

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' 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.2410/CHNY/2017
निर्धारण वर्ष /Assessment year : 2014-2015.

M/s. MTANDT Rentals Ltd,
No.62/2B, New No.99, Old No.144,
Padur Village,
Poonamallee Taluk.
Tiruvallur - 602 105.

Vs. The Income Tax Officer,
Corporate Ward 4(3)
Chennai.

[PAN AAGCM 2269J]
(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by : Shri. M. Karunakaran, Advocate
प्रत्यर्थी की ओर से /Respondent by : Dr. S. Pandiyan, Addl. CIT.

सुनवाई की तारीख/Date of Hearing : 30-05-2018
घोषणा की तारीख /Date of Pronouncement : 30-05-2018

आदेश / ORDER

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

Assessee in this appeal filed against an order dated 23.08.2017 of Id. Commissioner of Income Tax (Appeals)-8, Chennai, is aggrieved on disallowance of depreciation of ₹20,94,801/- claimed on goodwill.

2. Facts apropos are that one M/s.Mtandt Ltd, through a scheme of demerger approved by Hon'ble Jurisdictional High Court on 19th October, 2012 with effective date 1st January, 2012, had hived off one of its division engaged in rental of equipment, to the assessee company. M/s.Mtandt Ltd had three segments of business, depicted hereunder:-

- a) *Sale of tools, equipments and safety products*
- b) *Sale of access machines and equipments; and*
- c) *Rental of access equipments (hereinafter referred to as the "Demerged undertaking" or "Rental Division" or "Renal Division Undertaking")*

Through the scheme of demerger, the third segment of business was transferred to the assessee company. Net worth of the rental division of M/s. Mtandt ltd as on 31.12.2011 was ₹11,04,23,771/-, and this was worked out as under:-

<i>Value of fixed assets</i>		<i>₹35,75,09,580</i>
<i>Net Currents assets</i>		<i>₹16,73,67,750</i>
		<hr/> <i>₹52,48,77,330</i>
<i>Total Value of assets</i>		
<i>Less: Liabilities :</i>		
<i>Secured Loans</i>	<i>₹20,34,70,533</i>	
<i>Unsecured loans</i>	<i>₹2,53,64,267</i>	
<i>Current liabilities</i>	<i>₹18,56,18,759</i>	
	<i>-----</i>	<i>₹41,44,53,559</i>
		<hr/>
<i>Net Worth</i>		<i>₹11,04,23,771</i>

Net worth of the assessee company as on 31.12.2011 was as under:-

Value of fixed assets		₹48,15,970
Net Currents assets		₹2,01,31,353
Total Value of assets		<u>₹2,49,47,323</u>
Less: Liabilities :		
Unsecured loans	₹1,00,000	
Current liabilities	₹2,38,71,410	
	<u>-----</u>	₹2,39,71,410
Net Worth		<u>₹9,75,313</u>

3. Assessee company was incorporated with 1 lakh equity shares of ₹10/- each. Therefore value per share, as on 31.12.2011 of the assessee company, came to ₹9.75 per share. Accordingly, as consideration for the rental division of M/s.Mtandt Ltd taken over by the assessee, it had to issue equity shares worth ₹11,04,23,771/- @9.75 per share. Number of shares that had to be allotted to M/s.Mtandt Ltd, on account of merger came to 1,13,25,515 (₹11,04,23,770/9.75). Paid up capital of the demerged company namely M/s. Mtandt Ltd was 12 lakhs shares of ₹10 each. Hence the ratio of allotment of the shares to the share holders of M/s. Mtandt Ltd was 1,13,25,515: 12,00,000. This came to 9.43: 1. In other words the

assessee company had to issue 9.43 equity shares for every equity share held by the shareholders M/s. Mtandt Ltd in M/s. Mtandt Ltd. Since 9.43 had a decimal, assessee company allotted 10 fully paid up equity shares for each share held by shareholders of M/s. Mtandt Ltd in M/s. Mtandt Ltd. Thus, the value of the shares allotted came to ₹12 Crores, against value of ₹11,04,23,771/- of the rental division taken over. Balance sum of ₹95,76,229/- was treated by the assessee as goodwill. Depreciation claimed by the assessee on such goodwill for assessment year 2013-14 was allowed in a proceeding completed u/s.143(1) of the Act. However claim of depreciation on the written down value of such goodwill, was disallowed by the Id. Assessing Officer for the impugned assessment year and such disallowance was confirmed by the Id. Commissioner of Income Tax (Appeals). Id. Commissioner of Income Tax (Appeals) took a view that the value fixed for rental division and share issue ratio was artificial.

4. Now before us, Id. Authorised Representative strongly assailing the orders of the lower authorities submitted that the depreciation on goodwill was allowable by virtue of judgment of Hon'ble Apex Court in the case of *CIT vs. Smifs Securities Ltd*, 348 ITR 302. According to him, there was nothing artificial in the claim of depreciation. Id. Counsel submitted that Id. Commissioner of Income Tax (Appeals) did not correctly construe the judgment of Hon'ble Apex

Court and had erroneously treated the goodwill accounted by the assessee in its books as unrealistic and artificial. Submission of the Id. Authorised Representative was that depreciation was unfairly disallowed.

5. Per contra, Id. Departmental Representative strongly supported the orders of the authorities below.

6. We have considered the rival contentions and perused the orders of the authorities below. Reason why Id. C IT(A) disallowed the claim of depreciation appears at para 5 of his order which is reproduced hereunder:-

5. The issue is examined. It is noted that the assessee company has not paid for acquiring the goodwill. The amount of goodwill taken into the books of the demerged assessee company is merely an adjustment entry between the asset value and value of share allotment. To this extent, the depreciation amount is an artificially created amount without any basis or without the assessee company having to pay for it. The goodwill amount could as well have been Rs.1.95 Crores or at Rs.8.95 Crores if one were to consider value of share allotment at Rs.13 Crores or Rs.20 Crores respectively. The depreciation allowed goes to reduce the taxable profits of the assessee for the year. The depreciation is a real figure. However, the goodwill arrived at is an artificial figure arrived at during the process of demerger of the larger company. The judicial precedents in this regard are verified as below:

In CIT Vs Woodward Governor India (P) Ltd. (312 ITR 254) Supreme Court held that increase or reduction in the liability of the assessee in terms of India rupees to pay the price of an asset payable in foreign exchange or to repay moneys borrowed in foreign currency specifically for the

purpose of acquiring the asset should be taken into account to modify the figure of actual cost in the year in which the increase or decrease in liability arises on account of the fluctuation in the rate of exchange, irrespective of the date of actual payment in foreign currency.

In CIT Vs Doom Dooma India Ltd. (310 ITR 392) Supreme Court held that the words "depreciation actually allowed" mentioned in sec.43(6) (b) means depreciation actually granted i.e. in tea business only 40% of income is taxed and hence only proportionate depreciation can be treated as allowed which is to be deducted from WDV. Subsequently Expl.7 was inserted below sec. 43(6) by Finance (No.2) Act, 2009 w.e.f 01-04.2010 so as to treat the entire depreciation computed as actually allowed.

During the year assessee acquired by way of amalgamation the entire business of MPL - MPL did not have asset as goodwill in its balance sheet - High Court in its order merely gave approval to the amalgamation scheme and did not order to pay any specific amount of goodwill-- There was thus no cost of acquisition on account of goodwill to the assessee Mere accounting entries did not give a right to the assessee to claim depreciation on goodwill (intangible asset). Chowgule & Co. P. Ltd. Vs ACIT (ITAT, Panaji) 9 ITR (Trib) 21; 131 IT 545 Assets of firm taken over by assessee company - Assets revalued and depreciation claimed on enhanced value - Not allowed. CIT vs. Poulouse and Mathen (Pvt) Lte (Ker) 236 ITR 416.

If circumstances exist showing that a fictitious price has been put on the asset or there is collusion between the vendor and assessee and there has been inflation/ deflation of value for ulterior purposes, it is open to ITO to reject and ascertain the actual cost. JCIT Vs Mahindra Sona Lod. (ITA T, Mum) 96 ITD 303, Güzdar Kajora Coal Mines Ltd. Vs CIT (Supreme Court) 85 ITR 599

Depreciation - Actual cost - Conditional subsidy received from Rajasthara Government under the subsidized Housing Scheme for Industrial Workers shall be reduced from the cost u/s 43(1) and depreciation to be worked out on the reduced amount

Associated Stone Industries Kota Ltd. Vs CIT (Raj) 215 ITR 226

Dissolution of firm- Amount paid by continuing partners to

retiring partners - Not part of cost of acquisition of asset of old firm for depreciation purpose.

CIT Vs Theatre SriRangaraj (Mad) 260 ITR 453

Assessee company received capital assets from its holding company- WDV to be worked on the basis of Expl.6 to sec.43(1) and sec.47(iv) -Change in shareholding subsequently and before the close of the accounting year will not alter this legal position.

DCIT Vs NTPC -SAIL Power supply Co. Ltd. 2011 -TIOL-385-ITAT-DEL''.

What was held by the Hon'ble Apex Court in the case of *Smifs Securities Ltd (supra)* is reproduced hereunder:-

"Whether goodwill is an asset within the meaning of section 32 of the Income-tax Act, 1961, and whether depreciation on 'goodwill' is allowable under the said section ?"

Answer

6. In the present case, the assessee had claimed deduction of Rs. 54,85,430 as depreciation on goodwill. In the course of hearing, the explanation regarding the origin of such goodwill was given as under :

"In accordance with the scheme of amalgamation of YSN Shares and Securities (P.) Ltd. with Smifs Securities Ltd. (duly sanctioned by the hon'ble High Courts of Bombay and Calcutta) with retrospective effect from 1st April, 1998, assets and liabilities of YSN Shares and Securities (P.) Ltd. were transferred to and vest in the company. In the process goodwill has arisen in the books of the company."

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

8. *The Assessing Officer held that goodwill was not an asset falling under Explanation 3 to section 32(1) of the Income-tax Act, 1961 ("the Act", for short).*

9. *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, trade marks, licences, franchises or any other business or commercial rights of similar nature :"

10. *Explanation 3 states that the expression "asset" shall mean an intangible asset, being know-how, patents, copyrights, trade marks, 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).*

11. *In the circumstances, we are of the view that "goodwill" is an asset under Explanation 3(b) to section 32(1) of the Act.*

12. *One more aspect needs to be highlighted. In the present case, the Assessing Officer, as a matter of fact, came to the conclusion that no amount was actually paid on account of goodwill. This is a factual finding. The Commissioner of Income-tax (Appeals) ("the CIT(A)", for short) has come to the conclusion that the authorised representatives had filed copies of the orders of the High Court ordering amalgamation of the above two companies ; that the assets and liabilities of M/s. YSN Shares and Securities P. Ltd. were transferred to the assessee for a consideration ; that the difference between the cost of an asset and the amount paid constituted goodwill and that the assessee-company in the process of amalgamation had acquired a capital right in the form of goodwill because of which the market worth of the assessee-company stood increased. This finding has also been upheld by the Income-tax Appellate Tribunal ("the ITAT", for short). We see no reason to interfere with the factual finding.*

13. *One more aspect which needs to be mentioned is that, against the decision of the Income-tax Appellate Tribunal, the Revenue*

had preferred an appeal to the High Court in which it had raised only the question as to whether goodwill is an asset under section 32 of the Act. In the circumstances, before the High Court, the Revenue did not file an appeal on the finding of fact referred to hereinabove.

14. For the aforesaid reasons, we answer question No. (b) also in favour of the assessee.

In our opinion observation of the Id. Commissioner of Income Tax (Appeals) that goodwill shown by the assessee in its books was an unreal and artificially inflated one is incorrect. Assessee had worked out the share swap ratio considering net worth of the rental division of M/s.Mtandt Ltd transferred to it and divided such net worth with value of its own share as on 31.12.2011. The valuation of the rental division was supported by a certificate issued by a competent Chartered Accountant and Revenue has not placed anything on record to prove that the valuation was unfair or incorrectly done. Thus, in our opinion goodwill which came into the books of the assessee on account of rounding off of the decimal in share swap ratio was not an artificial one. Issue of equity shares by the assessee to M/s. Mtandt Ltd was not artificial but real. Even in the case of *Smifs Securities Ltd (supra)* considered by Hon'ble Apex Court, goodwill was result of an scheme of amalgamation which is not much different from a scheme of demerger. In the circumstances, we are of the opinion that the lower authorities fell in error in disallowing the

claim of depreciation. Orders of the lower authorities are set aside.
Depreciation claimed by the assessee stands allowed.

7. In the result, the appeal of the assessee is allowed.

Order pronounced on Wednesday, the 30th day of May, 2018, at Chennai.

Sd/-

(एन.आर.एस. गणेशन))

(N.R.S. GANESAN)

न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(अब्राहम पी. जॉर्ज)

(ABRAHAM P. GEORGE)

लेखा सदस्य/ACCOUNTANT MEMBER

चेन्नई/Chennai

दिनांक/Dated:30th May, 2018

KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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