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

BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER

ITA No.334/M/2020
Assessment Year: 2016-17

M/s. Keva Fragrances P. Ltd., 36 Devkaran Mansion, 36 Mangaldas Road, Mumbai – 400 002 **PAN: AAACK2243A**	Vs.	DCIT 4(2)(2), Room No.640, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

ITA No.1051/M/2020
Assessment Year: 2016-17

ACIT 4(2)(2), Room No.640, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s. Keva Fragrances P. Ltd., 36 Devkaran Mansion, 36 Mangaldas Road, Mumbai – 400 002 **PAN: AAACK2243A**
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Saurabh Bhat, A.R.
Revenue by : Shri Sandeep Raj, D.R.

Date of Hearing : 02.07.2021
Date of Pronouncement : 02.08.2021

O R D E R

Per Rajesh Kumar, Accountant Member:

The above titled cross appeals have been preferred by the assessee as well as by Revenue against the order dated 20.11.2019 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2016-17.

2. The only issue raised in the various grounds of appeal is against the confirmation of disallowance of Rs.62,79,73,780/-

by Ld. CIT(A) as made by the AO on account of depreciation on goodwill and also upholding the merger method for accounting the amalgamation and net asset value method instead of discounted cash flow method to compute the goodwill by the AO.

3. The facts in brief are that the assessee filed e-return of income on 30.11.2016 declaring a total loss of Rs.14,05,93,564/- under the normal provisions and Rs.8,11,17,325/- as book loss under section 115JB of the Act. The case of the assessee was selected for scrutiny and statutory notices were duly issued and served upon the assessee. The assessee is a private limited company of Keva Group of Companies. M/s. S.H. Kelkar & Co. Ltd. (hereinafter referred to as SHK) is a 100% holding company of the assessee and also listed on National Stock Exchange of India. Thus the assessee is a 100% subsidiary of a listed company and also a company in which public are substantially interested. During the year under consideration another 100% subsidiary company belonging to Keva Group was amalgamated with the assessee company after obtaining approval of Hon'ble Bombay High Court on the scheme of amalgamation. Prior to amalgamation, the name of the assessee was M/S KV Arochem Pvt. Ltd. which was changed to M/s. Keva Frangrances Pvt. Ltd. post amalgamation. In other words the Keva Fragrances Pvt. Ltd. was amalgamated with the assessee M/s. KV Arochem Pvt. Ltd. and after amalgamation the name of the company was changed to M/S Keva Frangrances Pvt. Ltd. from M/S KV Arochem Pvt. Ltd. The assessee company followed the purchase method of accounting the amalgamation entries in its books of the assessee which has resulted in the creation of goodwill of Rs.251,18,95,120/- which

was debited in the books of accounts of the assessee accordingly. The assessee company claimed depreciation @ 25% on the amount of goodwill which worked out at Rs. 62,79,73,780/-. The assessee followed discounted cash flow method to value the goodwill which was rejected by the AO on the ground that the results given by the DCF method were misleading and fallacious and the assessee should have followed net asset value method instead of discounted cash flow method. The AO analyzed the financial performances of both the companies amalgamated as well as amalgamating during the last 3 years which are incorporated in para 4.2 of the assessment order. The total consideration for amalgamation was fixed at Rs.381.72 crores which was the fair value of the amalgamating company (KFPL) as per the valuation report which was prepared by using discounted cash flow method by the assessee. The assessee company KVAPL issued 6,21,029 duly paid up equity shares of Rs.100/- each at a premium of Rs.6,046.50 to holding company i.e. SHK in discharge of the purchase consideration. The net book value of the assets (assets – liabilities) of the amalgamating company i.e. KFPL as per books of accounts was Rs.131.21 crores whereas the fair value was Rs.145.44 crores. The assessee accounted for the amalgamation following purchase method in terms of AS 14 thereby booking the assets and liabilities at fair market value and the difference of Rs.236.28 crores was accounted for its goodwill which was calculated by reducing the fair market value of Rs.145.44 crores from the sale consideration of Rs.381.72 crores. However, the asset and liabilities were booked at book value for the income tax purposes and difference of Rs.251.50

crores is accounted for as its goodwill under the head intangible assets which were calculated by reducing the book value of Rs.130.21 crores from sales consideration of Rs.381.20 crores and accordingly a depreciation of Rs.62,79,73,780/- was claimed on the goodwill @ 25%. The AO noted that the amalgamated company KVAPL was a loss making company and has huge unabsorbed losses and unabsorbed depreciation whereas the amalgamating company KFAL was a profit making company. The AO questioned the method of accounting for the amalgamation and held that the said method of accounting for amalgamation has resulted into a huge gap between sale consideration and book value due to which the assessee has claimed huge depreciation on the goodwill to reduce its profits. Accordingly, a show cause notice was issued to the assessee as to why the goodwill and depreciation as calculated by the assessee should not be rejected which was replied by the assessee by written submissions dated 13.12.2018 by submitting that the amalgamation was effected after approval of the scheme of amalgamation by the Hon'ble Bombay High Court which are incorporated in the assessment order. The AO, not being satisfied with the reply of the assessee, came to the conclusion that the claim of the depreciation is totally wrong and against the provisions of the Act and thus rejected the contentions of the assessee to the effect that claim of depreciation was pursuant to the decision of the Apex Court in the case of Smifs Securities Ltd. Consequently, the AO made an addition of Rs. 62,79,73,780/- to the income of the assessee in the assessment framed under section 143(3) dated 29.12.2018.

4. Aggrieved by the order of Ld. CIT(A), the assessee preferred an appeal before the Ld. CIT(A) and Ld. CIT(A) dismissed the appeal of the assessee on this issue by observing and holding as under:

> "4.3.29 *I* am of the opinion that, the issue of the allowance of the depreciation on the goodwill generated as a result of amalgamation in the hands of amalgamated company, is still open and needs judicial scrutiny especially in the light of the intent of the legislature to keep amalgamation a tax neutral scheme for companies as well as for the shareholders and not to provide any handle to gain tax benefits.
> 4.3.30 Following are the provisions made in the Income Tax Act to deal with amalgamation of companies, reflecting common thread of the intent of legislature, to keep the scheme of amalgamation tax neutral:
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> i] Section 47(vi): Exemption of capital gains in the hands of amalgamating company on transfer of capital asset of amalgamating company in the scheme of amalgamation
> ii) Explanation 7 to Section 43(1): Actual cost of capital assets in the hands of amalgamated company to be same as in the hands of amalgamating company
> iii) Explanation 2 to Section 32(1): 'Written down value of the block of assets' shall have the same meaning as in section 43(6)(c)
> iv) 5th proviso to Section 32(1): Restrictions on depreciation in the hands of amalgamating company and amalgamated company in the previous year to the depreciation calculated on 'actual cost' of capital asset in the hands of amalgamating company prior to amalgamation
> v) Section 43C(1): 'Cost' of stock-in-trade in the hands of amalgamated company to be taken the same as in the hands of amalgamating company held either as capital asset or stock-in-trade
> vi) Section 72A: Provisions relating to carry forward and set off of accumulated loss and unabsorbed depreciation allowance in amalgamation or demerger, etc vii) Section 47 (vii): Exemption of capital gains in the hands of shareholders of amalgamating company on transfer of shares of amalgamating company in the scheme of amalgamation.
> viii) Section 49(1) (Hi) (e): Cost of capital assets to be the same as in the hands of previous owner where capital assets became the assets of the successor as a result of transfer under section 47 (vi).
> ix) Section 49(2): Cost of shares of amalgamated company in the hands of shareholders, received as consideration for transfer of shares of amalgamating company, to be same as the cost of shares of amalgamating company.
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> 4.*31* The section 43 of the Income Tax Act provides for the definitions of certain terms, relevant to income from profits and gains of business or profession. In subsection 1 of this section the term "actual cost" has been defined. There are various provisions and explanations to this subsection to provide for various situations. Explanation 7 is one such explanation which provides for the situation involving amalgamation which is material to the case on hand. The explanation is reproduced 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."

4.3.32 Similarly, fifth proviso to section 32(1) of the Act 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.

4.3.33 A combined reading of the above provisions of sections mentioned above shows that, in respect of 'capital assets' transferred by the amalgamating company to the amalgamated company, the cost/written down value of the transferred capital asset to the amalgamated company shall be taken to be the same, as it would have been, had the amalgamating company continued to hold the capital asset for the purposes of its purposes of its business.

4.3.34 Though, the goodwill was not recorded in the books of accounts of the amalgamating company (i.e. KFG), it is an undeniable fact that KFG was holding that asset in intangible and unrecorded form. Had it recorded the asset in the books of accounts, it would have recorded the same at the value/cost of Nil, being a self-generated asset. The asset of goodwill got transferee! from KFG to KVA by virtue of amalgamation. If we see the explanation 7 of section 43(1) of the Act it clearly speaks about the ***actual cost of the transferred capital asset to the amalgamated company*** *(emphasis supplied) 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.* Whether, the cost of the goodwill was recorded in the books of account of the amalgamating company, is not a material fact here. What is material is, the cost to the amalgamated company for such asset. The goodwill being a self-generated asset, there was no cost to the amalgamating company, i.e. KFG. In such situation the cost of the goodwill for the amalgamated company should also be Nil.

4.3.35 The appellant has mainly relied upon the decision of Supreme Court in the case of CIT v. Smifs Securities Ltd.[2012] 348 ITR 302/210 Taxman 428/24 taxmann.com 222 (SC). It has also quoted various judgements in which reliance is placed on the aforesaid decision of the Supreme Court.

4.3.36 I have carefully read the said judgement. I find that the hon'ble Supreme Court has mainly decided the question of considering the goodwill in the category of intangible assets as per the provisions of section 32(1) of the Act. The contention before the court was not as to whether difference arising out of amalgamation was goodwill eligible for depreciation. The Court has not delved into the issue in light of provisions of explanation 7 to section 43(1) as well as fifth proviso to section 32(1) of the Act. The issue of the scheme of amalgamation being tax neutral in view of various provisions of the Act, as discussed in earlier paragraph no 4.3.29 of this order, was also not before the Supreme Court in the said case. In view of the above and in view of the rule of 'sub silentio', the judgement of Supreme Court in the case

of Smifs Securities Ltd. [Supra) cannot be treated as binding on the issue under discussion in the case of the appellant Reliance is placed on the judgement of Supreme Court in the case of S. Shanmugavel Nadar vs State Of Tamil Nadu, 263 1TR 658. The relevant observations of the hon'ble Supreme Court in that case are reproduced below:

"The question posed was: can the decision of an Appellate Court be treated as a binding decision of the Appellate Court on a conclusion of law which was neither raised nor preceded by any consideration or in other words can such conclusions be considered as declaration of law? His Lordship held that the rule ofsub-silentio, is an exception to the rule of precedents. "A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. "A court is not bound by an earlier decision if it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'."

4.3.37 The appellant has also relied upon some other decisions. I have considered all these decisions. The arguments made in the earlier paragraphs, in respect of the applicability of the judgement of Supreme Court in the case of Smifs Securities Ltd. (Supra), are squarely applicable to all these decisions. For the reasons mentioned in earlier paragraphs, these decisions are not applicable to the case on hand.

4.3.38 The appellant has also argued that, as per section 43(1) of the Act, block of assets shall include actual cost of assets which are 'acquired' by an assessee during the year. Amalgamation or merger is a manner in which acquisition of assets is made. Appellant placed reliance on the decision in the case of Hon'ble Delhi High Court in CIT vs. Mira Exim Limited (2013) 359 ITR 70.

4.3.39 I find that, there are express provisions in the section 55(2)(a)(ii) of the Act to determine the cost of acquisition of existing goodwill in the hands of the amalgamated company. As per the said provisions, the cost of acquisition of existing goodwill in the hands of the amalgamated company will be the cost/written down value in the hands of amalgamating company. Further, in case of goodwill arising out of amalgamation, the cost in the hands of amalgamating company would be NIL by virtue of section 55(2)(a)(ii] and, accordingly, the cost would be NIL in the hands of amalgamated company.

4.3.40 I find that, the issue under discussion with most of it's facets has been considered by the ITAT, Banglore in the case of United Breweries Ltd. v. Addl. CIT I.T.A. Nos.722,801 & 1065/Bang/2014. The ITAT, in it's decision, restricted amalgamated company's claim of depreciation in the year of amalgamation on goodwill arising on amalgamation, by applying fifth proviso to section 32(1] of the IT Act and held that, the amalgamated company cannot claim depreciation on assets acquired under amalgamation, more than the depreciation allowable to amalgamating company. Though, in that case the tangible asset was already valued by the amalgamating company and was existing in the balance sheet of the amalgamating company, the ITAT had made certain observations which are useful while deciding the issue under discussion. The ITAT, has unequivocally held that, the fifth proviso to the section 32(1) of the Act shall prevail while deciding the issue of the issue of depreciation on the assets acquired in the scheme of amalgamation.

4.3.41 The appellant has challenged the applicability of the case of United Breweries (Supra]. It has argued that, in the case of United Breweries (supra), goodwill was already appearing in the books of amalgamating company as an asset. Hence, the question of apportionment of depreciation arises on amalgamation. However, in the case of appellant company, facts are totally distinguishable. Goodwill was never part of financial statements of Keva Fragrances Private Limited (amalgamating company). Goodwill was not an "asset" appearing in books of accounts. Therefore, there is no question of applying provisions of fifth proviso to section 32 since the said provision applies to assets which are acquired from the amalgamating company.

4.3.42 I have considered the argument made by the appellant. As mentioned in the earlier paragraph, the decision of the ITAT, Banglore is useful to the extent of certain observations made by the court, which are relevant while deciding the issue under discussion. Though, the facts regarding pre-existence of the asset of goodwill in the books of amalgamating company are different in that case, it needs to be noted that the court has **refuted the argument** made by the assessee 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." To the extent of the rejection of the said argument, the decision in the case of United Breweries (supra) is very much relevant.

4.3.43 Since, in the case on hand, the goodwill was not existing in the books of the amalgamating company, the provisions of explanation 7 to section 43(1) of the Act shall prevail, while deciding the allowance of depreciation on the goodwill. These provisions are required to be read in consonance with various other provisions of the Act related to the scheme of amalgamation, such as 5th proviso to section 32 (1), section 49(l)(iii)(e), and/or Explanation 2(b) to section 43(6)(c) and section 55(2)(a)(ii) which clearly radiate the intent of legislature to keep the scheme of amalgamation tax neutral.

4.3.44 To conclude, without prejudice to my finding on the earlier ground that, the amalgamation was in the nature of merger, even if the amalgamation is considered to be in the nature of purchase, it is held that the value of the goodwill in the books of the appellant company should be Nil in view of the express provisions of explanation 7 to section 43(1) of the Act, which shall prevail over all other reasonings, and in view of the intent of the legislature to keep the provisions related to the scheme of amalgamation to be tax neutral.

4.3.45 **C) Nullification of goodwill and disallowance of depreciation by revising the valuation of KFG as a going concern:** The AO rejected the DCF method of valuation and adopted Net Asset Value method for the valuing the net worth of the amalgamating company. Since the value of the amalgamating company as per NAV method was equal to the book value, there was no question of generation of any goodwill.

4.3.46 The valuation of the amalgamating company KFG was carried out by using Discounted Cash Flow method by employing the services of a private agency by name Kaveri Venkatraman and Associates, which submitted it's report on 04.02.2016. It is seen that the AO has scrutinised the process of valuation and has questioned the validity and integrity of the process of valuation, after examining the concerned valuer on oath and examining the data used by the valuer for the purpose

of valuation. It would be pertinent to reproduce the relevant portion of the assessment order.

> *"From the share valuation report and the statement of the valuer, it is clear that the entire valuation was made exclusively on the information given by the assessee and no independent verification was made by the valuers. In fact, the projections of profits were also provided by the management It goes without saying that the projections made by the assessee are not based on any facts or tangible data but suppositions made for the purpose of valuation so as to suit themselves. It appears that the valuer has only fed the data into the formula for DCFmethod and arrived at the value rather than provide a proper unbiased valuation of shares as is expected. The valuers have not done any examination of comparative financials or prospective results to make an objective valuation. From the details of the share valuation report given by the latter, it is seen that the projections made by the assessee have been incorporated in toto in the valuation without the valuer applying her mind independently. This is a clear case of conflict of interest as the prospective results/projections that make the basis of the DCF report are supplied by the assessee and the valuers themselves have not examined it by their own admission but have relied on the details submitted by the former. Therefore, the data was provided to the valuer to arrive at the predetermined value that would enable the assessee to claim the Goodwill and the resultant depreciation. The fact that the amalgamating and the amalgamated company have the same 100% shareholders further establishes this.."*

4.3.47 The appellant, in its written submission has argued that the valuer has independently applied her mind and the Id. AO erred in merely reiving on a disclaimer to state that, there was no application of mind by the valuer. The appellant also referred to a letter issued by the valuer stating the methodology adopted by her in conducting the valuation. I have read the letter dated 13.12.2018 written by the valuer to the appellant company. The letter is cautiously worded and broadly states that the data provided by the appellant was reviewed for consistency and reasonableness. Neither the valuer, nor the appellant has provided any evidences to support this contention. I would rather rely on the information given by the valuer on oath in the statement recorded by the AO on 13.12.2018, rather than the broad statement made in the letter written to the appellant, who is interested party in the matter. 1 agree with the opinion of the AO that, the process of valuation lacked due rigour and was carried out in a manner, amenable to the appellant company.

4.3.48 I do not find it necessary to compare the projections of the value with the actual results while evaluating the soundness of the process of valuation. The valuation deserves to be rejected in light of the discussion in the earlier paragraphs. Reliance is placed on the decision of ITAT, Delhi in the case of Agro Portfolio (P.) Ltd. vs. Income Tax Officer, Ward 1 (4), New Delhi, in which it was held that Assessing Officer was justified in rejecting DCF method and adopting Net Asset Value method, because the valuation as per DCF method was carried out depending on data supplied by assessee and no evidence was produced for verifying correctness of data supplied by assessee. I agree with the decision of the AO, to use the Net Asset Value method as per which the value or net worth of the amalgamating company KFG comes to Rs. 130,21,00,000/-. The goodwill generated in such situation would be Nil.

4.3.49 In view of the discussions in the foregoing paragraphs, the **ground no B is dismissed."**

5. The Ld. A.R. submitted before us that the order of Ld. CIT(A) upholding the order AO on the disallowance of goodwill, merger method of accounting and net asset value method for valuation is completely wrong and against the provisions of the Act. The Ld. A.R. submitted that the assessee accounted for the goodwill in the books of accounts by following purchase method and consequently accounted for the goodwill of Rs.251.50 crores in the books of account as the total valuation for amalgamation fixed as per the valuation report was Rs.381.72 crore whereas the net book value of the assets as per books of accounts was Rs.130.21 crore and accordingly the assessee claimed the depreciation on the said amount of goodwill pursuant to the provisions of section 32 of the Act. The Ld. A.R. submitted that even the claim of depreciation on goodwill was in consonance with ratio laid by the Hon'ble Supreme Court in the case of CIT vs. Smifs Securities Ltd. 2012-TIOL-53-SC-IT and therefore the rejection of claim of the assessee by the authorities below is obviously against the provisions of the Act. The Ld. A.R. submitted that the decision of the Hon'ble Supreme Court squarely cover the issue of depreciation on goodwill resulting from amalgamation between two entities which has also been followed and held in favour of the assessee in the following decisions:

a. Toyo Engineering Ltd. (ITA No.3279/M/2008)
b. M/s. MTANDT Rentals Ltd. vs. ITO (ITA No.2410/CHNY/2017) (ITAT Chennai)
c. Sprit Infrapower & Multiventures Pvt. Ltd. vs. PCIT (ITA No.3081/M/2019)
d. Cosmos Coop Bank Ltd. vs. DCIT (2014) 45 taxmann.com 13 (Pune-Trib)

5.1. The Ld. A.R. also distinguished the decision relied upon by the AO and Ld. CIT(A) in the case of United Breweries Ltd. vs. Add.CIT ITA No.722, 801 &1065/Bang/2014. The Ld. A.R. submitted that in the said decision, the goodwill was already appearing in the books of amalgamating company and after acquisition by the amalgamated company, it was revalued by the amalgamated company. The Ld. A.R. submitted that the said decision has been distinguished by the co-ordinate bench of the Tribunal in the case of Aricent Technologies (Holdings) Ltd. vs. DCIT ITA No.90/Del/2013. The Ld. A.R. also submitted that the decision of Bangalore tribunal in the case of United Breweries Ltd. vs. Add. CIT (supra) is no more good law in view of the decision of Hon'ble Karnataka High Court in the case of Padmini Products Pvt. Ltd. vs. DCIT 2020-TIOL-1797-HC-Kar-IT. The Ld. A.R. submitted that in the said decision the Hon'ble High Court has held that 5th proviso to section 32(1) is only applicable in the circumstances where the predecessor and successor both have claimed depreciation in respect of the same asset. The Ld. A.R. submitted that the 5th proviso was inserted in order to prevent double claim of the depreciation in respect of the same asset. The Ld. A.R. submitted that the amalgamating company did not claim any depreciation on the goodwill and therefore the same can not be rejected and disallowed. The Ld. A.R. also relied on the decision of Mylane Laboratories Ltd. vs. DCIT (2020) 113 Taxman.com (6)(Hyderabad Tri) to support his contentions.

5.2. The Ld. A.R. also submitted that both the authorities below have grossly erred in questioning the claim of depreciation on goodwill which has resulted from the amalgamation of one

company with another due to consideration paid being higher vis-à-vis the net book value of the assets of the amalgamating company. The Ld. A.R. also vehemently argued that once the scheme of amalgamation is approved by the High Court after affording an opportunity to the Revenue to raise any objection, then Revenue can not be allowed to rake up the issue post approval of scheme of amalgamation by the Hon'ble High Court. The Ld. A.R. submitted that the Hon'ble Bombay High Court has passed an order dated 01.07.2016 seeking comments from the revenue within 15 days for objections, if any, to the proposed scheme of amalgamation and only after that the Hon'ble Bombay High Court passed the final order approving the scheme of amalgamation. The ld AR stressed that the revenue has not taken any objections to the scheme before the Hon'ble High Court. The Ld. A.R. submitted that once the scheme of amalgamation is approved by the Hon'ble Bombay High Court that too after providing opportunity to the Revenue to raise the objections, if any, principle of estoppels prevents the Revenue from challenging the validity of the scheme and/or the method of accounting at the subsequent stage. In defense of his arguments, the Ld. A.R. relied heavily on the decision of the co-ordinate bench of the Tribunal in the case of Electrocast Sales India Ltd. vs. DCIT ITA No.2145/Kol/2014. The Ld. A.R. finally prayed that in view of the legal position as discussed above the order of Ld. CIT(A) may kindly be set aside on this issue and AO may be directed to allow the depreciation on goodwill.

6. The Ld. D.R., on the other hand, opposed the arguments of the Ld. A.R. by submitting that the scheme of amalgamation was designed in such a way so that the goodwill is created in the

hands of the assessee by paying higher price than the book value and therefore the intent of amalgamation was nothing but to circumvent the tax liability of the assessee. The Ld. D.R. submitted that the scheme of amalgamation becomes suspicious as the amalgamation was carried out between two 100% owned subsidiaries one of which is assessee by the same holding company. The Ld. D.R. submitted that the amalgamation was a colourable device intended to defraud the Revenue by claiming depreciation on the amount of goodwill created as a result amalgamation by making excess payment of consideration by one subsidiary to the another subsidiary. The Ld. D.R. submitted that even the name of the assessee was changed to one after amalgamation to that of amalgamating company in the next year. The Ld. D.R. submitted that the assessee should have taken the merger method of amalgamation and not the purchase method to create artificial goodwill by paying higher consideration for the assets of amalgamating company. The Ld. D.R. relied heavily on the order of AO and Ld. CIT(A) so far as the rejection of depreciation on goodwill is concerned and submitted that the appeal of the assessee may kindly be dismissed by upholding the order of Ld. CIT(A) and AO.

7. We have heard the rival submissions of both the parties and perused the material on record. The undisputed facts are that the assessee is a private limited company of Keva Group of Companies. M/s. SHK which is a 100% holding company of the assessee company and is listed on National Stock Exchange of India meaning thereby that the assessee is itself a company in which public are substantially interested. During the year under consideration another 100% subsidiary company

belonging to Keva Group was amalgamated with the assessee company after the scheme of amalgamation is approved of Hon'ble Bombay High Court. Prior to amalgamation the name of the assessee was M/S KV Arochem Pvt. Ltd. which changed to M/S Keva Frangrances Pvt. Ltd which was the name of amalgamating company till the date it existed. In other words the Keva Fragrances Pvt. Ltd. was amalgamated with the assessee M/S KV Arochem Pvt. Ltd. and after amalgamation the name of the company was changed to M/S Keva Frangrances Pvt. Ltd. from M/S KV Arochem Pvt. Ltd. The assessee company followed the purchase method of accounting to account for amalgamation entries in its books of accounts resulting in the creation of goodwill of Rs.251,18,95,120/- which was debited in the books of accounts of the assessee. The assessee company claimed depreciation @ 25% on the amount of goodwill which worked out to Rs.62,79,73,780/-. The assessee followed discounted cash flow method for valuation which was rejected by the AO on the ground that the results given by the DCF were misleading and fallacious and the assessee should have followed net asset value method instead of discounted cash flow method. The total consideration for amalgamation was fixed at Rs.381.72 crores as fair value of the amalgamating company (KFPL) as per the valuation report prepared by using discounted cash flow method. The assessee company issued 6,21,029 fully paid up equity shares of Rs.100/- each at a premium of Rs.6,046.50 to holding company i.e. SHK in discharge of the purchase consideration for the net assets vesting in the assessee company as a result of amalgamation. The net book value of the assets (assets – liabilities) of the amalgamating company i.e. KFPL as

per books of accounts was Rs.131.21 crores and the fair market value of assets over liabilities was Rs.145.44 crores. The assessee accounted for the amalgamation following purchase method in terms of AS 14 thereby booking the assets and liabilities at fair market value and the difference of Rs.236.28 crores was accounted for as goodwill which was calculated by reducing the fair market value of assets over liabilities of Rs.145.44 crores from the sale consideration of Rs.381.72 crores. However, the asset and liabilities were booked at book value for the income tax purposes and difference of Rs.251.50 crore was accounted for as goodwill under the head intangible assets which were calculated by reducing the book value of Rs.130.21 crores from sales consideration of Rs.381.72 crores and consequently a depreciation of Rs.62.80 Crores was claimed on the goodwill @ 25%. The AO noted that the amalgamated company KVAPL was a loss making company and has huge unabsorbed losses and unabsorbed depreciation whereas the amalgamating company KFAL was a profit making company. The AO questioned the method of accounting for the amalgamation and held that the said method of accounting for amalgamation has resulted into a huge gap between sale consideration and book value due to which the assessee has claimed huge depreciation on the goodwill. Now in this background the issue before us is whether the assessee is entitled to depreciation or not.

8. We note that in accounting for the assets of the amalgamating company in the books of the assessee the assessee followed the purchase method in pursuance of accounting standard-14 and accounted for the cost of

acquisition at fair value resulting into goodwill of Rs. 251.50 Cr and then claimed depreciation thereon @25%. After taking into account the facts of the case and the provisions of section 32 of the Act , we are of the opinion that assessee has rightly claimed the depreciation on goodwill. The case of the assessee find supports from the several decisions cited by the ld AR which are discussed as under:

a) In the case of CIT vs. Smifs Securities Ltd.(supra), the Hon'ble Apex Court has held that depreciation is allowable on the amount of goodwill which has come into being as a result of amalgamation of two companies.

b) In the case of Toyo Engineering Ltd. (supra), the coordinate bench after following the decision of Apex Court in the case of CIT Vs Smifs Securities Ltd (supra) and also the Hon'ble Bombay High Court in Toyo Engineering India Ltd. Vs ACIT ITA No. 129 of 2013 and others decided the issue in favour of the assessee. The operative part is extracted as under:

> "7. We have heard both the parties and perused the orders of the Revenue Authorities as well as the cited judgments of the higher judiciary. On considering the relevance and importance of the said judgments, we have extracted the relevant portions in the above mentioned paras of this order. It is now binding on us that the difference, if any, between the book value of the assets and the liabilities, should be transferred to goodwill account of the assessee. Therefore, considering the judgment of the Bombay High Court, neither the nature of the goodwill nor the quantity of the goodwill can be now disputed. In any case, it is not the case of the Assessing Officer that there are any differences in quantity of the goodwill. It is also a decided issue in view of the Apex Court judgment in the case of Smifs Securities Limited (supra) that the goodwill is now eligible for depreciation. Relevant portion from the said Supreme Court judgment reads as under: "Taxpayer had acquired a capital asset in the form of „goodwill" pursuant to amalgamation. Further, the SC in a brief order observed that "the words „any other business or commercial rights of similar nature" in clause (b) of Explanation 3 to section 32 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 (b). In the circumstances, we are of the view that „Goodwill" is an asset under

Explanation 3(b) to section 32(1) of the Act". 8. Considering the above settled position, the issue of allowability of depreciation on goodwill should be decided in favour of the assessee. As such, Revenue has not bought any contrary material to suggest that the claim of depreciation on goodwill is not genuine and the same is not eligible for depreciation. Accordingly ground no.1 raised by the Revenue is dismissed. Ground nos. 2, 3a, 3b and 4 need no specific adjudication as they were already adjudicated and decided by the Tribunal in the first round vide its order dated 25th May, 2012 (supra)."

c) In the case of M/s. MTANDT Rentals Ltd. vs. ITO (Supra), the coordinate bench decided the issue of depreciation on goodwill in favour of the assessee by holding and observing as under:

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

d) In the case of M/S Sprit Infrapower & Multiventures Pvt. Ltd. vs. PCIT (supra), the coordinate bench has held that the assessee is entitled to depreciation on goodwill. The operative part is as under:

"10. We find that the assesees claim of depreciation on „goodwill" in the case before us falls within the four corners of the judgement of the Hon'ble Supreme Court in the case of CIT, Kolkata Vs. Smifs Securities Limited (2012) 348 ITR 302(S.C). As is discernib

le from the „Notes" forming part of the financial statements of the assessee company before us, the excess consideration of Rs. 145,29,10,901/- paid by the assessee company over the value of net assets acquired of M/s Premier Finance & Trading Company Private Limited (amalgamating company) had been considered as „goodwill" arising in the process of amalgamation. On a perusal of the order passed by the Pr.CIT under Sec. 263 of the Act, we find, that he had held the order passed

by the A.O as erroneous for two fold reasons viz. (i) that, as per „Proviso 5" to Sec. 32(1), what the merged entity can claim as depreciation consequent to amalgamation/merger can at the most be the arithmetic sum of depreciation claimed by the two merging companies prior to amalgamation and cannot be more consequent to merger; and (ii) that, the introduction of the balancing figure of excess of liabilities over the assets as „goodwill" and treating it as tangible assets and claiming depreciation on the same under the Income Tax Act was in violation of „Proviso 5" to Sec. 32(1). In our considered view, the aforesaid observations of the Pr.CIT are absolutely misconceived and in contradiction of the judgment of the Hon"ble Supreme Court of in the case of Smifs Securities Ltd. (supra). On a perusal of „Proviso 5" to Sec. 32(1), we find that the same is only in the nature of a rider which inter alia disentitles the amalgamating company and the amalgamated company in the case of amalgamation to claim depreciation on tangible assets or intangible assets, the aggregate of which would exceed the claim of such deduction as per the prescribed rates in case the amalgamation had not taken place. Apart therefrom, it is therein envisaged that the claim for such deduction for depreciation on assets shall be inter alia apportioned between the amalgamating company and the amalgamated company in the ratio of the number of days for which the assets were used by them. In our considered view, in the case before us the „goodwill" had arisen in the books of the assessee company in the course of the process of the scheme of amalgamation of M/s Premier Finance Trading Company Private Limited with the assessee company, that was approved by the Hon"ble High Court of judicature at Bombay, vide its order dated 20.09.2013, pursuant whereto the assets and liabilities of the amalgamating company were transferred to and vested with the assessee company from the appointed date i.e. 01.04.2013. In our considered view, the aforesaid claim of depreciation raised by the assessee on the value of „goodwill" is in conformity with the judgment of the Hon"ble Supreme Court in the case of M/s Smifs Securities Ltd. (supra). Also, we are unable to comprehend as to how the aforesaid claim of depreciation raised by the assessee is found to be in violation of „Proviso 5" to Sec. 32(1) of the Act. Further, we find that the claim of the assessee towards depreciation on „goodwill" which was acquired in process of amalgamation is also fortified by the order of a coordinate bench of the Tribunal viz. ITAT, Pune Bench "A", Pune in the case of The Cosmos Co-op Bank Limited Vs. Dy.CIT, Circle 7, Pune [ITA No. 460 & 461/PN/2012, dated 23.01.2014]. Be that as it may, in our considered view, as the A.O in the course of the assessment proceedings had examined the assesees entitlement towards claim of depreciation on „goodwill", and had only after necessary deliberations finding the same to be in order had accepted the same, therefore, the Pr.CIT in exercise of the powers vested with him under Sec. 263 of the Act, was divested of his jurisdiction for seeking dislodging of the aforesaid possible, or infact a balanced and a reasonable view taken by the A.O. Our aforesaid observation that a possible view arrived at by the A.O after necessary deliberations cannot be dislodged by the CIT/Pr.CIT in exercise of revisional jurisdiction under Sec. 263 is fortified by the judgments of the Hon"ble Supreme Court in the case of Malabar Industrial Company (2000) 243 ITR 83 (SC) and CIT Vs. Max India Ltd (2007) 295 ITR 282 (SC). Also, support his drawn from the judgments of the Hon"ble High Court of Bombay in the case of Grasim Industries Ltd. Vs. CIT (2010) 321 ITR 92 (Bom) and CIT Vs. Gabriel India Ltd (1993)203 ITR 108 (Bom). Accordingly, not being able to persuade ourselves to subscribe to the view taken by the Pr.CIT that the order passed by the A.O under Sec. 143(3), dated

23.12.2016 was erroneous insofar it was prejudicial to the interest of the revenue, we „set aside" his order and restore the order passed by the A.O.

11. The appeal filed by the assessee is allowed in terms of our aforesaid observations."

e) In the case of M/S Cosmos Coop Bank Ltd. vs. DCIT (Supra), the coordinate bench has taken the same view on depreciation on goodwill.

9. Further we also find merit in the contentions of the ld AR that the scheme of amalgamation is approved by the High Court after giving notice to the stakeholders including the Revenue to state its objections, if any, to the proposed amalgamation scheme. However revenue has raised no objection to the scheme of amalgamation. Therefore the principle of estoppel prevents the revenue from challenging the validity of the scheme at the subsequent date. The case of the assessee is squarely covered by the decision of the coordinate bench in Electrocast Sales India Ltd. Vs DCIT (Supra) wherein the coordinate bench has held as under:

"4.4. We find that the scheme of amalgamation would be approved by the Hon'ble High Court only after ensuring that the same is not prejudicial to the interests of its members or to public interest. Hence the merger scheme approved by the Hon'ble High Court having in mind the larger public interest, cannot be disturbed by the revenue merely because the assessee is not entitled for benefits u/s 72A of the Act. The expression 'Public interest' was discussed by the Hon'ble Gujarat High Court in the case of Wood Polymer Ltd reported in 109 ITR 177 (Guj) wherein the Hon'ble Court refused to sanction the scheme of amalgamation formulated solely for the purpose of avoiding taxes. It was held that :

> "The court is charged with a duty, before it finally permits dissolution of the transferor company by dissolving it without winding up, to ascertain whether its affairs have been carried on, not only in a manner not prejudicial to its members but in even public interest. The expression "public interest" must take its colour and content from the context in which it is used. The context in which the expression "public interest" is used, enables the court to find out why the transferor company came into existence, for what purpose it was set up, who were its promoters, who

> were controlling it, what object was sought to be achieved through creation of the transferor company and why it was being dissolved by merging it with another company, That is the colour and content of the expression "public interest" as used in the second proviso to section 394(1) of the Act which have to be enquired into. If the only purpose appears to be to acquire certain capital asset through the intermediary of the transferor-company created for that very purpose to meet the requirement of law, and in the process to defeat tax liability which would otherwise arise, it could not be said that the affairs of the transferor-company sought to be amalgamated, created for the sole purpose of facilitating transfer of capital asset through its medium, have not been carried on in a manner prejudicial to public interest. Public interest looms large in this background and the machinery of judicial process is sought to be utilized for defeating public interest and the court would not lend its assistance to defeat public interest. The court would, therefore, not sanction the scheme of amalgamation.´

Hence it could be safely inferred that the Court would exercise due diligence and would conduct detailed enquiries before sanctioning the scheme. A scheme formulated for the purposes of tax evasion cannot be held to be in 'public interest' and hence the same cannot be sanctioned under the provisions of Companies Act, 1956. The fact that the Hon'ble Calcutta High Court had accorded its sanction to the scheme of amalgamation in the assessee's case implies that the same had been done by considering representations from the various fields and by duly considering the tax evasion point for income tax purposes. In this regard, we would like to place reliance on the functions, powers and discretions of the court that had been noted by Shri A .Ramaiya in the Companies Act, Part 2 at pages 2499 and 2500 in Point No. 6 incorporated hereunder:

> "That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same."

4.4.1. Further we find that the provisions of section 394A of the Companies Act, 1956 reads as under:-

> Notice to be given to Central Government for applications under sections 391 and 394 – The court shall give notice of every application made to it under section 391 or 394 to the Central Government, and shall take into consideration the representations, if any, made to it by that Government before passing any order under any of these sections.

Hence if there be any objections for the income tax department , they could raise the same at that stage i.e. prior to sanction of scheme by the court. Once the scheme is approved, it implies that the same has been done after duly considering the representations from the Government / revenue. Similar view was expressed by

the Co-ordinate bench of this Tribunal in the case of ITO vs Purbanchaal Power Co. Ltd in ITA No. 201/Kol/2010 dated 17.7.2014 wherein it was held that :-

> From the above provisions of section 394A of the Companies Act, 1956, legal position enunciated in the decisions of Hon'ble Gujarat High Court in the case of Wood Polymer Ltd ., in re and Bengal Hotels Pvt Ltd in re, supra and Vodafone Essar Gujarat Ltd., supra, evidently makes the purpose clear that if the revenue wants to object to the proposed scheme of amalgamation, it has to do so in the course of proceedings before the High Court but before the final order is passed. Whenever such objections have been raised, these have been considered on merits by the concerned High Court and also incorporated the condition for safeguarding the interest of revenue in the very scheme. As a matter of public policy, once a scheme of amalgamation is approved by Hon'ble High Court no authority should be allowed to tinker with the scheme. In the present case of the assessee, neither the official liquidator nor the Regional Director nor Central Government raised any objection to the scheme of amalgamation. In such circumstances , we are of the view that the revenue has nothing to say at the time of approval of the scheme by Hon'ble High Court in the present case.

4.5. We find that the Hon'ble Madras High Court in the case of Pentamedia Graphics Ltd vs ITO reported in 236 CTR 204 (Mad) had categorically held that once the scheme had been sanctioned with effect from a particular date by the Court, it is binding on everyone including the statutory authorities. It further held that having regard to the law declared by the Hon'ble Apex Court as to the effect of the scheme sanctioned by the Court, the only course open to the revenue would be to act as per the scheme sanctioned effective from 1st Jan 2004, which means that the tax authorities are bound to take note of the state of affairs of the applicant as on 1st Jan 2004 and a return filed regarding the same cannot be ignored on the strength of section 139(5) of the IT Act. The merits or otherwise on the returns filed , however, is a matter of assessment for the authorities to consider and pass order in accordance with law. It was further held that when the claim of the assessee in the appeal had already been granted, on a mere circumstance that the Department had not accepted the same and gone before the appellate forum does not mean that the scheme sanctioned would be of no consequence to the respondent. The respondent cannot ignore the order of this Court approving the scheme giving the effective date as 1st Jan, 2004. Similar view, that once the court sanctions the scheme , the Income tax department will be bound by the same, including the appointed date and cannot review the same, has been held by the Hon'ble Bombay High Court in the case of Casby CFS (P) Ltd reported in 231 Taxman 89 (Bom) dated 19.3.2015

(underlining provided by us)

4.5.1. We also find that the Hon'ble Supreme Court in the case of J.K.(Bombay) (P) Ltd vs New Kaiser –I-Hind Spg.& Wvg.Co. reported in 1970 AIR 1041 (SC) dated 22.11.1968 had held :

> The Principle is that a scheme sanctioned by the court does not operate as a mere agreement between the parties ; it becomes binding on the company, the creditors and the shareholders and has statutory force , and therefore the joint-debtor could not invoke the principle of accord and satisfaction. By virtue of the provisions of sec. 391 of the Act, a scheme is statutorily binding even on creditors , and shareholders who dissented from or opposed to its being sanctioned. It has statutory force in that sense and therefore cannot be altered except with the sanction of the Court even if the shareholders and the creditors acquiesce in such alteration.
>
> (underlining provided by us)

4.5.2. We find that the aforesaid observations of the Hon'ble Supreme Court had been followed by the Hon'ble Bombay High Court in the case of Sadanand Varde and Others vs State of Maharashtra reported in 247 ITR 609 (Bom) wherein it was held that :

> "Once a scheme becomes sanctioned by the court, it ceases to operate as a mere agreement between the parties and becomes binding on the company, the creditors and the shareholders and has statutory operation by virtue of the provisions of section 391 of the Companies Act."

The said judgement of Hon'ble Bombay High Court further provided that an appeal, if any, against the order of amalgamation lies u/s 391(7) of the Companies Act, 1956 and the same cannot be agitated in any collateral proceeding. The relevant extract of the same is reproduced hereunder for the sake of ready reference :-

> "We are of the view that the amalgamation, which has become final and binding, cannot be permitted to be challenged by the petitioners, without locus standi, in a collateral proceeding in the present writ petition. An amalgamation order can only be challenged under the Companies Act by an appeal under section 291(7) by any one of the parties, but no such appeal was ever filed."

In the instant case before us, the ld AR informed that the Income Tax Department , which is part of Union of India, had not filed any appeal u/s 391(7) of the Companies Act, 1956 against the order of amalgamation sanctioned by the Hon'ble High Court. This fact was not controverted by the ld DR before us.

4.6. The ld AR further argued that the scheme of amalgamation, as sanctioned by the Hon'ble Calcutta High Court, was effective from 1.4.2010 and the parties had acted according to the said scheme and cannot be subjected to reversal after a period of 7 years by virtue of the principle of 'res judicata' , 'constructive res judicata' and 'acquiescence'. In this regard, the ld AR placed reliance on the decision of Hon'ble Supreme Court in the case of Forward Construction Co. and Others vs Prabhat Mandal reported in 1986 AIR 391 (SC) wherein it was held that :

> "The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is

> true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided . It could only be deemed to have been heard and decided."

We find that in the instant case, the income tax department had the opportunity to controvert the specific clause mentioned in para 10(iii) in the scheme of amalgamation , when the scheme was presented before the Hon'ble High Court for approval. Thus applying the principles of res judicata as explained by the Hon'ble Apex Court in the aforesaid case, the issue can be deemed to be heard and decided . Accordingly, the argument that the same cannot be agitated in appeal u/s 391(7) of the Companies Act, 1956 deserves attention and merit. The English Court of Chancery in case of Henderson vs Henderson reported in (1843-60) All ER Rep 378 while construing Explanation IV to Section 11 of Code of Civil Procedure quoted hereunder:-

> The plea of res judicata applies, except in special case (sic), not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgement, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time".

4.7. It would be relevant to note that the scheme of amalgamation was approved on 6.10.2010 and intimation to this effect was sent by the assessee to the income tax department in January 2011 (copies of letters enclosed in pages 33 to 37 of paper book). The same was acted upon by the assessee assuming acceptance from the income tax department since no appeal against the said judgement of the Hon'ble High Court was filed before the Hon'ble Supreme Court. Thus, at this juncture, if the revenue is allowed to challenge the same u/s 391(7) of the Companies Act, 1956, then it would be clearly barred by the doctrine of acquiescence and estoppel. In law, acquiescence occurs when a person knowingly stands by without raising any objection to the infringement of his or her rights, while someone else unknowingly and without malice aforethought acs in a manner inconsistent with their rights. As a result of acquiescence, the person whose rights are infringed may lose the ability to make a legal claim against the infringer, or may be unable to obtain an injunction against continued infringement. The doctrine infers a form of 'permission' that results from silence or passiveness over an extended period of time. Applying this principle to the instant case before us, the assessee probably paid a consideration for the set off of accumulated losses taken over from the amalgamating companies and accordingly the share exchange ratio (as approved under the scheme) was acted upon assuming acceptance from the income tax department. Thus by applying the Doctrine of acquiescence, the department would be now barred from raising an objection to the scheme. Further a claim of estoppel arises when one party gives legal notice to a second party of a fact or claim, and the second party fails to challenge or refute that claim within a reasonable time. The second party may be said to have acquiesced to the claim, and thus to be estopped from later challenging it or making a counterclaim based upon the actions of the other party. In the instant case also, the fact of amalgamation was intimated to the income tax department 7 years back against which no appeal was preferred by them. Accordingly the claim of estoppel applies.

These Doctrines of Estoppel and Acquiescence had been approved by the Hon'ble Calcutta High Court in the case of Suresh Kumar Rungta and Ors vs Roadco India Pvt Ltd dated 22.9.2011 wherein the Hon'ble Calcutta High Court upheld the view of Trial Court wherein it was held that " the present appellants / applicants had knowledge about the passing of order of winding up. They had knowledge or have had occasion to come before this Court earlier, and did not come because they have accepted legality and validity of amalgamation".

Applying the Doctrine of Acquiescence and Estoppel the Hon'ble Court held that "It appears to us all the appellants have accepted the scheme of amalgamation and now these companies against whom relief is sought for are no longer in existence and they cannot be reverted back to their earlier position as by this time third parties right have been created by reallocation or reallotment of shareholding for there may be fresh subscribing. In true sense there has been sea change in the shareholding pattern of these companies. Therefore we dismiss the appeal."

4.8. In view of the aforesaid observations and findings in the facts and circumstances of the case, we hold that the accumulated losses of amalgamating companies, comprising of unabsorbed short term capital loss of Rs 10,26,44,123/- ; unabsorbed long term capital loss of Rs 6,34,784/- and unabsorbed business loss of Rs 6,63,574/- , would belong to the amalgamated company pursuant to clause in para 10(iii) of the scheme of amalgamation which was approved by the Hon'ble Calcutta High Court vide order dated 6.10.2010. Since the losses belonged to the amalgamated company i.e the assessee herein, the provisions of section 72 and section 74 of the Act would come into play with respect to set off of the same against the respective incomes of the assessee . In view of this, the provisions of non-compliance of section 72A of the Act as narrated by the ld CITA does not hold any water. Accordingly, the Grounds 1 & 2 raised by the assessee are allowed."

10. We have carefully perused the decision relied upon by the revenue authorities in the case of United Breweries Ltd Vs ACIT(supra) and find that the same is not applicable on the facts of the instant case as in the said decision the goodwill was already appearing in the books of amalgamating company which was acquired by the amalgamated company and then it was revalued. Besides we note that the said decision of the coordinate bench has been distinguished by the co-ordinate bench of the Tribunal in the case of Aricent Technologies (Holdings) Ltd. vs. DCIT (supra). Further in view of the decision of Hon'ble Karnataka High Court in the case of Padmini Products Pvt. Ltd. vs. DCIT 2020-TIOL-1797-HC-Kar-IT, the

decision in United Breweries Ltd Vs ACIT is not a good law as the Hon'ble High Court has held that 5th proviso to section 32(1) is only applicable in the circumstances where the predecessor and successor both claimed depreciation in respect of the same asset. We find that the 5th proviso was inserted in order to prevent double claim of the depreciation in respect of the same asset. But these are not the facts in the present case before us as the amalgamating company did not claim any depreciation on the goodwill and therefore the same can not be disallowed.

11. In view of the above facts and circumstances and the various decisions as discussed above, the order of the ld CIT(A) upholding the order of AO on this issue can not be sustained. Accordingly we set aside the order of ld CIT(A) on this issue and direct the AO to allow the depreciation on goodwill. The appeal of the assessee is allowed.

ITA No.1051/M/2020(Revenue's Appeal)

12. The Revenue has taken the following grounds in its appeal:

"1. On the facts and circumstances of the case and in law, the Ld.CIT(A) erred in deleting the addition made u/s.56(2)(viib) of the I.T. Act, without appreciating the fact that the entire valuation was made exclusively on the information given by the assessee and no independent verification was made by the Valuer. In fact, the projections of the profit was also provided by the management".

"2. On the facts and circumstances of the case and in law, the Ld.CIT(A) failed to appreciate the fact that the projections made by the assessee was not based on any facts or tangible data but suppositions made for the purpose of valuation so as to suit the assessee".

"3. On the facts and circumstances of the case and in law, the Ld.CIT(A) failed to appreciate the fact that there was great difference between the projections and the actuals made in the share valuation report".

"4. On the facts and circumstances of the case and in law, the Ld. CIT(A) failed to appreciate the fact that the method (DCF method) deployed by the assessee for

valuation of shares is deeply flawed and the consideration received for the share premium does not stand the test of law".

"5. On the facts and circumstances of the case and in law, the Ld.CIT(A) failed to appreciate the fact that the amalgamated company KVAPL has since changed its name to Keva Fragrances Pvt. Ltd.. which is actually the original name of the amalgamating company."

"6. On the facts and circumstances of the case and in law, the Ld.CIT(A) failed to appreciate the fact that the intention of amalgamation was not to merge the companies as a matter of business arrangement or commercial expediency but to evade taxes".

"7. On the facts and circumstances of the case and in law, the Ld.CIT(A) failed to appreciate the fact that the amalgamated company KVAPL has since changed its name to M/s Keva Fragrances Pvt. Ltd., which is actually the original name of the amalgamating company and as per the provisions of Sec. 72 (A) of the I.T.Act, 1961, the assessee would not have been able to claim the carry forward loss or unabsorbed depreciation, if the amalgamation was done the other way round by amalgamating KVAPL with KFPL. Therefore, the scheme of amalgamation has been done in such a way that KFPL was thus amalgamated with KVAPL".

"8. On the facts and circumstances of the case and in law, the Ld.CIT(A) failed to appreciate the fact that the entire arrangement was made to set off the losses with future profits and to evade tax".

"9. The appellant prays that the order of CIT(A) on the above grounds be set aside and that of Assessing Officer be restored.

"10. The appellant craves leave to amend or alter any ground or add new ground which may be necessary"

13. The only effective issue raised in ground No.1 to 4 is against the deletion of addition of Rs.251,18,95,121/- as made by the AO under section 56(2)(viib) of the Act towards excess issue price of shares over fair market value of the shares.

14. The facts qua the amalgamation, fair market value and consideration etc. have been discussed in the assessee's appeal hereinabove and hence are not being reiterated for the sake of brevity. The total consideration fixed for the amalgamating company was discharged by the assessee by issuing 6,21,029

equity shares at issue price of Rs. 6,146.50 per equity share. The toal value of shares issued was Rs. 381.72 Crores. According to the AO, the valuation done by the assessee using discounted cash flow method for valuing the shares is not correct and calculated the value per share using net asset value method and the total valuation was done at Rs. 130.21 Crores. The AO on the basis of this valuation calculated the issue price over fair value of shares at Rs. 251.18 Crores and added the same u/s 56(2)(viib) of the Act to the income of the assessee.

15. In the appellate proceedings, the appeal of the assessee was allowed by Ld. CIT(A) by holding that the assessee is a subsidiary company of holding company which is a listed company and therefore the assessee is also a company in which the public are substantially interested and as a result, the provisions of section 56(2)viib) of the Act are not applicable to the appellant by observing and holding as under:.

> "4.1 I find that the arguments made by the appellant about the applicability of provisions of section 56(2)(viib) have force considering the fact that, the appellant company was wholly owned subsidiary of a listed public limited company, i.e. SHK. The provisions of section are not applicable to a company, in which public are substantially interested as expressly mentioned in the clause viib of subsection 2 of section 56 of the Act. The term "company in which public is substantially interested" is defined in the section 2(18) of the Act. As per the clause b of section 2(18) of the Act, a company is considered as a 'company in which public is substantially interested' if it is a company, which is not a private company as defined in the Companies Act, 1956 (1 of 1956), and the conditions specified either in item (A) or in item (B) of the clause b are fulfilled. Item (A) covers such companies, the shares in which (not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits) were, as on the last day of the relevant previous year, listed in a recognised stock exchange in India in accordance with the Securities Contracts (Regulation) Act, 1956 (42 of 1956), and any rules made thereunder. Whereas the item (B) covers such companies, the shares in which (not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits) carrying not less than fifty per cent of the voting power have been allotted unconditionally to, or acquired unconditionally by, and were throughout the relevant previous year beneficially held by any company to which this clause applies or any subsidiary company of

such company, if the whole of the share capital of such subsidiary company has been held by the parent company or by its nominees throughout the previous year.

4.4.2 SHK qualifies to be treated as a 'company in which public is substantially interested' as per the item (A) of the clause b of section 2(18) of the Act and by virtue of SHK, the holding company of the appellant, being a 'company in which public is substantially interested' the appellant company also qualifies to be a treated as 'company in which public is substantially interested' as per the item (B) of the clause b of section 2(18). Thus, in view of the bare provisions of the Act as discussed above, the provisions of section 56(2)(viib) of the Act are not applicable to the case of the appellant Therefore, in view of the above, the addition of Rs. 251,18,95,121/- made by the AO under section 56(2)(viib) of the Act is hereby deleted. **The concerned ground is allowed**."

16. We have heard the rival submissions and perused the material on record. The undisputed facts are that the assessee is a subsidiary company of a company SHK which is listed on the stock exchange and therefore is a company in which public are substantially interested. Since the assessee is a subsidiary company of a company which is listed and therefore assessee is also a company in which public are substantially interested and therefore provisions of section 56(2)(viib) are not applicable to the assessee company as the said section is not applicable to the company in which public are substantially interested. We have perused the order of Ld. CIT(A) and observed that while allowing the appeal of the assessee on this issue, Ld. CIT(A) has also held that provisions of section 56(2)(viib) of the Act are not applicable to the assessee for the reason that assessee company is a subsidiary company of holding company which is listed and therefore the assessee also becomes a company in which public are substantially interested. In view of these facts, we are of the view that Ld. CIT(A) has correctly allowed the appeal of the assessee on this issue and therefore uphold the same on this issue by dismissing the ground Nos.1 to 4 of the Revenue.

17. The issue raised in ground No.5 to 9 is against the order of Ld. CIT(A) allowing the benefit of brought forward losses to the assessee which was rejected by the AO.

18. The AO noticed that M/s. Keva Fragrances Private Limited had amalgamated with M/s. KV Arochem Private Limited. Immediately post amalgamation, the name of amalgamated company i.e. KV Arochem Private Limited was changed to M/s. Keva Fragrances Private Limited. The learned AO observed that the same is a violation of Companies Incorporation Rules 2014. Had the amalgamation been done the other way round, then benefit of brought forward losses would not have been available to the amalgamated company. Accordingly, the learned AO held that the brought forward losses and unabsorbed depreciation of amalgamated company would not be available for set off and the same was not allowed to be carried forward.

19. The learned CIT(A) allowed the appeal of the assessee on this issue by observing that as per provisions of section 72A of the Act, even if amalgamation was done the other way around, benefit of brought forward losses would have been available to the amalgamated entity. To that extent the observation of learned AO was factually incorrect. The learned CIT(A) also observed that the entire scheme of amalgamation could not be treated as a colourable transaction since section 72A of the Act would have allowed benefit of brought forward losses even if the amalgamation was carried out and done in the reverse manner. He accordingly, allowed the benefit of brought forward losses of the amalgamated company.

20. After hearing the rival contentions of parties and perusing the facts on records including the impugned appellate order under challenge before us, we note that the change of name was approved by the Hon'ble High Court of Bombay and the same is stated in the order of amalgamation as under:

> "13. CHANGE OF NAME OF TRANSFEREE COMPANY
> 14.1 With effect from the effective date, the name of transferree company shall stand changed to Keva Fragrances Private Limited or such other name as may be decided by the Board of Directors...."

21. We have also perused the provisions of section 72A of the Act minutely and observe that the section allows benefit of losses incurred by amalgamating company to the amalgamated company. Therefore, there is merit in the arguments of the ld. AR that even if the amalgamation was done the other way around, benefit of brought forward losses would have been available to the amalgamated company. Under these facts and circumstances we do not find any infirmity in the appellate order so far as this issue is concerned. The ld. CIT(A) rightly reversed the order of AO denying the benefit of brought forward losses and unabsorbed depreciation to the appellant assessee. Accordingly, the ground no. 5 to 9 are dismissed.

22. In the result the appeal of the assessee is allowed and that of the Revenue is dismissed.

Order pronounced in the open court on 02.08.2021.

Sd/-	**Sd/-**
(Amarjit Singh)	**(Rajesh Kumar)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated: 02.08.2021.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.