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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 475/2022

PR. COMMISSIONER OF INCOME TAX-1 ..... Appellant
Through: Mr. Sanjay Kumar, Ms. Easha, Ms. Hemlata Rawat, Advs.

versus

M/S ELTEK SGS PVT. LTD. ..... Respondent
Through: Mr. Piyush Kaushik, Adv.

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\+ ITA 476/2022

PR. COMMISSIONER OF INCOME TAX-1 ..... Appellant
Through: Mr. Sanjay Kumar, Ms. Easha, Ms. Hemlata Rawat, Advs.

versus

ELTEK SGS PVT. LTD. ..... Respondent
Through: Mr. Piyush Kaushik, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE DHARMESH SHARMA

O R D E R

% **01.08.2023**

1. These two appeals by the **Income Tax Department**[1] question the correctness of the order dated 08 September 2021 passed by the **Income Tax Appellate Tribunal**[2] dismissing the appeal preferred by the Department and which had questioned the judgment rendered by the **Commissioner of Income-Tax (Appeals)**[3] passed in favour of the respondent. The appellant has essentially questioned the deletion of disallowance on account of depreciation on goodwill in terms of the

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[1] Department
[2] ITAT
[3] CIT (Appeals)

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order framed by the CIT (Appeals).

2. On facts, it is not disputed that the respondent had amalgamated with M/s Valere Power India Limited in terms of a **Scheme of Amalgamation**[4] which came to be sanctioned by this Court on 05 February 2014. For the purposes of the present appeals, we take note of Clause 4.4 of the Scheme which came to be approved and which clause is extracted hereinbelow: -

> "4.4 The excess of value of assets over the value of liabilities of the Transferor Company and the amount of equity shares to be allotted/payment to be made to the equity shareholders of the Transferor Company will be credited to the Capital Reserve account. However, where value of liabilities and amount of equity capital allotted/payment to be made to the equity shareholders of Transferor Company exceeds the value of assets of the Transferor Company taken over then such excess shall be debited by the Transferee company to the goodwill account."

3. The Assessment Officer had added a sum of Rs.6,17,30,352/- on account of disallowance of depreciation on goodwill that was created as a result of amalgamation. Aggrieved by the aforesaid, the respondent had preferred an appeal before the CIT (Appeals). The CIT (Appeals) found that since goodwill had come to be created by virtue of the merger in terms of the Scheme approved by the Court, depreciation on goodwill to the extent of Rs. 6,17,30,352/- was correctly claimed by the assessee. It was this decision of the CIT (Appeals) which was assailed by the appellants.

4. The ITAT while dealing with the aforesaid challenge has held as follows: -

> "**5.** As per the scheme of amalgamation, where value of liabilities and amount of equity capital allotted /payment to the equity shareholders exceeds the value of assets of the transferor company taken over, such excess shall debited to the goodwill account. Accordingly, the assessee claimed on depreciation on goodwill which claim was denied by the AO.
>
> **6.** Assessee assailed the addition before the CIT(A) and reiterated its claim of depreciation strongly contended that the goodwill has

[4] Scheme

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> enumerated from the decision of the Hon'ble High Court and not out of accounting principles. It was brought to the notice of the CIT(A) that goodwill being a non tangible assets is eligible for depreciation u/s. 32 of the Act."

5. It ultimately proceeded to negate the challenge as raised resting its decision on the judgment of the Supreme Court in **Commissioner of Income Tax, Kolkata vs. Smifs Securities Limited**[5]. In *Smifs*, the principal question which stood raised was whether goodwill is an asset within the meaning of Section 32 of the **Income Tax Act, 1961**[6] and whether depreciation is allowable on the same. While answering that question, the Supreme Court in *Smifs* held as follows: -

> "**8.** We quote hereinbelow Explanation 3 to Section 32(1) of the Act:
>
> > "*Explanation 3*.—For the purposes of this sub-section, the expressions 'assets' and 'block of assets' shall mean—
> >
> > (*a*) tangible assets, being buildings, machinery, plant or furniture;
> >
> > (*b*) intangible assets, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature."
>
> 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. A reading of the words "any other business or commercial rights of similar nature" in clause (*b*) of Explanation 3 indicates that goodwill would fall under the expression "any other business or commercial right of a similar nature". The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3(*b*).
>
> **9.** In the circumstances, we are of the view that "goodwill" is an asset under Explanation 3(*b*) to Section 32(1) of the Act.
>
> **10.** One more aspect needs to be highlighted. In the present case, the assessing officer, as a matter of fact, came to the conclusion that no amount was actually paid on account of goodwill. This is a factual finding. The Commissioner of Income Tax (Appeals) ["CIT (A)", for short] has come to the conclusion that the authorised representatives had filed copies of the orders of the High Court

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[5] (2012) 13 SCC 488

[6] The Act

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> ordering amalgamation of the above two companies; that the assets and liabilities of M/s YSN Shares and Securities (P) Ltd. were transferred to the assessee for a consideration; that the difference between the cost of an asset and the amount paid constituted goodwill and that the assessee Company in the process of amalgamation had acquired a capital right in the form of goodwill because of which the market worth of the assessee Company stood increased. This finding has also been upheld by the Income Tax Appellate Tribunal ("ITAT", for short). We see no reason to interfere with the factual finding."

6. As is manifest from the aforesaid judgment, it was categorically held that goodwill is an intangible asset which would clearly fall within the ambit of Explanation 3 to Section 32(1) of the Act. It was in the aforesaid backdrop that it ultimately upheld the depreciation claimed in terms of Section 32.

7. Before us, learned counsel appearing in support of the appeal contended that it would be the provisions of Section 49 of the Act which would apply and that both the CIT (Appeals) as well as the ITAT have clearly erred in holding otherwise. Learned counsel referred to the definition of *"cost of acquisition"* as spelt out in Section 55(2) of the Act and which had defined that expression to also include goodwill of a business or profession or a trademark or brand name associated with the business or profession or any other intangible asset. It is in the aforesaid context that learned counsel for the appellant had sought to rely upon Section 49 and more particularly Section 49(1)(e) thereof.

8. The aforesaid submission, however, clearly loses sight of the fact that Section 47 in express terms excludes the transfer of a capital asset in terms of a scheme of amalgamation. We further find that the provisions of the Act referred to by learned counsel for the appellant are placed in a Chapter dealing with the "*Capital Gains*". That Chapter itself pertains to profits or gains arising from the transfer of a capital asset. However, it is well settled that a transfer in terms of a scheme of amalgamation which is sanctioned is accomplished by

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operation of law as opposed to an act of parties. It is in that backdrop that the decision in *Smifs* assumes significance. The judgment rendered by the Supreme Court in *Smifs* clearly recognises goodwill to be an intangible asset and on which depreciation can clearly be claimed in terms of Section 32(1) of the Act.

9. Accordingly and for all the aforesaid reasons, we find no merit in the instant appeals. They shall consequently stand dismissed.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

AUGUST 01, 2023
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