



**IN THE INCOME TAX APPELLATE TRIBUNAL**

**"H" BENCH, MUMBAI**

**BEFORE SHRI S. RIFAUH RAHMAN, ACCOUNTANT MEMBER AND**

**SHRI RAVISH SOOD, JUDICIAL MEMBER**

ITA no.7110/Mum./2019  
(Assessment Year : 2010-11)

Dy. Commissioner of Income Tax  
Circle-9(1)(2), Mumbai

..... Appellant

v/s

SabMiller India Ltd.  
(Now known as Anheuser Busch InBev  
India Ltd.), Unit no.301-302, 3<sup>rd</sup> Floor  
Dynasty Business Park, "B" Wing  
Andheri Kurla Road, Andheri (E)  
Mumbai 400 059 PAN - AAICS2238R

..... Respondent

C.O. no.71/Mum./2021  
(Arising out of ITA no.7110/Mum./2019)  
(Assessment Year : 2010-11)

SabMiller India Ltd.  
(Now known as Anheuser Busch InBev  
India Ltd.), Unit no.301-302, 3<sup>rd</sup> Floor  
Dynasty Business Park, "B" Wing  
Andheri Kurla Road, Andheri (E)  
Mumbai 400 059 PAN - AAICS2238R

..... Cross Objector  
(Original Respondent)

v/s

Dy. Commissioner of Income Tax  
Circle-9(1)(2), Mumbai

..... Respondent  
(Original Appellant)

Assessee by : Shri Rajan R. Vora  
Revenue by : Shri Gurbinder Singh

Date of Hearing - 11.08.2021

Date of Order - 25/10/2021

## **ORDER**

### **PER S. RIFAUH RAHMAN, A.M.**

Captioned appeal has been filed by the Revenue and cross objection by the assessee are against order dated 29<sup>th</sup> August 2019, passed under section 143(3) of the Income Tax Act, 1961 (for short "the Act") by the learned Commissioner of Income Tax (Appeals)-58, Mumbai, for the assessment year 2010-11.

### **ITA no.7100/Mum./2019** **Revenue's Appeal – A.Y. 2010-11**

2. The Revenue has filed the present appeal on the following grounds:-

*"1. Whether on facts & circumstance of the case, the Ld.CIT(A) is correct in deleting the disallowance of Rs.16,17,97,500/- on account of invoking of section 40(a)(ia) of the I.T. Act made by the AO.*

*2. Whether on facts & circumstance of case, the Ld.CIT(A) is erred in deleting the disallowance of depreciation on Foster's brand of Rs.16.17,97,500/- merely relying in judicial pronouncement of Hon'ble ITAT without discussing the issue on merit?*

*3. Whether on the facts & circumstances of the case and in law, the Ld.CIT(A) is erred in holding that the provisions of section 40(a)(1) were not applicable in respect of depreciation claimed u/s.32 of the Act on Foster brand for which payment was remitted without deducting tax in accordance with the provisions of Section 195 of the Act.*

*4. Whether on the facts & in circumstances of the case and in law, the Ld.CIT(A) justified in deleting the addition made by the AO of Rs.4,97,36,399/- as TDS deducted on account of payment of management fee and interest without examining the fact that*

*whether the TDS amount was actually deposited in the government account or retained or got refund of the same by the assessee?"*

3. The issue arising out of grounds no.1, 2 and 3, relates to disallowance of ₹ 16,17,97,500, under section 40(a)(i) of the Act on account of Foster's Brand.
4. The assessee had purchased Foster's Brand and Intellectual Property, Foster's Brewing Intellectual Property and Foster's Trademarks from Foster's Australia Ltd., for a consideration of ₹ 157,92,00,000 (approximately US Dollar 35 million) on which no TDS was deducted. The said amount was capitalized by the assessee in the books under Fixed Assets and depreciation on the same was claimed @ of 25% under section 32(1) of the Act. The assessee during the year under consideration also claimed depreciation amounting to ₹ 16,17,97,500, on the same. The Assessing Officer disallowed the depreciation under section 40(a)(i) of the Act for non-deduction of TDS under section 195 r/w section 200 of the Act.
5. The learned CIT(A) directed the Assessing Officer to delete the addition brought by disallowing depreciation. For better appreciation of facts, the relevant observations of the learned CIT(A) in allowing the claim made by the assessee are reproduced below:-

"The background of the issue in words of Assessing Officer is as under:-

7.1 During the financial year 2006-07, the assessee company had claimed to have purchased Foster's Brand from Foster's Australia and had capitalised the same in the 'Fixed Assets' Schedule under the head 'Trade Marks/Brands Thereafter, in the subsequent year, the assessee continued to claim depreciation @ 25% on the said asset. In the assessment order for A. Y. 2007-08, the cost of the brand was disallowed u/s. 40(a)(i) of the Income-tax Act, 1961 and as the assessee had claimed depreciation on the said amount, the claim of depreciation was disallowed. For the detailed reasons discussed in the assessment orders for A.Y. 2007-08 to A.Y. 2009-10, the assessee's claim of depreciation on the value of brand has been consistently disallowed.

The final conclusion is stated as under:

7.4 Thus, taking into account the factual position as discussed above and the clear position of law, it/s clear that the assessee was liable to deduct TDS on the payment made to Foster's Australia for acquisition of trademarks and the Foster's brand intellectual property. The said amount was capitalized by the assessee company in its books and the depreciation claimed on the same has already been disallowed in the assessment order for the A. Y. 2007-08, A Y 2008-09 and AY 2009-10. In the assessment order for A.Y.2009-10, depreciation of Rs.21,57,30,000/- claimed @25% of the WDV was disallowed. In the year under consideration, the assessee has claimed depreciation of Rs. 16,17,97,500/- on the brought forward WDV of Rs. 64,71,90,000/-. Since the original cost itself has been disallowed in the A.Y 2007-08 and the claim of depreciation on the same has consistently been disallowed in the subsequent years, including A.Y. 2009-10, the claim of depreciation of Rs. 16,19,97,500/- for the year under consideration is hereby disallowed and added to the total income of the assessee.

18. In A.Ys. 2007-08, 2008-09 the Hon. ITAT and 2009-10 the CIT(A) has directed granting of depreciation. The DRP allowed the deduction in AY 11-12 but disallowed in AYs 12-13,13-14 and 14-15. Further, in WP(C) 6962/2008 dated 25.07.2016 CUB PTY LIMITED (Formerly Known as Foster's Australia Limited) vs UOI & ORS, the Bombay High Court against AAR ruling considered the following question:

(i) On the facts and circumstances of the case, whether the receipt arising to the applicant, from the transfer of its right, title and interest in and to the trademarks, Foster's Brand

*Intellectual Property and grant of exclusive perpetual licence of Foster Brewing Intellectual Property is taxable in India, having regard to the provisions of the Income Tax Act, 1961 and the Double Taxation Avoidance Agreement between India and Australia.*

*The following decision was made by Hon. High Court*

*2.1 As a consequence of the foregoing discussion, the view taken by the AAR on question (1), which was placed before the AAR, cannot be accepted and the answer to the said question would be that the income accruing to the petitioner from the transfer of its right, title or interest in and to the trademarks in Foster's brand intellectual property is not taxable in India under the Income Tax Act, 1961. That being the case, question (2), which was posed before the AAR, would not arise.*

*19. The matter is examined. The payment is non-taxable, being similar payment as covered in the decision above. The issue of deduction of tax at source does not arise and hence section 40(a)(i) cannot be invoked. Further section 32 and 40(a)(ia) operate on different footing. The depreciation as disallowed as a consequence of invoking section 40(a)(i). The Assessing Officer is directed to delete the addition brought by disallowing depreciation. The ground is allowed."*

6. The Revenue being aggrieved by the order so passed by the learned CIT(A) filed appeal before the Tribunal.

7. The learned Departmental Representative relied upon the order of the Assessing Officer.

8. The learned Authorised Representative for the assessee submitted that this issue is covered by the decision of the Tribunal rendered in assessee's own case in ACIT v/s Anheuser Busch InBev India Ltd., ITA no.1205/Mum./2016, and Anheuser Busch InBev India Ltd. v/s ACIT, for the assessment year 2011-12, vide order dated 18<sup>th</sup>

February 2020. Accordingly, the learned Authorised Representative submitted that the issue be decided in favour of the assessee by upholding the order of the learned CIT(A).

9. Having considered the rival submissions and having perused the material on record, we find no infirmity in the order of the learned CIT(A) which is self-explained and speaking order as reproduced above. Before us, during the course of hearing, both the learned Authorised Representative for the parties conceded that similar issue has been decided by the Co-ordinate Bench of the Tribunal as relied upon by the learned Authorised Representative for the assessee ACIT v/s Anheuser Busch InBev India Ltd., ITA no.1205/Mum./2016, and Anheuser Busch InBev India Ltd. v/s ACIT, for the assessment year 2011-12, vide order dated 18<sup>th</sup> February 2020, wherein the Tribunal has deleted identical addition by holding that the claim of depreciation under section 32 of the Act is not in respect of the amount paid or payable which is subject to TDS, but is a statutory deduction on an asset which is eligible for deduction of depreciation. Consistent view being maintained by the Co-ordinate Bench of the Tribunal in assessee's own case cited supra, similar directions are issued on this issue also. Consequently, we have no hesitation in upholding the order

of the learned CIT(A) by dismissing the grounds no.1 to 3, raised by the Revenue.

10. Ground no.4, relates to disallowance of grossed-up expenses to the extent of taxes withheld therein amounting to ₹ 4,97,36,399, under section 195A of the Act.

11. The Assessing Officer during the assessment proceedings, found that in the Profit & Loss Account filed by the assessee, the assessee debited an amount of ₹ 46,17,25,791, under the head "*Management Fees*" and interest of ₹ 7,27,79,493, on the external commercial borrowings. In Schedule-8 to notes to accounts, Point no.9 (giving details of expenditure of foreign currency on accrual basis), the auditor has clarified that the same includes withholding of tax of ₹ 4,77,16,128, and ₹ 20,20,271, on account of interest expenses on a grossed-up basis @ 10%. The assessee submitted that in a net tax arrangement, payee's tax liability agreed to be borne by the payer forms part of the base cost for availing the services. Accordingly, the Assessing Officer disallowed management fees and interest to the extent of ₹ 4,77,16,128, and ₹ 20,20,271, respectively aggregating to ₹ 497,36,399, which were added back to the total income of the assessee.

12. The learned CIT(A) directed the Assessing Officer to delete the addition by observing as follows:-

*"37. The judicial history is that in none of the preceding or succeeding AYs the addition was made. In AY 2011-12, the DRP deleted the addition which was included in draft assessment order. The TDS is expenses payable net of tax under section 195A of Income Tax Act 1961. From the language of the act in section 195A it is clear that the tax payable is part of total consideration pursuant to the agreement under which the payment is made. The tax portion now disallowed has same character and colour as principal sum and needs no separate treatment. Under normal circumstances, if X is sum payable to A and at time of payment a fraction of X is paid to A and other fraction of X is remitted as TDS. Still X will be deductible. The only difference here is assessee is absorbing the tax liability of the recipient and this liability is absorbed as part of an agreement. As per the commercial agreement the aggregate figure computed in accordance with section 195A is liability of the appellant under the agreement. Considering all these factors I direct the Assessing Officer to delete the addition."*

13. Before us, the learned Counsel for the assessee submitted that this similar issue has been decided by the Tribunal in assessee's own case in ACIT v/s Anheuser Busch InBev India Ltd., ITA no.1205/Mum./2016, and Anheuser Busch InBev India Ltd. v/s ACIT, for the assessment year 2011-12, vide order dated 18<sup>th</sup> February 2020. Apart from this, the learned Counsel has also relied upon the decision of the decision of the Tribunal in CIT v/s BOB Cards Ltd., [2013] 56 SOT 232 (Mum.). Accordingly, the learned Counsel submitted that the issue be decided in favour of the assessee by upholding the order of the learned CIT(A).

14. The learned Departmental Representative relied upon the order of the Assessing Officer.

15. After hearing both the parties, we find that identical issue has been decided by the Co-ordinate Bench of the Tribunal in assessee's own case in ACIT v/s Anheuser Busch InBev India Ltd., ITA no.1205/Mum./2016, and Anheuser Busch InBev India Ltd. v/s ACIT, for the assessment year 2011-12, vide order dated 18<sup>th</sup> February 2020, wherein the Tribunal has decided the issue in favour of the assessee and against the Revenue by observing as under:-

*"39. We have considered rival submissions and perused the material on record. As could be seen, the assessee had entered into a borrowing arrangement with Standard Chartered Bank on a net of tax basis. As per the terms of the agreement, the assessee has computed TDS on a net of tax basis and no tax has been separately debited to the Profit & Loss Account. It is also a fact on record that as per the borrowing arrangement, the tax liability, if any, on payment of interest has to be borne by the assessee. Therefore, the tax withheld has to be allowed as expenditure to the assessee. In view of the aforesaid, we do not find any infirmity in the directions of the DRP. Ground is dismissed."*

16. Since the issue in hand is covered by the aforesaid decision of the Co-ordinate Bench of the Tribunal, for the sake of consistency, respectfully following the aforesaid decision, similar directions are issued in this year as well. Consequently, we uphold the order of the learned CIT(A) by dismissing the ground no.4, raised by the Revenue.

17. In the result, Revenue's appeal is dismissed

**C.O. no.71/Mum./2021**  
**(Arising out of Revenue's appeal**  
**being ITA no.7110/Mum./2019)**  
**Assessment Year : 2010-11**

18. The assessee has filed the present cross objection on the following ground:-

*I. On the facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeals) ("CIT(A)"):*

*Disallowance of commission to agents under section 40(a)(ia) of the Act - ₹4,36,32,364.*

*1. erred in confirming the treatment followed by AO for an amount of ₹ 4,36,32,364 being reimbursement of expenses (incurred by agents on behalf of Appellant) as commission and thereby disallowing it under section 40(a)(ia) of the Act on account of non-deduction of tax under the provisions of section 194H of the Act;*

*2. erred in confirming the disallowance made by the learned AO without considering the fact that pure reimbursement of expenses does not have the character of income chargeable to tax under the provisions of section 194H of the Act and hence tax is not required to be withheld on the same;*

*3. erred in confirming the disallowance made by the learned AO without considering the various supporting documents and additional evidences filed during the course of proceedings for reimbursement of expenses to demonstrate the fact the same has been paid to the commission agents on a cost-to-cost basis without any mark-up or profit element embedded it;*

*4. erred in confirming the disallowance without appreciating the fact that reimbursement of expenses incurred by the agents was wholly and exclusively for the purpose of Appellant's business and should be allowable under section 37 of the Act.*

*II. On the facts and in the circumstances of the case, the*

*learned AO has:*

*5. erred in objecting the order of CT(A) deleting various additions/disallowances made under assessment without appreciating the facts of the case;*

*Depreciation on Foster's Brand - ₹ 16,17,97,500*

*6. erred in disallowing depreciation of ₹ 16,17,97,500 pertaining to Foster's brand by applying the provisions of section 40(a)(1) of the Act read with section 195 and 200 of the Act;*

*7. erred in not appreciating that the provisions of section 40(a)(i) of the Act do not apply to capital expenditure and depreciation claimed on such expenditure;*

*8. erred in disregarding that depreciation is a statutory deduction on an asset which is eligible for deduction under section 32 of the Act;*

*9. erred in disallowing depreciation claim without considering the fact that the Hon'ble ITAT's order in the Appellant's own case for AY 2007-08, AY 2008-09, AY 2009-10 and AY 2011-12 has already decided the issue in favour of the Appellant wherein it was held that depreciation on capital expenditure cannot be disallowed under section 40(a)(i) of the Act.*

*Disallowance of grossed up expenses to the extent of taxes withheld therein - ₹ 4,97,36,399*

*10. erred in disallowing an amount of ₹ 4,97,36,399 being tax deducted on payments made after grossing up as per Section 195A of the Act;*

*11. erred in disregarding the well settled principle of law that TDS withheld on remittance is an allowable expenditure;*

*12. erred in objecting the CIT(A) order without appreciating the fact that the Appellant has duly deposited the tax deducted on management fees of ₹ 4,77,16,128 and on interest of ₹ 20,20,271 aggregating to ₹ 4,97,36,399 in the Government account and which was not the ground for disallowance in the assessment order passed under Section 143(3) of the Act;*

19. As it appears from the above, grounds no.1 to 4, relates to disallowance of ₹ 4,36,32,364, on account of commission to agents under section 40(a)(ia) of the Act.

20. The assessee had debited total commission of ₹ 22,50,00,435, in the Profit & Loss Account and out of this, an amount of ₹ 4,36,32,364, comprises of payments in the nature of reimbursement to the agents. The Assessing Officer considered the submissions of the assessee in this regard, however, disallowed the total amount of ₹ 4,36,32,364, representing reimbursement to the agents.

21. The learned CIT(A) did not consider the additional evidences filed by the assessee and upheld the decision of the Assessing Officer by concluding that the payments are in the nature of commission and it is the obligation of the assessee to deduct TDS.

22. Before us, the learned Counsel for the assessee submitted that the assessee had to reimburse certain expenses such as travelling charges, telephone expenses, printing and stationery, etc., incurred by the commission agents on behalf of the assessee. He submitted that the commission agents issue a separate debit note along with the supporting documents for the underlying expenses incurred on behalf of the assessee for such reimbursement. Based on the verification of

the debit notes and the supporting documents, the assessee issues a consolidated credit note in favour of the commission agent. He submitted that the assessee validly deducts taxes on the commission charges under section 194H of the Act. The learned Counsel further submitted that the reimbursement of expenses does not constitute an income to the commission agents and is, therefore, not taxable in their hands and hence there is no requirement to withhold taxes on the same. In support of his contention, the learned Counsel relied upon relevant extracts of additional evidences, partywise break-up of commission and reimbursement paid to the agents and sample copies of supporting documents for the reimbursements filed before the learned CIT(A) are placed at Page no.177 to 460 of the paper book. The learned Counsel further brought to the notice of the Bench the details submissions a copy of which is placed at Page no.465 to 470 of Factsheet. The learned Counsel, while concluding, submitted that the issue is fully covered by the decision of the Hon'ble Supreme Court in Director of Income Tax (IT) v/s A.P. Moller Maersk AS, [2017] 392 ITR 186 (SC) and the decision of the Hon'ble Jurisdictional High Court in Krupp Udhe GmbH, [2013] 354 ITR 173 (Bom.).

23. The learned Departmental Representative has objected to the order of the learned CIT(A).

24. We have considered the rival submissions of the learned Counsel appearing for the parties and perused the material on record in the light of the decisions relied upon. As it transpires from the record available before us as well we note it from the submissions of the learned Counsel for the assessee that the assessee during the course of first appellate authority, had filed certain additional evidences in support of its claim which were ignored by the learned CIT(A) consequent to which the order of the learned CIT(A) in the instant case becomes cryptic one which is without deliberating upon the provisions of the Act in disregarding the admissibility of the additional evidences filed by the assessee. Considering the legal proposition, the learned CIT(A) ought to have considered the additional evidences adduced by the assessee and could have decided the issue on merit and since the learned CIT(A) is failed to do so, therefore, we deem it fit and proper to admit the additional evidences filed by the assessee. Consequently, we set aside the impugned order passed by the learned CIT(A) and restore the issue back to the file of the learned CIT(A) and direct him to decide the issue considering the additional evidences filed by the assessee and decide the issue on merit in view of the decision of the Hon'ble Supreme Court in Director of Income Tax (IT) v/s A.P. Moller Maersk AS, [2017] 392 ITR 186 (SC) and the decision of the

Hon'ble Jurisdictional High Court in Krupp Udhe GmbH, [2013] 354 ITR 173 (Bom.) and in accordance with law after providing reasonable opportunity of being heard to the assessee. Thus, grounds no.1 to 4, are allowed for statistical purposes.

25. Grounds no.5 to 12, being consequential to the outcome of the issue raised by the assessee in grounds no.1 to 4, as aforesaid. Accordingly, we direct the learned CIT(A) to give consequential effect in accordance with law and in view of his decision in grounds no.1 to 4, as directed above.

26. In the result, the assessee's cross objection is partly allowed.

27. To sum up, Revenue's appeal is dismissed and assessee's cross objection is partly allowed.

Order pronounced in the open court on 25/10/2021.

Sd/-  
RAVISH SOOD  
JUDICIAL MEMBER

Sd/-  
S. RIFAUH RAHMAN  
ACCOUNTANT MEMBER

**MUMBAI, DATED: 25.10.2021**

*SabMiller India Ltd.  
(Now known as Anheuser  
Busch InBev India Ltd.)*

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Pradeep J. Chowdhury  
Sr. Private Secretary*

By Order

Assistant Registrar  
ITAT, Mumbai