आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ, अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV,
HON'BLE VICE-PRESIDENT
AND
SHRI WASEEM AHMED
HON'BLE ACCOUNTANT MEMBER

ITA.No.1806/Ahd/2019
निर्धारण वर्ष/Asstt.Year: 2015-16

Urmin Marketing P.Ltd. Now known as Unicorn Packaging LLP "Urmin House", Ground Floor Sidhu Bhvan Road Off: S.G.Highway, Bodakdev Ahmedabad. PAN : AAACU 9197 R	Vs	DCIT, Cir.4(1)(1) Ahmedabad.

अपीलार्थी/ (Appellant)		**प्रत्यर्थी/** (Respondent)

Assessee by :	Shri Aseem Thakkar, AR
Revenue by :	Shri Virendra Ojha, CIT-DR

सुनवाई की तारीख/**Date of Hearing : 06/08/2020**
घोषणा की तारीख /**Date of Pronouncement: 21/10/2020**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER

The above appeal is by the assessee against the order of Commissioner of Income-tax (Appeals)-8, Ahmedabad dated 23.10.2019 passed under section 250(6) of the Income Tax Act, 1961 for the assessment year 2015-16.

2. In the appeal memo, the grounds of appeal raised by the assessee vide ground no.1 to 17 are descriptive and argumentative in nature, which in fact involves only one substantive issue. However, we reproduce the grounds as such stated by the assessee in the appeal memo for the convenience of adjudication of substantive issue. It reads as under:

1. *The learned Commissioner of Income Tax (Appeals) has erred in confirming action of the Assessing Officer in computing the total income at Rs.2,56,06,81,0687- as against that of Rs.1,38,88,41,840/-declared by the appellant in the return of income filed on 30/09/2015.*

2. *The learned Commissioner of Income Tax (Appeals) has erred in passing the appellate order in undue haste without granting adequate opportunity of representation to the appellant Company when the written submissions dtd. 10/10/2019 filed before him specifically stating therein that the written submissions have been filed in part and the balance submissions shall be furnished to you shortly. Hence the order so passed being against the principles of natural justice and law requires to be cancelled.*

3. *The learned Commissioner of Income Tax (Appeals) has erred in not appreciating the fact that the assessee company had filed written submissions dtd.09/07/2019 and 10/10/2019. He ought to have considered the fact that in both the written submissions it has been specifically stated that the submissions have been made in part and the balance submissions shall be furnished to you shortly.*

4. *The learned Commissioner of Income Tax (Appeals) has erred in passing appellate order without granting further opportunity or rejecting the request for further time as intimated in the written submissions dtd. 10/10/2019 filed before him.*

5. *The learned Commissioner of Income Tax (Appeals) has erred in not considering the fact that there was reasonable cause in furnishing the written submissions in part as it was time for completion of audit and filing return of income of the audited cases which are due in the month of October, 2019.*

6. *The learned Commissioner of Income Tax (Appeals) has erred in confirming action of the Assessing Officer in passing an order u/s.!44C r.w.s.143(3) of the I.T. Act,1961.*

7. *The learned Commissioner of Income Tax (Appeals) has erred in confirming the action of the Assessing Officer in making disallowance of claim of depreciation on goodwill of Rs. 1,17,18,39,2287- u/s.32(l) r.w.s.43(l) r.w.s.43(6)(c) r.w.s.49(l)(iii)(e) r.w.s.55(2) (a)(ii) of the I. T. Act, 1961 and*

expressly clarifying that depreciation on goodwill is not allowable in future years also.

8. *The learned Commissioner of Income Tax (Appeals) has erred in confirming action of the Assessing Officer in rejecting the goodwill arising on account of amalgamation Merger of two companies when the amalgamation and the scheme thereof has been approved by the Gujarat High Court.*

9. *The learned Commissioner of Income Tax (Appeals) has erred in confirming action of the Assessing Officer in holding that the cost of goodwill in the case of amalgamating company is Nil as no asset by way of goodwill appears in the Balance Sheet of the amalgamating company.*

10. *The learned Commissioner of Income Tax (Appeals) has erred in confirming action of the Assessing Officer in not accepting the method of valuation of goodwill adopted by the appellant.*

11. *The learned Commissioner of Income Tax (Appeals) has erred in confirming action of the Assessing Officer in holding that the goodwill created in the books of UPPL is the result of the revaluation of the assets of the transferee company as there was no such assets in its books of accounts before amalgamation. Thus the cost of acquisition would stand Nil, as no outflow happened from the company and as per the provision of Income Tax Act depreciation is allowable on the cost of acquisition or WDV both are Nil here.*

12. *The learned Commissioner of Income Tax (Appeals) has erred in confirming action of the Assessing Officer in holding that the existing business of a group company has been amalgamated with a paper company of the same group only by issue of shares and without any material change in shareholding.*

13. *The learned Commissioner of Income Tax (Appeals) has erred in confirming action of the Assessing Officer in holding that the assessee has issued shares at a huge premium to the same shareholders of the group and the transferee company is a paper company with no worthwhile activities.*

14. *The learned Commissioner of Income Tax (Appeals) has erred in confirming action of the Assessing Officer in making allegation that high value tax evasion is happened in both by way of claiming excess depreciation and creation of dubious capital in the converted entity LLP.*

15. *The learned Commissioner of Income Tax (Appeals) has erred in confirming action of the Assessing Officer in not accepting valuation report of RBSA Capital Advisors LLP submitted by the Appellant and further holding that*

adoption of different value method for two companies UPPL and UMPL is unjustified.

16. *The learned Commissioner of Income Tax (Appeals) has erred in confirming action of the Assessing Officer in holding that the valuation report has several contradiction , discrepancies and inconsistent and the same has been prepared only to suit the interest of assessee to claim deprecation on goodwill.*

17. *The Appellant craves leave to add, alter, amend or modify any of the grounds of appeal on or before the date of hearing of appeal."*

3. The assessee has also raised some additional grounds. They read as under:

"1. The assessment order has been passed in the case of an non entity that ceased to exist pursuant to the order of amalgamation of Honourable High Court. The order passed on non entity is a nullity and void ab initio and deserves to be quashed.

2. The Ld. AO is aware of the subsequent amalgamation of the appellant company with UrminFlavoroma Pvt. Ltd. w.e.f. 01.04.2015 and further name change to Unicorn Packaging Pvt. Ltd. on 01.03.2016 and conversion to LLP by the name of Unicorn Packaging LLP on 20.03.2016 which fact has been acknowledged in the assessment order itself.

3. The appellant craves leave to add, alter, amend or modify all or any of the grounds of appeal before or at the time of hearing."

3.1 The above additional ground of appeal raised by the assessee has already been admitted by this Tribunal vide interim order dated 20.02.2020. The relevant extract of the order is reproduced as under:

"20.02.2020 Present: Assessee by : Shri Aseem L Thakkar, AR
Revenue by : Shri Virendra Ojha, CIT-DR

The present appeal was listed on 13th February 2020 and the hearing was adjourned to 19th February 2020. On 17th February 2020, the assessee has filed an application for permission to raise additional grounds of appeal. It has also filed the grounds of appeal which it sought to raise as additional grounds of appeal. On 19th February 2020, copy of the additional grounds of appeal alongwith application was handed over to the leaned CIT-DR and the hearing was adjourned for today.

The learned Counsel for the assessee submitted that an assessment has been framed in the name of the company which ceases to exist. Even notice under Section 143(2) of the Income-tax Act was issued after cessation of the existence of the assessee-company. Therefore, this assessment is not sustainable in view of the latest decision of the Hon'ble Supreme Court in the case of PC1T Vs. Maruti Suzuki India Ltd, (2019) 416 ITR 613. According to the learned Counsel for the assessee, it was not aware about the decision of the Hon'ble Supreme Court in the case of Maruti Suzuki India Ltd (supra) when the appeal was filed. It came to its notice subsequently. On the strength of the Hon'ble Supreme Court's decision in the case of National Thermal Power Co. Ltd. Vs. CIT, (1998) 229 ITR 383 (SC), he contended that this will go to the root of the assessment of the assessee and, therefore, being a legal issue, the assessee be permitted to raise these grounds.

On the other hand, learned CIT-DR opposed the prayer of the assessee. He contended that the assessee never took this objection before the Revenue Authorities below. According to him, permission to raise these additional grounds of appeal at this stage would require investigation of fresh facts which are not available on record. Therefore, assessee's application be rejected.

We have duly considered the rival contentions and gone through the record carefully. The issue which assessee wishes to raise by way of this application is purely a legal issue. The relevant facts require to be noted are already mentioned in paragraph no.3 to 3.6 of the assessment order. According to the decision of Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd., if a particular issue is going to affect the taxability of the assessee, then the assessee deserves to be permitted to raise that issue even before the Second Appellate Authority. Therefore, considering the above aspect, we permit the assessee to raise following additional grounds of appeal:-

> *1. The assessment order has been passed in the case of an non-entity that ceased to exist pursuant to the order of amalgamation of Hon'ble High Court. The order passed on non-entity is a nullity and void ab initio and deserves to be quashed.*
>
> *2. The Ld. AO is aware of the subsequent amalgamation of the appellant company with Urmin Flavoroma Pvt Ltd w.e.f. 01.04.2015 and further name change to Unicorn Packaging Pvt Ltd on 01.03.2016 and conversion to LLP by the name of Unicorn Packaging LLP on 20.03.2016 which fact has been acknowledged in the assessment order itself."*

After permitting the assessee to raise the additional grounds, we have heard the learned Counsel for the assessee on these preliminary issues. Thereafter, he commenced his arguments on the merits; however, after sometime, during the course of hearing it was felt that some of the paper-books filed by the assessee were not available with the learned CIT-DR; therefore, we adjourn the hearing for 17th March 2020. Since we have heard learned Counsel for the assessee on

the preliminary issue and subsequently admitted the additional grounds; therefore, we treat the appeal as part-heard. Copy be supplied to both the parties.

Sd/-	*sd/-*
(WA)	*(RPY)*
AM	*VP"*

In view of the above, we proceed to adjudicate the additional ground of appeal raised by the assessee.

4. The assessee in the additional ground of appeal has challenged the validity of the assessment on the reasoning that it was framed in the name of non-existent company.

5. The facts in brief are that the assessee is a Private Limited Company. The assessee company i.e. M/s Urmin Marketing Pvt. Ltd has taken over the other company namely M/s Unicorn Packers limited in a scheme of amalgamation w.e.f. 1st April 2014 approved by the Hon'ble Gujarat High Court vide order dated 27-7-2015. Subsequently the assessee company got amalgamated with another company namely M/s UrminFlavoroma Private Limited w.e.f. 1st April 2015 in a scheme of amalgamation approved by the Hon'ble Gujarat High Court vide order dated 05-01-2016. Thereafter w.e.f. 1stMarch 2016 the name of the resulting/amalgamated company i.e. M/s UrminFlavoroma Private Limited was changed to M/s Unicorn Packaging Private Limited. Finally w.e.f. 21stMarch 2016 M/s Unicorn Packaging Private Limited converted into limited liability partnership. The assessee, however, in the year under consideration was subject to scrutiny assessment. The AO framed the assessment order dated 27th December 2018 under section 143(3) read with section 144C of the Act in the name of the erstwhile company namely M/s Urmin Marketing Pvt. Ltd which was a non-existent entity at that point of time.

6. The Ld. AR before us has challenged the validity of the assessment order framed by the AO under section 143(3) read with section 144C of the Act dated 27th December 2018 on the reasoning that it was framed on erstwhile company which was a non-existent entity at that point of time. The ld. AR has filed a paper book running from pages 1 to 59 and highlighted the chronology of events right from the date of filing the returns, scheme of amalgamation, intimations for change of name and conversion into LLP and the assessment framed under section 143(3) read with section 144C of the Act dated 27th December 2018.

7. On the other hand the Ld. DR submitted that the notice under section 143(2) of the Act was issued on 8-4-2016 in the name of the erstwhile company before the approval of the scheme of amalgamation by the Hon'ble High Court. Therefore, the notice issued under section 143(2) of the Act was valid and consequent assessment in the name of the erstwhile company under section 143(3) of the Act was also valid.

8. We have heard both the parties and perused the materials available on record before us, especially the impugned orders and the case law cited therein and also cited by the learned AR of the assessee as discussed aforesaid.

9. Now coming to the legality of order framed by the AO under section 143(3) read with section 144C of the Act vide order dated 27thDecember 2018, in this regard we note that the AO on the first page of his order has mentioned the name of M/s. Urmin Marketing Pvt. Ltd. which was erstwhile company. Thus it is clear that the assessment order was framed in the name of non-existent entity (M/s. Urmin Marketing Pvt. Ltd.) as the M/s. Urmin Marketing Pvt. Ltd. was amalgamated with M/s UrminFlavoroma Pvt. Ltd.

w.e.f. 1st April 2015 by the order of the Hon'ble Gujarat High Court dated 5-1-2016 and subsequently the name of M/s UrminFlavoroma Pvt. Ltd. was changed and converted into Limited Liability Partnership w.e.f. 21st March 2016. This fact has been recognized by the AO himself in his order dated 27th December 2018. The relevant finding of the AO is reproduced here under:

> *"3.1. During the year under consideration, the Hon'ble High Court vide order dated 27.07.2015, has approved the scheme of amalgamation of M/s Unicorn Packers Private Limited (UPPL) with M/s Urmin Marketing Private Limited (UMPL). Thereafter M/s Urmin Marketing Private Limited (UMPL) was amalgamated with another company namely M/s UrminFlavoromaPvt Ltd with effect from 01.04.2015. Later on the name of M/s UrminFlavoromaPvt Ltd was changed to M/s Unicorn Packaging Private Limited with effect from 01.03.2016. This company i.e M/s Unicorn Packing Private Limited later on converted into an LLP in the name of M/s Unicorn Packaging LLP, with effect from 21.03.2016.*
>
> *3.2. During the year under consideration pursuant to an order passed by the Hon'ble High Court of Gujarat dated 27th July, 2015, M/s Unicorn Packers Private Limited (UPPL) (engaged in the business of packers) has been amalgamated with M/s Urmin Marketing Private Limited (UMPL). The appointed date of amalgamation is 1st April 2014. The amalgamated company has issued 4,50,00,000 equity shares against 90000/-equity shares of amalgamating company i.e. 500 shares for every one share, as per Report of Valuation of Shares by RBSA Capital Advisors LLP., accordingly shares in the ratio of 500:1 issued which are of Rs. 123.50/- per share (face value Rs. 10/- and share premium Rs.113.5/- per share)*
>
> *3.3. It is seen from the Balance Sheet as on 31.03.2015, (Fixed Assets) that during the year under consideration the assessee has created goodwill of Rs.468,73,56,913/- in the books of accounts by virtue of amalgamation of M/s Unicorn Packers Private Limited (UPPL) (hereinafter called as UPPL or Transferor Company) with Urmin Marketing Pvt Ltd (UMPL or Transferee Company). The excess consideration discharged by UMPL, over book value of UPPL Transferor Company, was recorded as goodwill in the books of UPPL, Transferee Company. In terms of the scheme, All the assets of UPPL transferred to and vested in UMPL pursuant to the Scheme have been recorded at the book value and all the liabilities of UPPL transferred*

to and vested in UMPL pursuant to the Scheme have been recorded at the book value. The difference of Rs.4,68,73,56,913/- between net value of assets over consideration has been debited to goodwill account in the books of the company."

10. The AO vide letter dated 25-1-2017 bearing No. ITO/Wd.4(1)(4)/AHD/Advance Tax/2016-17 has also requested to the UPPL for making the advance payment of tax. The copy of the letter is placed on page 51 of the paper book. Similarly, the fact of intimating the non-existence of the company UPPL and its conversion into LLP was brought to the notice to AO vide letter dated 6-2-2017. The copy of the letter is placed on page 52 of the paper book.

11. Likewise, the assessee vide letter dated 13-3-2018 under section 154 of the Act requested the AO for the grant of credit of the taxed paid by all the companies to the account of limited liability partnership. The copy of the letter is placed on page 53 & 54 of the paper book.

12. In the same way, the assessee vide letter dated 27-9-2018, addressed to the DCIT Cir(4)(1)(1) of the Act has requested for rectification and cancellation of demand for not granting full tax credit. The copy of the letter is placed on page 55 to 56 of the paper book.

13. Similarly, the form 26 Generated by the TDS Central Processing Cell showing the credit of tax was issued in the name of UPPL. The copy of the letter is placed on page 55 to 56 of the paper book.

14. It is undisputed fact that at the time of issue of notice dated 8thApril 2016 under section 143(2) of the Act, the company i.e. M/s Urmin Marketing Pvt. Ltd. was not non-existent which can be verified from the facts as discussed above. But, the assessment order was framed after amalgamation

and conversion into LLP in the name of M/s. Urmin Marketing Pvt. Ltd. which did not exist at the relevant point of time.

15. We further note that the Department was aware about the amalgamation of the company and further conversion into LLP before framing the assessment order as the assessee intimated to the department as well as Hon'ble High Court also called for the comments from the Department on the proposed scheme of amalgamation. Thus we can say that the provision of section 292B of the Act will not be applicable to the assessee as it is not a curable defect/mistake.

16. In this regard we would like to take a note of the position of law laid down by the Hon'ble Supreme in the case PCIT Vs. Maruti Suzuki India Limited reported in 416 ITR 613. The facts in this case are that Suzuki Motors Corporation, and Maruti Suzuki India limited (in short MSIL) constituted a joint venture with shareholding of 70% and 30%. Such joint venture was incorporated as Suzuki Motor India Ltd. Subsequently w.e.f. 8th June 2005 its name was changed to SPIL. On 28th November 2012 SPIL has filed its return of income. Upto this date no amalgamation had taken place. On 29th January 2013 a scheme for amalgamation of SPIL and MSIL was approved by the Hon'ble High Court w.e.f. 1st April 2012. The terms of approval scheme provided that all liability and duties of the transferor company shall stand transferred to the transferee company. On scheme being coming into effect, the transferor company was to stand dissolved without winding up. The scheme stipulated that the order of amalgamation will not be construed as an order granted exemption from the payment of stamp duty or taxes, or any other charges, if any payable in accordance with law. The AO has initiated the assessment proceedings by issuance of notice under section 143(2) on 26thSeptember 2013 followed by a notice under section 142(1) of

the Act to the amalgamating company. MSIL participated in the assessment proceedings of erstwhile amalgamating entity i.e. SPIL through its authorized representative and officers. The assessment was framed. Thereafter during the appellate proceedings before the Tribunal the assessee took an objection that final assessment order was passed on 31.10.2016 in the name of SPIL which was amalgamated with MSIL. The assessee took an objection that the assessment order has been passed in the name of company which ceased to exist and therefore, the assessment order is void ab initio. This plea of the assessee was accepted by the Tribunal. This order of the Tribunal was upheld by the Hon'ble High Court. Ultimately issue travelled upto Hon'ble Supreme Court. While taking cognizance of the submissions, and the proposition laid down in various High Courts' decisions, the Hon'ble Supreme Court made the following observations:

> *"19. While assessing the merits of the rival submissions, it is necessary at the outset to advert to certain significant facets of the present case:*
> *(i) Firstly, the income which is sought to be subjected to the charge of tax for AY 2012-13 is the income of the erstwhile entity (SPIL) prior to amalgamation. This is on account of a transfer pricing addition of Rs. 78.97 crores;*
> *(ii) Secondly, under the approved scheme of amalgamation, the transferee has assumed the liabilities of the transferor company, including tax liabilities;*
> *(iii) Thirdly, the consequence of the scheme of amalgamation approved under Section 394 of the Companies Act 1956 is that the amalgamating company ceased to exist. In Saraswati Industrial Syndicate Ltd., (supra) the principle has been formulated by this Court in the following observations: "5. Generally, where only one company is involved in change and the rights of the shareholders and creditors are varied, it amounts to reconstruction or reorganisation of scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or 'amalgamation' has no precise legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending company become substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly 'amalgamation' does not cover the mere acquisition by a company of the share capital of other company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. See: Halsbury's Laws of England (4th edition volume 7 para 1539). Two companies may join to form a new company, but there may be absorption or blending of one by the other, both amount to amalgamation. When two companies are merged and*

are so joined, as to form a third company or one is absorbed into one or blended with another, the amalgamating company loses its entity."
(iv) Fourthly, upon the amalgamating company ceasing to exist, it cannot be regarded as a person under Section 2(31) of the Act 1961 against whom assessment proceedings can be initiated or an order of assessment passed;
(v) Fifthly, a notice under Section 143 (2) was issued on 26 September 2013. To the amalgamating company, SPIL, which was followed by a notice to it under Section 142(1);

(vi) Sixthly, prior to the date on which the jurisdictional notice under Section 143 (2) was issued, the scheme of amalgamation had been approved on 29 January 2013 by the High Court of Delhi under the Companies Act 1956 with effect from 1 April 2012;

(vii) Seventhly, the assessing officer assumed jurisdiction to make an assessment in pursuance of the notice under Section 143 (2). The notice was issued in the name of the amalgamating company in spite of the fact that on 2 April 2013, the amalgamated company MSIL had addressed a communication to the assessing officer intimating the fact of amalgamation. In the above conspectus of the facts, the initiation of assessment proceedings against an entity which had ceased to exist was void ab initio.

20. In Spice Entertainment, (supra) a Division Bench of the Delhi High Court dealt with the question as to whether an assessment in the name of a company which has been amalgamated and has been dissolved is null and void or, whether the framing of an assessment in the name of such company is merely a procedural defect which can be cured. The High Court held that upon a notice under Section 143 (2) being addressed, the amalgamated company had brought the fact of the amalgamation to the notice of the assessing officer. Despite this, the assessing officer did not substitute the name of the amalgamated company and proceeded to make an assessment in the name of a non-existent company which renders it void. This, in the view of the High Court, was not merely a procedural defect. Moreover, the participation by the amalgamated company would have no effect since there could be no estoppel against law :

"11. After the sanction of the scheme on 11th April, 2004, the Spice ceases to exit w.e.f. 1st July, 2003. Even if Spice had filed the returns, it became incumbent upon the Income tax authorities to substitute the successor in place of the said 'dead person'. When notice under Section 143 (2) was sent, the appellant/amalgamated company appeared and brought this fact to the knowledge of the AO. He, however, did not substitute the name of the appellant on record. Instead, the Assessing Officer made the assessment in the name of M/s Spice which was non existing entity on that day. In such proceedings an assessment order passed in the name of M/s Spice would clearly be void. Such a defect cannot be treated as procedural defect. Mere participation by the appellant would be of no effect as there is no estoppel against law.

12. Once it is found that assessment is framed in the name of non-existing entity, it does not remain a procedural irregularity of the nature which could be cured by invoking the provisions of Section 292B of the Act."

Following the decision in Spice Entertainment, (supra) the Delhi High Court quashed assessment orders which were framed in the name of the amalgamating company in:

(i) Dimension Apparels (supra);
(ii) Micron Steels; and (supra)
(iii) Micra India (supra).

21. In Dimension Apparels, (supra) a Division Bench of the Delhi High Court affirmed the quashing of an assessment order dated 31 December 2010. The Respondent had amalgamated with another company and thus, ceased to exist from 7 December 2009. The Court rejected the argument of the Revenue that the assessment was in substance and effect in conformity with the Act by reason of the fact that the assessing officer had used correct nomenclature in addressing the Assessee; stated the fact that the company had amalgamated and mentioned the correct address of the amalgamated company. It was the Revenue's contention that the omission on the part of the assessing officer to mention the name of the amalgamated company is a procedural defect. The Delhi High Court rejected this contention. In doing so, it relied on the holding in Spice Entertainment, (supra) where the High Court expressly clarified that "the framing of assessment against a non-existing entity/person" is a jurisdictional defect. The Division Bench also relied on the holding in Spice Entertainment (supra) that participation by the amalgamated company in proceedings does not cure the defect as "there can be no estoppel in law", to affirm the quashing of the assessment order.

22. In Micron Steels, (supra) a notice was issued to Micron Steels Pvt Ltd (original assessee) after it had amalgamated with Lakhanpal Infrastructure Pvt Ltd. A Division Bench of the Delhi High Court upheld the setting aside of assessment orders, noting that Spice Entertainment (supra) is an authority for the proposition that completion of assessment in respect of a non-existent company due to the amalgamation order, would render the assessment a nullity.

23. In Micra India, (supra) the original assessee Micra India Pvt. Ltd had amalgamated with Dynamic Buildmart (P) Ltd. Notice was issued to the original assessee by the Revenue after the fact of amalgamation had been communicated to it. The Court noted that though the assessee had participated in the assessment, the original assessee was no longer in existence and the assessment officer did not the take the remedial measure of transposing the transferee as the company which had to be assessed. Instead, the original assessee was described as one in existence and the order mentioned the transferee's name below that of the original assessee. The Division Bench adverted to the judgment in Dimension Apparels (supra) wherein the High Court had discussed the ruling in Spice Entertainment (supra). It was held that this was a case where the assessment was contrary to law, having been completed against a non-existent company."

17. Hon'ble Supreme Court thereafter took the note of the judgment in the case of Sky Light Hospitality vs. ACIT, 259 taxman 390 (SC). This judgment was pressed in service by the Revenue to point out that if an order was framed

in accordance with law in the name of amalgamating company, then it would amount to mistake, defect or omission which is curable under section 292B of the Income Tax Act. Hon'ble Supreme Court has dealt with this judgment and explained its impact. Hon'ble Supreme Court ultimately upheld the judgment of Hon'ble Delhi High Court in the case of Maruti Suzuki (supra) and held that assessment order passed subsequently in the name of non-existing company would be without jurisdiction and a nullity. Concluding paragraph of the judgment is worth to note which reads as under:

> *"33. In the present case, despite the fact that the assessing officer was informed of the amalgamating company having ceased to exist as a result of the approved scheme of amalgamation, the jurisdictional notice was issued only in its name. The basis on which jurisdiction was invoked was fundamentally at odds with the legal principle that the amalgamating entity ceases to exist upon the approved scheme of amalgamation. Participation in the proceedings by the appellant in the circumstances cannot operate as an estoppel against law. This position now holds the field in view of the judgment of a co-ordinate Bench of two learned judges which dismissed the appeal of the Revenue in Spice Enfotainment (supra) on 2 November 2017. The decision in Spice Enfotainment has been followed in the case of the respondent while dismissing the Special Leave Petition for AY 2011-2012. In doing so, this Court has relied on the decision in Spice Enfotainment (supra).*
>
> *34. We find no reason to take a different view. There is a value which the court must abide by in promoting the interest of certainty in tax litigation. The view which has been taken by this Court in relation to the respondent for AY 2011- 12 must, in our view be adopted in respect of the present appeal which relates to AY 2012-13. Not doing so will only result in uncertainty and displacement of settled expectations. There is a significant value which must attach to observing the requirement of consistency and certainty. Individual affairs are conducted and business decisions are made in the expectation of consistency,uniformity and certainty. To detract from those principles is neither expedient nor desirable."*

18. In the case of Emerald Company Ltd., ITAT Kolkatta Bench has also dealt with similar situation after making reference to judgment of the Hon'ble Delhi High Court in the case of CIT Vs. Dimension Apparels P. Ltd., 370 ITR 288 (Del) as well as decision of Hon'ble Delhi High Court in the case of Spice Entertainment Ltd. The ITAT has also made reference to the decision of Hon'ble Karnataka High Court in the case of CIT Vs. Intel Technology Ltd. P. Ltd., 380 ITR 272 (Kar.). The Tribunal has held that action under section

263 is a jurisdictional action against an assessee. In the case of a company, the ld. Commissioner was required to issue a show cause notice against a juridical person contemplated in section 2(31) of the Income Tax Act and if a juridical person ceases to exist then it would not be construed as a person within the meaning of section 2(31) against whom any action can be taken. The Commissioner would not assume proper jurisdiction and such type of defect would not be cured with help of section 292B of the Act, because it is not a procedural irregularity which could be cured. We also note that this Tribunal in the case of Snowhill Agencies Pvt. Ltd. Vs. Pr. CIT bearing ITA No. 1775/AHD/2019 vide order dated 21st January 2020 involving identical facts and circumstances has decided the issue in favour of the assessee.

18.1 In the light of the above discussion, we analyze the facts of the case on hand. It is undoubtedly the assessment was made by the Assessing Officer on non-existing entity which is void ab-initio and nullity in the eye of law. The assessment framed against a non-existing entity goes to the root of the matter and it is not a procedural irregularity but a jurisdictional defect and there cannot be any assessment against a non-existing entity or a dead person. Therefore, the decision of the Hon'ble Supreme Court in the case of Maruti Suzuki India Ltd. (supra) squarely applies to the facts of the assessee's case. Respectfully following the decisions of various courts as discussed above, we hold that the assessment made by the Assessing Officer in the name of the Urmin Marketing Pvt. Ltd. under section 143(3) read with section 144C of the Act vide order dated 27thDecember 2018 for the year under consideration is void ab-initio and bad in law. Hence the assessment order is a nullity in the eye of law and the same is quashed. The additional ground raised by the assessee is allowed.

19. The grounds raised in the appeal memo are descriptive and argumentative in nature. They are in fact inter-connected to each other, raising to only one issue, that is to say, in ground no.1 to 17, the effective issue involved is that the ld.CIT(A) has erred in confirming the disallowance of depreciation for Rs.1,17,18,39,228/- on the intangible assets/goodwill acquired in the scheme of amalgamation.

20. The facts in brief are that M/s Unicorn Packers Private Limited (amalgamating co.) got amalgamated with the assessee company [M/s. Urmin Marketing Pvt Ltd. (amalgamated co.)]w.e.f. 01st April 2014 in a scheme of amalgamation approved by the Hon'ble Gujarat High Court vide order dated 27thJuly 2015. All the assets and liabilities of the amalgamating company i.e. M/s Unicorn Packers Private Limited (here-in-after known as UPPL) as on 31stMarch 2014 became the assets and liabilities of the assessee (amalgamated co.) w.e.f. 1stApril 2014.

20.1 The net value of assets (equivalent to capital and reserves) of UPPL was at Rs.87,01,43,087/- as on the date of amalgamation i.e. 1stApril 2014. But the purchase consideration of amalgamating company i.e. UPPL was valued by RBSA Capital Advisors LLP a category-I merchant banker registered with SEBI, at Rs.555,75,00,000/- only. The purchase consideration was paid by the assessee by issuing its fresh equity shares i.e. amalgamated company [Urmin Marketing Pvt. Ltd. (here in after UMPL)] which was valued @ Rs.123.50 per share having face value of Rs.10 each and premium of Rs. 113.50 per share. Accordingly the assessee (UMPL) issued 4,50,00,000 (555,75,00,000/113.50) fresh equity shares to the shareholder of UPPL resulting the excess payment of Rs.486,73,56,913/- (Rs. 555,75,000.00 - 87,01,43,087.00) over the assets and liabilities taken over by it. This excess payment was treated as goodwill by the assessee in the books of accounts.

Further, the assessee in return of income filed for the year under consideration claimed depreciation @ 25% on such goodwill, treating the same as intangible asset amounting to Rs.117,18,39,228/- only.

20.2 The AO during the assessment proceeding observed that both the amalgamating and amalgamated company i.e. UPPL and UMPL belong to the same group of companies known as 'Urmin Group', meaning thereby both the companies were owned, controlled and managed by same promoters/directors. Furthermore both the companies were also registered at the same address. The AO further observed that the there was no business in amalgamated company i.e. assessee (UMPL) on the date of amalgamation as there was no vendor or customers in its books of accounts. Similarly, there was no goodwill recorded in the books of accounts of both the companies prior to the amalgamation. Accordingly, there should not be any question of goodwill owing to close connection between both the companies in the scheme of amalgamation.

20.3 In addition to the above, the AO also observed that the proviso 5 to section 32(1) of the Act requires that the depreciation in case of amalgamation should be allowed to the amalgamated company to the extent what should have been allowed in case if amalgamating company would have continued.

20.4 Similarly the provisions of section 43 (1) & (6) of the Act require that the actual cost of the transferred assets and WDV should remain the same as it was there in the books of amalgamating company prior to the amalgamation. Accordingly, the AO was of the opinion that as there was no goodwill in the books of UPPL prior to amalgamation, therefore the value of goodwill in the books of UMPL should also be NIL for the purpose of taxation.

20.5 The AO further observed that in a scheme of amalgamation two or more separate entities join hands together and become one entity. The

shareholders of amalgamating company, in consideration for the transfer of the assets and liabilities, receive shares in new resultant company (amalgamated co.). The value of the shares of the amalgamating company is determined after considering various factor i.e. on the basis of valuation of the business and revaluation of assets and liabilities of the amalgamating company which results in the goodwill in the hands the amalgamated company if the purchase consideration is in excess to the net assets acquired by it from the amalgamating company.

20.6 Accordingly, the AO was of the view that such intangible asset in form of goodwill emerging in books of resulting company (amalgamated company) was on account of valuation of business and revaluation of assets & liabilitieswhich was not available in the books of accounts of amalgamating company. As such neither resulting company nor amalgamating company incurred any cost in acquiring such intangible assets. Therefore, under the provisions of section 32 of the Act there is no allowance of depreciation available for any asset created in the books of accounts due to valuation and revaluation of assets and liabilities. Moreover, the amalgamation is not a transaction of purchase and sale of shares/ assets/ liabilities but to join hands together for the business expediencies.

20.7 The AO in view of the above issued show cause notice dated 21stDecember 2018 purposing NIL value of Goodwill and denying the claim of the assessee for the depreciation.

21. The assessee in reply to such show cause notice submitted that the provision of Explanation 3 to section 32 of the Act provides that the intangible asset includes goodwill. Accordingly the goodwill is eligible for the depreciation as per the applicable rate.

21.1 As far as the provision of section 43(1) and 43(6) are concerned, these apply in a situation where any capital assets transferred by amalgamating company to the amalgamated company. As such the goodwill in the books of UPPL (i.e. amalgamating company) did not exist and therefore question of transfer of the goodwill as well as the applicability of the above provisions do not arise. As such, the provisions of section 43(1) and 43(6) deal with the assets already recorded in the books of accounts of the transferor/amalgamating company. In other words such provisions do not deal about the intangible assets emerging in the scheme of amalgamation.

22.2 The assessee also claimed, by making reference to the AS-14 and IndAS-103 that these standards recognize goodwill arising out of amalgamation as an asset. As per AS-14 goodwill arising in a scheme of amalgamation represents the consideration paid against future anticipated income.

22.3 The assessee further submitted that the scheme of amalgamation has been approved by the Hon'ble Gujarat High court. The FMV and exchange of shares were determined by the expert valuer. On the basis of such valuation and approval goodwill was recorded in the books of accounts.

22.4 The assessee with respect to its claim of depreciation on goodwill acquired in process of amalgamation placed its reliance on the following judgment:

I. CIT vs. Smifs Securities Ltd [2012] 348 ITR 302 (SC)
II. PCIT vs. Zydus Wellness Ltd [2017 87 taxmann.com 82(Gujarat)
III. Vimalachal Print & Pack Pvt. Ltd vs. DCIT (2016 tax Pub(DT) 3326 (Guj))

The assessee in view of above judgment claimed that the depreciation on goodwill arising in the scheme of amalgamation is allowable under section 32 of the Act.

22.5. However the AO during the assessment proceedings after considering the detailed submission made by the assessee observed certain facts which can be categorized under the sub-head as detailed under:

I. Controlled transaction/ same management :-

i. The directors/shareholders in both the companies i.e. UPPL and UMPL before and after the amalgamation were common. Similarly, there was no change in the shareholding pattern of the shareholders pre and post amalgamation. Thus both the companies were managed and controlled by the same group of persons.

ii. Likewise, the registered address of both the companies was common and the residential addresses of the directors was also common. Thus all the directors were belonging to the same group/family in case of both the companies.

iii. The amalgamated company namely UMPL was not engaged in any manufacturing activity in the financial year 2012-13 & 2013-14 and it was showing only meagre activity from trading operations which was resulting losses in its books of accounts. Similarly there were no vendors/customers in the balance sheet of the amalgamated company as on 31st March 2014.

iv. Subsequent to the amalgamation, the assessee company i.e. amalgamated company was converted into limited liability partnership (LLP) with effect from 21st March 2016. Accordingly, the shareholders become the partners in the LLP in whose accounts

huge partner's capital amount was credited in the books of accounts of LLP without involving any cash flow.

v. The shareholders/directors were having control over both the companies and accordingly designed the scheme of amalgamation in such a way which resulted huge goodwill in the books of accounts of the assessee (amalgamated company) without involving any cash payout, though there was no goodwill in the books of accounts pre amalgamation. Thus the purpose for creation of such goodwill was for evasion of large amount of taxes.

II. Contradictory and inconsistent valuation report

There were certain inconsistency/contradiction in the valuation report prepared by RBSA capital advisors LLP in the determination of fair value of shares of UPPL/ UMPL which are listed as under:

a. The valuation of fair market value of the shares of UPPL has been made using the income/market approach method whereas the net assets value approach has been used in the case of UMPL which is contradictory to each other. As such, the similar approach for determining the value of the shares should have been adopted, particularly in the given situation where the management of both the companies were common. But the assessee has used different approaches to determine the high value of equity shares in case of UPPL in order to get the higher value of goodwill.

b. The comparable selected by the valuer in the valuation report namely VST industries Ltd, Godfrey Philips Ltd., and Kothari Products Ltd were different in terms of size and scale as well as service lines of the business which were not matching with the

profile of the assessee. This fact was also admitted by the valuer in para 6.18 of the valuation report. But the same were taken as comparable on behest of directors.

c. Similarly the factors which used for valuation such as market capitalization, beta and risk free premium were also inconsistent. As such market capitalization has been determined onthe basisof one year data, beta determined on average of 5 years and risk free premium were calculated on an average of 10 year data. Thus the assumptions /basis i.e. market capitalization, beta and risk free premium used in the formula adopted for the valuation of shares were not as per the standard practice.

d. Based on the above discrepancies in valuation report it emerged that the valuation was done intentionally in such a way whichsuits to the directors/share holder of the assessee company so that it can claim huge depreciation on such goodwill.

III. Inflated amount of profit in the books of amalgamated company i.e. UPPL:

23. The higher profit before tax shown by the UPPL before amalgamation for the year ending 31stMarch 2014 is mainly due to reduction in the purchase price of the materials consumed in comparison to the earlier years which was supplied by the group concern. As such the reasonableness of cost of purchase is not known. Further the employee cost in relation to the revenue from operation of UPPL is negligible which suggests that the primary operations were carried out by the directors of the companies who are common. Hence there is no future benefit available to the assessee attributable to the employees. Similarly UPPL was not having any intangible assets such as

patents, copyrights or any other unique intellectual property or rights which would yield future benefit. Thus in the circumstances valuation of UPPL at such huge amount is not justifiable.

23.2 Furthermore, the AO was of the opinion that the goodwill is not a difference between purchase consideration and net book value of assets taken over by the assessee rather it (goodwill) represents the difference between purchase consideration and market value of assets acquired. As such the value of the land was not revalued though it keeps on appreciating. If same would have been done then the amount of goodwill would have been low. It accordingly suggests that the entire scheme of generating goodwill in the scheme of amalgamation was based on for tax benefit in a dubious manner.

23.3 In view of the above broad observation, the AO was of the opinion that the valuation of UPPL at Rs. 555.75 crores against net assets of Rs. 87,01,43,087/- resulting goodwill of Rs. 468,73,56,913/- has been managed by the directors of the companies which is nothing but a colourable device in order to reduce taxable profit by claim huge depreciation.

VI. Depreciation on goodwill emerged due to scheme of amalgamation is not allowable in view of legal provisions

23.4 The assessee was not entitled for depreciation on the impugned goodwill in pursuance to the proviso 5 to section 32(1) which restricts depreciation on the assets amalgamated to the extent it was available to the amalgamating company. Similarly the provision of explanation 7 to section 43 (1) and explanation 2(b) to section 43(6)(c) of the Act mandate that actual cost and WDV of assets transferred in scheme of amalgamation should be equal to what was in the books of amalgamating company. As there was no

goodwill available in the books of UPPL prior to amalgamation, accordingly no depreciation allowances is available to the assessee.

23.5 Further, if an assets emerges in the books of amalgamated company which was not existing in the books of amalgamating company, such an asset emerge only due to revaluation of assets & liabilities for which amalgamated company does not incur any cost. Hence as per the provision of section 55(2)(a)(ii) of the Act value of assets which has been acquired without incurring any cost should be taken at NIL. Similarly, there would not be any possibility for allowing the deduction for the assets resulting on account of revaluation of assets.

23.6 The AO Further observed that as per AS-14 there are two methods of accounting namely pooling of interest method and purchase method which are applied for recording the transaction arising in the scheme of amalgamation of companies. In case the conditions, in a scheme of amalgamation prescribed under para 3(e) of AS 14 are fulfilled, then pooling of interest method of accounting should be applicable. Under pooling of interest method any difference between purchase consideration and book value of assets & liabilities should be recognized as amalgamation reserve. As such no concept of goodwill is available in this method of accounting. Whereas any of the condition prescribed under para 3(e) is not fulfilled, in such case assets and liabilities are transferred at revalued price and any difference between purchase consideration and market value of assets & liabilities is to be recognized as goodwill in the books of resultant company.

23.7 Further para 8 of appendix-C of Ind AS -103 mandate pooling of interest method for amalgamation of commonly control entity. Similarly para 9 of Ind AS -103 mandates that all the assets and liabilities should be transferred at carrying amount. Further para 12 of Ind AS-0103 mandates that

any difference between purchase consideration and book value of assets & liabilities should be recognized as capital reserve.

23.8 In view of the above observation the AO held that the assessee has not incurred cost in order to acquire goodwill and also such goodwill was not transferred from amalgamating company. Therefore the value of the same for the purpose of taxation is NIL. Thus depreciation on goodwill is not allowable in the year under consideration and also in subsequent year. Hence the AO disallowed the depreciation and added to the total income of the assessee.

24. Aggrieved by the order of the AO, the assessee preferred an appeal before learned CIT (A) who confirmed the finding of the AO. Still aggrieved by the order of the ld. CIT-A, assessee is now in appeal before us.

25. The learned AR before us has filed a paper book running from pages 1 to 907 and submitted that the goodwill is arising in the books of accounts of the assessee on account of the difference between the purchase consideration paid to the amalgamated company over the assets acquired by it from the amalgamated company. The purchase consideration was decided as per the valuation report prepared by the qualified valuer certified by SEBI. The learned AR in support of his contention drew our attention on the valuation report placed on pages 306 to 334 of the paper book. The learned AR further submitted that such purchase consideration was part of the amalgamation scheme which was approved by the Hon'ble Gujarat High Court. The learned AR drew our attention on the clause 5 of the scheme which is placed on page 253 of the paper book. It was also contended by the learned AR that in the scheme of amalgamation it was clearly mentioned that the difference if any between the purchase consideration and the net value of the assets shall be adjusted to the capital reserve or the goodwill as the case may be which is

evident from the clause 6.4 of the scheme, copy of the same is placed on page 255 of the paper book.

25.1 Similarly, the Hon'ble Gujarat High Court has also invited objection from the central government if any in the scheme of amalgamation, but there was no objection of any type raised despite having the specific opportunity. Accordingly the learned AR claimed that the AO had no jurisdiction for disturbing the impugned amount of goodwill as there was not any violation in the implementation of the scheme which is approved by the Hon'ble Gujarat High Court.

25.2 It was also pointed out that all the details about the management / ownership/ shareholding patterns /control pre and post amalgamation about both the companies were available in the public domain and nothing was concealed in the impugned scheme of amalgamation. Furthermore, the reasons and the rationale behind the impugned scheme of amalgamation was duly explained in the scheme of amalgamation. Therefore, the common ownership/control/management cannot be a reason for not allowing the claim of goodwill on the assumption of that the entire scheme was a colourable device. The amalgamated company was earning huge amount of profit and it had a lot of business potential and other assets including creditors , customers, market base , supplier information, skilled labour/trained manpower and the licence agreement for producing/marketing the products. All these assets in the process of amalgamation eventually became the property of the assessee. The learned AR in support of his contention drew our attention on the income tax return, computation of income and audited financial statements for the assessment year 2014-15 which are placed on pages 51 to 102 of the paper book. Accordingly the learned AR claimed that the higher amount of purchase

consideration was paid over the net value of assets which was treated as goodwill.

25.3 The learned AR further submitted that subsequent to the amalgamation scheme the profitability of the assessee has increased manifolds. The learned AR in support of his contention drew our attention on the financial statements for the assessment years 2015-16, 2016-17, 2017-18 and 2018-19 which are placed on pages 1 to 50, 103 to 148, 186 to 231 and 457 to 499 of the paper book respectively. Accordingly it was contended that the amalgamation scheme was advantageous to the assessee and the consideration paid over the net assets value cannot be said as excessive or unreasonable.

25.4 Moreover it was the decision of the companies to go for the amalgamation and the revenue has no role to play in such decision-making process. The learned AR in support of claim relied on the judgment of Hon'ble Gujarat High Court in case of Voltap Transformers (P) Ltd. vs. CIT reported in 129 ITR 105.

25.5 Similarly, the learned AR also contended that it was the decision of the amalgamated company to issue the shares at a premium to the amalgamating company which was based on commercial expediency. The revenue cannot direct the assessee to carry out operation as per its opinion. The learned AR in support of his contention relied on the judgment of Hon'ble Supreme Court in the case of PCIT vs. Rohtak Chain Co. (P) Ltd. reported in 110 taxmann.com 59

25.6 Regarding the valuation report in connection with the purchase consideration paid by the assessee, the learned AR claimed that the AO has pointed out certain deficiencies in the assessment order without giving any opportunity to the assessee despite the fact that it (the valuation report) was

furnished during the course of the assessment proceedings. The learned AR further submitted that report has been prepared by the qualified and renowned valuer firm which has a rich experience of nearly 48 years in the field and registered with the SEBI. In case, the AO was dissatisfied with the valuation report, then he should have sought clarification directly from the valuer by issuing notice under section 133(6) of the Act. As such the valuation of the business requires distinct technical expertise and the AO does not possess such technical expertise. Therefore the AO was under the obligation to take the assistance of the valuer in the event of being dissatisfied with valuation. The learned AR in support of his contention referred to the orders of this tribunal in case of Synbiotics Ltd. vs. ACIT reported in 48 ITR (T) 210 (Ahd) and order of Delhi tribunal in case Cinestaan Entertainment Pvt. Ltd. vs. ITO reported in 177 ITD 809.

25.7 The learned AR for the ready reference has also filed the copy of the valuation report which is placed on pages 306 to 344 of the paper book.

25.8 The learned AR further contended that there is no violation of the proviso of 5 to section 32(1) of the Act as the impugned amount of goodwill was not shown by the amalgamating company. As such the amount of goodwill was generated by the assessee company in the process of amalgamation. Thus the question of apportioning the depreciation on the goodwill between the amalgamated and amalgamating company does not arise. Accordingly the proviso of 5 to section 32(1) of the Act does not have any applicability in the case on hand.

26. Similarly, it was contended that the assessee has incurred costs by issuing shares to the shareholders of the amalgamating company which was in excess of the net value of assets acquired in the scheme of amalgamation. Therefore such excess consideration paid by the assessee represents the cost

incurred by it as defined under section 43(1) of the Act. There was no doubt raised by the AO about the purchase consideration paid by the assessee to the shareholders of the amalgamating company which includes the payment for intangibles such as customer base, marketing network, right to use the licence attached with the amalgamating company resulting huge amount of profit. Thus such excess consideration represents the goodwill of the amalgamating company. Thus the assessee cannot be denied the benefit of depreciation as provided under section 32(1) of the Act. Accordingly there was no relation of the provisions of section 43(1) of the Act with goodwill as alleged by the AO.

26.1 Likewise, the explanation 3 to section 43 of the Act does not have any application in the case on hand as the asset being goodwill was not shown in the books of the amalgamating company. As such the explanation 3 to section 43 (1) of the Act comes into play where an asset exists in the books of amalgamating company.

26.2 Correspondingly the explanation (7) to section 43 (1) does not have any application in the present facts of the case as it deals with respect to the assets which were therein the books of accounts of the amalgamating company, whereas admittedly there was no goodwill shown by the amalgamating company in the books of accounts. Similarly the provisions of section 43 (6) of the Act does not have any application in the present facts of the case as these provisions deal with respect to the assets existing in the books of accounts of the amalgamating company. Admittedly, there was no written down value for the block of assets in the books of amalgamating company. As such the goodwill first time came into existence in the books of the amalgamated company.

26.3 It was also pointed out by the learned AR for the assessee that there was no transfer of the capital assets by the holding company to the subsidiary and vice versa and therefore the provisions as specified under section 47(iv) & (v) are not applicable in the given facts and circumstances. Likewise, the provisions of section 47(vi) are not applicable to the present facts of the case for the simple reason that there was no goodwill appearing in the balance-sheet/block of assets of the amalgamating company. Similarly the other provisions as specified under section 47 (iva), 47(ivaa), 47(ivab), 47(ivb), 47(ivc), 47(ivca), 47(ivcb) , 47(ivcc, 47(xiii) and 47(xiv) are not applicable in the case of the assessee on account of goodwill shown by it in the books of accounts. In view of the above, the assessee claimed that the property being goodwill has not become its property in the mode as specified under section 47 of the Act. Accordingly the provisions of section 49(1)(iii)(e) of the Act cannot be applied in the case on hand. The assessee also contended that goodwill being a business asset cannot be treated as capital assets for applying the provisions of the capital gain.

26.4 The learned AR further contended that the provisions of section 55 (2)(a)(ii) are related to the computation of capital gain for the purpose of section 48 and 49 of the Act whereas the issue in the case on hand relates to the disallowance of the depreciation claimed under section 32 of the Act. Therefore there cannot be any applicability of the provisions provided under section 55(2)(a)(ii) of the Act in the present given facts and circumstances, more particularly when the value of purchase consideration was based on the valuation report of approved valuer.

26.5 The learned AR for the assessee also contended that the finding of the AO is erroneous that amount of goodwill was representing the valuation of the assets and no cost was incurred by the assessee. As per the learned AR

goodwill was acquired by the assessee after incurring the cost by issuing the shares to the shareholders of the amalgamating company. The payment made throughissue of the shares was valid mode for the payment and therefore no adverse inference can be drawn that no payment was made by the assessee. The learned AR in support of his contention referred the judgment of Hon'ble Delhi High Court in the case of CIT vs. Mira Exim Ltd reported in 359 ITR 70. The learned AR also referred the order of Mumbai tribunal in case of KEC International Limited vs. ACIT reported in 41 SOT 43 and order of this tribunal in case of DCIT vs. Prakash agencies P. Ltd. reported in 136 ITD 222.

26.6 The learned AR also submitted that the assessee has adopted pooling of interest method for recording the transactions in the scheme of amalgamation which requires to record all the assets and liabilities of the amalgamated company at book value. Furthermore para 19 of accounting standard 14 recognizes the goodwill arising in the process of amalgamation on account of the payment made in the anticipation of future income.

26.7 Similarly, the allegation of the AO that the amalgamated company is a paper company is far from the truth for the reason that the existence of the company has been admitted by the AO himself by making the assessment. Furthermore the existence of the company has also been admitted by the Hon'ble Gujarat High Court and therefore its existence cannot be doubted.

26.8 The learned AR further submitted that the pre amalgamation earning per share of the amalgamated company stands at ₹ 8,672.34 as evident from the audited financial statements. Thus it was sufficient to pay high purchase consideration to the amalgamating company. In view of the above the learned AR submitted that claim of the assessee for the depreciation on the goodwill

being intangible assets should be allowed under the provisions of section 32 of the Act.

27. On the other hand the learned DR submitted that the scheme of amalgamation is tax neutral exercise and therefore there cannot be any question of goodwill arising in such a scheme.

28. The learned DR also argued that the assessment proceedings and the amalgamation proceedings are different exercises. In the amalgamation proceedings, there was no question raised about the allowability of the depreciation on such goodwill. Accordingly issue of allowability of the depreciation under the provisions of section 32(1) of the Act was verified during the assessment proceedings. Thus, no objection filed by the revenue in the amalgamation proceedings cannot be a ground for allowing the depreciation in the assessment proceedings.

28.1 The learned DR has also pointed out that the valuation report was not furnished to the Hon'ble High Court along with the scheme of amalgamation. The learned DR also reiterated the defects in the valuation report after making a reference to the finding of the AO.

28.2 The learned DR also submitted that there was no cash payment made by the assessee for acquiring the goodwill. Thus the impugned goodwill represents the self-generatedasset which is based on the revaluation of asset acquired in the scheme of amalgamation.

28.3 The learned DR before us vehemently supported the stand of the authorities below by reiterating the findings contained in the respective orders which we have already adverted to in the preceding paragraph. Therefore we are not repeating the same for the sake of brevity.

29. The learned AR in his rejoinder submitted that purchase consideration was based on the valuation report of an expert valuer which resulted goodwill on account of excess payment over the net value of assets acquired in the scheme of amalgamation. Moreover, the valuation report was admitted by the AO in the assessment proceedings and no show cause notice was issued by him either to the assessee or to the independent valuer highlighting any defect in such report. The purpose of the above scheme was to streamline the current organizational structure and usage of the commercial energies which has resulted huge profit to the assessee as evident from the financial statements.

30. We have heard the rival contentions of both the parties and perused the materials available on record.In order to resolve the controversy on hand, we have to understand the meaning of the term 'AMALGAMATION' which has been defined under section 2(1B) of the Act. Therefore, it is imperative to take note of this definition, which reads as under:

> *(1B) "amalgamation", in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company) in such a manner that—*
>
> *(i) all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation;*
>
> *(ii) all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation;*
>
> *(iii) shareholders holding not less than three-fourths in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsi-diary) become shareholders of the amalgamated company by virtue of the amalgamation,*
>
> *otherwise than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first-mentioned company;*

A bare perusal of the above provisions of the Act would indicate that in a scheme of amalgamation all the properties & liabilities of the amalgamating company would become the assets and liabilities of the amalgamated company. Similarly it was also provided that the shareholders holding not less than 75% in value of the shares in the amalgamating company should become the shareholders of the amalgamated company. The provision of section 2 (1B) of the Act reads as under:

> *(1B) "amalgamation", in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company) in such a manner that—*
>
> *(i) all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation;*
>
> *(ii) all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation;*
>
> *(iii) shareholders holding not less than three-fourths in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsi-diary) become shareholders of the amalgamated company by virtue of the amalgamation,*
>
> *otherwise than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first-mentioned company;*

30.1 In the scheme of amalgamation, two or more company merged and form a new company or, one or more companies merged into an existing company. As a result of amalgamation, the amalgamating company gets dissolved and its business along with assets and liabilities is taken over by the amalgamated company. In return amalgamated company pay purchase consideration to the shareholder of amalgamating company by way of issuing its equity share, other securities or by paying cash. Normally, the companies opt for amalgamation for numerous reasons/objectives which may include the

elimination of the competition, better/effective utilization of the resources, better/effective control over the market etc.

31.2 The purchase consideration paid by the amalgamated company to the shareholders of the amalgamating company may be in excess of the value of the net assets taken over or some time it may be lower than the net assets taken over. As such purchase consideration to be paid to the amalgamating company by the amalgamated company is determined after considering various internal and external factors which may affect future profitability and growth. Such factors includes previous earnings, future possible earnings, location, technical knowhow, customer base, marketing network etc.Thus it leads to difference between net value of assets taken over and purchase consideration paid.

31.3 Accounting standard-14, issued by the ICAI prescribes two method of accounting for the transaction carried out in the scheme of amalgamation namely pooling of interest method and purchase method. If scheme of the amalgamation fulfills the condition of para 3(e) of the Accounting standard-14 then pooling of interest method should be followed otherwise purchase method of accounting should be applied. The relevant extract of accounting standard reads as under:

> *7. There are two main methods of accounting for amalgamations:*
> *(a) the pooling of interests method; and*
> *(b) the purchase method.*
> *8. The use of the pooling of interests method is confined to circumstances which meet the criteria referred to in paragraph 3(e) for an amalgamation in the nature of merger.*

31.4 Under pooling of interest method the difference between purchase considerations and the net assets taken over by the amalgamated company is adjusted with reserve. On the other hand in case of purchase method if

purchase consideration exceeds net value of assets taken over then such difference is to be as recognized as goodwill or vise-versa as capital reserve.

31.5 Goodwill may be described as the aggregate of those intangible assets of a business which contributes to its superior earning capacity over a normal return on investment. It may arise from such attributes as favourable locations, the ability and skill of its employees and management, quality of its products and services, customer satisfaction etc.

31.6 Para 19 of AS-14 describes goodwill arising in a scheme of amalgamation as extra amount paid in anticipation of future income and suggest to treat the same as an assets, hence provide for systematic amortization of same over the period of useful life. The para 19 of AS-14 reads as under:

> *19. Goodwill arising on amalgamation represents a payment made in anticipation of future income and it is appropriate to treat it as an asset to be amortised to income on a systematic basis over its useful life. Due to the nature of goodwill, it is frequently difficult to estimate its useful life with reasonable certainty. Such estimation is, therefore, made on a prudent basis. Accordingly, it is considered appropriate to amortise goodwill over a period not exceeding five years unless a somewhat longer period can be justified.*

31.7 In the case on hand, the assessee company taken over the business of it's one of the group company namely UPPL with all the assets, liabilities and reserves. In return the assessee company issued its 500 share for one share of UPPL as purchase consideration. Accordingly the assessee company issued 4.5 crores new shares for 90000 shares of UPPL @ Rs. 123.50 having face value of Rs. 10 each and premium of Rs. 113.50 each. Thus the assessee company paid purchase consideration of Rs. 555.75 croresonly (4.5 crore x Rs. 123.50) against net book value of the assets and liabilities taken over by it at Rs. 87,01,43,087/- only leading to a difference between NAV and purchase consideration of Rs. 486,73,56,913/- only. The assessee by following the

pooling of interest method of accounting as prescribed under AS-14 recognized such difference as Goodwill in the books of account. The scheme of amalgamation was approved by the Hon'ble Gujarat High Court vide order dated 24thJuly 2015 which was effective from 1-4-2014. Subsequently the assessee at the time of filing return of income claimed depreciation on such goodwill by treating the same as intangible assetswhich was disallowed by the AO and confirmed by the learned CIT (A) by holding it at NIL value for the purpose of taxation.

31.8 Undeniably, the purchase consideration paid by the assessee to the shareholders of the transferor/ amalgamating company stands at Rs. 555.75 crores as evident from the scheme of amalgamation. The relevant clause of the scheme of the amalgamation stands as under:

> *500 (five hundered) fully paid Equity Shares of Rs.10/- each of Transferee Company shall be issued and allotted for every 1(one) Equity share of Rs.10/- each held in Transferor company.*
> XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
> *The new equity shares shall be issued by Transferee Company to the shareholders of Transferee Company at a premium of Rupees one hundred thirteen rupees and fifty paisa per share*

31.9 Hence, the purchase consideration exceeds the book value of net asset acquired by it by Rs. 486,73,56913/- as discussed above. The excess amount was recorded as goodwill in the books of the assessee. Admittedly, that the assessee incurred the cost more than the net book value of assets acquired by it in the scheme of amalgamation which has also been approved by the Hon'ble Gujarat High Court vide order dated 24thJuly 2015 w.e.f. 01stApril 2014.The relevant portion of the order reads as under:

> *8. Heard learned advocate Smt.SwatiSaurabhSoparkar for the petitioner companies as well as the counsel appearing for the Central government. Having gone through the petitions and having considered the submissions made in this regard and being satisfied that amalgamation under the proposed scheme would be in the interest of companies and their members and creditors, the scheme is hereby sanctioned. Prayers in terms of paragraph 16(a) of the Company Petition No.146 of 2015 and paragraph 15(a) of the Company Petition No.147 of 2015 are hereby granted.*

31.10 Furthermore, it was mentioned in the scheme of amalgamation that the difference if any between the value of the assets acquired by the amalgamated company and the consideration paid shall be recorded either as capital reserve or goodwill as the case may be. The relevant portion of the scheme reads as under:

> *6.4 The difference (excess of deficit), between the net value of assets over aggregate of face value and premium amount for the Equity shares issued by Transferee Company to the shareholders of Transferor Company pursuant to this Scheme and after giving effect to clause 6.3 be adjusted to Capital Reserve or goodwill, as the case may be in books of Transferee Company.*

31.11 It is also important to note that the Hon'ble Gujarat High Court before approving the impugned scheme of amalgamation has invited representation from the Central Government. In this regard the Regional Director, north-west region, Ministry of Corporate affaire filed affidavit dated 10thJune 2015, stating that as per the requirement of circular issued by the MCA it has sent letter to Income Tax Department to invite objection if any in the scheme of amalgamation. But the Income Tax Department did not reply within the time limit of 15 days, hence it was assumed that the Income Tax Department has no objection in connection with the impugned scheme of amalgamation. This fact can be verified from the order of the Hon'ble High Court,the relevant finding is reproduced as under:

> *i. It has been pointed out that paragraph 2(a) and 2(b) contain statements of fact and do not require any response.*
>
> *ii. The only observation of the Regional Director made vide paragraph 29c0 pertains to the letter dated 8.5.2015 sent by the Regional Director to the Income Tax Department to invite their objections, is any. It has been submitted on behalf of the petitioner that since the statutory period of 15 days as envisaged by the relevant circular of the Ministy of Corporate Affairs is over, it can be presumed that the Income Tax Department has no objection to the proposed scheme of arrangement. The petitioner companies have agreed to comply with the applicable provisions of the Income Tax Act and Rules. In view of the same, no further directions are required to be issued to the petitioner companies in this regard.*

iii. The Regional Director has confirmed that there are no complaints received against the Petitioner companies in the office of the Registrar of Companies, and there are no other objection to the scheme.

31.12 In this connection we note that the scheme for the amalgamation was presented before the Hon'ble Gujarat High Court for the approval in pursuance to the provisions of section 391 to 394A of the Companies Act. But on perusal of the provisions of section 391 to 394A of the companies Act, we note that there is the requirement for inviting the objection from the central government about the proposed scheme of amalgamation. The relevant extract of the section reads as under:

394A. NOTICE TO BE GIVEN TO CENTRAL GOVERNMENT FOR APPLICATIONS UNDER SECTIONS 391 AND 394 The 1 [Tribunal] 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. 1. Substituted for `Court' by the Companies (Second Amendment) Act, 2002 (w.e.f. a date yet to be notified).

31.13 Accordingly, we find that there was no requirement to invite the objections from the Income Tax Department. However, we find that the MCA has issued a circular no-1/2014 dated 15.01.2014 directing regional directors of Ministry of Corporate Affair to invitecomments and inputs from the Income Tax Department as well as fromother regulatory department before the amalgamation.The relevant copy of the circular reads under:

General Circular No 1/2014

F.No 2/1/2014

Dated 15th January 2014

Subject: Report u/s 394A of the Companies Act, 1956- Taking accounts of comments/inputs from Income Tax Department and other sectoral Regulators while filing reports by RDs.

Section 394A of the Companies Act, 1956 requires service of a notice on the Central Government wherever cases involving arrangement/compromise (under Section 391) or reconstruction / amalgamation (under Section 394) come up before the Court of competent jurisdiction. As the powers of the Central Government have been delegated to the Regional Directors (RDs) who also file representations on behalf of the Government wherever necessary.

2. It is to be noted that the said provisions is in addition to the requirement of the report to be received respectively from the Registrar of Companies and the Official Liquidator under the first and second provisos to Section 394(1). A joint reading of Sections 394 and 394A makes it clear that the duties to be performed by the Registrar and Official Liquidator under Section 394 and of the Regional Director concerned acting on behalf of the Central Government under Section 394A are quite different.

3. An instance has recently come to light wherein a ***Regional Director did not project the objections of the Income Tax Department in a case under Section 394.*** *The matter has been examined and it is decided that while responding to notices on behalf of the Central Government under Section 394A, the Regional Director concerned shall invite specific comments from Income Tax Department within 15 days of receipt of notice before filing his response to the Court. If no response from the Income Tax Department is forthcoming, it may be presumed that the Income Tax Department has no objection to the action proposed under Section 391 or 394 as the case may be. The Regional Directors must also see if in a particular case feedback from any other sectoral Regulator is to be obtained and if it appears necessary for him to obtain such feedback, it will also be dealt with in a like manner.*

4. It is also emphasized that it is not for the Regional Director to decide correctness or otherwise of the objections/views of the Income tax Department or other Regulators. While ordinarily such views should be projected by the Regional Director in his representation, if there are compelling reasons for doubting the correctness of such views, the Regional Director must make a reference to this Ministry for taking up the matter with the Ministry concerned before filing the representation under Section 394A.

5. This Circular is effective from the date of issue.

The above circular issued by the MCA was circulated by the CBDT among its officers vide F. No. 279/MISC./M-171/2013-ITJ, dated 11th April 2014 which reads as under:

F.NO.279/MISC./M-171/2013-ITJ, Dated- 11"' April, 2014

Government of India,Ministry of Finance, Department of Revenue, C.B.D,T., New Deihl

Subject: Merger/Amalgamation/de-merger Objections entertained by High Courts - reg.

I am directed to refer to the above mentioned subject.

2. In a recant case of proposed amalgamation, it was noted that the scheme of amalgamation was designed seeking amalgamation with retrospective dates so as to claim set off of losses of loss-making Companies against the profits of profit making Companies of the group and thus impacting adversely the much needed public revenue.

This fact of proposed amalgamation was not brought to the notice of Income Tax Department either by the Ministry of Corporate Affairs (MCA) or Registrar of Companies (ROC). The Deportment had to file an intervention application opposing such amalgamation before the High Court which was rejected on the ground that the Department had no locus standi in the matter and that Regional Director, MCA has been delegated power in this regard.

3. In this connection ***Circular No 1/2014 dated 15.01.2014*** *has been issued by MCA to Regional Directors which lays down that while furnishing any report regarding reconstruction or amalgamation of companies under the Companies Act, comments and inputs from the Income Tax Department may invariably be obtained so as to ensure that*

the proposed scheme of reconstruction or amalgamation has not been designed in such a way as to defraud the Revenue and consequently being prejudicial to public interest. It has further been said that the Regional Directors would invite specific comments from the Income Tax Department within 15 days of receipt of notice before filing response to the Court. It is emphasised that this is the only opportunity with the Department to object to the scheme of amalgamation if the some is found prejudicial to the interest of Revenue and therefore, it is desired that the comments/objections of the Department are sent by the concerned CIT to Regional Director, MCA for incorporating them in its response to the Court, immediately after receiving information about any scheme of amalgamation or reconstruction etc.

4. This issues with approval of Member (A&J).

31.14 From the above circular, it is transpired that the Revenue was conscious about the fact that there was the possibility of misusing the provisions of the Income Tax Act in the name of the scheme of amalgamation as provided under section 2(1B) causing prejudice to the Revenue. But the Revenue despite having the opportunity in its hand did not raise any objection within the time allowed by the MCA or subsequently by raising the objection in the impugned scheme of amalgamation. Thus from the conduct of the Revenue, it is revealed that there was no grievance in the impugned scheme of amalgamation. Had there been any grievance of the Revenue, the same could have been brought to the notice of the regional director of the MCA, then the suitable action should have been initiated against the impugned scheme of the amalgamation. In this regard, we note that recently the Mumbai bench of NCLT in one of the petitionfor amalgamation in case of Gabs Investment Pvt Ltd (Transferor) and Ajanta Pharma limited (Transfree)in CPS No 995 and 996/2017 has not approved the scheme of amalgamation on the objection raised by the revenue. The relevant extract of the order reads as under:

36. The rationale given in the scheme among others things are the proposed amalgamation of the transferor company into Transferee Company by the scheme, as a result of which the share holdersoft he transferor company viz. the promoters of the transferor company (who are also the promoters of the transferee company) shall directly hold shares in the transferee company and the promoters would continue to hold the same percentage of shares in the Transferee company pre and post merger.

37. The above rationale presented by the petitioner company is without any Justification. Petitioner has to comply with all applicable laws. By this scheme of

amalgamation and arrangement Gabs/shareholders of Gabs are avoiding full tax liability which is strenuously objected by the Income Tax Department as discussed Supra. Any transfer of property from one entity to other has to be treated as sale/transfer and the same has to comply with applicable provisions of law including applicable tax liability, stamp duty. In the instant case, the transferor is a private Ltd. company which is a separate legal entity and any transfer of shares to other entity including individuals from the legal entity would attract applicable tax liability. Therefore, we are of the considered view that the Bench can sanction/approve the scheme only if it complies with all applicable provisions of the Act, Rules and if the scheme is in the interest of public, shareholder etc. However, the petitioner companies did not provide details with regard to compliance of tax liability raised by the Income Tax Department, their undertaking to pay the huge tax liability as pointed out by the income department etc.

38. From the above analysis of the financials of Gabs, the bench noted that with an equity share capital of only 1,91,100 the promoters/share holders of Gabs who are also the common promoters of APL, by way of this proposed scheme of amalgamation and arrangement would get the shares of APL worth ?1477.50 Crores (market value as on 31.03.2017) and that too without paying any Income Tax, Stamp Duty etc. for which the bench is of the considered view that the same is not in the public interest, thousands of shareholders of Transferee company especially retail shareholders. The market value of the same number of shares as at 31.03.2016 was 1,182.59 Crores. 39. Since Income Tax department (IT) has raised strong objections about tax benefit, tax avoidance, tax loss as discussed above, we are of the opinion that it would be www.taxguru.in advisable to settle the important/crucial issue of huge tax liability before sanctioning the scheme by the Tribunal rather than disputing the same at a later stage after the scheme is sanctioned by the Tribunal. It is mandatory as per section 230 (5) of the Companies Act, 2013, a notice under sub section (3) along with all the documents in such form shall also be sent to central government, Income Tax Authorities, RBI, SEBI, ROC, stock exchanges, OL, CCI and other Sectoral regulators or Authorities for their representations. In response to the notice received as per above section the Income Tax Department has raised valid observation/objections as detailed above, we find merit in the objections raised by Income Tax Department and we are also inclined to agree with the objections raised.

From the above, it is inferred that the Income Tax Department, being aggrieved with the scheme of amalgamation, raised the objection which was duly accepted by the NCLT and accordingly, the scheme of amalgamation was disapproved in the above case.

31.15 Now, the question arises whether the scheme once approved by the Hon'ble Gujarat High Court after receiving no objection from the Income Tax Department, the AO/revenue has authority to challenge the same. What is the inference that flows from a cumulative consideration of all the aforesaid contending facts is that the revenue cannot object the impugned scheme of

amalgamation. It is because, it is implied that the revenue has given its consent in the impugned scheme of amalgamation by raising no objection in response to the letter issued by the regional director of the MCA as discussed above. Furthermore, had there been any grievance to the revenue, then it should have approached to the Hon'ble High Court through the regional director of the MCA. But it did not do so. As such the revenue on one hand is issuing circulars to its officers to object the scheme of amalgamation if it is found prejudicial to the interest of revenue but on the other hand it remains silent when such opportunity was afforded to it and raising the same issue during the assessment proceedings which in our considered view is not desirable.

31.16 There is also no dispute in the amount of the purchase consideration and the NAV determined between the companies, as available in the scheme of amalgamation, which was approved by the Hon'ble Gujarat High Court as well. However, the lower authority held the value of goodwill at NIL for the purpose of taxation during the assessment proceedings for the reasons as discussed above in their respective orders. But, in the backdrop of above discussion, we are not convinced with the orders of the authorities below on this preliminary issue.

32. Now, the next question arises for our consideration whether the value of goodwill should be taken at NIL under the provision of Income Tax Act in the books of amalgamated company as no such goodwill was available in the books of amalgamating company prior to amalgamation and such goodwill emerged in the books of amalgamated company were on account of valuation and revaluation of business as no cost incurred by the amalgamated company for such goodwill. In this connection, we are inclined to refer certain

provisions of law in the context of the scheme of amalgamation as provided under section 2(1B) of the Act as detailed under:

Depreciation.

[19]**32.** *(1)* [20]*[In respect of depreciation of—*

(i) XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

(ii) know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998,

owned[21], wholly or partly, by the assessee[21] and used for the purposes of the business[21] or profession, the following deductions shall be allowed—]

[22]*[(i) XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX*

(ii) [24]*[in the case of any block of assets, such percentage on the written down value thereof as may be prescribed[25]:]*

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

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

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

Explanation 2.—For the purposes of this [40]*[sub-section] "written down value of the block of assets" shall have the same meaning as in clause *(c) of sub-section †(6) of section 43.]*

[41]*[Explanation 3.—For the purposes of this sub-section, the expressions "assets" and "block of assets" shall mean—*

(a) tangible assets, being buildings, machinery, plant or furniture;

(b) intangible assets, being know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature.

The above provision of section 32 of the Act requires allowing the depreciation to the amalgamated company in the same manner which would have been allowed to the amalgamating company in the event had there not been any amalgamation.

32.1 Similarly, the actual cost of the assets acquired in the scheme of amalgamation in the hands of the amalgamated company will continue to be the same as it would have been in the hands of the amalgamating company in the event, had there not been any amalgamation. The relevant extract of the explanation 7 to section 43(1) reads as under:

> ***Definitions of certain terms relevant to income from profits and gains of business or profession.***
>
> ***43.*** *In sections 28 to 41 and in this section, unless the context otherwise requires[3]—*
>
> *[4](1) "actual cost" means the actual cost[3] of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met3 directly or indirectly by any other person or authority:*
>
> *xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx*
>
> *[14][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.]*

33.2 We further note that the WDV of the assets acquired in the scheme of amalgamation in the hands of the amalgamated company will continue to be the same as it would have been in the hands of the amalgamating company in the event, had there not been any amalgamation. The relevant extract of the explanation 2 to section 43(6)(c) of the Act reads as under:

> *(6) "written down value" means—*
>
> *xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx*
>
> *[42][Explanation 2.—Where in any previous year, any block of assets is transferred,—*
>
> *(a) XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX*
>
> *(b) by the amalgamating company to the amalgamated company in a scheme of amalgamation, and the amalgamated company is an Indian company,*
>
> *then, notwithstanding anything contained in clause (1), the actual cost of the block of assets in the case of the transferee-company or the amalgamated company, as the case may be, shall be the written down value of the block of assets as in the case of the transferor-company or the amalgamating company for the immediately preceding previous year as reduced by the amount of depreciation actually allowed in relation to the said preceding previous year.]*

33.3 As per section 32(1) of the IT Act 'depreciation' is to be computed on 'actual cost'/'written down value of the block of assets' ascertained in accordance with section 43 of the Act. Further, a reading of the above

provision 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 own business.

33.4 A combined reading of the above provisions reveals that the intention of the legislature behind the introduction of the amalgamation scheme was to achieve tax neutrality. Besides the above, the intention of the legislature is also reflecting from the following provisions:

i. There is no capital gain in the hands of the amalgamating company on the transfer of capital assets in the scheme of amalgamation under the provisions of section 47(vi) of the Act.

ii. The cost of stock-in –trade in the hands of amalgamated company shall remain the same as in the hands of amalgamating company either as capital asset or stock in trade as provided under section 43C of the Act.

iii. Provisions relating to carry forward and set off of accumulated loss and unabsorbed depreciation allowance in amalgamation or demerger, etc under the provisions of section 72A of the Act.

iv. Exemption of capital gains in the hands of shareholders of amalgamating company on transfer of shares of amalgamating company in the scheme of amalgamation under the provisions of section 47 (vii) of the Act.

v. 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) r.w.s. 49(1)(iii)(e) of the Act.

vi. 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 under section 49(2) of the Act.

33.5 From the above, it would appear that the intent of the Legislature is to make amalgamation a tax neutral scheme for companies as well as for the shareholdersand not to provide a tax planning mechanism to either of them.However, a conjoint reading of the above provisions reveal that the assets which were transferred by the amalgamating company to the amalgamated company in the process of amalgamation were not made subject to the capital gain tax. Furthermore, the 6thproviso to section 32 of the Act has limited the amount of depreciation available to the amalgamated company post amalgamation to the extent of the amount of depreciation which would have been available to the amalgamating company, had there not been any amalgamation. Indeed there was no entry in the books of the transferor/amalgamating company for the intangible assets/ goodwill being self-generated assets. However, we note that all the relevant provisions of the Act as discussed above deal with respect to the assets available/recorded in the books of the transferor/amalgamating company. In other words, the assets which have been acquired by the assessee in the scheme of amalgamation would continue at the book value in the books of the amalgamated company. The question arises whether the goodwill shown by the assessee as discussed above was acquired in the scheme of amalgamation from the amalgamating company. The answer stands in negative. It is because there was no entry in the books of accounts of the amalgamating/transferor company reflecting the value of the goodwill. As such, the amount of goodwill as claimed by the assessee represents the difference between the purchase consideration and the NAV acquired by it. The purchase consideration paid by the assessee was based on the valuation report as discussed above after considering the various factors. Thus the assessee has not acquired any goodwill from the

amalgamating/transferor company as alleged, accordingly the provisions of the Act i.e. 6 proviso to section 32, explanation 7 to section 43(1), explanation 2 to section 43(6)(c)of the Act cannot be applied to the case on hand.

33.6 Normally, the issue/question of the goodwill arises when one company is acquired by another company. In other words, when one company transfers its business to another company against the consideration, the difference between the net value of the assets acquired and the purchase consideration paid by the transferee is regarded as goodwill/ capital reserve as the case may be. The succeeding question arises whether such goodwill acquired by the assessee is eligible for depreciation under the provisions of section 32 of the Act. In this connection, we are inclined to refer to the provisions of section 32(1) of the Act which reads as under:

> ***32.*** *(1) In respect of depreciation of—*
>
> *(i) buildings, machinery, plant or furniture, being tangible assets;*
>
> *(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998,*
>
> *owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed—*

33.7 On perusal of the above provisions, we note that the word goodwill has nowhere been mentioned. However we note that, the Hon'ble Supreme Court in the case of CIT vs. Smifs Securities Ltd reported in 348 ITR 302 has held that the goodwill falls within the definition of the assets under the category of any other business or commercial rights of similar nature. The relevant extract reads as under:

> *Explanation 3 to section 32(1) states that the expression 'asset' shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature. A reading of the words 'any other business or commercial rights of similar nature' in clause (b) of Explanation 3 indicates that goodwill would fall under the expression 'any other business or commercial rights of a similar nature'. The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3 (b). (Para 4)*

> *In view of the above, it is opined that 'Goodwill' is an asset under Explanation 3(b) to section 32(1). (Para 5)*

In view of the above judgment, there remains no ambiguity that the goodwill is part and parcel of intangible assets. Hence, the assessee is eligible for depreciation on the goodwill.

33.8 Moving further, we note that for claiming the depreciation, among other conditions as provided under section 32 of the Act, one of the condition is that the assessee can claim depreciation on the goodwill being intangible asset if acquired on or after 1st day of April 1998. In other words, the assessee can claim depreciation on the goodwill acquired by it. Thus the controversy arises whether the goodwill generated in the scheme of amalgamation is acquired by the transferee company. Such controversy has been answered by the Hon'ble Supreme Court in the case of Smifs securities Ltd (supra) by holding as under:

> *One more aspect needs to be highlighted. In the present case, the Assessing Officer, as a matter of fact, came to the conclusion that no amount was actually paid on account of goodwill. This is a factual finding. The Commissioner (Appeals) has come to the conclusion that the assessee had filed copies of the orders of the High Court ordering amalgamation of the above two companies; that the assets and liabilities of 'Y' Ltd. were transferred to the assessee for a consideration; that the difference between the cost of an asset and the amount paid constituted goodwill and that the assessee-company in the process of amalgamation had acquired a capital right in the form of goodwill because of which the market worth of the assessee-company stood increased. This finding has also been upheld by Tribunal. There is no reason to interfere with the factual finding. (Para 6)*

From the above, there remains no ambiguity that the goodwill generated in the scheme of amalgamation is acquired by the assessee. Thus, in our considered view the assessee has complied all the conditions provided under section 32 of the Act. Accordingly, we are not convinced with the finding of the authorities below.

34. The next allegation of the AO is that there was contradiction and inconsistency in the valuation report filed by the assessee. Admittedly the valuation report was prepared by the RBSA capital advisors LLP which is the approved valuer. The valuation of the business being a technical matter, in our view, the assistance of the expert is required. The AO himself cannot determine such value. If he was not satisfied with the valuation report, then the only recourse available to the AO is to refer the matter to the technical person. In holding so we draw support and guidance from the judgment this tribunal in case of Synbiotics Ltd vs. ACIT reported in [2016] 48 ITR(T) 210 (Ahd) where it was held as under:

> *Assessing Officer has adopted the value of Rs. 250 per sq. mtr. On the basis of the sale instances related to residential areas situated 2 to 3 kms. away from the property in question. There is no dispute with regard to the fact that property in question is an industrial land which cannot be compared with the residential properties. Admittedly, neither the Assessing Officer nor the Commissioner (Appeals) called for report from the Departmental Valuation Officer and proceeded to make their own estimation. It is incumbent upon the assessing authority to call for report from Departmental Valuation Officer for ascertaining the fair market value of the asset, in the event he is not satisfied about the claim of the assessee. Both the authorities below are not justified in adopting the rate as the assessee had furnished a report from an expert, i.e., Government approved valuer.*

34.1 The subsequent allegation of the AO is that both the companies i.e. amalgamated and the amalgamating companies were controlled and managed by the same group of personpre and post amalgamation. Thus the issue arises whether it was a colourable device adopted by the assessee to create the goodwill in the books of accounts and claim such huge amount of depreciation. In this regard we note that both the companies namely UMPL and UPPL were registered on 28thAugust 2007 and 16thMarch 2010 respectively with the Ministry of corporate affairs. These 2 companies were filing separate income tax returns. Both the companies being body corporate have a separate legal identity. All these details were duly disclosed in the scheme of amalgamation which was duly approved by the Hon'ble Gujarat High Court vide order dated 24thJuly 2015.

34.2 We also note that vide letter dated 08thMay 2015 the regional director of ministry of corporate affair (MCA) has also invited comment or objection from the Income Tax Department but the department did not raise any objection with respect to scheme of amalgamation. This fact can be verified from the para 8 (i) of the order of the Hon'ble High Court which is placed on record and discussed above.

34.3 It is also pertinent to mention here that all the necessary details about the management of the both companies were disclosed in the scheme of amalgamation and nothing was hidden. The scheme contained all the information related to purchase consideration, its valuation, mode of payment and accounting treatment. The Hon'ble High Court approved such scheme after inviting comment from ROC, MCA, and officialliquidator including the income tax department. Thus in the given fact and circumstances the reasonableness of scheme cannot be doubted. Accordingly, no inference cannot be drawn that the assessee has employed colorable device in order to recordhigh value of purchase considerationwhich is resulting goodwill.

34.4 Without prejudice to the above, we also note that the Revenue has to consider certain facts before arriving at a finding whether a particular series of the transactions is a colourable device or not as the primary onus is on the AO to find out:

(i) Whether the parties to the transactions have concealed or hidden any fact and/or whether what is shown to be done could have actually happened in different time or at different place;

Ans: Regarding the facts of the transactions, we note that all the necessary facts were duly disclosed by the assessee in the scheme of amalgamation. The following facts were duly disclosed:

a) The purchase consideration by the amalgamated company to the shareholders of the amalgamating company was duly disclosed in the scheme of amalgamation.

b) The valuation of the business of the amalgamating company was based on the approved valuation report.

c) The fact of the common control and management of the both the amalgamated and amalgamating companies were disclosed in the scheme of amalgamation which was also noted by the Hon'ble Gujarat High Court and this fact was also in the knowledge of Revenue.

Thus, we are of the view no facts were concealed or hidden.

(ii) whether it could be a normal business practice;

Ans: In today's time the activity of amalgamation is very common and prevailing in the corporate world for synergising resources, control, eliminate the competition etc.

(iii) Even where individual transactions of the device are legal or legitimate, whether combination of these steps creates an effect which is abnormal in the business world and could not have been otherwise undertaken in normal circumstances;

Ans. In the present case there was no reference made by the authorities below suggesting that the transaction is carried illegally. Moreover, the transaction in the instant case were within the ambit of the law as per the provision of section 2(1B) of the Act.

(iv) These individual transactions create an effect which is contrary to human probabilities;

Ans. The transactions carried out by the parties were very much normal transaction.

(v) whether actions of the parties finally are at variance with the terms of the agreement;

Ans. There was no variance in the impugned transaction with regard to the terms of the agreement.

34.5 It is also important to highlight the fact that there is no prohibition under the Act for disallowing the depreciation on the goodwill generated in

the scheme of amalgamation. There are certain kinds of transactions, prejudicial to the interest of Revenue, which may fall under the purview of the provisions of General Anti-Avoidance rule (GAAR), POEM, and BEPS provided under section 95 to 102, section 6(3) of the Act respectively under which the impugned transaction (depreciation on the goodwill in a scheme of amalgamation) can be denied. But such provisions are not applicable for the year under consideration.

34.6 There is no dispute to the fact that the payment was made by the assessee to the shareholders of the amalgamating company in the form of shares and not through the cash payment. But the payment through the shares is valid mode of payment. In this regard we draw support and guidance from the judgment of Hon'ble Delhi High Court in the case of CIT vs. Mira Exim Ltd reported in 359 ITR 70 wherein it was held as under:

> *In terms of the order passed under section 394 of the Companies Act, 1956 the respondent company acquired the imported motor cars. The cars were not acquired and the respondent assessee was not owner of the motor cars prior to the said date. On merger of the three concerns with the respondent assessee, shares were issued as consideration to the proprietors of the business concerns. The shares issued were consideration for the transfer of the assets. It is immaterial, whether there was transfer of an undertaking, including the block of assets, which also included the imported motor cars. [Para 15]*
>
> *It is clear that the respondent assessee had acquired the asset, i.e., imported cars, after the cut off date, i.e., 1-4-2001 and, therefore, is entitled to depreciation and the bar/prohibition in clause (a) to proviso to section 32(1) would not apply. The Tribunal has rightly decided the issue in favour of the respondent assessee and against the revenue. [Para 16]*

34.7 It is also pertinent to note that scheme of the amalgamation can be approved under the provisions of section 2(1B) of the Act where shareholders holding not less than 75% in the value of shares of the amalgamating company become the shareholders of the amalgamated company. It is possible only when the shares are issued to the shareholders of the amalgamating company. Accordingly, we are not impressed with the finding of the AO that there was no cash payment for the acquisition of the goodwill

by the assessee rather it was recognized in the books of accounts by way of accounting entries. Thus we hold that the impugned transaction cannot be regarded as colorable device merely on the reasoning that the assessee claimed the depreciation on the goodwill in the scheme of amalgamation.

34.8 In view of the above and after considering the facts in totality, we set aside the order of the ld. CIT-A and direct the AO to allow the claim of the assessee for the depreciation on the impugned goodwill. Hence, the ground of appeal of the assessee is allowed.

35. In the result appeal of the assessee allowed.

Order pronounced in the Court on 21st October, 2020 at Ahmedabad.

Sd/-	**Sd/-**
(RAJPAL YADAV)	**(WASEEM AHMED)**
VICE-PRESIDENT	**ACCOUNTANT MEMBER**

Ahmedabad; Dated 21/10/2020

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण / DR, ITAT,
6. गार्ड फाईल / Guard file.

आदेशानुसार/BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad

1. Date of dictation- 15/20-10-2020
2. Date on which the typed draft is placed before the Dictating Member
3. Date on which the approved draft comes to the Sr.P.S./P.S. -
4. Date on which the fair order is placed before the Dictating Member for Pronouncement ……..
5. Date on which the file goes to the Bench Clerk .. : 22-10-2020
6. Date on which the file goes to the Head Clerk…….
7. The date on which the file goes to the Assistant Registrar for signature on the order……..
   Date of Despatch of the Order……