

Acit (Osd) Corporate Range 1, Chennai vs Dorma India P. Ltd., Chennai on 20 November, 2019

IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH: CHENNAI

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

ITA Nos.1664 to 1666/Chny/2019
(/Assessment Years: 2010-11 to 2012-13

The Asst. Commissioner of Income-
tax (OSD),
Corporate Range-1,
Chennai.

v. M/s.Dorma India Pvt. Ltd.,
No.14, Pattullous Road,
Royapettah,
Chennai-600 002.

(+/Appellant)

[PAN: AAACD3980D]
(, - +/Respondent)

Department by
Assessee by

: Ms.R.Anitha, JCIT
: Mr. N.V.Balaji, Adv.

/ /Date of Hearing

: 19.09.2019

/ /Date of Pronouncement

: 20.11.2019

/ O R D E R

PER RAMIT KOCHAR, ACCOUNTANT MEMBER:

These three appeals filed by Revenue are for assessment years (ay's) 2010-11 to 2012-13 respectively and are directed against common appellate order dated 22.03.2019 passed by learned Commissioner of Income Tax (Appeals)-1, Chennai (hereinafter called "the CIT(A)"), in ITA New No.67,61,181,349,348 & 36/CIT(A)-1/2014-15, 2015-16, 16-17, 16-17 & 17-18 for assessment year(s) (ay's) 2010-11 to 2015-16. We are presently concerned with ay's: 2010-11 to 2012-13 and we will restrict our discussions and decision to these three ay's only . The ITA Nos.1664-1666/Chny/2019 :- 2 :-

appellate proceedings before learned CIT(A) had arisen from different assessment order(s) dated 27.03.2014, 17.02.2015 and 30.03.2016 respectively passed by learned Assessing Officer (hereinafter called "the AO") u/s.143(3) r.w.s.92CA(3) , 143(3) and 143(3) r.w.s. 92CA respectively of the Income-tax Act, 1961 (hereinafter called "the Act") for ay's: 2010-11 to 2012-13 respectively . As common issue is involved in all these three appeals, hence these three appeals for ay's : 2010-11 to 2012-13 were heard together and disposed of by this common order.

First we shall take up appeal filed by Revenue for ay: 2010-11.

2. The grounds of appeal raised by Revenue in memo of appeal filed with the Income-Tax Appellate Tribunal, Chennai (hereinafter called "the Tribunal") for ay: 2010-11 read as under:-

1. The order of the Ld. CIT(A) is contrary to law, facts and circumstances of the case.

2.1. The CIT(A) erred in allowing the depreciation to the assessee relying on the decision of the Hon'ble Supreme Court in the case of M/s. Smifs Securities Ltd. and the ITAT's decision in the case of R.G. Keswani and failed to appreciate that following the principle of ejusdem generis, the goodwill accounted as balancing factor or non-compete fee is not a depreciable asset in nature of any other business or commercial rights' specifically similar to know-

how/ patents/ copyrights / trademarks/ licences/ franchises as per section 32(l)(ii) and explanation 3(b) of the section.

2.2. The CIT(A) failed to appreciate the decision of the Hon'ble ITAT in the case of Borkar Packaging (P) Ltd. wherein it was held that as goodwill was accounted as a balancing factor while merging accounts of three companies into assessee company and assessee had acquired no rights of business or commercial nature in course of amalgamation, goodwill was not eligible for depreciation.

2.3. The CIT(A) failed to appreciate the decision of the Hon'ble ITAT in the case of Chowgule & Co. (P) Ltd. where goodwill as claimed was self generated by the assessee and not acquired, and therefore held as fictitious and depreciation was disallowed. 2.4. The CIT(A) ought to have appreciated the decision of the Hon'ble ITAT in the case of Toyo Engineering India Ltd., wherein it was held that no depreciation could be allowed on goodwill where very purchase of goodwill was not proved by the assessee. 2.5. The CIT(A) failed to appreciate the fact that the clientele transferred that also to the extent of unsettled obligation, is not in the nature of any other business or commercial ITA Nos.1664-1666/Chny/2019 :- 3 -:

rights, specifically, similar to know-how/ patents/ copyrights/ trademarks/ licences/ franchises as per section 32(l)(ii) and explanation 3(b) of the section, since being a trading concern certified by the assessee by itself, and in the absence of vested interest of client it does not contribute to the market value of the acquired companies.

2.6. The CIT(A) erred in not following the decision of the Hon'ble High Court in the case of Sharp Business System wherein it was held that non-compete fee does not qualify for depreciation under section 32(l)(ii) of the Act.

2.7. The CIT(A) erred in allowing the appeal of the assessee relying on the decision of the Hon'ble High Court in the case of Pentasoft Technologies Ltd. without appreciating the fact that in the relied upon decision, non-compete fee was held as

supporting clause only and not of any significant value compared to the transferred intellectual property rights, whereas in the instant case, the acquired companies being trading companies and not software development companies, there is no transfer of significant intellectual property right that can outweigh non-compete clause as supporting clause.

2.8 The CIT(A) ought to have appreciated that the relied upon decision in the case of M/s. Rentokil India Private Limited (ITA No.2660/Mds/2016) has not been accepted by the Department and further appeal is pending before the Hon'ble High Court of Madras.

3. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the Ld. CIT(A) be set aside and that of the AO restored."

3. The only issue raised by Revenue in these appeals is with regard to allowability of depreciation on goodwill generated on acquisition of businesses of two entities namely GTS Exports Private Limited and Arc Trend Systems Private Limited by assessee, by learned CIT(A) . The assessee is engaged in manufacturing and wholesale trading of automatic door operators , door controls and accessories. The AO noted during the course of assessment proceedings that assessee has claimed depreciation on goodwill purported to be generated on acquisition of two businesses namely GTS Exports Private Limited and Arc Trend Systems Private Limited which in the opinion of the AO cannot be allowed . The AO asked assessee to explain the same as to how depreciation on goodwill can be allowed within the provisions of the 1961 Act. The assessee in reply submitted before learned AO as under::

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"Claim of depreciation on goodwill for subject A.Y. It is submitted that the Company has entered into two business transfer agreements, whereby the Company has acquired the assets and liabilities of two entities. Pursuant to the same, goodwill has been created in the books of the Company. Such goodwill is eligible for claim of depreciation under section 32 of the Act. Our detailed submission in support of our claim has been enclosed as Annexure-1 to this submission."

Claim of depreciation on goodwill

1. Background Dorma India Private Limited ("Dorma India' or 'the Company') is part of the Dorma Group and is a subsidiary of the Dorma Vertrieb International GmbH ('Dorma Germany'). Dorma Germany, headquartered in Ennepetal Germany, is a global supplier of door technology products and systems and is considered a market leader in door controls, movable walls, glass fittings and accessories.

Dorma India is engaged in the assembly and trading of door control products, glass fittings and systems, and security systems. Dorma India services various markets across India and countries in SAARC regions providing support to infrastructure projects. During the Financial Year ('FY')

2008-09, the Company entered into a Business Transfer Agreement ('BTA') with two of its business partners, namely Arc Trend Systems Private Limited ('ATS') and Global Trend Systems Private Limited ('GTS') to acquire the distribution segment of its business partners on a going concern basis for a net consideration of INR 213 million (INR 137,215,000 for acquisition of ATS and INR 76,600,000 for acquisition of GTS).

ATS and GTS were predominantly engaged in the business of trading in Dorma products including door controls, automatic doors, glass fittings, accessories and providing related installation services. ATS and GTS have been in existence for more than three years. The aforesaid acquisition was undertaken as a measure of forward integration in order to leverage on the synergies that were envisaged in terms of incremental revenues and operational benefits.

2. Depreciation on goodwill Schedule 18.3 to the Financial Statements of the Company for the year ended 31 March 2010, relating to "Acquisition of business of Certified Business Partners" (enclosed as Attachment 1) reflect the following assets and liabilities taken over by the Company pursuant to the BTAs executed with ATS and GTS:

| Particulars | Amount in INR Millions |
|---------------------|------------------------|
| Inventory | 22.06 |
| Sundry debtors | 53.08 |
| Loan and advances | 5.05 |
| Fixed assets | 0.75 |
| Current Liabilities | (41.68) |
| Goodwill | 174.55 |
| Total | 213.81 |

The net assets of INR 39.26 were taken over at book value and goodwill amounting to INR 174.55 million was created as a result of the said acquisition. In this regard, it is submitted that the Company has inadvertently not claimed the depreciation on goodwill amounting to INR 38,183,955 (refer Attachment 2 for the computation of depreciation under the Act).

2.1 Our Submission ITA Nos.1664-1666/Chny/2019 :- 5 :-

2.1.1. Eligibility to claim depreciation It is submitted that schedule 4B of the Financial Statement of the Company reflects depreciation on goodwill as per the Companies Act, 1956 (refer Attachment 1). However, the same was inadvertently not claimed by the Company in the computation of taxable income."

The assessee company relied on the following case laws:-

(i) CIT v. Smifs Securities Ltd., (348 ITR 302)(SC)

(ii) Areva T & D India Ltd., v. DCIT (345 ITR 421) (Delhi)

(iii) CIT-IV vs. Hindustan Coca Cola Beverages (P) Ltd., (331 ITR 192) (Delhi) The AO asked assessee to submit complete details of depreciation on goodwill claimed by assessee, financial statements of Arc Trends Systems India Private Ltd., and Global Trends System Private Ltd., as on the date of the agreements , complete details of valuation of purchase consideration of the said companies, mode and details of payment of purchase consideration , whether the said depreciation on goodwill was claimed in original return of income and/or in revised return of income filed by assessee with Revenue and whether assessee can claim depreciation on goodwill during assessment proceedings without filing the said claim for allowability of depreciation on goodwill in return of income filed with the Revenue. The assessee in its reply before the AO filed financial statements of both the companies namely Arc Trends Systems India Private Ltd., and Global Trends System Private Ltd., as on 31.03.2008 and not on the date of Business Transfer agreement (slump sale agreement between assessee and GTS was dated 21.11.2008 while slump sale agreement between assessee and ATS was dated 29.11.2008) . The AO observed as under:

"5.4. It is seen from the submissions produced, the details of Balance Sheet are as under:-

As per the Balance Sheet of Arc Trends Systems Private Limited (ATS) for the year ended 31.03.2008, the following details are noticed.

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| | |
|---|--------------|
| Fixed Assets (in Rs.) | |
| Gross Block | - 4484040 |
| Accumulated Depreciation | - 2054588 |
| | ----- |
| Net Block | - 2429452 |
| | ----- |
| Current Assets (Loans & Advances)(in Rs.) | |
| Stock in Trade | : - 14192036 |
| Sundry Debtors | : - 38246524 |
| | |
| Advances & Deposits | : -12974645 |
| Cash & Bank Balances | : - 4633935 |
| | ----- |
| | 70047141 |
| LESS:- Current Liabilities | : - 38938714 |
| | ----- |
| Net Current Assets | : - 31108427 |
| | ----- |

Only Unsecured Loans are from Directors and Family members As per GTS (in Rs.)
Fixed Assets (after depreciation) :- 12060792 Which includes industrial plot of Rs.66.80 Lakhs and building under construction of Rs.3 Lakhs (all others are business movable assets) Investments :- 22533123 Current Assets & Loans and Advances:-

| | |
|------------------|-------------|
| Cash in hand | :- 2892892 |
| Bank of India | :- 20850 |
| Bank of India | :- 18630 |
| Closing Stock | :- 1436840 |
| Cheque in hand | :- 1003855 |
| Sundry Debtors | :- 17609818 |
| Loans & Advances | :- 606994 |
| Unsecured Loans | :- 22761452 |
| Sundry Creditors | :- 18516984 |
| Advances..... | :- 1419137 |

The AO observed that assessee has allocated lesser value out of business consideration towards tangible assets and had claimed balance amount to be towards goodwill on acquisition of businesses. The AO observed that if proportionate allocations in value are done towards tangible assets based on book value, then there will not be any allocation remaining towards goodwill . The AO rejected contention of the assessee ITA Nos.1664-1666/Chny/2019 :- 7 -:

that consideration paid over and the above towards net worth of tangible asset is towards goodwill. The AO observed that since it is a case of slump sale, the book values were incorporated and fair market value of each of the asset was not considered by the assessee. The AO observed that if assessee had considered fair market value of each of the assets and also fair market value of liabilities, then there was a case for claiming that the assessee has incurred certain amounts towards goodwill. The AO was of the view that in the absence of such an exercise, it could not be said that the assessee incurred certain amounts for goodwill. Thus, in the absence of such exercise to identify fair market value of assets and liabilities acquired by assessee, the AO observed that it could not be said that the assessee had paid for purchase of goodwill in the nature of commercial rights. Thus, the AO observed that the assessee could not prove that it had purchased goodwill and hence consequentially no depreciation can be allowed on goodwill. The AO relied upon decision of Mumbai-tribunal in the case of DCIT v. Toyo Engineering India Ltd., (2013) (33 Taxman.com 560) (Mumbai Trib.).

3.2 Regarding non-compete clause in slump sale agreements ,the AO observed from slump sale agreements entered into by assessee with GTS and Arc Trend, vide clause 13.2 as under:

"13.2 Non-Compete 13.2.1 The parties agree that the Company and the Key Employee shall not for a period of five years (hereinafter referred to as the "Non-Compete Period") directly or indirectly, either for itself or for any other person, partnership, corporation or company, own, manage, control, participate in, consult with, render services for, permit its name to be used; or in any other manner engaged in any business or enterprise which manufactures, ITA Nos.1664-1666/Chny/2019 :- 8 -:

designs, produces or sells products which compete with products that the Purchaser currently produces or is in the process of developing anywhere in the world where the Purchaser currently conducts its business."

The AO observed that in slump sale agreements entered into by assessee, there is a condition of non-compete clause. Without prejudice to the above, the AO observed that if there is any consideration paid over and above the net worth of the business assets taken over by assessee, the same should be considered towards non-compete fee and not towards goodwill. The AO observed that issue of depreciation on non-compete fee has not attained finality as Hon'ble Delhi High Court in the case of Sharp Business System v. CIT-III reported in 254 CTR 233 has held that non-compete fee will not qualify for depreciation u/s.32(1)(ii) of the 1961 Act. The AO also observed that decision of Hon'ble Madras High Court in the case of Pentasoft Technologies Ltd., v. DCIT reported in (2014) 41 taxmann.com 120(Mad.) had held that depreciation is to be allowed on payment of non-compete fee in a composite agreement for acquisition of businesses. The AO observed that this decision of Hon'ble Madras High Court has not reached finality as Revenue has filed an SLP with Hon'ble Supreme Court. It was also observed by AO that assessee has admitted that there is no non-compete fee and assessee is claiming excess amount paid over and above net assets acquired towards goodwill. The AO also observed that it is the assessee who has himself admitted that there is no non-compete fee. The AO observed that assessee's reliance upon decision of Hon'ble Supreme Court in the case of CIT v. Smifs Securities Ltd., reported in (2012) 348 ITR 302 (SC) is not correct because facts of ITA Nos.1664-1666/Chny/2019 :- 9 -:

the assessee's case are distinguishable with facts in the case of Smifs Securities Ltd.(supra) and ratio of decision in the case of Smifs Securities Limited(supra) is not applicable in the case of the assessee. The AO observed that Hon'ble Supreme Court held in the case of Smifs Securities Limited(supra), as under:

"The Commissioner of Income Tax (Appeals) ['CIT(A)', for short] has come to the conclusion that the authorised representatives had filed copies of the Orders of the High Court ordering amalgamation of the above two Companies; that the assets and liabilities of M/s.YSN Shares and Securities Private Limited 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 Income Tax Appellate Tribunal ['ITAT', for short]. We see no reason to interfere with the factual finding."

The AO also observed that assessee has not made claim for depreciation on goodwill in the return of income filed with Revenue on 14.10.2010 , nor the said claim was made in revised return of income filed by assessee with Revenue on 14.02.2012 and AO was of the view that such a claim cannot be made otherwise than by filing of revised return of income u/s 139(5) of the 1961 Act. The AO rejected contentions of the assessee and held that no depreciation on goodwill can be allowed to the assessee, vide assessment order dated 27.03.2014 passed by AO u/s. 143(3) read with Section 92CA(3) of the 1961 Act.

3.3 Aggrieved by an assessment framed by the AO vide assessment order dated 27.03.2014 passed u/s. 143(3) read with Section 92CA(3) of the 1961 Act, the assessee filed first appeal before learned CIT(A) , which appeal stood allowed by Ld.CIT(A) vide appellate orders dated 22.03.2019 passed by learned CIT(A), by holding as under:

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"During the appellate proceedings, the appellant reiterated the contentions that were made in the grounds of appeal. The appellant also furnished written submissions regarding depreciation on goodwill. The submissions made by the appellant comprise explanations and facts about the transactions as well as judicial precedents pertaining to the issue.

The appellant stated that during the financial year 2008-2009, the appellant entered into BTA with 2 of its business partners, ATS and GTS, to acquire the distribution segment of the business partners on a going concern basis. The total purchase consideration amounted to Rs.21,38,15,000/-. The calculations pertaining to the purchase consideration were also furnished. It was stated that it was bifurcated between the assets and liabilities of the distribution business of ATS and GTS. It was also stated that the appellant had taken over the key employees as well as employees engaged in installation from ATS and GTS. The company had also taken over various assets such as business information, intellectual property, information relating to clients, and so forth. These benefits in the nature of bundled rights acquired by the company in the form of business or commercial rights were to be taken into consideration for the purpose of determining the purchase consideration. The appellant stated that the net assets of Rs.39.26 million were taken over at book value and the excess consideration amounting to Rs.174.55 million was, in fact, in the nature of business or commercial rights acquired by the, appellant as a result of the acquisition.

The appellant, while discussing the issue of depreciation on goodwill, referred to the provisions of section 32 of the Act. It was pointed out that the explanation 3 to section 32(1) defines intangible asset being know how, patents, copy rights, trade marks, licences, franchises, or any other business or commercial rights of similar nature. Therefore, it was held that payments for any business or commercial rights would fall under the definition of intangible assets. The appellant also relied upon

several judicial precedents, which have explained what constitutes intangible assets and assets in the nature of business or commercial rights.

CIT(A)'s Inferences and Decision:

The submissions of the appellant were considered vis-a-vis the findings of the Assessing Officer. The AO rejected the appellant's claim for depreciation on goodwill as the financials indicated that the transactions did not yield any goodwill. No commercial rights were held to be purchased by the appellant. It was based on book entries and not on Fair Market Values. It was also held that if proportionate allocation of tangibles was based on book values, no consideration would be remaining to be allocated towards goodwill. The AO also examined the non-compete fee clause. It was maintained that the excess consideration paid over and above the business assets should be reckoned as non-compete fee rather than goodwill. Furthermore, the AO declared that the claim for depreciation was made neither in the original return nor in the revised return for A.Y. 2010-

11. ITA Nos.1664-1666/Chny/2019 :- 11 -:

During the appellate proceedings, the appellant furnished details regarding the net assets acquired under BTA and the purchase consideration paid. The excess of purchase consideration over net assets taken over amounted to Rs.174.55 Millions. The appellant also furnished particulars regarding the nature and value of the assets that were taken over. The company acquired bundled rights in the form of business or commercial rights apart from know-how and expertise of the employees, all of which served to argument the turnover and the net profits of the company. Applying the principle of ejusdem generis, it was claimed that the bundled rights are in the nature of intangibles as provided in explanation 3 to section 32(1) of the Act as they would be within the ambit of any other business or commercial rights of similar nature. Reliance was placed on CIT vs Smifs Securities (cited supra) and various other judicial precedents.

It was clarified that the AO's contention that proportionately lesser values were allocated to the assets and liabilities was not sound because only the distribution business of ATS and GTS were taken over on a going concern bases. The appellant also furnished replies regarding the AO's findings that the excess purchase cost was in the nature of non-compete fee. The appellant cited the ratio of the Madras High Court in the case of Penta Soft Technologies Ltd. vs. DCIT (41 taxmann.com 120) where it was held that depreciation can be claimed on non-compete fee in a composite agreement. The appellant submitted that Depreciation; on goodwill for A.Y. 2010-11 amounting to Rs.38,183,955/- and the depreciation for A.Y. 2011-12 amounting to Rs.28,637,966/- were claimed during the course of the assessment proceedings and not by filing revised return. In this context, the appellant referred to Explanation 5 to section 32 of the Act:

"For the removal of doubts, it is hereby declared that the provisions of this subsection shall apply whether or not the assessee has claimed the deduction in respect of depreciation in computing his total income."

Furthermore, the appellant referred to the decision of Chennai Tribunal in this case of Shri Balaji Sago & Starch Products (ITO No.2081 (Mds/2010) which referred to depreciation as a statutory allowance which is distinct from other expenditure and which has to be allowed.

Taking into account the facts, circumstances the explanations furnished by the appellant and judicial precedents pertaining to this case, I am inclined to accept the contentions of the appellant. The company's claim for depreciation on goodwill is found to be admissible as it is in consonance with the requirement pertaining to the slump sale and the provisions of section 32 of the Act. It was also noted that in the case of M/s. Rentokil India Private Limited vs. DCIT (ITA No.2660/Mds/2016, the hon'ble ITAT had adjudicated on the claim of depreciation on goodwill on a similar set of facts. Paragraph 5 of the ITAT order cited supra states this:

5. We have considered the rival submissions. A perusal of the provisions of Sec. 32(1) Explanation-3 shows that the ITA Nos.1664-1666/Chny/2019 :- 12 :-

expression asset meant to include intangible assets being knowhow, patents, copyrights trademarks..... any other business or commercial rights of similar nature. A perusal of the decision of the Hon'ble Madras High Court in the case of M/s. Pentasoft Technologies Ltd., shows that it has recognized that the agreement therein was a composite agreement and under the agreement, the transferor had transferred all its rights, copy rights to the transferee and in order to strengthen those rights transferred, the non- compete clause was supporting the clause to strengthen the commercial right which is transferred in favour of the transferee. In the present case also, the Business Transfer Agreement is a composite agreement and the non-compete clause therein was supporting clause to strengthen the commercial rights which had been transferred to the assessee herein. Further, a perusal of the decision of the Coordinate Bench of this Tribunal, Pune 'A' Bench, in the case of M/s. Cosmos Co-op Bank Ltd., shows that even the customer list has been treated as falling within the expression "business or commercial rights of similar nature" contained in Sec.32(1)(ii) of the Act. For this purpose, the Co-ordinate Bench of this Tribunal has relied upon the decision of the Hon'ble Delhi High Court in the case of M/s.Areva T &D India Ltd., reported in [2012] 20 taxmann.com 29 (Delhi). In these circumstances, we are of the view that the assessee is entitled to the depreciation on the intangible asset viz., goodwill/customer list as claimed by him. Our view is also on account the fact that Sec.92B in respect of international transactions under the Explanation thereto has provided that the expression intangible property would include under clause-(f) "customer related intangible assets such as customer list, customer contacts,", thus, the legislature in its wisdom in respect of the international transactions, provided for the expression intangible property to include intangible assets such as customer list in Sec. 92B then an

interpretation difference from the same cannot be taken that under the same applicable act and that too to the detriment of local business and citizens. In these circumstances, we are of the view that the assessee is entitled to the claim of depreciation on the intangible assets, being the goodwill/customer list, as claimed by the assessee. In the result, Ground Nos.2 to 2.5 of the assessee's appeal stand allowed.

Taking into account these touchstones provided by the jurisdictional Tribunal, I hereby accept the submissions of the appellant and consider them to be tenable. This ground of appeal for the A.Y. 2010- 11 is allowed.

On the same lines as in A.Y.2010-11, the appellant's claim of depreciation on goodwill is considered admissible for the following assessment years. The company is entitled to the consequential benefit of depreciation in the succeeding years.

| Assessment year | Amount of depreciation on |
|-----------------|-----------------------------|
| | ITA Nos.1664-1666/Chny/2019 |
| | : - 13 - : |

| | Goodwill |
|---------|----------------|
| 2011-12 | Rs.2,86,37,966 |
| 2012-13 | Rs.2,14,78,475 |
| 2013-14 | Rs.1,61,08,856 |
| 2014-15 | Rs.1,20,81,642 |
| 2015-16 | Rs.90,61,232 |

This ground of appeal is allowed."

4. Aggrieved by an appellate order passed by learned CIT(A), the

Revenue has filed an appeal with tribunal. The learned DR submitted that two companies namely Arc Trends Systems India Private Limited and Global Trend Systems were bought by assessee. It was submitted by learned DR that the assessee is in manufacturing of doors. The assessee entered into an slump sale agreements to buy distribution businesses of these two entities. It was submitted that excess consideration over and above book value of the net assets was considered as goodwill by the assessee. It was submitted that depreciation on goodwill was not claimed in return of income filed with Revenue and it is only during assessment proceedings, the assessee claimed depreciation on goodwill. It was submitted that AO observed that these are payments towards non compete fee rather than for goodwill. Our attention was drawn to para 5.7 and 5.12 of the AO order. It was submitted that no depreciation is allowable on non compete fee. It was submitted by learned DR that learned CIT(A) gave relief to assessee by relying on decision of Hon'ble Supreme Court in the case of Smifs Securities Limited(supra). The learned DR would rely on assessment order passed by learned AO.

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4.2 The learned counsel for the assessee on the other hand submitted that valuation of the businesses acquired was done and furnished before the AO. It was submitted that agreement copies for acquiring businesses were filed before authorities below as well before ITAT. It was submitted that it is only businesses of these two companies related to distribution of Dorma products along with related installation service's business were taken over by assessee company. It was submitted that assets were valued, employees were taken over along with tangible assets, thus excess paid was towards goodwill. It was entire business of distribution of assessee's products by these two entities which was taken over by assessee and lumpsum consideration was paid. Our attention was drawn to slump sale agreements which are placed in file. The employees along with business contracts were also taken over by assessee along with distribution businesses of these companies. It was submitted that these two companies as such were not taken over by assessee. The learned counsel for the assessee drew our attention to ground number 2.8 filed by Revenue wherein it is stated that tribunal decision in the case of Rentokil India Private Limited in ITA no. 2660/Mds/2016 , dated 15.11.2017 for ay: 2011-12 is not accepted by Revenue and appeal is filed with Hon'ble Madras High Court. It was submitted that merely because an appeal filed by Revenue is pending before Hon'ble Madras High Court could not be a reason to deny benefit to the assessee of the decision of co-ordinate benches of ITAT in the case of Rentokil (supra) allowing depreciation on goodwill. The learned counsel for the assessee also relied upon decision of ITA Nos.1664-1666/Chny/2019 :- 15 :-

Chennai-tribunal in the case of Rentokil India Private Limited in ITA No. 444 & 445 /Chny2018 dated 26.07.2018 for ay's : 2010-11 and 2014-15.

It was submitted by learned counsel for the assessee that grant of depreciation is a statutory deduction and keeping in view Explanation 5 to Section 32 , even if depreciation is not claimed in return of income, still Revenue has to allow the same.

4.3 The learned DR in rejoinder drew our attention to non compete clause in agreement vide clause 13.2 . It was submitted that learned CIT(A) relied upon decision in the case of Pentasoft Technologies Limited (supra) which was a case of payment of non compete fee which was part of agreement and not separate and hence depreciation was held to be allowable. It was submitted that in the instant case before the Bench, the excess paid was not towards non compete fee and hence depreciation is not allowable. It was submitted that facts in the case of Pentasoft Technologies Limited were different than that of the assessee. 4.4 It was submitted by learned counsel for the assessee in rejoinder to rejoinder that facts in both the case namely of Pentasoft(supra) and of the assessee are related to transfer of businesses which were sold/acquired along with customers, contracts , employees etc and hence excess paid over and above value of tangible net assets was towards goodwill on which depreciation is to be allowed as provided under provisions of the 1961 Act .

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5. We have considered rival contentions and perused the material on record including cited case laws. We have observed that the assessee is engaged in the business of manufacturing and wholesale trading of automatic door operators , door controls and accessories. The background of the case before us is with respect to claim of the assessee towards depreciation on goodwill generated on acquisition of businesses of two entities namely M/s Arc Trend Systems Private Limited (hereinafter called "Arc") and GTS Exports Private Limited(hereinafter called "GTS"). The assessee has filed before the authorities below as well before us ,slump sale agreements entered into by it for acquiring businesses of these two entities. The interpretation and analysis of these two slump sale agreements is very vital for resolving controversy between rival parties. Before proceeding further let us carefully and closely analyze these two agreements, wherein critical gist for our purposes is as under :

(a) The first agreement is dated 21.11.2008 termed as Slump Sale Agreement which was entered into between assessee and GTS Exports Private Limited. The agreement stipulates that GTS is engaged inter-alia in the business of trading of Dorma Products, including door controls, automatic doors, glass fittings, accessories and providing installation services which business of GTS has been in existence for a period of more than three years. The assessee intends to acquire business of GTS which concerns with trading of Dorma products and related installation services. Perusal of the terms and conditions of the agreement undisputedly made it clear that the assessee intends to acquire business of GTS and not the company GTS Exports Private Limited per-se. The total composite consideration stated for acquisition for the business of GTS as stated in Slump Sale Agreement is ` 7.60 crores lumpsum consolidated for business of GTS related to trading of Dorma products and related installation services being acquired by assessee as stipulated in slump sale agreement dated 21.11.2008. The Business Assets as defined in the agreement to be acquired by assessee from GTS are ITA Nos.1664-1666/Chny/2019 :- 17 :-

Net current assets, Business Movable Assets, Business Goodwill, Business Intellectual Property, Business Contracts including rights thereunder, Business information and all of the assets which are used in the Business, to be sold and transferred to the assessee in accordance with the slump sale agreement. Business Contracts are defined as meaning contracts, agreements and undertakings pertaining to the Business , which shall also be taken over by assessee under the aforesaid slump sale agreement. The agreement also stipulates that all pending customer orders shall also stand transferred to the assessee. As per slump sale agreement, Business Goodwill is defined as meaning all the goodwill of GTS in relation to business transferred including customer relations and exclusive right of the assessee to carry on its activities under the name of business and represents itself as carrying on business of GTS, which shall also get transferred to assessee pursuant to aforesaid slump sale agreement dated 21.11.2008 , which is also included within the agreed consolidated lumpsum consideration of ` 7.60 crores and no separate amount is payable towards goodwill, business contracts , customer orders etc. The agreement

also stipulates that business intellectual properties, business information and business movable assets, as defined in agreement shall also stand transferred in favour of assessee under the aforesaid agreement within the aforesaid consolidated lumpsum consideration of ` 7.60 crores. All the defined employees including key employees , installation employees and other employees of GTS will sever their relations with GTS and then join employment of the assessee on fresh terms and conditions so as to enable assessee to carry on business activities of the acquired business under slump sale agreement on a going concern basis uninterruptedly . The assessee under the agreement is entitled to continue to carry on the business of trading of Dorma Products and related installation services so acquired in its own name and for its own sole benefit, which was hereinbefore conducted by GTS. There is also a non compete clause in the agreement which stipulates that GTS and its key employees shall not directly or indirectly compete for a period of five years with assessee with respect to products produced by assessee or in the process of developing anywhere in the world by the assessee. No separate consideration is stipulated in slump sale agreement to be paid separated for this non compete clause in slump sale agreement and rather a consolidated lumpsum consideration of ` 7.60 crores also includes consideration for non compete agreement by GTS and its key employees for a period of five years. The aforesaid agreement also contains details of business movable assets which are acquired by assessee under this slump sale agreement which mainly consist of personal computers, printers, fax machines , laptops, shelves , tables and chairs located at its GK-II and Anand Parbat office at New Delhi which shall stand transferred to assessee ITA Nos.1664-1666/Chny/2019 :- 18 -:

under this slump sale agreement . There is also transfer of inventories, account receivables , loans and advances outstanding in the books of accounts of GTS on effective date to the assessee under the aforesaid slump sale agreement but there is no land and building which is transferred to the assessee under the said agreement. The amounts received by GTS from its debtors of trading in Dorma Products and related installation services businesses directly post effective date shall have to be accounted for by GTS to the credit of assessee

b) The second agreement is dated 29.11.2008 which is again termed as Slump Sale Agreement and is between assessee and M/s Arc Trend Systems Private Limited . The agreement stipulates that Arc is engaged , inter-alia , in the business of investment of funds, trading of Dorma Products, including door controls, automatic doors, glass fittings, accessories and providing related installation services which has been in existence for a period of more than three years. The assessee has only intended to acquire business related to trading of Dorma Products and related installation services which is stated to be operated by Arc for period of more than three year. Thus, the business of investment of funds carried on by Arc is not acquired by assessee. Perusal of the terms and conditions of the agreement made it undisputedly clear that the assessee intends to acquire business of Arc and not the company Arc

Trend Systems Private Limited per-se. The total composite lumpsum consideration stated for acquisition for the business of Arc as stated in Slump Sale Agreement is ` 13,72,15,000/- for the business of Arc being acquired by assessee as stipulated in slump sale agreement dated 29.11.2008. The Business Assets as defined in the agreement to be acquired by assessee from Arc are Net current assets, Business Movable Assets, Business Goodwill, Business Intellectual Property, Business Contracts including rights thereunder, Business information and all of the assets used in the Business, to be sold and transferred to the assessee in accordance with aforesaid slump sale agreement.

Business Contracts are defined as meaning contracts, agreements and undertakings pertaining to the Business which shall also stood transferred to assessee under the said agreement and no separate consideration is stipulated for acquiring business contracts . The agreement also stipulates that all pending customer orders shall also stand transferred to the assessee. As per agreement, Business Goodwill is defined as meaning all the goodwill of Arc in relation to business transferred including customer relations and exclusive right of the assessee to carry on its activities under the name of business and represents itself as carrying on business of Arc, which shall also get transferred to assessee pursuant to aforesaid slump sale agreement dated 29.11.2008 within agreed lumpsum composite consideration of ` 13.72 crores and . The agreement also stipulates ITA Nos.1664-1666/Chny/2019 :- 19 -:

that business intellectual properties, business information and business movable assets, as defined in agreement shall also stand transferred in favour of assessee under aforesaid agreement within aforesaid lumpsum composite consideration of ` 13.72 crores. All the defined employees including key employees , installation employees and other employees of Arc will sever their relations with Arc and then join employment of the assessee so as to enable assessee to carry on business activities of the business so acquired under slump sale agreement uninterruptedly on going concern basis. The assessee under the agreement is entitled to carry on the business so acquired in its own name and for its own sole benefit. There is also a non compete clause in the agreement which stipulates that Arc and its key employees shall not directly or indirectly compete for a period of five years with assessee and the products produced by it or in the process of developing anywhere in the world. No separate consideration is specified for non compete agreement entered into by assessee with Arc and key employees and composite lumpsum consideration of ` 13.72 crores stipulated in slump sale agreement also, inter-alia includes payment of non- compete agreement entered into by assessee with Arc. The aforesaid agreement also contains details of business movable assets which are mainly personal computers, printers, fax machines , laptops, air conditioners, refrigerators , stabilizers , Dlink switch, etc located at Mumbai and Pune which shall also stood transferred to assessee under slump sale agreement . There is also transfer of inventories, account receivables , loans and advances outstanding in the books of accounts of Arc as on effective date to the assessee under the aforesaid slump sale agreement but there is no land and building which is transferred to the assessee

under the said agreement. The amounts received by Arc from its debtors of trading in Dorma Products and related installation services businesses directly post effective date shall have to be accounted for by Arc to the credit of assessee. Thus, on a careful perusal of both these aforesaid slump sale agreements dated 21.11.2018 and 29.11.2018 respectively entered into by assessee with GTS and Arc respectively, it is clear that assessee has only acquired running businesses on going concern basis carried on by GTS and Arc of trading in Dorma Products and related installation services along with all business assets, customers, business contracts, business intangibles, ITA Nos.1664-1666/Chny/2019 :- 20 :-

key employees, installation employees and other employees as detailed in the slump sale agreements entered into by the assessee with GTS and Arc, dated 21.11.2008 and 29.11.2008 respectively. These two agreements are undoubtedly composite agreements for acquiring running business of these two entities namely GTS and Arc concerning trading in Dorma Products along with related installation services on a going concern basis with an intent to continue running of the aforesaid businesses by assessee in its own name for its own sole benefit. The tangible assets which are acquired under these two agreements are mainly computer hardware, printers, fax machines, and other office equipments / appliances, inventories, accounts receivables, loans and advances etc. which were existing in the books of accounts of GTS and Arc on effective date which were incorporated by assessee in its books of accounts at their book value. The details of business movable assets and liabilities acquired by assessee are part of these slump sale agreements. Representations and warranties are made by GTS/Arc to assessee that their books of accounts and records represent true and correct position and all material financial transactions are accurately recorded in such books of accounts and record, that there are no contingent or other liabilities which are not recorded in books of accounts etc and several other representations and warranties were made by GTS/Arc and consequences for wrong/false representations and warranties are also provided in these agreements. .

Any realization of accounts receivable existing in the books of GTS and Arc on effective date of transfer directly by GTS and Arc subsequently is to be ITA Nos.1664-1666/Chny/2019 :- 21 :-

accounted by GTS and Arc to the credit of assessee. The key employees, employees working in the business of related installation services run by GTS and Arc shall resign from GTS and Arc, and join employment with assessee on terms and conditions freshly agreed by assessee with these personnel. The Agreement also stipulates Key employees of GTS/Arc as well the entities namely GTS/Arc shall not compete with assessee for a period of five years with respect to products produced by assessee and/or under development by assessee. The assessee has also acquired alongwith customers, business contracts, customer orders, business information etc. which are intangibles assets associated with these businesses. The lumpsum

consolidated consideration agreed by assessee to be paid is for acquisition of these businesses by assessee on going concern basis along with specified tangible assets such as computers, laptop, printers, fax machines , Information Technology accessories, office equipments , inventories, accounts receivables, loans and advances etc. as well for acquiring intangibles associated with businesses such as business contracts, customers, customer orders , business information , non compete clause, takeover of employees, right to run the businesses on going concern basis etc for a consolidated lumpsum consideration payable under a composite contract viz. slump sale agreements . The perusal of these slump sale agreements clearly and undisputedly specify the intention of the assessee to acquire these businesses erstwhile run by GTS and Arc which is related to trading in Dorma Products and related installation services , on a going concern basis with an intent to run these ITA Nos.1664-1666/Chny/2019 :- 22 -:

businesses thereafter by assessee under its own name for its own sole benefit uninterruptedly on a going concern basis. Thus , acquisition of these businesses as going concern basis with an intention to run thereafter directly by assessee in its own name for its own sole benefit is also visible from taking over of key employees, installation employees and other employees on its employment directly with an intent to continue the business on going concern basis thereafter smoothly with the existing key employees, installation employees and other employees. Thus, the clauses as to non compete by key employees and by GTS/Arc for a period of five years with assessee is a supportive clause to support acquisition of relevant businesses by assessee and thereafter running of these acquired businesses of trading in Dorma products and related installation services by assessee directly in its own name and for its own sole benefit uninterruptedly on going concern basis. Thus, it is undoubtedly clear that the assessee did not acquire the companies namely GTS and Arc per-se but acquired businesses of these two companies concerning trading of Dorma Products and related installation services business which were erstwhile run by GTS and Arc. The agreement is a composite agreement to acquire aforesaid businesses run by these two entities concerning trading of Dorma Products and related installation services for composite lumpsum consideration . The perusal of agreement also clearly evidences that consideration paid by assessee does not include any payments towards acquisition of land and building but these are mainly for acquiring movable assets such as computers, laptop, printers, fax machines, air ITA Nos.1664-1666/Chny/2019 :- 23 -:

conditioners, refrigerators, business stocks, accounts receivables , loans and advances etc. along with intangible assets such as business contracts, customers, business information, right to continue business as going concern basis , non compete clauses etc. which stood acquired by the assessee under these agreements for aforesaid consolidated lump sum consideration . Thus, to this extent decision relied upon by Revenue in the case of Toyo Engineering India Limited (supra) is distinguishable as in the case of Toyo Engineering India Limited(supra) , the acquisition consisted

predominantly of land admeasuring 5559.90 square meters and a building thereon , on which Toyo House was situated and hence non allocation of fair market value of land and building on the date of transfer weighed heavily on tribunal in coming to conclusion that no payment for goodwill was made. The relevant part of decision of Mumbai-tribunal in the case of Toyo Engineering India Limited(supra) is reproduced hereunder:

"The consideration in the form of cancellation of investments, cannot be said to have been made for purchase of assets at book value, when the fair value of each asset and liability is much higher. As already stated, the primary asset of CGEL was land admeasuring 5559.90 sq.mtrs. and a building thereon, on which Toyo House is situated. The market value of this asset should have been considered. If the assessee had paid more than the fair market value of assets minus the fair market value of liabilities, then the company would have a case to claim that certain amounts were incurred for goodwill. In the absence of such an exercise, we are of the considered opinion that there is no goodwill in the nature of commercial rights purchase by the assessee. This is only a book entry and it is only another way of disclosing the intrinsic value of the fixed asset of the company."

In the instant case before us, it is not the case of Revenue, that assessee had acquired some land and building in which case, the valuation of such ITA Nos.1664-1666/Chny/2019 :- 24 -:

land and building at book value in the books of acquirer will distort the books of accounts as the fair market value of land and building is significantly higher, as no such land and buildings are acquired by assessee under these two slump sale agreements . What is acquired in these two slump sale agreements by assessee is in the form of tangible assets by assessee which are mainly business movable assets such as computers, laptops, fax machines , printers, office equipments, IT accessories, account receivables, inventories , loans and advances etc and it cannot be said that incorporating these assets in books of accounts of the assessee at book value existing on the date of acquisition has led to distortion in presentation of books of accounts of the acquirer . There is no such allegation by Revenue that these tangible assets never existed or any attempt is made to defraud revenue by introducing non existent tangible assets or undervaluing these assets . The business assets related to these business activities of trading by these two entities GTS and Arc in Dorma Products and related installation services only were acquired by assessee and not all the assets existing in books of accounts of GTS/Arc and that is where the AO erred in computing the values of the assets acquired in the books of accounts of the assessee vis-à-vis assets existing in the books of accounts of GTS/Arc as the AO considered the entire assets of GTS/Arc existing in their books of accounts for incorporating in books of accounts of assessee which is not the correct thing to do as the assessee did not acquire these companies GTS/Arc nor acquire their entire assets /liabilities/businesses in toto but only acquired business related to trading ITA

Nos.1664-1666/Chny/2019 :- 25 -:

in Dorma Products and related installation services business erstwhile carried on by these two entities. Thus, we do not agree with this contention of Revenue that merely because these tangible business movable assets were included by assessee in its books of accounts at the book value existing in the books of GTS/Arc on effective date will disentitle assessee from claiming depreciation on the excess consideration paid over and above book value of tangible assets acquired of GTS/Arc. The representations and warranties are made by GTS/Arc to the assessee vide these agreements that their books of accounts and records reflect true and correct state of affairs and for making false/wrong representation/warranties by the sellers, the consequences are provided in these agreements. Thus, we do not find any reasons to doubt the value of these tangible movable assets acquired by the assessee and the value incorporated in books of accounts by the assessee in our view reflect their fair market value, unless rebutted by Revenue. The Revenue has also not done any exercise to valuing these tangible movable assets acquired by the assessee to rebut contention of the assessee that book value of these acquired tangible assets represent fair market value of these assets.

Rather AO has proceeded on wrong notion that the assessee acquired companies namely GTS/Arc or acquired their entire assets and liabilities which is not correct. The assessee has discharged its primary onus and now it was for Revenue to have brought on record incriminating material to rebut the contentions of the assessee and in the absence of any cogent incriminating material on record, we reject this contention of the ITA Nos.1664-1666/Chny/2019 :- 26 -:

Revenue and hold that book value of these tangible movable assets acquired by assessee was indeed their fair market value. The excess paid by assessee over and above book value of tangible movable assets (net of liabilities) acquired is definitely towards intangible assets acquired by assessee in the form of business contracts, customer orders, customers, business information, right to continue business as going concerns, non compete by GTS/Arc/key employees etc. Thus, consolidated payments made by assessee over and above net assets acquired by it under a composite contract in the present case before us, in our considered view is towards goodwill and non compete agreement by GTS/Arc and its key employees and in our considered view depreciation is allowable both on the aforesaid excess amount paid towards goodwill and non compete agreement. Our aforesaid view is supported by decision of Hon'ble Madras High Court decision in the case of Pentasoft Technologies Limited (supra). We have observed that co-ordinate Bench of Chennai-

tribunal in the case of M/s. Rentokil India Private Limited v. DCIT in ITA No.2660/Mds/2016 for ay: 2011-12 vide orders dated 15.11.2017 has allowed depreciation on the intangible assets viz. goodwill/customer list.

The co-ordinate Bench of this tribunal in Rentokil (supra) referred to Explanation to Section 92B of the 1961 Act to hold that intangible shall include customer list and depreciation shall be allowable u/s 32 of the 1961 Act . We have observed that co-ordinate Bench of this Tribunal in the case of M/s.Rentokil India Pvt. Ltd. v. DCIT in ITA Nos.444 & 445/Chny/2018 for ay's: 2010-11 & 2014-15 vide common order dated ITA Nos.1664-1666/Chny/2019 :- 27 -:

26.07.2018 has followed its earlier decision in the case of M/s.Rentokil India Pvt. Ltd. v. DCIT in ITA No.2660/Mds/2016 for ay: 2011-12 and has granted relief to the assessee by allowing depreciation on goodwill. Thus, keeping in view of the aforesaid decisions, we hold that Ld.CIT(A) has rightly allowed depreciation claimed by the assessee by following the decision of the tribunal in the case of M/s.Rentokil India Pvt. Ltd. v. DCIT in ITA no. 2660/Mds/2016, vide order dated 15.11.2017 in allowing relief to the assessee. The decision of Hon'ble Supreme Court in the case of Smifs Securities Limited (supra) also support the contentions of the assessee that goodwill is an asset under explanation 3(b) to Section 32(1) and depreciation shall be allowable on goodwill . Revenue has relied on decision of ITAT in the case of Chogule & Co. Private Limited We are of the view that the Ld.CIT(A) has rightly allowed claim of depreciation to the assessee by following Explanation-5 to Sec.32(1) of 1961 Act, which clearly stipulates that depreciation is to be allowed even if assessee has not claimed depreciation while computing income. Thus even if assessee has not filed claim of depreciation in return of income filed with Revenue as well in revised return of income filed with Revenue, but has made claim during the course of assessment proceedings, the assessee will be entitled for depreciation u/s.32 of the 1961 Act. Thus, we decide this effective ground in favour of the assessee. In the result appeal filed by Revenue in ITA No. 1664/Chny/2019 for ay: 2010-11 stand dismissed.

We order accordingly.

ITA Nos.1664-1666/Chny/2019 :- 28 -:

6 In the result appeal filed by Revenue in ITA no. 1664/Chny/2019 for ay:

2010-11 stand dismissed.

ITA No. 1665 & 1666/Chny/2019 for ay's: 2011-12 and 2012-13

7. Since similar issues are involved in appeals filed by Revenue in ITA No. 1665-1666/Chny/2019 for ay: 2011-12 and 2012-13 as in Revenue's appeal for ay: 2010-11 , our decision in appeal No. 1664/Chny/2019 for ay: 2010-11 shall mutatis mutandis apply to appeals filed by Revenue for ay: 2011-12 and 2012-13 respectively . Hence , both the appeals filed by Revenue in ITA no. 1665-1666/Chny/2019 for ay: 2011-12 and 2012-13 stand dismissed. We order accordingly.

8. In the result appeals filed by Revenue in ITA no. 1665-1666/Chny/2019 for ay: 2011-12 and 2012-13 respectively stand dismissed.

9. In the result, all the three appeals filed by the Revenue in ITA Nos.1664 to 1666/Chny/2019 for ay: 2010-11 to 2012-13 stand dismissed Order pronounced on this 20th day of November, 2019 in Chennai.

Sd/-
(. . .)
(N.R.S. GANESAN)
/JUDICIAL MEMBER

Sd/-
(")
(RAMIT KOCHAR)
/ACCOUNTANT MEMBER

/Chennai,
1 /Dated: 20th November, 2019.
TLN

ITA Nos.1664-1666/Chny/2019

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/ , " 2 3 2 /Copy to:
1. +/Appellant
2. , - +/Respondent
3. 4 ()/CIT(A)

4. 4 /CIT
5. 2 ¢ , /DR
6. (£)/GF