

IN THE INCOME TAX APPELLATE TRIBUNAL  
BANGALORE BENCHES “ C ” BENCH: BANGALORE

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT  
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**

ITA No.3291/Bang/2018  
(Assessment Year: 2008-09)

Dy. Commissioner of Income Tax,  
Circle 4(1)(1), Bangalore.

....Appellant

Vs.

M/s. LMG Brands India Pvt. Ltd.,  
5<sup>th</sup> Floor, 77 Town Centre Building, No.3,  
West Wing, Off HAL Airport Road,  
Yemlur, Bangalore-560 037  
PAN AAECM 2693J

.....Respondent.

C.O. No.08/Bang/2019  
(In ITA No.3291/Bang/2018)  
(Assessment Year: 2008-09)  
(By Assessee)

Assessee By:	Shri Sharath Rao, C.A.
Revenue By:	Smt. R. Premi, JCIT (D.R)

Date of Hearing :	07.09.2020.
Date of Pronouncement :	28.09.2020.

**ORDER**

**PER SHRI CHANDRA POOJARI, A.M. :**

This appeal filed by the revenue and C.O. by the assessee is directed against the order of Commissioner of Income Tax (Appeals), Bangalore dt.01.02.2011 for the Assessment Year 2008-09.

2. The revenue has raised the effective ground as follows :

*“ 2. The ld. CIT (Appeals) has erred in holding that expenditure claimed by the assessee is not in nature of capital expenditure whereas the assessee company has acquired the rights for the sale of products belonging to the specific brands.”*

3. The assessee filed C.O. in support of the order of CIT (Appeals). The assessee has raised various grounds supporting the order of CIT (Appeals).

4. The facts of the case are that the assessee claimed to the extent of Rs.2,50,26,758 under Section 37 of the Income Tax Act, 1961 ('the Act') being payment of franchisee fees. This was disallowed by the Assessing Officer by observing that the assessee has entered into Agreement to acquire the rights for sale of products belonging to the specific brands with Bossini Garment Limited, Viniciladies Specialities Centre Sdn Bhd, Basic Properties BV and Josef Seibel Asia Pacific Limited. On appeal, the CIT(Appeals) observed that the franchisee has not transferred any rights in the trademark or any other IP to the assessee. In other words, the franchisors remain the owners of the know-how, patents, trademarks, designs, brand names, etc and the assessee only possesses the right to use and not the right to transfer the right to use. The assessee has neither obtained any new asset of which it is the owner nor has acquired any rights which are freely transferable. Further, since the usage of such rights by the assessee is restricted to

the period of agreement and for the purpose of sale franchiser's product, as such the enduring benefit test laid down by the courts fails. It is also pertinent to note that the franchise fee is not a one time payment but a recurring fee which is directly related to the sales effected by the assessee. The royalty payments are made to use and exploit the brand names of which the franchisors are owners. It is also not a case where the assessee is setting up a new business with the technical know how provided by its franchisers for which it is paying royalty. Accordingly, the CIT(Appeals) allowed the appeal of the assessee. Aggrieved by the order of CIT(Appeals), the revenue is in appeal before us.

5. We have heard the rival contentions, perused and carefully considered the material on record. In this case, the assessee entered into various Agreements with various parties as discussed earlier which is the payment of franchisee fees as follows :

1.	Bossini Garment Limited	5% of Gross Sales
2.	Josef Seibel Asia Pacific Limited	Euro 2 per pair of footwear sold
3.	Vincciladies Specilities Centre Sdn Bhd	2% of Net Sales
4.	Basic Properties BV (Kappa)	5% of Net retail turnover or 10% of net wholesale turnover.

The above payments based on certain percentage of sales by the assessee. The parties with whom the assessee has entered into Agreement has not transferred any business or commercial rights with enduring benefits to the assessee. The assessee

cannot be said to have any enduring benefit by entering into these agreements.

These are in the nature of day to day operations of the assessee's business. Being so, the CIT(Appeals) justified in allowing the expenditure as revenue expenditure.

This position is fortified with the decision in the case of Jonas Woodhead & Sons Ltd. Vs.CIT 224 ITR 342 wherein it has been held that -

*" The Courts have applied different tests like starting of a new business on the basis of technical know-how received from the foreign firm, exclusive right of the company to use the patent or trademark which it receives from the foreign firm, the payments made by the company to the foreign firm whether a definite one or dependent upon certain contingencies, right to use the technical know-how of production or the activity even after the completion of the agreement, obtaining enduring benefit for a considerable part on account of the technical information received from a foreign firm, payment whether made ``once for all" or in different instalments co-relatable to the percentage of gross turnover of the product to ultimately find out whether the expenditure or payment thus made makes an accretion to the capital asset and after the Court comes to the conclusion that it does so then it has to be held to be a capital expenditure. No single definitive criterion by itself could be determinative and, therefore, bearing in mind the changing economic realities of business and the varieties of situational diversities the various clauses of the agreement are to be examined. The Tribunal having considered the different clauses of the agreement and having come to the conclusion that under the agreement with the foreign firm what was set up by the assessee was a new business and the foreign firm had not only furnished information and the technical know-how but rendered valuable services in setting up of the factory itself and even after the expiry of the agreement there is no embargo on the assessee to continue to manufacture the product in question, it is difficult to hold that the entire payment made is a revenue expenditure merely because the payment is required to be made on a certain percentage of the rates of the gross turnover of the products of the income as royalty. In the facts and circumstances of the case the High Court was fully justified in answering the question whether the Tribunal was right in holding that 25% of the amount paid by the assessee as royalty was capital expenditure in favour of the Revenue and against the assessee.—[Jonas Woodhead & Sons \(India\) Ltd. vs. CIT](#) (1979) 10 CTR (Mad) (FB) 150 : (1979) 117 ITR 55 (Mad) (FB) : TC 16R.1270 **affirmed.**"*

6. Further the co-ordinate bench of this Tribunal in the case of DCIT Vs. TTK Health Care Limited, the Hon'ble Bench of Chennai in ITA 1921/Mad/2016 Dt.8.9.2016 held in para 5 that when the assessee has not become ownership rights of trade mark and the such licenses are remained the property of the licensee, the assessee has not derived any enduring benefit. Therefore expenses are to be

treated as revenue expenditure, not capital expenditure. The ld. AR relied on the decision In the case of TTK LIG Ltd. Vs. ACIT in ITA Nos.1791 to 1796/Mad/2011 Dt.31.10.2012. Further the Hon'ble Madras High Court in the case of CIT Vs. TVS Ltd 110 ITR 338 (Madras) held that when the payment made by the assessee to a company was in the nature of license fees which constitute an item of allowable expenditure in the computation of profit and gains and it cannot be a capital expenditure. In our opinion, the findings and reasons given by the CIT(Appeals) to allow the claim of the expenses in regard to franchisee on the Agreement entered by the assessee is a revenue expenditure and it cannot be construed as a capital expenditure. Hence the appeal of revenue is dismissed.

7. Since we have dismissed the revenue's appeal, the C.O. of assessee become infructuous and dismissed.

8. In the result, both the revenue's appeal and assessee's C.O. are dismissed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

**(N.V. VASUDEVAN)**  
**VICE PRESIDENT**

Sd/-

**(CHANDRA POOJARI)**  
**ACCOUNTANT MEMBER**

Dated: 28.09.2020.

\*Reddy GP

Copy to

1. The appellant
2. The Respondent
3. CIT (A)
4. Pr. CIT
5. DR, ITAT, Bangalore.
6. Guard File

By order

Assistant Registrar  
Income-tax Appellate Tribunal  
Bangalore