IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI RAHUL CHAUDHARY, JM

ITA No.2108/Mum/2018
(Assessment Year: 2014-15)

ACIT-14(2)(2) 461, 4th Floor, Aaykar Bhavan Mumbai-400 020	Vs.	M/s Pfizer Limited The capital, 1802/1901, Plot No.C-70, G-Block, Bandra Kurla Complex, Bandra (East), Mumbai-400 051
(Appellant)		**(Respondent)**

PAN No. AAACP3334M

CO No. 110/Mum/2019
(Arising in ITA No. 2108/Mum/018 for A.Y. 2014-15)

ITA No. 2132/Mum/2018
(Assessment Year: 2014-15)

M/s Pfizer Limited The capital, 1802/1901, Plot No.C-70, G-Block, Bandra Kurla Complex, Bandra (East), Mumbai-400 051	Vs.	ACIT-14(2)(2) 461, 4th Floor, Aaykar Bhavan Mumbai-400 020
(Appellant)		**(Respondent)**

Assessee by	:	Shri P.J. Pardiwala Sr. Advocate & Shri Jeet Kamdar, Advocate ARs
Revenue by	:	Shri Ajay Kumar Sharma, CIT DR

Date of hearing: 24.08.2023

Date of pronouncement : 22.09.2023

O R D E R

PER PRASHANT MAHARISHI, AM:

01. These are the cross appeals for assessment year 2014 – 15 filed by the assessee and the learned Assessing Officer as well as one [1] cross objection filed by the assessee for the same assessment year against the appellate order passed by The Commissioner Of Income Tax (Appeals) – 22, Mumbai [The Ld CIT (A)]

02. ITA number 2132/M/2018 is filed by Pfizer Ltd (The Assessee/Appellant) raising following grounds of appeal.

Addition of alleged unreconciled transactions appearing in the end information return (AIR) – 338,302

1) on the facts and in the circumstances of the case and in law, the learned Commissioner of

income tax (appeals) erred in upholding an addition of ₹ 338,302/– in respect of transactions appearing in the IRS statement alleged as unreconciled by treating the same as income of the appellant

2) on the facts and in the circumstances of the case and in law, the learned CIT – A 14 ignoring that the reconciliation of transactions reported in the AI are statement could not be accomplished by the appellant in absence of details and information from the third parties

DEPRECIATION ON GOODWILL ARISING ON AMALGAMATION OF ERSTWHILE WYETH LTD WYETH ₹ 271, 63, 00,000

3) on the facts and in the circumstances of the case and in law, the learned CIT (A) erred in disallowing the claim of depreciation on goodwill arising on amalgamation of Wyeth amounting to ₹ 2,716,300,000

4) on the facts and in the circumstances of the case and in law, the learned CIT (A) order in not following the decision of the honourable Supreme Court in the case of CIT V Smif securities Ltd (2012) 348 ITR 302

5) without prejudice to the above grounds of appeal and in the alternative, the learned CIT (A) order in disallowing the aforesaid claim of

depreciation by invoking the erstwhile fifth of proviso to section 32 (1) of the act (now sixth proviso to section 32 (1) of the act) which proviso is not applicable to the facts of the appellant

DEDUCTION UNDER SECTION 35DD OF THE ACT IN RESPECT OF AMALGAMATION EXPENSES: ₹ 290,372/–

6) on the facts and in the circumstances of the case and in law, the learned CIT (A) order in holding that deduction claimed under section 35DD of the act amounting to ₹ 290,372/– being 1/5 of the amalgamation expenses of ₹ 1,51,862 is not allowable as the appellant was not able to produce copies of bill/invoices vouchers for the said amount which constituted only 1.12% of the total amalgamation expenses of ₹ 128,699,915/–

03. ITA number 2108/M/2018 is filed by The Assistant Commissioner Of Income Tax – 14 (2) (2), Mumbai (The Learned AO) raising following grounds of appeal:-

1) Whether on facts and circumstances of the case and in law, the learned CIT (A) erred in a ruling that points (a) and (b) listed below:-

(a) IMC (professional conduct, adequate and ethics) regulations, 2000 to which expressly prohibited medical practitioners from accepting any material gifts/benefits and

(b) CBDT circular number zero 5 – 2012, with 6 to support the IMC regulations by disallowing expense deductions claimed by pharmaceutical firms on providing such material gifts/benefits to medical practitioners

do not apply to the assessee

2) whether on the facts and in the circumstances of the case and in law, the learned CIT (A) order in not appreciating the fact that the prohibited practice of medical practitioners accepting material gifts/benefits cannot be conducted without assessee is complete consent/involvement, and overlooks judgment supporting the illegality and 90 public policy nature of the practice of providing such material gifts/benefits to medical practitioners, as held in the case of CIT versus KAP scan and diagnostic Centre (2012) 344 ITR 467 (P& H)

3) whether on facts and circumstances of the case and in law, the learned CIT (A) order by misconstruing the decision of honourable

Himachal Pradesh High Court in case of Confederation of Indian pharmaceutical industry versus CBDT (2013) 353 ITR 388 (H P)

4) whether on the facts and circumstances of the case and in law, the learned CIT (A) erred in allowing write-off of bad debts without granting AO an opportunity to consider fresh submissions made by assessee during appellate proceedings

04. Cross objection number 110/M/19 is filed by assessee raising following grounds of appeal:-

"Disallowance of payments made to Drs in alleged violation of Indian medical Council (professional conduct, adequate and ethics) regulations, 2002 (IMC regulations) – ₹ 11,60,34,713/–

if it is held that IMC regulations and the CBDT circular number 5 of 2012 are applicable to the assessee, as prayed by the Department in ground number 1 of the appeal bearing ITA number 2108/M/2018, then:-

1. on the facts and in the circumstances of the case and in law, the expenditure on brand reminders on purchase of medical books and journals to not fall within the scope of the IMC regulations and ought to be allowed as a business expenditure

The respondent here by reserves the right to add to, alter or amplify the above grounds of cross objections"

05. Brief facts of the case shows that assessee is a company engaged in the business of manufacturing, sale of pharmaceutical including over-the-counter [OTC] pharmaceuticals, cosmetics and allied consumer products and trading of pharmaceuticals. It filed its return of income [ROI] on 30/11/2014 declaring total income of Rs. 3,422,546,530/–. Assessee revised it on 30/11/2015 declaring a total income of Rs.1,939,382,340/–. Ld AO picked up ROI for complete scrutiny.

06. During the course of assessment proceedings, the learned assessing Officer made following three additions [3] to the total income of the assessee.

i. The learned assessing officer found that there is an un-reconciled amount as per individual transaction statement and details furnished by the assessee with respect to nine parties of Rs. 544,579. Books of account did not show amount mentioned in the ITS. Assessee submitted that it has written a letter to the concerned parties asking the nature and other supporting evidence in respect of the transaction, however, Assessee did not receive any reply. The learned assessing officer found that it is for the assessee to prove that the

transactions reflected in ITS data as well as form number 26AS data included in the books of account and assessee offers corresponding income for taxation. The AO noted that he has issued notices under section 133 (6) of the Act to the concerned parties, however, he did not receive any replies. Therefore as the assessee has not furnished the necessary evidence, LD AO added to the income Rs. 544,579/–.

ii. Assessing officer found that assessee has debited a sum of Rs.482,612,000/- as advertisement expenses. On examination of the details, he asked assessee to submit the nature and quantum of expenditure incurred that is in the nature of payment mentioned in the Indian medical Council (Professional Misconduct, Etiquette and Ethics) Regulations, 2000. Assessee submitted such details. However, the learned assessing officer after considering all the contentions of the assessee held that brand reminder and customer gifts amounting to Rs. 87,953, 773/– and purchase of medical books and journals of Rs. 28,080,940 is not allowable as an expenditure in view of the provisions of section 37 (1) of the act, as those expenses are in the nature of free bees and prohibited. Accordingly, he disallowed the sum of Rs.116,034,713/- incurred for providing brand reminders,

medical books and journals to medical practitioners to compromise with the professional autonomy of medical practitioners and autonomy or freedom of the medical institution, which is prohibited by IMC regulations.

iii. The learned AO further found that the honourable High Court has passed the order sanctioning the amalgamation of Wyeth Limited with the assessee. Therefore, the income of Wyeth limited and Pfizer Ltd as described in the original return of income is added to the total income of the assessee. Learned AO noted that originally the assessee filed the return income of Rs.3,422,546,533, which was revised to Rs.1,939,382,340 whereas the Wyeth Limited has filed its original return of income at Rs. 141,04,95,520 and the revised return filed on 30/3/2016 are Rs. Nil. The AO noted that the combined income of both these entities is Rs. 4,833,042,050/- as per the original return of income of both the entities whereas when the return was revised of both the entities total income are now returned at Rs. 1,939,382,340/- only. The learned assessing officer questioned the decline in amount of income in the return of income of assessee. The assessee submitted that the payment of

Rs. 1186,52,00,000/- was made to the erstwhile shareholders of Wyeth Ltd on account of goodwill and depreciation at the prevailing rate as per income tax account is amounting to Rs. 2,716,300,000 were claimed in the return of income on that goodwill. The ld. AO further noted that there is a difference of Rs. 177,359,710 for which no details were produced by the assessee. Learned assessing officer noted that assessee has not produced any supporting documentary evidence to justify its arguments with respect to the difference of Rs. 2,893,659,712 therefore the same was added to the total income of the assessee.

07. Accordingly assessment order under section 143 (3) of The Act was passed on 31/12/2016 determining total income at Rs. 4,949,621,342/- against the returned income as per the revised return of income of Rs. 1,939,382,340/-.

08. Assessee aggrieved with assessment Order, preferred appeal before the learned CIT –(A), who passed an appellate order on 24/1/2018.

09. The learned CIT – A dealt with all the issues as under: –

i. For addition of Rs.544,579/- after obtaining the remand report, he deleted the addition of Rs. 206,277 that were accepted by the learned assessing

officer in the remand report as it was wrongly shown in the name of the assessee by ICICI bank Limited. There was no clarification with respect to the other sum and therefore the balance addition was confirmed.

ii. On disallowance of ₹ 87,953,773/– of brand reminders and ₹ 28,080,941 purchase of medical books and journals provided to healthcare professionals, the learned CIT – A deleted the disallowance following the decision of the coordinate bench in ITA number 4605/M/2014 dated 12/1/2017 in case of PHI Pharma private limited, wherein it was held that the MCA regulation would be applicable to Drs only and not to pharmaceutical companies. It was further held that the board's circular number 05/2012 and the decision of the honourable Himachal Pradesh High Court in case of Confederation of Indian pharmaceutical industries has categorically stated that if the assessee satisfies the assessing authority that the expenditure is not in violation of the regulations framed by the medical Council, then it may legitimately claim the deduction.

iii. On addition of ₹ 289,36,59,710/– in respect of unexplained difference between income in the revised return of the assessee after amalgamation and the total income in the original return of income of the assessee and the amalgamating company, it was noted that the assessee has made detailed

submission before the appellate authority stating that the information was sought by the learned assessing officer belatedly, therefore assessee could not submit the detail in time. However, when details were submitted, the learned AO informed the assessee that Assessment order has already been passed. The learned CIT – A on perusal of the letter dated 31 December 2016 categorically noted that the learned AO has written by hand that the letter was submitted by the assessee after passing of /dispatch of the assessment order. The learned CIT – A asked the assessing officer by letter dated 13/11/2017 to give his comments. The learned AO submitted remand report on 6/12/2017 that though there are no sufficient materials available on record for the quantification of goodwill, the assessee is not eligible to claim depreciation over and above the depreciation allowable to the Wyeth Ltd before the merger as claim is in violation of proviso 5 to section 32 (1) of The Income Tax Act. The AO further submitted that the decision of the coordinate bench in ITA number 722/BANG/2014 [United Breweries Limited] for assessment year 2007 – 08 held that an amalgamated company cannot claim depreciation on the assets acquired in the scheme of amalgamation including goodwill, more than that which is permitted to the amalgamating company. With respect to the decision of the honourable Supreme Court in case of CIT versus Smiff securities Ltd 348 ITR 302, the AO

submitted that the bench also considered this decision. Accordingly, the assessee is not eligible for depreciation. The remand report was replied by the assessee on 20/12/2017. On 22/12/2017, the appellate authority once again given opportunity to the assessee to show a justification as to why depreciation on goodwill should not be disallowed. Another letter dated 26/12/2017 was also issued to the learned AO to examine and give comments on the issues of disallowance on which the remand report was silent. The second remand report was submitted on 8/1/2018, which was replied to by the assessee on 19/1/2018. The learned CIT – A held in paragraph number 7 rejecting the claim of the assessee of depreciation of ₹ 27,163,000 on goodwill arising on amalgamation.

iv. Further on the difference of income of 2 companies, the learned CIT – A also asked that there is a bad debts written off out of the provision for doubtful debts, inadvertently not claimed in the original return of income filed but same was claimed in the revised return of income filed of ₹ 151,101,570/–. The learned CIT – A after obtaining the explanation of the assessee and the remand report of the learned assessing officer along with the rejoinder, considered this issue in paragraph number 8.3 of Appellate Order and held that assessee has produced a statement showing party wise details of Baghdad's return of amounting to ₹ 151,101,570 along with the

sample copies of the Ledger accounts of the buyers in the books of account of the assessee, where dues were written off by the assessee in assessment year 2014 – 15. These bad debts were found in respect of sales made in the earlier years to the debtors. On perusal of the financial statement of the assessee, it was found that the provision made for doubtful loans and advances and provision made for doubtful trade receivables are separately accounted for, the provision for doubtful debt was never claimed as deduction, out of those provisions, certain debts have been written off and those trading debtors were written of and therefore the learned CIT – A allowed claim. Accordingly, bad debts written off out of the provisions amounting to ₹ 151,101,570/– was allowed.

v. Another issue was raised before the learned CIT – A about deduction under section 35 (DD) of the act in respect of amalgamation expenditure amounting to ₹ 25,739890/–. The learned CIT – A asked for the remand report of the learned assessing officer wherein it was stated that assessee has not been able to completely justify the entire expenditure of Rs.286,99,915/- in addition, many invoices and bills referred to the 'project Echo' /'Project Echo 1'. It is unclear that whether this project has any relation to the amalgamation expenses. The ld. CIT – A held that if the expenditure is related to the amalgamation than 1/5 of deduction under section

35DD may be granted. The response of the assessee was also obtained and after that the learned CIT – A as per paragraph number 9.3 of the order has dealt with this issue. He held that that assessee has stated by letter dated 19/1/2018 that the certificate has been issued by the Ernst & young LLP that the invoice of ₹ 159,396,000 issued by that company pertaining to that project is in relation to the tax advisory services provided in connection with the merger. The engagement letter and invoices were also submitted. However, he held that that assessing officer in his remand report stated that the assessee has not been able to give copies of the invoices and bills to justify the entire expenditure of ₹ 128699915/- , as before him the assessee submitted invoices of expenditure of ₹ 120,481,450/– and further invoices of ₹ 6,766,602/–. Therefore, the total expenditure, which has been substantiated by invoices is ₹ 127,248,052 so the learned CIT – A granted 1/5th of the above sum as deduction under section 35DD of the act. Thus, part of the claim was allowed.

vi. There were certain other issues, but those are not contested before us and hence are not required to be discussed.

010. Accordingly appellate order was passed on 24/1/2018 with which the AO and the assessee both are aggrieved are in appeal and in CO before us.

011. Assessee has also filed an additional ground of appeal as per letter dated 18 June 2021 with respect to the applicability of Dividend Distribution Tax [DDT] under section 115O of The Income Tax Act or lower rate of tax in case of Non-Resident Assessee who are eligible for the benefit of Double Taxation Avoidance Agreement [DTAA] as under:-

> "on the facts and in the circumstances of the case and law, the Dividend Distribution Tax (DDT) paid by the appellant on dividend distribution to its non-resident shareholders ought to have been charged at the rate prescribed under the Double Taxation Avoidance Agreement (DTAA) between India and the country of residence of the respective non-resident shareholders as against the rate as per the provisions of section 115O of The Income Tax Act 1961, i.e. at the rate of 16.995%."

012. In the application of the assessee, it has stated that

i. additional ground of appeal raised are purely legal issues,

ii. facts are already on record and does not need any verification of facts and

iii. it was only during the course of discussion, assessee was advised to raise the additional grounds of appeal, therefore failure to do so originally was neither deliberate nor contumacious.

iv. Issue involved therein is purely questions of the law.

v. Relied upon the decision of the honourable Supreme Court in case of National Thermal Power Co Ltd [229 ITR 383], Jute Corporation Of India Ltd [187 ITR 688] and of the Honourable Bombay High Court in Ahmedabad Electricity Co Ltd [199 ITR 351].

013. Arguing for the admission of this additional ground assessee submitted that

i. Assessee has paid an interim and final dividend, which is available and properly disclosed in the financial statements of the assessee.

ii. Similar dividends declared by the amalgamating company are also disclosed in schedule of Dividend Distribution Tax and in the financial statement.

iii. Shareholders are non-resident entities are properly disclosed in Notes to the share capital wherein the details of shareholders are mentioned and further in related party transaction disclosures are made.

iv. In case of Pfizer Ltd Pfizer investments, Netherlands BV is holding 29.52% and in case of Wyeth Ltd John Wyeth brothers, Ltd of United Kingdom holds 5.55% of the equity.

v. details of dividend paid to the aforesaid shareholders along with the corresponding dividend distribution tax liability is disclosed in the return of income

vi. Details are available on record that assessee has non-resident equity shareholders and dividend is paid to them as well as dividend distribution tax is also paid on dividend distributed to those non-resident shareholders along with resident shareholders.

vii. This is purely a legal issue and therefore it deserves to be admitted.

viii. Identically in case of several assesses the coordinate benches have admitted identical grounds.

ix. Thus, this ground may be admitted.

014. The learned departmental representative vehemently contested that the

i. Facts are not available on record to adjudicate this ground and therefore it deserves not to be admitted.

ii. There is no evidence that shareholders are resident of UK and Netherlands, address of those parties are not available.

iii. Nothing is showed how those are resident of those countries.

iv. No reference of DTAA is made before lower authorities.

v. In the report of DDT and ROI, assessee claimed it as tax on company.

vi. issue is not arising from the orders of lower authorities and hence same cannot be raised, The learned departmental representative vehemently supported the claim by relying on the decision of the coordinate bench in case of IT(TP)ANo.525 /Bang/2019 M/s. Texas Instruments (India) Pvt. Ltd., Bangalore wherein identical ground was not admitted by the coordinate bench holding that it does not arise from the orders passed section 143 (3) of the act.

015. In the rejoinder the learned authorized representative pointed out decision of the coordinate bench in case of GE BE private limited versus The Deputy Commissioner Of Income Tax (IT(TP)A number 2615/Bangalore/2019) for assessment year 2015 – 16 dated 17/05/2022 wherein the above decision of the Bangalore tribunal of Texas instruments India private limited was considered and it has been held in paragraph number 12.8 that the coordinate bench failed to consider the decision of Robert Bosch engineering and business solutions private limited in IT (TP) A number 608 and 445/Bangalore/2016 dated 2/2/ 2022 wherein the identical ground is admitted. Therefore, the decision cited by the learned departmental representative has been held by the coordinate bench as per incuriam. Thus, now that judgment cannot be relied upon. In the and it was submitted that the coordinate bench in case of above judgment followed the decision of the honourable Supreme Court in case of CIT versus vegetable products Ltd 88 ITR 192 and thereby admitted the additional ground of appeal on identical facts and

circumstances. Therefore there is no reason that why above ground cannot be admitted

016. We have carefully considered the rival contention and perused the available records. We find that assessee has disclosed the details of declaration of dividend (final as well as interim) in its financial statements along with the provision for Dividend Distribution Tax. In the return of income filed by the assessee the details of dividend distribution tax, the applicable rate under section 115O of the act, the date of declaration of the dividend, date of payment of dividend distributed and tax thereon are disclosed. In the share capital schedule in financial statements, it is evident that there are non-resident shareholders. However, whether those shareholders are eligible to claim the benefit of double taxation avoidance agreement between the country of their residence and country of the residence of the assessee is not clear, however, for the purpose of adjudication of the ground, enough details are available on record. Assessee has submitted several judicial precedents wherein identical additional ground is admitted. We have also carefully perused the decisions of various coordinate benches in favour of the assessee where these grounds were admitted and solitary decision of coordinate bench where the ground was not admitted. We find that there is no provision of appeal against the determination of tax under section 115O of the act. Admittedly, assessee himself has computed the tax as per the provisions of the act. The assessee has not challenged it before the lower

authorities. However, in the return of income the disclosure was made about the dividend distribution tax. The return is subject to assessment under section 143 (3) of the act. Therefore based on the return assessee is aggrieved as it has paid according to its version higher rate of tax then what it should have paid. This issue was not raised before the assessing officer despite the facts available on record. The learned assessing officer naturally did not question the assessee on this aspect as assessee has paid a dividend distribution tax in accordance with the income tax act. Therefore, there is an assessment order under section 143 (3) of the act based on the return of income by which the assessee is aggrieved, therefore, assessee has a right to raise additional ground of appeal on fact of DDT including Nonresident shareholders contained in the return of income which is against the assessee, provided adequate information is available on record. It is not the case where the assessee has on its own paid lesser amount of tax and assessee is a deemed to be an assessee in default under the provisions of section 115Q of the act. Therefore, adequate information available on the record, we have no hesitation in admitting the additional ground of appeal. Hence, we admit the same.

017. Coming to the merits of the ground of appeal, the learned authorized representative submitted that

i. Shareholders of Pfizer Ltd is a resident of Netherlands whereas the shareholders of Wyeth Ltd a resident of United Kingdom. I

ii. Netherlands, the Double Taxation Avoidance Agreement entered into by India has Most Favoured Nation [MFN] clause.

iii. India Netherlands DTAA Protocol where in it is provided for *Articles 10, 11 and 12* that :-

> *"2.* If after the signature of this convention under any Convention or Agreement between India and a third State which is a member of the OECD India should limit its taxation at source on dividends, interests, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of income, then as from the date on which the relevant Indian Convention or Agreement enters into force the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention.

iv. India has entered into a Double Taxation Avoidance Agreement with Hungary wherein in article 2 (3) provides that 'dividend tax' has been included in taxes covered.

v. Further, as per article 10 dividends can be taxed in source country; such dividend tax cannot exceed 10% of the gross amount of dividends.

vi. Protocol further provides that when the company paying the dividends is a resident of India, the tax on

distributed profits shall be deemed to be taxed in the hands of the shareholders and it shall not exceed 10 per cent of the gross amount of dividend.

vii. The dividend distribution tax paid by the assessee on distribution of dividend to non-resident shareholders of Pfizer Ltd has also attracted the tax as provided under section 115O of the act , which is more than 10 %.

viii. Therefore, if dividend distribution tax is considered as a tax on the income of the shareholders, then such tax cannot exceed 10%. The balance tax is required to be refunded to the assessee.

ix. However, special bench of ITAT in case of TOTAL OIL LTD has held that such tax is tax on the undistributed profits of the company and not tax on the income of the shareholders.

x. However, to keep the issue alive, this ground of appeal is pressed.

018. The learned authorized representative to support his contention relied upon the following judicial precedents:-

i. concentrix services Netherlands BV versus income tax officer (TDS) WP C9051/2020 dated 22/04/2021 Honourable Delhi High Court

ii. Giesecke & Diverient India private limited versus ACIT (120 taxmann.com 338

iii. Maruti Suzuki India Ltd (ITA number 961/12/2015) and decision of the honourable Delhi High Court in writ petition © 13241/2019

iv. Union of India versus Tata tea Ltd (CN number 9178 of 2012) (SC)

v. Indian oil petronas private limited ITA number 188 /KOL/2019

019. The learned departmental representative vehemently opposed the above argument. It was stated that:-

i. Special bench of tribunal has categorically held that dividend distribution tax under section 115O of the act is a tax under distributed profits of the assessee company. Therefore, there is no reason to hold that it is a tax on income of the shareholder.

ii. Here non-resident taxpayer have not challenged levy of the tax under section 115O of the act before the tribunal. Assessee is a resident, therefore assessee cannot invoke the provisions of Double Taxation Avoidance Agreement.

iii. He submits that as India Netherlands DTAA the claim is barred by limitation as such claim needs to have been raised within three years before competent authorities and not before ITAT by the shareholders and not by the Indian company like assessee. He referred to Protocol where in it is provided that :-

Articles 10, 11 and 12

"*1.* Where tax has been levied at source in excess of the amount of tax chargeable under the provisions of Article 10, 11 or 12, applications for the refund of the excess amount of tax have to be lodged with the competent authority of the State having levied the tax, within a period of three years after the expiration of the calendar year in which the tax has been levied."

iv. The most-favoured-nation clause has not been notified by the government of India and therefore assessee cannot invoke that clause of the double taxation avoidance agreement between India and Hungary. It was further stated that identical issue is pending before the honourable Supreme Court made the decision is awaited. He submitted that the stand of the revenue has been clarified in all the arguments made before the honourable Supreme Court that most favoured nation clause can only be invoked as and when notified by the government.

v. Even otherwise, if for any reason it is held that the tax under section 115 O should have been 10% as per the Double Taxation Avoidance Agreement coupled with most-favoured-nation clause of Netherlands Treaty importing Hungary Double Taxation Avoidance Agreement in case of Netherlands resident shareholder, then, the situation may arise that if an Indian resident, earning dividend income from Pfizer, has income below the taxable limits, no tax should have been deducted by Pfizer. However, such a resident shareholder is paying tax at the rate prescribed under section 115O of the act

whereas a non-resident shareholder is paying taxes at the lower rate. He submitted that in so far as interplay of section 115-O of the Act, with the provisions of international tax laws and DTAA, for the purpose of section 10(34) of the Act, there is no distinction between resident and non-resident shareholder. Section 10(34) of the Act does not distinguish based on the residential status of the person in receipt of income. In the absence of any intelligible differentia based on residential status of shareholders there can be no basis to segregate the case of non-resident shareholders.

vi. With reference to application of DTAA, the ld. DR submits that tax u/s 115-O of the Act is a tax on the company and not on the shareholder. Hence, its levy does not give any rise to double taxation. He submitted that invariably in all the DTAAs the words used are "dividends paid by a company". The treaty has to be interpreted as a whole and no clause of it should be read and/or interpreted in isolation.

vii. The impugned assessment year is 2014 – 15, even presumably if the refund is allowed to the assessee, it was be an unjust enrichment in the hands of the assessee. Therefore, also this ground deserves to be rejected.

viii. There is no evidence placed on record by the assessee that those Netherlands shareholders have not claimed any tax benefit of India Hungary double

taxation avoidance agreement and claimed the tax credit of dividend distribution tax. Unless the assessee produces the tax return of those non-resident shareholders, the claim of the assessee deserves to be rejected at the threshold only.

ix. Under the scheme of section 115O, the provisions of international tax laws are not attracted.

x. As per India Hungary DTAA, if tax resident of that country receives dividend from an Indian company, then dividend distribution tax paid in India would be deemed to be tax paid in the hands of the shareholder. Therefore, the only alternative is that non-resident shareholder resident of Hungary can only claim tax credit in the return of income filed by it in Hungary. There is no tax consequence in India. This applies to Netherland shareholder also.

xi. The learned departmental representative vehemently relied upon the paragraph number [7] of the decision of the coordinate bench in **[**2021] 127 taxmann.com 774 (Mumbai - Trib.) In case of TOTAL OIL LTD wherein reference was made to the special bench. It was stated that those arguments raised by the learned departmental representative therein are also relevant herein. He submitted that before the Total Oil, the issue was with respect to India France double taxation avoidance agreement and there was no reference to Hungary India double taxation avoidance agreement and therefore now the issue of

most-favoured-nation clause would be any addition to those reasons. It was stated that special bench has stopped by saying that it is not an income in the hence of shareholder whereas, the coordinate bench where the reference was made to the special bench, has clearly held that benefit of double taxation avoidance agreement cannot be invoked so far as the issue of dividend distribution tax is concerned. He specifically referred to paragraph number 10 of that decision wherein several reasons are given which negative the claim of the assessee. That observation of the bench binds this bench. Therefore, on this ground also the benefit cannot be granted to the assessee.

020. We have carefully considered the rival contention and find that the coordinate bench in case of Deputy Commissioner of Income Tax Vs The TOTAL OIL India LTD ITA NO.6997/MUM/2019 (A.Y.2016-17) dated 20/04/2023 (SB) (MUMBAI) has categorically held that dividend distribution tax is a tax on the under distributed profits of the company and it is not a tax on the income of the shareholder. The payment of dividend distribution tax under section 115 O does not discharge the tax liability of the shareholders. It is a liability of the company and discharged by the company. Whatever be the conceptual foundation of such a tax, it is not a tax paid by, or on behalf of, the shareholder.

021. In paragraph number 82 and 83 the special bench has categorically held that:-

> "82. We are of the view that the above exposition of law is correct and we agree with the same. Therefore, the DTAA does not get triggered at all when a domestic company pays DDT u/s.115O of the Act."
>
> 83. For the reasons give above, we hold that where dividend is declared, distributed or paid by a domestic company to a non-resident shareholder(s), which attracts Additional Income Tax (Tax on Distributed Profits) referred to in Sec.115-O of the Act, such additional income tax payable by the domestic company shall be at the rate mentioned in Section 115 O of the Act and not at the rate of tax applicable to the non-resident shareholder(s) as specified in the relevant DTAA with reference to such dividend income. Nevertheless, we are conscious of the sovereign's prerogative to extend the treaty protection to domestic companies paying dividend distribution tax through the mechanism of DTAAs. Thus, wherever the Contracting States to a tax treaty intend to extend the treaty protection **to the domestic company** paying dividend distribution tax, only then, the domestic company can claim benefit of the DTAA, if any. Thus, the question before the Special Bench is answered, accordingly."

022. No provisions have been shown by the learned authorized representative wherein the **domestic company** is entitled to invoke the articles of double taxation avoidance agreement between India and the country of residence of non-resident shareholders. Of course, the non-resident shareholders can take benefit of the double taxation avoidance agreement if it benefits them, however Indian company cannot invoke provisions of double taxation avoidance agreement, as held by the special bench Therefore any attempt by the assessee to invoke the provisions of double taxation avoidance agreement is contrary to the decision of the special bench and therefore all those arguments deserves to be rejected which refers to the articles of double taxation avoidance agreement by the assessee i.e. an Indian company. Therefore, Indian company is deprived of referring to the Double Taxation Avoidance Agreement with respect to dividend distribution tax under section 115O of the act.

023. In view of the above discussion, respectfully following the decision of the special bench and various observations made with respect to the applicability of double taxation avoidance agreement, we dismiss the additional ground raised by the assessee.

024. Coming to the appeal of the learned assessing officer wherein the solitary issue is with respect to payment made for customer gifts etc. to Drs, the learned departmental representative submitted that that assessee has debited a sum of ₹ 482,612,000 as advertisement expenses in the

profit and loss account. On examination of the details are sum of ₹ 87,953,773/– in respect of Brand reminder is and ₹ 28,080,940 on purchase of medical books and journals provided to healthcare professional has been disallowed by the learned AO which is been deleted by the learned CIT – A. The learned CIT DR stated that despite the IMC regulation 2002, circular number 05/2012 dated 1/8/2012 issued by The Central Board Of Direct Taxes, the honourable Supreme Court in case of Apex laboratories private limited dated 22/2/2022 has categorically held that if any expenses prohibited by the law, the same cannot be allowed as deduction under section 37 (1) of the act he further stated that the honourable Supreme Court has held that doctors prescription can be manipulated and driven by the motive to avail the freebies offered to them by Pharma companies ranging from gifts such as gold coins fridges LCD TVs to funding international trips for vacation two or at what an medical conferences. He specifically referred to the various paragraphs of the decision it was therefore stated that the issue is squarely covered against the assessee by the decision of the honourable Supreme Court. He further stated that the above decision of the honourable Supreme Court held that any expenses incurred by the pharmaceutical company which is in violation of such guidelines is disallowable under section 37 (1) of the act. He submitted that there is no overall upper limit of such expenditure. Therefore, now the issue is squarely covered by the decision of the

honourable Supreme Court and accordingly now the order of the learned CIT – A on this ground is not sustainable.

025. The learned authorized representative vehemently submitted that the decision of the honourable Supreme Court does not apply to the facts of the case for the reason that assessee has merely given brand reminder and customer gifts and purchase of medical books and journals. It was submitted that nominal value of the such gifts are very low and therefore those expenditure amounting to ₹ 87,953,773 does not violate the guidelines of Indian medical Council. With respect to the purchase of medical books and journals it was submitted that these are provided to the Drs with a view to disseminate knowledge and education and does not fall within the prohibited expenditure. It was further submitted that in the case of Apex Laboratories (P) Ltd [2022) 442 ITR I (SC), the Hon'ble Supreme Court proceeded with the admission of both parties to the said decision that 'there was violation of MCI regulations and the Board Circular' and the entire decision of the Hon'ble Supreme Court is based on this very admission Nowhere in that decision there appears any reference to the violation of law of IMC Regulations' to be in dispute The only dispute the Hon'ble Supreme Court was called upon to decide was whether IMC Regulations are applicable to pharmaceutical companies or not even prior to CBDT Circular i.e. from the date of amended IMC Regulations.

026. We have carefully considered the rival contention and perused the orders of the lower authorities. We do not find

any reason to uphold the order of the learned and CIT – A which is now been decided by the honourable Supreme Court holding that any free gifts in any manner is prohibited by the provisions of Indian medical Council's rules and therefore same is not allowable under section 37 (1) of the act Brand reminder is in the purchase of medical books and journals for the medical professionals are specifically covered under the gift prohibited by the rules of Indian medical Council. Nobody can deny that it is not a free be given by assessee to those doctors. We also find that the decision of the honourable Supreme Court is a lot of land and decision is not at all narrow in its scope. Therefore, for this reason it needs to be applied to the facts of each case irrespective of its consequences. With respect to the claim of the assessee that purchase of medical books and journals are provided for dissemination of knowledge and education. There is no doubt about that that the profession of medical is always evolving. Therefore, the need of medical books and journals is imperative. Similarly is the purpose of attending conferences seminars et cetera by the Drs. We are also aware about the various clauses 1.2.2., 1.2.3. and 6.8.1 (g) of the IMC Regulations, wherein these are provided for. But those regulations does not provide that the Drs should accept freebies of books, journals, conference fees paid, seminar fees, registration charges, hotel charges et cetera paid by a pharmaceutical company. Nobody denies that every profession should have a continuing education program but the cost of such a continuing education

program should be borne by the professional himself and cannot be given as a free be by the other parties. The similarly, there is no bar in attending the conference and seminar purchasing books et cetera by the Drs, but footing of those bills defrayed by pharmaceutical companies is prohibited. Therefore, allowance of such expenditure in the hands of pharmaceutical company, which is required to be incurred by the Drs for their continuing professional education, is against the letter and spirit of the law as well as against decision of the honourable Supreme Court. It would always be unfair , improper to find escape routes from the decision of the honourable Supreme Court when it covers extensively all the possible outcomes. Undoubtedly, the decision of the honourable Supreme Court in case of Apex laboratories has strong binding precedent and serves as an authority on the facts with respect to the payment of freebies by the pharmaceutical companies and on all the legal issues arising out of such payment and its allowability in the hence of pharmaceutical companies. In view of this, we reverse the order of the learned and CIT – A deleting the disallowance of ₹ 87,953,773 on account of brand reminders and customer gifts and ₹ 28,080,940 of purchase of medical books and journals for the medical professionals i.e. doctors. Accordingly, ground number 1 – 3 of the appeal of the learned assessing officer is allowed.

027. Ground number 4 of the appeal is with respect to allowance of write-off of bad debts. The only grievance of the learned AO is that the deduction is allowed to the

assessee without granting assessing officer and opportunity to consider the submissions made by the assessee during the appellate proceedings. We find that it is not the claim of the revenue that the allowance of write-off of bad that is granted to the assessee by the learned first appellate authority is not sustainable in law. For the 11's of bad debts the AO was directed to furnish remand report, it was furnished on 8/1/2018 as stated in paragraph number 8.1 of the learned CIT appeal's order. Therefore, it is incorrect to say that no opportunity was available to the assessing officer for verification of the claim. In any case, when there is no grievance that the claim allowed to the assessee by the first appellate authority is easy in accordance with the law, we failed to understand what purpose it would achieve if the learned assessing officer is given and unfortunately once again. In view of this, we dismiss ground number 4 of the appeal.

028. In the result ITA number 2108/M/2018 filed by the learned AO is partly allowed.

029. Coming to the cross objection filed by the assessee in CO number 110, we find that in view of our decision in ground number 1 – 3 of the appeal of the learned AO, the cross objection of the assessee deserves to be dismissed as it also argues the same thing which has been decided in those grounds.

030. Accordingly CO number 110/M/2019 filed by the assessee is dismissed.

031. Now we come to the appeal of assessee in ITA 2132/M/2018.

032. Ground number 1 and 2 of the appeal of the assessee are with respect to the addition of unreconciled transactions appearing in the annual information return of ₹ 338,302 confirmed by the learned CIT – A. The facts of the case shows that there are nine parties which appeared in ITS details pertaining to the assessee wherein it was found that all those nine parties have deducted tax at source of the assessee for income amounting to ₹ 544,579. In this list of 9 parties, most of them are banks. Before the assessing officer, the assessee tried to contact all nine parties however, no response was received. The learned assessing officer also issued notices under section 133 (6) of the act to those nine parties, however no response was received. Therefore, the AO made an addition of the above amount. Before the CIT – A1 of the parties ICICI bank admitted that it had inadvertently reported the transaction in the annual information return of the assessee amounting to ₹ 206,227. The learned CIT – A deleting the same. Therefore, the assessee is in appeal before us.

033. The learned authorized representative explained the relevant extracts of AI are statement of the assessee placed at page number 99 – 123 of the paper book as well as the copies of the letter is dated 20 December 2016, 21 December 2016 and 22 December 2016 return to all those nine parties which are placed at page number 124 – 134

of the paper book. He further submitted that that the learned assessing officer himself is issued notices under section 133 (6) of the act which is not been responded by those parties. He submitted that as the TAN of all the parties are available with the assessing officer, the learned assessing officer should have enquired from those parties by looking at their TDS returns. He submits that the assessee has categorically denied having received such sum. It was further claimed that merely because information appears in ITS data of the assessee, which is not, populated by the assessee but by others, cannot result into the income of the assessee. He further referred to the ITS data and submitted that in that data in most of the entries of the Hong Kong and Shanghai banking Corporation, proper addresses also not available of such tax deduct he submitted that merely state is mentioned. He submitted that wherever the addresses are available the assessee has made communication with them but they failed to reply to the request of the assessee. Therefore, the confirmation of addition by the learned CIT – A is not proper. It deserves to be deleted.

034. The learned departmental representative vehemently supported the orders of the lower authorities and submitted that where the ITS data is populated though by the others but it pertains to the permanent account number of the assessee and therefore it is for assessee to show that there is no transaction with those parties. As assessee has failed to obtain any confirmation from those

parties, the learned lower authorities have made the addition, which is justified.

035. We have carefully considered the rival contention and perused the orders of the lower authorities. We find that there is a difference between the AIR data of the assessee and the income shown by the assessee in its books of accounts. It is not denied that AIR data is populated by others if they have transaction with the assessee. The AR data is populated based on permanent account number. Therefore, there are chances that certain times when AR data is populated by others, the permanent account number of the assessee may be punched wrongly. The assessee has attempted to contact those parties but none of them replied. Even the notices issued by the learned AO under section 133 (6) are also not responded by those nine parties except ICICI bank before the first appellate authority. No doubt, difference between AIR data and books of account triggers the examination by the learned AO. However, when the assessee is helpless and unable to obtain confirmation from those parties, it is the duty of the assessing officer to issue notices under section 133 (6) of the act to those parties, which the assessing officer has done in this case also, but unless the information is received contrary to what assessee has stated, the addition cannot be made in the hence of the assessee. In view of this we set-aside ground number 1 of the appeal to the file of the learned assessing officer to examine if the response to those 133 (6) notices are showing any evidence contrary to what assessee has stated, assessee

must be confronted with that, after hearing the assessee, the learned AO may decide the issue afresh. Accordingly, ground number 1 and 2 of the appeal are allowed with above direction.

036. Ground number 3 – 5 of the appeal is with respect to the disallowance of the claim of depreciation on goodwill arising on amalgamation of Wyeth laboratories Ltd with the assessee. The fact shows that there was a scheme approved by the honourable High Court of amalgamation between the assessee company Pfizer Ltd and Wyeth Ltd having an appointed date of 1 April 2013 whereby all the assets and liabilities of Wyeth Ltd were transferred and vested in the Pfizer Ltd at the fair value is from the appointed date. The above scheme received the approval of the honourable Bombay High Court on 31 October 2014. The fair valuation of the assets of Wyeth Ltd were derived at ₹ 83,780 lakhs and total liabilities were determined at 61,053 lakhs therefore the net assets taken over by the Pfizer Ltd of Wyeth Ltd were Rs. 22,727 lakhs. As per paragraph number 6 of the scheme the exchange ratio was determined wherein the assessee allotted seven equity shares of ₹ 10 each fully paid up in it is capital in respect of every 10 equity shares of ₹ 10 each fully paid up in the equity share capital of Wyeth Ltd. Undoubtedly this exchange ratio was determined by the recommendation of fair equity share exchange ratio report By S R Batliboi & CO LLP and Deloitte Haskins and Sells as per the report dated 23 November 2013. The accounting treatment was passed by the assessee in terms

of clause 7 of the scheme wherein in clause 7.3 it was stated that any excess of the fair value of the shares issued by the assessee is a consideration over the value of the net assets of Wyeth Ltd acquired by the assessee shall be adjusted in the assessee company's financial statement as goodwill arising on amalgamation. The valuation report dated 27/12/2014 was obtained of movable properties wherein estimated fair work at value of over factory, HORO and CHC was determined at ₹ 263,463,300/–. A further report of Cushman and Wakefield dated 6 May 2014 for valuation of an industrial unit located in Verna industrial estate was also prepared where the market value of the property was considered at ₹ 323 million. Further fair valuation of identified intangibles of Wyeth Limited vested in Pfizer Ltd pursuant to the amalgamation of Wyeth Limited with Pfizer Ltd was prepared by Deloitte as per letter dated 9 March 2015 stated that the fair value of identified intangibles as arrived at INR 427 2 million and value attributable to goodwill is an 690 8 million. Thus, it was stated that the balance purchase price of INR 11,180 million is towards intangible assets (including goodwill transferred from Wyeth to Pfizer pursuant to the amalgamation. Assessee claimed depreciation on the above goodwill of INR 11,180 million amounting to INR 271,63,00,000/–. Firstly, there was no claim before the assessing officer. The claim was made before the learned CIT – A. The learned CIT – A after obtaining the remand report of the AO denied the depreciation to the assessee.

The reasons given by the learned CIT – A4 disallowance of depreciation on goodwill are:-

i. In paragraph number five of the remand report dated 6/12/2017 submitted by the learned assessing officer wherein it was stated that that there was not sufficient material available on record for the quantification of goodwill.

ii. Further proviso 6 to section 32 (1) of the act prohibits the deduction.

iii. The decision of the coordinate bench in ITA number 722/Bangalore/2014 (United breweries versus ACIT) on identical facts and circumstances covers the issue against the assessee. The learned CIT – A tabulated the similarities between the decision of United breweries Ltd and the case of the assessee and found that there is no material difference.

iv. The decision of the honourable Supreme Court in case of Smiffs securities Ltd has been considered by the coordinate bench in case of united breweries Ltd.

037. The learned authorized representative explained the facts of the case he referred to the copy of the scheme of amalgamation approved by the honourable Bombay High Court placed at page number 135 – 153 of the paper book. He also explained that how goodwill has arise in India books of the assessee company on amalgamation as assessee has paid higher price than the fair value of the assets acquired from Wyeth Ltd. He referred to the

valuation report determining the fair value of tangible assets as well as intangible assets. He also referred to the relevant financial statement to show that how the fact of the scheme of the amalgamation was given there in. He submitted that the honourable Supreme Court in case of 348 ITR 302 in case of smiffs securities Ltd has categorically held that goodwill is an intangible asset on which depreciation is allowable to the assessee. He submitted that the goodwill is arising in the books of the assessee by payment of purchase consideration, which is higher than the fair market value of assets acquired. He further referred to the object of amalgamation and stated that such difference is in the nature of goodwill on which assessee is entitled for the appreciation. He submitted that the learned lower authorities have denied the depreciation on this goodwill by invoking the sixth proviso to section 32 (1) of the act. For this proposition the revenue authorities of relied upon the decision of Bangalore bench in case of United breweries Ltd. He submitted that identical issue arose before the honourable Karnataka High Court in ITA number 154 of 2014 in case of Padmini products private limited wherein by order dated 14/11/2014, while deciding the substantial question of law (iii), the honourable High Court after considering the facts of the case, which is funny material the same with the facts of the case of the assessee, held that sixth proviso to section 32 of the act restricts aggregate deduction both by the predecessor and successor and if in a particular year there is no aggregate deduction, the sixth proviso does not apply. Therefore,

until and unless it is the case of aggregate deduction, that proviso has no role to play. Honourable High Court further held that that proviso in any case will apply only in the year of succession and not in subsequent years and also in respect of overall quantum of depreciation in the year of succession. Therefore, third substantial question of law was answered in favour of the assessee and against the revenue. Therefore, it was submitted that the decision of the coordinate bench in case of United breweries Ltd is no more good law.

038. He further supported his claim by relying on several judicial precedents:-

i. M/s Toyo engineering India private limited ITA number 3279/M/2008 dated 13/10/2014

ii. Cosmos cooperative bank Ltd 64 SOT 90

iii. Shri Krishna drugs limited ITA number 198/Hyderabad/2011

iv. AP paper Mills Ltd 33 DTR 148

v. Mylan laboratories Ltd 180 ITD 558

vi. Arricent technologies Holdings Ltd ITA number 19/del/2013

vii. Urmin marketing private limited ITA number 1806/Ahmedabad /2019

viii. JX Nippon lubricants private limited 4985/Del/ 2019

ix. classic strips private limited versus DCIT ITA number 2378/M/2017

x. ACIT versus Lafarge aggregates and concrete India private limited ITA number 4476/M/2018

xi. DHL Logistics private limited versus DCIT ITA number 1030/M/2015

039. On the issue of claim of depreciation on goodwill arising out of the amalgamation, the learned departmental representative submitted as under:-

> *"Depreciation on goodwill created during amalgamation is not allowable.*
>
> *1.1 Strategic acquisition of a target, by an acquirer paying more than its book net worth, is common in merger and acquisition deals. The acquisition price is generally based on the fair market value of business. The excess price is paid on account of various factors such as brand, clientele, combined synergies, etc., which may not be recorded in the books of account by the target. Such excess price, i.e., purchase price that exceeds the value of net assets, is recorded as 'goodwill' in the books of account of the acquirer. However depreciation on such recorded goodwill is not allowable.*
>
> *1.2 Let us start by taking an example. P Co is the parent company and S Co is its subsidiary. Both are Indian companies. S Co gets merged with P Co. The*

merger qualifies as amalgamation under section 2(1B) of the Income-tax Act (hereinafter referred to as "the Act"). Thus P co is amalgamated company and S co is amalgamating company. The investment of P Co in S co was appearing as asset before amalgamation; let us say at Rs 100. At the time of merger, the valuation of S Co is done and it comes to Rs 1000. P Co would not show the acquired assets at Rs 100 and the balance 900 would appear on the asset side as "Goodwill" and on liability side as "Capital Reserve". Thus, without any physical exchange of money, only by book entry goodwill has been created in the books.

1.3 Taxpayers claim that they are eligible for depreciation under section 32(1)(1) of the Act is not acceptable. The relevant portion of the section 32 of the Act reads as under:

32. Depreciation

(1) In respect of depreciation of

(i) Buildings, machinery, plant or furniture, being tangible assets;

(ii) Know-how, patents, copyrights, trademarks, licenses, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1 day of April 1998, owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed....."

1.4 The claim is that Goodwill qualifies for depreciation in the nature of "any other business or commercial rights of similar nature". This term is placed in after terms like know-how, patents, copyrights, trademarks, licenses and franchises. Thus the term must be understood in light of the terms placed before it. Further goodwill is an intangible asset and is in the nature of commercial rights and hence, it is covered by this term. However the " main question in the present case is whether the depreciation is allowable on goodwill acquired during amalgamation.

1.5 As per section 32(1) of the Act 'depreciation', in the case of any block of assets, is to be computed on the written down value. According to Explanation 2 of section 32(1) "written down value of the block of assets" shall have the same meaning as in section 43 (6) (c). This section lays down the meaning of the term "written down value", as under:

> *43(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 depreciation actually allowed to him under this Act, or under the 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:

Provided that in determining the written down value in respect of buildings, machinery or plant for the purposes of clause (ii) of sub-section (1) of section 32, "depreciation actually allowed" shall not include depreciation allowed under sub- clauses (a), (b) and (c) of clause (vi) of sub-section (2) of section 10 of the Indian Income-tax Act, 1922 (11 of 1922), where such depreciation was not deductible in determining the written down value for the purposes of the said clause (vi);

(c) in the case of any block of assets,-

(i) in respect of any previous year relevant to the assessment year commencing on the 1st day of April, 1988, the aggregate of the written down values of all the assets falling within that block of assets at the beginning of the previous year and adjusted,-

(A) by the increase by the actual cost of any asset falling within that block, acquired during the previous year;

(B) by the reduction of the moneys payable in respect of any asset falling within that block, which is sold or discarded or demolished or destroyed during that previous year together with the amount of the scrap value, if any, so, however, that the amount of such reduction

does not exceed the written down value as so increased; and

(C) in the case of a slump sale, decrease by the actual cost of the asset falling within that block as reduced-

(a) by the amount of depreciation actually allowed to him under this Act or under the corresponding provisions of the Indian Income-tax Act, 1922 (11 of 1922) in respect of any previous year relevant to the assessment year commencing before the 1st day of April, 1988; and

(b) by the amount of depreciation that would have been allowable to the assessee for any assessment year commencing on or after the 1st day of April, 1988 as if the asset was the only asset in the relevant block of assets,

so, however, that the amount of such decrease does not exceed the written down value;

(ii) in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 1989, the written down value of that block of assets in the immediately preceding previous year as reduced by the depreciation actually allowed in respect of that block of assets in relation to the said preceding previous year and as further adjusted by the increase or the reduction referred to in item (i).

1.6 Thus, if an asset is acquired during the previous year and it falls in a block of asset (like intangible in this case), then the written down value of that block of asset (to which such acquired asset belongs) would be increased by the actual cost of the asset acquired. Now definition of 'actual cost" is given in section 43(1). According to this "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. Explanation 7 of section 43(1) reads as below:

> *Explanation 7.-Where, in a scheme of amalgamation, any capital asset is transferred by the amalgamating company to the amalgamated company and the amalgamated company is an Indian company, the actual cost of the transferred capital asset to the amalgamated company shall be taken to be the same as it would have been if the amalgamating company had continued to hold the capital asset for the purposes of its own business.*

1.7 In the case before us, goodwill was transferred by the amalgamating company (S Co) to amalgamated company (P Co). According to this explanation, the 'actual cost' of goodwill to the amalgamated company (P Co) shall be same as it would have been if the amalgamating company (S Co) had continued to hold the capital asset for the purpose of its own business.

Since the actual cost of goodwill in the case of amalgamating company (5 Co) is zero, the actual cost in the case of amalgamated company (P Co) shall also be zero (and not the amount it paid to acquire the goodwill).

1.8 To clarify further, Explanation 2 to clause 43(6)(c) reads as under

> *Explanation 2.-Where in any previous year, any block of assets is transferred,-*
>
> *(a) by a holding company to its subsidiary company or by a subsidiary company to its holding company and the conditions of clause (lv) or, as the case may be, of clause (v) of section 47 are satisfied; or*
>
> *(b) by the amalgamating company to the amalgamated company in a scheme of amalgamation, and the amalgamated company is an Indian company,*
>
> *then, notwithstanding anything contained in clause (1), the actual cost of the block of assets in the case of the transferee-company or the amalgamated company, as the case may be, shall be the written down value of the block of assets as in the case of the transferor-company or the amalgamating company for the immediately preceding previous year as reduced by the amount of depreciation actually allowed in relation to the said preceding previous year.*

1.9 Thus the Act clearly lays down that the actual cost of the block of asset (intangible block in this case) in the hand of the amalgamated company (P Co) would be written down value in the immediate preceding year in the case of amalgamating company (S Co). Since, the written down value of the intangible block of asset was zero in the books of the amalgamating company (S Co), the actual cost would remain zero in the hand of amalgamated company (P Co).

1.10 Hence, the above provisions of law make it clear that the cost of goodwill in the hand of amalgamated company (P co) shall be zero for the purpose of depreciation.

1.11 Without prejudice to above argument, where it has been demonstrated that under the Act, cost of goodwill acquired during amalgamation shall be zero, I would like to bring to highlight the provisions of 6th proviso (5th proviso before Finance Act 2015) to section 32(1), which reads as under:

> *Provided also that the aggregate deduction, in respect of depreciation of buildings, machinery, plant or furniture, being tangible assets or know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets allowable to the predecessor and the successor in the case of succession referred to in clause (xill), clause (xilib) and clause (xiv) of section 47 or section 170 or to*

the amalgamating company and the amalgamated company in the case of amalgamation, or to the demerged company and the resulting company in the case of demerger, as the case may be, shall not exceed in any previous year the deduction calculated at the prescribed rates as if the succession or the amalgamation or the demerger, as the case may be, had not taken place, and such deduction shall be apportioned between the predecessor and the successor, or the amalgamating company and the amalgamated company, or the demerged company and the resulting company, as the case may be, in the ratio of the number of days for which the assets were used by them.

1.12 Thus even if the intangible block of asset has some value (which is denied as it has been explained above that it has zero value) the depreciation under this proviso is to be restricted to the value considering that amalgamation has not taken place. Since in the hand of the amalgamating company the depreciation would have been zero, there cannot be depreciation in the hand of the amalgamated company. This issue was also dealt by ITAT Bangalore vide its order dated 30 Sept 2016, in the case of United Breweries Limited in I.T. A. No.722, 801 & 1065/Bang/2014. The relevant discussion in the ITAT order is produced below:

"11……..The assessee is in the business of production and sale of Beer. During the previous year relevant to assessment year under consideration, the assessee's subsidiaries namely Karnataka Breweries & Distillery Ltd. (KBDL), London Draft Pubs Pvt. Ltd. (LDPPL) and London Pillsner Breweries Pvt. Ltd. (LPBPL) were amalgamated with the assessee. The assessee claimed depreciation of Rs.15,57,54,392 on goodwill of Rs.62,30,17,566. Thus goodwill was shown as a result of merger / amalgamation of KBDL. Therefore this dispute is confined only with respect to the valuation of the assets recorded by the assessee in its books post amalgamation which were taken from KBDL. The Assessing Officer asked the assessee to explain how this goodwill came to be added to the fixed assets. It was explained that goodwill arose on account of acquiring KBDL for a purchase consideration exceeding fair value of tangible assets and other net current assets from that company. KBDL became a wholly owned subsidiary of the assessee in the preceding year by virtue of acquisition of shares of the said company from shareholders for a consideration of Rs.180.52 Crores. During the year under consideration KBDL got amalgamated with the assessee as per the order of the Hon'ble High Court. Consequently all assets and liabilities as on 1.4.2006 were taken over into account for the tax purpose by the assessee. The assessee

explained before the Assessing Officer that while entering the tangible assets i.e. land, building and plant and machinery in its books the Fair Market Value (FMV) as on that date one entered. The assessee has also produced the valuation report of the valuer who has computed the FMV of the tangible assets on the basis of replacement method and after reducing the depreciation from the replacement price, the FMV has been arrived by the valuer Sri A. V. Sethi & Associates. Thus the difference between the fair value and consideration was shown as goodwill. The Assessing Officer did not accept the contention of the assessee and observed that the instead of fair value of asset based on the replacement value of the asset adopted in the valuation report the Fair Market Value (FMV) of assets should have been adopted in the books of accounts and consequently the valuation of the goodwill would be reduced by Rs.24.48 Crores. The Assessing Officer has also observed that on the land valuation, the valuer has adopted the guidance rate without considering the sale incidents of comparable land. Thus the Assessing Officer observed that if the replacement of cost of building, plant and machinery and higher value of land is taken to the books, there would not be any goodwill. The Assessing Officer concluded that differential amount being shown as goodwill cannot be considered as amount paid for brewing license

as the assessee has not got the valuation of the license. Accordingly, the Assessing Officer has disallowed the depreciation on the goodwill on the ground that there is no goodwill if proper valuation is assigned to the tangible asset and land. On appeal, the CIT (Appeals) has concurred with the decision of the Assessing Officer by considering the fact that the value of the goodwill in the books of the KBDL is only Rs.7.45 Crores which has been shown by the assessee at Rs.62.30 Crores. The CIT (Appeals) was of the view that when the financial results of the KBDL shows that there was a profit of Rs.2.14 Crores for the Assessment Year 2004-05 and loss of Rs.1.89 Crores for the Assessment Year 2005-06 then the assessee has failed to justify the valuation of goodwill estimated at Rs.62.30 Crores with reference to the average profit. Thus the CIT (Appeals) held that there is no justification for adopting the balance figure of excess consideration over the net asset without admitting to support the said valuation.

12. Before us, the Id. AR of the assessee has submitted that issue of depreciation on goodwill is concerned; the same is covered by the judgment of Hon'ble Supreme Court in the case of CIT Vs. Smifs Securities Ltd. 252 CTR 233 (SC). He has further submitted that valuation of goodwill is nothing but the differential figure between the consideration and the FMV of the

tangible asset and therefore the claim of depreciation cannot be denied on the ground that there is no goodwill and the assessee has failed to show the justification for excess consideration excluding the value of tangible assets. He has referred to the valuation report and submitted that valuer has adopted the replacement cost method and after allowing the depreciation for a period during which the assets were already under use, the FMV has been arrived. In support of his contention he has relied upon the judgment of Hon'ble Bombay High Court in the case of Chowgule& Co. Pvt. Ltd. Vs. Addl. CIT (2016) 95 CCH 0021 (Mum HC) as well as the decision of the Hyderabad Bench of the Tribunal in the case of A.P. Paper Mills Ltd. Vs. ACIT Dt.4.11.2009 in ITA No.218/Hyd/2006. Thus the Id.AR has submitted that when the assessee has produced the valuation report and valued of the tangible asset then without giving the correct value by the Assessing Officer the rejection of the valuation report is not justified. He has further submitted that the Assessing Officer has not determined the correct valuation if the valuation report produced by the assessee was doubted or found to be incorrect. The Assessing Officer has assigned more value to the tangible asset which means the depreciation on the tangible asset has been accepted on the higher valuation. The method adopted by the value is well accepted method of valuation and

therefore without giving any valuation by the Assessing Officer the claim of depreciation cannot be rejected only by doubting the valuation of the assessee.

13. On the other hand, the Id. DR has submitted that the Assessing Officer has clearly brought on record that there is no justification of the valuation of the goodwill when the assessee has not acquired any intangible asset from the KBDL and further the alleged license. He has further contended that even otherwise the claim of depreciation cannot be allowed in the hand of the assessee more than the depreciation which would have been allowed in the hand of KBDL as per the 5th proviso to Section 32(1) of the IT Act. He has referred to the assessment order and submitted that the Assessing Officer has considered the said proviso while disallowing the claim of depreciation. The CIT (Appeals) has confirmed the action of the Assessing Officer and therefore the claim of depreciation is not allowable as per the 5th proviso to Section 13(2)(1) of the Act. The Id. DR has also referred to the Expln. 3 to Section 43(1) and submitted that the Assessing Officer has the power to examine the valuation of the assets acquired by the assessee if these assets were already in use for business purpose and if the Assessing Officer is satisfied that the main purpose of transfer of such assets was the

reduction of the liability to Income-tax then the actual cost of the asset to the assessee shall be such an amount as the Assessing Officer determines. Therefore the Assessing Officer has rightly determined the valuation of the goodwill at NIL and the assessee has failed to substantiate the valuation of the goodwill. The Id. DR has relied upon the orders of

the authorities below.

13.1 In a rejoinder the Id. AR of the assessee has submitted that when the assets are introduced in the books of the assessee being the balancing figure of excess consideration over the value of the tangible assets then 5th proviso to Section 32(1) is not applicable. He has further submitted that in all the cases before the Hon'ble Supreme Court as well as Hon'ble High Courts, the revenue has not raised this objection of restricting the claim of depreciation by applying 5th proviso to Section 32(1) of the Act. Therefore the revenue cannot raise this objection when it was not raised in the other cases before the Hon'ble Supreme Court and Hon'ble High Courts.

14. We have considered the rival submissions as well as the relevant material on record. During the year under consideration the assessee inter alia amalgamated its wholly owned subsidiary KBDL. The assessee acquired the entire shareholding of the

company from the shareholders for consideration of Rs180.52 Crores. In the books of accounts, the assessee has recorded the value of the assets on the basis of revaluation done by the valuer and thereby shown the goodwill at Rs.62.30 Crores. The Assessing Officer has not accepted the claim of depreciation on goodwill by holding that the assessee has not acquired any intangible assets in pursuant to the amalgamation of its subsidiary with the assessee and therefore as per the Assessing Officer the goodwill was not at all in existence. It is pertinent to note that the Assessing Officer has the jurisdiction and power to examine the valuation of the assets as per Expin.3 to Section 43(1) of the Act which reads as under:

> *"43 (1)..... Explanation 1-…. Explanation 2... Explanation 3.-Where, before the date of acquisition by the assessee, the assets were at any time used by any other person for the purposes of his business or profession and the Assessing Officer is satisfied that the main purpose of the transfer of such assets, directly or indirectly to the assessee, was the reduction of a liability to income-tax (by claiming depreciation with reference to an enhanced cost), the actual cost to the assessee shall be such an amount as the Assessing Officer may, with the previous approval of the Joint Commissioner, determine having regard to all the circumstances of the case."*

As it is clear from the Expln.3 to Section 43(1) that if the Assessing Officer is satisfied that the main purpose of the transfer of such assets was the reduction of liability to income tax by claiming depreciation on the enhanced cost then the actual cost to the assessee shall be determined by the Assessing Officer. In the case on hand, since there is an amalgamation of the subsidiary with the assessee therefore all the assets which came to the assessee are already in use by the subsidiary and consequently the valuation of all the assets are subjected to the verification of the Assessing Officer as per Expl.3 of Section 43(1) of the Act. However, the Assessing Officer chose to examine the valuation of goodwill alone in order to disallow the claim of depreciation on the enhanced value of goodwill. We find that the Assessing Officer has not adopted any prescribed or well accepted method for valuation or actual cost of the goodwill in the hands of the assessee but he has doubted the valuation of the tangible assets and was of the view that the assessee has deflated the valuation of the tangible assets by the method of cost of replacement instead of FMV. The scope and objective of the Expl.3 of Section 43(1) of the Act is to check the excess claim of depreciation by enhancing cost of assets acquired which were already in use by other person. Therefore in case of valuation of goodwill the Assessing Officer ought to have

examined the valuation of all the assets taken over by the assessee under the amalgamation and thereby to determine the actual cost to the assessee for the purpose of claim of depreciation. In this case there is no doubt that the value of the goodwill was shown in the books of the KBDL at Rs.7.45 Crores which has been enhanced in the books of accounts of the assessee to Rs.62.30 Crores. The assessee has forcefully contended that the valuation of the goodwill is nothing but only the differential value between the consideration and FMV of the tangible assets. Thus the Id. AR has contended that Assessing Officer cannot disturb the valuation of the goodwill when it is a differential amount between the consideration and the FMV of the tangible assets. If such claim of goodwill and depreciation is allowed then it would render the provisions of Expin. 3 to Section 43(1) of the Act redundant, otherwise in every case of transfer, succession or amalgamation the party would claim excessive depreciation by assigning arbitrary value to the goodwill. Therefore the entire assets taken over by the assessee under the amalgamation are subjected to the Expl.3 of Section 43(1) of the Act and if the Assessing Officer finds that the assessee has claimed excess claim of depreciation by enhancing the cost of goodwill then actual cost of goodwill can be determined only by considering the actual cost of the other assets so acquired under amalgamation.

15. There is another aspect involved in this issue of claiming depreciation on the enhanced cost of goodwill in cases of succession / amalgamation as it is restricted in the hand of successor or amalgamated company only to the extent as apportioned between the amalgamating and amalgamated company in the ratio of number of days for which the assets used by them. Further the deduction shall be calculated at the prescribed rate as if the amalgamation has not taken place. For ready reference, we quote the provisions to section 32(1) as under:

> *"Section 32. (1) In respect of depreciation of (1) buildings, machinery, plant or furniture, being tangible assets; (ii) know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquisition by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed-(1) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed; (i) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed: Provided*

also that the aggregate deduction, in respect of depreciation of buildings, machinery, plant or furniture, being tangible assets or knowhow, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets allowable to the predecessor and the successor in the case of succession referred to in clause (xiii), clause (xillb) and clause (xiv) of section 47 or section 170 or to the amalgamating company and the amalgamated company in the case of amalgamation, or to the demerged company and the resulting company in the case of demerger, as the case may be, shall not exceed in any previous year the deduction calculated at the prescribed rates as if the succession or the amalgamation or the demerger, as the case may be, had not taken place, and such deduction shall be apportioned between the predecessor and the successor, or the amalgamating company and the amalgamated company, or the demerged company and the resulting company, as the case may be, in the ratio of the number of days for which the assets were used by them."

This proviso provides that depreciation allowable in the case of succession, amalgamation or merger, demerger should not exceed the depreciation allowable had the succession not taken place. In other words, the allowance of depreciation to the successor / amalgamated company in the year of amalgamation would be on the written down value of the assets in the books of the amalgamating company and not on the cost as recorded in the books of amalgamated company. The case of amalgamation is not regarded as transfer for the purpose of capital gain as provided under Section 47(vi) of the Act and therefore such cases are exempted from capital gain which is otherwise chargeable to tax on transfer of assets. In the case on hand the business of the subsidiary was transferred to the assessee by way of amalgamation therefore it would not be regarded as transfer of asset for the purpose of capital gain. Hence the claim of depreciation on the assets acquired under the scheme of amalgamation is restricted only to the extent if such amalgamation has not taken place. The Assessing Officer made a reference to 5th proviso to Section 32 in para 5.7 as under:

> *"5.7 As highlighted above, the company paid Rs.180.52 Crores in the preceding year as consideration for acquiring shares of KBDL from original owners and thereby*

KBDL became a subsidiary last year. Thus, the consideration paid is for shares but not for individual assets. In this year, KBDL which had earlier become subsidiary got amalgamated with the assessee company. As per 5th proviso under section 32(1)(ii), the aggregate deduction in respect of depreciation on any tangible or intangible assets allowable to amalgamating company and the amalgamated company shall not exceed the deduction calculated at the prescribed rates as if the amalgamation had not taken place and such deduction shall be apportioned between these companies in the ratio of period of usage of assets. In view of this explanation, KBDL was not claiming any goodwill as an asset eligible for depreciation. If amalgamation is not considered, there would not be any deduction of depreciation on goodwill. Therefore, under this provision also, the assessee is not eligible for depreciation on goodwill."

However the Assessing Officer has proceeded to hold the value of the goodwill as shown by the assessee is not justified. It is pertinent to note that once the claim of depreciation is restricted under the 5th proviso to section 32(1)(i) then the valuation issue become irrelevant. The CIT (Appeals) has also concurred with the view of

the Assessing Officer regarding the applicability of the 5th proviso to Section 32(1) of the Act in para 5.4 as under:-

> *5.4 It is also highlighted both in the assessment order and remand report that no depreciation on goodwill was claimed by KBDL before amalgamation. Therefore, as per the 5th proviso to Section 32(1)(i), the appellant is not entitled to depreciation. This is a valid and relevant argument and appellant has not offered any rebuttal to this contention of the A.0."*

It is not the case of the assessee that the subsidiary has claimed any depreciation of goodwill. Therefore by virtue of 5th proviso to Section 32(1), the depreciation on the hands of the assessee is allowable only to the extent if such succession has not taken place. Therefore the assessee being amalgamated company cannot claim or be allowed depreciation on the assets acquired in the scheme of amalgamation more than the depreciation is allowable to the amalgamating company. As regards the decision of Hon'ble Supreme Court in the case of CIT Vs. Smiff Securities Ltd. (2012) 348 ITR 302, the said ruling of the Hon'ble Supreme Court is only on the point whether the goodwill falls in the category of intangible assets or any other business or commercial rights of similar

nature as per the provisions of section 32(1) of the Act. Therefore there is no quarrel on the issue that goodwill is eligible for depreciation. However, the said judgment would not over-ride the provisions of 5th proviso to Section 32(1) of the Act which restricts the claim in the cases specified there under. The consideration paid by the assessee for acquiring the shareholding of the subsidiary in the earlier years is not relevant for the issue of depreciation on the assets taken under amalgamation and for the purpose of 5th proviso to Section 32(1) of the Act. Accordingly, in view of the above facts and circumstances of the case as well as the above discussion, we hold that the claim of depreciation in the hands of the assessee is subjected to the 5th proviso to Section 32(1) of the Act. Accordingly, this issue is decided against the assessee."

1.13 Thus Hon'ble ITAT did consider the decision of Hon'ble SC in the case of CIT Vs. Smiff Securities Ltd and held that Hon'ble SC only ruled on the issue as to whether goodwill falls in the category of Intangible assets or any other business or commercial rights of similar nature. Hence, it was held that due to operation of 5th proviso (now 6th proviso) to Section 32(1) of the Act, the depreciation on goodwill to assessee is allowable only to the extent if such amalgamation had not taken place. Thus no depreciation was allowed on the goodwill. This decision of the ITAT is not in conflict with Hon'ble SC

decision in the case of CIT Vs. Smiff Securities Ltd, 348 ITR 302 (2012) as has been observed by the ITAT in the judgment.

2. Reliance placed by the assessee on the decision of Hon'ble SC in case of Smiff Securities Ltd.,348 ITR 302 (2012) is not correct due to the reasons given in the trailing paragraphs.

2.1. In this case the assessee, 'Smiffs Securities Ltd., entered into the scheme of amalgamation with YSN Shares & Securities P Ltd. ('Amalgamating company'). The scheme was duly sanctioned by High courts with retrospective effect from April, 1st 1998. The assets and liabilities of amalgamating company were transferred and vested in the assessee. The assessee treated the difference between the consideration and the net value of assets of the amalgamating company, as "goodwill" and claimed depreciation on it. The depreciation on goodwill was claimed treating the same as an intangible asset u/s 32 of the IT Act. Explanation 3 to Sec 32(1) states that the expression 'asset' shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature. The AO rejected the claim on the basis that "goodwill" was not an "intangible asset" as defined in Explanation 3 to Sec 32(1) and the assessee had not paid anything for the same.

The CIT (A) and ITAT ruled in favour of the assessee, that the difference between the cost of the assets and the amount paid in the process of amalgamation constituted "goodwill. Further, it was held that the assessee in the process of amalgamation had acquired capital right in the form of goodwill, because of which the market worth of the assessee stood increased. This aspect was not challenged by the department during further appeal before the HC. HC affirmed the claim of the assessee and the IT department filed a SLP before SC. Ruling on favour of the assessee, SC held that 'goodwill' would fall under the expression 'any other business or commercial right of a similar nature' as per Sec 32(1)().SC observed that "Explanation 3 states that the expression 'asset' shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature....The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3(b)." SC also held that IT Department had not challenged the fact that assessee acquired capital right in the form of goodwill.

2.2.It may be highlighted that there were two questions of law before Hon'ble SC. The first was whether stock exchange membership cards are assets eligible for depreciation. This

question was answered in affirmative as the issue was already covered in the case of Techno Shares and Stock Limited (discussed subsequently). The second question was 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. This was also answered in affirmative. It is accepted that goodwill is an intangible asset and depreciation on goodwill is allowable. However, the issue in this case is whether the depreciation on goodwill acquired during amalgamation is allowable. This question was not considered by Hon'ble SC in the case of Smifs Securities, as it was not raised before them. In that case as well there was an amalgamation and the goodwill was acquired by the amalgamated company from the amalgamating company. However, the provisions of explanation 7 to section 43(1), explanation 2 to section 43(6)(c) and sixth proviso to section 32(1) were not raised before Hon'ble SC. Hence, there was no question of law before SC which required them to answer if depreciation on goodwill (acquired during amalgamation) is allowable in the light of aforesaid provisions of the Act.

2.3. In this regard we would like to quote from Earl of Halsbury LC in the case of Quinn v. Leather [1901] AC 495 (HL), wherein it was held that

"A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to logically follow from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

2.4. This decision of House of Lords was quoted with approval by the Constitution Bench of Supreme Court in the case of State of Orissa v. Sudhansu Sekhar Misra, (1968) 2 SCR 154(SC) wherein It stated that a decision is only an authority for what it actually decides. Thus we must appreciate that Hon'ble SC in Smiff Securities only decided that goodwill is depreciable. Whether other sections of the Act restrict depreciation in case of goodwill acquired during amalgamation, was not an issue before Hon'ble SC and therefore the decision of Hon'ble SC should not be extended to such issues which it never decided.

2.5. Further, it is submitted that in the case of Rameshwar Lal Sanwarmal v. CIT 122 ITR1(SC), Hon'ble SC had held that it is open to reconsidering its earlier decision if new arguments or facts are brought before it. The SC held that:

"It would be staining logic to an absurd limit to say that though this contention

was not raised, not argued, not discussed, not decided, yet it must be held to have been implicitly decided because through an error committed by this court, an answer was given in favour of the revenue in ignorance of the true position".

2.6. Thus, it is respectfully submitted that the decision of Hon'ble SC is restricted to the interpretation that goodwill is a capital asset under the category of intangibles and that depreciation is allowable to it under section 32(1). There was no occasion for Hon'ble SC to adjudicate as to whether the actual cost of goodwill acquired by the amalgamated company is to be taken as zero in view of provisions of explanation 7 to section 43(1) and explanation 2 to section 43(6)(c) or that no depreciation is allowable due to provision of sixth proviso (earlier fifth proviso) to section 32(1), as these issues were not agitated before Hon'ble SC. The same observation was also made by ITAT Bangalore in the case of United Breweries cited above.

3. Conclusion: It has been clearly established above that the issue before Hon'ble SC in Smiff Securities was only that whether goodwill is an intangible asset and hence eligible for depreciation under section 32(1) of the Act. Hon'ble SC has correctly laid down

the law that goodwill is an intangible asset and eligible for depreciation under section 32(1) of the Act. However, it is a different issue here. There are certain sections of the Act which restrict allowability of depreciation acquired during amalgamation. These sections of the Act have not been placed before Hon'ble SC in Smiff Securities or before Hon'ble SC/HC/ITAT in other cases cited above. I have cited relevant SC decisions to support my contention that the decisions cited above should be read only in the context of issues which were placed before them and the issues which were not before them should be decided independently on merit. It has been demonstrated that the actual cost of goodwill acquired by the amalgamated company is to be taken as zero in view of provisions of explanation 7 to section 43(1) and explanation 2 to section 43(6)(c). Further, it has also been submitted that even if it is assumed(not admitted) that there is some cost of acquisition of goodwill, no depreciation is allowable due to provision of sixth proviso (earlier fifth proviso) to section 32(1).

3.1. Ld. CIT(A) has dealt with this issue in detail vide paras 7.1 to 7.6 of order. In view of the above submission it is humbly submitted that the appeal of the assessee on this ground may be dismissed."

040. The learned departmental representative vehementally submitted that there is no question of granting depreciation to the assessee over and above the assets acquired by the assessee from the target company. He

submitted that as per section 32(1) of the income tax Act 'depreciation' is to be computed on 'actual cost'/'written down value of the block of assets'. Such returned down value of the block of assets is required to be ascertained in accordance with section 43. In respect of 'capital assets' transferred by the target company to the successor company, the cost/written down value of the transferred capital asset to the successor company shall be taken to be the same as it would have been had the target company continued to hold the capital asset for the purposes of its own business. Therefore, there is no question of providing depreciation on the goodwill.

041. It was further stated that goodwill is merely an accounting entry, assessee has failed to justify that it acquired any assets by paying the goodwill of ₹ 11180 million. It was further submitted that valuation report of the assessee itself shows at page number 277 of the paper book that valuation of goodwill is only INR 690 8 million. He further submitted that even INR 690 8 million stated is merely a balancing figure because the valuation that are including workforce, synergies, customer relationship, distribution network, vendor relationships, contract et cetera are not available. He submitted that only intangibles identified by the assessee are of ₹ 4272 million. He further submitted that quantification of goodwill is the issue raised by the assessing officer in the first remand report and therefore complete facts are not available before the lower authorities. He further stated that merely because assessee has recorded goodwill in its books of account,

does not become a depreciable asset, unless it satisfies provisions of the income tax act and further represents the actual intangible asset. Therefore, the depreciation is correctly denied.

042. The learned authorized representative vehemently objected the submission of the learned that departmental representative stating that he does not have any authority to improve upon the case of the revenue. Therefore there is no reason learned departmental representative to add further arguments what has not been the case of the lower authorities.

043. We have carefully considered the rival contention and perused the orders of the lower authorities. The facts stated above are undisputed that Wyeth Ltd amalgamated with Pfizer Ltd in terms of scheme of amalgamation approved by the honourable High Court. Accordingly, Wyeth Ltd shareholders were compensated by issue of 7 shares of Pfizer Ltd in exchange of 10 shares of Wyeth Ltd. The appointed date was 1 April 2013 on which date all the assets and liabilities of Wyeth Ltd were transferred and vested in the assessee company recording them at the fair value after eliminating the transactions and balances of the two entities. Accordingly total assets of Rs. 83,780 crores and the liability of Rs. 61,053 crores were taken resulting into the net assets taken over of ₹ 22,727 crores. Assessee accounted the amalgamation under the purchase accounting method as per accounting standard 14 – accounting for amalgamation issued by ICAI. The

assessee recorded in its books of account fixed assets and other assets amounting to ₹ 1630 crores. As assessee has paid market value of the shares of ₹ 12,810 crores, balance sum of ₹ 11,180 crores was treated as same is located to the intangible asset. Out of the above sum of 11,180 crores assessee has identified value of intangible assets in the form of various brands/trademark et cetera of ₹ 4272 crores. The balance sum of ₹ 6908 crores was accounted for as Goodwill. This is supported by a report of Deloitte Touch and Tomastu India private limited dated 9 March 2015 placed at paper book page number 246 and relevant data. Page number 277 of the paper book. When the value of goodwill was put at ₹ 6908 crores, apparently it is a balancing figure, for which the report says that goodwill is also an intangible asset of the business and we have been informed by the management that the same represents the value of various intangible assets/aspects of Wyeth which we have not been valued separately as at the valuation date including workforce, synergies, customer relationships, distribution network, vendor relationships, contract et cetera. This was also recorded in financial statements signed by BSR and Co LLP on 30 March 2015 post amalgamation. In note number 11 of fixed assets, the same was also accounted for in the books of account. Thus it is apparent that in books of account the assessee recorded trademark separately of ₹ 4272 crores and goodwill also of ₹ 6908 crore separately. In the tax audit report, form number 3CD with respect to clause 18 of the particulars of addition to the fixed assets

assessee made an addition to the fixed assets under the intangible assets on 1/4/2013 of an amount of ₹ 186,52,00,000 claiming depreciation thereon at the rate of 25% giving the description of the asset as Goodwill (including the right to use the trademarks of ₹ 4,272,000,000 (refer not 6 of annex 4 of tax audit report and not 11 fixed assets of the financial statements. This was stated to be the purchase value. Admittedly before the assessing officer no explanation was given. The learned assessing Officer categorically asked the reason of substantial reduction in the combined income offered by both these companies in their original return compared to the revised return filed by the assessee. After the assessment proceedings are over, assessee submitted compliances to that letter wherein the learned assessing officer questioned decrease in the return income on amalgamation. Therefore, neither the quantification nor the examination of conditions of depreciation on goodwill arising on amalgamation in the hence of the assessee was examined. In the remand report, when the claim was made before the learned CIT – A, the learned assessing officer categorically stated that quantification of goodwill is not been made, however it objected that even otherwise fifth proviso to section 32 (now sixth proviso) prohibits 11's of the goodwill on the basis of the decision of the coordinate bench. The learned CIT – A upheld the view of the learned assessing officer is stated in the remand report. We find that if in any previous year there is any amalgamation than for the purpose of computing the

appreciation for that previous year, it would be first assumed as if no amalgamation had taken place and thereafter depreciation so computed shall be apportioned between the amalgamating company and the amalgamated company in the ratio of number of days for which the assets were used by both the entities. This has been answered by the honourable Karnataka High Court in paragraph number 9 of the decision in case of Padmini Products Pvt Ltd V DCIT [2020] 121 taxmann.com 237 (Karnataka)/[2021] wherein fifth proviso to section 32 was discussed as under:-

> **"9.** Thus, it is evident that 5th proviso to section 32 of the Act restricts aggregate deduction both by the predecessor and the successor and if in a particular year there is no aggregate deduction, the 5th proviso does not apply. Thus, it is axiomatic that until and unless it is the case of aggregate deduction, the proviso has no role to play. The 5th proviso in any case will apply only in the year of succession and not in subsequent years and also in respect of overall quantum of depreciation in the year of succession. Accordingly, the third substantial question of law is answered in favour of the assessee and against the revenue."

044. Further that proviso applies in the case of the appointed date being in between the previous year. When on the first day of previous year, the assets are transferred, then in such case fifth proviso to section 32 cannot apply because

in case of predecessor company there cannot be any claim of depreciation. In the present case also the date of transfer of the asset is at the beginning of the previous year, therefore proviso 5 to section 32 does not apply.

045. However the learned CIT DR has categorically stated that the claim of depreciation was not before the AO, in the remand report the AO has questioned the quantification and has relied upon the decision of United breweries Ltd. The decision of United breweries Ltd was not only with respect to proviso 5 of section 32, there was a consideration of the decision of the honourable Supreme Court, as well as the cost of acquisition of goodwill under section 43 (1) of the act. He submitted that in the present case also the provisions of explanation 2 to section 43 of the income tax act clearly applies. As we already noted that the learned assessing officer has categorically stated that subject to the quantification of depreciation on goodwill, at the threshold itself it cannot be allowed by invoking proviso 5 of section 32 of the act, we find that the learned CIT DR is not improving the case of the AO but merely saying that the provisions of the law i.e. the income tax act cannot be ignored.

046. We find that assessee has recorded in its books of account goodwill of ₹ 6908 crores. Obviously honourable Supreme Court has categorically held that it is an intangible asset on which depreciation can be allowed under the provisions of section 32 (1) (ii) of the act. The exclusion of goodwill as been inserted by the finance act 2021 with effect from

1 April 2021. Therefore, prior to that, the goodwill was a depreciable asset under section 32 (1) (ii) of the act.

047. So far as the computation of the goodwill is concerned, it is the actual cost of the asset which needs to be determined for the purpose of computation of depreciation. For the purpose of computation of actual cost, the provisions of section 43 (1) of the act cannot be ignored. Explanation 7 to that section provides that where, in a scheme of amalgamation, any capital asset is transferred by the amalgamating company to be amalgamated company and the amalgamated company is an Indian company, the actual cost of the transferred capital asset to the amalgamated company shall be taken to be the same as it would have been if the amalgamated company had continued to hold the capital assets for the purposes of its own businesses. Further, reference to page number 277 being page number 33 of the valuation report clearly shows that the difference in the purchase price and the fair value of other identified assets and identified intangible assets the presence goodwill. Therefore it is apparent that the surplus price paid by the purchaser is towards buying the goodwill of the business which is self generated. The valuation report also suggest that a sum of ₹ 6908 crores though classified as a goodwill is also including valuation of workforce, synergies, customer relationships, distribution network, vendor relationships, contacts et cetera. It also says that goodwill is primarily arise in also due to the future earning capacity of the business to generate profits and returns to the

shareholders. Therefore it is not clear whether in the valuation of goodwill of ₹ 6908 crores there are any other intangible assets or it is purely goodwill. Though assessee has accounted for in the books of account ₹ 6908 crores as goodwill, however for the purpose of depreciation the accounting entries do not either supports the case of the assessee or goes against the assessee. However when the income tax act requires the cost of acquisition of the assets to be recorded at a particular price in a particular manner, regard shall be made to those specific provisions of the act. In view of this, we set-aside the issue back to the file of the learned assessing officer to examine the actual cost of the goodwill, and if allowable in accordance with the law, to allow depreciation on it. The assessee is directed to show before the learned assessing officer that the claim of depreciation on goodwill satisfies the provisions of the income tax act, the learned AO may verify the same and decide the issue in accordance with the law. Needless to say, the proper opportunity of hearing is given to the assessee. In the result ground number 3 – 5 of the appeal of the assessee are allowed with above directions.

048. Ground number 6 of the appeal of the assessee is with respect to the claim of deduction under section 3 5DD of the act, assessee has incurred amalgamation expenditure of Rs. 257,39,983/- being 1/5 of the expenditure on amalgamation incurred amounting to ₹ 128,699,915/-. Though in the original proceedings the learned assessing officer did not call about the expenditure details, this is for

the reason that assessee did not furnish the explanation of decrease in the combined annual return income of both the entities, same were asked in the remand report, the assessee submitted some of the invoices. On verification of such invoices the learned CIT – A the assessee deduction under section 35DD of the act. The deduction was denied to the assessee for the reason that for these balance expenditure assessee failed to provide any evidence.

049. The learned authorized submitted that assessee has failed to produce only minuscule percentage of the total expenditure and therefore the deduction on non-production of invoices/vouchers cannot result into denial of deductions.

050. The learned CIT DR supported the order of the lower authorities and submitted that when the assessee has failed to produce the invoices/cultures of the expenditure allegedly incurred for amalgamation, there is no reason that assessee should be granted 1/5 of such expenditure as deduction under section 35DD of the act.

051. We have carefully considered the rival contention and perused the orders of the lower authorities. Assessee has been granted deduction under section 35DD of the act with respect to all the expenditure which assessee supported by producing evidences in the form of invoices/vouchers/men that letter et cetera. However when the assessee has failed to produce the evidence of incurring the expenditure as well as the purpose for which

it is incurred, we do not find any infirmity in the order of the lower authorities in denying the deduction to the assessee to that extent under section 35DD of the act. Accordingly ground number 6 of the appeal of the assessee is dismissed.

052. In the result, appeal filed by the assessee is partly allowed.

053. Thus appeal filed by the AO and assessee is partly allowed whereas the cross objection filed by the assessee are dismissed.

Order pronounced in the open court on 22.09 .2023.

Sd/-	Sd/-
(RAHUL CHAUDHARY)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated: 22.09.2023
Sudip Sarkar, Sr.PS
Copy of the Order forwarded to:

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai