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

Judgment delivered on: 20.02.2025

\+ ITA 363/2023

PMV MALTINGS PVT LTD .....Appellant

Through: Mr. Satyen Sethi, Mr. Artatrana Panda & Ms. Gargi Sethee, Advs.

versus

DY. COMMISSIONER OF INCOME TAX, CIRCLE 19(1) & ANR. .....Respondents

Through: Mr. Puneet Rai, SSC with Mr. Ashvini Kumar & Mr. Rishabh Nangia, JSCs.

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CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

J U D G M E N T

YASHWANT VARMA, J. (Oral)

1. This appeal instituted by the appellant/assessee had come to be

admitted by us on 12 July 2023 on the following question of law:

> "Whether disallowance of depreciation claimed on goodwill under Section 32, albeit post demerger was sustainable in law?"

2. The Court, on that, occasion had noted that goodwill was undisputedly eligible for depreciation in the period in question in light of the judgment rendered in **Commissioner of Income Tax, Kolkata v. Smifs Securities Ltd.**[1] The aforesaid observation appears to have been rendered in light of the subsequent amendments which came to be incorporated in Section 32 of the **Income Tax Act, 1961**[2] **['Act']** and more particularly the Finance Act, 2021 in terms of which the phrase *'not being goodwill of a business or profession'* came to be inserted.

3. We are thus concerned with a period where Section 32(1) stretched the principle of depreciation to any business or commercial rights including pertaining to intangible assets.

4. The appeal before the **Income Tax Appellate Tribunal**[3] ['**Tribunal**'] itself related to **Assessment Years**[4] ['**AYs**'] 2015-16 and 2016-17. The question of depreciation itself arose in the context of a Scheme of Arrangement which came to be sanctioned on 05 October 2012. In terms of the covenants comprised in that Scheme, the appointed date was prescribed to be 01 April 2013.

5. Insofar as the apportionment of depreciation between the amalgamating entity and the resultant company is concerned and relevant to AY 2014-15, there is no dispute. The solitary question,

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[1] (2012) 13 SCC 488
[2] Act
[3] Tribunal
[4] AYs

which thus arose for consideration of the Tribunal, was the depreciation claimed by the appellant for AYs 2015-16 and 2016-17.

6. On facts, the Tribunal has found that the appellant had acquired the malt production units of Malt Company India Pvt. Ltd ['**MCIPL**']. situated at Pataudi (Haryana) and Kashipur in the State of Uttarakhand. These two units had remained a part of the demerged company till 31 March 2013.

7. The salient facts emanating from the Scheme of Arrangement as well as the depreciation claimed in Financial Year ['**FY**'] 2013-14 (corresponding to AY 2014-15) are noticed by the Tribunal as follows:

> "8. We find from the record, during the financial year 2013-14, the appellant had acquired malt production units of Malt Company India Pvt. Ltd. (MCIPL). Malt production units at Pataudi (Haryana) and Kashipur (Uttarakhand) were a part of MCIPL {the demerged company} till 31st March 2013. In accordance with the scheme of Arrangement, Reorganization& Demerger, the interest therein of MCIPL got vested in the assessee (the resulting company) w.e.f. 1st April 2013 as per order of the Hon'ble High Court of Delhi dated 5th October 2012. In terms of such order, the difference between purchase consideration and net assets acquired (net assets = assets less liabilities) was recorded as goodwill in the books of the assessee company in F.Y. 2013-14 at value of Rs. 16,62,37 ,413/- on which it claimed depreciation @ 25% as per Section 32 of the Income Tax Act, 1961 of Rs.4,15,59,353/- in A.Y. 2014-15. Thus, goodwill amounting to Rs 16,62,37,413/- was recognized in the books of the appellant during FY 2013-14. It was noticed by the AO that during the year, the assessee has claimed depreciation on goodwill @ 25% of opening WDV of Rs. 12,46,78,060/- equivalent to Rs.3,11,69,515/-."

8. The Tribunal then proceeded to accept the uncontested position of goodwill constituting an intangible asset and depreciation thus being allowable thereon. It has in this respect duly taking note of the judgment of the Supreme Court in *Smifs Securities.* In paragraph 11, it

has reproduced the details pertaining to the block of assets which changed hands pursuant to the demerger and as they stood on 01 April 2013 in the following terms:

> "11. In the instant case 1 the following assets and liabilities of production units at Pataudi (Haryana) and Kashipur (Uttarakhand) of MCIPL (the Demerged Company), stood vested in the appellant as on 1st April 2013:

S.NO.	***Particulars***	***Amount in Rs.***
I	***ASSETS***	
	Land	*2,76,30,716*
	Buildings	*13,69,61,629*
	Plant & Machinery	*71,27,75,421*
	Other Fixed Assets	*51,72,993*
	Capital Work in Progress	*12,17,04,012*
	Non Current Investments	*70,000*
	Long Term Loans and Advances	*3,94,59,698*
	Inventories	*5,68,79,698*
	Trade Receivables	*15,04,66,263*
	Other Current Assets	*5,90,56,353*
	Total Assets	***1,31,01,77,069***
II	***LIABILITIES***	
	Long Term Borrowings	*1,05,96,54,849*
	Deferred Tax Liability	*9,36,70,517*
	Long term provisions	*10,35,325*
	Trade Payables	*5,79,65,825*
	Other Current Liabilities	*15,06,16,758*
	Short term provisions	*97,708*
	Total Liabilities	***1,36,30,40,982***
III	***Net Assets***	***(-) 5,28,63,913***

9. It has thereafter in paragraph 14 observed as follows:

> "14. The Act provides 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), clause (xiiib) 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. It also provides that depreciation allowable in the case of succession, amalgamation or merger, demerger should not exceed the depreciation allowable had the succession not taken place. For the same reason, the case of amalgamation is not regarded as transfer for the purpose of capital gain as provided under Section 47(vi) of the Act and therefore such cases are exempted from capital gain which is otherwise chargeable to tax on transfer of assets."

10. The ultimate conclusion which came to be rendered by the Tribunal is founded solely on the Fifth Proviso to Section 32(1) as it stood at the relevant time. That provision and the extract of which has been placed on our record by Mr. Sethi, is reproduced hereinbelow:

"32. (1) [In respect of depreciation of—

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

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

[(i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed;]

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

[***]

[**Provided** [***] that no deduction shall be allowed under this clause in respect of—

(a) any motor car manufactured outside India, where such motor car is acquired by the assessee after the 28th day of February, 1975 [but before the 1st day of April, 2001], unless it is used—

(i) in a business of running it on hire for tourists ; or

(ii) outside India in his business or profession in another country ; and

(b) any machinery or plant if the actual cost thereof is allowed as a deduction in one or more years under an agreement entered into by the Central Government under section 42 :]

[**Provided further** that where an asset referred to in clause (i) or clause (ii) [or clause (iia)] [*or the first proviso to clause (iia)*], as the case may be, is acquired by the assessee during the previous year and is put to use for the purposes of business or profession for a period of less than one hundred and eighty days in that previous year, the deduction under this sub-section in respect of such asset shall be restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under clause (i) or clause (ii) [or clause (iia)], as the case may be :]

[**Provided also** that where an asset referred to in clause (iia) or the first proviso to clause (iia), as the case may be, is acquired by the assessee during the previous year and is put to use for the purposes of business for a period of less than one hundred and eighty days in that previous year, and the deduction under this sub-section in respect of such asset is restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under clause (iia) for that previous year, then, the deduction for the balance fifty per cent of the amount calculated at the percentage prescribed for such asset under clause (iia) shall be allowed under this sub-section in the immediately succeeding previous year in respect of such asset:]

[**Provided also** that where an asset being commercial vehicle is acquired by the assessee on or after the 1st day of October, 1998 but before the 1st day of April, 1999 and is put to use before the 1st day of April, 1999 for the purposes of business or profession, the deduction in respect of such asset shall be allowed on such percentage on the written down value thereof as may be prescribed.

Explanation.—For the purposes of this proviso,—

(a) the expression "commercial vehicle" means "heavy goods vehicle", "heavy passenger motor vehicle", "light motor vehicle", "medium goods vehicle" and "medium passenger motor vehicle" but does not include "maxi-cab", "motor-cab", "tractor" and "road-roller";

(b) the expressions "heavy goods vehicle", "heavy passenger motor vehicle", "light motor vehicle", "medium goods vehicle", "medium passenger motor vehicle", "maxi-cab", "motor-cab", "tractor" and "road roller" shall have the meanings respectively as assigned to them in section 2 of the Motor Vehicles Act, 1988 (59 of 1988):]

[**Provided also** that, in respect of the previous year relevant to the assessment year commencing on the 1st day of April, 1991, the deduction in relation to any block of assets under this clause shall, in the case of a company, be restricted to seventy-five per cent of the amount calculated at the percentage, on the written down value of such assets, prescribed under this Act immediately before the commencement of the Taxation Laws (Amendment) Act, 1991:]

[**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)*, clause *(xiiib)* 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.]

[*Explanation 1*.—Where the business or profession of the assessee is carried on in a building not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee for the purposes of the business or profession on the construction of any structure or doing of any work in or in relation to, and by way of renovation or extension of, or improvement to, the building, then, the provisions

of this clause shall apply as if the said structure or work is a building owned by the assessee.

Explanation 2.—For the purposes of this *64*[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.]

[*Explanation 3*.—For the purposes of this sub-section, [the expression "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.

Explanation 4.—For the purposes of this sub-section, the expression "know-how" means any industrial information or technique likely to assist in the manufacture or processing of goods or in the working of a mine, oil-well or other sources of mineral deposits (including searching for discovery or testing of deposits for the winning of access thereto).

[*Explanation 5*.—For the removal of doubts, it is hereby declared that the provisions of this sub-section shall apply whether or not the assessee has claimed the deduction in respect of depreciation in computing his total income;]

[(iia) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing [[*or in the business of generation, transmission or distribution*] of power], a further sum equal to twenty per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii) :

[**Provided** that where an assessee, sets up an undertaking or enterprise for manufacture or production of any article or thing, on or after the 1st day of April, 2015 in any backward area notified by the Central Government in this behalf, in the State of Andhra Pradesh or in the State of Bihar or in the State of Telangana or in the State of West Bengal, and acquires and installs any new machinery or plant (other than ships and aircraft) for the purposes of the said undertaking or enterprise during the period beginning on the 1st day of April, 2015 and ending before the 1st day of April, 2020 in the said backward area, then, the provisions of clause (iia) shall have effect, as if for the words "twenty per cent",

the words "thirty-five per cent" had been substituted :]

Provided [***further***] that no deduction shall be allowed in respect of—

(A) any machinery or plant which, before its installation by the assessee, was used either within or outside India by any other person; or

(B) any machinery or plant installed in any office premises or any residential accommodation, including accommodation in the nature of a guest-house; or

(C) any office appliances or road transport vehicles; or

(D) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any one previous year;]

[(iii) in the case of any building, machinery, plant or furniture in respect of which depreciation is claimed and allowed under clause (i) and which is sold, discarded, demolished or destroyed in the previous year (other than the previous year in which it is first brought into use), the amount by which the moneys payable in respect of such building, machinery, plant or furniture, together with the amount of scrap value, if any, fall short of the written down value thereof :

Provided that such deficiency is actually written off in the books of the assessee.

Explanation.—For the purposes of this clause,—

(1) "moneys payable" in respect of any building, machinery, plant or furniture includes—

(a) any insurance, salvage or compensation moneys payable in respect thereof;

(b) where the building, machinery, plant or furniture is sold, the price for which it is sold,

so, however, that where the actual cost of a motor car is, in accordance with the proviso to clause (1) of section 43, taken to be twenty-five thousand rupees, the moneys payable in respect of such motor car shall be taken to be a sum which

bears to the amount for which the motor car is sold or, as the case may be, the amount of any insurance, salvage or compensation moneys payable in respect thereof (including the amount of scrap value, if any) the same proportion as the amount of twenty-five thousand rupees bears to the actual cost of the motor car to the assessee as it would have been computed before applying the said proviso;

(2) "sold" includes a transfer by way of exchange or a compulsory acquisition under any law for the time being in force but does not include a transfer, in a scheme of amalgamation, of any asset by the amalgamating company to the amalgamated company where the amalgamated company is [an Indian company or in a scheme of amalgamation of a banking company, as referred to in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949) with a banking institution as referred to in sub-section (15) of section 45 of the said Act, sanctioned and brought into force by the Central Government under sub-section (7) of section 45 of that Act, of any asset by the banking company to the banking institution.]]

(iv) [***]

(v) [***]

(vi) [***]

(1A) [***]

[(2) Where, in the assessment of the assessee, full effect cannot be given to any allowance under sub-section (1) in any previous year, owing to there being no profits or gains chargeable for that previous year, or owing to the profits or gains chargeable being less than the allowance, then, subject to the provisions of sub-section (2) of section 72 and sub-section (3) of section 73, the allowance or the part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance, or if there is no such allowance for that previous year, be deemed to be the allowance for that previous year, and so on for the succeeding previous years.]"

11. As is apparent from a bare reading of the Fifth Proviso, the same pertains to aggregate deduction that may be claimed in respect of

intangible assets *"allowable to the predecessor and the successor in the case of succession"*. The said provision proceeds further to speak of the amalgamating company, the amalgamated company as well as the demerged and resultant company as the case may be. The proscription which is thereafter introduced is that the aggregate deduction of depreciation shall not exceed in any previous year the deduction calculated as if the succession, amalgamation or demerger as the case may be had not taken place. The Proviso thus clearly seeks to regulate affairs which would obtain in the year immediately following the process of merger or demerger as the case may be.

12. As was noticed in the preceding parts of this decision, we are concerned with a Scheme which came into effect in FY 2013-14 and the Proviso thus being pertinent only for AY 2014-15. The said provision could have had no bearing on the issue of depreciation claimed by the appellant in AY 2015-16 or 2016-17.

13. Our conclusion in this respect finds resonance in the judgment rendered by the Karnataka High Court in **Padmini Products (P) Ltd. v. Deputy Commissioner of Income Tax**[5] and where their Lordships had held as follows:

> "**8.** It is noteworthy to mention here that 5th proviso to S. 32(1) of the Act restricts the total depreciation which can he claimed in case of succession etc. to the depreciation which would have been allowable had there been no succession. The 5th proviso (earlier 4th proviso) to S. 32(1) was inserted by Finance Act, 1996 to restrict the claim of aggregate deduction, which is evident from the memorandum to Finance Bill, 1996, which reads as under:

[5] 2020 SCC OnLine Kar 4271

> *"In cases of succession in business and amalgamation of companies, the predecessor of the business and successor the amalgamating company and amalgamated company as the case may be, are entitled to depreciation allowance on same assets which in aggregate exceeds depreciation allowance for Previous year at the prescribed dates. It is proposed to restrict the aggregate deduction in a year to the deduction computed at the prescribed rates and apportion the allowance in the ratio of number of days for which the assets were used by them*."

> **9.** Thus, it is evident that 5th proviso to S. 32 of the Act restricts aggregate deduction both by the predecessor and the successor and if in a particular year there is no aggregate deduction, the 5th proviso does not apply. Thus, it is axiomatic that until and unless it is the case of aggregate deduction, the proviso has no role to play. The 5th proviso in any case will apply only in the year of succession and not in subsequent years and also in respect of overall quantum of depreciation in the year of succession. Accordingly, the third substantial question of law is answered in favour of the assessee and against the revenue."

14. A similar view is found expressed by the Bombay High Court in **Principal Commissioner of Income-tax v. Dharmanandan Diamonds (P) Ltd.**[6] and where the following observations were rendered:

> "**7.** Therefore, as per proviso to section 32, aggregate deduction in respect of depreciation on tangible assets or intangible assets allowable to the predecessor and the successor in the case of succession, i.e., to the partnership firm and to the assessee, respectively, 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. This was applicable only to the assessment year 2008-2009 when the succession took place as for later years, it would not be the case as the assets would no longer belong to the predecessor but only the successor, i.e., the assessee, who can claim depreciation.
>
> **8.** In this case, for the assessment year 2008-2009, predecessor, i.e.,

[6] 2023 SCC OnLine Bom 2976

> the partnership firm has claimed depreciation for five months from April 1, 2007 to August 31, 2007 and the successor, i.e., the assessee has claimed depreciation for the assessment year 2008-2009 for the period from September 1, 2007 to August 31, 2008. By way of illustration, if succession had not taken place during the assessment year 2008-2009 and the predecessor, i.e., the partnership firm would have claimed Rs. 1 crore as depreciation, both predecessor and successor for that year could claim together only Rs. 1 crore as depreciation and nothing more. Admittedly, this is what happened in the case at hand also. The appeal pertains to the assessment year 2009-2010 in which year the asset is clearly owned by the successor, i.e., the assessee. The assessee as per section 32 read with rule 5 of the Act quoted above, will be entitled to claim depreciation in respect of any assets on the actual cost of the said assets. The actual cost of the said assets will be the actual cost which the assessee paid to the predecessor after revaluing the assets and certainly in our view the assessee will be entitled to claim depreciation for the subsequent years on the basis of the actual cost paid."

15. Mr. Rai, learned counsel representing the respondents however, took us through Section 43 and which prescribes the manner in which the Written Down Value ['**WDV**'] is to be computed. Learned counsel laid special stress upon Explanations 2(a) and 2(b) appended to Section 43(6)(c) of the Act to submit that these aspects had clearly guided the Assessing Officer ['**AO**'] in computing the WDV of the block of assets on which depreciation could have been claimed in the two assessment years with which we are concerned.

16. We, however, note that the Tribunal has failed to even notice or examine the issue from that angle. Its judgment is based solely on the applicability of the Fifth Proviso to Section 32(1) and which we, in any case, have found was clearly not germane to AYs 2015-16 and 2016-17.

17. In view of the above in our considered opinion, therefore, the ends of justice would warrant the matter being remitted to the board of the Tribunal for examining the appeal afresh and bearing in mind the

issue which stands flagged hereinabove.

18. We accordingly allow the instant appeal and set aside the Order of the Tribunal dated 03 February 2023.

19. The appeal shall consequently stand revived on the board of the Tribunal to be examined afresh and in light of the observations appearing hereinabove.

YASHWANT VARMA, J.

HARISH VAIDYANATHAN SHANKAR, J.

FEBRUARY 20, 2025/v