आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ,G ,मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "G", MUMBAI

श्री अमित शुक्ला, न्यायिक सदस्य **एवं**

श्री अश्वनी तनेजा, लेखा सदस्य**,** के समक्ष

Before Shri Amit Shukla, Judicial Member, and
Shri Ashwani Taneja, Accountant Member

ITA No.528/Mum/2012
Assessment Year: 2007-08

Grindwell Norton Ltd., Kalyaniwall & Mistry, Army & Navy Building, 3rd Floor, 148 M.G. Road, Fort, Mumbai-400001	**बनाम**/ Vs.	Addl. CIT 1(1) Aayakar Bhavan, 5th Floor, Mumbai-400020
(Assessee)		(Revenue)
P.A. No.AAACG8725B		

ITA No.5800/Mum/2013
Assessment Year: 2008-09

Grindwell Norton Ltd., Kalyaniwall & Mistry, Army & Navy Building, 3rd Floor, 148 M.G. Road, Fort, Mumbai-400001	**बनाम**/ Vs.	Addl. CIT 1(1) Aayakar Bhavan, 5th Floor, Mumbai-400020
(Assessee)		(Revenue)
P.A. No.AAACG8725B		

ITA No.603/Mum/2012
Assessment Year: 2008-09

Addl. CIT 1(1) Aayakar Bhavan, 5th Floor, Mumbai-400020	**बनाम**/ Vs.	Grindwell Norton Ltd., Kalyaniwall & Mistry, Army & Navy Building, 3rd Floor, 148 M.G. Road, Fort, Mumbai-400001
(Revenue)		(Revenue)
P.A. No.AAACG8725B		

Appellant by	Shri P.J. Pardiwalla & Shri Jitendra Jain (AR)
Respondent by	Shri A. Ramachandran (DR)

सुनवाई की तारीख/**Date of Hearing:**	**01/06/2016**
आदेश की तारीख /**Date of Order:**	**27 /07/2016**

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

These appeals pertain to the same assessee for different assessment years involving identical issues, therefore these were heard together and being disposed of by this common order.

2. We shall first take up appeal filed by the assessee in ITA No. 528/Mum/2012 against the order of Ld. Commissioner of Income Tax (Appeals), Mumbai-15 {(in short 'CIT(A)'}, dated 09.11.2011 passed against assessment order u/s 143(3) r.w. section 144C(3)(a) of the I.T. Act, dated 11.01.2011 for the Assessment Year 2007-08 on the following grounds:

> *"This Appeal is against the Order of the Commissioner of Income-tax (Appeals)-15, Mumbai and relates to the Assessment Year 2007-2008.*
> *1. The learned Commissioner of Income-tax (Appeals) erred in holding that the surplus of Rs.1,63,03,435/- arising on prepayment of deferred sales tax was a*

revenue receipt liable to tax u/s.28(iv) of the Income-tax Act.

2. The learned Commissioner of Income-tax (Appeals) erred in holding that the appellant obtained a "benefit" in respect of the said pre-payment.

3. The learned Commissioner of Income-tax (Appeals) erred in applying section 28(iv) to tax the said amount.

4. Having regard to the facts and circumstances of the case, the Appellant submits that the addition of Rs.1,63,03,435/- be deleted.

5. Both the lower authorities erred in holding that the Appellant was not entitled to depreciation under section 32 in respect of the following intangible assets:

Assets	*Value (Rs.)*
Trade Mark	*2,00,00,000*
Technical Know-How	*3,50,00,000*
Goodwill	*3,20,00,000*
Marketing Network	*3,75,00,000*
Non-Compete fees	*4,02,50,000*
Total	*16,47,50,000*

6. The learned Commissioner of Income-tax (Appeals) erred in giving several findings which are either irrelevant or incorrect for allowing depreciation under section 32.

7. The learned Commissioner of Income-tax (Appeals) erred in holding that depreciation is allowable only on those intangible assets which are protected rights.

8. The learned Commissioner of Income-tax (Appeals) erred in holding that depreciation is available under section 32 only in respect of a "registered trade mark' or "patented know how".

9. Having regard to the facts and circumstances of the case, the Appellant submits that the Assessing Officer be directed to allow depreciation under section 32 amounting to Rs.2,37,22,787/- on the intangible assets referred to above.

10. The learned Commissioner of Income-tax (Appeals) erred in confirming the allocation of interest to the earning of dividend income under section 14A

amounting to Rs.4,90,799/-.

11. The learned Commissioner of Income-tax (appeals) erred in confirming the allocation of expenditure to the tune of Rs.29,68,291/- to the earning of dividend income under section 14A.

12. Having regard to the relevant facts and circumstances of the case and the past record of the appellant, it is submitted that the disallowance under section 14A read with Rule 8D is grossly excessive and requires to be reduced substantially.

3. During the course of hearing, arguments were made by Shri P.J. Pardiwalla & Shri Jitendra Jain, (AR) on behalf of the Assessee and by Shri A. Ramachandran, Departmental Representative (Ld. DR) on behalf of the Revenue.

4. Ground Nos. 1 to 4: These grounds deal with the identical issue of determining the nature and taxability of surplus of Rs.1,63,03,435/- arising to the assessee in the year under consideration on account of pre-payment of deferred sales tax. The AO held this surplus to be taxable as a revenue receipt liable to be taxed u/s 41(1) of the Act, whereas Ld. CIT(A) has treated the same as 'benefit' liable to be taxed u/s 28(iv) of the Act. But, according to the assessee the said amount is neither liable to be taxed u/s 41(1) nor it is in the nature of 'benefit' liable to be taxed u/s 28(iv), but merely a capital receipt not in the nature of income to be taxed.

4.1. The brief facts and background of the case are that during the year under concern, the assessee was engaged in the business of manufacturing of abrasives & refractory products and also dealt in ceramics and plastics. During the course of assessment proceedings, it was noted by the AO that

during the year the assessee company had made some gain on repayment of deferred sales tax amounting to Rs.1,63,03,435/-. The assessee had claimed the same as capital receipt, and thus not liable to be taxed. The AO gave show cause notice to the assessee to treat the same as revenue receipt liable to be taxed u/s 41(1) of the Act. The AO also proposed to treat the same as revenue receipt taxable in the hands of assessee u/s 28(iv) of the Act. The assessee made detailed submissions before the AO to explain that surplus accruing on account of pre-payment of deferred sales tax was capital receipt not liable to tax. It was submitted that deferred sales tax was treated as unsecured loan in its books by the assessee and loan was not a trading liability. Thus, making full payment of loan at lesser account did not give rise to revenue receipts and therefore, it could not have been brought to tax u/s 41(1). No benefits had accrued to the assessee and therefore, it could not be brought to tax u/s 28(iv) of the Act also. But, the AO was not satisfied with the submissions of the assessee and therefore, he brought to tax the impugned amount as business income of the assessee u/s 41(1).

4.2. Being aggrieved, the assessee contested the matter before Ld. CIT(A) and made detailed submissions before him. It was submitted that the AO had relied upon the order of earlier year i.e. A.Y. 2005-06 to decide this issue against the assessee, and in A.Y. 2005-06 the Tribunal has decided this issue in favour of the assessee by holding that this amount was not liable to be taxed u/s 41(1). Ld. CIT(A) in the appeal order relying upon the order of the Tribunal in assessee's own case of earlier year

held that this amount was not liable to be taxed u/s 41(1) and thus, allowed the relief to the assessee on this ground. But, he raised another issue of taxability of this amount as a 'benefit' having been accrued to the assessee, which is liable to be taxed u/s 28(iv) of the Act. The assessee made detailed submissions on this issue also, but Ld. CIT(A) was not satisfied and treated it as 'benefit' accrued to the assessee and taxed the same u/s 28(iv) of the Act.

4.3. Being aggrieved, the assessee filed an appeal before the Tribunal contesting the order of Ld. CIT(A). During the course of hearing before us, Ld. AR first of all relied upon the decision of the Tribunal for A.Y. 2005-06 (ITA No.1603/Mum/2010) and A.Y. 2006-07 (ITA No.3447/Mum/2010) as well as order of Hon'ble Bombay High Court in assessee's own case for these two assessment years i.e. 2005-06 and 2006-07 and submitted that this issue has become now settled as Hon'ble High Court has confirmed the order of the Tribunal wherein it was held that this amount was not taxable u/s 41(1) of the Act. It was submitted that in the impugned year revenue has not contested before the Tribunal, the decision of Ld. CIT(A) on this issue and thus it has attained finality. With regard to the alternative issue raised by the Ld. CIT(A) i.e. taxability of this amount u/s 28(iv) of the Act by treating the same as benefit accruing to the assessee, it was submitted by the Ld. Counsel that this amount cannot be treated as 'benefit' as there has to be some inflow of money to be put in the category of 'benefit'. It was also submitted that remission of a liability may be taxed u/s 41(1) of the Act, whereas section 28(iv), which seeks to tax

a non-monetary inflow, operates into different field. It cannot be said that if an item is not covered u/s 41(1) then, it would automatically fall u/s 28. He placed reliance upon the Borad's circular w.r.t. section 28 issued in 1964. It was further submitted by him that it has been held by the High Court also that this amount was not even a 'benefit' of the nature as envisaged u/s 28(iv) and thus, the order of the Hon'ble High Court squarely covers this issue.

4.4. Per contra, Ld. DR relied upon the orders of the lower authorities and submitted that amount not paid is a 'benefit'. Reliance was placed by the Ld. DR on the judgment of Amritsar Bench of the Tribunal in the case of Gurdaspur Co-op. Sugar Mills vs. Deputy Commissioner of Income Tax for the proposition that amount of loan constituted 'benefit' within the meaning of section 28(iv) and was thus taxable therein.

4.5. We have gone through the orders of the lower authorities, submissions made and judgments relied upon before us by both the parties. It is noted that the issue of taxability of surplus arising to the assessee on repayment on deferred sales tax liability has also arisen in earlier A.Y. i.e. A.Y. 2005-06 and 2006-07 wherein this issue has been decided in favour of the assessee by the Tribunal as well as by Hon'ble Bombay High Court. It has been contended by the Ld. DR before us that in earlier year, the taxability has been examined u/s 41(1) only and not with respect to the provisions of section 28(iv), under which the impugned amount will be taxable as benefit accrued to the assessee. Before we deal with the arguments of Ld. DR, we find it appropriate to discuss about precise nature of

impugned transaction. The assessee explained the nature of transactions before the AO and the reply of the assessee has been reproduced by the AO in the assessment. We find it appropriate to reproduce the relevant part of the same for the sake of better clarity of facts:

> *"In the preceding financial years, the Company has availed of benefits of deferral of sales tax offered by the Govt. of Maharashtra as an incentive for rapid industrialisation of the developing region of the State of Maharashtra. The Sales tax Incentive Scheme was availed by the Company in respect of its plant at Butibori Industrial area at Nagpur (Butibori Plant). Copy of the agreement between the Company and the Govt. of Maharashtra is enclosed herewith. In accordance with the Sales tax Incentive Scheme, the sales tax collected in respect of Butibori Plant was credited separately to Sales tax account. Set off if any available on the purchases was debited to this account with corresponding credit to purchases. The net sales tax differential was then transferred to deferred sales tax liability account grouped under "Unsecured Loan" in the Balance Sheet of the Company.*
>
> *The sales tax, payment of which was deferred under the incentive scheme was deemed to have been paid for the purpose of the Bombay Sales Tax Act, 1959 and the Income- tax Act, 1961, in the year in which the amount was so deferred. Section 43B of the Income-tax provides for deduction in respect of any tax only on payment basis. However, in respect of such deferral schemes the CBDT has vide Circular No. 496 dated 28.9.1987 and Circular No. 674 dated 29.12.1993 notified that although the sales tax collected in accordance with a deferral scheme is not paid into the Government Treasury, the same is deemed to have been paid and no disallowance under section 43B is called for.*
>
> *On 12th December, 2002, the Govt. of Maharashtra announced a scheme of "Premature repayment of the amount of deferred tax by the eligible units at net present value (NPV) ". We enclose a copy of the trade*

circular dtd. 12th December 2002 for your reference. Under the said prepayment scheme, industries in the State of Maharashtra who had availed of the deferred sales tax incentive scheme as per Maharashtra 1993 package scheme of incentive were permitted to pre maturely pay the deferred sales tax liability by arriving at a net present value by applying a specific discount rate. The Company availed the benefit of the scheme announced on 12th December, 2002 and has during the year under consideration made a premature payment of its deferred sales tax liability as under:

	Rs.
Sales tax liability	*2,26,45,595*
Less: Premature pre-payment	*63,42,160*
Surplus on the above	*1,63,031435*

The company has treated the surplus accruing on premature repayment of deferred sales tax as a capital receipt not liable to income tax.

4.6. As discussed earlier also, the AO held this amount of surplus as remission of liability and brought to tax the same u/s 41(1). Ld. CIT(A) did not agree with the AO on this aspect and in view of decisions of the Tribunal and judgment of Hon'ble Bombay High Court of preceding year, and it was held by him that this is not equivalent to remissions of liability as envisaged u/s 41(1) and therefore, same is not taxable u/s 41(1). The decision of Ld. CIT(A) was not contested by the Revenue on this issue and therefore it has attained finality. But the alternative issue raised by the Ld. CIT(A) was that this amount is equivalent to a benefit as has been envisaged u/s 28(iv) and therefore, it would be liable to tax u/s 28(iv). But, Ld. Counsel of the assessee vehemently assailed the reasoning given by Ld. CIT(A), *inter alia,* on the ground that Hon'ble

Bombay High Court in assessee's own case in earlier years had examined this aspect also and held that in fact no benefit accrued to the assessee. Under these circumstances, before we discuss this issue further, we find it appropriate to discuss and reproduce the relevant portion of order of Hon'ble Bombay High Court in assessee's own case published in the name of CIT vs. Sulzer India Ltd, Grindwell Norton Ltd. and others 369 ITR 717 (Bom) as under:

> *"It is not possible to agree with Mr. Gupta. Because, premature payment of Sales Tax already collected but its remittance to the Government, as Mr. Gupta envisages, is not covered by this provision else the subsections and particularly section 43B(1) would have been worded accordingly. Therefore section 43B has no application. Insofar as applicability of section 41(1)(a), there also the applicability is to be considered in the light of the liability. It is a loss, expenditure or trading liability. In this case, the scheme under which the Sales Tax liability was deferred enables the Assessee to remit the Sales Tax collected from the customers or consumers to the Government not immediately but as agreed after 7 to 12 years. If the amount is not to be immediately paid to the Government upon collection but can be remitted later on in terms of the Scheme, then, we are of the opinion that the exercise undertaken by the Government of Maharashtra in terms of the amendment made to the Bombay Sales Tax Act and noted above, may relieve the Assessee of his obligation, but that is not by way of obtaining remission.* ***The worth***

of the amount which has to be remitted after 7 to 12 years has been determined prematurely. That has been done by finding out its NPV. If that is the value of the money that the State Government would be entitled to receive after the end of 7 to 12 years, then, we do not see how ingredients of sub section (1) of section 41 can be said to be fulfilled. The obligation to remit to the Government the Sales Tax amount already recovered and collected from the customers is in no way wiped out or diluted. The obligation remains. All that has happened is an option is given to the Assessee to approach the SICOM and request it to consider the application of the Assessee of premature payment and discharge of the liability by finding out its NPV. If that was a permissible exercise and in terms of the settled law, then, we do not see how the Assessee can be said to have been benefited and as claimed by the Revenue.

The argument of Mr. Gupta is not that the Assessee having paid Rs.3.37 crores has obtained for himself anything in terms of section 41(1), but the Assessee is deemed to have received the sum of Rs.4.14 crores, which is the difference between the original amount to be remitted with the payment made. Mr. Gupta terms this as deemed payment and by the State to the Assessee. We are unable to agree with him. The Tribunal has found that the first requirement of section 41(1) is that the allowance or deduction is made in respect of the loss, expenditure or a trading liability

incurred by the Assessee and ***the other requirement is the Assessee has subsequently obtained any amount in respect of such loss and expenditure or obtained a benefit in respect of such trading liability by way of a remission or cessation thereof.*** *As rightly noted by the Tribunal, the Sales Tax collected by the Assessee during the relevant year amounting to Rs.7,52,01,378/was treated by the State Government as loan liability payable after 12 years in 6 annual/equal instalments. Subsequently and pursuant to the amendment made to the 4th proviso to section 38 of the Bombay Sales Tax Act, 1959, the Assessee accepted the offer of SICOM, the implementing agency of the State Government, paid an amount of Rs.3,37,13,393/to SICOM, which, according to the Assessee, represented the NPV of the future sum as determined and prescribed by the SICOM. In other words, what the Assessee was required to pay after 12 years in 6 equal instalments was paid by the Assessee prematurely in terms of the NPV of the same. That the State may have received a higher sum after the period of 12 years and in instalments. However, the statutory arrangement and vide section 38, 4th proviso does not amount to remission or cessation of the Assessee's liability assuming the same to be a trading one. Rather that obtains a payment to the State prematurely and in terms of the correct value of the debt due to it. There is no evidence to show that there has been any remission or cessation of the liability by the State*

Government. ***We agree with the Tribunal that none of the requirement of section 41(1)(a) has not been fulfilled in the facts of the present case.****" (emphasis in bold letters)*

4.7. The perusal of the order of the Hon'ble High Court reveals that in the earlier two years i.e. A.Ys. 2005-06 and 2006-07, it has been held by the Tribunal as affirmed by the Hon'ble Bombay High Court that impugned amount will not be taxable u/s 41(1). While holding so, Hon'ble Bombay High Court has also observed that, in effect, no benefit had accrued to the assessee, since ultimate effect of the transaction is that the assessee paid present value of a future liability. In case the assessee would not have paid this liability, the assessee could have utilized this amount during these years for the purpose of business or for earning of interest income. Instead of doing it like that, the assessee chose to pay it upfront at a discounted value. Under these circumstances, it would be very difficult to say if at all assessee has derived any benefit in financial terms and if yes, then to what extent. Hon'ble High Court has held that in fact no benefit has been derived in any manner. In the case of **Sulzer India Ltd. v. JCIT (42 SOT 457) (SB)**, Hon'ble Special Bench had held that surplus arising on repayment of sales tax liability is on account of difference between payment of net present value against the future liability and it can neither be termed as remissions/session of liability nor it gives rise to any benefit to the assessee. According to Hon'ble Special Bench, it is a simple case of collecting amount at net present value of future

liability, which cannot be regarded as giving rise to any kind of benefit to the assessee. The Hon'ble special Bench has discussed law on this issue in detail and this decision was subsequently affirmed by Hon'ble High Court by passing detailed order which has been briefly discussed in our order above. It is further noted by us that Hon'ble High Court has also relied upon and discussed its earlier order in the case of Mahindra and Mahindra Limited 261 ITR 501, wherein it was held that waiver of the principal amount of loan did not give rise to 'benefit' as envisaged u/s 28(iv) and therefore it was not taxable u/s 28(iv). It is further brought to our notice by Ld. Counsel of the assessee that the 'benefit' as envisaged u/s 28(iv) is something which actually flows to the assessee in monetary terms. In support of his view, he relied upon circular of the Board No. 20D, dated 07.07.1964, relevant part of the circular is reproduced hereunder for the sake of ready reference:

> *"Assessment of the value of any benefit or perquisite arising from business or exercise of a profession, as income from business or profession.*
> *A new clause (iv) has been inserted in section 28, with effect from 1-4-1964, by section 7 of the Finance Act, 1964, under which the value of any benefit or perquisite (whether convertible in money or not) arising from business or the exercise of a profession will be chargeable to tax under the head "Profits and gains of business or profession". A corresponding amendment has been made to section 2(24), including the value of such benefit or perquisite in the definition of the term "income" vide new sub-clause (va) inserted in section 2(24) by section 4(c)(i) of the Finance Act, 1964.*

The effect of the above-mentioned amendment is that in respect of an assessment for the assessment year 1964-65 and subsequent years, the value of any benefit or amenity, in cash or kind, arising to an assessee from his business or the exercise of his profession, e.g., the value of rent-free residential accommodation secured by an assessee from a company in consideration of the professional services as a lawyer rendered by him to that company, will be assessable in the hands of the assessee as his income under the head "Profits and gains of business or profession".

4.8. We have discussed in earlier part of our order also that by making payment of net present value of a future liability it cannot be said if any financial benefit, in real terms, has accrued to the assessee. It is noted that none of the authorities had gone into this aspect and did not quantify, in financial or monetary terms, if any amount could be worked out which could be said to be a 'benefit' that had accrued to the assessee. Under these circumstances, we are of this considered opinion that the impugned amount cannot be brought into tax either u/s 41(1) or u/s 28(iv). Hon'ble High Court while giving its decision had analysed all the aspect of this issue and therefore, this issue is not open for reconsideration before us. Thus, respectfully following the order of Hon'ble High Court, we find that no different decision can be taken; therefore, this issue is decided in favour of the assessee. Thus, ground nos. 1 to 4 are allowed.

5. Ground Nos.5 to 9:- In these grounds the assessee has challenged the action of lower authorities in denying the benefit of depreciation u/s 32 in respect of following intangible assets:-

Assets	*Value (Rs.)*
Trade Mark	*2,00,00,000*
Technical Know how	*3,50,00,000*
Goodwill	*3,20,00,000*
Marketing Network	*3,75,00,000*
Non-Compete fees	*4,02,50,000*
Total	*16,47,50,000*

5.1. The brief background of the issue involved is that during the year under concern, the assessee had taken over Grinding Wheel Business of M/s Orient Abrasive Ltd. ('OAL') as a going concern on a slump sale basis under Business Transfer Agreement dated 18.04.2006 for a consideration of Rs.26.17 crores. Out of the assets acquired from OAL, assets worth Rs.16.86 crores were intangible assets and accordingly the assessee claimed depreciation amounting to Rs.2.37 crores on the same. But, AO asked the assessee to establish the genuineness of the intangible assets in terms of their existence as well as correct value at which these have been taken over by the assessee. The AO simultaneously made direct enquiry from the said company i.e. OAL. After analysing entire facts and submissions of the assessee, the AO was of the view that profitability of the said business was very low, its market share was not much, the assessee did not acquire full rights with respect to Trademark License and also found various defects in valuation report submitted by the assessee with respect to valuation of its business and its assets. Finally, AO arrived at a conclusion that in absence of any cogent evidences establishing correct value of the intangible assets claimed to be acquired under the Business Transfer

Agreement or otherwise, the value of intangible assets was adopted by the assessee arbitrarily and it was based upon conjectures and surmises and therefore depreciation was not admissible on the tangible assets claimed to have been acquired by the assessee on the aforesaid takeover of business of OAL and accordingly the same was disallowed.

5.2. Being aggrieved, the assessee filed an appeal before the Ld. CIT(A) wherein exhaustive submissions were filed demonstrating that acquisition of 'Grinding Wheel Business' of OAL was purely a business decision which was taken by the assessee keeping in view business interest and commercial expediency. The transaction of takeover was supported with a Business Transfer Agreement dt. 18.04.2006 and also supported with a valuation report and certificate of a Chartered Accountant, earmarking separate valuation for each and every asset taken over as per the said Business Transfer Agreement. Nothing wrong has been found therein by the AO except making of suspicion without any concrete basis. Enquiry made by the AO directly with the said company resulted into a positive reply and confirmation of the transaction by the said party and therefore, same should not have been simply ignored by the AO.

5.3. The perusal of the order of the Ld. CIT(A) also shows that the assessee had filed exhaustive evidences in support of its claim, but Ld. CIT(A) was not satisfied with the submissions of the assessee and therefore, he confirmed the order of the AO doubting the very existence of Trademarks, Know-How,

Licence and other rights acquired by the assessee as part of aforesaid deal and also doubted about the valuation of the same as was recorded by the assessee in its books. It was also held by the Ld. CIT(A) that the assessee did not acquire any Goodwill as it did not get any legal rights which were enforceable under the law and therefore it could not be considered to be eligible for depreciation.

5.4. Being aggrieved, the assessee filed an appeal before the Tribunal.

5.5.During the course of hearing before us, it has been argued by the Ld. Counsel that now this controversy has become narrowed down because of judgment of Hon'ble Supreme Court in the case of CIT vs Smiff Securities Ltd. 348 ITR 302 (SC) wherein Hon'ble Apex Court has held that assessee is entitled to claim of depreciation on the amount of Goodwill. It was held that amount of difference between book value of assets acquired and amount paid by an assessee represents amount of Goodwill acquired by the assessee as part of take-over deal, upon which assessee would be entitled to claim depreciation. It was brought to our notice that in subsequent year i.e. in A.Y. 2008-09, Ld. CIT(A) has himself granted 'benefit' of depreciation on the amount of Goodwill which has not been challenged by the revenue before the Tribunal. Thus, revenue has accepted the decision of Ld. CIT(A) in A.Y. 2008-09 with regard to admissibility of claim of depreciation on the amount of Goodwill acquired by the assessee under the same transaction of takeover of Grinding Wheel Business of M/s

Orient Abrasives Ltd (OAL). It was thus, submitted that in this year also, the depreciation has to be allowed as per law and especially in view the judgment of Hon'ble Apex Court and facts of this case. In addition to that, Ld. Counsel also took us through various pages of the paper book to show the business transfer agreement as well as other supporting evidences established the existence of intangible assets and their appropriate value. It was further submitted that the decision of taking over of Grinding Wheel Business of OAL was taken by the assessee in the interest of its business and keeping in view commercial expediency and revenue cannot sit in the arms chair of a businessman to dictate as to how the business is to be conducted. The assessee was very much aware about the assets to be acquired under the deal and the price paid for the same. Since nothing non-genuine has been found by the AO, therefore he was not in a position to re-write the Business Agreement entered into by the assessee with OAL. Under these circumstances, there were no bases to reject the claim of depreciation on the assets acquired by virtue of this agreement.

5.6. Per contra Ld. DR relied upon the orders of the lower authorities.

5.7. We have gone through the orders of the lower authorities and judgments relied upon before us. The solitary issue involved here is about the allowability of the depreciation on the amount of intangible assets acquired by the assessee as part of deal of acquisition of Grinding Wheel Business of OAL

in terms of the Business Transfer Agreement dated 18.04.2006 entered by the assessee with the said company. It is noted by us that from the perusal of the business agreement enclosed at paper book no. 27 to 87 that assessee acquired Grinding Wheel Business of OAL along with its tangible and intangible assets including Goodwill, intellectual property rights e.g. patents, copyrights, past and present R & D works, brands, trademark, service marks, registered design etc. and all other rights available to prevent the misuse or disclosure of trade secrets. The assessee also submitted valuation report from M/s. Anmol Sekhri and Associates, the Registered Valuers (enclosed at page no. 10 to 192 of the paper book) for ascertaining valuation of the business giving values of each and every fixed assets and other intangible assets acquired by the assessee under the aforesaid deal. It is noted by us that the lower authorities have granted the benefit of depreciation on the amount of fixed assets acquired i.e. plant and machinery etc. Thus, genuineness of transaction has not been doubted, but what has been doubted merely is the 'valuation' of intangible assets acquired under the deal. It is to be noted here that factum of acquisition of intangible assets has also not been disputed. Thus, under these circumstances, case made out by the lower authorities is that the amount paid by the assessee for its business is more than the appropriate value of its intangible assets. The assessee has also admitted this position that the assessee has paid an amount which is more than the amount of its tangible assets because of numerous intangible assets acquired by the assessee which

were quite valuable in the opinion of the assessee. Under these circumstances, we can say that since the assessee had purchased the Grinding Wheel Business from OAL as a going concern, therefore, amount of consideration paid in excess of value of tangible assets would be accounted for in its books of accounts as 'Goodwill'. Under these circumstances, no further exercise would be required to make precise valuation of the amount of 'Goodwill'. There are no doubts about the legal position that as per law, the assessee is eligible to claim depreciation on the amount of Goodwill. It is worth noting that this legal position has been accepted by Ld. CIT(A) in the subsequent year i.e. A.Y. 2008-09 wherein claim of depreciation on Goodwill was accepted and order of CIT(A) has been accepted by the revenue also as no appeal has been filed against the said decision. Our view finds support from the judgment of Hon'ble Delhi High Court in the case of TRIUNE ENERGY SERVICES PRIVATE LIMITED v. DCIT 65 taxmann.com 288(Delhi) wherein identical issue was involved, in similar facts and circumstances. Hon'ble Delhi High Court relied upon the judgment of Apex Court in the case of CIT vs. Smifs Securities Ltd. (348 ITR 302) and held as under:

> *"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.*
>
> *From an accounting perspective, it is well established that 'goodwill' is an intangible asset, which is required to*

be accounted for when a purchaser acquires a business as a going concern by paying more than the fair market value of the net tangible asset, that is, assets less liabilities. The difference in the purchase consideration and the net value of assets and liabilities is attributable to the commercial benefit that is acquired by the purchaser. Such goodwill is also commonly understood as the value of the whole undertaking less the sum total of its parts. The 'Financial Reporting Standard 10' issued by Accounting Standard Board which is applicable in United Kingdom and by the Institute of Chartered Accountants of Ireland in respect of its application in the Republic of Ireland, explains that the accounting requirements for goodwill reflect the view that goodwill arising on an acquisition is neither an asset like other assets nor an immediate loss in value. Rather, it forms the bridge between the cost of an investment shown as an asset in the acquirer's own financial statements and the values attributed to the acquired assets and liabilities in the consolidated financial statements.

In view of Accounting Standard 10 as issued by the [CAI the assessee's contention was right that the consideration paid by the assessee in excess of value of tangible assets was rightly classified as goodwill.

In the facts of the present case, the Tribunal has rejected the view that the slump sale agreement was a colourable device. Once having held so, the agreement between the parties must be accepted in its totality. The agreement itself does not provide for splitting up of the intangibles into separate components. Indisputably, the transaction in question is a slump sale which does not contemplate separate values to be ascribed to various assets (tangible and intangible) that constitute the business undertaking, which is sold and purchased. The agreement itself indicates that slump sale included sale of goodwill and the balance sheet specifically recorded goodwill at Rs. 40.58 crore. Goodwill includes a host of intangible assets, which a person acquires, on acquiring a business as a going concern and valuing the same at the excess consideration paid over and above the value of net tangible assets is an acceptable accountinpractice.

Thus, a further exercise to value the goodwill is not warranted."

5.8. In the case before us also the facts are identical. The Grinding Wheel Business has been acquired under a slump sale, under a Business Transfer Agreement with OAL. The said agreement has not been held to be bogus or sham. It can neither be rewritten or nor has been written by the lower authorities. The AO had made direct inquiries with OAL wherein it was confirmed that the assessee had paid sales consideration as per the terms of the agreement and the tangible assets were acquired as stated in the said agreement and accepted by the AO and depreciation was allowed on the same as per facts brought before us. Under these circumstances, any amount of consideration paid over and above the value of tangible assets would be classified as amount of Goodwill on which the assessee would be entitled for depreciation in view of judgment of Hon'ble Supreme Court in the case of CIT vs Smifs Securities Ltd,(supra). Similar view has been taken by Hon'ble Pune Bench in the case of Cosmos Co-op Bank Ltd. v. DCIT (64 SOT 90) and coordinate Bench of Mumbai in the case of DCIT vs. Worldwide Media Pvt Ltd 153 ITD 162. It is further noted by us that Delhi Bench of ITAT in the case of Thyssenkrup Elevator (India) Pvt. Ltd. v. ACIT 167 TTJ 131 also held that where the assessee had acquired business of another company on slump sale basis, excess consideration paid by it over and above the value of net asset acquired, was to be considered as Goodwill u/s 32(1)(ii) which was eligible for depreciation.

5.9. In addition to the above, on facts also, it is noted by us that the assessee brought on record ample evidences in support of its claim to justify the acquisition of various other intangible assets and the justification of their valuation as well as admissibility of depreciation on these assets. It is noted that the Business Transfer Agreement was quite exhaustive having elaborate schedules and annexures containing item wise description of each and every tangible and intangible assets acquired by the assessee. The assessee acquired entire plant and machinery, various trademarks, commercial list of customers and dealers, entire data and information in relation to sales and distribution network, of technical know-how, Goodwill of Grinding Wheel Business, rights of non-competition etc were described in the said agreement. It is further noted that proper break-up and justification for the consideration has been narrated in the said agreement. The said agreement also contains lists of employees of OAL to be taken-over by the assessee company. It also containing the list of trademarks, particulars of goodwill of business of the OAL in the form of business data, customer details, specifications and quality requirement for the products, trade secrets and other confidential information, software process and similar other intangible assets. There was a proper valuation report specifying separate value of each and every asset of tangible or intangible nature. It is also noted that the AO made direct inquiries with OAL in response to which proper reply was given by the OAL confirming the transactions. The OAL submitted letter dated 21.02.2009 to the AO wherein it was

inter alia confirmed that the said company transferred its abrasive division situated at Bhiwadi (Rajasthan) to the assessee company for a total consideration of Rs.26.17 crores. It is also brought to our notice that subsequent to the take-over, the assessee company filed petitions with the concerned departments for registration of trademarks in the name of Assessee Company. It is further noted by us from the perusal of the order of Ld. CIT(A) wherein it has been accepted that the assessee had produced before him (i.e. CIT(A)) more than 26 files containing evidences with regard to acquisition of technical know-how. Under these circumstances, we find that there was no basis with the lower authorities to hold that no intangible assets were acquired by the assessee. Thus, viewed from any angle, the assessee is eligible for the claim of depreciation u/s 32(1)(ii) on the amount of intangible assets acquired by it as per Business Transfer Agreement, and thus action of lower authorities was not factually or legally justified while making disallowance of the depreciation on the intangible assets. The AO is directed to grant the benefit of depreciation in terms of section 32(1)(ii) upon the intangible assets acquired by the assessee. Thus, these grounds are allowed in favour of the assessee.

6. Ground Nos. 10 to 12: These grounds are with regard to disallowance made u/s 14A. The facts brought before us are that disallowance was made by the AO u/s 14A wherein disallowance on account of interest was to the tune of Rs.4.49 lacs and disallowance on account of indirect expenses was to the tune of Rs.20.19 lacs made @ of 1% of total expenses.

6.1. Being aggrieved, the assessee filed an appeal before the Ld. CIT(A) wherein the same was confirmed. Before us Ld. Counsel of the assessee submitted that balance sheet of the assessee shows that in the list of investments, there are various items of mutual funds which are actually debt funds and therefore, these should not be considered for making the disallowance u/s 14A. Our attention was also drawn on the order of the Tribunal for A.Y. 2006-07 in assessee's own case wherein disallowance was confirmed @ of 2% of the dividend income.

6.2. Per contra, Ld. DR did not bring before us any contrary decision. It is noted from the facts brought before us that dividend income in this year was to the tune of Rs.4.90 crores. Rule 8D is not applicable in this year. In A.Y. 2007-08, in assessee's own case, the Tribunal held vide its order dated 28th April 2011 in ITA No. 3447/Mum/2010 as under:

> *"Vide ground Nos. 4 to 6 assessee contends that Rule 8D is not applicable retrospectively and disallowance under section 14A should be based on the facts and material circumstances of each case and in the light of decision of the ITAT in assessee's own case for the earlier year, we hold that it is reasonable to restrict disallowance to 2% of the dividend earning and we direct the Assessing Officer accordingly."*

6.3. Thus, respectfully following the order of the Tribunal we hold that the disallowance on account of expenses under section 14A should be restricted to 2% of the dividend income. The disallowance with regard to interest should be made after excluding those mutual funds which are debt funds. Thus, assessee gets part relief and these grounds are partly allowed.

6.4. As a result appeal filed by the assessee is partly allowed.

Now we shall take up assessee's appeal for A.Y. 2008-09 in ITA No.5800/Mum/2013

7. Ground Nos. 1 to 4: These grounds relate to taxation of surplus of Rs.1,68,43,200/- arising on prepayment of deferred sales tax. It is noted that issue involved is identical to Ground Nos.1 to 4 of A.Y. 2007-08. No distinction has been made out before us in facts or law, therefore, respectfully following our order for the earlier years, these grounds are decided in favour of the assessee and the addition made in this regard is directed to be deleted.

8. Ground Nos. 5 to 9: These grounds relate to disallowance of depreciation upon the intangible assets acquired under takeover of the business of the assessee. These grounds are identical to ground Nos. 5 to 9 of A.Y. 2007-08 wherein claim of depreciation has been directed to be allowed, and no distinction having been made in facts or law, the AO is directed to allow depreciation in this year as well.

9. Ground Nos. 10 to 12. These grounds pertain to disallowance u/s 14A. In this year, AO made disallowance u/s 14A for a total amount of Rs.21,00,757/- comprising of disallowance on account of interest of Rs.2.29 lacs and disallowance out of indirect expenses of Rs.18.72 lakhs, which was made @ 0.5 % of average investments, as per rule 8D. The limited prayer of the assessee was that the assessee had already made voluntary disallowance of a sum of Rs.3.67 lakhs and therefore disallowance made by the AO led to double disallowance of interest to this extent. It was also

submitted that since the assessee had sufficient own funds, therefore, no disallowance should be made in this regard.

9.1. Per contra Ld. DR relied upon the order of the lower authorities.

9.2. We have gone through the facts of this case. The AO is directed to give relief of the voluntary disallowance made by the assessee u/s 14A in its computation of income. Further, with regard to interest, it is noted that own funds of the assessee are far more than the investment made in tax free securities and therefore, disallowance of interest of Rs.2,29,091/- is directed to be deleted. These grounds are partly allowed.

9.3. As a result, appeal of the assessee is partly allowed.

Now we shall take up Revenue's appeal for A.Y. 2008-09 in ITA No.603/Mum/2012

10. It is noted that the solitary issue raised by the revenue is with regard to action of Ld. CIT(A) in reversing the action of AO in treating the amount of surplus on account of prepayment of deferred sales tax liability as taxable u/s 41(1) of the Act. It is noted by us that the issue involved is identical to Ground No. 1 to 4 of A.Y. 2007-08. No distinction is made before us in facts or law, therefore, following our order for A.Y. 2007-08, grounds raised by the revenue in this regard are dismissed.

10.1. As a result, appeal filed by the revenue is dismissed.

11. In the result, appeals filed by the assessee are partly allowed and appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 27th July, 2016.

Sd/-	Sd/-
(Amit Shukla)	(Ashwani Taneja)
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य** / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 27/07/2016

*Patel, P.S.*नि.स.

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**