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

Judgment Reserved on: 28th September, 2010
% Judgment Pronounced on: 14th, January, 2011

\+ **ITA Nos.1391/2010, 1394/2010 & 1396/2010**

COMMISSIONER OF INCOME TAX - IV ..... Appellant
Through: Mr.Sanjeev Sabharwal, Adv.

versus

HINDUSTAN COCA COLA
BEVERAGES PVT. LTD. ..... Respondent
Through: Mr. Ajay Vohra and Ms. Kavita Jha, Advs.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

1. Whether reporters of the local papers be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

DIPAK MISRA, CJ

Regard being had to the similarity of the questions involved in these three appeals, they were heard analogously and are being disposed of by a singular order.

2. In this batch of appeals preferred under Section 260A of the Income Tax Act, 1961 (for brevity 'the Act'), the assail is to the composite order dated 25.8.2009 in ITA Nos.1884/Del/2006, 2724/Del/07 and 2038/Del/08 pertaining to the assessment years 2001-2002, 2002-03 and 2003-04 respectively passed by the Income Tax Appellate Tribunal (for short `the

tribunal') by the appellant – revenue raising the following substantial questions of law:

> "(1) Whether learned ITAT erred in holding that exercise of Revisionary Jurisdiction under Section 263 of the Income Tax Act, 1961 was invalid?
>
> (2) Whether learned ITAT erred in setting aside the order of the CIT under Section 263 ignoring the fact that the goodwill generated in a business cannot be described as an "asset" so as to be entitled to depreciation under Section 32 and, therefore the depreciation on goodwill was not admissible?"

3. To appreciate the questions posed in proper perspective, it is necessitous to state the relevant facts. For the sake of convenience, the facts from ITA No.1391/2010 are exposited herein. The respondent – assessee is a limited company engaged in manufacturing and trading of non-alcoholic beverages. The assessee filed its return of income on 2.12.2003 declaring loss for the relevant assessment year under Section 143(3) of the Act and the assessment was completed and loss was determined at Rs.2,82,90,29,838/- and the assessing officer had allowed the depreciation on goodwill as claimed in the return.

4. After the order of assessment was framed, the Commissioner of Income Tax-IV, New Delhi (in short 'Commissioner') invoked the jurisdiction under Section 263 of the Act as he noticed that the depreciation on goodwill which was accepted by the assessing officer was not an asset so

as to entitle the assessee the benefit of depreciation as claimed under Section 32 of the Act and, hence, the order was erroneous and prejudicial to the interest of the revenue which resulted in escapement of income and, accordingly, issued notice to the assessee. The assessee filed its reply to the notice contending, interalia, that the proceeding under Section 263 was not sustainable inasmuch as the Commissioner has the jurisdiction to set aside the order of assessment and send the matter for fresh assessment or interfere with it if he is satisfied that further enquiry is necessary on the foundation that the order passed by the assessing officer is erroneous and prejudicial to the interest of the revenue which was not so in the case at hand; that no material was available on record to enable the Commissioner to exercise the power under Section 263 of the Act to reach a conclusion that the same warranted a further enquiry; that the claim put forth by the assessee for depreciation on the goodwill was on the foundation that it has paid the said amount to its various bottlers for marketing and trading reputation, trading style and name, territory know-how and information of territory and that it included the cost of know-how relating to acquiring business, customer, database, distribution network, contract and other commercial rights and, therefore, it was within the purview of Section 32(1)(ii) of the Act; and that once a plausible view has been taken by the assessing officer, the same did not warrant any interference in exercise of suo motu jurisdiction under Section 263 of the Act.

5. The CIT repelled the submissions raised on behalf of the assessee on the ground that on a scrutiny of the provision of Section 32 of the Act in

entirety, it is clear that goodwill is not covered within the meaning of intangible assets which mean only know-how, patent, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature. The Commissioner further noted that the assessee considered goodwill to be a valuable commercial asset similar to other intangible asset mentioned in the definition of block of assets which was contrary to Explanation 3 to Section 32 and, hence, the same was not justified. Being of the said view, the Commissioner set aside the order of the assessing officer relating to the claim of depreciation on goodwill and sent the matter for fresh adjudication.

6. Being dissatisfied with the aforesaid order, the assessee preferred appeals before the tribunal which deliberated upon the contentions raised by the assessee as well as the revenue and referred to the audit report which showed the computation of depreciation on goodwill and the answers to the queries made by the assessing officer. Thereafter, the tribunal addressed itself to what was termed as goodwill in the books of accounts and noticed that the same was in the compartment of the definition "any other business or commercial rights of similar nature (i.e. know-how, patent, copyrights, trademarks, licences, franchises)". The tribunal further took note of the fact that the Commissioner had recorded a finding that such a claim is patently inadmissible and the said finding is solely based on the entry in the books of accounts. It referred to its earlier decision in ***Skyline Caterers Pvt. Ltd. v. ITO***, [2008] 116 ITD 348 wherein it has been held by the tribunal that there is no dispute to the legal proposition that the nomenclature given to the

entries in the books of accounts is not relevant for ascertaining the real nature of the transaction. The said view was expressed on the basis of the decision rendered by the Apex Court in ***Kedarnath Jute Mfg. Co. Ltd. v. IT***, [1971] 82 ITR 363 (SC). Thereafter, the tribunal proceeded to ascertain the true nature of the transaction. The tribunal further noted that the Commissioner has per se proceeded on the ground that the claim of goodwill in the books of account is totally inadmissible but such a perception is not acceptable inasmuch as it is obligatory on the part of the Commissioner to examine the entire record of proceeding and take into account all the material facts on record which are of relevance. The tribunal apprised itself of the fact that payments have been made towards business acquired on slump price and a part of the price so paid is allocated to the intangible assets covered under the head 'goodwill'. After so stating, the tribunal expressed the view thus:

> "The allocation of amount paid as a slump price is not in dispute and the fact that a part of consideration represents consideration for rights, as detailed in the audit report notes extracted above, is also not in disputed. The case of the Commissioner mainly is that depreciation is not admissible on goodwill but the fact the accounting treatment of a payment per se cannot govern its treatment in the income tax proceedings. Even if an amount is termed as 'Goodwill' in the books of accounts but it is a business or commercial rights in the nature of know how, patent, copyrights, trade marks, licences, franchises, the claim of depreciation is indeed admissible thereon. It is not that 'goodwill' is specifically excluded from the intangible assets eligible for depreciation, and, therefore, even if an asset is described as goodwill but it fits in the description of Section 32(1)(ii), depreciation is to be granted on the same; the true basis of depreciation allowance is the character of the asset not it's description."

7. Thereafter, the tribunal referred to the decision cited by the revenue in ***CIT v. Jagadhari Electric Supply & Industrial Co.***, [1983] 140 ITR 490 (P&H) and proceeded to hold as follows:

> "As held by Hon'ble Delhi High Court in the case of Gee Vee Enterprises (99 ITR 375), even an inertia of the Assessing Officer in examining a claim, when he ought to have examined the same, does render the assessment order erroneous. However, as far as situation before us is concerned, we have noted that the Assessing Officer had detailed explanation of the claim of depreciation on goodwill before him, and that the same claim was allowed in earlier years. There was no change in the facts of the case nor there was slightest change in the legal position in this year vis-à-vis the earlier years in which claim was allowed. As regards Assessing Officer not commenting upon the legality of the claim, we have noted that the Assessing Officer examined the submissions of the same and did comment upon the same when, and to the extent, he did not agree with the submissions i.e. on the question of allowing depreciation on lease hold rights. The fact that there are no elaborate discussions about a claim of deduction cannot, in the light of the decision of a coordinate bench in the case of Khatiza S Omerbhoy Vs. ITO (100 ITD 173), cannot be a good ground for assuming jurisdiction under section 263. In these circumstances, in our considered view, from the fact that the Assessing Officer has not discussed the claim of depreciation on goodwill in the assessment order even though the same claim was allowed in the earlier years and even though the Assessing Officer had before him detailed explanation in support of legal claim, it cannot be inferred that the Assessing Officer did not apply his mind to the matter. His decision to accept the submission of the assessee may have been incorrect, but right now that is not the issue before us. The Assessing Officer decided not to reject the claim, admittedly after having had an opportunity to peruse the detailed submissions, and this stand by itself cannot imply that there was no application of mind. It is well settled in law that when Assessing Officer takes a possible view of the matter on merits, his order cannot be subjected to review merely because other view is possible, as held by the

> Hon'ble Supreme Court in the case of CIT Vs. Malabar Industrial Co. Ltd. (243 ITR 243)."

8. Being of the aforesaid view, the tribunal allowed the appeal and dislodged the order passed by the Commissioner.

9. We have heard Mr.Sanjeev Sabharwal, learned counsel for the revenue, and Mr.Ajay Vohra and Ms.Kavita Jha, learned counsel for the respondents.

10. Before we advert to the justifiability and sustainability of the order passed by the tribunal, it is appropriate to refer to certain citations relating to the scope of interference under Section 263 of the Act by the competent authority.

11. In ***Malabar Industrial Co. Ltd. v. CIT***, [2000] 243 ITR 83 (SC), their Lordships of the Apex Court, after referring to Section 263 of the Act, have opined thus:

> "A bare reading of this provision makes it clear that the prerequisite to the exercise of jurisdiction by the Commissioner suo moto under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent – if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue – recourse cannot be had to section 263(1) of the Act.
>
> There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect

> application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.
>
> The phrase "prejudicial to the interests of the Revenue" is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The High Court of Calcutta in Dawjee Dadabhoy & Co. v. S.P. Jain & Anr. [1957] 31 ITR 872, the High Court of Karnataka in CIT v. T. Narayana Pai [1975] 98 ITR 422, the High Court of Bombay in CIT v. Gabriel India Ltd. [1993] 203 ITR 108 and the High Court of Gujarat in CIT v. Smt. Minalben S. Parikh [1995] 215 ITR 81 treated loss of tax as prejudicial to the interests of the Revenue."

After so stating, their Lordships proceeded to hold as under:

> "The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law. It has been held by this court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the Revenue. Rampyari Devi Saraogi v. CIT [1968] 67 ITR 84 (SC) and in Smt. Tara Devi Aggarwal v. CIT [1973] 88 ITR 323 (SC)."

12. Be it noted, in ***Malabar Industrial Co. Ltd.*** (supra), the Apex Court has also opined that where two views are possible and the assessing officer has taken one view with which the Commissioner does not agree, the said advertence cannot be given the sanction of law as it would not come within

the ambit and sweep of an erroneous order prejudicial to the interests of the revenue. It is obligatory on the part of the revenue to show that the order of the assessing officer was not in accordance with law.

13. In ***Gee Vee Enterprises v. Addl. Commissioner of Income-tax, Delhi and others***, [1975] 99 ITR 375 (Delhi), it has been held that:

> "These two decisions show that it is not necessary for the Commissioner to make further inquiries before cancelling the assessment order of the Income-tax Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquires before accepting the statements made by the assessee in his return.
>
> The reason is obvious. The position and function of the Income-tax Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may be accepted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. <u>It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. The meaning to be given to the word "erroneous" in section 263 emerges out of this context. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in Section 263 includes the failure to make such an inquiry</u>. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct."
>
> [Emphasis added]

14. In ***CIT v. Gabriel IndiaLtd.***, [1993] 203 ITR 108 (Bombay), after referring to Black's Law Dictionary for what an "erroneous judgment"

means, the Division Bench has opined that the Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such an action is against the well-accepted policy of law that there must be a point of finality in all legal proceedings and that stale issues should not be reactivated beyond a particular stage. It has also been held therein that there must be prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed.

15. In ***Hari Iron Trading Co. v. Commissioner of Income-Tax***, [2003] 263 ITR 437 (P&H), the Division Bench, after referring to Section 263 of the Act, has held as follows:

> "A bare perusal of the aforesaid provision shows that the Commissioner can exercise powers under sub-section (1) of section 263 of the Act only after examining "the record of any proceedings under the Act". The expression "record" has also been defined in clause (b) of the Explanation so as to include all records relating to any proceedings available at the time of examination by the Commissioner. Thus, it is not only the assessment order but the entire record which has to be examined before arriving at a conclusion as to whether the Assessing Officer had examined any issue or not. The assessee has no control over the way an assessment order is drafted. The assessee on its part had produced enough material on record to show that the matter had been discussed in detail by the Assessing Officer. The least that the Tribunal could have done was to refer to the assessment record to verify the contentions of the assessee. Instead of doing that, the Tribunal has merely been swayed by the fact that the Assessing Officer has not mentioned anything in the assessment order. During the course of assessment proceedings, the Assessing Officer examines numerous issues. Generally, the issues which are accepted do not find mention in the assessment

order and only such points are taken note of on which the assessee's explanations are rejected and additions/ disallowances are made. As already observed, we have examined the records of the case and find that the Assessing Officer had made full inquiries before accepting the claim of the assessee qua the amount of Rs.10 lakhs on account of discrepancy in stock. Not only this, he has even gone a step further and appended an office note with the assessment order to explain why the addition for alleged discrepancy in stock was not being made. In the absence of any suggestion by the Commissioner as to how the inquiry was not proper, we are unable to uphold the action taken by him under section 263 of the Act."

[Emphasis supplied]

16. In ***Commissioner of Income-Tax v. Max India Ltd.***, [2007] 295 ITR 282 (SC), the Apex Court has ruled thus:

"At this sage we may clarify that under paragraph 10 of the judgment in the case of Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83 this court has taken the view that the phrase "prejudicial to the interests of the Revenue" under section 263 has to be read in conjunction with the expression "erroneous" order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law. According to the learned Additional Solicitor General, on an interpretation of the provision of section 80HHC(3) as it then stood the view taken by the Assessing Officer was unsustainable in law and therefore the Commissioner was right in invoking section 263 of the Income-tax Act. In this connection, he has further submitted that in fact the 2005 amendment which is clarificatory and retrospective in nature itself indicates that the view taken by the Assessing Officer at the relevant time was unsustainable in law. We find no merit in the said contentions. Firstly, it is not in dispute that

> when the order of the Commissioner was passed there were two views on the word "profits" in that section. The problem with section 80HHC is that it has been amended eleven times. Different views existed on the day when the Commissioner passed the above order. Moreover, the mechanics of the section have become so complicated over the years that two views were inherently possible. Therefore, subsequent amendment in 2005 even though retrospective will not attract the provision of section 263 particularly when as stated above we have to take into account the position of law as it stood on the date when the Commissioner passed the order dated March 5, 1997, in purported exercise of his powers under section 263 of the Income-tax Act."
>
> [Underlining is ours]

17. The present factual matrix is to be tested on the anvil of the aforesaid enunciation of law. As is discernible, during the relevant assessment year, the respondent – assessee claimed Rs.70,63,93,292/- as depreciation on goodwill treating the same as an intangible asset and, hence, depreciable under Section 32(1)(ii) of the Act. The assessee had proferred complete justification for the claim of depreciation at the time of filing of return. In the notes to the income-tax return, it has been mentioned as follows:

> "Goodwill of the company comprises of (a) payment made to bottlers at the time of acquisition of their business and (b) the difference between the consideration paid for business and the value of tangible assets determined by a reputed valuer.
>
> The specific payment for goodwill referred to in (a) above represents the consideration for the marketing and trading reputation, trading style and name, marketing and distribution territorial know how and information of the territory. And the amount referred to in (b) above has been paid for certain contracts, rights etc. owned by the seller. In the valuation report these contracts, rights etc. have not been assigned any value. Therefore, the difference between the total consideration and the value of as the tangible assets has been accounted for as goodwill.

> Goodwill in the assessee's case is in substance similar to the tangible assets. It includes industrial information relating to the acquired business like data base of the territory relating to consumer preferences of different flavours, season curves, distribution network, population related statistics etc. These information assist in the manufacture of the product of the assessee in the sense that based on this only the assessee plans its manufacturing schedules. Hence, it is in effect know-how.
>
> Further, the payment on account of goodwill is similar to assets like patents, copyrights, trademarks; licences referred to in the definition of the block of assets in the sense that the function of all these assets is to restrict their misuse and to earn maximum profits in the business. The function of goodwill acquired by the assessee also is same in view of the fact that it maximizes the profits of the company. Since, the function of intangibles defined in the act and the intangible acquired by the assessee is same, the assets are similar.
>
> Therefore, the assessee's goodwill being a valuable commercial asset similar to other intangibles specified in the definition of block assets, is eligible to depreciation."

18. A Schedule annexed to the balance sheet as on 31.3.2002 depicting the breakdown of the claim of depreciation was also filed. Annexure IV to the Tax Audit Report in Form 3CA was filed alongwith the return of income quantifying the amount of depreciation admissible under the provisions of the Act. The assessing officer during the assessment proceedings under Section 143(3) of the Act vide communication dated 15.9.2003 had raised specific queries regarding the admissibility of the claim of depreciation on goodwill. The assessee by letter dated 8.1.2004 had offered justification for depreciation on goodwill which is as follows:

> "Goodwill is the consideration paid to various bottlers for marketing and trading reputation, trading style and name, marketing and distribution territorial know-how and information of territory. It includes know-how related to acquired business, customer data base, distribution net work, contract and other commercial rights. Intangible assets like know-how, patent, copyrights, trademark, licenses, franchisee or any other business or commercial rights of similar nature acquired after 1.4.1998 are eligible for depreciation."

19. The assessing officer, after examination of the annual accounts, audit report in Form 3CA, notes to the return and reply dated 8.1.2004, took the view that the assessee's claim for depreciation on goodwill was allowable more so considering that similar claim of depreciation had been allowed for the assessment years 1999-2000 and 2000-2001. The Commissioner, while exercising the power under Section 263 of the Act, has held that the assessment order framed under Section 143(3) of the Act was erroneous as the assessing officer had allowed depreciation though the same had been wrongly claimed and allowed inasmuch as Explanation 3 to Section 32 of the Act never regards goodwill as an intangible asset. The tribunal in its order referred to the audit report wherein the assessee had made the disclosure about the computation of depreciation on goodwill and addressed itself whether or not a claim of depreciation on goodwill in the books of account is final or it is otherwise admissible. In that backdrop, the tribunal referred to the concept of any other business or commercial rights of similar nature, i.e., know-how, patent, copyrights, trademarks, licences, franchises and referred to its decision rendered in ***Skyline Caterers Pvt. Ltd.*** (supra) wherein it had held that nomenclature given to the entries in the books of

accounts is not relevant for ascertaining the real nature of the transaction. To arrive at the said conclusion in the earlier case, the tribunal had placed reliance on the decision rendered in ***Kedarnath Jute Mfg. Co. Ltd.*** (supra). After so stating, the tribunal opined that it was difficult to accept the view of the Commissioner that once an amount is described as goodwill in the books of accounts, depreciation thereon as an intangible asset cannot be admissible on the same.

20. In this regard, we may refer with profit to the relevant part of Section 32 of the Act which reads as follows:

> **"Section 32 - Depreciation**
>
> (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]
>
> [(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)], 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 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, trade marks, 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 of work is a building owned by the assessee.]

[Explanation 2 .- [For the purposes of this 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 expressions "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;]"

21. It is worth noting, the scope of Section 32 has been widened by the Finance (No.2) Act, 1998 whereby depreciation is now allowed on intangible assets acquired on or after 1st April, 1998. As per Section 32(1)(ii), depreciation is allowable in respect of know-how, patent, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature being intangible assets. Scanning the anatomy of the section, it can safely be stated that the provision allows depreciation on both tangible and intangible assets and clause (ii), as has been indicated hereinbefore, enumerates the intangible assets on which depreciation is allowable. The assets which are included in the definition of 'intangible assets' includes, along with other things, any other business or commercial rights of similar nature. The term 'similar' has been dealt with

by the Apex Court in ***Nat Steel Equipment Pvt. Ltd. v. Collector of Central Excise,*** AIR 1988 SC 631 wherein the Apex Court has opined that the term 'similar' means corresponding to or resembling to in many aspects. In this regard, it would not be out of place to refer to the decision in ***Commissioner of Income Tax v. B.C. Srinivasa Setty,*** [1981] 128 ITR 294 (SC) wherein the concept of goodwill has been understood in the following terms:

> "Goodwill denotes the benefit arising from connection and reputation. The original definition by Lord Eldon in Cruttwell v. Lye 1810 17 Ves 335 that goodwill was nothing more than "the probability that the old customers would resort to the old places" was expanded by Wood V.C. in Churton v. Douglas 1859 John 174 to encompass every positive advantage "that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on or with the name of the old firm, or with any other matter carrying with it the benefit of the business". In Trego v. Hunt 1896 A.C. 7 (HL) Lord Herschell described goodwill as a connection which tended to become permanent because of habit or otherwise. The benefit to the business varies with the nature of the business and also from one business to another. No business commenced for the first time possesses goodwill from the start. It is generated as the business is carried on and may be augmented with the passage of time. Lawson in his *Introduction to the Law of Property* describes it as property of a highly peculiar kind. In CIT v. Chunilal Prabhudas & Co. [1970] 76 ITR 566 the Calcutta High Court reviewed the different approaches to the concept (pp.577, 578):
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> > "It has been horticulturally and botanically viewed as 'a seed sprouting' or an 'acorn growing into the mighty oak of goodwill'. It has been geographically described by locality. It has been historically described by locality. It has been historically explained as growing and crystallizing traditions in the business. It has been described in terms of a magnet as the 'attracting force'. In terms of comparative dynamics, goodwill has been described as the 'differential return of profit'.

> Philosophically it has been held to be intangible. Though immaterial, it is materially valued. Physically and psychologically, it is a 'habit' and sociologically it is a 'custom'. Biologically, it has been described by Lord Macnaghten in Trego v. Hunt [1896] AC 7(HL) as the 'sap and life' of the business. Architecturally, it has been described as the 'cement' binding together the business and its assets as a whole and a going and developing concern."

> A variety of elements goes into its making, and its composition varies in different trades and in different businesses in the same trade, and while one element may preponderate in one business, another may dominate in another business. And yet, because of its intangible nature, it remains insubstantial in form and nebulous in character. Those features prompted Lord Macnaghten to remark in IRC v. Muller & Co.'s Margarine Limited [1901] A.C. 217(HL) that although goodwill was easy to describe, it was nonetheless difficult to define. In a progressing business goodwill tends to show progressive increase. And in a failing business it may begin to wane. Its value may fluctuate from one moment to another depending on changes in the reputation of the business. It is affected by everything relating to the business, the personality and business rectitude of the owners, the nature and character of the business, its name and reputation, its location, its impact on the contemporary market, the prevailing socio-economic ecology, introduction to old customers and agreed absence of competition. There can be no account in value of the factors producing it. It is also impossible to predicate the moment of its birth. It comes silently into the world, unheralded and unproclaimed and its impact may not be visibly felt for an undefined period. Imperceptible at birth it exists enwrapped in a concept, growing or fluctuating with the numerous imponderables pouring into, and affecting, the business."

22. Regard being had to the concept of 'goodwill' and the statutory scheme, the claim of the assessee and the delineation thereon by the tribunal are to be scanned and appreciated. The claim of the assessee-respondent, as

is discernible, is that the assessing officer had treated the transactions keeping in view the concept of business or commercial rights of similar nature and put it in the compartment of intangible assets. To effectively understand what would constitute an intangible asset, certain aspects, like the nature of goodwill involved, how the goodwill has been generated, how it has been valued, agreement under which it has been acquired, what intangible asset it represents, namely, trademark, right, patent, etc. and further whether it would come within the clause, namely, 'any other business or commercial rights which are of similar nature' are to be borne in mind.

23. On a scrutiny of the order passed by the tribunal, it is clear as crystal that the depreciation was claimed on goodwill by the assessee on account of payment made for the marketing and trading reputation, trade style and name, marketing and distribution, territorial know-how, including information or consumption patterns and habits of consumers in the territory and the difference between the consideration paid for business and value of tangible assets. The tribunal has treated the same to be valuable commercial asset similar to other intangibles mentioned in the definition of the block of assets and, hence, eligible to depreciation. It has also been noted by the tribunal that the said facts were stated by the assessee in the audit report and the assessing officer had examined the audit report and also made queries and accepted the explanation proferred by the assessee. The acceptance of the claim of the assessee by the assessing officer would come in the compartment of taking a plausible view inasmuch as basically intangible assets are identifiable non-monetary assets that cannot be seen or touched or

physical measures which are created through time and / or effort and that are identifiable as a separate asset. They can be in the form of copyrights, patents, trademarks, goodwill, trade secrets, customer lists, marketing rights, franchises, etc. which either arise on acquisition or are internally generated.

24. It is worth noting that the meaning of business or commercial rights of similar nature has to be understood in the backdrop of Section 32(1)(ii) of the Act. Commercial rights are such rights which are obtained for effectively carrying on the business and commerce, and commerce, as is understood, is a wider term which encompasses in its fold many a facet. Studied in this background, any right which is obtained for carrying on the business with effectiveness is likely to fall or come within the sweep of meaning of intangible asset. The dictionary clause clearly stipulates that business or commercial rights should be of similar nature as know-how, patents, copyrights, trademarks, licences, franchises, etc. and all these assets which are not manufactured or produced overnight but are brought into existence by experience and reputation. They gain significance in the commercial world as they represent a particular benefit or advantage or reputation built over a certain span of time and the customers associate with such assets. Goodwill, when appositely understood, does convey a positive reputation built by a person / company / business concern over a period of time. Regard being had to the wider expansion of the definition after the amendment of Section 32 by the Finance Act (2) 1998 and the auditor's report and the explanation offered before the assessing officer, we are of the considered opinion that the tribunal is justified in holding that if two views

were possible and when the assessing officer had accepted one view which is a plausible one, it was not appropriate on the part of the Commissioner to exercise his power under Section 263 solely on the ground that in the books of accounts it was mentioned as 'goodwill' and nothing else. As has been held by the Apex Court in ***Malabar Industrial Co. Ltd.*** (supra), ***Max India Ltd.*** (supra) and ***Commissioner of Income-Tax v. Vimgi Investment P. Ltd.*** [2007] 290 ITR 505 (Delhi) once a plausible view is taken, it is not open to the Commissioner to exercise the power under Section 263 of the Act.

25. In view of the aforesaid analysis, we are of the considered opinion that the order passed by the tribunal is justified in the facts and circumstances of the case and the questions which have been raised by the revenue as substantial questions of law really do not arise. Resultantly, the appeals have to pave the path of dismissal which we direct. There shall be no order as to costs.

CHIEF JUSTICE

MANMOHAN, J.

JANUARY 14, 2011
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