INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
BEFORE SHRI BEENA A PILLAI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No.	Assessment Year
3235/Del/2005	2001-02
2896/Del/2007	2002-03
938/Del/2007	2003-04
4078/Del/2015	2006-07
5894/Del/2015	2008-09
5895/Del/2015	2009-10
4079/Del/2015	2010-11
2561/Del/2018	2013-14

Yum! Restaurants Marketing Pvt. Ltd, 2nd Floor, Tower D, Global Business Park, MG Road, Gurgaon PAN: AABCT2884P	Vs.	ITO, Ward-18(4), New Delhi
(Appellant)		(Respondent)

ITA No. 5735/Del/2015
Assessment Year 2008-09

ITO, Ward-18(4), New Delhi	Vs.	Yum! Restaurants Marketing Pvt. Ltd, 2nd Floor, Tower D, Global Business Park, MG Road, Gurgaon PAN: AABCT2884P
(Appellant)		(Respondent)

Assessee by :	Shri Salil Kapoor, Adv Ms. Soumya Singh, Adv
Revenue by:	Shri J. K. Mishra, CIT DR Smt Naina Soin Kapil, SR. DR
Date of Hearing	11/6/2019
Date of pronouncement	09/09/2019

O R D E R

PER BENCH

1. These nine appeals are pertaining to one assessee for different assessment years involving similar grounds and issues in appeal. Therefore, both the parties argued the matter together and hence, same are disposed of by this common order.

AY 2001-02

3235/Del/2005

2. First, we come to appeal of the assessee for AY 2001-02. Brief facts of the case shows that originally the appeal of the assessee was decided by the coordinate bench in ITA number 3235/Del/2005 for assessment year 2001 – 02 vide order dated 31/01/2008. While deciding the issue the coordinate bench, vide para number 11 has held that in absence of the applicability of the principle of mutuality the surplus cannot be held to be exempt on the principles of mutuality. It was further stated in the same paragraph that no other arguments were advanced to justify the applicability of the principle of mutuality. Consequently, the appeal of the assessee was dismissed. Against the order of the coordinate bench, Assessee preferred appeal before the honourable Delhi High Court. Hon. High Court was pleased to notice the issue in the appeal as per paragraph number 2 holding that the only issue, which arose in this case, is with respect to the taxability Vis a Vis Mutuality of Rs. 4444002/- *being* excess amount of income or expenditure. The honourable High Court dismissed the appeal of the assessee holding that the principle of mutuality would not be applicable to the instant case. Accordingly the order was passed by the honourable High Court on 1/4/2009 holding as under :-

> **"2. The only issue which arose in this case is with respect to the taxability of Rs 44,44,002/- being excess amount of income over expenditure. The said surplus had arisen on account of advertisement contributions received from**

the holding company of the assessee- company which remained unexpended.

2.1 The broad facts with respect to the above case have been delineated in the connected appeal entitled Yum! Restaurant (India) Pvt Ltd vs CIT; being ITA No. 192/2009, which was heard along with the present appeal. Judgment was reserved in both the appeals.

3. Briefly, the parent company, that is, Yum! Restaurant (India) Pvt Ltd (in short "YRIPL") formerly known as Tricon Restaurants India Pvt Ltd was incorporated on 17.03.1994. The YRIPL had a license arrangement with Kentucky Fried Chicken International Holdings, Inc. (in short „KFC") and Pizza Hut International LLC (in short "PHILLC"). The YRIPL sought permission from the Government of India, Ministry of Industry, Department of Industrial Policy and Promotion, Secretariat for Industrial Assistance (SIA), Foreign Collaboration, for setting up a wholly owned step-down subsidiary to manage retail restaurant business, for advertising and promotion at local store level, regional level and national level. By a letter dated 05.10.1998, SIA granted approval to YRIPL to set up a step-down wholly owned subsidiary on the basis of a broad framework indicated by YRIPL. The broad framework being that the proposed new subsidiary company would be a non-profit enterprise, which would be governed by the principles of mutuality. The wholly owned subsidiary, as indicated by YRIPL, was being set up to carry out and economies the cost of advertising and promotion by catering to the specific needs of its franchisees in order to enable them to concentrate on restaurant operations and management. The approval was granted on the condition that the subsidiary would be a non-profit

enterprise and that it would not repatriate its dividends out of the country.

3.1 Upon receiving the requisite permission the assessee-company was incorporated on 08.06.1999.

3.2 In September 2000 the YRIPL, the assessee-company, as well as, the franchisees entered into tripartite agreements. Under the agreement, the assessee-company received contributions from the franchisees as well as the franchisees of the YRIPL to the extent of 5% of the gross sales in order to carry on co-operative advertising. The agreement also envisaged that the purpose of incorporating the assessee-company was really to carry the marketing activities of each of the brands of which YRIPL was a licensee for the mutual benefit of the franchisees. The entire activity of the assessee-company was to be carried out on no-profit basis and that the assessee-company was obliged not to repatriate any dividends. The broad purpose of the agreement is best encapsulated in the following clauses:-

> "2.2 TRIM will establish and operate Brand Funds in respect of each brand for the purpose of allocating and using the advertising contribution received from franchisee and other franchisee of Tricon operating Restaurants under the Brands. TRIM will allocate the advertising contribution received from the franchisees including franchisee for each restaurant to the respective Brand Funds established for that brand. It is agreed between the parties that the advertising contribution paid into a brand fund will be used for the AMP activities relating to that brand.

3.1 As and from the Effective Date, franchisee will pay the advertising contribution of 5% of Revenue for a particular month into the bank account of the brand fund established by TRIM by the 10th day of the following month. Details of the bank account of each brand fund set up by TRIM will be notified to franchisee by TRIM from time to time. Notwithstanding the aforesaid the executive committee of any Brand (constituted under Article 7 of this Agreement) may, by a three fourth majority, which shall be binding on all franchisees of Tricon including the franchisee, require the franchisee to pay the advertising contribution in advance. For the avoidance of doubt it is clarified and agreed that while recommending advance payment of advertising contribution the chairman will not have a casting vote.

Franchise will spend an additional 1% of Revenues, in the manner directed by Tricon and/or TRIM in writing from time to time, on such local store marketing, advertising, promotional and research expenditure proposed by franchisee and approved in advance by Tricon and/or TRIM during the relevant accounting period, in accordance with the requirements and guidelines set out in the manuals, provided that if franchisee fails to spend the full amount as directed by Tricon and/or TRIM franchisee will pay the unspent amount to TRIM within the period specified in a written demand from TRIM. Upon receipt of the unspent amount TRIM will spend the amount on regional and/or national

advertising, promotions or research expenditure conducted by TRIM in its discretion....."

4.1 Tricon may at the request of TRIM, but subject to Tricon's sole and absolute discretion pay to TRIM any such amount(s) as it may deem appropriate to support the AMP activities during any accounting period. For the avoidance of doubt, it is clarified and agreed between the parties that Tricon shall have no obligation to pay any such amounts if it chooses not to do so. xxxx xxxx

8.4 In the event there is any surplus left over in any of the Brand Funds at the end of an accounting period, TRIM shall be entitled to retain the surplus to be spent on AMP activities during the following accounting period. Alternatively, TRIM may, subject to the approval of its Board of Directors refund the surplus amounts to the franchisees including Franchisee in the same proportion as the actual advertising contribution made by each franchisee including franchisee in that accounting period.

On the other hand, if there is a deficit in any of the brand funds at the end of an accounting period, the deficit will be carried forward to the next accounting period and be met out of the advertising contribution paid by the franchisees including franchisee for that accounting period. For the avoidance of doubt, it is agreed between the parties that Tricon and/or TRIM shall not be obliged to fund the deficit.

> 8.5 It is clearly understood and agreed between the parties that the only objective of TRIM is to coordinate the marketing activities of the brands including the mutual benefit of the franchisees including the franchisee. It is envisaged that no profits will be earned and no dividends will be declared by TRIM."

3.3 It is in this background that on 31.10.2001 the assessee-company filed its return for assessment year 2001-02. On 27.08.2002, the assessee‟s return was processed under Section 143(1) of the Act. On 24.10.2002, the assessee's case was picked up for scrutiny and a notice under Section 143(2) of the Act was issued to the assessee-company. During the course of scrutiny, queries were raised with the representatives of the assessee-company; whereupon it was revealed that the assessee-company had an excess income over expenditure amounting to Rs 44,44,002/-. However, the gross total income had been declared as „nil‟. The income and expenditure account as recorded in the order of the Assessing Officer read as follows:-

> "INCOME Advertising contribution from franchises, Holding company and key associates 26469546 EXPENDITURE Advertising, Marketing and Promotional 21256032 Expenditure Preliminary expenses 454992 Administrative and other expenses 190272 21901296 Excess of expenditure carried forward from the (124248) Previous year Excess of income/ (Expenditure) over 4444002 (expenditure)/income carried forwarded to the Balance sheet (included under current Liabilities)"

3.4 With the return the assessee-company had appended the notes broadly indicating that it was operating on principles of mutuality and on „no-profit" basis. The note further read that there was a complete identity between the contributors and the receipts of the fund, that is, the assessee-company. The assessee-company rendered services exclusively to the franchisees and that the franchisees had exclusive right over the surplus. The outlet of the franchisee did not derive any profit from the funds. The funds of the assessee-company could only be used for meeting expenses on their behalf or be returned to them.

4. The Assessing Officer examined the case laws and the details submitted by the assessee-company. The Assessing Officer after examining the contents of the SIA approval granted vide letter dated 05.10.1998 and the contents of the tripartite agreement returned the following finding of facts:

"It was seen from the details filed by the assessee company that in terms with the approval SIA as per clause 3 as reproduced above in para VI.1, YRIPL and the franchisees will contribute fixed percentage of their revenues to the proposed new company i.e. assessee. Whereas clause 4.1 of the Tripartite operating agreement as reproduced above in para VI.2, provides that YRIPL has no obligation to contribute any amount which is contradictory to the terms of approval of SIA.

Separate funds were to be maintained for KFC and Pizza Hut brands. Further as per clause 5.1 as reproduced above in para VI.2 of the operating agreement provides that bank account of each brand fund established by assessee-company will be notifying to the franchisee and the franchisee will paying the advertising contribution of 5% of revenues for a

particular month into such bank account. However, it was seen brand funds was established by assessee-company. In fact, YRIPL continued to receive the advertising contribution from the franchisee as was being done by it prior to setting up of assessee-company. This findings shows that assessee-company has been used as a tool to evade tax on excess of income over expenditure incurred in during the previous year. A chart giving complete details of contributions receivable by assessee-company and amounts actually received by assessee-company and YRIPL is being enclosed as Annexure 'A'. This annexure shows that most of the contribution has been received by YRIPL that is against terms of SIA approval and even the clauses of Tripartite operating agreement.

VI.5 Single Ledger Account- assessee-company and YRIPL - considered as one entity-

Information under Section 133(6) was called from all the franchisees. The information received from such franchisees is analyzed in the ensuing paras below. In their books of account, the franchisees have one ledger account for royalties marketing advertising payable to YRIPL/assessee-company. For them it is single entity. They have not maintained any separate account of assessee-company. A few instances are discussed below.....

....The assessee-company was also informed about non-submission of details by Pepsi Foods Ltd. vide order sheet entry 05.03.2004. It is pertinent to mention here that as per details of contributions filed by the assessee company M/s Pepsi Food Ltd's Marketing Contributions of Rs 32.70 lacs was received by YRIPL. All the above findings make it clear

that the assessee company was not operating in terms with the SIA approval."

"It was seen from the details of accrued marketing filed by the assessee company during the course of assessment proceedings u/s 143(2) of the Income Tax Act, 1961 in the case of M/s Yum! Restaurants India Pvt Ltd pending before this office that not all the franchises are paying 5% of their revenues: e.g. M/s Devyani International Private Limited and Specialty Restaurants were paying contribution @ 4% instead of 5% as prescribed in the tripartite agreement. All the participants to the so-called brand fund or so-called 'mutual concern' should have been contributing equally or an equal proportion.

It is further seen that as for clause 3 of SIA letter as reproduced in para VI.1 of this order the franchisees and YRIPL were required to make contribution of affix (a fixed percentage) of their respective revenue. However, as per clause 4.1 of Tripartite operating agreement as reproduced in para VI.2 of this order YRIPL is under no obligations to payable any contribution if it chooses not to do so which is totally in contradiction to SIA letter."

4.1 From the aforesaid the Assessing Officer came to the conclusion that the assessee-company was not operating in terms of the SIA approval.

5. Based on these findings the Assessing Officer brought to tax a sum of Rs 44,44,002/- which was an excess of income over expenditure by rejecting the claim that it was a mutual concern.

6. Aggrieved by the same the assessee-company filed an appeal before the Commissioner of Income Tax (Appeals)

[hereinafter referred to as the "CIT(A)]. The CIT(A), after analyzing all the facts and the case laws in issue, was of the view that all the participants in the module set up by the assessee-company were business concerns and the purpose of setting up of fund was a commercial purpose. The CIT(A) observed that the advertising, marketing and promotional activities (hereinafter referred to as the "APM activities") being a critical component of running a successful business venture, it is intrinsically linked to profit on sales of franchisees, that is, the contributors. It could not be said that the contributors activity was immune from the taint of „commerciality" and that unlike a club the assessee-company was not set up for social intercourse nor was a set up for cultural activity where the idea of profit or trade does not exist. What was essential was that there should not be any dealing with the outside body, which results in benefit, which promotes some commercial/business venture. He further held that though the form taken up to conduct its activity resembles a mutual concern, it could not however be denied that the contributions were made undoubtedly for business considerations. The CIT(A) being of the view that the underlying purpose was solely for commercial consideration and excess of income over expenditure should be brought to tax.

7. Being aggrieved, the assessee-company preferred an appeal to the Tribunal. The Tribunal by the impugned judgment dismissed the appeal of the assessee-company after noting the facts of the case as well as the principle of mutuality invoked by the assessee-company to sustain its stand that the said excess of income over expenditure was not taxable. The Tribunal noted that in the present case the principle of mutuality was not applicable on account of the fact that

apart from contributions received from various franchisees contributions to the extent of 32.70 lacs had also been received from Pepsi Foods Ltd as also from YRIPL, who were neither franchisees nor beneficiaries. As per the tripartite agreement, it noted that contributions were received from YRIPL, that is, the parent company that was not under any obligation to pay. Therefore, the essential requirements of a mutual concern were missing. This was especially so that since Pepsi Food Ltd and YRIPL who was a contributor to the fund did not benefit from the APM activities. Thus, the Tribunal held that the principles of mutuality being not applicable to the excess of income over expenditure were required to be taxed.

8. Having heard the learned counsel Mr C.S. Aggarwal, Sr. Advocate for the assessee-company and Ms Prem Lata Bansal for the Revenue we are of the view that the judgment deserves to be sustained. The principle of mutuality as enunciated by the Courts in various cases is applicable to a situation where the income of the mutual concern is the contributions received from its contributors. The expenses incurred by the mutual concerns are incurred from such contributions and hence on the principle that no man can do business with himself, the excess of income over expenditure is not amenable to tax. However, in the present case the authorities below have returned a finding of fact that the fund as contributors such as Pepsi Food Ltd which do not benefit from the APM Activities. Moreover, the principle of mutuality is applicable to those entities whose activities are not tinged with commercial purpose. As a matter of fact in the instant case the parent company i.e., YRIPL, which has also contributed to the brand fund, is under the agreement under no obligation to do so. The contributions of YRIPL are at its

> own discretion. Thus, looking at the facts obtaining in the present case, it is quite clear that the principle of mutuality would not be applicable to the instant case. This was the only stand taken by the appellant before the authorities below. In these circumstances, we are of the opinion that the impugned judgment of the Tribunal does not call for interference. The authorities below have returned pure findings of fact, which are not perverse to our minds. No substantial question of law arises for our consideration. Resultantly, the appeal is dismissed."

[Underline supplied by us]

3. Subsequently before Honourable Supreme Court assessee preferred petitions for special leave to appeal in (civil) numbers 20571/2009 arising out of the judgment dated 1/4/2009 in ITA number 1433/2008 of the honourable Delhi High Court. As per order dated 26/3/2010, the honourable Supreme Court granted the leave to the assessee.

4. Meanwhile, assessee preferred a Miscellaneous Application vide M A No. 295/Del/2008 before the coordinate bench stating that ground number 1 (b) raised in the appeal memo, though noted by the tribunal in its order in para number 3, has remained to be disposed of. The coordinate bench vide order dated 31/03/2010 vide para number 8 , has not been decided, therefore there is a 'mistake apparent from record'. The said ground was as under:-

> *(b) in failing to consider and appreciate that the amount received by the Appellant from the franchisees towards advertising contributions are diverted at source by overriding title for being spent on advertisement, and*

5. Relying upon the decision of the honourable Gujarat High Court in case of Nirma Industries Ltd Vs DCIT 283 ITR 402 and the decision of special bench of the tribunal in Medicare investment Ltd vs JCIT 304 ITR (AT) 44, coordinate bench noted that the above ground was not found to have been "not pressed", non-disposal of the said ground amounts to a mistake

apparent on record. Therefore, even subsequent to the decision of Honourable High court , coordinate bench recalled the order partially to the extent that the said ground would be decided on merit and for this purpose, the registry was directed to post the case for the hearing. Thus, now therefore the ITA number 32345/Del/2005 for assessment year 2001 – 02 is listed for hearing before us.

6. The only ground to be adjudicated is :-

"1. the learned Commissioner of Income-tax (Appeals) has erred both on facts and in law:

(b) in failing to consider and appreciate that the amount received by the Appellant from the franchisees towards advertising contributions are diverted at source by overriding title for being spent on advertisement, and

7. Adverting to the above ground, the learned authorised representative submitted a detailed note contending that the amount received by the appellant from franchisees towards advertisement contribution are diverted at source by overriding title for being spent on advertisement expenditure and therefore it is not an income chargeable to tax under the income tax act. He submitted that ITAT has inadvertently omitted to decide one of the core issues, which goes to the root of the matter, namely Ground No i(b) raised by the appellant in its appeal for AY 2001-02; which is also a subject matter of the current appeals. It may be pertinent to state here that, since there is an overriding obligation on the appellant to spend the contributions for AMP activities, the contributions are 'diverted at source by overriding title' and therefore there is no question of application or non-application of an amount, which is not in the nature of income in the hands of the appellant. In this regard, the appellant wishes to submit as under:

a. Section 4 of the Act creates a charge on 'income' of an assessee to be liable to tax. Thus, what is essential is that an assessee should be in receipt of an 'income'. It is a well-settled principle of law that not every 'receipt' is income. In this regard reliance is interalia placed on the principles emerging out of the following judgments by the appellant:

- Siddheshwar Sahakari Sakhar Karkhana Ltd vs. CIT (SC) (270 ITR 1)
- CIT vs. Netar Krishna Sahgals Pr. Ltd (Delhi) (141 ITR 681)
- Mehboob Productions Pvt. Ltd vs. CIT (Bombay) (106 ITR 758)
- CIT vs Late Rajesh Pilot (Delhi) (219 CTR 403)

b. The amounts received by the appellant from YRIPL, its franchisee's and other concerns, is for the predefined purpose of incurring them on AMP activities. In view of the obligation that has been imposed under the facts and circumstances of the present case, the appellant is never in receipt of any 'income' since the amounts that are received as AMP contributions are diverted at source by an overriding title in view of this enforced obligation.

c. Thus the surplus that remains, if any, at the end of the accounting period is not exigible to tax. This is even more so in view of the fact that the surplus that remains, is either to be expended in the subsequent period or to be refunded to the contributories in the same proportion as it is received. The AMP contributions never vests in the hands of the appellant as its income as it does not have any 'right' or 'discretion' or 'dominion' over them. Therefore, there arises no question of any 'income' accruing in the hands of the appellant. In this regard, the relevant extract from the tripartite operating agreement (Clause 8.4 and Clause 8.5) have also been reproduced above.

d. In this regard, reliance is placed on the landmark judgment of the Hon'ble Supreme Court in the case of CIT vs. Bijlii Cotton Mills (116 ITR 60). In this case, the assessee company used to collect certain 'dharmada' charges compulsorily at the time of every sale made to its customers, which were credited to a separate account to be subsequently incurred by it on

charitable activities. The issue that arose for consideration was whether the amounts received by the assessee on account of 'dharmada' charges were taxable in its hand. The Hon'ble Apex Court, while analyzing the various aspects emerging out of the issue. interalia held that as the assessee was under a compulsory obligation to spend the amount received on charitable activities, the same cannot be regarded as income in its hand. The relevant extract of the judgment is reproduced hereunder for your honour's ready reference:

> " In other words, right from inception these amounts were received and held by the assessee under an obligation to spend the same for charitable purposes only, with the result that these receipts cannot be regarded as forming any income of the assessee. "

The Hon'ble Apex Court has also gone on to hold that even if the assessee has some discretion over the manner of utilization or the time of utilization of the funds, this would not be a relevant factor to dilute the obligation or purpose with which the amount is received.

e. The appellant also wishes to place reliance on the decision of the Hon'ble Mumbai Tribunal in the case of Bass International Holdings NV vs. Joint Commissioner of Income Tax (ITA No. 4341/ Mum/ 02), where the assessee company received marketing and reservation contributions from its franchisee hotels with an obligation to use them exclusively for costs associated with advertising, promotion, publicity etc. Such receipts were sought to be taxed as royalty income of the assessee by the assessing officer. The Hon'ble Tribunal while rejecting the contention of the tax department held that, such contributions were received by the assessee with a corresponding obligation to use it for the agreed purposes (i.e.

for marketing activities) and it was not an unfettered receipt in the hands of the assessee. The Hon'ble Tribunal further held that it was a kind of trust money, received in fiduciary capacity by the assessee and hence it cannot be viewed as "income" of the assessee. Also, it was held that the contribution having been made by the participating hotels/ franchisee's mandatorily does not affect the determination of the character of receipts.

f. Your honors would appreciate that the facts and circumstances of the appellant's case are identical to that of the issue involved in the case of Bass International Holdings N.V. (supra). Therefore, keeping in mind the principles emerging out of the above mentioned judgments of the Hon'ble Apex Court and Mumbai Tribunal, as the amounts received by the appellant are within an overriding obligation of incurring the same for AMP activities, the amounts received cannot be categorized as income, much less the same being chargeable to tax.

g. The appellant further places reliance on the principles emerging out of the following landmark judgments in support of its contention that the AMP contributions are diverted at source by way of an overriding title:

i. CIT vs. Sitaldas Tirathdas (Supreme Court) (41 ITR 367)

> "In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation, which is the decisive fact. There is a difference between an amount, which a person is obliged to apply out of his income, and an amount, which but the nature of the obligation cannot be said to be a part o f the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible ; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first

kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable."

ii. Loknete Balasaheb Desai Sahakari Sakhar Karkhana Ltd vs. DCIT (Pune Tribunal) 148 ITD 372

"Now the question before us is whether this collection made towards "ADF" by the assessee sugar factory is impressed with the specific obligation or assessee hold this money as a trustee as held in the case of Bijli Cotton Mills (P.) Ltd. (supra)? Our answer is yes. In this case, even if initially it was by way of discretion the Sugar Co-operative factories were collecting the fund and spending the same on the different projects undertaken in the area of operation but subsequently the collection and use of fund was regulated by the intervention of the Govt, by issuing the order u/s. 79 A of the Maharashtra Co-operative Society Act. The assessee has maintained the separate account in respect of this fund and as per the statement filed before us it is seen that the assessee sugar factory is utilizing the ADF on different projects as per the approval given in the annual general meeting (AGM). The assessee has to submit the report every year in respect of the collection and utilization of the amount under the ADF to the Government. Nowhere, it is the case of the Revenue that any money is diverted by the assessee sugar factory for any other purpose other than approved in the AGM of the members. Merely because the amount collected is not kept separately in the bank account, the character of the amount will not change as held in the case of Bijli Cotton

> Mills (P.) Ltd. (supra). As submitted before us the assessee is required to submit the Auditor's Report to the Director of Sugar, Govt, of Maharashtra each year showing the opening balance of the ADF, amount collected during the year and utilized during the year (Page No. 29 of the Compilation). We, therefore, hold that the collection made by the assessee towards the ADF by way of deduction made from the sugarcane bills payable to the members and non-members is impressed with an obligation to spend the same for the specified purposes and the persons/Members paying contribution to ADF are aware before the deduction is made that for what purpose the assessee Co-operative Factory is collecting the said fund and where the fund will be utilized. In our humble opinion, the assessee's role is like a trustee of the "Area Development Fund". We, accordingly, decide this issue in favour of the assessee. It was submitted before us that the Department has allowed the expenditure incurred by the assessee out of the ADF on the actual basis treating the same as a business expenses. As we have held that, the amount collected under the ADF is not a trading receipt in the hands of the assessee hence, the deduction given by the Assessing Officer in the respective assessment years towards ADF is to be withdrawn. The Assessing Officer is accordingly direct to exclude fully the amount included towards "Area Development Fund" in the income of the assessee and also to withdraw the amount allowed as business expenditure towards ADF. Accordingly the assessee succeeds on this issue."

h. Further, reference may also be drawn to the recent judgment of the Apex case in the case of DCIT vs T Jayachandaran (Supreme Court) (Civil Appeal no. 4341-4344, 4346- 4357 of 2018), held that only income that has actually accrued to the

assessee is taxable. What income has really occurred to be decided, not by reference to physical receipt of income, but by the receipt of income in reality. The fact that there is no written agreement to show that the assessee was acting as a broker is not relevant. The relationship of the assessee vis-a-vis others can be inferred from the conduct of the parties.

In addition, reference may also be drawn to the following judgments:

- Official Trustee of West Bengal vs. CIT (Calcutta) (116 ITR 2x9)
- DCM Limited vs. CIT (Delhi) (158 ITR 64)

i. Here it would also be pertinent to observe that the appellant is under an obligation to utilize the entire amounts received on AMP activities, i.e. the entire amount is to be incurred, and no part out of the total contributions carries an income element. The amounts received by the appellant are not a consideration for the provision of services: therefore, there can be no question of any income element in the AMP contributions.

j. The above view of the appellant is also fortified from the following –

[A] The appellant had no intention to earn any profit (refer to the proposal submitted to SIA by YRIPL, and the appellants amended main objects clause)

[b] The appellant can make no profits (refer the restrictions placed by the SIA in its approval and the tripartite operating agreement)

[c] The appellant has made no profits (refer its financial statements collectively for all years including the years in which excess expenditure is there). Thus, there is no intent to earn any profit nor has any profit been earned in view of the

actual functioning of the appellant and the activities carried out by it.

In v Yum! Restaurants Marketing Pvt. Ltd,

k. iew of the foregoing discussions and judicial precedents being relied upon by the appellant it is amply clear that the amounts received by the appellant are not in the nature of income as it is under an overriding obligation to expend the same on AMP activities. The appellant has no vested right in the amounts that it receives and is under a strict mandate either to expend the same or return the surplus if any. Therefore it has no rights over the funds and is a mere conduit to expend the amounts received in a collective manner for and on behalf of all the contributories."

8. The learned authorised representative has further referred to the additional evidences filed for assessment year 2002 – 03 and 2003 – 04 as per application dated 7/4/2010 being the advertisement material of the Pepsi. He further referred to the letter dated 12/file/2015 and submitted that it is common for the both the years to show that the assessee was buying huge benefit to Pepsi. He extensively referred to the decision of the coordinate bench and submitted that in absence of these evidences only the coordinate bench has upheld that there is no such mutuality concept applicable to the income received by the assessee. He therefore submitted that the additional evidences may be admitted and adjudicated.

9. The learned departmental representative vehemently opposed the ground of the appeal on several counts. He stated that when the honourable High Court has already decided the issue, the principles of finality say that now this issue cannot be decided. For this proposition, he relied upon the principles of 'constructive res judicata.' He submitted a written note as under:-

"A.Y. 2001-02

3. In A.Y. 2001-02, the assessment order was passed u/s 143(3) on 29.03.2004 at total income of Rs. 48,98,484/- as against nil income declared by the assesse in the return of income. In its

Income & Expenditure account, income of Rs. 2,64,69,546/- has been shown from 'advertising contribution from franchisees, holding company and key associates' as against which advertising. Marketing and promotional expenses of Rs. 2,12,56,032/- has been shown. Excess of income over expenditure has been shown as Rs. 44,44,002/-. The assesse claimed that it operates as a mutual concern on a no profit basis. It was also claimed that the assesse company does not fall within the ambit of taxable income u/s 4 of the Act. The A.O. held that the principle of mutuality does not apply in the case of the assesse and the assesse applies its income after it reaches its hands and it is its application of income. It was held by the A.O that the excess of income over expenditure amounting to Rs. 44,44,002/- is taxable income of the assesse and after disallowing expenditure of Rs. 4,54,484/- claimed u/s 35D, total income was determined at Rs. 48,98,484/-.

4. The order of the A.O. was confirmed by the Ld CIT(A) vide order dated 31.03.2005 holding that the surplus of income over expenditure was taxable as business income of the assesse. It was held that the assesse is not a mutual concern. As regards claim that the advertising contributions were diverted at source by overriding title, it was held by the Ld. CIT(A) that the said ground was related to claim of mutuality and no separate adjudication was required.

5. The Hon'ble ITAT dismissed the appeal of the assessee vide order dated 31.03.2008. It was held that principle of mutuality is not applicable in the case of the assesse and the surplus of income over expenditure cannot be held to be exempt income.

6. Against the order of the Hon'ble ITAT, the assesse preferred an appeal before the Hon'ble Delhi High Court. The Hon'ble Delhi High Court considered the facts of the case in detail and upheld the decision of Hon'ble ITAT vide its order dated 1.04.2009 holding that the assesse doesn't fulfill the conditions and requirements of a mutual concern. It was held that the assessee company had not only received the contributions from various franchises but also from "P" Ltd and YRIPL who were neither franchisees nor beneficiaries and therefore essential requirements of a mutual concern were missing and that Tribunal had taken a correct view. Subsequently the SLP filed in Hon'ble Supreme court was filed and admitted on 26.04.2011 but no order has been apparently passed on that.

7. The assesse filed M.A. on 25.06.2008 which was revised and filed on 10.07.2009 , which was after 4 months of the order passed by Hon'ble High Court for rectification of the order dated 31.01.2008 passed by the. The said MA was filed on the ground that ground of appeal no. 1(b) of the assesse regarding diversion of income by overriding title was not adjudicated by the ITAT and therefore, the ITAT should rectify its earlier order under of the Act. In its order dated 31.03.2010 under section 254(2), the ITAT partially recalled its order to decide the aforesaid ground of appeal no 1(b) on merit. This appeal is being heard now after 21 adjournments taken over a period of 9 years from the date of the order u/s 254(2).

Constructive Res Judicata

8. In this connection, it is to submit that the matter in issue in this case is squarely covered by the principle of constructive res judicata. In this context, kind attention is drawn to Explanation IV to Section 11 of The Code of Civil Procedure, 1908 which reads as under

> "Explanation IV.- Any matter which might and ought to have been made ground of defense or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. "

9. Essentially, matter in issue in this case is taxability of surplus of income over expenditure in respect of advertising contributions / receipts. As per the provisions of CPC, Matter in issue is the rights litigated between the parties, that is the facts on which the right is claimed and the law applicable to the determination of the issues. In every suit, the said cause of action has to be either proved or disproved by the adverse parties. The process of proving and disproving can be done on the basis of certain facts. These facts, which essentially go on to prove or disprove the cause of action, will be called the matter in issue. Matters which are directly and substantially in issue are the ones from which we seek a relief. It is constructively an issue when the matter 'might' or 'ought' to have been made a ground of attack or defense in the former suit. In a suit, the parties must include all facts pertaining to the suit and must claim all the reliefs that he is entitled to. Failure to do so would bar such a party from raising those pleas again. In this context, it may please be noted that matter in issue in this case is

whether surplus of income over expenditure in respect of advertising contributions receipt is taxable or not. The said matter in issue has already been decided by the Hon'ble Delhi High Court in this case.

10. It may be appreciated that matter in issue in this case is whether surplus of income over expenditure in respect of advertising contributions / receipt is taxable or not.

The assessee raised the following ground of appeal before the ITAT

1. The Learned CIT(A) has erred both on facts and in law

a. in not accepting that the appellant Is a "mutual concern" and is solely operating for the benefit of a group of persons who contribute funds which are to be spent on advertisement and publicity for their benefit,

b. in failing to consider and appreciate that the amount received by the appellant from the franchisees towards advertising contributions are diverted at source by overriding title for being spent for advertisement.

c. in consequently upholding that Rs. 44,44,002/- being the unspent amount is taxable income in the hand of the appellant for the A. Y. 2001-2. (emphasis added)

From the above, it can be noted that the assessee has taken the ground that the CIT(A) has wrongly upheld the income of Rs. 44,44,002/- by -

1, not accepting that assessee is a mutual concern and

2. not considering advertising contributions are diverted at source by overriding title

Therefore, admittedly matter in issue is whether surplus of income over expenditure in respect of advertising contributions receipt is taxable or not and to prove that the assessee has taken two grounds of defense.

11. The ITAT considered the arguments of the assessee and held that assessee is not a mutual concern and therefore, its income was taxable. Though both the arguments/grounds taken by the assessee are related, the ITAT did not give its specific findings in respect of diversion of income by overriding title. The assessee took up the matter before the High Court, The Hon'ble Delhi High Court considered the facts of the case in detail and passed

the order holding that the judgment of the ITAT deserves to be sustained.

12. Since the matter in issue in this case is whether surplus of income over expenditure in respect of advertising contributions / receipt is taxable or not, it will be assumed that any matter which might and ought to have been made ground of defense in this suit before the Hon'ble Delhi High Court shall be deemed to have been a matter directly and substantially in issue in such suit Therefore, in respect of taxability of surplus income it shall be assumed that not only to points upon which the Hon'ble Delhi High Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. Since The Hon'ble High Court examined the facts of the case and held that the said surplus income of the assessee is taxable, it shall be assumed that all the grounds of defense or attack ought to have been taken by the assessee and the Revenue in ITA No. 1433/2008. The rule of constructive res judicata provides that if a plea could have been taken by a party in a proceeding between him and his opponent, he should not be permitted to take that plea against the same party in a subsequent proceeding with reference of the same subject matter.

13. The concept of res judicata has been succinctly explained by the Hon'ble Supreme Court in the case of State Of Karnataka & Anr vs All India Manufacturers Organization & Ors. in Appeal (civil) 3492-3494 of 2005 as under

> "The spirit behind Explanation IV is brought out in the pithy words of Wigram, V.C. in Henderson v. Henderson as follows:
>
> > "The plea of res judicata applies, except in special case (sic), not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."
>
> In Greenhalgh v. Mallard (hereinafter "Greenhalgh"), Somervell L.J. observed thus:

> "I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the Court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them."

The judgment in Greenhalgh (supra) was approvingly referred to by this Court in State of U. P. v. Nawab Hussain. Combining all these principles, a Constitution Bench of this Court in Direct Recruit, Class II Engineering Officers' Association v. State of Maharashtra expounded on the principle laid down in Forward Construction Co. (supra) by holding that:

> "an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had (sic) decided as incidental to or essentially connected with (sic) subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence.. ”

14. Further, in the case of Forward Construction Co. & Ors vs Prabhat Mandal (Regd.) Andheri & .Ors 1986 AIR 391, 1985 SCR Supl. (3) 766, the Hon’ble Supreme Court of India held as under

> "So far as the first reason is concerned, the High Court in our opinion was not right in holding that the earlier judgment would not operate as res judicata as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. Explanation IV to s. 11 C.P.C. provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter

> determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming with the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. ”

15. Further, Constitution Bench of Hon'ble Supreme Court in Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra [1990] 2 SCC 715 laid down the following principle: —

> " an adjudication is conclusive and final not only as to the actual matter determined but as to M.Nagabhushana v. State Of Karnataka & Orson 2 February, 2011 Indian Kanoon - http://indiankanoon.org/doc/432335/ 7 every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence”

16. In the case of Workmen v Board of Trustees , Cochin Port Trust (1978) 3 SCC 119, the Hon’ble Supreme Court has held as under

> “It is well known that the doctrine of res judicata is codified in section 11 of the Code of Civil Procedure but it is not exhaustive. Section 11 generally comes into play in relation to civil suits. But apart from the codified law the doctrine of res judicata or the principle of res judicata has been applied since long in various other kinds of proceedings and situations by Courts in England, India

and other countries. The rule of constructive res judicata is engrafted in Explanation IV of section 1 1 of the Code of Civil Procedure and in many other situations also principles not only of direct res judicata but of constructive res judicata are also applied. If by any judgment or order, any matter in issue has been directly and explicitly decided the decision operates as res judicata and bars the trial of an identical issue in a subsequent proceeding between the same parties. The principle of res judicata also comes into play when by the judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication; then also the principle of res judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground of defense or attack in a former proceeding but was not so made, then such a matter in the eye of law, to-avoid multiplicity of litigation and to bring about finality in it is deemed to have been constructively in issue and, therefore, is taken as decided ”(emphasis supplied)

17. In the case of Ramadhar Shrivas v Bhagwandas (2005)13 SCC1, it has been held by the Supreme Court as under

> “The expression 'matter in issue’ under Section 11 of the Code of Civil Procedure, 1908 connotes matter directly and substantially in issue actually or constructively. A matter is actually in issue when it is in issue directly and substantially and a competent court decides it on merits. A matter is constructively in issue when it 'might and ought’ to have been made a ground of defense or attack in the former suit. Explanation IV to Section 11 of the Code by a deeming provision lays down that any matter which 'might and ought’ to have been made a ground of defense or attack in the former suit, but which has not been made a ground of defense or attack, shall be deemed to have been a matter directly and substantially in issue in such suit.
>
> The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. The object of

Explanation IV is to compel the plaintiff or the defendant to take all the grounds of attack or defense in one and the same suit. fVide Horn v. Jahan Ara, [1973] 2 SCC 189 192 : AIR (1973) SC 1406 (1409); Jaswant Singh v. Custodian of Evacuee Property, [1985] 3 SCC 648: AIR (1985) SC 1096 : (1985) Supp 1 SCR 331; Forward Construction Co. v. Prabhat Mandal, (1986) 1 SCC 100 : AIR (1986) SC 391 : [1985] Supp 3 SCR 766; Direct Recruits Class II Engineering Officers' Association v. State of Maharashtra. [1990] 2 SCC 715: AIR (1990) SC 1607 and Vijayan v. Kamalakshi, [1994] 4 SCC 53 : AIR (1994) SC 2145.

In the case on hand, it is clear that in the earlier suit, the Court had recorded a clear finding that defendant-Bhagwandas was neither the owner of the property nor he could show any right as to how he was occupying such property except as a tenant of Hiralal. If Bhagwandas was claiming to be in lawful possession in any capacity other than a tenant, he ought' to have put forward such claim as a ground of defense in those proceedings. He ought to have put forward such claim under Explanation IV to Section 11 of the Code but he had failed to do so. The doctrine of constructive res judicata engrafted in Explanation IV to Section 11 of the Code thus applies to the facts of the case and the defendant in the present suit cannot take a contention which ought to have been taken by him in the previous suit and was not taken by him. Explanation IV to Section 11 of the Code is clearly attracted and defendant-Bhagwandas can be prevented from taking such contention in the present proceedings. ”

18. In the case of Electrocast Sales India Ltd. V DCIT , [2018] 170 ITD 507 (Kolkata - Trib.) held as under

“4.6 The Id AR further argued that the scheme of amalgamation, as sanctioned by the Hon'ble Calcutta High Court, was effective from 1.4.2010 and the parties had acted according to the said scheme and cannot be subjected to reversal after a period of 7 years by virtue of the principle of 'res judicata' , 'constructive res judicata' and 'acquiescence'. In this regard, the Id AR placed reliance on the decision of Hon'ble Supreme Court in the case of Forward Construction

Co. v. Prabhat Mandal AIR 1986 SC 391 wherein it was held that:

"The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided.

We find that in the instant case, the income tax department had the opportunity to controvert the specific clause mentioned in para 10(iii) in the scheme of amalgamation, when the scheme was presented before the Hon'ble High Court for approval. Thus applying the principles of res judicata as explained by the Hon'ble Apex Court in the aforesaid case, the issue can be deemed to be heard and decided. Accordingly, the argument that the same cannot be agitated in appeal u/s 39 held as1 (7) of the Companies Act, 1956 deserves attention and merit. The English Court of Chancery in case of Henderson v. Henderson (1843-60) All ER Rep 378 while construing Explanation IV to Section 11 of Code of Civil Procedure quoted hereunder:—

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

19. Further, in the case of CIT v T P Kumaran [1996] 88 Taxman 206 (SC), the Hon'ble Supreme Court held as under

"3. This appeal by special leave arises against an order of the Central Administrative Tribunal, Ernakulam made on 16-8-1994 in OA No. 2026 of 1993. The admitted position is that while the respondent was working as the ITO, he was dismissed from service. He laid a suit against the order of dismissal. The suit came to be decreed and he was consequently reinstated. Since the arrears were not paid, he filed a writ petition in the High Court. The High Court by order dated 16-8-1982 directed

the appellant to pay all the arrears. That order became final. Consequently, arrears came be paid. Then the respondent filed an OA claiming interest at 18 per cent p. a. The Administrative Tribunal in the impugned order directed the payment of interest. Thus, this appeal by special leave.

4. The Tribunal has committed a gross error of law in directing the payment. The claim is barred by constructive res judicata under section 11, Explanation IV of the Code of Civil Procedure, 1908, which envisages that any matter which might and ought to have been made ground of defense or attack in a former suit, shall be deemed to have been a matter directly and substantially in issue in a subsequent suit. Hence, when the claim was made on earlier occasion, he should have or might have sought and secured decree for interest He did not set and, therefore, it operates as res judicata. Even otherwise, when he filed a suit and specifically did not claim the same. Order 2, Rule 2 of the Code prohibits the petitioner to seek the remedy separately. In either event, the OA is not sustainable, "(emphasis supplied)

20. The attempt to re-argue the case, which has been finally decided, by the Hon'ble ITAT and Delhi High Court is a clear abuse of process of the Court, regardless of the principles of Res Judicata. In this connection, relevant portions of the order of Hon'ble Supreme Court in the case of K.K. Modi v. K.N. Modi [1998] 3 SCC 573 is extracted below —

> The Supreme Court Practice 1995 published by Sweet & Maxwell in paragraph 18/19/33 (page 344) explains the phrase "abuse of the process of the court" thus:
>
> "This term connotes that the process of the court must be used bona fide and properly and must not be abused. The court will prevent improper use of its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances. And for these purpose considerations of public policy and the interests of justice may be very material."

One of the examples cited as an abuse of the process of court is re-litigation. It is an abuse of the process of the court and contrary to justice and public policy for a party to re-litigate the same issue, which has already been tried and decided earlier against him. The re-agitation may or may not be barred as res judicata. However, if the same issue is sought to be re-agitated, it also amounts to an abuse of the process of court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the court. Frivolous or vexatious proceedings may also amount to an abuse of the process of court especially where the proceedings are absolutely groundless. The court then has the power to stop such proceedings summarily and prevent the time of the public and the court from being wasted. Undoubtedly, it is a matter of courts' discretion whether such proceedings should be stopped or not; and this discretion has to be exercised with circumspection. It is a jurisdiction, which should be sparingly exercised, and exercised only in special cases. The court should also be satisfied that there is no chance of the suit succeeding. In the case of Greenhalgh v. Mallard [19147 (2) AER 255] the court had to consider different proceedings on the same cause of action for conspiracy, but supported by different averments. The Court, held that if the plaintiff has chosen to put his case in one way, he cannot thereafter bring the same transaction before the court, put his case in another way and say that he is relying on a new cause of action. In such circumstances, he can be met with the plea of res judicata or the statement or plaint may be struck out on the ground that the action is frivolous and vexation and an abuse of the process of court. In Mcllkenny v. Chief Constable of West Midlands Police Force and another [1980 (2) AER 227], the Court of Appeal in England struck out the pleading on the ground that the action was an abuse of the process of the court since it raised an issue identical to that which had been finally determined at the plaintiffs' earlier criminal trial. The court said even when it is not possible to strike out the plaint on the ground of issue estoppels, the action can

> be struck out as an abuse of the process of the court because it is an abuse for a party to re-litigate a question or issue which has already been decided against him even though the other party cannot satisfy the strict rule of res judicata or the requirement of issue estoppels.(emphasis supplied)

Applicability of Explanation V to Section 11 of Code of Civil Procedure,1908

21. In this matter, attention is also drawn to the following portion of para 4 of the aforesaid rectification order under section 254(2) of the Act dated 31.03.2010 -

"Even in appeal filed before the High Court it was specifically contended that the issue raised in ground no. 1(b) has not been disposed off in respect of which a miscellaneous application is pending. For this purpose, he invited our attention to page 4 of the appeal memo filed before the High Court wherein the contention was so raised. He accordingly submitted that since in the appeal before the High Court the issue was raised in ground no 1(b) was not taken, to that extent the order of Tribunal has not merged into the order of High Court. "

As admitted by the assesse, in its pleading before the Hon'ble High Court the ground of diversion of income by overriding title was mentioned and also the fact about its pending MA before the ITAT. The Hon'ble High Court considered the pleadings of the assesse and passed an order holding that income of the assesse is taxable. As regards the claim of the assesse that there was no specific finding in the order of the High Court in respect of its pleading with regard to diversion of income by overriding title, it is pertinent to refer to Explanation V to Section 11 of Code of Civil Procedure,1908 which provides as under-

> " Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section be deemed to have been refused."

Considering the above-mentioned provision, it is deemed that the Hon'ble High Court refused any relief to the assesse in respect of its pleading with regard to diversion of income by overriding title.

Doctrine of merger

22. Apart from the fact that this appeal is covered under the rule of constructive res judicata, the impugned matter is covered under doctrine of merger also. The ITAT considered the arguments of the assessee and held that assessee is not a mutual concern and therefore, its income was taxable. Though both the arguments/grounds taken by the assessee are related, the ITAT did not give its specific findings in respect of diversion of income by overriding title. The assessee took up the matter before the Hon'ble Delhi High Court. The Hon'ble Delhi High Court considered the facts of the case in detail and passed the order holding that the judgment of the ITAT deserves to be sustained.

23. Further, after 4 months of the order passed by Hon'ble High Court, the assesse filed a revised miscellaneous application on 10.07.2009 for rectification of the order dated 31.01.2008 passed by the. On perusal of the rectification order dated 31.03.2010 , it may be noted that in Para 4 of the order it is mentioned that the Ld Counsel of the assessee submitted that MA was filed before the Tribunal prior to the appeal filed before the High Court. In this connection, attention is further drawn to the following portion of para 4 of the aforesaid rectification order dated 31.03.2010 that -

> "Even in appeal filed before the High Court it was specifically contended that the issue raised in ground no. 1(b) has not been disposed off in respect of which a miscellaneous application is pending. For this purpose, he invited our attention to page 4 of the appeal memo filed before the High Court wherein the contention was so raised. He accordingly submitted that since in the appeal before the High Court the issue was raised in ground no 1(b) was not taken, to that extent the order of Tribunal has not merged into the order of High Court. "

24. It is pertinent to note that once a pleading has been taken before the Hon'ble High Court in respect of a matter, the order of the ITAT gets merged with the order of the High Court and that matter attains finality. The assesse included its pleading of diversion of income by overriding title was in its appeal memo. The assesse also mentioned about its pending MA in its appeal memo. If any mistake is noticed by the party in the order of the High Court, only recourse left was to file revision petition before

the High Court or to file an appeal before the Supreme Court , but by no stretch of imagination any rectification appeal will lie before the ITAT against any alleged apparent mistake in the order of the High Court In this case, matter in issue is taxability of surplus of income over expenditure in respect of advertising contributions receipts. Once that matter has been adjudicated and decided by the High Court, the order of the ITAT merged with the order of the High Court.

25. In this connection, reliance is placed on the very recent order dated 25.02.2019 of the Jurisdictional Hon'ble Delhi High Court in the case of Principal CIT v N R Portfolio (P) Ltd. [2019] 103 taxmann.com 17 (Delhi). In respect of doctrine of merger, reference is made to para 21 of the order which is extracted as under

> "21. What is discernible from the above discussion is that if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law. If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. Undoubtedly, there are cases and causes where issues that were not the subject matter of appeals were sought to be made the content of a later litigation before the lower court or tribunal. As emphasized in Amritlal Bhogilal and Gojer Bros, (supra) as to what was that issue or matter may at times be decisive to consider whether the previous binding order of the appellate or revlsional authority prevailed over the lower court or authority's order. "

26. Further, reference is made to following portion of the order which is extracted as under:-

> 24. This court is of the opinion that in the present case, the issue sought to be urged by the assessee in the first ITAT order was in its cross objection, concerning the legality of reassessment. Undoubtedly, the validity of a reassessment notice can be a matter of substance. The merits of the additions made after considering the assessee's contentions were deleted by the CIT (A). He however upheld the reassessment proceeding. The assessee had two courses: either appeal or cross object

against that part of the order, to the ITAT. It chose the latter, when the revenue appealed to the tribunal. The ITAT rejected the revenue's appeal and also dismissed the assessee's cross objections as infructuous. At that stage, the assessee could have cross objected before this court, or filed independent appropriate proceedings to protect its interest. It however was sanguine about its case on the merits; unfortunately, it did not choose to appeal or question the dismissal of its cross objections. It sought to challenge the judgment of this court reversing the ITAT (on merits of the addition) by appeal through special leave to the Supreme Court. Although the judgment of this court was rendered on 21-12-2012, it chose to approach the ITAT in 2014; that rectification application was allowed on 26-03-2015.

25. To this court it appears that the assessee's claim for rectification is precluded by the doctrine of finality and not merely merger. Once the additions were upheld on merits, the second innings as it were before the tax authorities, which have the effect of unsettling binding decisions of higher courts, cannot be countenanced. In that, sense the issue of merger applies. In the facts of this case, this court is of opinion that the doctrine of finality applies as well. The assessee by conduct in not seeking remedy for the dismissal of its cross objection and speculatively waiting for the outcome of the revenue's appeal, cannot be heard to complain that its grievance with respect to reassessment remained unaddressed. The court is conscious that it is not dealing with an uninformed litigant; instead, it is advised by counsel. Furthermore, the court notices that the first ITAT order was by two members (M/s C.L. Sethi and Shamim Yahya). The application made under Section 254 for rectification was heard and disposed by two others (M/s C. M. Garg and N.K. Saini).

26. This court further notices that there is a difference in the structure of the power of rectification conferred upon tax authorities, such as the AO and the CIT on the one hand, and the ITAT, on the other. The AO- as well as lower revenue authorities have an overriding power to rectify, in Section 154 (1 A) which reads as follows:

> "(1 A) Where any matter has been considered and decided in any proceeding by way of appeal or revision relating to an order referred to in sub-section (1), the authority passing such order may, notwithstanding anything contained in any law for the time being in force, amend the order under that sub-section in relation to any matter other than the matter which has been so considered and decided."

27. However, such overriding power is absent, in the case of the ITAT, whose authority to amend or rectify its order is confined by the language (of Section 254 (2)), i.e. "to with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake is brought to its notice by the assessee or the Assessing Officer..."

28. Furthermore, this court is of the opinion that the conduct of the assessee was speculative, to put it mildly. As observed earlier, it is not an uninformed litigant; it calculatedly chose not to question the rejection of its cross objection (on grounds of its having been rendered infructuous). Having waited more than a year after the decision of this court (which was rendered on 21-12-2012), it approached the ITAT in 2014. It offered no explanation why it did not seek the rectification earlier, during the pendency of the revenue's appeal- in that event, if the ITAT had rejected its application this court would have given suitable directions. Instead, waiting for the time till the two members who decided the first ITAT orders were not available and choosing to prefer the rectification application at a convenient time, the assessee no doubt technically was compliant, but stood exposed to the odium of forum shopping.

29. In the circumstances of this case, the court holds that the rectification application filed by the assessee (MA 250/2014) was barred by the principle of finality, and to an extent the doctrine of merger. The ITAT, in the opinion of this court, entirely mis-appreciated its jurisdiction, which, as held in Honda Siel, is to correct an apparent mistake. That its previous decision to dismiss the cross

> appeal as infructuous was a mistake in the light of the subsequent reversal of its order on the merits of the addition, is not in the considered view of this court, a mistake or error warranting rectification. This court deprecates in the strongest terms, the invocation of the power of rectification. ”

27. It may be noted that the facts in the aforesaid case are very similar to the instant case. As mentioned above, the ITAT passed the order on 31.01.2008. The Hon’ble Delhi High Court passed the order on 01.04.2009 against the assessee. After that, the MA of the assessee was heard before the ITAT. The issue has already reached finality by the order of the High Court. Therefore, the rectification order of the ITAT was barred by the principle of finality and also by the doctrine of merger.

28. In Commissioner of Income-tax, Bombay Vs. M/s Amritlal Bhogilal and Co. AIR 1958 SC 868 the Hon’ble Supreme Court held as under:

> "There can be no doubt that, if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law. If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law, the position would be just the same even if the appellate decision merely confirms the decision of the tribunal. As a result of the confirmation or affirmation of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement. "

29. In the landmark decision in the case of Kunhayammed & Ors vs State Of Kerala & Anr (2000) 6 SCC 359, it has been held by the Hon’ble Supreme Court as under

> “1. The doctrine of merger is neither a doctrine of constitutional law nor a doctrine statutorily recognized. It is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system. On more occasions than one, this Court had an opportunity of dealing with the doctrine of merger. It would be advisable to trace and set out the

judicial opinion of this Court as it has progressed through the times.

2. In CIT v. Amritlal Bhogilal & Co. AIR 1958 SC 868 this Court held :

"10. There can be no doubt that, if an appeal is provided against an order passed by a Tribunal, the decision of the appellate authority is the operative decision in law. If the appellate authority modifies or reverses the decision of the Tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirms the decision of the Tribunal. As a result of the confirmation or affirmance of the decision of the Tribunal by the appellate authority, the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement;...." (p. 871)

However, in the facts and circumstances of the case, this Court refused to apply the doctrine of merger. There, an order of registration of a firm was made by the ITO. The firm was then assessed as a registered firm. The order of assessment of the assessee was subjected to appeal before the Commissioner (Appeals). Later on, the order passed by the ITO in respect of registration of the firm was sought to be revised by the Commissioner. Question arose whether the Commissioner could have exercised the power of revision. This Court held that though the order of assessment made by the ITO was appealed against before the Commissioner (Appeals), the order of registration was not appealable at all and, therefore, the order granting registration of the firm cannot be said to have been merged in the appellate order of the Commissioner (Appeals). While doing so, this Court analyzed several provisions of the Income-tax Act, 1961 so as to determine the nature and scope of the relevant appellate and revisional powers and held that if the subject matter of the two proceedings is not identical, there can be no merger. In State of Madras v. Madurai Mills Co. Ltd. AIR 1967 SC 681 this Court held that the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior authority and the other by a superior authority, passed in an appeal or revision, there is a

fusion or merger of two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. The application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction.

3. In Gojer Bros. (P.) Ltd. v. Ratanlal Singh AIR 1974 SC 1380, this Court made it clear that so far as merger is concerned, on principle there is no distinction between an order of reversal or modification or an order of confirmation passed by the appellate authority. In all the three cases, the order passed by the lower authority shall merge in the order passed by the appellate authority whatsoever be its decision - whether of reversal or modification or only confirmation. Their Lordships referred to an earlier decision of this Court in U.J.S. Chopra v. State of Bombay AIR1955 SC 633 wherein it was held :

"A judgment pronounced by a High Court in exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing in the presence of both the parties would replace the judgment of the lower court, thus, constituting the judgment of the High Court the only final judgment to be executed in accordance with law by the Courts below."

4. In S. S. Rathore i/. State of Madhya Pradesh AIR1990 SC 10 a larger Bench of this Court (Seven-Judges) having reviewed the available decisions of the Supreme Court on the doctrine of merger, held that the distinction made between the Courts and the Tribunals as regards the applicability of the doctrine of merger is without any legal justification; where a statutory remedy was provided against an adverse order in a service dispute and that remedy was availed, the limitation for filing a suit challenging the adverse order would commence not from the date of the original adverse order but on the date when the order of the higher authority disposing of the statutory remedy was passed. Support was taken from the doctrine of merger by referring to Amritlal Bhogilai & Co's case (supra)and several other decisions of this Court.

5. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative order governing

the same subject matter at a given point of time. When a decree or order passed by the inferior court, Tribunal or authority was subjected to a remedy available under the law before a superior forum, then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the list before it either way - whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, Tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the Court, Tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject matter of challenge laid or which could have been laid shall have to be kept in view. ”

It has been further held that

“Where an appeal or revision is provided against an order passed by a Court, Tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law. ”

30. Further, reliance is also placed on the order of the Hon’ble Supreme Court in the case of Indian Council for Enviro-Legal Action v. Union of India & Ors. [2011] INSC 626 (18 July 2011) in IA No. 36 &44 in WP (C) No. 967 of 1989 . In the said decision, Hon’ble Justice Dalveer Bhandari and Justice H.L. Dattu, have examined the concept of finality of judgment and how the adversarial system in India is being abused by litigants, and its adverse impact of the administration of justice. The relevant extracts from the judgment are reproduced as under:-

> “114. The maxim interest Republicae ut sit finis litium' says that it is for the public good that there be an end of litigation after a long hierarchy of appeals. At some stage, it is necessary to put a quietus. It is rare that in an adversarial system, despite the judges of the highest court doing their best, one or more parties may remain unsatisfied with the most correct decision. Opening door

for a further appeal could be opening a floodgate, which will cause more wrongs in the society at large at the cost of rights.

116. In Manganese Ore (India) Ltd. v. The Regional Assistant Commissioner of Sales Tax, Jabalpur(1976) 4 SCC 124 this court held that the doctrine of stare decisis is a very valuable principle of precedent which cannot be departed from unless there are extraordinary or special reasons to do so.

132. This court in a recent judgment in M. Nagabhushana v. State of Karnataka and others (2011) 3 SCC 408 observed that principle of finality is passed on high principle of public policy. The court in para 13 of the said judgment observed as under:

> That principle of finality of litigation is based on high principle of public policy. In the absence of such a principle, great oppression might result under the color and pretence of law inasmuch as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of res judicata has been evolved to prevent such anarchy. That is why it is perceived that the plea of res judicata is not a technical doctrine but a fundamental principle, which sustains the rule of law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing court for agitating on issues, which have become final between the parties.

157. The applicants certainly cannot be provided an entry by back door method and permit the unsuccessful litigant to re- agitate and reargue their cases. “

31. In the instant case, the matter in issue has already been decided by the Hon’ble High Court and therefore, the order of the ITAT merged with the order of the Hon High court.

32. Considering the above facts and decisions of Hon'ble Supreme Court and High Courts, income of the assessee Where by the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment, which can truly be excused, and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable. In our opinion, the present case is one in which the wife and children of the assessee who continued to be members of the family received a portion of the income of the assessee, after the assessee had received the income as his own. The case is one of application of a portion of the income to discharge an obligation and not a case in which by an overriding charge the assessee became only a collector of another's income. "

33. Even if for the sake of argument, without accepting the contention of the assesse , it is considered that the assesse was obliged to expend its receipts towards advertisement and marketing expenses only, then also its income cannot be excluded from taxability . As elucidated by the Hon'ble Apex Court in the case of Sitaldas Tirathdas (supra) that obligations, no doubt, there are in every case, but it is the nature of the obligation, which is the decisive fact. It has been further held that Whereby the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. In the instant case, at the most assesse has applied its income received from its clients to discharge its expenses towards advertisement, marketing and publicity expenses.

34. Further, in the case of Pr. CIT v Chamundi Winery & Distilley [2018] 97 taxmann.com 568 (Karnataka), it has been held as under

> ■ Admittedly, the assessee in the instant case was the Excise Licensee under the provisions of the Karnataka Excise Act, 1965 and Diageo India had no Excise License

in its name from the State during the relevant assessment period. The business of m.s matter is squarely covered by the doctrine of merger and doctrine of finality. Therefore, this appeal deserves to be dismissed.

Diversion of Income by overriding title

35. Without prejudice to the abovementioned submission on the ground of applicability of constructive res judicata and doctrine of merger in this matter, the claim of the assesse in respect of diversion of income by overriding title is correct on facts and law. Law is well settled that the doctrine of diversion of income by reason of overriding title applies only in cases where the income never reaches the assessee as his income. The mere fact that the assessee has an obligation to apply certain amount out of its income for a particular purpose cannot make it a case of diversion of income by overriding title. An obligation to apply the income accrued, arisen or received amounts merely to the apportionment of income and the income so applied is not deductible. There is a difference between an amount which a person is obliged to apply out of his income and an amount which, by the nature of the obligation, cannot be said to be a part of his income. Where by the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow.

36. It may be noted that the assesse has shown receipts on account of advertisement in its P&L account against which different expenses have been claimed. It was the income of the assessee and being in the business of advertisement and publicity, the funds received have been utilized and applied towards expenses pertaining to advertisement and publicity. There is no question of diversion of income by overriding title. The receipts were always shown in P&L account and against which different expenses were claimed.

37. In the landmark case of CIT v Sitaldas Tirathdas [1961] 41 ITR 367 (SC), the Hon'ble Supreme Court held as under

> "In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation, which

is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the manufacture and sale of liquor Is closely controlled and regulated by the State Government Including its storage, bottling, wastage, retail and wholesale sales thereof. The exclusive purchaser in the instant case was a State Corporation, namely, KSBCL and therefore, such end to end control of the State Government under whose licence, the respondent assessee alone was to manufacture and sell the liquor, it cannot be said by any stretch of imagination that such a business was being done exclusively for and on behalf of the third party, viz. Diageo India, who was not at all subject to any control under the Excise Act. The income or business profits taxable under the Income- tax Act, 1961 naturally arose out of the said business activity of manufacture and sale of liquor only. Merely because the Diageo Pic. is a Brand owner and a big liquor business entity of United Kingdom, whose Indian Subsidiary, Diageo India had a private arrangement or Agreement like the one under the Agreement dated 30-10-2007 with the respondent assessee and many other such Agreements with others and it provided not only right of user of brands, trademarks and labels, but also provided some raw materials and concentrates and the working capital etc., and the bank accounts were to be operated by the respondent assessees were also closely monitored, it does not mean that the present assessee was either only an agent or a benami of Diageo India. For all practical and legal purposes, de facto and de jure, the respondent assessee was the Excise Licencee engaged in the business of manufacture and sale of liquor during the relevant period and must therefore account for its all profits subject to income tax during the relevant years.[para 24]

- The question therefore, that the 'distributable surplus' arising out of that business which is liable to be paid or made over to Diageo India by way of compensation or benefit to Diageo India under the said Agreement is nothing but an 'application of income' by assessee and

not a 'diversion of income at source by overriding title' in favour of Diageo India.[Para 25]

- It is only 'application of income' and not 'diversion of income' by overriding title at source. The terms of the Agreement are very carefully crafted and intelligently drafted and they may at first blush give an impression of an overriding title over income in favour of Diageo India, but on a closer and deeper scrutiny, it is nothing but a devious diversion, falling short of the legal prerequisites for taking it out of the ambit and charge of the Income Tax Act in the hands of the respondent assessee.[Para 26]
- The source of income is the manufacture and sale of liquor under the Excise Licence, where Diageo India has no privity or locus. Therefore, whatever income is generated out of the said business has to be first taxed in the hands of the Excise License and after payment of the Income tax, the 'distribution of surplus' between the two parties, is their discretion and if the assessee gets its share of total profits only to the extent of Rs. 45 per case in the name of bottling charges and Diageo India takes the entire remaining balance as per clauses 16 and 17 of the Agreement dated 30-10-2007, that distribution of surplus between the two parties to the contract has no effect and overriding impact on the taxability part of the entire income arising or accruing firstly, in the hands of the respondent assessee for the period in question.[Para 27]

38. Further, in the aforesaid decision of Chamunda Winery & Distillery, it has been held by the Hon'ble Karnataka High Court that

> "73. We further hold clearly and firmly that Book entries and Method of Accounting is not determinative and conclusive for deciding the computation of 'taxable income' in the hands of the Assessee though they may be relevant to be considered.
>
> 74. This is where we feel the tax avoidance effort has been made by the parties and we cannot uphold the same in the overall analysis of the facts and legal position applicable to the facts of the present case.
>
> 75. What we further feel Is that the "diversion of income by transfer of overriding title at

> source" should normally have the support of the statutory requirements or some decretal binding character of Courts of law and even though the private contractual obligations can also bring about such "diversion of income at source" but in this last sphere of private contractual obligations, the Courts and the Income Tax Authorities have to examine such aspects carefully in comparison to the above two other categories of statutory requirements and the Court decrees and then examine the real purport and object of such private arrangements and Contracts.
>
> 76. Besides the issues of the legality of the Agreement, the real intention of the parties should be ascertained as to see whether such arrangements and contracts have been entered into to deflect and divert the applicability of Income-Tax laws on the Assessee who has really earned the "real income", profits and gains under such Contract or whether such diversion is only an arrangement to suit the purposes of tax avoidance in such cases. ”

39. In the instant case also, it is required to examine the real purport and object of the private arrangements and contracts. On perusal, it is evident that the assesse is carrying out the business of advertisement, marketing and publicity for certain parties from whom it receives money and against the said receipts, expenses are made. All the receipts and expenses are shown in P&L account. However, surplus of income over expenditure is not offered to tax.

40. In this regard, reliance is also placed on the order of High Court of Kerala in the case of Fr. Sunny Jose V UOI [2015] 60 taxmann.com 386(Kerala). The relevant portion of the said order is extracted below >

> “16. In the light of the principles that can be culled out from the decisions referred to above, I am of the view that for the concept of diversion of income by overriding title to apply, the diversion of income must be effective at the stage when the amount in question leaves the source, on

its way to the intended recipient. At that stage, on account of a pre-existing legal obligation, the amount should be diverted to another, who can claim it as of right, based on the pre-existing legal arrangement. The person to whom the amount is diverted should have a legal right that entitles him to claim the amount directly from the source, and without the intervention of the person who would have received the amount but for the said legal arrangement. Viewed from that angle, the nature of the receipt would also have a bearing on the issue of whether the amount in question reached the member of the congregation or was diverted to the congregation, without reaching the member, by way of overriding title. "

In the instant case, amounts are received from the clients for AMP activities and the said amounts are duly credited to P&L Account of the assesse. The amount is not diverted to any other person who can have claim over the amounts received by the assessee company.

41. Considering the above facts and case laws, there is no applicability of doctrine of diversion of income by overriding title in this case. This plea of diversion of income by overriding title was admittedly raised by the assesse before the High Court. Once the order is passed by the High Court in a matter, the said pleading cannot be entertained afresh by the Hon'ble Tribunal. Moreover, the plea of the assessee with regard to diversion of income by overriding title also, assesse has no case.

42. In other assessment years, which are under appeal before the Hon'ble ITAT, the same issue is involved. The facts are similar in other assessment years as well. The essential requirements of a mutual concern are missing. The fact remains that Pepsi Food Ltd. was a contributor to the fund did not benefit from the APM activities. Contributors of the fund and beneficiaries are not the same and therefore, the income of the assessee cannot be excluded from taxation on the ground of mutuality. The assessee does not meet the conditions as laid down in the decision of Bankipur Club Ltd, Chemsford Club Ltd and Bangalore Club Ltd. as regards mutual concerns. Further, the observation of the Hon'ble Delhi High Court in the case of the assessee for A.Y. 2001-02 to the effect that the principle of mutuality is applicable to those entities whose activities are not

tinged with commercial purpose continues to be applicable since the assessee continues to engage in the business activity of advertising, marketing and publicity. As regards plea of diversion of income by overriding title, the above discussion in respect of A.Y. 2001-02 is applicable in other assessment years as well having same facts.

43. In nutshell he submitted that the coordinate bench passed an order on 31st of January 2008, the miscellaneous application was filed before the coordinate bench on 24/6/2008, the appeal was filed before the honourable High Court on 30/6/2008, the honourable High Court announced its order on 01/04/2009 and thereafter on 10/07/2009 the assessee revised its miscellaneous application the coordinate bench decided the miscellaneous application on 31/03/2010 by recalling the order of the coordinate bench which was merged with the order of the honourable High Court on 01/04/2009. He submitted that the order of the miscellaneous application of the coordinate bench recalling its order is giving a back door entry to the assessee. He extensively referred to para number 28 of the decision of principal Commissioner of income tax vs NR portfolio private limited (2019) 103 taxmann.com 17 (Del). He further extensively referred the order of the honourable Delhi High Court in that case where the principle of finality is discussed. He therefore submitted that for this assessment year the matter has reached the finality and therefore now tinkering with the concluded issues is not permitted.

44. On the issue of the decision relied upon by the learned authorised of CIT vs Bijlii cotton Mills 116 ITR 60 he submitted that the facts of this case are distinguishable as in that particular case the sum was credited to a separate account and never to the profit and loss account whereas in the present case the assessee himself has credited the same to the profit and loss account as income.

45. He further stated that the reliance placed by the assessee on bass international Holdings and we vs joint Commissioner of income tax Mumbai in ITA number 4341/MU M/2002 dated is also distinguishable on the facts of the case.

46. On the admission of additional evidences for assessment year 2002 – 03 and 2003 – 04 with respect to the expenditure of the Pepsi he submitted that it is an outsider and not covered in the tripartite agreement as the same company is neither a member

and there is no use of additional evidences filed by the assessee he further submitted that the Pepsi has been held to be an outsider by the honourable High Court and the coordinate bench both. He further stated that merely displaying the name of the Pepsi does not make it a contributor and beneficiary both. He therefore submitted that this additional evidence does not make any difference on the issue of principles of mutuality.

47. The learned DR also referred to the balance sheet of the assessee company and stated that when the assessee itself has accounted for the advertisement contribution from franchisee and holding company amounting to INR 7 8429361/– in its profit and loss account therefore it is apparent that this income is available for the assessee to be spent according to the objects of the company. He submitted that this fact itself shows that there is no diversion by overriding title over this income. He further stated that there is in excess of income of Rs. 4444002/– brought forward from the previous year and during the year there is in excess of income over expenditure of INR 3 408129/– thus the above excess of expenditure is available to the assessee of income and therefore there is no diversion by overriding title of the income of the assessee. He further stated that merely because the unspent contribution of INR 7 852131/– which is accumulated over the assessee profit has been shown as current liabilities does not show that there was any diversion of the income. He stated that income has been accrued to the assessee, which has been shown in the profit and loss account, and therefore now there is no reason to state that did not accrue to the assessee at all.

48. He further submitted that the assessee contends that the income is tainted with mutuality, assessee also submitted that therein income but it has never accrue to the assessee because of the diversion of overriding title over the same. On advertisement marketing promotion activities. He submitted that both these arguments are contradictory to the each other and therefore as the argument of the mutuality has been already rejected by the coordinate bench as well as found by the honourable High Court, even otherwise, the argument of the assessee of diversion of income by overriding title also deserves to be rejected.

10. The learned authorised representative in rejoinder submitted that:-

a. On the principles of constructive res judicata and the argument that the order of the coordinate bench has merged with the order of the honourable High Court, he submitted that now this argument cannot be taken up when the revenue has accepted the order of the miscellaneous application and its decision in 2010. Now as the matter is recalled by the coordinate bench, the only option available with the coordinate bench is to decide/adjudicate the issue for which the matter has been recalled.
b. He further stated that the sequence of events narrated by the learned departmental representative is not correct. He submitted that MA was filed. On 25/08/2008 which is apparent at page number 21 of the appeal before the honourable High Court. He referred to para number 4 of the order of the coordinate bench disposing of the miscellaneous application wherein it is stated that the miscellaneous application was filed before the tribunal prior to the appeal filed before the honourable High Court. Further the coordinate bench has also held that it can rectify its order as the said issue cannot be said to have merged in the order of the honourable High Court placing reliance on the decision of the honourable Gujarat High Court in case of Nirma industries Ltd vs THE DEPUTY COMMISSIONER OF INCOME TAX 283 ITR 402.
c. On the issue of the merger of the order of the coordinate bench with the order of the honourable High Court he submitted that the issue of merger is already adjudicated in the miscellaneous application in para number 8 of the order. He submitted that the coordinate bench has considered the decision of the honourable Gujarat High Court as well as the decision of the special bench of the tribunal to recall the order of the coordinate bench to decide on the ground which is not at all been decided in the original order.
d. With respect to the decision of the honourable Delhi High Court in case of N R Portfolio private limited (Supra), he submitted that the

facts of that case are quite different from the facts before the coordinate bench

e. With respect to the argument of the learned about the accounting entry he submitted that the contribution to be spent on future promotion has been shown as current liabilities in schedule 5 of the annual accounts. He stated that INR 7 852131/– is shown as a current liabilities which is an obligation on the assessee to be spent on the advertisement expenditure. He submitted that the same has not been credited to the general reserve account of the assessee. Thus, though the sum is credited to the profit and loss account the excess is carried forward as a current liability. He stated that this itself proves that the above sum does not belong to the assessee.

f. He submitted that assessee has filed an application for additional evidence from assessment year 2002 – 03, 2003 – 04 but not for assessment year 2001 – 02. He further referred that 1 of the reason why the honourable High Court did not accept the argument of the assessee that the above sum is a mutual receipt and not an income of the assessee is for the reason that Pepsi was not found to be contributing to the advertisement pool of the assessee, and therefore such evidences now filed clearly shows that Pepsi is also contributing for the same.

g. He further submitted that the learned CIT DR has argued that the issue has reached finality. He submitted that such argument is devoid of any merit as only issue decided by the honourable High Court was with respect to the income of the assessee whether tainted with mutuality ought not. He submitted that whether it is an income of the assessee or not is not at all reached finality and therefore the principle of finality argued by the learned CIT DR is misplaced.

11. We have carefully considered the rival contentions and perused the orders of the lower authorities. We have also carefully considered the decision of the honourable Delhi High Court in appeal preferred by the assessee against the order of the coordinate bench. We have also noted the fact that honourable

Supreme Court has granted leave to the assessee against the order of the honourable High Court. Concurrently, the learned CIT – A, the coordinate bench and the honourable Delhi High Court has held that amount received by the assessee towards the contribution for advertisement marketing and promotion expenditure is not tainted with mutuality but, thus, income of the assessee chargeable to income tax under the income tax act.

12. The brief facts, despite the indulgence of duplicity, stated that assessee earlier known as Tricon Restaurants marketing private limited was established as a wholly owned step-down subsidiary of Tricon restaurants (India) Private Ltd to manage advertising, marketing and promotional activities at regional and national level of brands currently owned or to be acquired in future by Tricon restaurants (India) Private Ltd. This company has been setup pursuant to approval dated 05/10/1998 of the Ministry of industry for carrying out advertisement and promotion activities for Kentucky fried chicken and Pizza Hut restaurants in India. As per the approval the company is a non-profit-making enterprise. The company has entered into an operating agreement with its holding company and its franchises where under the franchisees will pay a certain percentage of the revenue as advertisement contribution to the company. Further the holding company may also at its sole discretion paid to the company such amount as it may deem appropriate to support the activities of the company. According to the operating agreement the preamble show that under the terms of the franchisee agreement, they have agreed to pay certain advertisement contribution to the holding company ought to local and original and/or national advertising arrangement under setup by the holding company. The assessee company is established as a wholly owned step-down subsidiary of the holding company to manage for retail restaurant business, the advertisement, media and promotion at regional level and national level of contract if right kitchen and Pizza Hut and other brands currently owned or acquired in future by the holding company and its parent or its associated companies. According to the terms of the franchisee agreement the franchisee have agreed to participate in the

cooperative advertising Brand funds to be established by the assessee for utilization of the advertising contribution payable by the franchisee in India under the respective agreements with the holding company. The assessee has in turn also entered into trademark license agreements with the onus of the respective trademarks for the use of the trademarks in the advertising, media and marketing activities envisaged under this agreement. As requested by the holding company all the franchisees has agreed to pay to the assessee the advertising contribution to enable assessee to undertake advertising, media and marketing activities and holding company has agreed to provide assessee certain marketing technical and financial services as per clause 4 and 6 associated with the activities of the assessee. And for these reasons to pursue above objectives and plans and for the mutual benefit of the franchisees assessee was developed as a nonprofit making entity engaged in operation and management of the regional and national level advertising, media and marketing of the brands. According to the agreement the advertising contribution means the advertising contribution which franchisee has agreed to pay to the holding company pursuant to the franchisee agreements. Therefore it is apparent that according to that agreement there is an agreement by the franchisees to pay certain sums to the holding company in terms of their franchisee agreement with the holding company, which is now paid by those franchisee owners to the assessee. This sum is shown now as advertisement contribution received by the assessee. Undoubtedly the above sum is credited to the profit and loss account. Out of these contributions, various types of expenditures have been incurred by the assessee. To look at the balance sheet of the assessee for assessment year 2001 – 02 the assessee has received the total contribution of INR 2646 9546/–, shown as advertising contribution from franchisee, holding company and key associates. Out of this the assessee has incurred the advertisement marketing and promotional expenditure of INR 21 256032/–. Other preliminary expenses and advertisement expenses of Rs. 454992/– and INR 1 90272/– were also incurred resulting into the excess of income over expenditure. Further there

was an outstanding carried forward of excess of expenditure from the previous year amounting to INR 1 24248/– which resulted into the net surplus of Rs. 4444002/–. The above sum has been shown by the assessee under the head current liabilities as excess of income over expenditure of Rs. 4444002/–. It is also necessary to understand how these funds have been invested by the assessee. The amount of INR 6 389831/– is outstanding in sundry debtors account, INR 2 404127/– is advances recoverable in cash or kind of INR 2 404127/– the balance sum is locked up in the cash in bank balances. Further according to clause 4 of the above operating agreement the holding company may at the request of the assessee but subject to holding companies sole and absolute discretion paid to assessee any such amount as it may deem appropriate to support the AMP activities during any accounting period. Further it was clarified in the same clause that the holding company shall have no occasion to pay any such amount if it chooses not to do so. However the contribution of the franchisee is covered in clause 3 of the agreement wherein there is a mandatory requirement of contribution by this franchisee to the assessee. Even there is a condition which gives the right to the assessee to terminate this agreement in the even any amount is not paid by franchisee to the assessee. Even the payment of the contribution was also required to be supported with statement of sale is directed by the assessee from time to time. Further according to clause number 4.2 of the agreement the holding company shall pass on to assessee any rebates received by the holding company from advertisement and marketing companies and attributable to the AMP activities during the terms of this agreement further the board of director of the assessee company shall also be nominated by the holding company and the holding company has reserved its rights to nominate one representative of 2 franchisees on a rational basis further in clause number 7.5 of the agreement there is a binding requirement of increase in the contribution by the franchisee. It is also interesting to note at para number 8.1 of the ago above agreement which provides that:-

> " 8.1 it is agreed between the parties hereto that TRIM (Assessee) shall make best efforts, but shall not be obliged to allocate the advertising contributions and expenses met out of the Brand funds on the basis of the revenue generated by each franchisee of TRicon (holding company) including franchisee...."

Further according to para number 8.4 in the event there is any surplus leftover in any of the Brand funds at the end of an accounting period, the assessee shall be entitled to retain the surplus to be spent on AMP activities during the following accounting period. Alternatively, assessee may subject to the approval of its board of directors refund the surplus amounts to the franchisees including franchisee in the same proportion as the actual advertising contribution made by each franchisee including franchisee in that accounting period. It is further provided that assessee as well as the holding company shall not be obliged to fund any deficit. According to clause 8.5 of the agreement it is clearly understood that only objective of the assessee is to coordinate the marketing activity of the grounds including the mutual benefit of the franchisee including the franchisee. It is further and recent that no profits will be on and no dividends will be declared by assessee. Further according to clause 10 of the agreement this of operating agreement with the franchisee shall be coterminous with the franchisee agreement and shall terminate automatically with immediate effect on the determination of the franchisee agreement. However on determination there is no provision of paying the balance outstanding amount of the franchisee from the assessee, which remains unspent. However as per clause number 10.3 in the event of termination or expiry of the agreement without determination of the franchisee agreements, the advertising contribution payable by franchisee will be paid by the franchisee to the holding company as per the provisions of the franchisee agreement from the effective date of termination of operating agreement. In view of above facts, the claim of the assessee is that the income of the assessee is diverted by overriding title and hence cannot be taxed in the hands of the company.

13. The above issue is challenged by the assessee as per ground number 1 (b) which has not been decided by the coordinate bench in its original order in ITA number 3235/Del/2005 for assessment year 2001 – 02 dated 31/01/2008. Therefore the assessee preferred a Miscellaneous Application Number 295/Del/2008, which was allowed by order dated 31st of March 2010 recalling the original order of coordinate bench passed on 31/1/2008. Prior to this honourable High Court, against the order of the coordinate bench dated 31/01/2008 in appeal preferred by the assessee, in ITA number 1433/2008 as per order dated 1/4/2009 has upheld the order of the coordinate bench. Thus, it is apparent that coordinate bench subsequent to the decision of The Honourable High court entertained the miscellaneous application of the assessee and recalled the order originally passed by ITAT. Thus when the issue is admitted and decided by the Honourable High court or Hon supreme court according to us , we are not empowered at all to touch up on any aspect of the issues decided by those Honourable higher judicial forums.

14. Further an issue, which has already been decided by the honourable high court, whether tribunal is empowered to touch up on "any aspect" of that matter while adjudicating MA or even in a recalled order. The honourable High Court in para number 2 of order has categorically held that the only issue, which arose in this case, is with respect to the taxability of Rs. 4444002/– being excess amount of income over expenditure. The said surplus had arisen on account of advertisement contribution received from the holding company of the assessee company, which remained unexplained. Therefore on reading of the above paragraph number 2 it is clear that the taxability of the sum of Rs. 4444002/– has already been decided by the honourable High Court. Even before the honourable High Court the assessee did not press the issue with respect to the alternative grounds taken before the coordinate bench about the claim of 'diversion by overriding title' of the above sum. Against the order of the honourable High Court the assessee approached the honourable Supreme Court with petition for special leave to appeal in No. 20571/2009 and honourable Supreme

Court as per order dated 26/03/2010 granted the leave and directed the parties to expedite the hearing and complete their pleadings within 8 weeks. Meanwhile, assessee preferred a miscellaneous application before the coordinate bench which recalled the order of the coordinate bench passed on 31/01/2008 to the extent for adjudicating the ground number 1(b) raised by the assessee. On careful reading of the order of the learned CIT – A in the above case at page number 13 in para number 2, the learned CIT appeal has dealt with this issue but adjudicated stating that as it is related to the ground number 1, which was related to the mutuality, no separate adjudication is required. Therefore the assessee raised this ground before the coordinate bench. Now the issue is, wherein the honourable High Court has decided an issue with respect to the taxability of the sum, whether above issue has reached finality or not? If it has reached finality, the coordinate bench does not have any power to adjudicate on '**any issue or any aspect of the matter'** considered by the honourable High Court. If for the sake of convenience, it is presumed that coordinate bench agrees with the submission of the learned authorised representative that income is diverted by overriding title, then, the decision of the honourable High Court holding that the income of the assessee is chargeable to income tax, then, the situation will arise that same amount of income which is held to be taxable as income by the honourable High court earlier and subsequently Tribunal will hold that it is not chargeable to tax as income on altogether different grounds. In such a situation, if the argument of the learned authorised representative is accepted, it will override or nullify the decision of the honourable High Court, which we are sure, are not vested with such power. The judicial propriety also demands that when a particular issue has been decided by the higher forum then, the lower forum should always refrain from deciding any aspect of that matter which can disturb the finding of the higher judicial forum. Therefore it will create a situation of confusion and as we understand, it is improper for us to consider any aspects of taxability of the sum, which was already decided by the Honourable High court. We do not have any other power also to make any

decision, which will override the issue as decided by the higher forum. Such overriding power is absent in the hands of the tribunal whose authority is to amend and rectify its order. However when such an order has been challenged before the higher forum and higher forum adjudicate it on the issue, our understanding is that, the tribunal is precluded from dealing with any of the matter relating to the aspect of that particular ground. It cannot be said that if one alternative has failed, the assessee can agitate the alternative contention about the taxability of the same income, which has been considered by the higher forum. Thus, according to us the above issue raised before us in ground number 1 (b) of the grounds of appeal has already reached finality and we are barred by the principle of finality and to an extent the doctrine of merger.

15. Further assessee has also not agitated about the non-taxability of the above excess on the ground of diversion by overriding title before the honourable High Court when the appeal was argued before it.

16. Further, no evidence has been shown by the assessee that while arguing the original appeal before the coordinate bench assessee made any submission with respect to ground number 1 (b) raised in its grounds of appeal. Though the coordinate bench while recalling the order and allowing the miscellaneous application of the assessee has held that the logbook did not show any remarks that assessee did not press that ground. However the order of recalling also did not mention that assessee advanced any argument on the ground. Naturally no arguments were mentioned before the coordinate bench when the matter originally heard and same was also not agitated before the honourable High Court, therefore, it is apparent that the matter has reached the finality.

17. Hence, we are precluded from dealing with any aspect about the taxability of the sum, which has been considered by the honourable High Court in para number 2 of its order. To reach at the above conclusion, we are guided by the decision of the honourable Delhi High Court in Principal Commissioner Of Income Tax Vs N R Portfolio Private Limited dated 25/02/2019 reported

at (2019) 103 taxmann.com 17 (Delhi). The facts of that case and the impugned case before us are identical.

18. In view of above facts, we dismiss ground number 1 (b) of the appeal of the assessee only on the issue of principles of finality and doctrine of merger.

19. Accordingly appeal of the assessee for assessment year 2001 – 02 is dismissed.

ITA No. 2896/Del/2007

Assessment Year 2002-03

20. Assessee has raised the following grounds of appeal in ITA No. 2896/Del/2007 for the Assessment Year 2002-03:-

"1. The learned Commissioner of Income-tax (Appeals) has erred in confirming the order of the Assessing Officer assessing the total income of the Appellant at Rs. 3,408,129/-

2. The learned Commissioner of Income-tax (Appeals) has erred both on facts and in law in not appreciating that the Appellant is a "mutual concern" and is solely operating for the benefit of a group of persons who contribute funds which are to be spent on advertisement and publicity for their benefit and therefore the surplus over expenditure is not liable to tax.

3. The learned Commissioner of Income-tax (Appeals) has erred both on facts and in law in not appreciating that receipts amounting to Rs. 78,429,361 which represent advertising contribution received from the franchisees and Yum! Restaurants India Private Limited ("YRIPL") - the Appellant's holding company are in fact 'diverted at source by overriding title', and therefore the surplus over expenditure is not liable to tax.

4. The learned Commissioner of Income tax (Appeals) has erred both on facts and in law in not contravening the following contentions of the Appellant and yet confirming the order of the Assessing Officer:

4.1 The contributions by YRIPL to the Appellant are not contradictory to the terms of the approval granted by the Secretariat of Industrial Assistance, Government of India and the tripartite Operating Agreement between the Appellant, YRIPL and the franchisees [Ground 1.3 of the Grounds of Appeal filed before the Commissioner of Income-tax (Appeals)].

4.2 The Appellant and YRIPL were, in fact, considered as two different entities by the franchisees [Ground 1.4 of the Grounds of Appeal filed before the Commissioner of Income tax (Appeals)].

4.3 The Appellant has not been used as a tool to evade tax on excess of income over expenditure' [Ground 1.5 of the Grounds of Appeal filed before the Commissioner of Income tax (Appeals)].

5. The learned Commissioner of Income tax (Appeals) has erred both on facts and in law in holding that the order of the Assessment Officer is not contrary to the principles of natural justice.

6. The learned Commissioner of Income-tax (Appeals) has erred both on facts and in law in upholding the levy of interest under section 234B of the Income Tax Act, 1961 by the Assessing Officer."

21. Ground no 1 is general in nature and hence dismissed.

22. With respect to ground no. 2, In assessment year 2002 – 03 the assessee has made an application for admission of the additional evidences as per application dated 07/04/2010. It is submitted by the learned authorised representative that the above additional documentary evidences are vital for deciding the appeal of the assessee. The additional evidences are as under:-

a. simple copy of franchisee agreement entered into by assessee with specialty restaurants private limited as annexure 1 and
b. advertising material published in various newspapers as per annexure -2

location of additional evidences also supported by an affidavit.

23. The assessee submitted that the additional material in the facts of the instant case was to the root of the case and in the direct and relevant bearing on the basic issue arising from the decision of the coordinate bench. Therefore such additional evidences play pivotal role and the same is essential for proper consideration and adjudication of the controversy involved. It is further stated that the assessment year 2001 – 02 the appellant's plea of being a mutual concern was rejected by the lower authorities on the premises that there is no concept of a mutual concern applicable to the income tax act. The lower authorities are simply applied the said decision and it is rational to the subsequent years which under consideration before the coordinate bench. For assessment year 2001 – 02

the coordinate bench rejected the appellant's plea of mutual concern but for an altogether different reason. The reasons stated by the coordinate bench was that as the two contributories namely holding company and Pepsi foods Ltd were not beneficiary and there was lack of absolute identity between contributories and the beneficiaries. The learned authorised representative stated in the application that observation of the coordinate bench were not borne out of any records nor was this e basis of rejection of the appellant's plea by the lower authorities. Moreover the assessee was not afforded an opportunity to clarify the position with regard to these observations. Further since the facts and circumstances of the case for this year under consideration by the audited bench remains the same, these additional facts and evidences which were overlooked by the coordinate bench while passing the appeal order for assessment year 2001 – 02 would be critical to the outcome of the matter. He submitted that there was no opportunity to file the additional evidences before any of the authorities below, since the basis of the rejection of the appellant's plea was for all together different reasons. He thus submitted that it is necessary to adjudicate the issue of mutuality to admit the additional evidences.

24. Adverting to the additional evidences, The assessee further submitted that the holding company is in the business of developing and managing restaurant franchisee in India. For this purpose it has obtained a license from Kentucky fried chicken international Holdings, incorporation. and Pizza Hut International LLC. The site has further been sublicensed by the holding company to its respective franchisee in accordance with the franchisee agreement. As per the franchisee agreements, each franchisee required to pay a certain percentage of their sales to holding company as royalty for use of the rights granted to them under the agreement. In support of this contention the learned authorised representative drew the attention of the coordinate bench towards the franchisee agreement. Further it was stated that when the appellant would advertise on behalf of the franchisees, the same would lead to increase sales for the franchisees. Increase sales for the franchisees would in turn lead to higher royalty

income for the holding company. Thus holding company has its interest embedded in the retiring and sales promotion activities carried out by the appellant. He further submitted that the interest of the holding company and the benefit accruing to it from the activities of the assessee is far more than that accruing to the franchisees. It was further stated that in the case of Pepsi foods Ltd under a marketing arrangement the franchisees of the holding company were exclusively selling the beverages made by Pepsi foods Ltd at the outlets and in some of the advertisements issued on behalf of the franchisees, the products of Pepsi foods Ltd were prominently displayed. With the increase in sales at the various outlets of Pizza Hut, on account of the advertisement and marketing activities of the assessee, there was a corresponding increase in the sales of Pepsi products. Thus even Pepsi food Ltd has also benefited out of the contribution made by it to the appellant. He further referred to the sum of the advertisement material published in the newspapers in support of the above contention. He further stated that the above material conclusively establishes the benefit flowing to Pepsi foods Ltd from the advertisement and marketing activities of the assessee. Thus he submitted that the holding company as well as the Pepsi foods Ltd was direct beneficiary of its activities, but in a different manner owing to the different business functions as compared to the franchisees. He further submitted that what is essential for the doctrines of which are key to apply is absolute identity between the contributors and the beneficiaries. It is not at all essential that each contributory should be a beneficiary in the same manner or even the same extent as the other contributors. He therefore submitted that additional evidences furnished conclusively proves that both the holding company and Pepsi foods Ltd also are covered under the mutuality concept.

25. The learned departmental representative vehemently objected to the submission of the additional evidences and submitted that assessee has every opportunity before the lower authorities to submit those additional evidences; however, the assessee did not care to submit them. He submitted that neither before the learned CIT – A, the assessing officer

those evidences were laid. Thus, the assessee should now be precluded from submitting the above evidence afresh. He submitted that the transactions with the holding company were discussed by the assessee before the assessing officer therefore it cannot be said that assessee did not have any opportunity of submitting them. He extensively referred to the order of the learned assessing officer. He further referred to the order of the learned CIT – A wherein in para number 7 wherein the above issue is also discussed.

26. With respect to the additional evidences submitted by the assessee the learned departmental representative also submitted that even these additional evidences admitted by the assessee does not show that there is a mutuality principal applicable to the facts of the case.

27. We have carefully considered the rival contention and perused the application of the assessee under rule 29 of the income tax appellate tribunal rules, which deal with the additional evidences. However the tribunal is empowered to admit the additional evidences if other substantial cause justifies the admission of those evidences. In the present case, we find that to determine the correct facts of the whole case if the assessee, could not produce the fact that its holding company and the Pepsi foods Ltd are also the contributors as well as beneficiaries of the activities of the assessee, we do not find any reason to not to admit those additional evidences. Therefore in the interest of the justice, we admit those additional evidences.

28. Now we come to the issue whether the principles of mutuality apply to the income of contribution from franchisee is tainted with the above concept and therefore not taxable in the hands of the assessee. It is interesting to note paragraph number 8 of the order of the honourable High Court in case of the assessee for assessment year 2001 – 02 wherein the arguments of the assessee about the mutuality principles, were rejected. The honourable High Court held as under:-

> "8. Having heard the learned counsel Mr C.S. Aggarwal, Sr. Advocate for the assessee-company and

Ms Prem Lata Bansal for the Revenue we are of the view that the judgment deserves to be sustained. The principle of mutuality as enunciated by the Courts in various cases is applicable to a situation where the income of the mutual concern is the contributions received from its contributors. The expenses incurred by the mutual concerns are incurred from such contributions and hence on the principle that no man can do business with himself, the excess of income over expenditure is not amenable to tax. However, in the present case the authorities below have returned a finding of fact that the fund as contributors such as Pepsi Food Ltd which do not benefit from the APM Activities. Moreover, the principle of mutuality is applicable to those entities whose activities are not tinged with commercial purpose. As a matter of fact in the instant case the parent company i.e., YRIPL, which has also contributed to the brand fund, is under the agreement under no obligation to do so. The contributions of YRIPL are at its own discretion. Thus, looking at the facts obtaining in the present case, it is quite clear that the principle of mutuality would not be applicable to the instant case. This was the only stand taken by the appellant before the authorities below. In these circumstances, we are of the opinion that the impugned judgment of the Tribunal does not call for interference. The authorities below have returned pure findings of fact, which are not perverse to our minds. No substantial question of law arises for our consideration. Resultantly, the appeal is dismissed."

29. Coming to the additional evidences filed by the assessee to examine whether the change the facts in the present case or not, we 1st referred to the agreement dated 25th day of December, 1999 titled as license agreement which is between the icon restaurants India private limited and the franchisee. It is in fact a franchisee agreement is submitted by the assessee in the application for additional evidence admission. The benefit that accrues to the holding company is stated to be increased sales of the franchisees, which results into higher royalty payment to the holding company by those franchisees. Therefore it is apparent that the contribution made by the holding company to the appellant is tinged with commercial considerations. Similarly the advertisement material showed by the assessee wherein the Pepsi is also advertised. The argument of the assessee is that such advertisement made by the assessee will also improve the sales of Pepsi foods Ltd. Therefore, for the similar reasons as given by us with respect to the holding company of the assessee, the contribution of the Pepsi foods Ltd is also tinged with commercial considerations. The honourable High Court has held that that principle of mutuality is applicable to those entities whose activities are not tinged with commercial purposes. Therefore according to us, the additional evidences submitted by the assessee do not make any impact on the income of the assessee. Further as per the operational agreement as discussed by us there is no obligation on the holding company to contribute for the advertisement expenditure. Even otherwise it is at the sole discretion of the holding company. Therefore, we do not find any reason to disturb the finding of the coordinate bench, which has been approved by the honourable High Court in assessee's own case for assessment year 2001 – 02. Accordingly ground number 2 of the appeal for assessment year 2002 – 03 is dismissed.

30. Now we come to ground number 3 of the appeal where the assessee has contended that receipt of INR 78429361/– which represent advertising contribution received from the franchisees and the holding company are in fact diverted at source by overriding title and therefore the surplus over the expenditure is not liable to tax. Admittedly in the present case we are duty

bound to decide the above issue. The contention of the assessee is that there is an overriding obligation on the assessee to spend contribution for advertisement marketing and promotion activities, the contributions are diverted at source by overriding title and therefore there is no question of application or non application of an amount which is not in the nature of income in the hands of the appellant. There is no dispute on the contention raised by the assessee that every receipt is not an income. The contention of the assessee is that the contribution that is received by assessee is for the predefined purposes for incurring them on advertisement marketing and promotion activities. There is an obligation imposed under the facts and circumstances of the present case and the appellant is never in receipt of any income since the amounts that are received as the contribution are diverted at source by an overriding title in view of this enforced obligation. The assessee has relied upon the decision of the honourable Supreme Court in case of CIT vs Bijlii cotton Mills 116 ITR 60. We have carefully considered the above decision and find that the assessee collected in that particular case the drama charges compulsorily at the time of every sale made to its construction of which was credited to a separate account to be subsequently incurred by it on charitable activities. On that basis the honourable Supreme Court held that, as the assessee was not under a compulsory obligation to spend that amount received on charitable activities it cannot be regarded as income in its hands. On careful consideration of the above decision it is apparent that the assessee in that particular case was carrying on the business of manufacturing and selling of yarn and it used to realize certain amounts on account of Charity from its customers on sale of yarn and bales of cotton this amounts were collected through bills and same were shown in a separate column. Assessee did not credit the amount of the mother so realized by it in its trading account but it maintained the separate account known as the mother account in which realization on account of Charity were credited and payments made outward debited from that account time to time. Thus, it was held that those amounts were held in trust by the assessee. The honourable High Court in that particular case

held that the assessee never treated the above sum as a trading receipt. It was also found that it was customary levy prevailing in certain parts of the country and it was not paid as a price for the commodity is sold to the customers. In that particular case the receipt from the inception were impressed with the obligation to spend the same only on charitable objects. The honourable Supreme Court further considered that what is the true nature or character of these receipts whether they constitute a part of the prize received by the assessee while affecting the sale of yarn or cotton and therefore trading receipts of the assessee and reach a conclusion that same was not trading receipts. In the present case in the account of the assessee the contributions were received were shown as income in the profit and loss account (income and expenditure account) and the expenditure were different for administrative and other expenditure and also the advertisement expenditure were incurred out of it. As per the significant accounting policies being part of the accounts the assessee also has a policy that advertising contributions from franchisees and the parent company is accrued as income in accordance with the terms of the agreements entered into with them. Further in the background to schedule eight it is mentioned that franchisees where under the franchisee will pay a certain percentage of the revenue is advertising contribution to the company. Further the holding company may its sole discretion paid to the company such amount, as it may deem appropriate to support the activities of the company. Therefore the assessee has treated the above sum as a trading receipt and is also tainted with commerciality. Further on careful reading of the operating agreement, it is merely an attempt to separately form an advertisement marketing and publicity company for the products or the licenses of the holding company by receiving the compulsory contributions at agreed percentage from the franchisee. The contribution of the holding company is always indeterminate and without obligation. Therefore, as the contribution received by the assessee are treated by the assessee itself as a trading receipt, the ratio laid down by the honourable Supreme Court, due to the peculiar facts of the case before us does not apply.

31. The assessee has also relied upon the decision of the honourable Supreme Court in CIT vs Sitaldas Tirathdas [41 ITR 367] where the honourable Supreme Court held that the true test is whether the amount short to be deducted in truth never reached to the assessee as his income. However in the present case as we already stated the assessee himself recognizes it as its income. In that particular case the assessee was under a decree required to pay such sum is maintenance to his wife and children is substantial evidence. The honourable Supreme Court in that particular case held that there is a difference between an amount, which a person is obliged to apply out of his income, and an amount, which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible, but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. In the present case it is after the receipt of the income it is the obligation of the assessee to spend it for the advertisement and marketing activities of its holding company and its franchisees. Thus the income of the assessee after it is received is applied to discharge its obligation. Therefore the impugned decision cited by the learned authorised representative in fact goes against it.

32. The learned authorised representative also referred to the decision of the Pune bench in 148 ITD 372 wherein it is held that where a cooperative sugar factory deducted certain amount from bills payable to members and nonmembers towards supply of sugarcane on account of area development fund, in view of the fact that the said amount was impressed with an obligation to spend same for specified social purposes approved in annual general meeting, it could not be brought to tax in the assessee's hands as income. In that particular case the director of sugar, government of Maharashtra of the supervising authority on the collection and use of area development fund. Assessee also transferred the above sum a specific had of area development fund. The above fund can also be utilized after the approval of the members of the society in the annual general meeting. In

the present case the assessee has credited the income of advertisement marketing promotion activities as the income of the assessee in its income and expenditure account and further the spend out of the same is also not at the discretion of the franchisee but at the discretion of the holding company. The advertisement marketing promotion spend is also under the direction of the holding company. Therefore the facts of the case before us are distinguishable.

33. The learned authorised representative also placed heavy reliance on the decision of the coordinate bench in ITA number 4341/MUM/2002 for assessment year 1997 – 98 dated 12th day of may 2006. We have carefully considered that decision. The main issue which was to be adjudicated in that appeal was whether on the facts of that particular case marketing contribution of INR 4 80876/– made by the assessee is required to be treated as royalty under article 12 of the India Netherlands double taxation avoidance agreement and can be taxed as such. The coordinate bench held that that the receipt is not a consideration for use of any of the intellectual property of the assessee and further it cannot be taxed as royalty fees for technical services since the company does not have the permanent establishment in India there is no question of taxing it under the article 7 as business profits either. However the learned authorised representative stated that the marketing contribution is with respect to the percentage of gross room revenue and in the case of the assessee also the contribution is as a percentage of sales. However, the above argument of the learned authorised representative deserves to be rejected for the reason that here the issue is whether the income received by the assessee is diverted by overriding title or not. Such was not the issue before the coordinate bench in the decision cited. Hence, reliance placed on the above decision of the tribunal does not help the case of the assessee.

34. In view of the above facts, judicial precedent cited before us by the learned authorised representative does not support the case of the assessee in view of the nature of the receipt as well as the purpose for which the assessee, appellant company was formed. The operating agreement submitted before

us also support the above view. The board of directors of the appellant company is also decided by the holding company. The franchisees were also required to report their sales along with the contribution there are also terms and conditions attached to the contribution, which is coterminous with the franchisee agreement entered into with the holding company. On the conjoint reading of the franchisee agreement and the operating agreement it is apparent that the holding company of the appellant has created a specific entity for the purposes of performing the advertisement promotion and marketing activities of its franchisee by collecting the funds from the franchisee. There is no obligation on the assessee also to spend any definite amount every year on the advertisement marketing and promotion activities. Further, neither the assessee nor the holding company were in any manner applies to fund the deficit if any on account of AMP activities. Therefore, according to us, the assessee has received that income for the purposes of the business of the assessee and out of the above income it makes an advertisement of the licensee is of the holding company for increasing the overall business of the holding company and to gain the higher royalty from franchisees to the holding company.

35. Further, assessee is placed before us the copy of the memorandum and articles of Association of the appellant. The assessee company was formed on 18/06/1999. The certificate of incorporation furnished shows that Assessee Company was a company having limited liability of the members. The main object of the assessee company was as under:-

> "to carry on the business as buyers, sellers, traders, importers, exporters, distributors, agents, brokers, factors, stockiest, domestic traders, international traders, dealers and consultants of all types of merchandise, materials, commodities, goods and services of restaurant business and allied activities in India and abroad and to carry on any other business that is customarily, usually and conveniently carried on their with and to provide development advisory services to the restaurant industry."

36. The assessee also submitted that the above object clause of the company was altered as per special resolution passed in the extraordinary general meeting dated 15/07/2003 and certificate of registration confirming the alteration dated 21/08/2003 issued by the registrar of companies. The altered object reads as under:-

> "to carry out advertising, media and promotion for KFC, Pizza Hut and other brands currently owned or required in future by Yum! Restaurants (India) Private Ltd and/or its parent/associate companies, on a non-profit making principle, funded by marketing contributions received from the licensees of Yum! Restaurants (India) Private Ltd and/or other sources as the case may be."

37. On careful appreciation of the MOA of the assessee company , it is apparent that till 15/7/2003 it was a normal company carrying on business. With effect from the main object of MAO was changed. Thereafter The main object of the assessee is to carry out advertising, media and promotion for Kentucky filed kitchen, Pizza Hut and other brands owned or required by the holding company funded by the marketing contributions received from the licensees of its holding company and/or other sources. Therefore main object is stated in the memorandum of Association of the assessee also shows that there is no obligation at the time of receipt of the income. Further merely mentioning that it will act on the non-profit basis does not make the income received by the assessee has received diverted by overriding title. However, we do not find any clause in the memorandum of Association or articles of Association of the above company, which created any obligation on the income of the assessee company.

38. The assessee has also relied heavily on the approval granted to the assessee by the Sec for industrial assistance, foreign collaboration –II section dated 5th October 1998. Such approval is placed at page number 1 – 4 of the paper book. The assessee is relying heavily on 1 of the conditions mentioned in para number 3 that the proposed new company would be a

non-profit enterprise is governed by the principles of mutuality. As the issue of the mutuality has already been decided by the honourable High Court against the assessee according to us, so far as the provisions of the income tax act are concerned, the income of the assessee is not covered by the principles of mutuality. Further the application was made to setup a wholly on step-down subsidiary to manage retail restaurant business for advertising and promotion at local store level, regional level and national level. Therefore it is apparent that the above approval was granted to carry on the business. Further according to the condition number 3 the franchisees and the holding company were both to make contribution of the fixed percentage of the respective revenues to the proposed new company on regular basis. On careful reading of the operating agreement and as observed by the honourable High Court, the holding company was not obliged to contribute on regular basis or as a fixed percentage of its turnover. Further the approval also laid down the condition that separate funds may be maintained for KFC and Pizza Hut brands. No such separate funds were shown to us or could be located in the annual accounts maintained by the assessee. Thus, according to the above facts there is no implication of the above approval given by the Ministry of industry, Department of industrial policy and promotion to the appellant company.

39. Doctrine of 'diversion of income by overriding title' mainly signifies that an income received by an assessee is actually belongs to somebody else with an obligation to divert the income in a particular manner before it accrues to assessee. On the contrary if income passes through the assessee to an ultimate purpose, the case is of application of income in a particular manner. Even though he may enter into a legal obligation, as in the present case by Operating agreement, to apply it in a certain way, still it remains the income of the assessee. What is necessary to be considered is the true nature of the transaction and whether in fact the transaction has resulted in profit or loss to the assessee. The True nature of transaction in the present case is of a marketing arrangement by the holding company by forming Assessee Company where the licensees of the holding company

shall contribute to the assessee company for a certain business activity. More so the Holding company is not a contributor but gives a direction for spending the fund. Fund is received from the franchisee owners but it is used as per directions of holding company Further treatment of income merely in a particular manner may not be determinative , however the business functions, various agreements, approvals, conditions attached in the agreements clearly show that it is a business arrangement. The issue whether an income is 'diverted by overriding title' or 'applied' cannot be answered with a straitjacket formula and each case has to be decided based on its own merits looking at the specific arrangements made by the assessee. Each and every fact needs to be carefully examined before giving it colour of diversion of income by overriding title at source. The utmost significant factor in deciding a case on such an issue is to see, as formulated in Sitaldas Tirathdas (supra), whether the income had at all reached the assessee or whether the same was diverted at the source itself. The fact that the assessee was legally or statutorily obliged to part with such an income by itself cannot be a criterion to decide this question. The nature of obligation is also significant factor to conclude. In the present case, to reach at the conclusion that income of the assessee is not diverted by overriding title, we have relied on the operating agreement, the franchisee agreement, the memorandum of Association, the annual accounts of the assessee as well as approval granted by the SIA. Accordingly we dismiss ground number 3 and 4 of the appeal of the assessee.

40. Ground number 5 is with respect to violation of the principles of natural justice. No arguments were advanced before us and therefore we dismiss the same.

41. Ground number 6 is with respect to charging of interest u/s 234B of the income tax act. According to us the same is mandatory, even otherwise, it is consequential in nature, no arguments were advanced on the same, and hence, same is dismissed.

42. Accordingly appeal of the assessee for assessment year 2002 – 03 is dismissed.

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43. The assessee has raised the following grounds of appeal in ITA No. 938/Del/2007 for the Assessment Year 2003-04:-

"1. That the Learned CIT(A) has erred both on facts and in law in upholding the assessment on the Appellant and determining the total taxable income at Rs. 55,3ft, 150/- and consequently raising a demand of tax and interest of Rs.24,14,386/-.

1.1 That the Learned CIT(A) has erred both on facts and in law in not appreciating that the Appellant is a 'mutual concern' not carrying the business and operating on a non-profit basis and is therefore not liable to tax and hence the order of assessment determining taxable income of Rs. 55,30,150/- is liable to be quashed.

1.2 That the learned CIT(A) has erred both on facts and in law in upholding addition of Rs.50,55,375/- by holding th Accordingly is under at the receipts amounting to Rs.8,97,62,468/- which represent advertising contribution/ received from the franchisees and the Appellant's holding company were not 'diverted at source by overriding title'.

1.3 That the Learned CIT(A) has erred both on facts and in law in confirming that contributions by Yum! Restaurants India private Limited ("YRIPL") to the Appellant were contradictory to the terms of the approval granted by the Secretariat of Industrial Assistance , Government of India and the tripartite Operating Agreement between the Appellant, YRIPL and the franchisees.

1.4 That the Learned CIT(A) has erred both on facts and in law in upholding that the 'Appellant has been used as a tool to evade tax on excess of income over expenditure ',and thereby making a disallowance of Rs.50,55,375/- in the hands of the Appellant.

2. The Learned CIT (A) has erred both on facts and in law in not adjudicating the grievance of the appellant that the assessment order has been passed contrary to the principal of natural justice.

2.1 That the ld CIT(A) has erred in law in not interfering with the unilateral action of the A.O. in confronting the Appellant with the material gathered by him during the course of assessment proceeding by the issue of notice under section 133(6) of the Act to the franchisees of YRIPL and used as a basis of the assessment.

3. That the Learned CIT(A) has erred both on facts and in law in confirming the levying of the interest of Rs.4,07,34 - under section 234B

of the Act, even though the Appellant has clamed exemption from tax in the return of income.

4. *That the Learned CIT(A) has erred both on facts and in law in confirming the levying of the interest of Rs. 1,18,961 /'- under section 234D of the Act. Without prejudice, the interest is computed wrongly resulting in excess levy on the Appellant.*

5. *That the Learned CIT(A) has erred both on facts and in law in not interfering with the action of the A.O. in initiating penalty proceeding under section 27 IB of the Act.*

6. *The appellant craves leave to add, supplement, amend, vary, withdraw or otherwise modify the grounds mentioned hereinabove at or before the time of hearing. The Appellant prays for appropriate relief based on the said grounds of appeal and the facts and circumstances of the case."*

44. Ground number 1 of the appeal is general in nature and therefore same is dismissed.

45. Ground number 1.1 of the appeal of the assessee against the action of the learned CIT – A confirming the order of the learned AO holding that assessee is not a mutual concern, it is carrying on the business, and therefore the income is liable to tax. Both the parties submitted that the facts of the case are identical to the issue involved in the appeal of the assessee for assessment year 2001 – 02 and 2002 – 03.

46. Assessee also submitted the additional evidences in identical manner for this year also and stated the similar reasons as stated in appeal of the assessee for assessment year 2002 – 03. The argument of the learned departmental representative also remained the same as in that year. Therefore, for the similar reasons we admit the additional evidences raised by the assessee.

47. As the issue has already been decided by us in the appeal of the assessee for assessment year 2001 – 02 and 2002 – 03 holding that assessee is not a mutual concern and the income of the assessee is not tainted with mutuality and therefore chargeable to tax as a business income. Further similar reasons given therein we dismiss ground number 1.1 of the appeal of the assessee and upon the finding of the learned CIT – A.

48. Ground number 1.2 – 1.4 is of the appeal is with respect to the addition of INR 5 055375/– by holding that the receipt of INR 8 9762468/– which represent advertising contribution received from the franchisees and the appellant's holding company were not diverted at source by overriding title. To substantiate the above ground the assessee advance the similar argument is advanced for assessment year 2001 – 02 and 2002 – 03. The learned departmental representative also advanced the same argument is advanced by him in those appeals.

49. We have already decided the above issue in appeal of the assessee for assessment year 2002 – 03 wherein we have held that there is no infirmity in the order of the learned CIT – A in confirming the action of the learned assessing officer holding that that appellant company's income are not diverted at source by overriding title. For the similar reasons we also dismiss ground number 1.2, 1.3 and 1.4 of the appeal of the assessee .

50. Ground number 2 of the appeal is with respect to grievance against the order of the assessee officer for not following the principles of natural justice and ground number 2.1 of the appeal is with respect to the material gathered by the assessing officer u/s 133 (6) of the income tax act. No specific arguments were advanced by the parties and no instances were shown to us which were related the principles of natural justice during the course of assessment proceedings and appellate proceedings before the lower authorities. In view of this ground number 2 of the appeal of the assessee is dismissed.

51. Ground number 3 is with respect to the levy of interest of rupees for 07340/– u/s 234B of the income tax act, which is consequential in nature, and therefore same is dismissed.

52. Ground number 4 of the appeal is with respect to chargeability of interest u/s 234D of the income tax act, which is consequential in nature, no arguments were advanced by the parties, therefore, same is dismissed.

53. Ground number 5 of the appeal is against the initiation of the penalty proceedings u/s 271B of the income tax act. Assessee cannot be said to be aggrieved by the mere initiation of the penalty proceedings as the assessee

will get definitely an opportunity to reply to the show cause notice and thereafter the learned assessing officer will pass a speaking order. Thus ground number 5 of the appeal is dismissed.

54. No arguments were advanced with respect to ground number 6 of the appeal and therefore same is dismissed.

55. Accordingly ITA number 98/Del/2007 for assessment year 2003 – 04 preferred by the assessee is dismissed.

ITA No. 4078/Del/2015

Assessment Year 2006-07

56. The assessee has raised the following grounds of appeal in ITA No. 4078/Del/2015 for the Assessment Year 2006-07:-

"1. That on the facts and in law, the impugned order passed by the Ld. Commissioner of Income Tax (Appeals) -17 ('Ld. CIT(A)') confirming the order of the Assessing Officer ('AO7) and assessing the total income of the Appellant at Rs. 2,58,288 as against NIL returned income, is bad in law.

Principle of Mutuality

2. That on the facts and in law, the Ld. CIT(A) has grossly erred in holding that the Appellant cannot be classified as a mutual concern and consequently its income would not be exempt from tax.

3. That on the facts and in law, the Ld. CIT(A) has failed to appreciate that there being complete identity between the contributories and the beneficiaries, the 'principle of mutuality' was applicable and the receipts of the Appellant could not partake the character of taxable income.

4. That on the facts and in law, the Ld. CIT(A) erred in concluding that the 'principle of mutuality' could not be applied owing to the fact that YRIPL and Pepsi Foods Ltd. do not benefit from the AMP activities rendered by the Appellant, which finding is contrary to the facts on record.

4.1 That on the facts and in law, the Ld. CIT(A) has grossly erred in not recognising that in the current assessment year the increase in the sales and royalty income of YRIPL bore a direct nexus to the AMP activities carried on by the Appellant, and as such the benefit to YRIPL was clearly established.

4.2 That on the facts and in law, the Ld. CIT(A) has grossly erred in not appreciating that Pepsi Foods Ltd. also benefited from the exclusive right to sell its products granted as per the terms and conditions of the

'Pepsi Beverage Supply Agreement' and as such all conditions relating to the mutuality concept stood satisfied.

Every receipt is not income

5. *That, without prejudice, on the facts and in law, the Ld. CIT(A) erred in not appreciating that every receipt in the hands of an assessee does not partake the character of income.*

Diversion of Income by Overriding Title

6. *That the on the facts and in law, Ld. CIT(A) failed to adjudicate upon ground/issue relating to diversion of income by overriding title.*

7. *Without prejudice to the above, on the facts and in law, the Ld. CIT(A) failed to appreciate that even assuming that the said AMP contribution partakes the character of income, it is diverted for a specific purpose (AMP activities) by virtue of a pre-existing obligation attached to the source of such contribution itself and hence the contribution was not exigible to tax.*

Other Grounds

8. *That the Ld. CIT(A) has erred in following the order of the Hon'ble Income Tax Appellate Tribunal in Appellant's own case for AY 2001-02 despite appreciating that there has been change in facts in the current year.*

9. *That the Ld. CIT(A) has erred in not appreciating the business model of the Appellant and the terms and conditions of the tripartite agreement.*

10. *That the Ld. CIT(A) has erred in disallowing the provision for doubtful debts amounting to Rs. 2,58,288.*

11. *That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in upholding the interest levied by the AO under Section 234B of the Act."*

57. Ground number 1 of the appeal is general in nature and therefore same is dismissed.

58. Ground number 2, 3 and 4 are with respect to the argument of the assessee that the income of the assessee is tainted with mutuality and therefore consequently the income would not be chargeable to tax. Both the parties submitted that this issue is identical to the issue decided in the appeal of the assessee for assessment year 2001 – 02 and 2002 – 03, they also submitted that their arguments are also similar.

59. We have already decided above issue against the assessee following the decision of the honourable Delhi High Court in case of the assessee for assessment year 2001 – 02, therefore ground number 2 – 4 of the appeal are

dismissed for the similar reasons and order of the lower authorities are confirmed.

60. Ground number 5 and ground number 6-7 are with respect to the argument of the assessee that every receipt is not an income and the income of the assessee is diverted by overriding title. Both the parties submitted that issue is identical to the ground of appeal of the assessee for assessment year 2002 – 03. We have already decided this ground in appeal of the assessee for assessment year 2002 – 03 holding that the income of the assessee is not diverted by overriding title but it is merely an application of the income of the assessee. For the similar reasons we dismiss ground number 5 – 7 of the appeal of the assessee, accordingly, we confirm the order of the lower authorities.

61. Ground number 8 of the assessee is with respect to the action of the learned CIT – A in following the decision of the coordinate bench in assessee's own case for assessment year 2001/02 despite change in the facts in the current year. Ground number 9 is with respect to the action of the learned CIT – A not appreciating the business model of the appellant and the terms and conditions of the tripartite agreement. We have already dealt with this issue in deciding the principal issues involved in the appeal of the assessee for assessment year 2002 – 03 wherein we have held that the assessee is not a mutual concern and the income of the assessee is not diverted by the overriding title. These grounds of supporting the grounds of appeal of the assessee for this year on the above issue. As we already decided the ground number 2 – 7 on the above issue is, ground number 8 and 9 accordingly are dismissed.

62. Ground number 10 is with respect to the disallowance of the provision for doubtful debts amounting to Rs. 258288/–. No arguments were advanced on this issue before us and therefore same is dismissed.

63. Ground number 11 is with respect to the charging of interest u/s 234B of the income tax act which is consequential in nature and therefore same is dismissed.

64. Accordingly the appeal of the assessee in ITA number 4078/DEL/2015 for assessment year 2006 – 07 is dismissed.

ITA No. 5735/Del/2015 (AO)

&

ITA No 5894/Del/2015

Assessment Year 2008-09 (Assessee)

65. These are the cross appeals filed by the parties against the order of the Commissioner of income tax (appeals) – 22, New Delhi dated 14/8/2015. The assessee filed its return of income showing taxable income of rupees nil on 30/9/2008. The assessment u/s 143 (3) of the income tax act was passed on 22/12/2010 where the income of the assessee was determined at INR 5 2403120/–. The addition of INR 3 6151479/– was made by the learned assessing officer on account of the unverified sundry creditors and further addition of INR 1 6251645/– was made on account of unverified amount payable to holding company. Further sum of INR 3 9956238/– was added on account of Income not booked by the assessee rejecting the contention of the assessee that it is a mutual concern as well as alternatively the income of the assessee has diverted by overriding title. The assessee preferred an appeal before the learned CIT – A confirmed the action of the learned assessing officer with respect to assessment of the income of the assessee holding that it is not a mutual concern and income of the assessee is not diverted by overriding title. However the learned CIT – A deleted the other additions and against which the learned assessing officer has preferred an appeal stating that the learned CIT – A has erred in deleting an addition of INR 3 6151479/– on account of unverified sundry creditors.

66. The Ld AO has raised the following grounds of appeal in ITA No. 5735/Del/2015 for the Assessment Year 2008-09:-

> "*1. On the facts and in the circumstances of the case and in law the learned CIT(A) has erred in deleting an addition of Rs. 36151479/- made by AO on account of unverified S. Creditors.*"

67. Adverting to the ground of appeal the learned departmental representative vehemently supported the order of the learned assessing officer whereas the learned authorised representative relied upon the order of the learned CIT – A.

68. We have carefully considered the rival contentions and perused the orders of the lower authorities. The learned CIT noted that the assessee could not furnish the confirmation from the above parties amounting to INR 3 6151479/– at the assessment stage however the assessee has submitted party wise details along with the permanent account number and the nature of transactions. At the appellant state the appellant furnished additional evidences mentioning the details of payment of such and the creditors in subsequent years and certificate from the bank confirm clearances of such act. In the remand report the AO stated that the all confirmation for not filed stating that some of the confirmation or find that the remand state but not all and the appellant could not produce the parties that the remand stage. Further in some of the confirmation filed there is some difference in the closing balances. Before the learned CIT – A the assessee explained the differences which is mainly due to the different accounting principles covering income and expenses by the appellant and the creditors and further the learned CIT – A has admitted the additional evidences and also obtained the remand report. In fact 10/19 creditors confirmed balance though there were some differences in the closing balances in view of cases due to different method of revenue recognition. Further the assessee also explained the differences in closing balance and also submitted the certificate of the creditors with respect to payment made to them in subsequent years along with the details of the banks how the payments have been discharged. The learned departmental representative also could not show any infirmity in the order of the learned CIT – A. In view of this we do not find any infirmity in the order of the learned CIT – A in deleting the above addition. Accordingly appeal of the learned assessing officer is dismissed.

69. Now we come to the appeal of the assessee where the assessee has raised the following grounds of appeal in ITA No. 5894/Del/2015 for the Assessment Year 2008-09:-

"General Ground

1. That on the facts and in law, the impugned order passed by the Ld. Commissioner of Income Tax (Appeals) -22 ('Ld. CIT(A)') confirming the order of the Assessing Officer ('AO') in not accepting the returned income as Nil, is bad in law.

2. That the Ld. CIT(A) erred in holding that the activities of the assessee are an adventure in the nature of trade.

Principle of Mutuality

3. That on the facts and in law, the Ld. CIT(A) has grossly erred in holding that the Appellant cannot be classified as a mutual concern and consequently its income would not be exempt from tax.

4. That on the facts and in law, the Ld. CIT(A) has failed to appreciate that there being complete identity between the contributories and the beneficiaries, the 'principle of mutuality' was applicable and the receipts of the Appellant could not partake the character of income.

5. That on the facts and in law, the Ld. CIT(A) erred in concluding that the 'principle of mutuality' could not be applied owing to the fact that YRIPL and Pepsi Foods Ltd. do not benefit from the AMP activities rendered by the Appellant, which finding is contrary to the facts on record.

5.1 That on the facts and in law, the Ld. CIT(A) has grossly erred in not recognising that in the current assessment year the increase in the sales and royalty income of YRIPL and income of Pepsi Foods bore a direct nexus to the AMP activities carried on by the Appellant, and as such the benefit to YRIPL and Pepsi Foods was clearly established.

5.2 That on the facts and in law, the Ld. CIT(A) has grossly erred in not appreciating that Pepsi Foods Ltd. also benefited from the exclusive right to sell its products granted as per the terms and conditions of the 'Pepsi Beverage Supply Agreement' and as such all conditions relating to the mutuality concept stood satisfied.

5.3 That the Ld. CIT(A) erred in alleging that the additional contribution by YRIPL which was discretionary led to the assumption that the appellant was not functioning as a mutual concern.

6. That the Ld. CIT(A) erred in law and on facts whilst observing that the appellant was working as an advertising contractor and was allegedly rendering services for which it was receiving money with a profit element in it.

7. The on the facts and circumstances of the case, Ld. CIT(A) erred in holding that the assessee is not functioning as a mutual concern by not

appreciating the law laid down by the Apex Court in the case of CIT v Bankipur Club Ltd, 226 ITR 97.

Every receipt is not income

8. *That, without prejudice, on the facts and in law, the Ld. CIT(A) erred in not appreciating that every receipt in the hands of an appellant does not partake the character of income.*

Diversion of Income by Overriding Title

9. *That the on the facts and in law, Ld. CIT(A) failed to adjudicate upon ground/issue relating to diversion of income by overriding title.*

10. *That the Ld. CIT(A) failed to appreciate that even assuming that the said AMP contribution partakes the character of income, it is diverted for a specific purpose (AMP activities) by virtue of a pre-existing obligation attached to the source of such contribution itself and hence the contribution was not exigible to tax.*

Other Grounds

11. *That the Ld. CIT(A) has erred in following the order of the Hon'ble Income Tax Appellate Tribunal in Appellant's own case for AY 2001-02 despite the fact that the facts of the current Assessment Year were distinguishable from Assessment Year 2001-02.*

12. *The Ld. CIT(A) erred in not appreciating that the appellant did not have any commercial element in the activities carried out by it.*

13. *That the Ld. CIT(A) erred in not appreciating the fact that the sole purpose of the appellant coming into existence was to work as a non-profit enterprise, working for the mutual benefit of its mutual concerns/members which is further corroborated by the approval obtained by the appellant from the Ministry of Industry, Department of Industrial Policy and Promotion.*

14. *That the Ld. CIT(A) has erred in not appreciating the business model of the Appellant and the terms and conditions of the tripartite agreement.*

15. *That the Ld. CIT(A) erred in concluding that the amount payable to the holding company (i.e. YRIPL) amounting to Rs. 1,62,51,645 is in the nature of revenue receipts.*

16. *That the Ld. CIT(A) erred in not appreciating the fact that the amount payable to the holding company (i.e. YRIPL) amounting to Rs. 1,62,51,645 was subsequently adjusted against the AMP contributions from YRIPL in the subsequent years.*

17. *That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in upholding the interest levied by the AO under Section 234B of the Act."*

70. Ground number 1 and 2 of the appeal are general in nature. No arguments were advanced by either of the parties. Therefore, same are dismissed.

71. Ground number 3 – 7 relates to the argument of the assessee with respect to the applicability of the principle of mutuality to the income of the assessee. Both the parties agreed that this is identical to the ground of appeal in the appeal of the assessee for assessment year 2001 – 02 and 2002 – 03. They also submitted that their arguments are also same and there is no change in the facts of the case. We have already decided the above ground against the assessee holding that income of the assessee is not covered by the principle of mutuality, accordingly we confirm the order of the lower authorities and dismiss the above grounds.

72. The ground number 8 – 10 of the appeal of the assessee is with respect to the claim of the assessee that income of the assessee is diverted by in overriding title. Both the parties agreed that this issue is identical to the issue is decided in appeal of the assessee for assessment year 2001 – 02 and 2002 – 03. They also submitted that their arguments are also similar. We have already held in appeal of the assessee for assessment year 2002 – 03 that income of the assessee is not diverted by overriding title. Accordingly we confirm the order of the lower authorities and dismiss ground number 8 – 10 of the appeal of the assessee.

73. Ground number 11 of the assessee is with respect to the following the order of the coordinate bench by the learned CIT – A in deciding the appeal of the assessee. Ground number 12 of the appeal of the assessee is with respect to the order of the learned CIT – A not appreciating that the appellant did not have any commercial element in the activities carried out by it. Ground number 13 of the appeal is with respect to the approval obtained by the assessee from the Ministry of industry, Department of industrial policy and promotion as a non-profit enterprise. Ground number 14 is with relation to the non-appreciation of the fact by the lower authorities about the business model of the appellant and the terms and condition of the tripartite agreement. Ground number 15 -16 are with respect to the order of the lower authorities holding that amount payable to the holding company of INR 1 6251645/– is in the nature of revenue receipts. All these grounds are covered by the ground number 3 – 10 of the appeal of the assessee for this

year wherein we have dismissed these grounds. Accordingly ground number 11 – 16 of the appeal of the assessee.

74. Ground number 17 is against the charging of interest u/s 234B of the income tax act, which is consequential in nature, and therefore this ground of appeal is dismissed.

75. Accordingly ITA number 5894/del/2015 filed by the assessee for assessment year 2008 – 09 is dismissed.

ITA No. 5895/Del/2015

Assessment Year 2009-10

76. The assessee has raised the following grounds of appeal in ITA No. 5895/Del/2015 for the Assessment Year 2009-10:-

"General Ground

1. That on the facts and in law, the impugned order passed by the Ld. Commissioner of Income Tax (Appeals) -22 ('Ld. CIT(A)') confirming the order of the Assessing Officer ('AO') in not accepting the returned income of Rs. 5,98,586, is bad in law.

2. That the Ld. CIT(A) erred in holding that the activities of the assessee are an adventure in the nature of trade.

Principle of Mutuality

3. That on the facts and in law, the Ld. CIT(A) has grossly erred in holding that the Appellant cannot be classified as a mutual concern and consequently its income would not be exempt from tax.

4. That on the facts and in law, the Ld. CIT (A) has failed to appreciate that there being complete identity between the contributories and the beneficiaries, the 'principle of mutuality' was applicable and the receipts of the Appellant could not partake the character of income.

5. That on the facts and in law, the Ld. CIT(A) erred in concluding that the 'principle of mutuality' could not be applied owing to the fact that YRIPL and Pepsi Foods Ltd. do not benefit from the AMP activities rendered by the Appellant, which finding is contrary to the facts on record.

5.1 That on the facts and in law, the Ld. CIT(A) has grossly erred in not recognising that in the current assessment year the increase in the sales and royalty income of YRIPL and income of Pepsi Foods bore a direct nexus to the AMP activities carried on such the benefit to YRIPL and Pepsi Foods was clearly established.

5.2 That on the facts and in law, the Ld. CIT(A) has grossly erred in not appreciating that Pepsi Foods Ltd. also benefited from the exclusive right to sell its products granted as per the terms and conditions of the

'Pepsi Beverage Supply Agreement' and as such all conditions relating to the mutuality concept stood satisfied.

5.3 *That the Ld. CIT(A) erred in alleging that the additional contribution by YRIPL which was discretionary led to the assumption that the appellant was not functioning as a mutual concern.*

6. *That the Ld. CIT(A) erred in law and on facts whilst observing that the appellant was working as an advertising contractor and was allegedly rendering services for which it was receiving money with a profit element in it.*

7. *The on the facts and circumstances of the case, Ld. CIT(A) erred in holding that the assessee is not functioning as a mutual concern by not appreciating the law laid down by the Apex Court in the case of CIT v Bankipur Club Ltd, 226 ITR 97.*

Every' receipt is not income

8. *That, without prejudice, on the facts and in law, the Ld. CIT(A) erred in not appreciating that even' receipt in the hands of an assessee does not partake the character of income.*

Diversion of Income by Overriding Title

9. *That the on the facts and in law, Ld. CIT(A) failed to adjudicate upon ground/issue relating to diversion of income by overriding title.*

10. *That the Ld. CIT (A) failed to appreciate that even assuming that the said AMP contribution partakes the character of income, it is diverted for a specific purpose (AMP activities) by virtue of a pre-existing obligation attached to the source of such contribution itself and hence the contribution was not exigible to tax.*

Other Grounds

11. *That the Ld. CIT(A) has erred in following the order of the Hon'ble Income Tax Appellate Tribunal in Appellant's own case for AY 2001-02 despite the fact that the facts of the current AY were distinguishable from that of AY 2001-02.*

12. *The Ld. CIT(A) erred in not appreciating that the assessee did not have any commercial element in the activities carried out by it.*

13. *That the Ld. CIT(A) erred in not appreciating the fact that the sole purpose of the assessee coining into existence was to work as a non-profit enterprise, working for the mutual benefit of its mutual concerns/members which is further corroborated by the approval obtained by the assessee from the Ministry of Industry, Department of Industrial Policy and Promotion.*

14. *That the Ld. CIT(A) has erred in not appreciating the business model of the Appellant and the terms and conditions of the tripartite agreement.*

15. That the Ld. CIT(A) has erred in not adjudicating on the ground in relation to disallowance of Rs. 13,97,806 on account of doubtful debts.

16. That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in upholding the interest levied by the AO under Section 234B of the Act."

77. Ground number 1-2 of the appeal are general in nature and therefore same is dismissed.

78. Ground number 3 – 7 are with respect to the identical issue involved in the appeal of the assessee for assessment year 2001 – 02 and 2002 – 03 contesting that the income of the assessee is tainted with mutuality and therefore not chargeable to tax. Both the parties agreed that there is no change in the facts and circumstances of the case in their arguments are also remained the similar. We already decided the above issue in the case of the assessee for assessment year 2001 – 02 and 2002 – 03 holding that the income of the assessee is not tainted with the mutuality and is chargeable to tax. Accordingly we confirm the order of the lower authorities and dismiss ground number 3 – 7 of the appeal.

79. Ground number 8 – 14 are with respect to the claim of the assessee that income of the assessee is diverted by overriding title and therefore not chargeable to income tax. This issue has already been decided by us in appeal of the assessee for assessment year 2001 – 02 and 2002 – 03 wherein we have held that income of the assessee is not diverted by overriding title, therefore is chargeable to income tax, and confirmed the orders of the lower authorities. For the similar reasons we dismiss this ground of appeal.

80. Ground number 15 of the appeal of the assessee is with respect to the disallowance of INR 1 397806/– on account of doubtful –. The learned assessing officer disallowed the above sum holding that it is a mere provision for doubtful – and therefore same is not an allowable. The learned CIT – A did not adjudicate the same. No arguments were advanced before us also. Therefore we dismiss the same.

81. Ground number 16 is against the charging of interest u/s 234B of the income tax act, which is consequential in nature, and no arguments were advanced by the assessee on this ground. Accordingly same is dismissed.

82. Accordingly ITA number 5895/del/2015 for assessment year 2009 – 10 filed by the assessee is dismissed.

ITA No. 4079/Del/2015

Assessment Year 2010-11

83. The assessee has raised the following grounds of appeal in ITA No. 4079/Del/2015 for the Assessment Year 2010-11:-

"General Ground

1. That on the facts and in law, the impugned order passed by the Ld. Commissioner of Income Tax (Appeals) -17 ('Ld. CIT(A)') confirming the order of the Assessing Officer ('AO') and assessing the total income of the Appellant at Rs. 4,94,434 as against NIL returned income, is bad in law.

Principle of Mutuality

2. That on the facts and in law, the Ld. CIT(A) has grossly erred in holding that the Appellant cannot be classified as a mutual concern and consequently its income would not be exempt from tax.

3. That on the facts and in law, the Ld. CIT(A) has failed to appreciate that there being complete identity between the contributories and the beneficiaries, the 'principle of mutuality' was applicable and the receipts of the Appellant could not partake the character of taxable income.

4. That on the facts and in law, the Ld. CIT(A) erred in concluding that the 'principle of mutuality' could not be applied owing to the fact that YRIPL and Pepsi Foods Ltd. do not benefit from the AMP activities rendered by the Appellant, which finding is contrary to the facts on record.

4.1 That on the facts and in law, the Ld. CIT(A) has grossly erred in not recognising that in the nexus to the AMP activities carried on by the was clearly established.

4.2 That on the facts and in law, the Ld. CIT(A) has grossly erred in not appreciating that Pepsi Foods Ltd. also benefited from the exclusive right to sell its products granted as per the terms and conditions of the

'Pepsi Beverage Supply Agreement' and as such all conditions relating to the mutuality concept stood satisfied.

Every receipt is not income

5. *That, without prejudice, on the facts and in law, the Ld. CIT(A) erred in not appreciating that every receipt in the hands of an assessee does not partake the character of income.*

Diversion of Income by Overriding Title

6. *That the on the facts and in law, Ld. CIT(A) failed to adjudicate upon ground/issue relating to diversion of income by overriding title.*

7. *Without prejudice to the above, on the facts and in law, the Ld. CIT(A) failed to appreciate that even assuming that the said AMP contribution partakes the character of income, it is diverted for a specific purpose (AMP activities) by virtue of a pre-existing obligation attached to the source of such contribution itself and hence the contribution was not exigible to tax.*

Other Grounds

8. *That the Ld. CIT(A) has erred in following the order of the Hon'ble Income Tax Appellate Tribunal in Appellant's own case for AY 2001-02 despite appreciating that there has been change in facts in the current year.*

9. *That the Ld. CIT(A) has erred in not appreciating the business model of the Appellant and the terms and conditions of the tripartite agreement.*

10. *That the Ld. CIT(A) has erred in disallowing the provision for doubtful debts amounting to Rs. 4,94,434.*

11. *That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in upholding the interest levied by the AO under Section 234B of the Act."*

84. Ground number 1 of the appeal is general in nature and therefore same is dismissed.

85. Ground number 2 – 4 of the appeal relates to the argument of the assessee that the income on by the assessee is tainted with the principle of mutuality and is not chargeable to tax. Both the parties it was the same argument and also submitted that there is no change in the facts and circumstances of the case, to the facts and circumstances for assessment year 2001 – 02 in 2002 – 03. We have already decided this issue against the assessee in the about two assessment years holding that income of the assessee is not covered by the principles of mutuality and are chargeable to tax.

Accordingly we confirm the order of the lower authorities and dismiss ground number 2 – 4 of the appeal.

86. Ground number 5 – 9 of the appeal is with respect to the argument of the assessee that income of the assessee is diverted by overriding title and therefore is not chargeable to tax in the hands of the appellant. Both the parties submitted that facts and circumstances in the arguments of them on this issue are identical is advanced by them for assessment year 2001 – 02 in 2002 – 03. He already decided above issue in the appeal of the assessee for assessment year 2001 – 02 in 2002 – 03 holding that there is no diversion of the income of the assessee by overriding title and therefore confirmed the orders of the lower authorities. Accordingly we confirm the orders of the lower authorities for this year too and dismiss ground number 5 – 9 of the appeal of the assessee.

87. On the issue of the disallowance of the provision for doubtful debts amounting to Rs. 494434 challenge by ground number 10 of the appeal no arguments were advanced and therefore same is dismissed.

88. The ground number 11 of the appeal is against charging of interest u/s 234B of the income tax act, which is consequential in nature, and are no arguments advanced by the assessee and therefore same is dismissed.

89. Accordingly ITA number 4079/del/2015 for assessment year 2010 – 11 filed by the assessee is dismissed.

ITA No. 2561/Del/2015

Assessment Year 2013-14:

90. The assessee has raised the following grounds of appeal in ITA No. 2561/Del/2015 for the Assessment Year 2013-14:-

"General Ground

1. *That on the facts and in law, the impugned order passed by the Ld. Commissioner of Income Tax (Appeals) -09 ('Ld. CIT(A)') confirming the order of the Assessing Officer ('AO') and assessing the total income of the Appellant at Rs. 11,74,97,849 as against NIL returned income, is bad in law.*

Principle of Mutuality

2. *That on the facts and in law, the Ld. CIT(A) has grossly erred in holding that the Appellant cannot be classified as a mutual concern and consequently its income would not be exempt from tax.*

3. *That on the facts and in law, the Ld. CIT(A) has failed to appreciate that there being complete identity between the contributories and the beneficiaries, the 'principle of mutuality' was applicable and the receipts of the Appellant could not partake the character of taxable income.*

4. *That on the facts and in law, the Ld. C1T(A) has erred in concluding that the 'principle of mutuality' could not be applied owing to the fact that YRIPL and Pepsi Foods Ltd do not benefit from the AMP activities rendered by the Appellant, which finding is contrary to the facts on record.*

5. *That on the facts and in law, the Ld. CIT(A) has grossly erred in not recognising that in the current assessment year the increase in the sales and net royalty income of YRIPL bore a direct nexus to the AMP activities carried on by the Appellant, and as such the benefit to YRIPL was clearly established.*

6. *That on the facts and in law, the Ld. CIT(A) has grossly erred in not appreciating that Pepsi Foods Ltd. also benefited from the exclusive right to sell its products granted as per the terms and conditions of the 'Pepsi Beverage Supply Agreement' and as such all conditions relating to the mutuality concept stood satisfied.*

7. *That on the facts and in law, the Ld. CIT(A) has grossly erred in concluding that the appellant has failed to give the workings of contribution of Pepsi vis-a-vis sale of Pepsi products at restaurant outlets of the franchisee and its parent company i.e. YRIPL.*

8. *That on the facts and in law, the Ld. CIT(A) has grossly erred in concluding that the appellant has violated the terms and conditions on which the approval was obtained from Secretariat of Industrial Assistance ("SIA"), Ministry of Finance, Government of India, as the appellant has inducted business associates like Pepsi.*

9. *That on the facts and in law, the Ld. CIT(A) has grossly erred in concluding that the receipts in the hands of the appellant are in the character of income as the same were made to the appellant after deduction of tax at source.*

Every receipt is not income

10. *That, without prejudice, on the facts and in law, the Ld. CIT(A) has erred in not appreciating that every receipt in the hands of an assessee does not partake the character of income.*

Diversion of Income by Overriding Title

11. *That on the facts and in law, Ld. CIT(A) has failed to adjudicate upon ground/issue relating to diversion of income by overriding title.*

12. Without prejudice to the above, on the facts and in law, the Ld. CIT(A) failed to appreciate that even assuming that the said AMP contribution partakes the character of income, it is diverted for a specific purpose (AMP activities) by virtue of a pre-existing obligation attached to the source of such contribution itself and hence the contribution was not eligible to tax.

Other Grounds

13. That the Ld. CIT(A) has erred in following the order of the Hon'ble Income Tax Appellate Tribunal in Appellant's own case for AY 2001-02 despite appreciating that there has been change in facts in the current year.

14. That the Ld. CIT(A) has erred in not appreciating the business model of the Appellant and the terms and conditions of the tripartite agreement."

91. Before us assessee has submitted a written note that ground number 1 to ground number 15 of the appeal is identical to issues raised in the appeal of assessment year 2001 – 02 in 2002 – 03 of the appeal of the assessee. The learned CIT DR also agreed that there is no change in the facts and circumstances of the case compared to those years in this year. Both the parties also stated that their arguments are also remains the similar. As we already held that the income of the assessee is not intend with the principles of mutuality and is also not diverted by overriding title for those years in deciding the appeal of the assessee. Therefore, for the similar reasons we also hold for this year too that income of the assessee is not intend with the principles of mutuality and is also not diverted by overriding title but is chargeable to tax. Accordingly ground number 1 – 15 of the appeal of the assessee is dismissed for the similar reasons.

92. Ground number 16 of the appeal is with respect to the action of the learned CIT – A concluding that revenue is to be recorded on accrual basis without appreciating the fact that the same needs to be adjusted against the deficit. No arguments were advanced before us on that issue however the assessee has placed written submission stating that ground number 16 is without prejudice to the contention of the appellant that it is functioning as a mutual concern, the learned CIT – A as and in not allowing the loss of rupees 117497849/– as held by the honourable CIT – A in the appellant's own case in assessment year 2008 – 09 and 2009 – 10, thus has added by

not following the principles of consistency. The assessee has altogether raised any previous us without making any application for raising an additional ground of appeal and therefore we do we are not inclined to consider the same. However, if there is any carry forward loss is allowable to the assessee, the learned assessing officer is duty-bound to grant credit of the same. Therefore we direct the learned assessing officer to give if any carry forward loss is allowable to the assessee in accordance with the law. However we do not adjudicate the contention raised by the learned authorised representative in written submission filed before us, as there was no ground raised in the appeal memo for this year. The ground number 17 mentioned by the learned authorised representative and on which he is given the detailed submission, we do not find any such ground raised in the appeal memo and therefore we do not adjudicate the same.

93. Accordingly appeal of the assessee for assessment year 2013 – 14 is dismissed.

94. Accordingly appeals of the assessee for respective years from assessment year 2001 – 02 to 2013 – 14 (as listed above) are disposed of by this common order.

Order pronounced in the open court on 09/09/2019.

-Sd/-	-Sd/-
(BEENA A PILLAI)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 09/09/2019
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating member	
Date on which the typed draft is placed before the other member	
Date on which the approved draft comes to the Sr. PS/ PS	
Date on which the fair order is placed before the dictating member for pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	
date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	