IN THE INCOME-TAX APPELLATE TRIBUNAL "K" BENCH MUMBAI

BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER AND

SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No.7204/Mum/2019 (Assessment Year 2015-16)

L'Oreal India Pvt. Ltd. A-Wing, 8th Floor, Marathon Futurex, N.M. Joshi Marg, Lower Parel, Mumbai-400013. P**AN: AAACL0738K**	Vs.	DCIT Circle-7(1)(2) Aayakar Bhavan, M.K. Road, Mumbai-400020.
Appellant		Respondent

Appellant by : Shri Neeraj Seth (AR)

Respondent by : Shri Anand Mohan (CIT-DR)

Date of Hearing : 03.07.2020

Date of Pronouncement : 27 .07.2020

ORDER UNDER SECTION 254(1)OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee is directed against the assessment order dated 14.10.2019 passed under section 143(3) rws 144C (13), passed in pursuance of direction of Dispute Resolution Panel-1(WZ) (DRP), Mumbai dated 20.09.2019 for Assessment Year 2015-16. The assessee has raised following grounds of appeal:

Following grounds are without prejudice to each other:

GENERAL

1. erred in assessing the total income at INR 413.09 crores as against INR 153.60 crores computed by the Appellant.

I. TRANSFER PRICING GROUNDS

A. Adjustment on account of Advertisement, Marketing and Promotion ('AMP') expenses

Adjustment proposed by incorrectly applying Section 92CA(3) of the Act and disregarding the relevant submissions made during the assessment proceedings

2. Erred in making an addition of Rs 256.56 crore (Rs 129.57 crore for the distribution segment and Rs 126.99 crore for the manufacturing segment) to the total income of the Assessee under Section 92CA(3) of the Act on account of adjustments in the arm's length price of the alleged international transactions undertaken by the Assessee.

Presumption of fictitious transaction in the nature of 'provision of brand promotion services' since AMP is not an international transaction

3. Erred in alleging that the AMP expense incurred by the Assessee is an international transaction under Section 92B of the Act;
4. erred in ignoring that the Appellant has not rendered any service to the Associated Enterprises ('AEs') and hence erroneously treating and categorizing AMP expenses incurred by the Appellant on its own behalf, as an international transaction between the Appellant and AEs under Section 92B of the Act;
5. failed to appreciate the fact that AMP expenses were incurred 'wholly and exclusively' for purpose of business of the Assessee in India and no benefit was passed on to the AE and hence, there should not any reimbursement of such expenses to the Assessee;
6. erred in ignoring that in absence of a valid international transaction, the adjustment is outside the purview of the jurisdiction of learned AO/ TPO, as the alleged AMP transaction is not covered under Section 92B of the Act;
7. erred in not appreciating that there is no arrangement whatsoever between the Appellant and its AEs for promotion of AEs brand by incurring AMP expenses on behalf of the AEs;
8. erred in linking the AMP expenses incurred by the Appellant as expenses incurred for the purpose of brand building activities for its AEs;
9. erred in concluding that the Appellant is engaged in performing development, enhancement, maintenance, protection or exploration

('DEMPE') services which includes market development, value addition, creation of marketing intangibles etc and there is mutual agreement/ arrangement between the Appellant and its AE for discharging market development functions;

10. erred in overriding the charging provisions of Section 4 of the Act by the machinery provisions of Section 92 of the Act to bring to tax fictional/ assumed/ hypothetical income/ benefit.

Recharacterisation of Assessee's Entrepreneur Activities

11. erred in disregarding the Appellant's contention that the issue of marketing intangibles (AMP) is not applicable to the Appellant, as the Appellant is an entrepreneur licensee in the Indian market, and is entitled to entrepreneurial returns in the form of residual profit loss associated with India business, remaining after the overseas AEs are compensated with an arm's-length return for royalty, goods and services and that the said Entrepreneur charaterisation is in line with the economic organisation of L'Oreal Group globally. Therefore, the AMP expenses incurred by the Appellant has to be considered as being incurred on account of its entrepreneurial activities (full risk and return of which lies with the Appellant itself) and therefore cannot be construed as an international transaction which warrants a separate adjustment;

12. erred in artificially bifurcating the Appellant's entrepreneurial business activities into manufacturing and distribution segment without any cogent reasons for the same and arbitrary and ad hoc selection of comparable companies for manufacturing and distribution segment without adopting a scientific search process for applying bright line test ('BL T') using 'Other Method' to determine the arm's length price of the AMP expenses incurred by the Appellant;

Business and commercial expediency

13. erred in holding that the Appellant incurred AMP expenses for promoting the brands owned by overseas AE, instead of appreciating that the Appellant was only carrying out its business by using the well-established brands and any benefit derived by the AE is purely incidental;

14. erred in ignoring that the advertisements by the Appellant are product advertisements to enable higher sales of the products in the Indian market and not brand advertisements.

Most appropriate method

15. without prejudice to the above, erred in applying bright line test ('BLT') and treating the same as routine ALP determination method under "Other Method" to determine the arm's length price of the AMP expenses incurred by the Appellant;

16. without prejudice to the above, erred in not appreciating that BL T does not take the functional and the accounting differences between the Appellant and the comparable companies;

Mark-up on AMP expenses

17. without prejudice to the above, erred in holding that the Assessee should have earned a mark-up of 16.11 % on the alleged excessive AMP expenses in relation to manufacturing and distribution segment, which are to be reimbursed to the Assessee by considering inappropriate comparable companies;

18. without prejudice to the above, erred in computing mark-up over alleged excessive AMP expenses incurred without appreciating that an addition if any, shall be commensurate with agency function, if any, undertaken by the Assessee.

19. erred in disallowing the amount of INR 6.16 crores for payment towards packaging design cost, training to salon customers and promotional goods by going into the questions of the alleged absence of service and further alleging that the Appellant was unable to provide sufficient documentation for proof of need and benefit test;

B. Alternate adjustment (primary adjustment of Rs 126.99 crore has been made as AMP to manufacturing segment) on account of payment for packaging design cost, training to salon customers and promotional goods

20. erred in exceeding the jurisdiction by concluding that payment on account of packaging design cost, training to salon customers and promotional goods is excessive;

21. erred in proposing an adjustment to the arm's length price of the international transaction payment for packaging design cost, training to salon customers and promotional goods without providing sufficient opportunity of being heard;
22. erred in disregarding evidences/ information submitted by the Appellant to substantiate services received/ benefits derived/ basis of allocation of cost and disregarded the same without giving any cogent reasons;
23. erred in determining the arm's length price of the international transaction of payment for packaging design cost, training to salon customers and promotional goods as NIL based on 'Other Method' as the most 'appropriate method.

II. CORPORATE TAX GROUNDS

A. Disallowance of depreciation on goodwill - arising on purchase of existing business unit on 'slump sale' basis

24. erred in disallowing deprecation of Rs 1.03 crores on goodwill arising on purchasing of existing business of Rahul Health Care (RHC), an unrelated party, on a going concern basis;
25. erred in not appreciating the fact that the transaction was undertaken with unrelated enterprise (RHC) and the transaction value was commercially agreed between the two parties;
26. erred in holding that valuation of goodwill at Rs. 8.27 crore was not justified;
27. failed to appreciate that by entering into the transaction for purchase for purchase of existing business of RHC, the Appellant had acquired significant intangible assets, including but not limited to permits, approvals, registrations, licences, know-how, skilled manpower, contracts, other business or commercial rights, etc.
28. failed to appreciate that assets and liabilities (including goodwill) were valued at their respective fair values based on a valuation report in accordance with the prevailing accounting norms.
29. erred in not appreciating the documents submitted by the Appellant justifying the value of goodwill as well as other assets & liabilities and disregarded the same without giving any cogent reasons;

30. erred in not appreciating that the assessing officer cannot step in the shoes of the Appellant and define the commercials of the transaction which has to be adjudged from the point of view of the businessman and not of the Revenue;

31. erred in holding that:

(i) the extra consideration was paid to retain the existing clientele of RHC;

(ii) the evidences for acquisition of business or the payment of consideration is not substantiated by proper documents and evidence;

(iii) the allocation of consideration towards acquired tangible and intangible assets was not shown; (iv) the valuation report in respect of tangible and intangible assets has not been furnished;

(iv) the assessee has not given working, justification, rationale and explanation on valuation of goodwill

(v) the valuation is not based on proper documentation, arbitrary and therefore indeterminate.

32. erred in equating the facts of the appellant's case with decision of the Hon'ble ITAT Mumbai in the case of Toyo Engineering India Ltd;

B. Income from other sources amounting to INR 1,89,52,744/- considered twice

33. erred in considering gross total income as per the return of income as income from business and profession while passing the order;

34. erred in considering income from other sources amounting to INR 1,89,52,744 twice while computing the gross total income chargeable to tax.

C. **Deduction in respect of Education Cess:**

35. The appellant submits that the liability for education cess on income tax debited to Profit and Loss account amounting to Rs. 1,75,13,010/- ought to be allowed as tax deductible expense while computing the taxable income.

Short grant of self-assessment tax and incorrect levy of interest under section 234A and 234B of the Act

36. erred in not granting self-assessment tax credit of INR 53 lakhs claimed by the Appellant in the return of income;

37. erred in levying interest under section 234A of the, Act without appreciating that the Appellant had filed the return of income within timeline as prescribed under 139(1) of the Act;
38. erred in levying interest under section 234B of the Act.

E. **Initiation of penalty proceedings**

39. Erred in initiating penalty proceedings under section 271 (1)(c) of the Act.

2. Brief facts of the case are that the assessee-company is engaged in the business of manufacturing of cosmetic, marketing and sale of product, filed its return of income for relevant AY on 29.11.2015 declaring income of Rs. 153.60 crore. Along with the return, the assessee furnished report under Form-3CEB reporting certain international transaction with its various Associated Enterprises (AEs). On reporting international transaction more than the prescribed limit of Rs. 15 crore, the assessing officer (AO) made reference to Transfer Pricing Officer (TPO) for computation of Arms Length Price (ALP). During the T.P. assessment proceeding, the TPO noted that the assessee has incurred huge expenses of Rs. 711.57 crore on advertising and marketing and promotion (AMP), and thus creating valuable marketing intangible by incurring huge expenses for L'Orial brand. The assessee is not the legal owner of the brand in India and by way of huge marketing expenses which effectively translate into development of brand and thus contributing the huge expenses for development of brand AEs. On the aforesaid view, the TPO issued show-cause notice as to why the adjustment as undertaken in AY 2014-15 should not be adopted in AY

2015-16. The TPO also took his view that the function performed asset implied and risk assumption (FAR) is materially remains the same.

3. The assessee filed its detailed reply vide reply dated 17.10.2018. The extract of reply is recorded by TPO in paragraph-5.3 of his order. In the reply, the assessee apart from raising various legal and factual objections contended that the assessee incurred AMP expenses in the course of carrying on its business in India. Neither there is any mutual understanding between the assessee and its AEs nor such expenditure incurred at the instance of AEs. The marketing condition of the particular region and other economic condition of the concern market decide the requirement of AMP expenditure. In absence of any understanding, arrangement etc., no transaction or international transaction could be said to be involved with respect to AMP expenditure incurred by assessee, which may be covered with the provisions of T.P. Regulations. The assessee specifically contended that in assessee's own case for AY 2008-09 to 2010-11, the Tribunal held that an AMP expense incurred by assessee does not constitute an international transaction.

4. The reply furnished by assessee was not accepted by TPO. The TPO on the basis of order for AY 2014-15 suggested the addition of Rs. 256.56 crores on account of AMP. On receipt of report of TPO, the AO made addition of Rs. 256.56 crores on account of AMP expenses. During the draft assessment proceeding, the AO also noted that assessee has shown intangible assets in

the form of goodwill of Rs. 8.27 crore on acquiring existing manufacturing unit from Rahul Healthcare and the assessee claimed depreciation of Rs. 1.03 core of goodwill @ 25% at half rate. The AO further noted that the assessee acquired the unit on Shop located at Baddi H.P from Rahul Healthcare on slum sale basis vide business agreement dated 26.02.2014 for Rs. 12.94 crore. As per the Schedule-3 of Business Transfer Agreement (BTA), Rahul Healthcare had current asset in the form of refund from tax authorities, inventories and cash, which cannot be aggregated into negative value. The assessee has shown fair value of Rahul Healthcare at (-) Rs. 3.14 crore in the valuation report. As per Business Transfer Agreement both the parties agreed on non-compete clause, meaning thereby the value of non-compete and no how are not considered in the valuation report. On the basis of aforesaid facts, the AO was of the view that Rahul Healthcare is not a brand name and merely has any goodwill and thus acquiring the business on such high price was doubted by him.

5. The AO issued show-cause notice as to why goodwill recognized in the books of account should not be treated as Nil and accordingly corresponding depreciation should not be disallowed. The assessee filed its reply dated 21.12.2018. The reply of assessee is extracted by AO in paragraph-4.4 of the draft assessment order, relevant part of the reply is extracted below:

> "The company vide that BTA had agreed to acquire various business assets and liabilities from Rahul Healthcare. Accordingly, the company had acquired the current assets and current liabilities from Rahul Healthcare. The details of the

net current assets / liabilities purchased on going concern basis from Rahul Healthcare are as under:

	Particulars	**INR in million**	**INR in million**
	Inventory	160.14	
	Deposits	1.13	
	Trade Receivables	13.60	
	Loans & Advances	0.15	**175.02**
Less:	Sundry Creditors		(203.58)
Less:	Expenses payable		(2.81)
	Net current assets		**(31.37)**

From the above, it is clear that the net current assets in negative because even the liabilities of Rahul Healthcare were also purchased by the company"

Regarding basis for recognition of Goodwill and reasons for not considering non-compete and know-how, the assessee stated:

"At the outset, L'Oreal India's core business activity is manufacturing, marketing and sale of cosmetic products and not soaps. L'Oreal India and Rahul Healthcare are not in competition in any way. Therefore, the valuation of the non-compete option and know-how in relation to manufacture of soaps are not relevant for L'Oreal India's business. Non compete has relevance when both parties are in the same product portfolio, nature of business and compete market share. L'Oreal brand is well known in cosmetics and beauty business in India as well as globally. Rahul Healthcare is mainly engaged in the manufacturing activities on behalf of other companies and has no specific brand name or knowhow to compete with L'Oreal. Hence, even though agreement has reference to non-compete clause as part of standard template, this does not have any relevance in the present situation. There is no commercial value to non-compete and technical knowhow of Rahul Healthcare.

Accordingly, there is no value assigned to non-compete and knowhow while calculating the goodwill."

6. After considering the reply of assessee, the AO treated the goodwill as unexplained investment and made addition under section 69 of the Act. The

AO also disallowed the depreciation on the goodwill claimed by the assessee. The treated the investment on goodwill as unexplained investment and disallowed depreciation on goodwill by passing the following order:

4.5. "The assessee has claimed depreciation of Rs. 1,03,45,097/- on the Goodwill @ 25% at half rate. As established above, there was no goodwill to be recognized for purchase of business from M/s Rahul Healthcare. Hence, the amount of Rs. 1,03,45,097/- is disallowed u/s 32 of the Act and added to the total income of the assessee."

	Particulars	**INR in million**	**INR in million**
	Inventory	160.14	
	Deposits	1.13	
	Trade Receivables	13.60	
	Loans & Advances	0.15	175.02
Less:	Trade Payables		(0.50)
Less:	Others payable		(0.21)
	Net Current Assets		**174.31**

In view of the above, the purchase price allocation should have to be as under:

Particulars	INR in million	INR in million
Consideration paid by the company		129.39
Fair Value of Land & Building	69.55	
Fair Value of Fixed Asset	8.46	
Fair Value of net current Assets	174.31	252.32
Goodwill recognized		**(122.93)**

In view of the above facts, the Goodwill claimed by the assessee is not correct. Therefore, it is presumed that the assessee has claimed unjustified Goodwill amounting to Rs. 8,27,60,777/- towards purchase of running business from M/s Rahul Healthcare on 'Slum Sale basis'.

4.6 The claim of the assessee is not acceptable as the primary onus is on the assessee to establish the genuineness of the claim. As per section 101, 102 and 106 of the Evidence Act, the onus lies upon the assessee to prove all the claims to the satisfaction of the AO, which was not discharged by the assessee as it failed to prove the source of Goodwill claimed. Since, the primary facts are in the knowledge of the assessee; it is its duty to prove the genuineness of the transaction and identity & creditworthiness of the lenders. This view is supported by the decision of Hon'ble Raj. High Court of India (2002) 178 CTR (RAJ) 420 MP High Court in the case of VISP(P) vs. CIT Indore (2004) 186 CTR 218 (MP).

4.7 Therefore, on the facts and findings in the case and considering the assessee's submissions in the matter, the assessee has claimed unjustified goodwill of Rs. 8,27,60,777/- towards purchase of running business from M/s Rahul Healthcare on 'Slum Sale' basis. Therefore, a sum of Rs. 8,27,60,777/- is treated as unexplained investment within the meaning of section 69 of the Act and added back to the total income of the assessee.

4.8----------

5. **Disallowance of Depreciation:**

The assessee has claimed depreciation of Rs. 1,03,45,097/- on the Goodwill @ 25% at half rate. As established above, there was no goodwill to be recognized for purchase of business from M/s Rahul Healthcare. Hence, the amount of Rs. 1,03,45,097/- is disallowed u/s 32 of the Act and added to the total income of the assessee."

7. The copy of draft assessment was served upon the assessee. The assessee exercised its option for filing objection before the DRP. The DRP upheld the addition on account of AMP expenses and depreciation of goodwill. However, the addition on account of unexplained investment under section 69 of Rs. 8.27 crore was deleted. On receipt of direction of DRP, the AO passed the final assessment order dated 14.10.2019 by making adding

addition of AMP and disallowance of depriciation. Aggrieved by the various addition/disallowance, the assessee has filed the present appeal before this Tribunal.

8. We have heard the submission of ld. Authorized Representative (AR) of the assessee and ld. Departmental Representative (DR) for the revenue and perused the material available on record. The ld. AR of the assessee submits that Ground No.1 is general, hence needs no adjudication.

9. Ground No. 2 to 18 relates to adjustment on account of advertisement and marketing expenses (AMP). The ld. AR of the assessee submits that these grounds of appeal are covered in favour of assessee by the decision of Tribunal in A.Y. 2008-09 to 2014-15. The ld. AR of the assessee furnished the copy of consolidated decision of Tribunal for A.Y. 2008-09 to 2020-11, order of Tribunal for AYs 2011-12, 2012-13, 2013-14 & 2014-15 respectively.

10. On the other hand, the ld. DR for the revenue relied upon the order of lower authorities. The ld. DR for the revenue further submits that revenue has already filed appeal against the order of Tribunal for various assessment years before the jurisdictional High Court and the issue is sub-judice before the Hon'ble High Court.

11. We have considered the rival submission of the parties and have gone through the orders of authorities below. We have also gone through the orders of Tribunal for various earlier years. We have noted that the TPO

while passing the order under section 92CA basically followed the order for AY 2014-15. We have further noted that in appeal for AY 2014-15 in ITA No. 6448/Mum/2018, the Tribunal while considering the orders for earlier year passed the following order:

"9. We have heard both the counsel and perused the records. Learned Counsel of the assessee submitted that identical issues have been considered by the ITAT in assessee's own case for earlier year except for the alternative adjustment on manufacturing segment. Submission of learned counsel in this regard is summarised as under :-

(A) Adjustment on account of advertisement, marketing and brand promotion (AMP) expenses :-

(i) Covered by appellant's own ITAT order for A.Y. 2013-14 (page No. 31 para 18) (copy of aforesaid orders were submitted during the course of hearing).

(ii) Also appellant's own ITAT order for A.Y. 2008-09 to A.Y. 2010-11 (page 16-17 and para 2.4), A.Y. 2011-12 (page 13 and para 16) and A.Y. 2012-13 (page 23-24 and para 12) (copy of aforesaid orders were submitted during the course of hearing.

(B) Alternate adjustment on manufacturing segment on account of payment of royalty for use of technical know-how (Rs. 38.82 crores) and trademark (Rs. 25.16 crores) :-

(i) Appellant's own ITAT order for A.Y. 2013-14 : Trademark royalty - page No. 35 para 23 Technical know-how royalty- page No. 37 para 25.

(ii) Also appellant's own ITAT order for A.Y. 2012-13 - page No. 29 para 18

(iii) Further the TPO in his order has not examined whether or not the method adopted by the appellant to determine the Arm's length price (ALP) is the most appropriate method and has instead concluded that the payments for trademark and technical know-how royalty are excessive in nature (page 176 of appeal memo)

(iv) Accordingly, the TPO has exceeded his jurisdiction by making an addition to the international transaction of payment of royalty for technical know-how and trademark. In this regard, the appellant relies on the Judgment of Bombay

High Court in the case of CIT Vs. Lever India Exports Ltd. (78 taxmann.com 88) (copy enclosed as Annexure1)

(v) Without prejudice to the above, it is submitted that the TPO has proposed the royalty adjustment, inter alia on the basis of AMP spend of the Appellant (page 141 and 142 of the appeal memo). Therefore, in the event it is held that AMP does not constitute an international transaction, then this adjustment would not survive.

(vi) In this connection, a reference may be made to Para 20 on Page 33 of ITAT order for AY 2013-14, wherein an alternate adjustment for the distribution segment (based on AMP) was deleted by the ITAT on the ground that once AMP was held not to be an international transaction, this adjustment which was based thereon, could not survive.

(vii) It is further submitted that L'Oreal SA, France (recipient of income) has offered the royalty income received from the Appellant and the said royalty income has been accepted to be at arm's length by the TPO in hands of L'Oreal SA. In view of the above, the appellant prays that the adjustment on account of royalty should be deleted.

(C) Alternate adjustment on the distribution segment-international transaction of import of finished goods from AEs for resale. Appellant's own ITAT order for A.Y. 2013-14 (page 33 and para 20).

(D) Alternate adjustment on the manufacturing segment- international transaction of payment for availing of marketing support services to AEs. (a brief description of marketing support services availed is described in Annexure 2 to this note).

1. The TPO in his order has instead of examining whether or not the method adopted to determine the ALP is the most appropriate method or whether the comparable companies selected are appropriate or not, has gone into the question of determining the need for such services, proof of rendition of such services, commercial expediency, basis of cost allocation etc. It is submitted that it is not part of the TPO's jurisdiction to consider the above aspects.

2. In this regard, the Appellant relies on the Judgment of Bombay High Court in the case of CIT vs. Lever India Exports Ltd. (supra)

3. In any extent, Appellant has submitted extensive evidences to TPO including advertising creative/concepts developed by AEs, sample story boards for Television Commercial conceptualized by AEs and adopted by the Appellant,

agreements, sample invoices, Organisation structure of Marketing support services team, sample email correspondences, product and marketing dossiers, public relationship guidelines, screenshot of global database and websites of AEs accessible to appellant, etc. along detailed write up on the nature of service/evidences and benefits of the services.

[Page 536-642 (Paper book Volume 1 and 2); Page No. 1092-1780 (Paper book Volume 3 and 4); Page 2174-3272 (Paper book Volume 5 and 6)].

Further, the Appellant submitted additional evidences to DRP comprising of cost allocation certificate and tables along copies of invoices [Page No. 3707- 4536 (Volume 7 and 8)].

These have been examined by TPO in remand proceedings and no fault is found with the same [Refer remand report on Page No. 498 to 535 of Paper book (Volume 1)]

4. Accordingly, the Appellant submits that considering that no adverse comments are provided by the TPO as well as the DRP, the said transaction should not be remanded back to the file of the AO/DRP as it would tantamount to giving a second inning to the Department and taking advantage of its own wrong.

5. In this regard, reliance is placed on the following judicial precedents: - Kansai Nerolac Paints Ltd. Vs Deputy Commissioner of Income-tax, [2014] 49 taxmann.com 208 (Bombay High Court) (Copy enclosed as Annexure 3); - K. Rajiv v. Additional Commissioner of Income-tax, [2018] 98 taxmann.com 418 (Madras High Court) (Copy enclosed as Annexure 4).

6. Further, it may be noted that in AY 2011 -12, the ITAT has remanded the issue of marketing support services availed to the DRP since additional evidences were submitted before the ITAT. However, in the year under consideration, all evidences which are filed before the ITAT were filed before the lower authorities and the TPO has himself examined them in remand proceedings and not adversely commented thereon, thereby accepting the same.

7. Further, it is submitted that L'Oreal SA, France (recipient of income) has offered to tax the income received from the Appellant and the said service income has been accepted to be at an arm's length by the TPO in hands of L'Oreal SA. Thus, the provision of services being availed by the Appellant, its

rendition and benefits of services etc. stands accepted in the case of the income recipient, L'Oreal SA.

8. In light of the above, it is humbly submitted that the matter should not be remanded back since there were extensive evidences submitted before the lower authorities and the same was accepted by the TPO in remand proceedings.

E) Alternate adjustment on the manufacturing segment- international transaction of payment for availing of consulting services. (Brief description 1).

The TPO in his order has instead of examining whether or not the method adopted to determine the ALP is the most appropriate method or whether the comparables selected are appropriate or not, has gone into the question of determining the need for such services, proof of rendition of such services, commercial expediency, basis of cost allocation etc. It is submitted that it is not part of the TPO's jurisdiction to consider the above aspects.

2. In this regard, the Appellant relies on the Judgment of Bombay High Court in the case of CIT vs. Lever India Exports Ltd. (supra)

3. In any event, the Appellant has submitted extensive evidences inter alia including agreements, sample invoices, evidences for technical/ consulting advise provided by AE through sample emails etc. in support of receipt of consultancy services and the benefits derived [Page 536-678 (Paperbook Volume 1 and 2); Page 1092-1193 (Paperbook Volume 3)].

Further, the Appellant submitted additional evidences before DRP comprising of agreement, certificate for costs allocated, evidences for technical/ consulting advise provided by AE through sample emails in relation to Packaging Services, Environmental, Health and Safety Services, Finance Services, Supply Chain Services, HR Services along with a list summarizing the evidences submitted and benefits derived thereof [Page No. 3707- 4536 (Volume 7 and 8)].

4. After verifying the evidences, the TPO in his remand report has accepted that the services were rendered, that they have benefited the Appellant and were necessary. He has only made a vague allegation that cost justification in a third-party situation needs to be established. (Refer remand report on Page No. 535 of Paperbook Volume 1)

5. Accordingly, the Appellant submits that the said transaction should not be remanded back to the file of the AO / DRP as it would tantamount to giving a second inning to the Department and taking advantage of its own wrong.

6. In this regard, reliance is placed on the following judicial precedents: -

Kansai Nerolac Paints Ltd. Vs Deputy Commissioner of Income-tax (supra); -

K. Rajiv v. Additional Commissioner of Income-tax (supra)

7. Further, it is humbly submitted that Transfer Pricing officer allowed identical expenses in earlier years and subsequent years of AY 2015-16 and AY 2016-17 after detailed scrutiny.

10 Per contra, learned Departmental Representative relied upon the orders of the authorities below.

11. Upon careful consideration we hold as under :-

As regards the adjustment on account of AMP expenses in manufacturing segment the ITAT has decided the issue in favour of the assessee. In this regard, we may refer to ITAT order in assessee's own case for A.Y. 2013-14 vide order dated 23.8.2019 for following concluding adjudication on this issue :-

"8. We find that in the backdrop of our aforesaid observations that de hors any 'understanding' or an 'arrangement' or 'action in concert', as per which the assessee had agreed for incurring of AMP expenses for brand building of its AE, viz L'Oreal S.A., France, the provisions of Chapter-X could not have been invoked for undertaking TP adjustment exercise. Apart there from, we find that a similar view had been taken by the Tribunal while disposing off the appeals of the assessee for the preceding years viz. A.Ys 2008-09 to 2011-12. In fact, the Tribunal while disposing off the appeal of the assessee for A.Y 2012-13 in M/s L'Oreal India Pvt. Ltd. Vs. ACIT-7(1)(2), Mumbai [ITA No. 1417/Mum/2017; dated 30.01.2019], had followed the view earlier taken in the preceding years and had vacated the adjustment of 304.69 crores that was made by the TPO by alleging that the AMP expenses incurred by the assessee was an international transaction under Sec. 92B of the Act. The Tribunal while so concluding had observed as under:

"12. We have also perused the agreement of assessee with its AE dated 4th January 2011 executed between assessee and its AE. Clause 7 of the agreement descries about right of distribution of licensed product in the territory. As per Clause 8 of the said agreement the assessee is responsible for the advertising the licensed product in the territory. The territory is defined under clause 1.5 of the agreement, which means the territory of Nepal, Bhutan, Bangladesh, Maldives, Mauritius, India and Sri Lanka. However, it

excludes any free trade zone, which may exist or may be created. Further it excludes duty free shops located in the duty free or travel retail area which is specialized in sales against foreign currency to foreigner or diplomatic corps, ship chlanders, airlines companies or shipping companies. Though the AE has reserves its right for the zones of excluded areas. The contentions of the ld. A.R for the assessee is that clause 8 of the agreement does not obligates the assessee to incur expenses on AMP so as to promote the brand owned by its AE's. And that the expenses are incurred by assessee in the normal course of its business. The perusal of the Clause 7 and 8 reveals that there is no agreement between the assessee and the AEs for sharing the expenses and the payments made by the assessee for the expenses of AMP. The TPO has also not brought any fact on record that there exist any agreement between the assessee and its AE to share or reimburse the AMP expenses. Moreover, we have seen that there is no material change in the facts for the year under consideration. Therefore, considering the above factual discussions and the decision of the coordinate bench of Tribunal for A.Y. 2008-09 to 2010-11, on the identical issue the ground No. 2 to 21 of the appeal is allowed." We thus in terms of our aforesaid observations, finding ourselves to be in agreement with the view taken by the Tribunal in the assesses own case for A.Y 2012-13 viz M/s L'Oreal India Pvt. Ltd. Vs. ACIT-7(1)(2), Mumbai [ITA No. 1417/Mum/2017; dated 30.01.2019],therefore, respectfully follow the same. Accordingly, being of the considered view that as the revenue had failed to discharge the onus that was cast upon it as regards proving that there was any 'understanding' or an 'arrangement' or 'action in concert' as per which the assessee had agreed for incurring of AMP expenses for brand building of its AE, viz. L'Oreal S.A., France, the TP adjustment of Rs. 354.73 crores in respect of AMP expenses cannot be sustained and is liable to be vacated."

12. Since the facts are identical we set aside the order of authorities below and direct that the TP adjustment of Rs. 198.18 crores is to be deleted."

12. Considering the consistent decision of Tribunal on identical set of fact on identical issue for earlier years, wherein no factual difference for the year under consideration is brought to our notice, nor any contrary law is shown

to us, to take any other view, therefore, respectfully following the orders for earlier years the Ground No.2 to 18 are allowed.

13. Ground no.19 to 23 relates to alternate adjustment on account of payment for packaging design, cost, training to Saloon customers and promotional goods. The ld. AR of the assessee further submits that these grounds of appeal are also covered by the decision of Tribunal for AY 2014-15. The ld. AR for the assessee submits that the assessee has also filed an application for admission of additional evidence. The additional evidences furnished by the assessee have direct relevance with the issue under consideration. The lower authorities however, did not give due cognizance to those evidences and made adjustment by taking view of insufficient documentation. Accordingly, the assessee wishes to furnish additional explanation/supporting documents to supports assessee's contention that no adjustment should be made on account of payment made in lieu of support services received by it. The assessee has filed various documents in the form of Annexure-1 to Annexure-4, details of which is annexed along with the application for additional evidence. The assessee is also furnished copies of all those evidences running from page no. 3046 to 3312 of Paper book (PB). The ld. AR for the assessee prayed that additional evidences furnished by the assessee may be admitted and the issue may be restored to the file of assessing officer for considering the issue afresh.

14. On the other hand, the ld. DR for the revenue submits that assessee has not furnished sufficient evidence, thus, the assessee cannot find fault in the finding of lower authorities. The assessee is filing the alleged supporting evidences at this stage, which were not before the lower authorities. The ld. DR further submits that in case the Hon'ble Bench deems it appropriate to take additional evidence on record, in such eventuality issue may be restored to the file of AO/TPO for verification of evidence and consideration of issue afresh at their end.

15. We have considered the rival contention of both the parties and gone through the orders of authorities below. We have also gone through the additional evidences filed by assessee along with the application dated 04.02.2020. In the application for admission of additional evidence the assessee stated that TPO while making T.P. Adjustment made alternative T.P. Adjustment on account of payment of packaging, design cost, training to Saloon Customers and promotional goods by assessee to its AEs. It is further contended that the assessee furnished various information/documents vide its letter dated 22.10.2018 to substantiate the genuineness of payment made to AE containing need of services, benefit of services, evidence of receipt of services, cost allocation methodology, agreements with list of copies of invoices, the copies of which is at page no. 3046 to 3082 in the form of Appendix A to D. We have noted that the documentary evidences furnished by the assessee relates to the payment on account of packaging,

design cost, training to Saloon Customers and promotion of various products and goods. Considering the nature of the evidences which has relevance with the issue under consideration, we admit the additional evidences furnished by the assessee. We have further noted that on alternate adjustment in AY 2014-15, Tribunal restored the similar issue(s) to the file of AO/TPO by passing the following order:

> "20. Upon careful consideration, we note that the reference to the excessive nature/benefit derived by the assessee by the TPO is not at all sustainable in the light of Hon'ble Jurisdictional High Court decision in the case of Lever India Exports Ltd. (supra). In the said decision it was expounded by Hon'ble Jurisdictional High Court that it is not for the TPO to apply benefit test. Hence, this limb of TPO's reasoning is not sustainable. Further it is clear that the assessee has submitted enormous additional evidence before the DRP and they have been remanded to the TPO also. The TPO has not made any adverse comment rather he has again reiterated that expenses are excessive and has justification aspect in third party situation. In other words, TPO's has again reiterated the issue of benefit test which has been held by Hon'ble Jurisdictional High Court to be not applied by TPO in his adjudication. The Hon'ble Jurisdictional High Court in CIT vs. Johnson & Johnson Ltd., ITA No. 1030/2014, dated 7th March 2017, while dealing with similar issue of determination of arm's length price of royalty by resorting to estimation by theTransfer Pricing Officer has held as under:-
>
> > "(d) We find that the impugned order of the Tribunal upholding the order of the CIT(A) in the present facts cannot be found fault with. The TPO is mandated by law to determine the ALP by following one of the methods prescribed in section 92C of the Act read with Rule 10B of the Income Tax Rules. However, the aforesaid exercise of determining the ALP in respect of the royalty payable for technical knowhow has not been carried out as required under the Act. Further, as held by the CIT(A) and upheld by the impugned order of the Tribunal, the TPO has given no reasons justifying the technical know-how royalty paid by the Assessing Officer to its

Associated Enterprise being restricted to 1% instead of 2%, as claimed by the respondent assessee. This determination of ALP of technical knowhow royalty by the TPO was ad-hoc and arbitrary as held by the CIT(A) and the Tribunal."

21. We find that ratio from the above Hon'ble Jurisdictional High Court decision is squarely applicable here. Hence transfer pricing adjustment at nil fails on both counts. Firstly on the account of benefit test which is not to be applied by the TPO and secondly none of the method of benchmarking the international transaction as specified in section 92C has been applied. Furthermore as rightly contended by the learned counsel of the assessee the ITAT in earlier year had remanded the issue as the issue of additional evidences was there, However ITAT was in principle of the view that application of benefit test by the TPO is not at all sustainable on the touchstone of honourable jurisdictional High Court decision in the case of Lever India Exports Ltd. (supra). In the present case we note that detailed evidences has been submitted before the DRP and the same have been examined by the TPO in remand proceedings, who has reiterated his reservations on the need and benefit to the assessee instead of applying any method of determining the arms length price. Accordingly in the background of aforesaid discussion and precedent from honourable jurisdictional High Court in the case of Lever India Exports Ltd. (supra) and Johnson & Johnson Limited (supra) we direct that these alternative adjustments as above are liable to be deleted. We order accordingly.

16. Considering the decision of Tribunal for earlier year on alternate adjustment and the fact that the assessee has filed the aforesaid additional evidence for the first time before the Tribunal and the fact that we have already held that the additional evidence furnished by the assessee has direct relevance qua the grounds of appeal, which required consideration and verification at the end of AO, therefore, we remit the issue to the file of AO for consideration and decision on the issue afresh. The AO/TPO is also directed to follow the

order of Tribunal for AY 2014-15 as well. Needless to order that before deciding the issue, the AO shall grant opportunity to the assessee. In the result these grounds of appeal are allowed for statistical purpose.

17. Ground No. 24 to 32 relates to disallowance on depreciation of goodwill. The ld. AR for the assessee submits the assessee acquired goodwill pursuant to acquisition of business from Rahul Healthcare, the valuation of business and goodwill cannot be questioned by revenue authorities. The price allocation was done on the basis of a report of Valuer /Chartered accountant, copy of which is placed on record. The lower authorities erred in holding that calculation for goodwill was not provided. The goodwill as computed by assessee is represented by various intangibles such as licenses, permits etc, amongst these are intangibles, one of the key intangibles was excise licence which allows manufacturing of goods without payment of excise duty due to area which based at exemption provided by Government of Himachal Pradesh at Baddi. The assessee obtained substantial benefit by way of acquisition of a business from third party in the form of increase in sales/stock transfer of goods etc. The computation of goodwill, as excess of consideration paid over net asset, is in the lines Accounting Standard -10. In support of his submission the learned AR of the assessee relied upon the following decision;

- Triune energy Services (P) Ltd (65 taxmann.com 288) (Delhi High Court),
- Cyber India Online versus ACIT [2014] 42 taxmann.com 108 (Delhi Trib),

- ThyssenKrupp Elevator (India) P Ltd versus ACIT 50 taxmann.com 279 (Delhi Trib),
- ACIT Versus Zydus Wellness Ltd [2017] 87 taxmann.com 82 (Gujarat High Court)

18. On the other hand the learned AR for the revenue supported the order of lower authorities. The learned AR further submits that during the assessment proceedings the assessing officer from the lodges of business transfer agreement noted that the fair market value of non-compete clause and knowhow as nil. It was further noted that Rahul Healthcare is not a brand name and without any goodwill, accordingly the claim of goodwill is found unjustifiable and was added as unexplained investment. However, the learned DRP in its order held that application of 69 in treating the payment of goodwill as unexplained investment is inappropriate as the same is recorded in the books of assessee. However, the disallowance of depreciation of goodwill was upheld by following the decision of Mumbai Tribunal in Toyo Engineering Ltd (ITA No. 3279/Mum/2008). The learned DRP not accepted the valuation of goodwill and intangible, which has not been explained by the assessee through proper documentation and valuation but rather it is an arbitrary and indeterminate. The learned DR for the revenue submits that the core issue to be decided is whether on the facts and circumstances of the case, the excess considerations paid by assessee over the value of net assets on acquisition of Rahul healthcare will partake the character of 'goodwill'. If it comes within the definition or parameter of

goodwill, depreciation will be allowed under section 32 of the Act in view of the decision of Hon'ble Apex Court in Smifs Securities Ltd [2012] 24 taxmann.com 222.

19. The ld DR for the revenue further submits the claim of the assessee that extra consideration paid is with respect to acquisition of bundle of intangibles from Rahul Healthcare (RHC) as provided in the Business Transfer Agreement (BTA) viz; intangibles identified by the assessee are (i) Existing permits, approvals, licenses, registration etc.,(ii) skilled employees of RHC, which are inducted by the assessee and (iii) existing business contracts of RHC acquired for the business of the assessee. The ld. DR further submits that his First contention on the claim of "Goodwill" or depreciation is that it is not an automatic claim, had that been so, the assessee would pay any extra consideration viz., Rs. 50 crore or Rs. 100 crore and claim it as "goodwill" with depreciation entitlement. Amount of payment or business decision is not questioned here, since it is the prerogative of the business concern. There is bound to be some qualification attached, for which the payment are made to give it the character of "Goodwill" in order to get benefit of depreciation u/s 32 of the I.T. Act. It was submitted that "Goodwill" is not defined under the Income tax Act but the qualifications to get the character of Goodwill one has to look into the definitions of Goodwill as per Accounting Standard (AS) as well as the decisions of Higher Courts. As per AS-10 and other AS(s) issued by

Institute of Chartered Accountants of India (ICAI), the definition of goodwill is read as;

16.1 Goodwill, in general, is recorded in the books only when some consideration in money or money's worth has been paid for it. Whenever a business id acquired for a price (payable either in cash or in shares or otherwise) which is in excess of the value of the net assets of the business taken over, the excess is termed as 'goodwill'. Goodwill arises from business connections, trade name or reputation of an enterprise or from other intangible benefits enjoyed by an enterprise.

Ind AS 103, dealing with Business Combinations, provides as under in respect of goodwill:

2. *Definition of goodwill: An asset representing the future economic benefits arising from other assets acquired in a business combination that are not individually identified and separately recognised.*

Ind AS 38- There may also be self-generated goodwill which is not acquired but created by the enterprise itself.

48. *Internally generated goodwill shall not be recognised as an asset.*

49 *In some cases, expenditure is incurred to generate future economic benefits, but it does not result in the creation of an intangible asset that meets the recognition criteria in this Standard. Such expenditure is often described as contributing to internally generated goodwill. Internally generated goodwill is not recognised as an asset because it is not an identifiable resource (i.e it is not separable nor does it arise from contractual or other legal rights) controlled by the entity that can be measured reliably at cost.*

50 *Differences between the market value of an entity and the carrying amount of its identifiable net assets at any time may capture a range of factors that affect the value of the entity. However, such differences do not represent the cost of intangible assets controlled by the entity.*

On the basis of aforesaid definition of Goodwill, the ld. DR would submits that no depreciation can be allowed on the self-generated goodwill in accounting as it is not an intangible asset.

20. The ld DR for the revenue strongly relied on the decision of Hon'ble Apex Court in the case of CIT Vs B.C. Srinivasa Setty [1981] 128 ITR 294 (SC),

wherein the Hon'ble Court held that "*Goodwill denotes the benefit arising from connection and reputation"*. The ld. DR also refereed the decision of Hon'ble Delhi High Court in Triune Energy Services (P.) Ltd. vs DCIT [2016] 65 taxmann.com 288 (Delhi), wherein it was has held as under;

> *13. Goodwill is an intangible asset providing a competitive advantage to an entity. This includes a strong brand, reputation, a cohesive human resource, dealer network, customer base etc. The expression "goodwill" subsumes within it a variety of intangible benefits that are acquired when a person acquires a business of another as a going concern.*

21. In the second alternative submissions the ld. DR for the revenue submits that no "Goodwill" exists as per the certificate of independent Auditor and in the Business Transfer Agreement dated 26.02.2014. In third alternative submissions the ld. DR submits that as per reply dated 21.12.2018, before assessing officer no goodwill exists. In fourth alternative submissions the ld. DR for the revenue submits that real reason for such a claim lies in the Sub-Contract Manufacturing Agreement between L'Oreal India Pvt. Ltd. and Rahul Healthcare dated 20th February 2013. A perusal of various clauses of contract manufacturing agreement shows that before the sub-contract agreement only soaps are manufactured by RHC while subsequent to the agreement the hair colour products bearing L'Oreal India brand are proposed to be manufactured using the technology provided by L'Oreal SA, France. Hence, the claim of Intellectual Property Rights (IPR) that are claimed to come in possession of the assessee with the Business Transfer

Agreement (BTA) were either already pre-owned by the assessee or internally generated. And as per AS-38 no depriciation is available on self generated goodwill being not intangible asset.

22. In fifth alternative submissions the ld. DR for the revenue submits that no transferrable intangible of RHC is created even after entering into sub-contract agreement. It is the assessee, which has made huge advances to the RHC, which has been partly utilized for purchase of adjustment land and inventories. Thus, intangible if any is self created intangible.

23. And finally in sixth alternative submissions the ld. DR would submit that first business contract between assessee and RHC relates to solid waste management contract with Shivalik Solid Waste Management Ltd., which was terminated on execution of BTA as mentioned in the said agreement. The second is unwritten contract between Rahul Healthcare and Oirpil Biotech Ltd. Since the contract is unwritten, the terms and conditions are not on record. Moreover, there is nothing on record, which suggests that Oirpil Biotech Ltd. was either a dealer or customer of Rahul Healthcare, whose continuation is of any benefit to the assessee. And third contract is the sub-manufacturing contract dated 20/02/2013 between Rahul Healthcare and the assessee itself. This had no bearing on the goodwill. From all three contracts it is clear that there exists no contract, which can be claimed to be acquired from Rahul Healthcare for future benefit or of economic value of the business of the assessee. The ld for the revenue finally submits that as

per the 5th Proviso to section 32(1) the allowance of depreciation to the successor/amalgamated company in the year of amalgamation would be on the written down value (WDV) of the assets in the books of the amalgamating company and not on the cost as recorded in the books of amalgamated company. To buttress his submissions he also relied on the decision of Bangalore Tribunal in United Breweries Ltd. (2016) 76 taxmann.com 103 (Bangalore Trib.). The ld. DR also furnished his submissions in the form of written notes.

24. In the rejoinder submission the ld. AR for the assessee filed detailed written submissions running in to more than 30 pages. In rejoinder written submissions the ld. AR refuted all the submissions of the ld. DR for the revenue and re-treated his submission. Besides that the ld. AR for the assessee further submitted that the ld. DR is trying to make out an altogether new case, which is without any basis. It was argued that during the course of hearing, the ld. AR has put forth the same line of argument and stand as adopted by the AO/DRP. Moreover, the submissions of the ld. DR are based on the paper books submitted by the assessee itself and nothing has been additionally added. The Tribunal being the last fact-finding Authority, a duty is cast on him bring to the notice of Bench, all facts as apparent from records and from orders of the lower Authorities etc. Reliance in case of Mahindra & Mahindra Ltd. v. DCIT [2009] 30 SOT 374 (Mumbai) (SB) is totally misplaced. It is submitted that the ld. DR has only supported and

elaborated the stand of the AO/TPO with the help of PB filed by the assessee. In without prejudice submissions the ld AR for the assessee that indirect benefits were also obtained by the assessee company, for quantification of benefit he has relied on the additional evidences furnished by assessee on alternate T.P. adjustment.

25. We have considered the rival submissions of the parties and have gone through the orders of the lower authorities. We have also deliberated on the various case laws and the voluminous paper book furnished by the assessee. During the relevant financial year involved in this case, the assessee entered into a business transfer agreement with Rahul Healthcare for purchase of Soap manufacturing unit of Rahul Healthcare as a going concern on the lump-sum basis. The business transfer agreement was amended vide agreement dated 8th July 2014 and again on 31st October 2014. As per agreement the parties agreed for a lump sum consideration for purchase of ongoing concern for a consideration of ₹ 12.94 crore. The sale transaction of Rahul Healthcare was completed on 3rd November 2014. The consideration of ₹ 12.94 crore was allocated over various assets and liabilities of the unit as per value based on the purchase price allocation report prepared by M/s SSPA & Co, Chartered Accountant. As per valuation the land and building was valued at ₹ 6.96 crore. All other fixed asset, current asset and current liabilities in the unit were taken over at their book value. The difference of ₹ 8.27 crore between the considerations paid and the fair value of the asset

and liability was claimed by assessee as Goodwill. On the basis of aforesaid facts the assessee claimed depreciation of ₹ 1.03 crore on the goodwill of ₹ 8.27 crore at 25% of half of the year.

26. The assessing officer while passing the draft assessment order issued show cause notice as to why net current asset were taken at a negative value of Rs. 3.14 crore and also why depreciation of Rs. 1.03 crore should not be disallowed. The assessee filed its reply dated 21st December 2018. In the reply the assessee stated that current assets of Rahul Healthcare were negative because of the liabilities of Rahul Healthcare were also purchased by the assessee. It was also contended that no value was assigned to non-compete and knowhow, while calculating the goodwill because the assessee's core business activities was manufacturing, marketing and sales of cosmetic product and not Soaps and that the assessee and Rahul healthcare were not in competition in anyway.

27. The reply furnished by assessee was not accepted by the assessing officer. The assessing officer while passing the draft assessment order on 28th December 2018 treated the goodwill recorded by assessee is at ₹ 8.27 crore as an unexplained investment under section 69 of the Act. The assessing officer also took his view that amount of current liabilities and expenses payable by Rahul Healthcare was taken into account as on 30th September 2013 instead of taking into account the liability as on 31st October 2014 which is the date on which the balance sheet was actually drawn and the

transaction was concluded on 3rd November 2014, consequently the depreciation claimed by assessee was also disallowed. On filing objections before DRP, the DRP directed the assessing officer to delete the addition under section 69 by holding that even if the payment represents excess payments by the assessee, is still these payments were made from the books of the assessee and there is no question of applicability of section 69 in this case. However, the disallowance of depreciation on goodwill was upheld holding that there is no proper documentation.

28. Before us the ld AR for the ld AR for the assessee vehemently argues that along with the acquisition of business of RHC the assessee also acquired the business of Rahul Healthcare was acquired on a slump sale basis, which included not only tangible assets but also bundle of intangible assets collectively called goodwill. The assessee claimed that reference of intangible assets includes permits, employee, and contracts. The contention of the ld. AR for the assessee is strongly contested by ld. DR for the revenue by making multiple submissions, which we have recorded above.

29. The Hon'ble Apex Court in CIT Vs Smifs Securities Ltd (supra) held that Goodwill is an asset under Explanation 3(b) to section 32(1) and, thus, it is eligible for depreciation. The Hon'ble Court observed that Explanation 3 to section 32(1) states that the expression 'asset' shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature. A reading of the

words 'any other business or commercial rights of similar nature' in clause (b) of Explanation 3 indicates that goodwill would fall under the expression 'any other business or commercial rights of a similar nature'. The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3 (b).

30. Hon'ble Delhi High Court in Triune Energy Services (P.) Ltd. vs DCIT (supra) also held that Goodwill is an intangible asset providing a competitive advantage to an entity. This includes a strong brand, reputation, a cohesive human resource, dealer network, customer base etc. The expression "goodwill" subsumes within it a variety of intangible benefits that are acquired when a person acquires a business of another as a going concern.

31. A perusal of draft assessment order shows that the assessee failed to discharge the source of 'goodwill' (para 4.6). The ld. DRP while considering the objections of the assessee though deleted disallowance of cost of acquisition of goodwill, however, the depreciation claimed on goodwill was upheld. In our view the AO as well as ld. DRP have not considered the aforesaid submission of the assessee that the assessee acquired not only tangible assets but also bundle of intangible assets collectively called goodwill, which includes various permits, employee, and contracts, though the assessee in Annexure-2 of its reply dated 21.12.2018 has specifically contended about its claim of 'goodwill' (page 2237 to 2245

of PB). Considering the facts that neither the AO nor the ld. DRP considered the aforesaid facts as placed before us, therefore, we remit these grounds of appeal to the file of AO to consider these issues afresh by considering the aforesaid submission of the assessee and the evidences and pass the order in accordance with law. The AO shall consider the decision of Hon'ble Apex Court in Smifs Securities Ltd (supra) and Delhi High Court in Triune Energy Services (P.) Ltd. Vs DCIT (supra). Needless to order that before passing the order the AO shall grant opportunity of hearing to the assessee. In the result these grounds of appeal are allowed for statistical purpose.

32. Ground No. 33 to 34 relates to treatment of income from other sources of Rs. 1.89 crore considering twice. The ld. AR of the assessee submits that computation of income for AY 2015-16 is placed on record evidencing breakup profit and gain from business /profession and other income to show that income from Other Sources of Rs. 1.89 crore has been considered twice in the assessment order. The ld. AR of the assessee submits that the same should be deleted.

33. On the other hand, the ld. DR for the revenue in all fairness submits that this issue may be restored to the file of AO for verification of fact and for passing order, if required.

34. Considering the submission of both the parties, we remit these grounds of appeal to the file of AO, with the direction to verify the fact and rectify the

order if the same income of Rs. 1.98 Crore is taxed twice in the assessment order. The assessee also directed to explain the fact and provide necessary information/document to the assessing officer for passing the order in accordance with law.

35. Ground No. 35 relates to deduction in respect of Education Cess. The ld. AR of the assessee submits that the Hon'ble Bombay High Court in Sesa Goa Ltd. in ITA No. 17 & 18/2013 dated 28.02.2020 held that Education Cess is a deductable item. The ld. AR of the assessee also relied upon the various other following decisions of High Courts and Tribunal;

- Chambal Fertilizer and Chemical Limited Vs JCIT (ITA No. 52/2018) Rajasthan High Court,
- Tata Steel Limited Vs DCIT (ITA No.5616/M/2012, 4043,5573/M/2012),
- DCIT Vs Bajaj Allianz General Insurance Co (ITA No. 1111 & 1113/Pun/2017),
- Atlas Copco (India) Ltd Vs ACIT (ITA No. 732/Pun/2011) and
- ITC Vs ACIT (ITA 685/Kol/2014)

36. On the other hand, the ld. DR for the revenue submits that assessee has not raised such ground before the lower authorities. This ground of appeal is raised belatedly.

37. We have considered the rival submission of the parties and deliberated on various case laws relied by ld. AR of the assessee. Considering the fact that the ground of appeal raised by assessee is purely legal in nature. Further, considering the decision of Hon'ble Bombay High Court in Sesa Goa (supra), we admit the ground of appeal and direct the AO to consider the

claim of assessee and allow appropriate relief in accordance with the decision of Hon'ble Bombay High Court in Sesa Goa (supra) wherein it was held that Education Cess and Higher and Secondary Education Cess are liable for deduction in computing income chargeable under head of 'profits and gains of business or profession'. In the result, this ground of appeal allowed for statistical purpose.

38. Ground No.36 to 38 relates to interest under section 234A and 234B. The ld. AR of the assessee submits that the assessee paid self-assessment tax of Rs. 53 lakhs on 31.03.2017, the credit of which has not been granted by AO. The AO may be directed to grant the credit of the same. The ld. AR of the assessee further submits that the return of income was filed on 30.11.2015, therefore, interest under section 234A is not applicable as return was filed within due date. The ld. AR of the assessee submits that the direction may be given to the AO to re-compute the interest under section 234A and 234B.

39. The ld. DR for the revenue submits that these issues may also be restored to the file of AO for consideration at his end.

40. Considering the submission of both the parties, we direct the AO to grant the credit of self-assessment tax and re-compute the interest under section 234A and 234B afresh in accordance with law. Needles to say that before re-computing the interest under section 234A and 234B, the AO shall grant opportunity of hearing to the assessee. In the result, these grounds of appeal are allowed for statistical purpose.

41. Ground No. 39 relates to initiation of penalty under section 271(1)©. This ground of appeal is premature and needs no adjudication.

42. In the result, appeal of the assessee is partly allowed.

Order pronounced on 27/07/2020 as per Rule 34.

Sd/- Sd/-

R.C. SHARMA
ACCOUNTANT MEMBER

PAWAN SINGH
JUDICIAL MEMBER

Mumbai, Date: 27.07.2020
SK

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "K" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai

		Date	Initials	
	Draft order dictated on (dictation sheet is enclosed with main file)	17.07.20		
	Draft placed before author	20.07.20		
	Draft proposed & placed before the Second Member			
	Draft discussed/approved by Second Member			
	Approved draft comes to the Sr.PS			
	Kept for pronouncement			
	Date on which the file goes to the Bench Clerk			
	Date on which file goes to the A.R. for signature of the Order			
	Date of dispatch of the Order			