the assessee by the order of the Hon'ble Gujarat High court in the case of CIT vs. Torrent Pharma Ltd. reported in 29 taxmann.com 405 where following question of law was framed:*

*[B] Whether the Appellate Tribunal is right in law and on facts in directing the Assessing Officer to treat the expenditure of Rs. 28,14,355/- incurred on foreign registration fees as revenue expenses?"*

193.1 The Hon'ble bench regarding the above question of law held as under:

*Similarly, the expenses for foreign country registration was for business purpose only, because the same helped the assessee in marketing its products in the foreign countries and promoting the sales.*

*6. For the aforesaid reasons, the Tribunal committed no error. Its findings are proper and in no way are perverse. No substantial question of law arises for consideration.*

*193.2 Respectfully following the order of the Hon'ble jurisdictional High court in the above-mentioned case, we do not find any infirmity in the order of the learned CIT(A). Hence, the ground of appeal of the Revenue is hereby dismissed."*

10.1 Respectfully following the above decision of the Tribunal in assessee's own case for AYs 2009-10 to 2011-12, and in the absence of any material change in facts or legal position, we find no reason to take any other view of the matter.

Accordingly, the Revenue's appeal on this ground is dismissed.

**D. Deletion of addition on account of benchmarking of loan u/s 92CA:-**

11. The grievance raised by the Revenue by way of this ground is that the Ld. CIT(A) has erred in directing the Assessing Officer to delete the addition made for Rs.38,752/- on account of benchmarking of loan to foreign subsidiary. The observation of the Ld. CIT(A) in this regard is as follows:-

*"10.2 I have carefully considered the rival contentions, case laws relied upon and observations made by the A.O. in the assessment order. Appellant submitted that loan granted to its Associated Enterprise (subsidiary company) should be computed at LIBOR plus 200 to 250 points. Appellant submitted that considering the fact that the LIBOR rate during FY 10-11 was 0.90% and by applying the higher rate of 293 basis points the total interest percentage comes to 3.83%. Appellant submitted that it charged interest of 5% and there was no justification for the TPO to take the interest rate at 6.18% by considering the basis points at 293 instead of the settled rate as accepted by various Tribunals as relied upon by the appellant in the written submission. The then CIT(A)-9, Ahmedabad also decided similar issue in favour of the appellant in the appeal order passed for A.Y. 2010-11 by holding as under:*

*"12.2 I have carefully considered appellant's submission and case laws relied upon by the appellant. Appellant submitted that Ld. Transfer Pricing Officer passed an order u/s. 92CA(5) r.w.s. 154 of the I. T. Act dtd. 18.07.2014 revised the addition on account of benchmarking of loan to Rs. 13,92,104/-. The copy of the order u/s 92CA(5) r.w.s. 154 of the I. T. Act was furnished. Appellant submitted that loan granted to its AE (subsidiary company) should be computed at LIBOR plus 200 to 250 points. Appellant*

*submitted that considering the fact that the LIBOR rate during FY 09-10 was 1.28% and by applying the higher rate of 250 basis points the total interest percentage comes to 3.78%. Appellant submitted that it charged interest of 5% and there was no justification for the TPO to take the interest rate at 5.38% by considering the basis points at 409.72 instead of the settled rate as accepted by various Tribunals as relied upon by the appellant in the written submission. After considering the entirety of facts, I am inclined to agree with the contention of appellant and the addition made by the A.O. for 32,23,160/-, which is now revised to Rs. 13,92,104/- as per order u/s. 92CA(5) r.w.s. 154 of the I.T. Act dtd. 18.07.2014 passed by TPO Accordingly, the addition made for Rs. 13,92, 104/- is deleted. This ground of appeal raised by the appellant is allowed.*

*I have also allowed the claim of appellant in the appeal order passed by me for A.Y. 2011-12. After considering the facts and circumstances of the case and respectfully following the order passed by appellate authorities, I am inclined to agree with the contention of the appellant. Accordingly, I direct the A.O. to delete the addition made for Rs. 38,752/- on account of benchmarking of loan to foreign subsidiary. Thus, this ground of appeal raised by the appellant is allowed.*

11.1 We find that similar issue had come up before the Tribunal in assessee's own case for AYs 2010-11 and 2012 and the same has also been decided in favour of the assessee by the Tribunal vide its order dated 30.06.2023. For facility of reference, the relevant portion of the Tribunal's order is reproduced hereunder:-

*"230. We have heard the rival contention of both the parties and perused the materials available on record. Admittedly, the assessee has extended loan & advances to its AE in USA and also charged interest @ 5% on such loan & advance. However, the AO/TPO worked out the ALP of interest at 5.38% being LIBOR + 409.72 basis points and made upward adjustment but the learned CIT(A) was pleased to delete such upward adjustment. The basis adopted by the learned CIT(A) was that there were series of orders of different Tribunal where ALP of interest extended to AE were taken at LIBOR + 200 or 250 basis points as against the ALP taken by the TPO or present assessee at LIBOR + 409.72 basis points. Considering the finding of learned CIT(A) and the series of order of different bench Tribunal as referred by the assessee during the appellate proceeding if we take the ALP in the case of the present assessee at LIBOR + 250 basis points then interest would be at 3.8% whereas assessee has charged interest @ 5% from its AE which is more than the ALP. Therefore, in our considered view no further adjustment is required to be made on account of benchmarking of interest on loan & advances to the AE. Hence, we uphold the order of the learned CIT(A) regarding issue of benchmarking of interest on loan."*

11.2 Respectfully following the above decision of the Tribunal in assessee's own case for AYs 2010-11 to 2011-12, and in the absence of any material change in facts or legal position, we find no reason to take any other view of the matter.

Accordingly, the Revenue's appeal on this ground is dismissed.

**E. Disallowance u/s 80IA in respect of power generation units at Bhavnagar & Porbandar:**

12. We note that this issue has been decided in favour of the assessee by the Tribunal in its orders for Assessment Years 2006-07 to 2011-12 in the assessee's own case. For ease of reference, the relevant extract from the Tribunal's order is reproduced below:

*"28. The next issue raised by the assessee vide ground No. 9 of its appeal is that the learned CIT(A) erred in dismissing the additional ground raised before him for claiming the deduction under section 80IA of the Act.*

*29. The necessary facts are that the assessee during the appellate proceeding before the learned CIT(A) raised additional ground of appeal wherein it was contended that the power undertaking located at Bhavnagar is eligible for deduction under section 80IA of the Act. But the deduction under section 80IA of the Act on the said unit was not claimed at the time of filing the return of income since total income was declared at Rs. NIL. However, the AO assessed the income in the assessment framed under section 143(3) of the Act at Rs. 449,07,95,360/- only. Therefore, the amount eligible for deduction under section 80IA of the Act should be provided. The assessee in support of its claim furnished audit report of eligible undertaking and claimed that similar deduction was allowed by the ld. CIT(A) in its own case for the AY 2004-05.*

*30. However, the learned CIT(A) dismissed the additional ground of appeal of the assessee by observing as under:*

*I have carefully considered the contention made by the appellant. Hon'ble Supreme Court in the case of Goetz India Ltd. 284 ITR 323 has held that any claim for deduction not made in the return cannot be made except by way of filing revised return. In the case of appellant, no revised return was filed for making the claim. Hence, the claim is not acceptable. The additional ground of appeal raised by appellant is dismissed.*

*31. Being aggrieved by the order of the learned CIT(A), the assessee is in appeal before us.*

*32. The learned AR before us contended that the deduction was not claimed by the assessee as there was no positive income but on account of the disallowance made by the AO, there was positive income to the assessee and therefore the assessee*

*becomes entitled for the deduction provided under section 80-IA of the Act. It was further contended by the learned AR that the assessee has been allowed the deduction under section 80 IA of the Act in the earlier assessment year. Therefore, according to the learned AR, the assessee cannot be denied for the deduction under section 80 IA of the Act for the year under consideration.*

*33. On the other hand, the learned DR before us vehemently supported the order of the authorities below.*

*34. We have heard the rival contentions of both the parties and perused the materials available on record. From the foregoing discussion, we note that the revenue has admitted the claim of the assessee for the deduction under section 80-IA of the Act in the earlier years with respect to its power undertaking located at Bhavnagar. The learned CIT(A) in the assessment year 2004-05 has allowed the deduction to the assessee under section 80IA of the Act and the same was not challenged by the revenue. Likewise, the ITAT in the own case of the assessee for the assessment 2003-04 in ITA No. 1599/AHD/2013 vide order dated 19 April 2018 has dismissed the appeal of the revenue. Thus, we are of the view that the assessee is eligible for deduction under section 80 IA of the Act with respect of power undertaking at Bhavnagar. Nevertheless, it is pertinent note that the assessee in the year under consideration has not claimed any deduction under section 80 IA of the Act for the simple reason that it has offered the income under the provisions of MAT. As such the assessee has declared NIL income under normal computation of income. Thus, there was no occasion for the assessee to claim the deduction in the return of income under section 80IA of the Act. As such, the issue of claiming the deduction under section 80IA of the Act has come on the surface once the AO has made the disallowance of various expenses while computing the income under normal computation of income in the assessment framed under section 143(3) of the Act.*

*34.1 However, the authorities below have denied the benefit of deduction to the assessee on the reasoning that such deduction was not claimed in the return of income. In doing so, the revenue authorities have referred the judgement of Hon'ble Supreme Court in the case of Goetze India Ltd reported in 284 ITR 323. The relevant extract of the judgement is under:*

*4. The decision in question is that the power of the Tribunal under section 254 of the Income-tax Act, 1961, is to entertain for the first time a point of law provided the fact on the basis of which the issue of law can be raised before the Tribunal. The decision does not in any way relate to the power of the Assessing Officer to entertain a claim for deduction otherwise than by filing a revised return. In the circumstances of the case, we dismiss the civil appeal. However, we make it clear that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income-tax Appellate Tribunal under section 254 of the Income-tax Act, 1961. There shall be no order as to costs.*

*34.2 On perusal of the above judgement, there remains no ambiguity to the fact that it is the only AO who has no power under the statute to entertain a claim of deduction otherwise than by filing a revised return. However, there is no*

*restriction on the power of the CIT(A) and ITAT being quasi-judicial authority. Thus, we are of the view that the learned CIT(A) should have accepted the claim of the assessee by extending the benefit of deduction envisaged under the provisions of section 80IA of the Act. Accordingly, we set aside the finding of the learned CIT(A) and direct the AO allow the deduction to the assessee under section 80IA of the Act as per the provisions of law. Hence, the ground of appeal of the assessee is hereby allowed."*

12.1 Respectfully following the above decision of the Tribunal in assessee's own case for AYs 2006-07 to 2011-12, and in the absence of any material change in facts or legal position, we find no reason to deviate from the earlier view.

Accordingly, the Revenue's appeal on this ground is dismissed.

**F. Corporate guarantee commission :-**

13. We note that this issue has also been decided by the Tribunal in its orders for Assessment Years 2009-10 to 2011-12 in the assessee's own case. For the sake of reference, the relevant extract from the Tribunal's order is reproduced below:

*"202. The last issue raised by the Revenue is that the learned CIT(A) erred in deleting the addition on account of guaranteed fee for Rs. 12,48,19,000/- only.*

*203. The AO/TPO in the assessment proceedings found that that the assessee has provided foreign Bank Guarantee for the borrowing taken by its USA based AE namely Karnavati Holdings Inc and Searles Valley Minerals Inc to the extent of Rs. 659.62 crores without charging any guaranteed fees. The TPO/AO treating the same as an international transaction and made upward adjustment of Rs. 12,48,19,000/- by applying guarantee fee @ 2.09%.*

*204. On appeal, the learned CIT (A) held that extension of bank guarantee is not an international transaction. The relevant finding of the learned CIT(A) reads as under:*

*I have carefully considered appellant's submission and case laws relied upon by the appellant. On perusal of the factual position and legal position I find that the addition of Rs.12,48,19,000 is required to be deleted. The appellant company furnished bank guarantee to the foreign bank for providing finance to associated enterprise at U.S.A. which is wholly owned subsidiary of the appellant company. Hon'ble Delhi Tribunal in the case of Bharti Airtel Ltd Vs. CIT (43 taxmann.com 150) held that extending corporate guaranteed not within the purview of international transaction. The Tribunal in this case held as under;*

- *Capital financing! transactions {covered by the Explanation to section 92B} are international transactions only if they have any real bearing as distinct from contingent effect on the profits, income, losses or assets of the enterprise;*
- *When an assessee extends an assistance to the Associated Enterprise (AEs), which does not cost anything to the assessee, such an assistance or accommodation will not have any bearing on its profits, income, losses or assets, and, therefore, it is outside the ambit of international transaction under section 92B(1).*
- *Corporate guarantees issued for the benefit of AEs do not cost anything to the issuing enterprise and yet it might provide certain comfort levels to the parties dealing with the AEs;*
- *These guarantees do not have any impact on profits, income, losses or assets of the enterprise. Therefore, corporate guarantees do not fall within the scope of the term 'international transaction' even after insertion of Explanation to section 92B by Finance Act, 2012 with retrospective effect from 01.04.2002.*

*Considering the submissions made by appellant as above, it is concluded that the appellant did not incur any costs in providing the corporate guarantee to the associated enterprises and neither was any amount of guarantee commission charged by the appellant. As the transaction did not have any impact on the income, profits, losses or assets of the appellant the same could, not be classified as an international transaction as per the provisions of chapter X of the income tax act. In view of decision of Hon'ble Delhi Tribunal, in the case of Bharti Airtel Ltd Vs. CIT (43 taxriann.com 150), "It is held that, the bank guarantee to the foreign bank for providing finance to associated enterprise at U.S.A. which is wholly owned subsidiary of the appellant company, is not covered within the purview of making any adjustment since it is not international transaction. Following the said decision, I delete the addition made for Rs.12,48,19,000/-. This ground of appeal raised by the appellant is allowed.*

*205. Being aggrieved by the order of the learned CIT(A) the Revenue is in appeal before us.*

*206. The learned DR before us vehemently supported the findings of the assessment order.*

*207. On the other hand, the learned AR contended that the assessee has not taken any fees against the bank guarantee furnished to the AE and therefore there cannot be any adjustment towards the upward direction with respect to the bank guarantee furnished by the assessee to the AE. The learned AR vehemently supported the order of the learned CIT-A.*

*208. We have heard the rival contentions of both the parties and perused the materials available on record. Admittedly, the assessee company extended the bank guarantee for the borrowing availed by its AE in USA from foreign banks. The AO/TPO treated the same as international transaction being services*

provided by the assessee to its AE and accordingly benchmarked the guarantee-fee @ 2.09% of amount of loan for which guarantee extended. The learned CIT(A) by following the order of the Delhi Tribunal in case of Bharti Airtel Ltd vs. CIT reported in 43 taxmann.com 150 held the extension of bank guarantee is not covered under the purview of international transaction.

208.1 In this regard we find that the Hon'ble Madras High Court in the case of PCIT vs. Redington (India) Ltd. reported in 122 taxmann.com 136 has held that corporate guarantee is covered under the limb of international transaction and having bearing on profit and loss account. The relevant finding of the Hon'ble court reads as under:

*The concept of bank Guarantees and Corporate Guarantees was explained in the decision of the Hyderabad Tribunal in the case of Prolifics Corpn. Ltd v. Dy. CIT [2015] 55 taxmann.com 226/68 SOT 104 (URO). In the said case, the revenue contended that the transaction of providing Corporate Guarantee is covered by the definition of international transaction after retrospective amendment made by Finance Act, 2012. The assessee argued that the Corporate Guarantee is an additional guarantee, provided by the Parent company. It does not involve any cost of risk to the shareholders. Further, the retrospective amendment of section 92B does not enlarge the scope of the term 'international transaction' to include the Corporate Guarantee in the nature provided by the assessee therein. The Tribunal held that in case of default, Guarantor has to fulfil the liability and therefore, there is always an inherent risk in providing guarantees and that may be a reason that Finance provider insist on non-charging any commission from Associated Enterprise as a commercial principle. Further, it has been observed that his position indicates that provision of guarantee always involves risk and there is a service provided to the Associate enterprise in increasing its creditworthiness in obtaining loans in the market, be from Financial institutions or from others. There may not be immediate charge on profit & loss account, but inherent risk cannot be ruled out in providing guarantees. U1 and adjustment are to be made on guarantee commissions on such guarantees provided by the Bank directly and also on the guarantee provided to the erstwhile shareholders for assuring the payment of Associate Enterprise. In the light of the above decisions, the Tribunal committed an error in deleting the additions made against Corporate and Bank Guarantee and the order passed by the DRP is to be restored. [Para 76]*

208.2 Thus, in view of the above, we hold that the bank/corporate guarantee is an international transaction. Therefore, the same has to be bench marked for determining the ALP. Thus, the issue involved on hand is no longer covered as alleged by the learned AR for the assessee in view of the judgment of Hon'ble Madras High Court as discussed above.

208.3 The next aspects arise to determine the benchmarking for working out the ALP of the impugned international transaction. The TPO/AO in the case on hand has worked out the ALP at 2.09 % and basis of the same has already been

elaborated in TPO order. In this regard, we find that the Hon'ble Bombay High Court in case of *CIT vs. Everest Kento Cylinders Ltd* reported in 58 taxmann.com 254 held that while determining the ALP the rate charged by the bank or financial institution cannot be taken as comparable. The relevant finding of the Hon'ble Court reads as under:

*In the present case, it is assessee-company that is issuing corporate guarantee to the effect that if the subsidiary AE does not repay loan availed of it from ICICI, then in such event, the assessee would make good the amount and repay the loan. The considerations which apply for issuance of a corporate guarantee are distinct and separate from that of bank guarantee and, accordingly, commission charged cannot be called in question, in the manner TPO has done. The comparison is not as between like transactions but the comparisons are between guarantees issued by the commercial banks as against a corporate Guarantee issued by holding company for the benefit of its AE, a subsidiary company. In view of the above discussion, appeal does not raise any substantial question of law and it is dismissed*

208.4 Now, the question arises what should be the ALP rate of the commission on corporate guarantee? In this regard we find that The Tribunal in several cases has considered 0.50% (of corporate guarantee given) as ALP rate of Corporate/bank Guarantee commission. Some of these cases are as under:

- (i) *Videocon Industries Ltd. v. Dy. CIT [2017] 79 taxmann.com 216 (Mumbai - Trib.)*, Parent company charged commission at 0.25 %. The ALP was determined by the Tribunal at 0.50%.
- (ii) *Hindalco Industries Ltd. v. Addl. CIT [2015] 62 taxmann.com 181 (Mum.)*, Parent company charged commission at 0.50% which was considered as at ALP.
- (iii) *Manugraph India Ltd. v. Dy. CIT [2015] 62 taxmann.com 347 (Mum. - Trib.)*, The corporate guarantee was not treated as international transaction by the parent company but the Tribunal treated it as international transaction u/s 92B and upheld the ALP of 0.50%, following the order in the case of the assessee for the earlier year. The Tribunal followed *Everest Kento Cylinder Ltd. v. Asstt. CIT [2015] 56 taxmann.com 361 (Mum- Trib)*. It seems that the decision in *Bharti Airtel Ltd. (supra)* was not referred to in this case.
- (iv) *Aditya Birla Mincas Worldwide Ltd. v. Dy. CIT [2015] 56 taxmann.com 317/69 SOT 18 (URO) (Mum - ITAT)*. The assessee had not classified this transaction as international transaction. However, guarantee commission was fixed at 0.50%.
- (v) *Mylan Laboratories Ltd. v. Asstt. CIT [2015] 155 ITD 1123/63 taxmann.com 179 (Hyd.-Trib.)*. The assessee admitted corporate guarantee as international transaction, then as against 2% fixed by TPO the Tribunal upheld the claim of the assessee at 0.53% following the decision in *Prolifics Corpn. Ltd. v. Dy. CIT [2015] 68 SOT 104 (URO)/55 taxmann.com 226 (HYD - Trib.)*.
- (vi) *Everest Kanto Cylinder Ltd. (supra)* - Assessee paid guarantee commission at rate of 0.5 per cent for obtaining guarantee. This was accepted as ALP for all corporate guarantees given by the assessee.

(vii) *Godrej Consumer Products Ltd. v. Asstt. CIT [2016] 69 taxmann.com 436 (Mumbai -Trib.)- The assessee suo motu benchmarked the commission chargeable on bank guarantee @ 0.25%. It was determined at 0.50%.*

208.5 Thus, in view of the above discussed latest development, we are also of the opinion that the extension of corporate/guarantee to AEs is an international transaction which needs to be benchmarked and in view of several order of the tribunal as referred **above 0.5% commission** on the value of corporate/ bank guarantee will serve the justice to both the assessee and the Revenue. Thus, in view of the above, the ground of appeal of the revenue is hereby partly allowed.”

13.1 Respectfully following the above decision of the Tribunal in assessee’s own case for AYs 2009-10 to 2011-12, and in the absence of any material change in facts or legal position, we find no reason to deviate from the earlier view.

Accordingly, the Revenue’s appeal on this ground is partly allowed.

14. In the result, all the appeals filed by the Revenue and the appeals for AYs 2012-13 & 2013-14 filed by the assessee are partly allowed, while the appeal of the assessee for AY 2014-15 is allowed.

**Order pronounced in the Court on 30<sup>th</sup> June, 2025 at Ahmedabad.**

Sd/-

**(SUCHITRA R. KAMBLE)**  
**JUDICIAL MEMBER**

Ahmedabad, dated 30/06/2025

Sd/-

**(DR.B.R.R. KUMAR)**  
**VICE-PRESIDENT**

**आदेश की प्रतिलिपि अग्रहित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपेक्षित) / The CIT(A)
5. विभागध्य प्रतिनिधि, आयकर अपेक्षित अधिकरण / DR, ITAT,
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**आदेशानुसार/BY ORDER,**

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