

IN THE INCOME TAX APPELLATE TRIBUNAL  
BENCH : BANGALORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER  
AND SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER

ITA Nos.918 & 919/Bang/2013
Assessment years : 2008-09 & 2009-10

Fibres & Fabrics International Pvt. Ltd., No21-E1, 2 <sup>nd</sup> Phase, Peenya Industrial Area, Peenya, Bangalore 560 058. <b>PAN: AAACF 6841M</b>	Vs.	The Deputy Commissioner of Income Tax, Circle 11(3), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Nageshwar Rao, Advocate
Respondent by	:	Shri Sunil Kumar Agarwala, Jt. CIT(DR)

Date of hearing	:	20.04.2016
Date of Pronouncement	:	13.07.2016

**ORDER**

*Per Inturi Rama Rao, Accountant Member*

These are appeals filed by the assessee company directed against the different orders of CIT(Appeals)-I, Bangalore dated 27.3.2013 for the assessment years 2008-09 & 2009-10. Since common issues are involved in both these appeals, we proceed to dispose of the same vide this consolidated order.

2. The appellant raised the following grounds of appeal for the AY 2008-09:-

**Ground 1**

- 1.1 The impugned order of the learned CIT(A) is erroneous and bad in law as the learned CIT(A) has wrongly disallowed the Appellant's claim for depreciation on goodwill and carry forward of losses contrary to provisions of law.
- 1.2 The learned CIT(A) has erred in confirming the additions made by the learned Assessing Officer ("AO") on untenable and unlawful grounds much contrary to law.

**Ground 2: Depreciation on Goodwill**

- 2.1 The learned CIT(A) has erred in upholding the disallowance of the Appellant's claim for depreciation on Goodwill amounting to Rs 2,76,85,547 and further erred in disallowing the valid claims, of the Appellant, citing irrelevant and unlawful grounds, baseless presumptions. The valid claim for deduction of depreciation by the Appellant deserves to be allowed in toto.
- 2.2 The learned CIT(A) has failed to appreciate that the rights acquired are in the nature of Goodwill and further that as an intangible asset, the same is lawfully eligible for depreciation under Section 32(1)(ii) of the Act.
- 2.3 The learned CIT(A) erred in not appreciating that intangible assets acquired by Appellant in the nature of customer/ supplier contracts, export quotas and assembled workforce (employee base) are in the nature of business/ commercial rights and thus eligible for depreciation under Section 32(1)(ii) of the Act and has wrongly ignored to consider the law laid down by various courts, disallowing valid contentions of the Appellant on relevant, untenable and unlawful reasons.
- 2.4 The learned CIT(A) has erred in construing the intangible assets acquired by the Appellant as 'self generated asset' ignoring that the Company is a separate entity and has a distinct legal status from the shareholders in the Company.

- 2.5 The learned CIT(A) has erred in not appreciating that factors which may be relevant while adjudicating the deduction claim in an earlier assessment period, when Goodwill was acquired, vary from considerations for allowance of depreciation in subsequent year when Goodwill is part of the opening WDV and block of assets for current Assessment period. Consequently the learned CIT(A) proceeded to summarily deny the valid claim for depreciation on untenable grounds, much contrary to law as laid down by the courts, while disregarding the submissions of the Appellant without citing any valid reasons for the same.

### **Ground 3: Carry forward of losses**

- 3.1 The learned CIT(A) has erred in disallowing the Appellant's claim for carry forward of losses amounting to Rs 2,58,76,063 under the head of 'Profits & gains from Business or Profession' and Rs 1,22,41,530 under 'Income from Capital Gains' and wrongly upheld the order of the learned AO.
- 3.2 The learned CIT(A) erred in disregarding the valid return filed by the Appellant, within statutory time, by reference to inapplicable provisions and notifications while ignoring the relevant provisions, notifications and circulars. Without prejudice, the learned CIT(A) failed to appreciate that the return was filed within time and in any case reasonable time as applicable to the year under consideration.
- 3.3 The learned CIT(A) failed to appreciate that there was no time limit specified, for filing of the physical copy of the return post electronic filing, during the year under consideration.
- 3.4 The learned CIT(A) erred in wrongly disallowing the appellant's valid claim, for carry forward of losses based on valid return, by misinterpreting the legal requirements and by a arbitrary, cryptic and non speaking order.

The Appellant submits that each of the above grounds is independent and without prejudice to one another.

Further, the Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before, or at the time of, hearing of the appeal.

3. Briefly the facts of the case are that the appellant is a company duly incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of manufacture and export of readymade garments. The return of income for the AY 2008-09 was filed on 29.9.2008 disclosing a loss of Rs.6,58,03,141. This return was revised on 20.11.2008 at the same income. It was stated that the revised income was necessitated on account of enhanced claim for refund.

4. Against the said return of income, the AO i.e., DCIT, Circle 11(3), Bangalore completed the assessment u/s. 143(3) of the Act vide order dated 27.12.2010 at a loss of Rs.3,81,17,594. While doing so, the AO denied the depreciation claimed on goodwill of Rs.2,76,85,547 holding that goodwill does not qualify for depreciation. The AO held as follows:-

Therefore, it is not the case that depreciation has to be allowed at the rate prescribed under the Income tax Rules 1962 on all the assets whether tangible or intangible of the assessee while computing the business income of the assessee carrying on business profession etc., It is only in respect of such assets owned and used by the assessee in his business qualify for depreciation allowance. Similarly, it is only those assets which have reduction in its value by virtue of its vigour, strength, capability etc., going down over the user and time the asset qualify for depreciation allowance. For example. even in respect of tangible asset, like "land" etc., where there is no negative growth for the asset and on the other hand there will be only

appreciation in its value no depreciation allowance is allowed under the Income tax Act 1961, though such an asset is owned and used by the assessee in his business. Therefore, even for a while, without conceding, it is taken that "goodwill" could be considered as a business or commercial rights similar to know how, patents, copyrights, trademark, licences, franchises in order to hold that it constitutes intangible asset in the light of the very undisputed fact that it is a "self generated asset" as held by the Supreme Court in the case of M/s B.C. Srinivas Setty vs. CIT (128 ITR 294(SC) ) which may or may not appear in balance sheet and it normally appreciates in its value throughout the period of assessee's business. Actually, there is no negative growth for the "goodwill". Hence, whether there is a prescribed rate for intangible asset or not for an asset like "goodwill" in the I.T. Rules, 1962, the asset like "goodwill" will not qualify for depreciation allowance.

Under these circumstances, and by following above legal and accountancy principles, I hold that the assessee is not entitled to depreciation allowance on his asset (viz., " Goodwill"). In view of this, I disallow the deduction claim for depreciation allowance on goodwill of Rs.2,76,85,547/- and add the said amount to the total income declared.ö

5. The AO also had not allowed the carry forward losses under the head capital gains of Rs.1,22,41,530 and business loss of Rs.2,58,76,063 by holding that the Form of verification of return of income in ITR-V was received beyond the stipulated time of 15 days from the date of electronically filing the return of income. Aggrieved by this order of assessment, appeal was preferred before the CIT(Appeals), who vide the impugned order had confirmed the assessment order.

6. The CIT(Appeals) upheld the denial of depreciation on goodwill vide paras 5 to 5.4 of his order which read as under:-

5. I have carefully considered the facts and submissions of the appellant and the reasons given by the A.O in the assessment order. The brief facts of the issues are that, the appellant company acquired 'Fibres and Fabrics International', a sole proprietorship concern on slump sale basis and as a going concern in the F.Y: 2002-03. As a part of the business acquisition, a number of intangible assets including customer/supplier contracts, export quotas and assembled workforce (employee base) were acquired and the consideration for the same was settled by way of issuance of shares. The said intangible assets were classified as 'goodwill' for the purpose of disclosure in the financial statement. The appellant claimed depreciation u/s 32(1)(ii) of the Act on the said intangible asset classified as goodwill. In fact the said claim was rejected by the A.O for the Assessment Years 2004-05 & 2005-06 and the said orders are pending in appeal.

5.1 As per the provisions of Sec. 32(1)(ii) of the Act, an assessee is entitled for depreciation of

- (i) buildings, machinery, plant or furniture, being tangible assets;
- (ii) know-how, patents, copyrights, trade marks, license, franchises or any other business or commercial rights of similar nature. being intangible assets acquired on or after the 1<sup>st</sup> day of April, 1998,

As per Explanation-3, the expression '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.

5.2 It is the contention of the appellant the intangible assets of customer/supplier contracts, export quotas and assembled workforce (employee base) are business / commercial rights and eligible for depreciation. As the appellant classified the above intangible assets as goodwill in the financial statements, the A.O elaborately discussed the issue relating to depreciation of these assets and disallowed the same.

5.3 The appellant relied on the decision of the Apex court in the case of SMIFS Securities Ltd. (348-ITR-362 (SC) and argued that 'goodwill' is an intangible asset as per the decision and eligible for depreciation. The appellant also relied on the decision of the Mumbai High Court in the case of Birla Global Asset Finance Co. Ltd. (TS-791-HC-2012(BOM) on the ground that 'brand equity' was also eligible for depreciation as an intangible asset. It is already mentioned in the above paras the appellant acquired certain rights / assets which are distinguishable from 'goodwill', therefore, the above decisions are not applicable to the present facts of the case. The appellant had made elaborate discussion about how it had incurred a cost of Rs. 64,25,62,688/- towards the purchase of business of sole proprietorship which included the above said intangible rights. The appellant explained that the intangible assets were acquired as a part of the sale consideration paid by way of issuance of shares to the proprietor. Thus, it was argued that the appellant incurred a cost by paying in terms of allotment of shares and eligible for depreciation. As per the facts of the said decision of the Apex Court, the goodwill was acquired on account of a scheme of amalgamation from a different company and in that context, it was held the goodwill was eligible for depreciation. In the instant case the sole proprietorship was converted into a private limited company. It was further noticed that 99% of the shares of the appellant company were allotted to the erstwhile 'proprietor'. In this back ground it is for consideration as to whether it can be construed that the 'goodwill' in the form of intangible assets was acquired by the company. I am of the considered opinion that the said rights are not goodwill and also cannot be considered as acquired by the company and it is a self generated asset, as 99% of the share holding was controlled by the erstwhile proprietor. When this was pointed out, the appellant made elaborate submissions explaining that 'company' is a separate legal entity and the share holder / erstwhile proprietor has a separate legal status. However, I am not able to accept the assessee's explanation because the ultimate beneficiary is one and the same. Therefore, the submissions of the appellant are not acceptable that the so called 'goodwill' is not eligible for depreciation.

5.4. It may be seen from the submissions of the appellant that the amount paid towards 'goodwill' was actually towards the customer / supplier contracts on export quotas and assembled workforce etc.,. It is the contention of the appellant that these are business and commercial rights under the category of intangible

assets. As per the Explanation 32(1)(ii) of the Act, the commercial or business right should be similar to 'licence' or 'franchise'. However, the appellant failed to give any explanation in this regard in their detailed submissions. The said rights can not be regarded as commercial/business rights mentioned in the above said explanation for the purpose of granting depreciation. There cannot be any exclusive right on the customer or supplier contracts or workforce. The appellant also did not give neither the valuation nor the basis of valuation of these so called rights. In the absence of the basic facts relating to these rights I am unable to accept that the said items are falling under the category of intangible asset u/s 32(1)(ii) of the Act. Therefore, the appellants claim for depreciation on these assets is rejected and the AO's action is upheld.ö

7. The CIT(Appeals) also upheld the denial of carry forward losses vide para 10, which reads as under:-

ö10. I have considered the facts and submissions of appellant and also the reasons given by the A.O. It is undisputed fact that the ITR-V was filed by the appellant beyond the period of 15 days from the date of electronically filing the return of income. Thus, the appellant failed to comply with the terms of the above said notification dated 27.07.2007. The said notification was issued by the Central Board of Direct Taxes, New Delhi in exercise of the powers conferred by sub-section (1B) of sections 139 and 139D the Income-tax Act, 1961 (43 of 1961) read with sub-rule (3) of rule 12 of the Income tax Rules, 1962. In view of this, the said notification is binding on all Income Authorities mentioned in Sec. 116 of the IT Act. In absence of any waiver of the said stipulated condition, delay in filing of ITR-V can not be accepted. Therefore, A.O's action is fully justified. The reliance on circular no. 3/2009 dated 21. 05. 2009 by the appellant is misplaced because the said circular is applicable for the A.Y 2009-10 onwards. In view of this the ground no. 3 and also the addition ground of appeal raised by the appellant are hereby dismissed.ö



8. Thus, aggrieved by the order of CIT(Appeals), the appellant is before us in the present appeals.

9. The Id. counsel for the appellant submitted that goodwill is acquired by the appellant company on acquisition of the sole proprietary concern viz., Fibres & Fabrics International Pvt. Ltd. It was stated before us that this goodwill was present in the hands of the sole proprietary concern at the time of acquisition of the same by the appellant company and in support of this submission, he filed before us the balance sheet of the erstwhile sole proprietary concern wherein goodwill of Rs.35 crores was shown on the asset side of the balance sheet of the said company.

10. The Id. counsel for the appellant submitted that valuation of goodwill has not been disputed by the AO. Though the sole proprietary concern was acquired during the previous year relevant to AY 2003-04, there was no claim made towards depreciation on the goodwill. It was only in A.Y. 2004-05 for the first time that the claim for depreciation on goodwill was made. The same came to be allowed in the original assessment proceedings for both the AYs 2004-05 and 2005-06. However, in the reassessment proceedings initiated under the provisions of section 148, the same was sought to be disallowed. On appeal before the Tribunal, reassessment proceedings were held to be invalid and consequently the claim for depreciation finally came to be allowed.

11. For the AYs 2006-07 & 2007-08, depreciation claim was sought to be withdrawn by exercising the revision proceedings u/s. 263 of the Act and the issue is pending disposal before the CIT(Appeals) now.

12. Thus, it was submitted that even without going into the other aspects of the issue, since the claim for depreciation came to be allowed for the first year of the claim and subsequent years, the AO was left with no option but to allow the same in view of the specific provisions of sub-sec. (6) of section 43 of the Act. In other words, it was the contention of the assessee that once an asset enters into a particular block of assets, it continues to be so till the particular block of asset is extinguished or exhausted. In support of this proposition, he relied on the Mumbai coordinate Bench decision in the case of *Godrej Agrovat Ltd. v. ACIT, ITA No.1629/Mum/2009*. He also relied on the decision of the Hon'ble Supreme Court in the case of *CIT v. Mahindra Mills, 243 ITR 56 (SC)*. He further submitted that w.e.f. 1.4.2002, the AO was duty bound to allow depreciation even without the claim from the appellant as per law.

13. On merits, the Id. counsel for the appellant submitted that the issue whether goodwill is eligible for depreciation is no longer *res integra* in the light of the decision of Hon'ble Supreme Court in the case of *CIT v. Smifs Securities Ltd., 348 ITR 302 (SC)*. He also placed reliance on the decision of the Hon'ble jurisdictional High Court in the case of *CIT v. Manipal Universal Learning Pvt. Ltd. in ITA No.61 of 2007 dated 1.4.2013* and

coordinate Bench decision in the case of *Padmini Products Pvt. Ltd. v. DCIT in ITA Nos.429 to 432/Bang/2013, order dated 10.1.2014.*

14. On the issue of carry forward losses, the Id. counsel for the appellant submitted that it is only a procedural delay in filing the Form ITR-V. He further submitted that delay has occurred on account of transmission. The notification prescribing the time limit for receipt of Form ITR-V cannot override the provisions of the Act. He also submitted that the AO having acted upon the original return of income, he cannot turn back and say now that the original return of income is not valid as Form ITR-V was received belatedly.

15. On the other hand, the Id. Sr. DR submitted that the assessee was not entitled to depreciation on goodwill as there was no actual amount paid for acquisition of the goodwill of the erstwhile proprietary concern which was acquired by the appellant and the sole proprietor of the erstwhile proprietary concern continues to enjoy 99% shareholding in the new company and therefore, there was no transfer of goodwill involved in the present case. He further submitted that goodwill acquired by the appellant is not valued as per the prescribed methods. Thus he prayed that the orders of lower authorities may be upheld in this regard.

16. As regards the other issue, the Id. Sr. DR submitted that non-receipt of Form ITR-V within the stipulated time does not constitute a valid return of

income and therefore the assessee company is not entitled to carry forward of determined losses for future years.

17. We have heard the rival submissions and perused the material on record. We shall first deal with the grounds challenging the disallowance of depreciation on goodwill.

18. From a perusal of the assessment order, it is clear that the AO denied the benefit of depreciation on goodwill on two grounds; (i) goodwill is not of those assets which is specified as intangible asset under the provisions of section 32(1) of the Act, and (ii) goodwill is not an asset whose value goes down with the passage of time, on the other hand, the value of goodwill grows with every year. Thus, the AO had not doubted the existence of goodwill, but the AO only denied the benefit of depreciation holding that it is not eligible for depreciation.

19. On appeal, the CIT(Appeals) after considering the relevant material and the submissions made by the appellant, held that since no commercial rights have been acquired, no depreciation was admissible on the goodwill.

20. In the present case, it is an undisputed fact that the sole proprietary concern was acquired by the appellant as a going concern with all assets & liabilities. In the balance sheet of the sole proprietary concern, goodwill of Rs.35 crores was shown on the assets side of balance sheet. The agreement of take over had clearly mentioned that all assets including the

goodwill was taken over by the company. Even accepting the view of the CIT(Appeals) that there were no commercial rights acquired, now the Hon<sup>ble</sup> Supreme Court in the case of *CIT v. Smifs Securities Ltd.*, 348 ITR 302 (SC) held that purchase consideration paid over and above the net value of the assets constitutes goodwill. Even the Hon<sup>ble</sup> Delhi High Court recently in the case of *Triune Energy Services (P.) Ltd. v. DCIT*, 65 *taxman.com* 288 (Delhi) held that the excess of the amount paid over net value of assets constitutes goodwill. In coming to this conclusion, the Hon<sup>ble</sup> Delhi High Court relied on Accounting Standards AS-10 issued by the ICAI. That apart, when the company was taken over as a going concern with all the assets & liabilities for a slump consideration, it is neither permissible nor possible to apportion the consideration paid against different assets as held by the Hon<sup>ble</sup> Supreme Court in the case of *CIT v. Mugneeram Bangur & Co.*, 57 ITR 299 (SC). Thus, in our considered view, the view of the CIT(Appeals) that there was no goodwill as no commercial rights were acquired, cannot be accepted.

21. The view of the AO that goodwill is not eligible for depreciation as there could be no erosion in the value of goodwill cannot also be accepted in view of the decision of the Hon<sup>ble</sup> Kerala High Court in the case of *B. Raveendran Pillai v. CIT*, 194 *Taxman* 477 (Ker.) wherein it was held as follows:-

õ3. í í í í í í í í í í í í í í í í Depreciation  
though is an allowance to take care of loss or erosion in value of

the asset in the course of time on account of use, such consequence need not actually take place for the purpose of entitling assessee for the relief in terms of the statutory provision. In fact, it is common knowledge that on account of the inflation even tangible assets such as building, machinery, plant or furniture will fetch higher price in later years, though in the assessee's books value got eroded on account of depreciation written off. The Income-tax Act also takes into account the possibility of appreciation or at least retention of value of depreciable assets on which depreciation is allowed. While section 41(2) provides for assessment of profit arising on sale of intangible depreciable assets, section 50 provides for assessment of capital gains on sale of depreciable assets. Therefore, we do not think assessee's entitlement for depreciation on assets including intangible assets can be negative on the ground that no erosion in value takes place on account of use of the asset in business or profession. í í í í í í í í í ..ö

22. This leaves us with the limited question of considering whether goodwill is eligible for depreciation by residual clause in section 32(1)(ii) of the Act.

23. The Hon'ble Kerala High Court in the case of *B. Raveendran Pillai v. CIT*, 194 Taxman 477 (Ker) has held as follows:-

“4. From Schedule B of the sale deed which gives the value of goodwill, we notice that the trademark or the logo and the name of the hospital are specifically covered by it. In fact, without resorting to the residuary entry appellant-assessee is entitled to claim depreciation on the name, trade mark and logo under the specific head provided under section 32(1)(ii) which covers trademark and franchise. It is common knowledge that trademark and franchise covers name, logo etc., the value of which are included in the value of goodwill claimed for the purpose of depreciation by the assessee. Though it may be difficult to define goodwill, its meaning and scope are explained in several Court judgments. In the case of *Khushal Khemgar Shah v. Mrs.*

*Khorshed Banu Dadiba Boatwalla* AIR 1970 SC 1147, the Supreme Court has explained goodwill as follows :

"It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in customers. It is the magnetic quality of a particular trade of business which attracts customers to it as a matter of course. This quality springs from and is developed by various contributing factors that earn a reputation for honest dealing, quality and standard. It is an intangible asset being the whole advantage of the reputation and connections formed with the customers together with the circumstances which make connections durable. It is the component of total value of the undertaking which is attributable to the ability of the concern to earn profits over a course of years because of its reputation, location and other features."

In *B.C. Srinivasa Setty's* case (*supra*), the Supreme Court held that in a progressing business goodwill tends to show progressive increase and in a failing business it may begin to wane.

24. The Honble High Court of Delhi in the case of *Triune Energy Services (P.) Ltd. v. DCIT, 65 taxman.com 288 (Delhi)* held as under:-

13. Goodwill is an intangible asset providing a competitive advantage to an entity. This includes a strong brand, reputation, a cohesive human resource, dealer network, customer base etc. The expression "goodwill" subsumes within it a variety of intangible benefits that are acquired when a person acquires a business of another as a going concern.

14. In *CIT v. B.C. Srinivasa Setty* [\[1981\] 128 ITR 294/5 Taxman 1 \(SC\)](#), the Supreme Court had explained that:

"Goodwill denotes the benefit arising from connection and reputation. The original definition by Lord Eldon in *Cruttwell v. Lye* [1810] 17 Ves 335 that goodwill was nothing more than 'the probability that the old customers would resort to the old places' was expanded by Wood V. C. in *Churton v. Douglas* [1859] John 174 to encompass every positive advantage that has been acquired by the old

firm in carrying on its business, whether connected with the premises in which the business was previously carried on or with the name of the old firm, or with any other matter carrying with it the benefit of the business."

The Court had further explained that:

"A variety of elements goes into its making, and its composition varies in different trades and in different businesses in the same trade, and while one element may preponderate in one business, another may dominate in another business. And yet, because of its intangible nature, it remains insubstantial in form and nebulous in character. Those features prompted Lord Macnaghten to remark in *IRC v. Muller and Co.'s Margarine Limited* [1901] AC 217 (HL) that although goodwill was easy to describe, it was nonetheless difficult to define. In a progressing business goodwill tends to show progressive increase. And in a failing business it may begin to wane. Its value may fluctuate from one moment to another depending on changes in the reputation of the business. It is affected by everything relating to the business, the personality and business rectitude of the owners, the nature and character of the business, its name and reputation, its location, its impact on the contemporary market, the prevailing socio-economic ecology, introduction to old customers and agreed absence of competition. There can be no account in value of the factors producing it. It is also impossible to predicate the moment of its birth. It comes silently into the world, unheralded and unproclaimed and its impact may not be visibly felt for an undefined period. Imperceptible at birth it exists enwrapped in a concept, growing or fluctuating with the numerous imponderables pouring into, and affecting, the business."

25. The issue whether depreciation is allowable on goodwill is no longer *res integra* as the Hon<sup>ble</sup> Supreme Court in the case of *CIT v. Smifs Securities Ltd.* (*supra*) had resolved this issue and held that goodwill is an asset within the meaning of section 32 of the Income-tax Act, 1961 and



depreciation on goodwill is allowable. The Hon<sup>ble</sup> Supreme Court held as follows:-

ö The Assessing Officer held that goodwill was not an asset falling under *Explanation 3* to Section 32(1) of the Income Tax Act, 1961 ['Act', for short].

We quote hereinbelow *Explanation 3* to Section 32(1) of the Act:

*"Explanation 3.- For the purposes of this sub-section, the expressions 'assets' and 'block of assets' shall mean--*

*[a] tangible assets, being buildings, machinery, plant or furniture;*

*[b] intangible assets, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature."*

*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.ö

26. The ratio of the Hon<sup>ble</sup> Supreme Court was followed by the Hon<sup>ble</sup> Delhi High Court in the case of *Triune Energy Services (P.) Ltd.*, Hon<sup>ble</sup> Gujarat High Court in the case of *Principal CIT v. Swastik Industries*, 68 *taxman.com* 329 (Gujarat), Hon<sup>ble</sup> Bombay High Court in the case of *CIT*

*v. Birla Global Asset Finance Co. Ltd., 41 taxmann.com 262 (Bombay)* and the Hon<sup>ble</sup> Karnataka High Court in the case of *CIT v. M/s. Manipal Universal Learning Pvt. Ltd., ITA No.61 of 2007 dated 1.4.2013*. Respectfully following the decision of the Hon<sup>ble</sup> Supreme Court and the decisions of several High Courts, we hold that assessee is entitled for depreciation on goodwill. We hold accordingly and direct the AO to allow the same. Hence, the ground of appeal is allowed.

27. The second issue relates to the denial of carry forward losses on the ground of belated receipt of Form ITR-V. It is not in dispute that the appellant had submitted Form ITR-V, but it was submitted with a delay of only 5 days. The appellant received the electronically generated mail from the department acknowledging e-filing of return of income. Subsequently, in accordance with the instructions of the Department, the appellant posted a copy of Form ITR-V duly signed. The Form was remitted by post. Based on this return, the AO has acted upon. The AO while rejecting the carry forward losses has relied upon the Notification issued by the Ministry of Finance wherein it is stated that date of transmission of data electronically shall be the date of furnishing of return, if the Form ITR-V is furnished in the prescribed manner and within the period specified. Further ITR-V was required to be furnished within a period of 15 days from the date of filing the return of income electronically. It is worth noting that AO has not rejected the claim on account belated receipt of Form ITR-V. It is undisputed fact that there was no communication of any kind either from

the Central Processing Unit or the AO intimating the appellant that ITR-V was not received within time. In fact, the AO acted upon the return of income filed by the appellant. It implies that the AO had condoned the delay in receipt of Form ITR-V, as the Notification dated 4.1.2012 empowers the Commissioner to condone the delay in receipt of Form ITR-V. In fact, we are told at the Bar that the CBDT had issued general Notifications extending the date of receipt of ITR-V. Furthermore, the provisions of sub-section (9) of section 139 provides that where the AO considers that return of income furnished by the assessee is defective, he may intimate the defect to the assessee and afford an opportunity to rectify such defect within a period of 15 days or within such further period as may be extended by the AO. Failure to comply with the defect notice renders the return of income invalid. Proviso to sub-section (9) of section 139 stipulates that where the assessee rectifies the defect after the expiry of such period of 15 days or the extended period, but before the assessment is made, the AO may condone the delay and treat the return as a valid return.

28. In the present case, the AO has not intimated any defect in the return of income filed to the appellant and therefore the action of the AO in treating the original return of income as invalid does not stand the test of the law. Even otherwise, it is not the case of the AO that the appellant had not posted Form ITR-V within the prescribed time limit. The Hon'ble Bombay High Court in the case of *Crawford Bayley & Co. v. UOI*, 343 ITR

232, held that the action of the AO declaring return of income invalid for non-receipt of ITR-V was invalid. Respectfully following this decision, we hold that the AO is not justified in treating the original return of income as invalid for belated receipt of Form ITR-V. We therefore direct the AO to grant the benefit of the determined business losses for future years. Accordingly, this ground of appeal is also allowed.

29. In the result, both the appeals are allowed.

Pronounced in the open court on this 13<sup>th</sup> day of July, 2016.

Sd/-  
(VIJAY PAL RAO )  
Judicial Member

Sd/-  
( INTURI RAMA RAO )  
Accountant Member

Bangalore,  
Dated, the 13<sup>th</sup> July, 2016.

/D S/EKS/

Copy to:

1. Appellant
2. Respondents
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,  
ITAT, Bangalore.