IN THE INCOME TAX APPELLATE TRIBUNAL, 'K' BENCH MUMBAI

BEFORE: SHRI VIKAS AWASTHY, JUDICIAL MEMBER
&
SHRI M.BALAGANESH, ACCOUNTANT MEMBER

ITA No.1793/Mum/2017
(**Assessment Year : 2012-13**)
&
ITA No.7157/Mum/2017
(**Assessment Year : 2013-14**)

M/s. Anheuser Busch InBev India Limited (Formerly known as SABMiller India Limited) Unit No.301-302, Third Floor, Dynasty Business Park B-Wing, Andheri Kurla Road Andheri (E), Mumbai – 400 059	Vs.	Assistant / Deputy Commissioner of Income Tax Circle 11(1)(2) Mumbai
PAN/GIR No. AAICS2238R		
(Appellant)	..	**(Respondent**)

Assessee by	Shri Rajan R. Vora / Shri Hemen Chandariya
Revenue by	Dr. Yogesh Kamat
Date of Hearing	**01/02/2022**
Date of Pronouncement	**24/02/2022**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

ITA No.1793/Mum/2017 & 7157/Mum/2017 (A.Y.2012-13 & 2013-14)

These appeals in ITA Nos.1793/Mum/2017 & 7157/Mum/2017 for A.Y.2012-13 & 2013-14 preferred by the assessee against the final assessment order passed by the Assessing Officer dated 24/01/2017 & 30/10/2017 respectively u/s.143(3) r.w.s.144C(13) of the Income Tax Act, hereinafter referred to as Act, pursuant to the directions of the ld. Dispute Resolution Panel-2 (DRP in short) u/s.144C(5) of the Act dated 29/11/2016 & 05/09/2017 respectively for the A.Y.2012-13 & 2013-14.

1.1. As identical issues are involved, these appeals are taken up together and disposed of by this common order for the sake of convenience.

ITA No.1793/Mum/2017 A.Y.2012-13

2. The Ground Nos. 1 & 2 raised by the assessee are general in nature and does not require any specific adjudication.

3. The Ground Nos. 3.1 – 3.4 raised by the assessee are challenging the disallowance of management fees of Rs.29,76,67,534/- paid by the assessee to its Associated Enterprises (AE) by determining the arm's length price (ALP) at 'Nil'.

3.1. We have heard rival submissions and perused the materials available on record. The assessee company is primarily engaged in the business of brewing, packaging, distribution, marketing and sale of beer. The return of income for the A.Y.2012-13 was filed on 28/11/2012 declaring loss of Rs.135,45,95,943/-, which was later revised on 26/03/2014 declaring loss of Rs.133,07,69,973/-. The draft assessment order was passed by the ld. AO on 29/03/2016 wherein certain additions / disallowances including

transfer pricing adjustment were made. Pursuant to the directions of ld. DRP, final assessment order u/s.143(3) r.w.s. 144C(13) of the Act was passed on 24/01/2017 determining total loss of the assessee at Rs.35,61,91,243/-.

3.2. During the financial year ended 31/03/2012, ABI India (i.e. the assessee) paid management group service charge hereinafter referred to as GSC charge amounting to Rs.29,76,67,534/- to its AE for the following services:-

i. **General managerial and consultancy services**
- Financial Consulting
- Improved Personnel Strategy
- Business Advisory Services
- Corporate Affairs (including assistance on Intellectual Property related matters)
- Marketing

ii . Technical services
- Technical Consulting

iii. Information technology related services
- Computer Advisory Services and Data Processing

3.3. The assessee entered into a group service agreement with SABMiller Management (IN) BV (SABMiller group) as per which SABMiller provides specialised services as well as global strategies and policies that are aimed at assisting its operations in increasing local revenues. The said agreement copy is enclosed in page 605 of the paper book filed before us. Further as per the group transfer pricing policy, the cost had been allocated on the basis of time spent, head count, number of users etc., and was charged to ABI India at full cost plus mark-up basis. This transaction was benchmarked by the assessee using Transactional Net

Margin Method (TNMM) considering the AE as the tested party and since the mark-up charge of 3% / 5% was less than the comparables mark-up of 4.35% / 5.40%, the assessee concluded in its Transfer Pricing (TP) study report that the transaction was made at arm's length price.

3.4. During the course of assessment proceedings, the ld. TPO has requested the assessee to justify the benefit test in the form of benefits derived by the assessee on the cost base of which such mark-up was charged. The assessee was also directed to furnish real time documentary evidences to substantiate the receipt of services. The assessee submitted supporting documents / evidences that the management group services have actually been rendered as well as received. The assessee also submitted that the group services have indeed resulted in benefits accruing to the assessee and the cost allocation methodology adopted by the SABMiller group is genuine, scientific, logical, reasonable and has been subjected to audit and certification by an independent Accountant.

3.5. The ld. TPO ignoring the aforesaid submissions and explanations determined the ALP of Management fees paid at Rs. 'Nil' passed on the action taken by him for A.Y.2011-12 thereby making an adjustment of Rs.29,76,67,534/-.

3.6. This order of the ld. TPO was upheld by the ld. DRP. The crux of the observations of the ld. DRP are as under:-

- *Unless a tangible benefit is derived from the payment, the ALP of such payment would be treated as either NIL or to the extent it is shown that the benefit actually derived from such payment.*

- *It is not permissible to charge expenditure incurred for the benefit of the Group as a whole, as the same is not incurred in connection with any individual member.*

- *Expenditure incurred by the AE for stewardship activities or duplicate services are also not permissible to be charged on other Group entities*

3.7. We find that this issue is no longer *res-integra* as the same has already been decided in favour of the assessee by this Tribunal in assessee's own case for A.Y.2011-12 in ITA No.1205/Mum/2016 and 1738/Mum/2016 dated 18/02/2020 wherein it was held as under:-

> *8. We have considered rival submissions in the light of the decisions relied upon and perused the material on record. The fact culled out from record would reveal that the assessee has entered into a group service agreement (GSA) with SABMiller Management (IN) B.V., for availing certain services. As could be seen from the aforesaid agreement, a copy of which is placed in the paper book, companies of the group availed such services relating to financial consulting, improved personnel strategy, business advisory services, corporate affairs, marketing, technical consulting, computer advisory services and data processing and intellectual property services, etc. The agreement also provides that such services can be provided by procuring them from other companies in the group or even from third party. It is also mentioned in the agreement that the provision of such service would be at the request of the recipient. As per the terms of agreement, the cost of service provided to different entities in the group would be charged with a mark–up and the allocation of such expenditure to the recipient should be on the basis of allocation keys which could vary according to the nature of service being provided. The agreement also provides, all information whether tangible or intangible including any formula, pattern, compilation, method, technique or process relating to the service rendered which is not generally known to the public would be treated as confidential. The agreement also provides that in consideration of the supply of service, a fee would be charged on the basis of cost incurred together with a mark–up to be determined as per Schedule–(II) of the agreement and on the basis of invoice raised by the service provider.*
>
> *9. Thus, from the aforesaid facts, it is clear that the nature of services to be provided at the request of the service recipient as well as the payment to be made for such service is regulated by the terms of the agreement. In fact, the Transfer Pricing Officer has also not disputed the aforesaid factual position. It is also a fact on record that the assessee in its transfer pricing study report has conducted economic analysis of the price paid to the A.E. towards service received by adopting TNMM as the most appropriate method. Further, the assessee has undertaken comparability analysis by selecting independent comparables from the database and*

considering the margin of the comparables vis–a–vis the margin shown by the assessee, price paid for the transaction was found to be at arm's length. Apparently, the Transfer Pricing Officer has not accepted the economic analysis of the assessee and has determined the arm's length price of the transaction at nil primarily on the ground that the assessee has not proved the actual receipt of service and the benefit accrued / derived from such service as well as the value of service rendered. We have noted that in the course of proceedings before the Transfer Pricing Officer, the assessee has furnished voluminous documents in the form of correspondence, notes, e–mails, invoice raised, etc., to prove not only the actual rendition of service, but also the benefit derived. In fact, before us, the assessee in the written note has enumerated the exact nature of services rendered in terms of the agreement as well as the benefit derived with reference to the documentary evidence filed before the Transfer Pricing Officer. For better appreciation, we think it appropriate to reproduce the same hereunder:–

Description of services	*Description of the document*	*Benefits derived by SABMiller India*	*Paper book Reference*
Financial Consulting	*Presentation outlining Group approach for financial capability assessment and improvement planning. The document provides a detailed plan to assess the abilities of the finance team in India and how to improve what the team can achieve in the future.*	*Provides SABMiller India with the templates to be used for capturing and calculating the capability level of the team. The provision of templates means SABMiller India does not have to incur time and resource to create them.* *The templates have supported Finance team development in India as they make commercial decisions.*	*590-613* *For other supporting evidences, please refer submissions dated 11th November 2014 and 19th January 2015 (enclosed as Item 8 and 10 of the Paper book at Page no.394 and 554 respectively)*
Improved Personnel Strategy	*As part of Organizational Development there is a training program, Global Action Learning Program ("GALP"), and Derek Jones, the Indian Marketing Director attended part of a 3 week long global leadership program with approx. 35 participants. The workshop addressed 5 real strategic challenges faced by the SABMiller ExCom.* *As one example, Derek attended a training session on 'what capability needs to be built to become a best practice Point of Purchase Off Trade executor'.*	*This training program has been used by SABMiller India to improve the off-trade position of the company which helps SABMiller India increase revenue compared to the market segment.* *This type of training is highly bespoke and only comes from having these centres of excellence and sharing Group learnings.*	*854-856* *For other supporting evidences, please refer submissions dated 11th November 2014 and 19th January 2015 (enclosed as Item 8 and 10 of the Paper book at Page no.394 and 554 respectively)*

	In particular how this capability is going to be created within SABMiller and with 3rd parties. Attachment 2.4 shows the attendee list for the GALP training sessions as well as slides describing the initiative.		
Marketing	*Miller high life brand development* *SABMiller Group helps SABMiller India in undertaking a market study for a product launch of Miller High Life in India.* *The attachments provided by Group Marketing outline the action plan to introduce Miller High Life into India include pricing, how to launch and where to position the product.*	*Group Marketing helps SABMiller India in undertaking a market study in order to ascertain the need for introducing a global brand in India, understanding the preferred tastes of the customers and accordingly, analysis of the right ingredient mix, providing guidance on the packaging, pricing range and identification of the market where these products can be launched initially etc.* *Group Marketing provide the best launch plan for Miller High Life. This launch has been developed with huge levels of assistance from Group. Ultimately the launch will increase the sales growth and profitability prospects in India.*	*871-896* *For other supporting evidences, please refer submissions dated 11th November 2014 and 19th January 2015 (enclosed as Item 8 and 10 of the Paper book at Page no.394 and 554 respectively)*
Technical Consulting	*The water risk assessment is a critical part of brewing beers. In this regard, the Group facilitates frequent assessments and reviews of SABMiller India's breweries of vulnerabilities and helps in developing specific concrete action plans for each prioritized risk.* *The attachments include:* • *A presentation from a water risk assessment workshop for the HBL Brewery. The purpose was to share and confirm top water risks identified for the brewery and develop a mitigation plan* • *A list of key stakeholders*	*Water is a critical issue as it is linked to a wide range of environmental, business and social aspects of a region. The problems related to water availability, quality and reputation represent a significant risk to SABMiller India's business.* *The benefits of this tool include improving water efficiency within the operations of SABMiller India and also mitigating the water risks faced by the community.* *The technical assessments of vulnerabilities helps SABMiller India in developing action plans for each prioritized risk signed*	*1019-1112* *For other supporting evidences, please refer submissions dated 11th November 2014 and 19th January 2015 (enclosed as Item 8 and 10 of the Paper book at Page no.394 and 554 respectively)*

	who would be affected by the risks identified. • *The water risk assessment tool (excel workbook) which provides a very detailed assessment of the water risks exposure to SABMiller India.*	*off by Technical Director.*	
*Computer Advisory & Data Processing services **	*Applications used by SABMiller India.* *The worksheet provided shows an example of the applications used by India during F11. As detailed above, applications are designed to meet the needs of functions within the business and ultimately rely on the infrastructure set-up by GIS.*	*An example of an application is Hyperion which is SABMiller's Platform for Advanced Reporting and Consolidation tool used for financial & internal financial management reporting.* *Another example of an application is Webrew, which is the global Intranet for SABMiller. This enables SABMiller India to access data, keep in contact with case studies. Such a website providing beer industry data for all commercial functions would not be possible, or would come at significant cost if acquired through a third party. SABMiller India is therefore prepared to pay for such a website and for access to it.*	*1221-1224* *For other supporting evidences, please refer submissions dated 11th November 2014 and 19th January 2015 (enclosed as Item 8 and 10 of the Paper book at Page no.394 and 554 respectively)*
Corporate Services & Intellectual Property services	*Attached is an example of output from the global Sustainability Assessment Matrix ("SAM") tool with a detailed assessment for India.* *SAM is a benchmarking tool to measure progress against SABMiller's 10 sustainable development priorities.*	*The SAM tool benefits the group through providing a benchmarking platform to identify markets which need additional support with Sustainable development priorities.* *Further SABMiller India benefits from being given clear benchmarking data which they can then target to reduce costs and environmental impact - including being given suggestions that have been identified elsewhere in the group.*	*1263-1320* *For other supporting evidences, please refer submissions dated 11th November 2014 and 19th January 2015 (enclosed as Item 8 and 10 of the Paper book at Page no.394 and 554 respectively)*
Business Advisory Services	*An engineering note on environmental and health issues with respect to paint*	*Supports SABMiller India business in securing the inputs that are needed while*	*1381-1392* *For other supporting evidences, please*

	coatings which are used to protect steel structures.	*building and provides guidance on energy and climate security by improving the management of internal resources.*	*refer submissions dated 11th November 2014 and 19th January 2015 (enclosed as Item 8 and 10 of the Paper book at Page no.394 and 554 respectively)*

10. Further, it is noticed, under the computer advisory and data services specific applications are designed to meet the needs of functions within the business and ultimately rely on the infrastructure set–up by global information system. Based on the needs of the assessee and other Indian group companies, access to these applications is granted under the GSA to the identified users. The applications which were recommended to the assessee are as under:–

Application	*Service Description*
Activity learning database (ALD)	*ALD is used to enable the marketing insights team to use lessons from previous activates to inform future objective and activity planning. It is an application that captures information as a part of the cycle planning process from both group and local country marketing teams*
Career Framework	*The Career framework project is used to allow individuals to plot their future careers using pre-mapped career models for each functional area (as approved by functional leaders and SMEs). It is a model whereby employees can define the shape of their current and aspired-to-roles.*
Financial Controls Management (FCM)	*FCM is used as the central repository for documentation and processes that relate to internal controls. It is a web-based application that facilitates compliance with Sarbanes-Oxley. It is used in sites that do not have the Global template as their core financial controls system*
Knowledge library	*Knowledge library is used to provide a central focal point for members of the SABMiller marketing community to share knowledge with the rest of that community. It is hosted on SharePoint*
Manufacturing KPI	*Global Evaluation Manufacturing (GEM) is used to ensure alignment and compliance to the principles of the Manufacturing Way and is owned by Group Technical. It is a Web based application for tracking best practices across breweries.*
Media Library	*"Media Library is used to store images and Video clips to be used for competition and reporting purposes. This is an externally hosted site and can be accessed by SABMiller employees worldwide via single sign on functionality added to SharePoint*
Office communicator	*"Office communicator is used to provide presence awareness and instant messaging functionality throughout the SABMiller organization to users who have been enabled on AD. It is an application that is built in to your laptop set up*
Supplier Audit System	*"SAS provides a single source of master reference data to be used for the generation of Audit Scorecard Excel templates and a central online store of completed Audit Scorecards for global reporting. It is a centralized system that can be accessed globally within SABMiller*
Technical DMS	*"Tech DMS is used to manage documents using an automated process for the approval and publication of controlled and part controlled documents as defined by ISO9001. It is a secure system for the technical department*

11. It is further relevant to observe, the assessee had furnished documentary evidences before us which clearly demonstrate that in the course of proceedings before the Transfer Pricing Officer, the assessee had not only furnished the details of services rendered under the GSA, but the break–up and quantification of such expenditure with specific allocation keys. In contrast to the details/information furnished by the assessee, including the independent benchmarking done in the transfer pricing study report by following an approved method, on a perusal of the order passed under section 92CA(3) of the Act by the Transfer Pricing Officer, it is very much clear that the Transfer Pricing Officer has not done any independent benchmarking as per the mandate of section 92C r/w rule 10B even after rejecting the transfer pricing analysis of the assessee under TNMM. Further, the finding of the Transfer Pricing Officer is not only ambiguous, but contradictory as, though, he himself has stated that copy of e–mails and reports filed before him show that some services have been rendered, however, in the same breath he says that whether such services have any value and, if so, the cost incurred for that and the benefit derived by the assessee has not been proved. The Transfer Pricing Officer while determining the arm's length price of the transaction at nil has apparently not followed any one of the prescribed method under section 92C r/w rule 10B. Rather, he has determined the arm's length price at nil on a purely ad–hoc and presumptive basis by stating that the assessee has failed to demonstrate the rendition of service and benefit derived by it as well as the quantification of such services.

12. It is trite law, as per the mandate of Chapter–X of the Act, the Transfer Pricing Officer is required to determine the arm's length price of a specific international transaction. Section 92C of the Act prescribes certain methods for determining the arm's length price. Whereas, rule 10B lays down the mode and manner of computation of arm's length price under different methods prescribed under section 92C of the Act. A careful reading of the order passed by the Transfer Pricing Officer would make it clear that, while determining the arm's length price of intra group services at nil he has not followed any one of the prescribed methods. Therefore, the determination of arm's length price at nil cannot be accepted, as it is not in accordance with the statutory provisions which the Transfer Pricing Officer is duty bound to follow. More so, when the Transfer Pricing Officer himself has admitted that the evidence on record does show that some services have been rendered. If the Transfer Pricing Officer was not convinced with the benchmarking done by the assessee under the TNMM, after rejecting the same he should have conducted an independent benchmarking by following any one of the prescribed methods to determine the arm's length price of the intra group services which he himself, to some extent, acknowledges to have been received by the assessee.

13. It is relevant to observe, the Hon'ble Delhi High Court in EKL Appliances (supra), has held that it is not necessary for the assessee to show that any legitimate expenditure incurred by it was also incurred out of necessity. It is also not necessary for the assessee to show that any expenditure incurred by him for the purpose of business carried on by him has actually resulted in profit or income either in the same year or in any of the subsequent years. The burden is initially on the assessee to determine the arm's length price. When the assessee determines the arm's length price following one of the methods, the Transfer Pricing Officer has to determine the arm's length price by following any one of the methods if he does not agree with the benchmarking of the assessee. In the aforesaid decision, the Hon'ble High Court has also taken note of the decision rendered the Hon'ble Punjab & Haryana High Court in Cushman and Wakefield India Pvt. Ltd. (supra). The Co–ordinate Bench in Merck Ltd. (supra), after analyzing the facts held that if the material on record show that the assessee in terms of the agreement was entitled to received a package of services and in fact such services were received, just because the services were too general in the perception of the Transfer Pricing Officer or just because the assessee did not avail them from outside agency, cannot be a reason to hold that services were not rendered at all. The Bench held that when it is established that under the agreement, the assessee had right to receive services as and when required and receipt of service is reasonably established, the payment made is for the rights accruing to the assessee for the bundled services under the contract and not for each service on ala karte basis. The Bench held that in case the Transfer Pricing Officer is able to demonstrate that the consideration for similar service under the CUP method is nil, he can very well do so. However, when the assessee benchmarks the transaction under TNMM basis, unless the Revenue authorities can demonstrate that some other method of ascertaining the arm's length price would be more appropriate method, they cannot discard the method adopted by the assessee and determine the arm's length price at nil without following any method. Ultimately, the Bench following the decision of the Hon'ble Delhi High Court in EKL Appliances (supra) held that arm's length price adjustment made by being contrary to the scheme of the Act cannot be sustained. In case of CIT v/s Johnson & Johnson Ltd., ITA no. 1030/2014, dated 7th March 2017, the Hon'ble Jurisdictional High Court has reiterated the same legal proposition by holding that the Transfer Pricing Officer is mandated by law to determine the arm's length price by following one of the methods prescribed under section 92C r/w rule 10B.

14. In the facts of the present case, the Transfer Pricing Officer admits that the evidences brought on record demonstrate that some services were actually received by the assessee. However, he has failed to determine the arm's length price by following any one of the prescribed method. Thus, for the aforesaid reason, the adjustment made by the Transfer Pricing

Officer cannot be sustained. In fact, very recently in INA Bearings India Pvt. Ltd. v/s DCIT, (supra) and in case of M/s. Ipsos Research Pvt. Ltd. V/s ACIT, (supra), the Tribunal has again disapproved the determination of arm's length price at nil by the Transfer Pricing Officer without following any one of the methods prescribed under the statute. Thus, keeping in perspective the ratio laid down in the judicial precedents cited before us, we have to hold that the adjustment made by the Transfer Pricing Officer by determining the arm's length price of Intra Group Services at nil is contrary to the statutory provisions, hence, cannot be sustained.

15. It is worth mentioning, assessee's AE, SABMiller Management (IN) B.V. had approached the AAR seeking ruling on various issues relating to the nature and character of services rendered under the GSA. After analyzing the terms and conditions of the erstwhile TTA and the present GSA as well as various evidences available on record, the AAR found that there is not much difference between the nature of services provided under the TTA and GSA. The AAR has observed that SABMiller management (IN) B.V., (the AE), is providing specialized services to fulfill the exclusive needs of the Indian companies for manufacture of beer under its brand name and not offering a standard service for general use. The AAR has observed that the AE is providing technical consulting and setting–up/up gradation of the manufacturing facilities and brewing/manufacture of beer as also procurement of raw material and identifying markets, etc., which are the core activities of the AE and its Indian companies. The AAR has also observed that while providing technical services, the AE has provided such service through human intervention by training the personnel of Indian Companies through various programs, models and by allowing online access to secret information. The AAR has observed that the services rendered by the AE are not merely managerial, but are also technical service. The AAR has observed that it is inconceivable that world class beer can be manufactured and plant and machinery up–graded and maintained by mere managerial / administrative instructions. It was also observed that the AE not only holds training program, but through computer advisory services and secure databases it allows restricted access to the personnel of the India companies to streamline their business activities. The AAR has observed that the services provided by the AE both under the TTA as well as GSA specialized and technical services for the setting up of and maintenance of plant and machinery specific to the beer industries as well as brewing of beer through technical consultancy services. The AAR observed, as per the GSA, the foreign AE provides the Indian company access to online databases and through secret passwords for utilizing the resources. The access to IT online platform provided to the Indian companies conveys privileged secret information to which the access control standard applies and is provided to defined users with unique

user ID. They have also observed that AE is also providing engineering support services through online links. The AAR observed, various services rendered under the GSA can be classified as technical services and fee is charged as consideration for the provision of technical and consultancy services, skill, knowledge, knowhow, process, etc., made available to the Indian companies. Thus, after threadbare analysis of the TTA and GSA as well as other material on record, the AAR ultimately in ruling dated 6th June 2018, in AAR no.1199 of 2011, has held as under:–

> *"11. In view of the foregoing discussion, the questions posed to us for a Ruling are answered as under:–*
>
> *1. The amount receivable by the Applicant from SKOL Breweries Limited and SABMiller Breweries Private Limited (i.e., Indian Companies) under the Group Service Agreement towards Financial Consulting, Improved Personal Strategy, Business Advisory Services, Corporate Affairs, Marketing, Technical Consulting, Computer Advisory Services and Data Processing and Intellectual Property Services are in the nature of "Fees for Technical Services", within the meaning of the term in Article–12 of the DTAA between India and the Netherlands.*
>
> *2. The amount receivable by the Applicant from Indian Companies for "Computer Advisory and Data Processing Services" is also chargeable to tax as "Royalty" under the DTAA between India and the Netherlands."*

16. Thus, from the aforesaid ruling of the AAR, it becomes absolutely clear that not only the AE has rendered services to the assessee under GSA, but the assessee is also in receipt of such services and has also benefited by such services. In fact, it has been submitted by the learned Authorised Representative that while making payment towards intra group services, the assessee has also deducted tax at source under section 195 of the Act. Thus, all these facts clearly go to prove that the assessee, indeed, has received certain specified services from the AE and payments have been made in consideration of such services. Therefore, the services rendered by the AE to the assessee certainly have some value attached to it which requires benchmarking under any of the methods prescribed under the statute. It is manifest, though, Transfer Pricing Officer accepts that some services have been rendered, however, he has made a general observation that such services do not have any value and has proceeded to determine the arm's length price on a purely on ad–hoc basis. Whereas, the reading of the AAR ruling, referred to above, clearly demonstrate that highly specialized services, in fact, were rendered by the AE to its Indian subsidiary. Thus, on the basis of facts available on

> *record, we have no hesitation in holding that the determination of arm's length price at nil is without any legal sanctity, hence, cannot be sustained. Accordingly, following the judicial precedents cited before us, we delete the addition made in this regard."*

3.8. We find that in the aforesaid order each of the services rendered by the AE had been examined by this Tribunal and the same global services agreement was available in A.Y.2011-12 also and the said agreement is continuing even for the year under consideration.

3.9. The ld. DR referred to order of the ld. TPO at page 13 wherein information / details obtained from the ld. TPO of the AE i.e. in the case of SABMiller Management (IN) BV Netherlands was sought to be utilised to contest that the AE is merely a conduit / shell company with no capabilities to render services and hence, could not be considered as the tested party by the assessee for benchmarking and determining the ALP of the impugned transaction of payment of management fees. The ld. DR vehemently argued on this point. We are unable to persuade ourselves to accept to this argument of the ld. DR in view of the fact that the ld. TPO had made the adjustment because, in his opinion, assessee was not able to prove the benefit test for the cost incurred by it. The case of the assessee was not rejected by the ld. TPO or by the ld. DRP for the reason that AE was taken as a tested party. Hence, we hold that the ld. DR is only trying to improve the case of the Revenue and trying to make out a new case before this Tribunal which is not at all the subject matter before the lower authorities. The selection of AE as a tested party being the least complex entity as compared to the assessee had been duly documented by the assessee in the TP study report and the same is not disputed by the lower authorities at all. Moreover, the information on the margins earned by the AE and information of margins of comparable companies of AE were very much available in the instant case for carrying out the

benchmarking analysis smoothly. Hence, we have no hesitation in dismissing this plea of the ld. DR.

3.10. Apart form this, we also find that the cost allocation sheet in detail containing various cost allocation keys for GSC charges along with other benefit test documentation were subjected to audit and certificate from an independent accountant was also placed on record in page Nos. 2520,2563,2564,2565 & 2519 of the factual paper book. The complete documentation for the benefits derived by the assessee are enclosed in pages 605 to 2548 of the factual paper book. All these documents were indeed filed before the lower authorities and the lower authorities had simply ignored the same.

3.11. The ld. DR also argued that since the ld. TPO had obtained certain information from the ld. TPO of the AE i.e. DCIT, Bangalore and the audited financials of AE were not available and hence that ld. TPO could not have benchmarked the international transaction of the assessee and was therefore justified in determining the ALP at Rs. Nil. In this regard, we find that assessee had indeed furnished the audited financials of the AE in A.Y.2013-14 which includes the previous year figures i.e. for A.Y.2012-13 before the ld. TPO. This is enclosed in page 2650 of the factual paper book. One more observation made by the ld. DR was that AE does not have employees to render the services. To buttress this argument, the ld. AR submitted that the AE has procured services from various professionals and in any case not having any employees is of absolutely no relevance. Ultimately for the purpose of TP benchmarking, margins of AE are to be compared.

3.12. In any case, as rightly held by this Tribunal in assessees own case for A.Y.2011-12, the ld. TPO ought not to have determined the ALP of payment of management fees at Rs. 'Nil' without following any of the prescribed methods in the statute.

3.13. In view of the aforesaid observations and respectfully following the observation given by this Tribunal in A.Y.2011-12 reproduced supra, we have no hesitation in deleting the action of the ld. TPO in determining the ALP on payment of management fees at Rs. 'Nil'. Accordingly, the Ground Nos. 3.1 to 3.4 raised by the assessee are allowed.

4. The Ground Nos.4 – 4.4 raised by the assessee are challenging the disallowance of commission fees of Rs.1,13,75,252/- paid by the assessee to its AE.

4.1. We have heard rival submissions and perused the materials available on record. The assessee paid commission fee amounting to Rs.1,13,75,252 to its AE during the year under consideration. The assessee stated that SABMiller Group in an effort to mitigate 'volatility in the price of raw materials', had set up a procurement organisation called Trinity Procurement GmbH ("Trinity"). This transaction of payment of commission for procurement services was benchmarked by the assessee by adopting Comparable Uncontrolled Price (CUP) method as Most Appropriate Method (MAM) in the TP study report. The assessee considered itself as a tested party. Since, the commission rate charged at 1.10% was less than arithmetic mean of four comparables rate of 3.63%, the assessee concluded that this transaction was at arm's length.

4.2. During the course of assessment proceedings, the ld. TPO requested the assessee to justify the benefits derived by way of benefit test. The assessee was also asked to furnish documentary evidences to substantiate the receipt of such services. The assessee submitted supporting documents / evidences that the global procurement arrangement services have indeed resulted in benefits accruing to the assessee and accordingly commission paid to the AE for the services received are at arm's length. The assessee also submitted that the commission paid represents the charges that would have been actually paid in uncontrolled circumstances and reasonably be expected to be understood between independent parties dealing at arm's length. The ld. TPO however, ignoring the aforesaid contentions of the assessee and determined the ALP of this international transaction at 'Nil' and made an adjustment of Rs.1,13,75,252/- without applying any of the methods prescribed u/s.92C of the Act r.w.r. 10B of the Income Tax Rules. This action of the ld. TPO was upheld by the ld. DRP.

4.3. The benefits derived by the assessee by utilising the procurement services from the SABMiller Group (AE) to mitigate the fluctuation in the price of raw materials are listed in Annexure-B at page 3790 of the paper book filed before us. This document was indeed placed before the lower authorities. It is a fact on record that assessee had adopted CUP as MAM and had benchmarked the payment of commission paid to AE for procurement services on purchase of raw materials at 1.10% which was compared with arithmetic mean margin of four comparables of 3.63% and accordingly, assessee had concluded its payment of commission fees to be at arm's length. Admittedly, the agreement for the four comparable companies was searched from Royalty Stat Database. In our considered opinion, if the ld. TPO is not in agreement with the benchmarking

exercise carried out by the assessee, then it is incumbent on the part of the ld. TPO to carry out the said exercise by following any of the prescribed methods in Section 92C of the Act r.w.r. 10B of the rules for benchmarking an international transaction. Without carrying out such exercise, the ld. TPO is not justified in determining the ALP of payment of commission to AE at Rs. Nil.

4.4. Apart from this, we find that assessee had indeed placed on record global procurement framework agreement in page 2886 of the paper book. The entire details of net savings derived by the assessee from global procurement arrangement and reconciliation of commission paid by the assessee with the value reported in the financials were furnished as Annexure-B to the synopsis filed by the ld. AR before us as under:-

> ***"Benefits to ABI India***
> *The benefits to ABI India are not incidental; they are the culmination of value that the procurement organization can bring to countries. The establishment of a global procurement organization proved to have a number of commercial and financial advantages for the Group, and examples of these are as follows:*
> • *Global management and overview of procurement and improved strategic decision making;*
> • *Commercial savings i.e. through innovation, standardization, consolidation of suppliers;*
> • *Improved speed and cost efficiency on contract negotiation;*
> • *Improved leverage with suppliers:*
> • *Improvement of contract enforceability globally;*
> • *Purchasing function on a global and more specialized basis combined with an increased ability to attract and retain skilled procurement staff with expertise specific to the brewing industry.*
> *There are also a number of quantitative benefits which are captured each year. These value opportunities materialize as quantitative procurement benefits in the form of a reduction or avoidance of the cash cost to the customer of the relevant items being procured.*
> *The Global Procurement arrangement has benefited ABI India by way of a net savings of INR 4 crores approximately which has been computed having regard to the baseline prices (i.e. prices paid for FY 2010-11). Detail of savings in cost due to such centralized procurement was provided as part of Attachment 5 to submission dated 04 November **2015** (Copy enclosed at **Page No.** 2559 of the Paperbook). Extract of the same is provided below:*

<table>
<tr><th>Material Category</th><th>Benefit to ABI India</th></tr>
<tr><td>Marketing Material - Fridges</td><td>ABI India's cooler requirement were contracted with Everest Sri Lanka (vendor routed through Trinity) during the FY 2012. Benefit/ savings out of such negotiation were arrived as below:
<table>
<tr><th>Material</th><th>Currency</th><th>Procurement Price (F11)</th><th>Procurement Price (F12)</th><th>Savings per unit</th><th>F12 Volume</th><th>Total Savings</th></tr>
<tr><td>Fridge</td><td>INR</td><td>25,007</td><td>23,134</td><td>1,873</td><td>535</td><td>1,002,055</td></tr>
</table></td></tr>
<tr><td>Cans</td><td>ABI India's cans requirement were contracted with Canpack (vendor routed through Trinity) during the FY 2012. Benefit/ savings out of such negotiation were arrived as below: 268950
<table>
<tr><th rowspan="2">Particulars</th><th colspan="3">Basic Price - USD/1000 cans</th><th rowspan="2">Qty in million</th><th rowspan="2">Savings (USD million)</th><th rowspan="2">Savings (INR)</th></tr>
<tr><th>F12 Rexam</th><th>F12 Canpack</th><th>Saving</th></tr>
<tr><td>500 ML</td><td>125.19</td><td>120.3</td><td>4.89</td><td>55</td><td>0.27</td><td>12,640,650</td></tr>
<tr><td>330 ML</td><td>98.44</td><td>97.23</td><td>1.21</td><td>20</td><td>0.02</td><td>1,137,400</td></tr>
<tr><td>Total</td><td></td><td></td><td></td><td></td><td>0.29</td><td>13,778,050</td></tr>
</table></td></tr>
<tr><td>Hops</td><td>1) CTZ Pellets - During the FY 2011-12, long term contract was entered with Aromatrix for 4 years i.e., 2011 to 2014 for hops pellets with the support from Trinity.
<table>
<tr><th>Material</th><th>Currency</th><th>Procurement Price (F11)</th><th>Procurement Price (F12)</th><th>Savings per kg</th><th>F12 Volume</th><th>Total Savings</th></tr>
<tr><td>CTZ Pellets</td><td>INR</td><td>535</td><td>300</td><td>235</td><td>21333</td><td>5,013,255</td></tr>
</table>
2) During the said year, ABI India introduced Pike downstream of hop extract with the support of Trinity. The same was introduced in three breweries in FY 12 and 100% conversion was done in FY 13. There was an overall reduction of 692 kgs in FY 2012 due to such shift to Pike usage and this resulted in a benefit of INR 1 million approximately (692 kgs * 1425/kg).</td></tr>
</table>

<table>
<tr><td>Material Category :</td><td colspan="8">Benefit to ABI India</td></tr>
<tr><td>Malt</td><td></td><td colspan="8">Malt extraction improved with the optibrew initiative undertaken by ABI India in collaboration with Trinity. Benefit arising out of such initiative is provided below:</td></tr>
<tr><td></td><td></td><td>F11 Extract (for 100kg)</td><td>F12 Extract (for 100kg)</td><td>Improvement in Extract (%)</td><td>Consumption of Malt (in MT)</td><td>Improvement (in MT)</td><td>Price per MT (INR)</td><td>Total Savings</td></tr>
<tr><td></td><td></td><td>70.20</td><td>71.54</td><td>1 .34%</td><td>61,000</td><td>817</td><td>24,85 0</td><td>20,302,450</td></tr>
</table>

Barley	*Domestic barley prices increased substantially during the FY 2012. Trinity supported ABI India in organizing imports for barley. ABI India imported around 8000 MT during the FY 201 2.*

The transaction was considered at arm's length for a number of reasons. The commission rates were selected using a benchmarking study containing independent companies undertaking comparable activities to that of procurement. Also, it was possible to show the benefits/ value derived from the arrangements as detailed above.

In light of the above, the Appellant wishes to submit that the above services are not incidental in nature and wishes to mention that the detailed workings related to commission i.e., nature of work performed, procurement made for the Appellant, amount spent, calculation of commission, etc. formed part of the invoice, however, was made available separately to the TPO. Hence, it should not be considered as a post facto analysis without scope for independent verification and the TPO incorrectly concluded that there is no safeguards against manipulation of the same.

Invoices provided

The Appellant wishes to submit that the invoice copies received from Trinity were always backed by supporting calculations including details relating to procurement made for the Appellant, amount spent and commission payable. As a practice, Trinity issued invoices to ABI India generally on a quarterly basis based on the affected spend for the respective quarter ending. In respect of second half of fiscal period FY 2011-12, Trinity issued an invoice for five month ending 29 February 2012 on the basis of affected spend and in addition to this, estimated the commission payable for month ending March 2012 for the limited purpose of recording the transaction on an accrual basis.

However, based on the affected spend for the month of March 2012, Trinity re-determined the actual commission charges payable for the said month in July 2012 (i.e. post finalization of the financial statements of ABI India) and accordingly, the excess commission amounting Rs. 9,78,331 accounted as of 31 March 2012 was revered in the following financial year. A brief reconciliation of the same is provided below for your good self's ready reference: (Copy of the invoices along with detailed computation have been enclosed ***Page No.*** *3101 of the Paperbook)*

Particulars	*AMOUNT (IN INR)*
Invoice dated 21 September 2011 for the quarter ending June'11 [USD 20,761 .62 @ INR 4S.69/- USD]	*948,598*
Invoice dated 11 November 2011 for the quarter ending September'11 [USD 24,115.68 @ INR 49.16/ USD]	*1,185,527*

Invoice dated 21 March 2012 for the period October'11 to February'12 [USD 140,176.39 @ INR 50.18/ USD]	*7,034,051*
Invoice dated 26 July 2012 for the month March'12 [USD 25,873.00 @ INR 47.49/ USD]	*1,228,745*
Actual Commission expense as per invoices raised [USD 210,926,65]	***10,396,921***
Commission amount as per financial statements	***11,375,252***
Difference which was reversed based on affected spend in the FY 2012-13	***978,331***

With the above details, the Appellant reiterates that the commission payment was based on a consistent and systematic approach and thus, the learned TPO's/ DRP's observation citing this as "a post facto analysis" is erroneous and incorrect.

Reasoning for payment of commission to affiliate in Switzerland for procurement from Indian vendors

Trinity is a global strategic sourcing centre of deep expertise in Switzerland, supported by regional procurement teams and local procurement professionals in SABMiller country business locations, such as ABI India.

Commission fees are only paid to Trinity on purchases where Switzerland sets the procurement strategy and is accountable for delivering this strategy with commercial benefits through its control on the choice of suppliers and supplier base and negotiations with the suppliers. It will usually have a global sourcing agreement with third party suppliers under which key terms and conditions are agreed. In essence, Trinity centrally leads a range of key processes and activities that drive the realization of procurement value for ABI India.

The quantification of benefits in section above shows that the help from the strategic sourcing team even in the first year of providing the services was able to provide real savings to ABI India, over and above what the Appellant was able to provide without the help of Trinity.

The strategic sourcing services the Appellant receives is not duplicative. As explained above Trinity has deep specialist procurement knowledge which is not available locally.

4.5. We do not deem it fit to go into the aforesaid data as adjudication of the same would purely be academic in nature in view of the fact as stated earlier that the ld. TPO had not benchmarked the payment of commission to AE for procurement services by using any of the prescribed methods in

Rule 10B of the Rules. Hence, we hold that the ld. TPO was not justified in determining the ALP of payment of commission fees to AE at Rs. Nil in the facts and circumstances of the instant case. As stated earlier, in any case, this aspect is already addressed by us in Ground Nos. 3.1 to 3.4 above which shall apply mutatis mutandis to this ground also. Accordingly the Ground Nos.4 – 4.4 raised by the assessee are allowed.

5. The Ground No.5-5.4 raised by the assessee are challenging the disallowance made u/s.40(a)(ia) of the Act in respect of discount given to distributors in the sum of Rs.51,11,25,328/-.

5.1. We have heard rival submissions and perused the materials available on record. Both the parties fairly agreed that this issue is already covered by the order of this Tribunal in assessee's own case for A.Y.2011-12 in ITA No.1205 and 1738 /Mum/2016 dated 18/02/2020 wherein the relevant facts and the findings recorded by the Tribunal are reproduced hereunder for the sake of convenience:-

> *"17. In ground no.2, the assessee has challenged the disallowance of ` 34,81,60,500, under section 40(a)(ia) of the Act.*
>
> *18. Brief facts are, during the assessment proceedings, the Assessing Officer noticed that the assessee has debited an amount of ` 70,84,40,897, to its Profit & Loss Account as sales scheme expenditure. After calling for necessary details and examining them, the Assessing Officer was of the view that the discount offered to distributors has to be treated as commission and since the assessee has not deducted tax at source on such amount, it has to be disallowed under section 40(a)(ia) of the Act. Therefore, he called upon the assessee to explain why the amount of ` 34,81,60,500. Though, the assessee objected to the proposed disallowance by submitting that the payment made is not in the nature of commission, hence, not covered under section 194H of the Act, however, rejecting the submissions of the assessee the Assessing Officer disallowed the amount under dispute under section 40(a)(ia) of the Act. While considering assessee's objection on the issue, learned DRP noted that while*

deciding identical issue in assessee's own case for the assessment years 2007–08 and 2008–09, the Tribunal has restored the issue to the Assessing Officer for fresh adjudication. Stating that the assessee has not brought to its notice any record and material in support of its claim of giving discount to the distributors duly approved by the Board of Directors, they held that assessee's claim is inadmissible.

19. The learned Authorised Representative submitted, while deciding identical issue in assessee's own case for the assessment years 2007–08, 2008–09 and 2009–10, the Tribunal has given a clear finding that there is no principal–agent relationship between the assessee and distributors and remanded the matter back to the Assessing Officer to verify and examine the relevant record and then to decide the issue as per law. He submitted, while giving effect to the aforesaid direction of the Tribunal, the Assessing Officer has allowed assessee's claim in assessment year 2007–08, vide order dated 30th December 2016. Further, he submitted, in assessee's own case for the assessment year 2013–14, after obtaining the remand report from the Assessing Officer the DRP has allowed assessee's claim regarding discount given to the distributors. Thus, he submitted, the addition made has to be deleted. Further, in support of his contention that the discount given to the distributor is an allowable expenditure, the learned Authorised Representative relied upon the decision of the Hon'ble Jurisdictional High Court in CIT v/s Intervet India Pvt. Ltd., [2014] 364 ITR 238 (Bom.).

20. The learned Departmental Representative submitted, since the relevant facts relating to the existence of a discount scheme and other relevant materials have to be brought on record and examined, consistent with the view taken by the Tribunal in assessment years 2007–08, 2008–09 and 2009–10, the issue may be restored back to the Assessing Officer for fresh adjudication.

21. We have considered rival submissions and perused the material on record. It is evident, the discount given to the distributors was disallowed under section 40(a)(ia) of the Act primarily for the reason that it is in the nature of commission, hence, comes within the purview of section 194H of the Act, requiring deduction of tax at source. As noted by us, though, learned DRP has stated that while deciding similar issue in assessee's own case, the Tribunal has restored the matter to the Assessing Officer for fresh adjudication, however, they ultimately held the claim of the assessee inadmissible. Undisputedly, identical issue arose in assessee's own case for the assessment years 2007–08, 2008–09 and 2009–10. While deciding the issue in assessment year 2007–08 in ITA no.6175/Mum./2011, dated 18th January 2013, the Tribunal has restored the issue to the Assessing

> *Officer for fresh adjudication. Identical view was expressed by the Tribunal while deciding the issue in assessment years 2008–09 and 2009–10. Pertinently, while implementing the direction of the Tribunal in assessment year 2007–08, the Assessing Officer vide order dated 30th December 2016, has allowed assessee's claim of discount given to the distributors which is evident from the copy of the order placed in the paper book. It is also the submissions of the learned Authorised Representative that though similar disallowance was made by the Assessing Officer in the assessment years 2013–14 and 2014–15, however, the DRP has allowed assessee's claim by deleting the disallowance. Considering the fact that while deciding identical issue in assessee's own case for the assessment year 2007–08, 2008–09 and 2009–10, the Tribunal has restored the issue to the Assessing Officer for fresh adjudication with specific direction, we are inclined to follow the same and restore the issue to the Assessing Officer for fresh adjudication with similar direction. Suffice to say, if similar claim made by the assessee was allowed by the Assessing Officer in assessment year 2007–08 and by the DRP in assessment years 2013–14 and 2014–15, then there should not be any difficulty in allowing assessee's claim."*

5.2. Respectfully following the same, we restore this issue to the file of the ld. AO to decide in the light of directions contained hereinabove. Accordingly, the Ground Nos.5-5.4 raised by the assessee are allowed for statistical purposes.

6. The Ground Nos. 6-6.4 raised by the assessee are challenging the disallowance of depreciation amounting to Rs.9,10,11,094/- on Foster's brand u/s. 40(a)(ia) of the Act r.w.s. 195 and 200 of the Act.

6.1. We have heard rival submissions and perused the materials available on record. During the course of assessment proceedings, the ld. AO asked for details in respect of depreciation claimed for the subject AY in respect of the Foster's brand for which the disallowance was made in earlier years. In this regard, the assessee vide its letter dated 25/01/2016 submitted that the assessee purchased Foster's Brand and Intellectual Property, Foster's Brewing Intellectual Property and Foster's Trademarks

from Foster's Australia Limited for a consideration of Rs. 157,92,00,000 (approximately USD 35 million). The assessee has not deducted tax on the payment as the same was not liable for TDS. The assessee capitalised the said amount in its 'Fixed Assets' Schedule of its audited financial statements under the head "Trade Marks/ Brands" and claimed depreciation on the Foster's Brand, at the rate of 25% on written down value basis, in accordance with section 32(1) of the Act and the Income Tax Rules, 1962.

6.2. For the year under consideration, the assessee claimed depreciation amounting to Rs 9,10,11,094 (being 25% of Rs 36,40,44,375 opening written down value) on Foster's brand in its return of income filed. However, while concluding the assessment, the ld. AO disregarded the submissions and explanations provided by the assessee and disallowed the depreciation of Rs. 9,10,11,094/- u/s 40(a)(i) of the Act for non-deduction of TDS under section 195 read with section 200 of the Act.

6.3. We find that this Tribunal in assessee's own case for A.Y.2007-08 had held that claim of depreciation u/s.32 of the Act is not in respect of amount paid or payable which is subject to TDS but as a statutory allowance on an asset which is eligible for depreciation. Similar views were taken by this Tribunal for A.Ys. 2008-09, 2009-10 and 2011-12. The ld. AR before us pointed out that pursuant to the decision of Tribunal in earlier years, the ld. AO in the order giving effect for A.Y.2007-08 and 2009-10 had indeed deleted the disallowance of depreciation on Foster's brand and granted complete relief to the assessee. The ld. AR also pointed out that in the case of the payee, the taxability of payment made by the assessee for purchasing the trademark from CUB Pty Ltd (formerly Foster's Australia Ltd) came up before the Hon'ble Delhi High Court which

concluded that situs of intangible assets is not located in India since the owner i.e. Foster's Australia Ltd., was not located in India at the time of transaction. Accordingly, it held that the monies received by the Foster's Australia is not taxable in India. Once it is held that in the hands of the recipient, the money is not at all taxable in India, then there cannot be any question of deduction of tax at source in terms of Section 195 of the Act. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of GE India Technology Cen. Pvt. Ltd., vs CIT reported in 193 Taxman 234. Hence, in any case, there cannot be any disallowance that could be fastened in the hands of the assessee payer u/s.40(a)(i) of the Act.

6.4. In view of the aforesaid observations, we direct the ld. AO to grant depreciation amounting to Rs.9,10,11,094/- on Foster's brand for A.Y.2012-13. Accordingly, the Ground Nos. 6-6.4 raised by the assessee are allowed.

7. The Ground Nos. 7-7.8 raised by the assessee are challenging the disallowance of commission on sales u/s.40(a)(ia) of the Act.

7.1. We have heard rival submissions and perused the materials available on record. During the course of assessment proceedings, the ld. AO asked the assessee to submit partywise list of commission paid to agents amounting to Rs.28,87,41,263. The assessee vide letter dated 29/02/2016 submitted the partywise list of commission paid to agents totalling to Rs.28,87,41,263/- during the year alongwith copies of TDS certificates issued to substantiate that appropriate taxes had been deducted by the assessee during the year under consideration. The assessee also stated that out of the total amount debited in the profit and

loss account in respect of commission amounting to Rs.28,87,41,263/-, a sum of Rs.24,84,64,517/- represents commission for the year and balance amount of Rs.3,77,87,461/- represent reimbursement paid to commission agents for the expenses incurred by them on behalf of the assessee and year end accruals of Rs.24,89,285/- recorded in the books. The assessee stated that reimbursement of expenses of Rs.3,77,87,461/- paid to commission agents are purely in nature of reimbursement with no income element thereon and hence, there is no requirement to deduct tax at source u/s.194H of the Act for the same. It was also pointed out by the assessee that the commission agents issued separate claim / debit note for the expenses incurred by them on behalf of the assessee seeking for reimbursement. On the commission portion, the assessee correctly deducts taxes at source u/s.194H of the Act and on the reimbursement portion, the assessee does not have to deduct tax at source as they are claimed by way of a separate debit note by the commission agents. The assessee enclosed the sample copies of claim / debit notes raised by the agents showing the break-up details of reimbursement of expenditure incurred by the agents on behalf of the assessee before the ld. AO.

7.2. The assessee also submitted that in respect of the year end accruals of expenses of Rs.24,89,285/- recorded by the assessee, these are commission accrued at the end of the year and its provision is made based on previous experience and based on consistent accounting practice followed by the assessee. It was also stated that this provision would get adjusted with the vendor accounts upon receipt of their final invoices in the subsequent year. Hence, it was pleaded that since the payee name is not identifiable while making this provision, the assessee had not deducted tax at source in terms of section 194H of the Act. However, as and when the final invoices are received from the vendor, at

that point in time, due deduction of tax at source as per Section 194H of the Act was made.

7.3. The ld. AO while concluding the assessment proceedings disallowed a sum of Rs. 4,02,76,746 (Rs.3,77,87,461/- + Rs.24,89,285/- representing reimbursement of expense and year end accruals) for non-deduction of tax at source u/s.40(a)(ia) of the Act.

7.4. We find that this issue has already been decided by this Tribunal in assessee's own case for A.Y.2011-12 in ITA No.1205 and 1738/Mum/2016 dated 18/02/2020 wherein the relevant facts together with the findings of the Tribunal are reproduced below for the sake of convenience:-

> *22. In ground no.3, the assessee has challenged the disallowance of commission paid for an amount of ₹ 2,30,66,201.*
>
> *23. Brief facts are, in the course of assessment proceedings, the Assessing Officer noticed that the assessee has debited an amount of ₹ 19,07,53,069, to the Profit & Loss Account towards commission on sales. After calling for necessary details and examining them, the Assessing Officer observed that the assessee has not furnished requisite details showing deduction of tax at source. Further, he observed that as per assessee's submissions, the commission of ₹19,07,53,069, includes accruals at the yearend amounting to ₹2,30,66,201. Being of the view that the amount of ₹2,30,66,201, being a commission on sales is subject to deduction of tax at source, which the assessee has not done, the Assessing Officer disallowed the amount under section 40(a)(ia) of the Act.*
>
> *24. The DRP also sustained the disallowance made by the Assessing Officer.*
>
> *25. The learned Authorised Representative submitted, in the subsequent years, the assessee has duly deducted and deposited the applicable TDS upon receipt of invoice from the agents. Thus, he requested for restoration of the issue to the Assessing Officer for verification and necessary adjudication.*

> *26. The learned Departmental Representative has no objection for restoration of the issue to the Assessing Officer.*
>
> *27. Having considered rival submissions, we are of the view that assessee's claim that the accruals of ₹2,30,66,201, was subjected to deduction of tax at source on receipt of invoice in subsequent years requires factual verification at the end of the Assessing Officer. Accordingly, we restore the issue to the Assessing Officer for fresh adjudication after verifying the material available on record or to be filed by the assessee and decide the issue in accordance with law after due opportunity of being heard to the assessee. Ground is allowed for statistical purposes.*

7.5. We find that the aforesaid reliance placed on Tribunal order for A.Y.2011-12 would hold good only for disallowance made in the sum of Rs.24,89,285/- representing year end provisions. Accordingly, to that extent, the issue is restored to the file of the ld. AO to decide in the light of directions given by this Tribunal in earlier year as referred to supra. Accordingly, the Ground Nos. 7.1 to 7.4 are allowed for statistical purposes.

7.6. In respect of reimbursement of expenses made by the assessee to the agents, the ld. AR stated that there was absolutely no dispute in this regard in earlier years and the ld. AO had allowed the same in earlier years. We find that during the year under consideration, the assessee vide letter dated 29/02/2016 had indeed enclosed the sample copies of the debit notes raised by the agents showing the complete break-up of expenses incurred by them and seeking reimbursement thereon from the assessee. From the sample invoices, we find that there was no income element included thereon. Hence, the reimbursement portion paid by the assessee to the commission agents is not chargeable to tax in the hands of the payee. Once the particular receipt is not chargeable to tax in the hands of the recipient, there is no obligation for the assessee to deduct tax at source on the same.

7.7. The ld. DR stated that the reimbursement of expenses contain salaries paid to various third parties. He argued that why the assessee should reimburse the salary paid to some other third parties. Per contra, the ld. AR countered this argument by showing that the distributors incurred the expenditure by way of salaries, rent, electricity etc., on behalf of the assessee which are being reimbursed by the assessee on actual basis. As per the terms agreed upon, the assessee is bound to reimburse the same as the distributors had conducted the activities only on behalf of the assessee. Hence, there is no question of any disallowance u/s.40(a)(ia) of the Act in the sum of Rs.3,77,87,461/-. Accordingly, the Ground Nos. 7.5 to 7.8 raised by the assessee are allowed.

8. The Ground Nos. 8-8.6 raised by the assessee are challenging the disallowance of expenses of Rs.2,31,22,776/- on account of social corporate initiatives.

8.1. We have heard rival submissions and perused the materials available on record. During the course of assessment proceedings, the ld. AO asked for the details in respect of 'Social Corporate Initiatives' incurred by the assessee for the year. The assessee submitted that it undertook several marketing initiatives to promote its brand and activities that would have an impact on the business of the company. While some of the activities/ initiatives had a social connect like activities for education and awareness for farmers/ producers, conservation of water resources, public awareness on drinking & driving and moderate consumption of alcohol, awareness campaigns for responsible drinking, etc. these have a significant impact on the business of the company such as educating the farmers on

increasing yield results in increased production of barley thereby ensuring a steady supply for the business of the company etc. The amounts debited under this head comprises of the expenditure incurred on such initiatives/ activities undertaken by the assessee during the year.

8.2. The assessee gave a brief description of the nature of activities undertaken by the assessee and its relation to the business as under:-

- *Fajmer's awareness proqramrnes/_activities*

The assessee undertakes certain awareness and educative campaigns on better practices of farming and water conservation for the farmers in rural areas from where the Assessee procures barley (a key raw material for production of beer) on a regular basis.

As a result of the awareness campaigns on better farming practices, the assessee has benefitted with good quality of yield of barley which is a major ingredient for its manufacture. Further, these activities also ensure a regular supply of the produce to the assessee on a year-on-year basis from the same farmers of these regions resulting in the assessee not having to import any barley to make up for any shortfall. As a result of these activities, the assessee gets a consistent supply of better raw material from these regions and also the assessee earns the loyalty of these farmers for regular supply.

- *Activities for conservation of water resources*

The assessee undertakes certain water conservation and awareness programmes and activities amongst the farmers and the general public in the regions in which it operates.

From the assessee's perspective, water is an important raw material for brewing purposes. Since beer largely comprises of water, the quality of local water supply, and its characteristics become critical. Further, cleaner source of water also requires less treatment for brewing purposes. The activities carried out/ supported by the assessee would result in improvement in the quantity and quality of water in the regions in which the assessee operates, which eventually benefits the assessee's business as well.

- *Other public awareness programmes*

Apart from the above, the assessee has supported/ sponsored various campaigns and programmes for spreading social awareness with a view of promoting its brand and ensuring that it is not seen as a social ill, in the consumers mind. As you are aware, drinking of alcohol/beer has a negative

> *image associated with it and hence, it is very important for the assessee to promote a "good image" of itself as a socially responsible company, among citizens. The activities supported by the assessee are awareness campaigns on responsible drinking in association with the local RTO/ non-profit organisations, truckers awareness & road safety, educative programmes on safe driving practices and moderate-consumption of alcohol, recycling of waste, etc, all of which are directly associated with the assessee's business.*
>
> *The assessee supports these activities by way of amounts spent on sponsorships, poster & banners, circulation of pamphlets, merchandise etc. with the display/ prints of the brands/ name of the assessee.*

8.3. The assessee has also filed sample copies of documents for the aforementioned expenses. The assessee submitted that through the aforementioned activities the assessee is promoting its brands/products, creating a socially responsible company in the consumers' minds and projects the assessee as a good corporate citizen, which is very essential for promoting the assessee's business. It may be appreciated that there was no statutory mandate to incur these expenses but has been incurred by the assessee since it is essential for/ impact the business of the assessee, similar to an advertising expenditure. Further, the assessee submitted that the aforementioned expenses incurred by the assessee are distinguishable from the expenses in the nature of donations/ charity, undertaken by the assessee, which do not have any direct or indirect nexus or benefit to the business of the assessee. Such expenses amounting to Rs.95,582/- have been duly disallowed in the computation of income by the assessee.

8.4. However, the ld. AO while concluding the assessment proceedings disallowed an amount of Rs.2,31,22,776 on account of Social Corporate Initiatives by concluding that the assessee has filed only a general submission and not furnished any supporting documents in relation to the claim made by it.

8.5. Accordingly, during the course of the DRP proceedings, the assessee filed certain additional evidences such as agreements, MOUs, invoices, ledger extracts, etc, which was remanded back to the ld. AO for verification. Post verification of the additional evidences filed by the assessee, the ld. AO vide letter dated 18/10/2016 to the ld. DRP recommended that the claim of the assessee may be allowed. However, the ld. DRP disregarding the recommendation of the ld AO, directed the ld. AO to disallow the social corporate expenses under section 37 of the Act.

8.6. We find that these expenses under corporate social initiatives are claimed by the assessee as deduction in accordance with provisions of Section 37(1) of the Act. We find that the ld. DRP in page 33 of its order in para 11.3.3 had reproduced the remand report dated 18/10/2016 of the ld. AO. In the said remand report, we find that the ld. AO had categorically stated that the disallowance was originally made in the assessment for non-filing of documents and bills. The ld. AO categorically stated that on verification of the additional evidences furnished by the assessee in the remand proceedings, the claim of the expenditure of Rs.2,31,22,776/- may be allowed to the assessee. We find that despite this favourable remand report from the ld.AO, the ld. DRP chose to make disallowance of expenditure u/s.37(1) of the Act. We find that the main grievance of the ld. DRP seems to be that assessee had claimed expenditure merely on the basis of assigning of Memorandum of Understanding (MOU) with various non-profit organizations. It is a fact that assessee had signed MOUs with various non-profit organizations for carrying out this corporate social initiatives. The various details of corporate social initiatives carried on by the assessee are detailed already hereinabove. We find from the said details that the activities carried on

are meant mainly for public awareness programmes, activities for conservation of resources which are purely social in nature and to improve the morale among the employees and the workers in the vicinity of the factory in which assessee is situated and also to promote good image among the general public about the assessee company. This is more of a welfare measure as it improves the social fabric of the surrounding society and intrinsically linked with the activities of the company for promoting its business of brewing, packaging, distribution, marketing and sale of beer. In any case, we find that the ld AO had given a favourable remand report on verification of the evidences furnished by the assessee. Hence, we hold that the ld. DRP ought not to have taken contrary stand in the peculiar facts and circumstances of the instant case. Accordingly, we direct the ld. AO to grant deduction of expenditure of Rs. 2,31,22,776/- on account of corporate social initiatives. Hence, the Ground Nos. 8 – 8.6 raised by the assessee are allowed.

9. The ground No.9 raised by the assessee is challenging the initiation of penalty proceedings u/s.271(1)(c) of the Act which would be premature for adjudication at this stage. Hence, dismissed.

10. In the result, appeal of the assessee in ITA No.1793/Mum/2017 for A.Y.2012-13 is partly allowed for statistical purposes.

ITA No.7157/Mum/2017 (A.Y.2013-14)

11. The Ground Nos.2-2.1 and 3 – 3.4 raised by the assessee for A.Y.2013-14 are identical with Ground Nos.3-3.4 raised by the assessee for A.Y. 2012-13 and the decision rendered hereinabove for A.Y.2012-13

shall apply with equal force for this assessment year also except with variance in figures.

12. The Ground Nos.4-4.4 raised by the assessee for A.Y.2013-14 are identical to Ground No.4-4.4 raised for A.Y.2012-13 and the decision rendered for A.Y.2012-13 shall apply with equal force for this assessment year also except with variance in figures.

13. The Ground Nos. 5.1 to 5.4 raised by the assessee are identical to Ground Nos. 6- 6.4 raised by the assessee for A.Y.2012-13 and the decision rendered there on would apply with equal force for this assessment year also except with variance in figures.

14. The Ground Nos. 6.1 to 6.4 raised by the assessee for A.Y.2013-14 are identical to Ground Nos. 7.1 to 7.4 raised by the assessee for A.Y.2013-14 and the decision rendered for A.Y.2012-13 shall apply with equal force for this assessment year also except with variance in figures.

15. The Ground No.7 raised by the assessee for A.Y.2013-14 is challenging the addition made on account of mis-match of receipts declared in the return vis-à-vis the receipts appearing in Form 26AS amounting to Rs.11,00,880/-.

15.1. We have heard rival submissions and perused the materials available on record. During the course of assessment proceedings, the assessee was asked to submit reconciliation of the receipts appearing in Form 26AS for the year with the receipts / income credited in the P & L account. The assessee submitted the reconciliation of the same which are enclosed in pages 2743 to 2745 of the paper book. The ld. AO

disregarding the same proceeded to make addition to the difference amount of Rs. 11,00,880/- in the assessment which was upheld by the ld. DRP. We find that this issue requires factual verification and accordingly, we deem it fit and appropriate to restore this issue to the file of the ld. AO for denovo adjudication in accordance with law. The assessee is at liberty to furnish further evidences, if any, in support of its contentions. Accordingly, the Ground No.7 raised by the assessee is allowed for statistical purposes.

16. The Ground No.8 raised by the assessee for A.Y.2013-14 is only seeking direction of credit of TDS and TCS. We find that this aspect has to be factually verified by the ld. AO and the ld. AO accordingly is hereby directed to grant TDS and TCS credit to the assessee in accordance with law. Accordingly, the Ground No.8 raised by the assessee is allowed for statistical purposes.

17. In the result, appeal of the assessee in ITA No.7157/Mum/2017 for A.Y.2013-14 is partly allowed for statistical purposes.

TO SUM UP:

ITA No.	**A.Y.**	**Appeal by**	**Result**
1793/Mum/2017	**2012-13**	**Assessee**	**Partly Allowed for statistical purposes**
7157/Mum/2017	**2013-14**	**Assessee**	**Partly Allowed for statistical purposes**

Order pronounced on 24/02/2022 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(VIKAS AWASTHY)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 24/02/2022

KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai