

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A": HYDERABAD
(THROUGH VIRTUAL CONFERENCE)**

**BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
and
LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

ITA Nos. 650 & 651/H/2015 and 463/Hyd/2017 Assessment Years: 2009-10, 2010-11 & 2012-13		
M/s Toshali Cements Pvt. Ltd., Hyderabad. PAN - AABCT 8989K	Vs.	1. Income-tax Officer, Ward - 2(2), Hyderabad. 2. DCIT, Circle - 2, Hyd. 3. ITO, Ward - 2(4), Hyd.
(Appellant)		(Respondent)
Assessee by:		Shri V. Siva Kumar
Revenue by:		Shri Sunil Kumar Pandey
Date of hearing:		27/04/2021
Date of pronouncement:		02/09/2021

and

ITA No. 2346/H/2018 Assessment Year: 2014-15		
M/s Toshali Cements Pvt. Ltd., Hyderabad. PAN - AABCT 8989K	Vs.	Dy. Commissioner of Income-tax, Circle - 2(2), Hyderabad.
(Appellant)		(Respondent)
Assessee by:		Shri V. Siva Kumar
Revenue by:		Smt. M. Narmada
Date of hearing:		23/06/2021
Date of pronouncement:		02/09/2021

ORDER

PER L.P. SAHU, AM:

These appeals filed by the assessee for AYs 2009-10, 2010-11 and 2012-13 are directed against CIT(A) – 2, Hyderabad’s separate orders involving proceedings u/s 143(3) of the Income Tax Act, 1961 ; in short “the Act”. As identical issues are involved in these appeals, the same were clubbed and heard together and for AY 2014-15 the issue is similar, therefore, a common order is passed for the sake of convenience. To adjudicate these appeals, we refer the facts in AY 2009-10 and the decision taken in this year shall apply mutatis mutandis to the other appeals.

2. The grounds raised in these appeals are common, which are as under, as taken from AY 2009-10:

“1. The order of the Commissioner of Income Tax (Appeals)-2, Hyderabad, dated 23.02.2015 on the issue of depreciation on goodwill, is erroneous, contrary to law and facts of the case.

2. a) Commissioner of Income Tax (Appeals)-2 grossly erred in law in confirming the disallowance of depreciation on goodwill brushing aside the decision of the Hon'ble Supreme Court in the case of CIT vs. Smifs Securities Ltd (348 ITR 302) on the ground that the facts of the appellant's case are different from the facts of the case before the Supreme Court.

b) Commissioner of Income Tax (Appeals)-2 erred in stating that it is not clear as to how deferred sales tax liability is claimed under the head of Goodwill and sought to be depreciated. Commissioner of Income Tax

ought to have seen that deferred sales tax liability and goodwill are two different items and therefore not justified in concluding that depreciation is not allowable on goodwill.

c) Commissioner of Income Tax (Appeals) ought to have seen when once goodwill IS accounted for by the appellant in its books of account which is not disputed, depreciation on goodwill is allowable as deduction.

3. For all of the above and such other grounds as may be urged at the time of hearing it is prayed that the appeal be allowed and suitable directions be issued to grant depreciation on goodwill.

2.1 The assessee has also raised the following Additional ground of appeal and requested to adjudicate the same:

“Without prejudice to Ground Nos.2(a), 2(b) and 2(c), the learned Commissioner of Income Tax (Appeals) ought to have allowed the depreciation claimed by the Appellant holding that such claim is allowable even otherwise treating deferred sales tax liability as part of cost of various fixed assets.”

3. Briefly the facts of the case as taken from AY 2009-10 are that the AO during the course of assessment proceedings noticed from the MOU dated 27.09.2004 between the M/s SAGAR CEMENTS LIMITED as party NO. 01 and the ASSESSEE party NO. 02 , that the assessee company agreed to purchase the Assets consisting the Immovable properties at Rs. 2.80 Crores as per describe inr para No. 01 and Movable properties at cost of RS. 12.70 crores

described at para no. 02 of the MOU which is placed on record apart from purchasing the assets of 'cement grinding unit' agreed to take over the liability of Sales Tax Deferment Scheme amount of Rs. 11,00,81,342/- which was up to September 2004 payable from 2014 onwards and the balance unavailed deferment entitlement was about Rs. 6.32 crores.. An another MOU was made on 29.09.2004 for purchasing of Coal Field Hot Air Generator as per annexure at Rs. 2.00 Crore The deferment of sales tax liability was treated as goodwill which will be written off over a period of ten years from 2004-05. According to AO, as per the provisions of the Act, depreciation on goodwill is not allowable, hence, he disallowed the same.

4. Aggrieved by the order of AO, the assessee preferred an appeal before the CIT(A) and contended that since sales tax deferment of Rs. 11,00,81,342/- which is part of consideration for acquiring cement plant from Sagar Cements Ltd., was shown as Goodwill in books of account, it is to be taken as Goodwill for granting depreciation. In this connection, the assessee relied on the decision of the Hon'ble Supreme Court in the case of CIT vs. SMIFS Securities Ltd. [348 ITR 302].

5. After considering the submissions of the assessee, the CIT(A) observed that the ratio of the decision of the Hon'ble

Apex Court in the case of SMIFS Securities Ltd. (supra) is not applicable to the goodwill claim made by the assessee as the facts and circumstances of the Hon'ble Supreme Court decisions cited by the appellant and the instant case are quite different and confirmed the assessment order by observing as under:

“6. The assessment order, submissions of the appellant and facts, issues and circumstances of the case have been gone through. The issue regarding claiming of deferred sales tax liability a goodwill d claiming depreciation on the same is not in consonance with the decision of the Hon'ble Supreme Court in the above cited case. It is not clear as to how deferred sales tax liability is claimed under the head of Goodwill and sought to be depreciated by the appellant. Hence, grounds no. 2 and 3 of grounds' of appeal are dismissed.”

6. Aggrieved by the order of CIT(A), the assessee is in appeal before the ITAT.

7. Before us, the ld. AR of the assessee filed a petition seeking admission of additional evidence, the contents of which are as under:

“1. The appellant company has filed the above numbered appeals which are pending disposal before the Hon'ble Income Tax Appellate tribunal, Hyderabad.

2. The appellant is seeking relief, by way of allowance of depreciation on plant and Machinery which has been partly disallowed by the Assessing Officer and which has been upheld by the C.I.T (Appeals).

3. The appellant entered into an agreement in November, 2004 for purchase of plant and machinery. It agreed to take over the sales tax deferral liability to the extent of Rs11,00,81,342/- from the seller. It has discharged the liability taken over by it along with further liability that arose after the plant and machinery were purchased by it. The relevant payments were made subsequent to the date of assessment. The correspondence with the sales tax department took place in the year 2016. These documents constitute important evidence supporting the grounds of appeal raised by the appellant in the appeal before the Hon'ble Appellate tribunal. The said documents have been filed before the Hon'ble Appellate Tribunal on 31-03-2017. Since these papers were not in existence during the course of proceedings before the lower authorities, these constitute additional evidence. The appellant prays that the Hon'ble Appellate Tribunal may kindly to admit these documents in evidence and take the same into account while adjudicating upon the grounds of appeal.

List of documents constituting additional evidence.

Sl.No.	Description	Page Nos.
1	Copy of letter dated 29/09/2016 issued by the Commissioner of Commercial Taxes, Vijayawada addressed to the assessee	1
2	Copy of letter dated 03/10/2016 issued by the Asst. Commissioner of Commercial Taxes (LTU & INT), Office of DCIT, Visakhapatnam addressed to the assessee	2 to 4
3	Copy of assessee's letter dated 05/10/2016 addressed to Asst. Commissioner of Commercial Taxes (LTU & INT), Visakhapatnam evidencing payment of Rs. 1,10,99,694/-	5 To 6
4	Copy of assessee's letter dated 05/10/2016	7

	addressed to Asst. Commissioner of Commercial Taxes (LTU & INT), Visakhapatnam evidencing payment of Rs. 8,72,30,313/-	
5	Copy of letter dated 14/10/2016 issued by Asst. Commissioner of Commercial Taxes (LTU & INT), Visakhapatnam certifying payment, by the assessee, of Rs. 8,72,30,313/- and Rs. 1,10,99,694/-.	

7.1 The ld. AR of the assessee filed the written submissions, which are as under:

“7. The assessee submits that the learned CIT (Appeals) erred in brushing aside the decision of the Hon'ble Supreme Court in the case of CIT vs SMIFS Securities Ltd (24 Taxmann 222- 348 ITR 302 SC. (copy submitted herewith). The assessee submits that the amount in question in the case before the Hon'ble Supreme Court was excess consideration paid which was treated as goodwill. The learned CI.T (Appeals) ought to have allowed the assessee's appeal based on the ratio of the said decision. The assessee also relies on the decision of the Hon'ble Karnataka High Court in the case of CIT vs Manipal Universal Learning (P) Ltd 34 Taxmann.com 9 KAR (copy submitted herewith) In the said case, the assessee claimed depreciation on the excess consideration paid over the value of the net assets. The A.O. treated the same as goodwill and did not allow depreciation on the said amount treated by him as goodwill. The assessee's claim was allowed by the Hon'ble ITAT. In further appeal by the Department, the Hon'ble High Court, following the decision of the Hon'ble Supreme Court in the case of CIT vs SMIFS Securities Ltd., (Supra), held that goodwill is an asset and entitled to depreciation and upheld the decision of the Hon'ble ITAT and dismissed the appeal filed by the Department. The assessee relies on the ratio of the decisions cited above and submits that even if the

amount of Rs. 11,00,81,342/- were treated as goodwill, the assessee is entitled to depreciation on the same.

8. The learned CIT (Appeals) ought to have appreciated that the amount of Rs. 11,00,81,342/- in fact represented part of cost of the assets acquired and should have allowed the claimed of depreciation as such.

9. The assessee has filed additional evidence on 31-03-2017 consisting of documents in 9 pages. The assessee has also filed a petition on 04-04-2017 praying for admission of the said documents as additional evidence. These documents comprise of correspondence between the assessee and the Sales Tax authorities which show that the assessee has paid the entire deferred sales tax liability that it took over at the time of purchase of assets in the year 2004. These documents support the stand that the amount of Rs. 11,00,81,342/- was part of the cost of the assets agreed to be paid by the assessee and paid later on to the Sales Tax Department.

10. The assessee also invites kind attention to the order dated 30-10-2015 passed by Hon'ble ITAT in the assessee's own case for Asst.Years 2005-06 and 2006-07 in ITA Nos. 184 and 185/Hyd/2015. (copy submitted herewith) For the said two assessment years, the A.O completed regular assessments u/s.143(3) and allowed depreciation on the amount of Rs. 11,00,81,342/- being deferred sales tax liability taken over by assessee as part of cost of assets purchased by it but reflected as good will in its books. Later on, the A.O reopened the assessments and disallowed depreciation on the amount of Rs.11,00,81,342/-. Assessee challenged the validity of reopening before the learned CIT {Appeals} who allowed assessee's appeals holding that reassessment was not valid. Department filed appeals for both years contesting the decision of Cl.T {Appeals} and also that

the learned CI.T {Appeals} should have decided the case on merits.

11. Hon'ble ITAT in paragraph 10.3 of its order (refereed in the previous paragraph) held "Moreover, from the fixed assets schedule filed by the Id.AR, he has clearly demonstrated that the goodwill was wrongly capitalized instead of clubbing the sales tax liability with the cost of plant & machinery. We do not find any escapement of income to the revenue as the depreciation will be the same when calculated on revised plant & machinery cost as explained below.

<i>As per depreciation schedule</i>	<i>Additions</i>	<i>Depreciation</i>
<i>3. Plant & machinery</i>	<i>250,502,072</i>	<i>31,312,759</i>
<i>7.. Goodwill</i>	<i>110,081,342</i>	<i>13,760,168</i>
	<i>360,583,414</i>	<i>45,072,927</i>

*As per revised
(as explained above)*

<i>3. Plant & machinery (After capitalization of sales tax liability)</i>	<i>360,583,414</i>	<i>45,072,927</i>
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The assessee submits on the facts and circumstances explained in the preceding paragraphs and the evidence filed, appeal in ITA No.650/Hyd/2015 relating to the Asst.Year 2009-10 may kindly be allowed.

Asst Years 2010-11 and 2012-13

12. It is submitted that the facts and circumstances in the appeal in ITA No.651/Hyd/2015 relating to the Asst.Year 2010-11 and ITA No.463/Hyd/2017 for Asst.Year 2012-13 are similar. The assessee prays that the appeals filed by the assessee may kindly be allowed

for the said two years also based on the submissions made in the preceding paragraphs.”

8. The Id. DR, on the other hand, besides relying on the orders of revenue authorities submitted that the deferred sales tax liability claimed by the assessee under the head of goodwill sought to be depreciated by the assessee is not proper and not in accordance with law. This is the liability which was existed on the date purchase and it was known liability ,therefore, it cannot be treated as goodwill . He further submitted that the every year is a separate assessment year and *res judicata* does not apply in the assessment proceedings.

9. We have considered the rival submissions and perused the material on record as well as gone through the orders of revenue authorities. The additional evidence filed by the assessee are admitted as they constitute and important in adjudicating the issue in dispute, these documents are only evidencing that the deferred sales tax liability has been shifted in the name of the assessee. The contention of the AR of the assessee before us is that the assessee has been claiming depreciation treating the amount of deferred sales tax as part of the cost of fixed assets and the same has been allowed year after year till AY 2008-09 and the assessee is entitled to plead for allowance of depreciation by treating the amount of deferred sales tax

liability as part of the cost of assets. The contention of the assessee is not acceptable because the assessee has created the goodwill against the known liability in the balance sheet as on the date of purchase. The assessee has pick and choose the assets and liabilities from the vendee company. In the process of amalgamation, the entire assets and liabilities are taken over by the purchasing company or as per their agreed terms and conditions and the value of goodwill arises if the net assets (Total Assets- Total Liabilities) value is less than the price paid for the purchase/taking over of the previous company. While going through the MoUs executed on 29/09/2004, which are placed at pages 1 to 5 and 6 to 9 of paper book, it is clear that only assets and part of the liabilities as described in the MoUs has been taken over by the assessee company. It is obvious at para no. 3.2, of page No. 4, which is as under:

“The first part shall be responsible for payment of all other liabilities of the unit accruing till the date of handing over except liability due to transfer of sales tax deferment and agrees to indemnify the second part against all such liabilities like Term loan and working capital liabilities, electricity dues, excise duties, sundry creditors, etc.”

From the above clause, it is clear that the entire assets and Liabilities of the unit have not been taken over by assessee.

9.1 From the submissions made by the Ld. AR is that the value of the goodwill (deferred sales tax liability) is cost of

plant and machinery, which has been apportioned in the value of fixed assets is not acceptable for the reason that the assessee has produced annual reports in the form of paper book, which are placed at page No. 28, which is 13th Annual Reporting relating to FY 2014-15 in which, we find that at Note No. 12, the goodwill has been separately shown by the assessee under the fixed assets, which is placed at page 38. We further find that the assessee has produced paper book containing pages 10 to 16 which is a summary of depreciation schedule as per IT Act from AY 2005-06 to 2011-12 where there is no separate description of goodwill. The goodwill is an intangible asset, which cannot be equated with the tangible fixed assets. We observe that on the one hand the assessee submits that it is a part of fixed assets included in the cost of the fixed assets and on the other hand, he submits that it is a goodwill which has been arisen towards excess consideration paid for the discharging of liabilities in future date, **therefore, it is goodwill and to be named as intangible assets, which are contrary in nature.** Further, we observe that the assessee has paid 17.50 crores for the tangible fixed assets and agreed to take the deferred sales tax liability at book value which will be paid in future date(to be paid in 2014) . The goodwill arises if the net consideration is over and above the net assets, but in the impugned case the Fixed Assets have been purchased at the cost of Rs. 17.50

Crores and the deferred sales tax liabilities are to be discharged at the book value in future date. On the date of execution of MoUs, the liability was a known liability, therefore, it cannot be treated that it is an intangible asset and cannot be treated as a goodwill. Before us the assessee has not produced any details in regard to how he has arrived the value of assets and entry in the books of accounts. Therefore the contention of the assessee is rejected.

9.2 It is seen that Goodwill of a business or a profession has not been specifically provided as an asset either in the definition under clause (11) of section 2 of the Act or in section 32 of the Act. The question whether goodwill of a business is an asset within the meaning of section 32 of the Act and whether depreciation on goodwill is allowable under the said section, is an issue which came up before Hon'ble Supreme Court in the case Smifs Securities Limited [(2012)348 ITR 302 (SC)]. Hon'ble Supreme Court answered the question in affirmative. Thus, as held by Hon'ble Supreme Court, Goodwill of a business or profession is a depreciable asset under section 32 of the Act.. This issue relates to the amalgamation and entire assets and liabilities were transferred and consideration paid was over and above to the value of net assets , therefore the difference was treated as Goodwill. But in the impugned case on hand the entire assets and liabilities

were not taken over by the assessee as per MOUs quoted “supra”, therefore, the assets and deferred sales tax liabilities which are not in the nature of amalgamation. In the impugned case, it appears that the assessee has tried to pass entry in its books of account only giving corresponding effect in the assets side in the balance sheet of the said liability as goodwill, which is a self-creating in nature. The liability will always remain the liability and the liability cannot change in the form of assets. Therefore, the creation of goodwill in the books of account is completely wrong and charging depreciation on the goodwill is also wrong, hence, the depreciation claim of the assessee on the goodwill is not allowable as per the IT Act. Considering the totality of the facts and circumstances of the case, the assessee is not eligible for claiming depreciation on goodwill since its inception i.e. first year of claiming of depreciation and accordingly, the grounds raised by the assessee on this issue are dismissed.

9.3 Further, the contention of the ld. AR of the assessee’s is not acceptable that for AY 2011-12, the revenue has accepted the depreciation on goodwill claimed by the assessee for the reason that res-judicata does not apply in the income-tax proceedings as every assessment year is a separate assessment year. The ld. AR of the assessee also relied on the decision coordinate bench of this Tribunal in

assessee's own case for AY 2005-06 and 2006-07 in ITA Nos. 184 & 185/Hyd/2015 vide order dated 30th October, 2015, is not acceptable because it was decided on the legal issue regarding challenging the reopening of the case.

9.4 Direction: Since the assessee has claimed depreciation since its acquisition of the deferred sales tax liabilities to which we have decided the issue against the assessee and depreciation has been charged on Written Down Value basis. Accordingly we direct, as under:

7.7 Accordingly, the AO is directed to take necessary action to bring the income escaped assessment, being business income, in the hands of the assessee for the AYs 2010-11, 2011-12 and 2012-13. This particular direction is being issued in terms of sec. 150 of the Act and, therefore, the limitation stipulated u/s 149 of the Act is not applicable for reopening the assessment u/s. 147 of the Act. In this regard, the reliance is placed on the following decisions:

1) B.A.R. Abdul Rehman Saheb Vs. ITO (1975) 100 ITR 541 (AP)

2) Sukh Dayal Pahwa Vs. CIT (1983) 140 ITR 206 (MP)

3) MauNa Realtors (P.) Ltd Vs. Union of India (2009) 3151TR 393 (Potno)

7.8 In all the above mentioned decisions, including the judgment of Hon'ble jurisdictional High Court, it has been judiciously held that the AO can re-open the assessment beyond the period of limitation u/s 149 of the Act, on the basis of findings and direction issued by the First Appellate Authority i.e. CIT (A), apart from the

Hon'ble ITAT, Hon'ble High Court and Hon'ble Supreme Court, as the case may be.

9.5 Alternatively, that the assessee may claim the deduction when it is actually paid to the concerned department subject to the First party had claimed it as expenditure and suo motto disallowed under section 43 B(a) of the Income Tax Act. 1961, if it satisfies the conditions stipulated in section 43B(a) of the income tax act. The AO is directed to ensure to avoid double deduction on this count.

10. As the facts and grounds raised in AY 2010-11, 2012-13 and 2014-15 are materially identical to that of AY 2009-10, following the conclusions and decision therein, we dismiss these appeals as well.

11. In the result, all the appeals under consideration are dismissed in above terms. A copy of this common order be placed in the respective case files.

12. We lastly acknowledge that although the instant appeals, except for the AY 2014-15, are being decided after a period of 90 days from the date of hearing as per Rule 34(5) of the IT(AT) Rules 1963, the same however, does not apply in the covid lockdown situation as per hon'ble apex court's recent directions dated 27-04-2021 in

M.A.No.665/2021 in SM(W)C No.3/2020 'In Re Cognizance for extension of limitation' making it clear that in such cases where the limitation period (including that prescribed for institution as well as termination) shall stand excluded from 14th of March, 2021 till further orders.

Pronounced in the open court on 2nd September , 2021.

**Sd/-
(S. S. GODARA)
JUDICIAL MEMBER**

**Sd/-
(L.P. SAHU)
ACCOUNTANT MEMBER**

Hyderabad, Dated: 2nd September, 2021.

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copy to :

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5	<i>CIT(A) - 2, Hyderabad.</i>
6	<i>Pr. CIT - 2, Hyderabad.</i>
7	<i>ITAT, DR, Hyderabad</i>
8	<i>Guard File.</i>

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*ITA Nos. 650/H/2015 and others
M/s Toshali Cements Pvt. Ltd.,
Hyderabad*