आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
' C' BENCH : CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री अब्राहम पी. जॉर्ज, लेखा सदस्य के समक्ष।
[BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER**]**

आयकर अपील सं./I.T.A.No.1405/Mds/2016
निर्धारण वर्ष /Assessment year : 2012-13

M/s TVS Electronics Ltd 'Jayalakshmi Estate' 29, Old No.8, Haddows Road Chennai 600 006 **[PAN AAACI 0886 K]** **(अपीलार्थी/Appellant)**	**Vs.**	The Asstt. Commissioner of Income-tax Corporate Circle 3(1) Chennai **(प्रत्यर्थी/Respondent)**

आयकर अपील सं./I.T.A.No.2006/Mds/2016
निर्धारण वर्ष /Assessment year : 2012-13

The Dy. Commissioner of Income-tax Corporate Circle 3(1) Chennai **(अपीलार्थी/Appellant)**	**Vs.**	M/s TVS Electronics Ltd 'Jayalakshmi Estate' 29, Old No.8, Haddows Road Chennai 600 006 **(प्रत्यर्थी/Respondent)**

Assessee by	:	Shri R. Vijayaraghavan, Advocate
Department by	:	Shri A.V Sreekanth, JCIT
सुनवाई की तारीख/Date of Hearing	:	04-08-2016
घोषणा की तारीख /Date of Pronouncement	:	24-08-2016

आदेश / O R D E R

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

These cross appeals by the assessee and the Revenue are directed against the order of the Commissioner of Income-tax (Appeals)-11, Chennai, dated 30.3.2016 for assessment year 2012-13.

2. Appeal of the assessee is taken up first for disposal. Grievance of the assessee in its appeal apart from assailing levy of interest u/s 234B and 234D of the Income-tax Act, 1961('the Act' in short), is that amortization of business rights of ₹ 8,16,38,966/- was disallowed by the Assessing Officer and this was confirmed by the CIT(A).

3. Facts apropos are that the assessee, a manufacturer and trader of computer peripherals and electronic equipments, had during the relevant previous year acquired a Customer Support Division of M/s TVS-E Servicetec Ltd on a slump sale. There was a business transfer agreement dated 15.12.2011, pursuant to which the assets and liabilities pertaining to the customers support service business of M/s TVS-E Servicetec Ltd was acquired by the assessee for a consideration of ₹ 37.32 crores. Out of the above amount, assessee had accounted ₹ 32.62,90,864/- as business rights. It seems assessee claimed the said amount as technical knowhow and made a depreciation claim of 25%. Assessee, vide letter dated 26.3.2015 addressed to the Assessing Officer mentioned that it was amortization of the business rights valued at ₹ 32,62,90,864/-. The relevant portion of the reply of the assessee has been reproduced by the

Assessing Officer at paragraph 4.2 of his order and it is once again reproduced below for brevity:

> " The business transfer includes transfer of intellectual property including all rights, privileges and benefits of use and exploitation of all intangible assets and/or intellectual property rights pertaining to or forming part of the CSS business including he trade mark, domain name, patents, copy rights, technical knowhow, trade secrets, confidential information in relation to the CSS business."

4. However, the Assessing Officer, on verification of the accounts, found that the assessee had carried to its fixed assets a sum of ₹ 4,50,34,774/- and to its net current assets a sum of ₹ 28,74,360/- and the balance figure of ₹ 32,62,90,865/- was considered as technical knowhow value. As per the Assessing Officer, in the case of slump sale, there could be no separate valuation of fixed assets and liabilities that were to be transferred. Though the assessee had relied on the mandatory statutory audit report in Form 3CEA, Assessing Officer was of the opinion that such valuation was only for the purpose of working out the net worth and not for the purpose of arriving at individual value of the assets and liabilities. The Assessing Officer held that the claim of depreciation on technical knowhow made by the assessee was vague and arbitrary. He disallowed a sum of ₹ 8,16,38,966/-.

5. In its appeal before the CIT(A), argument of the assessee was that business transfer consisted of transfer of intellectual property including all rights, privileges and benefits of use and exploitation of all intangible assets and/or intellectual property right pertaining to or forming part of the CSS business. As per the assessee, it included trade mark, domain name, patents, copyrights, technical knowhow, trade secrets, confidential information in relation to the CSS business of M/s TVS-E Servicetec Ltd. Relying on Explanation 3 of sec. 32, assessee stated before the Assessing Officer that technical knowhow, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights fell within the meaning of 'intangible assets'. Insofar as the assets and liabilities taken to its Balance Sheet, the assessee relied on sec. 43(6)(c)(i)(C) of the Act and submitted that WDV of the assets alone were considered. Specific reliance was placed on the judgment of the Apex Court in the case of CIT vs SMIFS Securities Ltd, 348 ITR 302. The CIT(A) was however, not appreciative of the above contentions. As per the CIT(A), judgment of the Apex Court in the case of SMIFS Securities Ltd (supra) did not involve a slump sale and could not be factually compared with that of the assessee. According to him, assessee's case could be more favourably compared with the facts in the case of M/s Saipem Triune Engineering P. Ltd vs DCIT in I.T.A.No.5239/Del/2012, decided by the

Delhi Bench of this Tribunal. He was of the opinion that the Assessing Officer was justified in disallowing the claim of depreciation.

6. Now before us, the ld. AR strongly assailing the orders of the lower authorities, submitted that the difference between the total purchase value of the undertaking and the amount paid could only be considered as goodwill. Once again relying on the judgment of the Apex Court in the case of SMIFS Securities Ltd(supra), the ld. AR submitted that the assessee is eligible for claiming deduction under clause(ii) of sec. 32(1) of the Act. Specific reliance was placed on the decision of Co-ordinate Bench of this Tribunal in the case of M/s Hinduja Foundries Ltd in I.T.A.Nos.1590 to 1593/Mds/2015, dated 19.2.2016. As per the ld. AR, in the said case also similar situation was there and it was held by the Co-ordinate Bench that depreciation had to be allowed on goodwill.

7. Per contra, the ld. DR supported the orders of the authorities below.

8. We have considered the rival contentions and perused the orders of the authorities below. The claim of the assessee before the Assessing Officer was that excess paid by it over the net worth of the business acquired was some kind of intellectual property including trade mark, domain name, patent, copy rights, technical knowhow,

trade secrets, confidential information etc. Depreciation was however claimed by the assessee considering the excess amount over the WDV of the assets taken over, as technical knowhow. At no point of time, assessee had mentioned before the Assessing Officer that the claim of depreciation was on goodwill. The Apex Court in the case of SMIFS Securities Ltd (supra) has held that goodwill is a depreciable asset and eligible for depreciation allowable u/s 32(1)(ii) of the Act. Similar view was taken by the Co-ordinate Bench in the case of Hinjuja Foundries Ltd. (supra) also. It may also be true that on technical knowhow or value of copy rights/value of patents/value of trademarks, also assessee would be eligible for depreciation u/s 32(1)(ii) of the Act. However, it is required for the assessee to point out what exactly was the type of intangible asset which it acquired by payment of consideration of ₹ 32,62,90,865/-. Just because the depreciation was allowable on various classes of items mentioned in sec. 32(1)(ii) of the Act may not be sufficient reason to say that a demarcation between the various items mentioned therein was not necessary. This is for the simple reason that at a subsequent point of time legislature may choose to differentiate the depreciation rate in between the various items in the very same clause(ii) of sec. 32(1). In our opinion, it is essential to find out as to what was the exact nature of the surplus amount paid by the assessee before allowing depreciation claimed by

it. None of the authorities below have gone into this particular aspect. We are, therefore, of the opinion that the issue needs fresh look by the Assessing Officer. Accordingly, the orders of the lower authorities are set aside and the issue is remitted back to the Assessing Officer for consideration afresh in accordance with law.

9. As regards levy of interest u/s 234B and 234D of the Act, such levy, no doubt, is mandatory and consequential. However, we have set aside the orders of the authorities below on the issue of amortization of business rights and hence the Assessing Officer shall rework the interest also.

10. Coming to the appeal filed by the Revenue, it has altogether taken four grounds of which Ground Nos.1 and 4 are general in nature requiring no specific adjudication.

11. In Ground No.2, grievance raised is on direction given to the Assessing Officer to recalculate the disallowance made u/s 14A of the Act.

12. Facts apropos are that the assessee had an investment portfolio of ₹ 8,11,23,000/- as on 31.3.2012. The assessee had not made any disallowance by itself u/s 14A. Assessing Officer was of the opinion that assessee would have incurred expenditure towards

administrative/managerial as well as interest amount in relation to the investment portfolio. He applied sec. 14A r.w.Rule 8D for arriving at the disallowance of ₹ 90,58,212/-. While doing so, no disallowance was made by him under Rule 8D(2)(i) but only under Rule 8D(2)(ii) and 8D(2)(iii).

13. Aggrieved, the assessee moved in appeal before the CIT(A). Argument of the assessee before the CIT(A) was that out of the total investment of ₹ 8,11,23,000/- a sum of ₹ 7,11,50,000/- represented investment in the units of TVS Shriram Growth Fund. As per the assessee, the said Growth Fund was registered with SEBI as venture capital fund and income therefrom was offered to tax u/s 115U of the Act. Argument of the assessee was that disallowance u/s 14A of the Act could not be made for such investments. Assessee further submitted that a sum of ₹1,00,72,550/- represented investment in entities wherein it had controlling powers. These entitles were M/s Tumkur Property Holdings Ltd, Prime Property Holdings Ltd and associate company M/s Modular Infotech Pv. Ltd. Reliance was placed by the assessee on the decision of this Tribunal in the case of EIH Associated Hotels Ltd in I.T.A.No. 1503/Mds/2012, dated 17.7.2013 and the decision of the CIT(A) in assessee's own case for assessment year 2011-12. The CIT(A), after going through the submissions of the

assessee, was of the opinion that the Assessing Officer had mechanically applied Rule 8D without considering the applicability of different limbs of such Rule to assessee's case. As per the CIT(A), assessee had sufficient own funds for making above investments and hence, disallowance of interest was not necessary. Therefore, according to him, Rule 8D(2)((ii) did not apply at all. Further, as per the CIT(A), assessee itself had worked out the disallowance that could be made under Rule 8D and pegged it at ₹ 50,363/-. He therefore, directed the Assessing Officer to verify the figures furnished by the assessee and if found correct, to restrict the disallowance u/s 14A to ₹ 50,363/- in place of ₹ 90,58,212/- made by the Assessing Officer.

14. Now, before us, the ld. DR strongly assailing the order of the CIT(A), submitted that the assessee had not brought on record anything to show that the investment in portfolio was made out of own funds. As per the ld. DR, the CIT(A) had simply accepted the claim of the assessee. He further submitted that the onus was on the assessee to show that no borrowed funds were used for making investment. Further, as per the ld. DR, the assessee had never made any suo motu disallowance u/s 14A. According to him, it would be hard to imagine that the assessee had not incurred any expenditure for maintaining such a huge investment portfolio.

15. Per contra, the ld. AR strongly supporting the orders of the authorities below, submitted that by virtue of decision of Bombay High Court in the case of CIT vs Reliance Utilities and Power Ltd., 313 ITR 340, and the jurisdictional High Court in the case of CIT vs Hotel Savera, 239 ITR 795, when both interest-free and interest bearing funds were available, then the presumption should go in favour of the assessee. As per the ld. AR in such a situation, presumption would be that own funds were utilized for making investment rather the borrowed funds. Thus, according to him, disallowance under Rule 8D(2)(ii) was not at all warranted. In this scenario, as per the ld. AR, the CIT(A) was justified in restricting the disallowance.

16. We have considered the rival contentions and perused the orders of the authorities below. We find that nothing is available on record to show that investments were made out of own funds of the assessee and not from the borrowed funds of the assessee. The CIT(A) had taken a presumption that assessee had utilized own funds for making investment. It may be true that a part of the investment would come within the ambit of sec. 115U of the Act. The question whether applicability of sec. 115U by itself would render the dividend received on such investment at par with a taxable receipt has also not been verified by any of the authorities below. In our opinion, in the

interest of justice, the matter requires a fresh look by the Assessing Officer. We set aside the orders of the authorities below and remit the issue of disallowance u/s 14A to the file of the Assessing Officer for deciding afresh in accordance with law. Ground No.2 of the Revenue's appeal stands allowed.

17. In Ground No.3, grievance of the Revenue is that the CIT(A) erred in deleting the addition made on account of unexpired value of Annual Maintenance Contract receipts received during the year relying on the decision of the Tribunal in assessee's own case for assessment year 2005-06 in I.T.A.No.811/Mds/2010 dated 25.5.2012 and CIT(A)'s order for assessment year 2011-12 dated 27.10.2015.

18. Insofar as addition of ₹ 31,54,000/- towards AMC charges the claim of the assessee was that AMC was spread over two years and therefore, based on matching principles earnings in the future period beyond the end of the relevant previous year could not be assessed was not accepted by the Assessing Officer. The Assessing Officer was of the opinion that AMC collected would be income of the year of collection, in full.

19. Assessee went in appeal before the CIT(A). CIT(A) followed the decision of the Co-ordinate Bench in assessee's own case

for assessment year 2005-06 in I.T.A.No. 811/Mds/2010, dated 25.5.2012 and his own order for assessment year 2011-12 in assessee's own case, while allowing the claim of the assessee.

20. We find that there being no difference in factual situation in the year under consideration with that of the earlier years, CIT(A) was justified in deleting the addition made by the Assessing Officer relying on the abovementioned orders. Ground No.3 of the Revenue stands dismissed.

21. In the result, the appeal of the assessee is allowed for statistical purposes and that of the Revenue is partly allowed for statistical purposes.

Order pronounced in the open court on 24th August, 2016, at Chennai.

Sd/-	Sd/-
(एन.आर.एस. गणेशन))	**(अब्राहम पी. जॉर्ज)**
(N.R.S. GANESAN)	**(ABRAHAM P. GEORGE)**
न्यायिक सदस्य/JUDICIAL MEMBER	**लेखा सदस्य/ACCOUNTANT MEMBER**

चेन्नई/Chennai
दिनांक/Dated: 24th August, 2016
RD

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF