



॥ आयकर अपीलीय न्यायाधिकरण, पुणे “ए” न्यायपीठ, पुणे में ॥
IN THE INCOME TAX APPELLATE TRIBUNAL, PUNE “A” BENCH, PUNE
BEFORE HON’BLE SHRI S. S. GODARA, JUDICIAL MEMBER
AND

SHRI G. D. PADMAHSHALI, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No.1545/PUN/2019

निर्धारण वर्ष / Assessment Year : 2013-2014

Aggreko Energy Rental India Pvt. Ltd.,

501, The Chambers, Plot No. 4/12,13,

Viman Nagar, Pune – 411 014

PAN : AAHCA2440E

..... अपीलार्थी / *Appellant*

बनाम / *V/s.*

Deputy Commissioner of Income Tax

Circle-1(1), Pune

..... प्रत्यर्थी / *Respondent*

द्वारा / Appearances

Assessee by : Shri Alisagar Rampurwala & Pratik Shah

Revenue by : Shri Ramnath Murkunde

सुनवाई की तारीख / Date of conclusive Hearing : 29/11/2022

घोषणा की तारीख / Date of Pronouncement : **20/01/2023**

आदेश / ORDER

PER G. D. PADMAHSHALI, AM;

The captioned appeal is filed at the instance of the assessee against the order of Commissioner of Income Tax (Appeals)-1, Pune [in short “**CIT(A)**”] dt.17/06/2019 passed u/s 250 of the Income-tax Act, 1961 [in short “**the Act**”] which has arisen in the matter of assessment order dt.14/12/2016 passed u/s 143 r.w.s. 92CA(4) of the Act, by the Dy. Commissioner of Income Tax, Circle-1(1), Pune [in short “**AO**”] for the assessment year [in short “**AY**”] 2013-14.

2. The adjudication under the present appeal is directed to determine the **written down value** for the purpose of depreciation where the asset is acquired prior to previous year and remained un-depreciated.

3. The facts in brief are that;

3.1 The assessee is a resident private limited company engaged in the business of renting power generation & temperature control equipments etc. in whose case the return of income [for short "**ITR**"] was subjected to scrutiny. The regular assessment proceedings were culminated accepting the returned income without variation, whereby a claim made in the return of income for depreciation on goodwill for sum of ₹49,98,074/- computed @25% on notional **written down value** [for short "**WDV**"] of ₹1,99,92,295/- was allowed as deduction u/s 32(1)(ii) of the Act. However while framing the aforesaid assessment Ld. AO rejected to entertain an additional claim for **notional depreciation** of ₹3,41,66,726/- made first time during the course of assessment proceedings without filing a revised ITR on record.

3.2 Aggrieved assessee preferred an appeal to the first appellate authority, who countenanced the rejection on equi-reasons.

3.3 Being aggrieved by the orders of both the tax authorities below, the assessee is in appeal before us contesting against denial of legitimate claim for depreciation made u/s 32(1)(ii) of the Act.

4. In the course of physical hearing, the learned representative of the assessee [in short "**AR**"] contended that, since the goodwill was acquired prior to previous year, the **WDV** for the purpose of computation of depreciation should be its **full cost of acquisition**, as claim for depreciation thereon was neither made nor allowed to it in any of the preceding assessment years. It is further argued that, the assessee for AY 2009-10 to 2012-13 could not claim any depreciation on goodwill on account of opacity on the issue of its allowability and was highly litigative till it was finally settled by the Hon'ble Apex Court in "**CIT Vs Smifs Securities Ltd.**" (2012) reported in 348 ITR 302.

The appellant in support of its contentions also relied upon Hon'ble Supreme court decisions laid in "Mahadev Upendra Sinai Vs UOI" 98 ITR 209, "CIT Vs Straw Products Ltd." 60 ITR 156 and "CIT Vs Dharampur Leather Co. Ltd." reported in 60 ITR 165. To buttress the entitlement for revised claim of depreciation on actual cost of acquisition made otherwise than by filing a revised return, the appellant placed its reliance on the decision of Hon'ble Bombay High Court in "**CIT Vs Pruthvi Brokers & Shareholders**" reported in 349 ITR 346. *Per contra*, the learned departmental representative [in short "**DR**"] placing strong reliance on "**Goetze India Ltd. Vs CIT**" reported at 284 ITR 323 supported the orders of his tax authorities below and pleaded for dismissal.

5. We have heard Ld. Alisagar Rampurwala the counsel for the assessee and Ld. Ramnath Murkunde representing the respondent Revenue at length and subject to the provisions of rule 18 of Income Tax Appellate Tribunal Rules, 1963 [for short "**ITAT, Rules**"] perused the material placed on records till the

date of conclusive hearing and duly considered the facts of the case in the light of settled legal position which are forewarned to the parties present.

6. The solitary issue raised by the present appeal is directed against the revised claim of depreciation u/s 32(1)(ii) of the Act, computed with reference to **actual cost of goodwill acquired and capitalised** i.e. ₹5,41,59,024/- as against the depreciation computed, claimed and allowed in the return of income on **notional WDV** of ₹1,99,92,295/- newly added to block of intangible assets in the previous year relevant to assessment year under consideration in terms of section 43(6)(b) of the Act.

7. **Undisputedly**, the assessee company in the financial year 2008-09 relevant to AY 2009-10 had acquired a division of Gensets Rental business from Cummins India Limited on a purchase consideration of ₹30,00,00,000/- as against its Net Asset Value of ₹24,58,50,976/-, accentuating the excess purchase consideration of ₹5,41,59,024/- paid by appellant

company was towards acquisition of Goodwill. This purchase cost of goodwill during AY 2009-10 to AY 2012-13 was accounted and carried in its financial statement **as Non-Depreciable Asset**, wherefore claim of depreciation were neither made in the returns of income filed nor were actually allowed while framing the relevant assessments in terms of explanation 5 to section 32(1) of the Act.

8. **Admittedly**, for the purpose of filing return for the impugned AY, the assessee by applying notional depreciation for AY 2009-10 to 2012-13 has computed the **notional WDV** of Goodwill in terms of section 43(6)(b) of the Act and added the same to a new block of intangible asset qualifying for depreciation u/s 32(1)(ii) of the Act. Accordingly a claim of depreciation thereon @25% was made first time in the light of settled legal position laid in "**Smifs Securities Ltd.**" (supra), which was duly accepted and allowed by the Ld. AO while framing the regular assessment u/s 143(3) r.w.s 92CA(4) as the said claim was made in return of income filed.

9. During the course of assessment proceedings, the appellant in addition to aforesaid claim of depreciation, has put forth a **new or fresh claim for deduction** against notional depreciation i.e. sum reduced from the actual cost of acquisition of goodwill in arriving at its notional WDV. The Ld. AO, however seized the issue by placing reliance on “**Goetze India Ltd. Vs CIT**” reported at 284 ITR 323 and denied to allow this new or fresh claim of notional depreciation being made otherwise than filing a revised return.

10. The appellant disputed the denial of claim of deduction for notional depreciation before the Ld. **FAA** with an **alternate claim for depreciation on actual cost of acquisition of goodwill** as against depreciation allowed on notional WDV by the Ld. AO. However finding no force in the claim **vis-à-vis** submission of the appellant, the Ld. CIT(A) turned down the claim for notional depreciation as well as the alternate claim of depreciation made with reference to actual cost of intangible asset, by dilating as under;

“In my considered opinion the ld. AR for the appellant has miserably failed to demonstrate that there was carry forward of unabsorbed depreciation for the earlier years due to insufficiency of profits and furthermore the same facts do not emerge from the records. In these circumstances, provision of Explanation 5 to Section 32(1) gets triggered and depreciation is deemed to have been allowed. Further, in my opinion, if the appellant has not claimed depreciation on goodwill for F.Y. 2008-09 to F.Y. 2011-12, the same, in view of the provision of Explanation 5 to Section 32(1) of the Act cannot be given in the instant assessment year.” (Emphasis supplied)

11. In this clinched factual matrix, we have to adjudicate the matter answering two questions as to;

a. What is the **WDV** for the purpose of computation of depreciation u/s 32 for the impugned AY?

b. Whether **revised claim** for depreciation on goodwill can be made **otherwise than by filing a revised return** or revised income computation?

12. In reaching the answer hereto, it apropos to state that, section 32(1) of the Act provides that depreciation is to be computed at the prescribed percentage on the **written down value** of the asset which in turn is calculated with reference to actual

cost. And in this context of computing depreciation, it is important to understand the meaning of these two terms i.e. '**actual cost**' and '**WDV**', as defined by section 43 of the Act, which reads as under;

"43. In sections 28 to 41 and in this section, unless the context otherwise requires —

*(1) "actual cost" **means the actual cost of the assets to the assessee**, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority:*

.....

*(6) "**Written down value**" means –*

*(a) in the case of assets **acquired in the previous year**, the **actual cost** to the assessee*

*(b) in the case of assets **acquired before the previous year**, the **actual cost** to the assessee **less** all the **depreciation actually allowed** to him under this Act, or under Indian Income-tax Act, 1922 (11 of 1922) or any Act repealed by that Act, or under any executive orders issued when the Indian Income-tax Act, 1886 (2 of 1886) was in force;*

(Emphasis supplied)

13. A close reading of opening phase of section 43 of the Act suggests that, definitions contained therein are subject to contextual requirement and whereas sub-section (6) defining the term '**WDV**', essentially begins with the words '**means**' so as to

provide a meaning of the term by exclusivity. In simple words opening phrase of headman section 43 lends flexibility to definitions in order to synchronise them in line with the contextual requirement. This necessarily means context exerts influence over terms defined thereunder, thus the meaning of **WDV** as provided in section 43(6) is always **subject to context** and carry some amount of flexibility and need not always be construed in a stricter sense.

13.1 Irrefutably in the extant case, the appellant company **de-facto** right from the date of acquisition of goodwill till 31/03/2012 carried the actual cost thereof as its non-depreciable asset and consequent to the decision of Hon'ble Supreme Court in case of "**CIT Vs Smifs Securities Pvt Ltd.**", (supra) the assessee created a new block of intangible asset by debiting thereto the actual cost of acquisition as addition to block in the impugned year for the purpose of section 32(1)(ii) of the Act. Since the aforestated intangible asset right from its acquisition was treated as non-depreciable in the books of account and carried as

such, the question of claiming depreciation thereon by the appellant did neither arose nor was actually allowed to it while assessing the taxable income by the Ld. AO in any of the preceding assessment years prior to the assessment year under adjudication.

13.2 Therefore in our considered view, the **WDV** of intangible asset i.e. Goodwill for the purpose of section 32(1)(ii) shall solely be its **actual cost of acquisition** in both the scenarios of section 43(6) as;

a. Treating it as acquired in the previous year

Note well, on account of settled legal position (and not otherwise), erstwhile non-depreciable goodwill in the impugned year became an intangible asset within the meaning of explanation 3b to section 32(1) of the Act, consequentially qualified for depreciation under the category of 'any other business or commercial rights of similar nature' u/s 32(1)(ii) of the Act. Thus the very treatment to erstwhile amount of non-depreciable goodwill as **addition to block of intangible asset *ispo-facto*** brought into

existence a new qualifying block of asset in the impugned year first time for the purpose of depreciation, for the reason **WDV** for the purpose of computation of depreciation u/s 32(1)(ii) of the Act shall be the **actual cost of acquisition** in terms of section 43(6)(a) of the Act.

b. Treating it as acquired prior to previous year

Instead, going by date of acquisition of rental division from Cummins India Limited, the goodwill in the hands of appellant arose (acquired) in the year prior to previous year and was remained un-depreciated for the reason that, the same in the eyes of Income Tax Law was outside the umbrella of explanation 3b to section 32(1) of the Act. Since it was outside the ambit of explanation 3b upto AY 2012-13, the explanation 5 to section 32(1) of the Act (albeit inserted by FA 2001) was also not put to service by the Revenue, resultantly the notional depreciation thereon for the period during which it was not a qualifying depreciable asset, the depreciation thereon

cannot said to be '**actually allowed**' in arriving at 'WDV' in terms of section 43(6)(b) of the Act. As it is now very well settled that, the key words 'actual cost' and '**actually allowed**' are the pivot of the meaning of '**written down value**'. Any notional allowance or any allowance merely allowable will not be deducted from the actual cost or WDV **unless benefit of depreciation has actually been given effectively in the assessment of taxable income it cannot be deducted.** For the reason the Revenue cannot carry a right to object the allowability of depreciation on goodwill for the preceding years as it has also failed to give effect to explanation 5 while assessing the taxable income of the appellant for the preceding assessment years. Consequently the actual cost of acquisition solus shall be the '**WDV**' within the meaning of section 43(6)(b). And we find that, subsequent to insertion of explanation 5 to section 32(1), the Hon'ble Supreme Court had occasioned to consider this term 'actually allowed'

in its landmark decision rendered in "**CIT Vs Doom Dooma India Ltd.**" (2009) reported in 310 ITR 392 wherein vide para 8-9, their lordships have held categorically that;

"8. The key word in Section 43(6)(b) of the 1961 Act is "actually". We quote herein below an important observation, made by this Court on the meaning of the words "actually allowed" in Section 43 (6)(b) in the case of Madeva Upendra Sinai v. Union of India and Others - (1975) 98 ITR 209 at pages 223 & 224, which reads as under:

"The pivot of the definition of "written-down value" is the "actual cost" of the assets. Where the asset was acquired and also used for the business in the previous year, such value would be its full actual cost and depreciation for that year would be allowed at the prescribed rate on such cost. In subsequent year, depreciation would be calculated on the basis of actual cost less depreciation actually allowed. The key word in clause (b) is "actually". It is the antithesis of that which is merely speculative, theoretical or imaginary. "Actually" contra-indicates a deeming construction of the word "allowed" which it qualifies. The connotation of the phrase "actually allowed" is thus limited to depreciation actually taken into account or granted and given effect to, i.e. debited by the Income-tax Officer against the incomings of the business in computing the taxable income of the assessee; it cannot be stretched to mean "notionally allowed" or merely allowable on a notional basis."

"From the above conspectus, it is clear that the essence of the scheme of the Indian Income-tax Act is that depreciation is allowed, year after year, on the actual cost of the assets as reduced by the depreciation actually allowed in earlier years. It follows, therefore, that even in the case of assets acquired before the previous year, where in the past no depreciation was computed, actually allowed or carried forward, for no fault of the assessee, the "written-down value" may, under clause (b) of Section 43(6), also, be the actual cost of the assets to the assessee e."

9. Therefore, this Court has clearly laid down the meaning of the words "actually allowed" in Section 43(6)(b) to mean - "limited to depreciation actually taken into account or granted and given effect to, i.e. debited by the Income-tax Officer against the incomings of the business in computing the taxable income of the assessee". *(Emphasis supplied)*

14. In the light of aforestated decision, we note that, the appellant did neither accounted the goodwill as depreciable asset nor did claimed any depreciation thereon till AY 2012-13 and further no claim of depreciation thereon was actually granted to the appellant company while assessing it's taxable income till the AY 2012-13. Thus asset being non-depreciable no notional depreciation can lawfully be reduced from its actual cost of acquisition in arriving at the WDV for

impugned AY, consequently its actual cost of acquisition shall alone be WDV for the purpose of computation of depreciation u/s 32(1)(ii) of the Act. We hold so as the department has also despondently failed to allow the depreciation thereon by virtue of explanation 5 to section 32(1) of the Act, therefore we would be failing in our duty, if we exercising the widest powers ***'to pass such orders thereon as it thinks fit' as rooted in section 254(1) of the Act***, do not direct the Ld. AO to compute the depreciation u/s 32(1)(ii) of the Act treating the acquisition of said intangible asset as of the previous year relevant to assessment year under consideration for reasons of its own failure to actually allow the depreciation while assessing the income of the appellant in terms of explanation 5 fastened to section 32(1) of the Act.

15. Thus, in the light of aforestated discussion and the ratio laid by Hon'ble Apex Court (ibid) we have no hesitation in accepting the plea of the assessee and answering the first question in favour of the appellant vocalising that explanation 5 has no relevance in

working out the written down value of the block of asset at the hands of the appellant company.

16. Insofar as the allowability of revised claim for depreciation on goodwill made otherwise than by filing a revised ITR is concerned, it shall suffice to quote from the ratio laid down by the Hon'ble Jurisdictional Bombay High Court in "**CIT Vs Pruthvi Brokers & Shareholders**" (supra) wherein Hon'ble lordships have recognized the power of the appellate authority to entertain any new claim for the first time though not made before the Assessing Officer as the intention of the revenue would be to tax real income. On the subject matter it is also apposite to note the decision of Hon'ble High Court of Gujarat in "**CIT Vs Mitesh Impex**" reported in 367 ITR 85 wherein their lordships vide para 39 have categorically held as;

"Income-tax proceedings are not strictly speaking adversarial in nature and the intention of the Revenue would be to tax real income. This is primarily on the premise that if a claim though available in law is not made either inadvertently or on account of erroneous belief of complex legal position, such claim cannot be

shut out for all times to come, merely because it is raised for the first time before the appellate authority without resorting to revising the return before the assessing officer.”

(Emphasis supplied)

17. In omnibus, we accept the contention of the appellant and allow the ground raised. Thus holding the orders of both the tax authorities below as erroneous, we set-aside the order of Ld. CIT(A) and direct the Ld. AO to allow the depreciation in aforestated terms.

18. Resultantly, the appeal of the appellant assessee SUCCEEDS in aforestated terms.

In terms of rule 34 of ITAT-Rules, the order pronounced in the open court on this FRIDAY 20th day of January, 2023.

-S/d-

S. S. GODARA

JUDICIAL MEMBER

-S/d-

G. D. PADMAHSHALI

ACCOUNTANT MEMBER

पुणे / PUNE ; दिनांक / Dated : 20th day of January, 2023.

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

1. अपीलार्थी / The Appellant.
3. The Pr. CIT-1, Pune (Mh-India)
5. DR, ITAT, Pune Bench 'A', Pune

2. प्रत्यर्थी / The Respondent.
4. The CIT(A)-1, Pune(Mh-India)
6. गार्डफ़ाइल / Guard File.

आदेशानुसार / By Order,
वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय न्यायाधिकरण, पुणे / ITAT,