IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH: BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

IT(TP)A No.2532/Bang/2019
Assessment Year: 2015-16

United Brewries Ltd. UB City, UB Tower, Level 4 No.24, Vittal Mallya Road Bangalore 560 001 Karnataka **PAN NO : AAACU6053C**	**Vs.**	JCIT Special Range-7 Bangalore
APPELLANT		**RESPONDENT**

Appellant by	:	Shri Ankur Pai for Shri K.R. Vasudevan, A.R.
Respondent by	:	Shri Sankar Ganesh K., D.R.

Date of Hearing	:	17.05.2023
Date of Pronouncement	:	19.05.2023

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal by assessee is directed against order of JCIT Special Range-7, Bangalore passed u/s 143(3) r.w.s. 144C(15) of the Income-tax Act,1961 ['the Act' for short] dated 21.10.2019.

2. Facts of the case are that the learned Transfer Pricing Officer ("TPO") has passed the transfer pricing ("TP) order dated 17.10.2018 under section 92CA of the Act and has made the following adjustments:

S No	Particulars	Amount (Rs)
A	*International Transaction with Associated Enterprises ("AE")*	
1.	Management Fee	6,00,00,000
2.	Brad promotion expenses paid to Force India Formula one team Limited, UK	22,84,61,026
B	*Specified Domestic Transaction*	
1.	Sales promotion expenses paid to United East Bengal Football Team Private Limited ("UEBFT")	9,25,00,000
Total		**38,09,61,026**

The TPO accordingly made TP adjustment of Rs.38,09,61,026/- in the order passed under section 92CA of the Act.

2.1 The learned Assessing Officer ("AO") passed the draft assessment order on 17.12.2018 and proposed the following disallowances / additions to the returned income of the assessee:

Particulars	Amount in Rs.
TP adjustment as per section 92CA and protective addition of the same amount under section 37 of the Act	38,09,61,026
Additional depreciation on pellets and cartons	49,25,796
Commission paid to Mr Vijay Mallya	2,04,44,000
Foreign remittance for labels	41,34,952
Foreign remittance for business promotion	5,15,843
Reimbursement of expat salary	43,52,220
Disallowance under section 14A of the Act	59,87,469
Disallowance of digital media expenses	10,12,47,072
Disallowance of TV advertisement expenses	26,16,12,490
Depreciation on goodwill	1,57,73,310

2.2 The AO accordingly proposed to assess the income of the assessee at Rs.429,75,39,850/- against the income of Rs.349,75,85,670/- declared by the assessee in its returned income.

The assessee being aggrieved by the additions proposed by the AO in the draft assessment order, filed its objections before the Dispute Resolution Panel ("DRP").

2.3 The DRP rejected the objections of the assssee and confirmed the additions proposed in the draft assessment order. The DRP vide directions dated 24.09.2019 directed the AO to complete the assessment.

2.4 The AO completed the assessment on 21.10.2019 by passing the order under section 143(3) read with section 144C(13) of the Act. The AO confirmed the additions proposed in the draft assessment order as per the directions of the DRP.

2.5 The AO accordingly assessed the income of the assessee at Rs.429,75,39,850/- against the income of Rs.349,75,85,670/- declared by the assessee in its returned income.

2.6 The assessee being aggrieved by the disallowances / additions made in the assessment order, has challenged the same in appeal before us.

3. Ground Nos.1 to 7 are general in nature which do not require any adjudication.

4. Ground No.8 to 18 of the assessee's appeal reads as under:

I. Grounds relating to payment of Management Fee:

"8. *The learned AO/ TPO erred in law and on facts in concluding that the Arm's Length Price (ALP) of Management Fee paid by the Appellant to its AE as NIL and thus erred in making an adjustment of IN R 6,00,00,000.*

9 The learned AO/ TPO erred in law and on facts in concluding that no specific tangible services have been rendered by the AE to the Appellant;

10 The learned AO/ TPO further erred in law and on facts in concluding that the payment made towards Management Service Fee by the Appellant to the AE is not connected to any specific services rendered by the AE to the Appellant;

11 The learned AO/ TPO has erred in law and on facts in making the TP adjustment on account of, Management Service Fee ignoring the commercial and economic rationale and business expediency of the Appellant for receiving the Management Services from its AE;

12 The learned AOl TPO erred in law and on facts in making the TP adjustment on account of Management Service Fee without appreciating the fact that the Management Services have been rendered by the AE to the Appellant based on an agreement between AE and the Appellant;

13 The learned AO/TPO erred in law and on facts in making the TP adjustment on account of Management Service Fee by disregarding the agreement between AE and the Appellant on the basis of wrong understanding of certain clauses in the agreement

14 The learned AO/TPO erred in law and on facts in making the IP adjustment on account of Management Service Fee ignoring the fact that the services rendered by the AE to the Appellant resulted in various tangible benefits and further erred in ignoring the submissions and evidence placed by the Appellant before learned TPO.

15 The learned AO/TPO erred in law and on facts in making the TP adjustment on account of Management Service Fee ignoring the judicial precedents prevailing on the matter and relied upon by the Appellant before the learned TPO

16 The learned AO/TPO erred in law and on facts in making the TP adjustment on account of Management Service Fee adjustment inasmuch as the learned TPO has not undertaken any independent analysis to determine the ALP and thus arbitrarily concluded that the ALP is NIL;

17 The learned AO/TPO erred in law and on facts in making the above adjustment ignoring the fact that the ALP of Management Fee in the previous years has been accepted by the department which was paid under similar facts and circumstances.

18. Without prejudice to the above, the learned AO/TPO erred in not allowing the benefit of the +/-3% range prescribed in the proviso to section 92C(2), after proposing the adjustment."

4.1 Facts of the issue are that as per TP study the Assessee has entered into an agreement with its AE, Heineken International B.V. ("HIBV") with effect from 09.04.2014 for assisting the Assessee in managing, developing and conducting its business of sale of beer and alcoholic beverage in India and overseas.

4.2 During the FY 2014-15 (AY 2015-16), the Assessee paid an amount of Rs.6,00,00,000/- to HIBV for availing services in the following areas to assist the Assessee in managing, developing and conducting the business:

i. Technical – Brewery Operations
ii. Procurement
iii. Laboratory
iv. Packaging
v. License
vi. Audit

4.3 The A.R. considered the above transaction of payment of service fee as closely-linked with the transaction of import of raw materials from AE, consultancy fees and sales promotion charges, reimbursement of expenses and trade payables and advances. Since the benefits accrued by the Assessee was more than the price paid for the services, the international transaction of management fee / service fee was treated to be at arm's length.

4.4 The TPO held that the Assessee has not been able to give evidence in respect of specific services received by it from the AE. The

TPO held that the services rendered by the AE to the Assessee are share holder services and no two independent entities would enter into such transactions. The TPO relied on its earlier orders for AY 2013-14 and 2014-15 passed in the Assessee's cases which were confirmed by the DRP. The TPO therefore treated the arm's length price ("ALP") of the management fees as 'Nil' adopting CUP as the most appropriate method ("MAM"). The TPO made downward adjustment of Rs.6,00,00,000/- towards management fees.

4.5 The ld. DRP relied on its order passed in Assessee's case for AY 2014-15 and upheld the order passed by the TPO.

5. The ld. A.R. for the assessee submitted as follows:

i. While the agreement with HIBV was entered into on 09.04.2014, HIBV has been rendering the services and technical know-how to the Assessee since 01.09.2009.

ii. The agreement is for a fixed amount for various services rendered by HIBV to the Assessee.

iii. The Assessee submitted that it had submitted before the TPO the details of the areas of business operations in which the services were rendered and the benefits that have accrued to the Assessee.

iv. Copious details / evidences were furnished to the TPO which have been totally disregarded.

v. The TPO merely says that no evidences were furnished or the evidences are not adequate, without specifying what details were required by him.

vi. The TPO accepted the intra-group service payments as being at ALP in the earlier years and no TP adjustment was made in the earlier years.

vii. The TPO in the subsequent years i.e. AY 2017-18 and 2018-19 has specifically mentioned that the rendition of service is proved and the payment made is at ALP, on the same set of facts and same agreement.

viii. The ld. A.R. submitted that it is settled principle upheld in several decisions of the Tribunal that the TPO cannot hold the ALP as 'Nil' and that the TPO is required to do a benchmarking analysis as per the Income-tax Rules, 1962 ("Rules").

ix. On the same set of facts, the ALP cannot be held to be 'Nil' when in the earlier AY and subsequent AY, the transaction is accepted by the TPO to be at ALP.

5.1 The Assessee submitted that the issue is covered by the decision of this Tribunal in Assessee's case for AY 2013-14 *[IT(TP)A No.2569/Bang/2017]* and AY 2014-15 *[IT(TP)A No.3144/Bang/2018]* wherein, the Tribunal has remanded the issue to the TPO for fresh analysis.

6. The ld. D.R. relied on the order of the lower authorities.

7. After hearing both the parties, we are of the opinion that similar issue came for consideration before this Tribunal in assessee's case for assessment year 2013-14 in IT(TP)A No.2569/Bang/2017 the Tribunal vide order dated 1.6.2022 held as under:

"15. We have given a careful consideration to the rival submissions. The law with regard to determination of ALP in a case of services rendered by an AE and the benchmarking process to be adopted in such cases has been laid down in several decisions. in the case of Dresser Rand India Pvt. Ltd. Vs. ACIT ITA No.8753/Mum/2010 AY 2006-07 order dated 7.9.2011, the Mumbai Tribunal had an occasion to examine as to what is the approach that has to be adopted for determining ALP in the case of cost contribution agreement which is akin to the arrangement in the present case between the Assessee and its parent company. The assessee in case of Dresser Rand (supra) entered into a 'cost contribution agreement' with its parent company pursuant to which it paid a sum of Rs. 10.55

crores as its share of the costs. The TPO, AO & DRP disallowed the expenditure on the ground that the ALP was 'Nil' as no real services had been availed by the assessee and the arrangement was not genuine. On further appeal by the Assessee, the Tribunal held as follows:-

> *"8. We find that the basic reason of the Transfer Pricing Officer's determination of ALP of the services received under cost contribution arrangement as 'NIL' is his perception that the assessee did not need these services at all, as the assessee had sufficient experts of his own who were competent enough to do this work. For example, the Transfer Pricing Officer had pointed out that the assessee has qualified accounting staff which could have handled the audit work and in any case the assessee has paid audit fees to external firm. Similarly, the Transfer Pricing Officer was of the view that the assessee had management experts on its rolls, and, therefore, global business oversight services were not needed. It is difficult to understand, much less approve, this line of reasoning. It is only elementary that how an assessee conducts his business is entirely his prerogative and it is not for the revenue authorities to decide what is necessary for an assessee and what is not. An assessee may have any number of qualified accountants and management experts on his rolls, and yet he may decide to engage services of outside experts for auditing and management consultancy; it is not for the revenue officers to question assessee's wisdom in doing so. The Transfer Pricing Officer was not only going much beyond his powers in questioning commercial wisdom of assessee's decision to take benefit of expertise of Dresser and US, but also beyond the powers of the Assessing Officer. We do not approve this approach of the revenue authorities. We have further noticed that the Transfer Pricing Officer has made several observations to the effect that, as evident from the analysis of financial performance, the assessee did not benefit, in terms of financial results, from these services. This analysis is also completely irrelevant, because whether a particular expense on services received actually benefits an assessee in monetary terms or not even a consideration for its being allowed as a deduction in computation of income, and, by no stretch of logic, it can have any role in determining arm's length price of that service.* ***When evaluating the arm's length price of a service, it is wholly irrelevant as to whether the assessee benefits from it or not; the real question which is to be determined in such cases is whether the price of this service is what an independent enterprise would have paid for the same.***
>
> *9.....*
>
> *10. In case the Assessing Officer comes to the conclusion that the assessee has indeed received the services from the AE the next*

question which we have to decide is as to what is the arm's length price of these services received under cost contribution agreement. It hardly needs to be emphasized that even cost contribution arrangement should be consistent with arm's length principle, which, in plain words, requires that assessee's share of overall contribution to the costs is consistent with benefits expected to be received, as an independent enterprise would have assigned to the contribution in hypothetically similar situation..."

16. The Hon'ble High Court of Delhi in the case of EKL Appliances Limited [(2012) 209 Taxman 200 as well as Cushman & Wakefield India Private Limited in ITA No.475/2012 dated 23.5.2014, 367 ITR 730 (Del), rendered similar ruling as was rendered in the case of Dresser Rand (supra). In the case of Cushman & Wakefield (supra), the Hon'ble Delhi High Court observed that whether a third party in an uncontrolled transaction with the Taxpayer would have charged amounts lower, equal to or greater than the amounts claimed by the AEs, has to perforce be tested under the various methods prescribed under the Indian TP provisions. In the context of cost sharing arrangement, the Hon'ble High Court opined that concept of base erosion is not a logical inference from the fact that the AEs have only asked for reimbursement of cost. This being a transaction between related parties, whether that cost itself is inflated or not only is a matter to be tested under a comprehensive transfer pricing analysis. The basis for the costs incurred, the activities for which they were incurred, and the benefit accruing to the Taxpayer from those activities must all be proved to determine first, whether, and how much, of such expenditure was for the purpose of benefit of the Taxpayer, and secondly, whether that amount meets ALP criterion. In the present case however, the arrangement between the AE and the Assessee is not a cost sharing arrangement but a payment for specific services rendered. To this extent the above observations of the Hon'ble High Court may not be relevant to the present case.

17. The following aspects would require consideration in order to identify intra group services requiring arm's length remuneration:-

- *Whether services were received from related party.*
- *Nature of services including quantum of services received by the related party.*
- *Services were provided in order to meet specific need of recipient of the services.*
- *The economic and commercial benefits derived by the recipient of intra group services.*
- *In comparable circumstances an independent enterprise would be willing to pay the price for such services?*
- *An independent third party would be willing and able to provide such services?*

* *Whether payment made to AE meets ALP criterion will be determined, keeping in mind all the above factors, as well.*

18. Keeping in mind the principles emanating from the aforesaid decisions, we shall now proceed to examine the material on record to see the nature of services received by the Assessee and as to whether the same were at Arm's Length.

19. In the present case, the plea of the assessee has been that documentary evidence furnished by it has not been examined by the TPO, who has merely come to the conclusion that the assessee failed to prove the nature of services rendered by the AE for which the assessee made payment. There is force in the arguments of the ld. counsel for the assessee, in as much as the TPO as well as the DRP ignored the documentary evidence filed by the assessee and have proceeded on the assumption that these details were general in nature and did not prove the rendering of services by the AE. It is also equally true that the bulk of evidence filed by the assessee at pages 198 to 424 of PB have to be corelated with type of services rendered and it is necessary for the assessee to explain as to how these emails show that services were rendered by the AE. It is only on such analysis being provided by the assessee, can the TPO proceed to examine the rendering of services as well as benefit that the assessee might derive. In the matter of coming to the conclusion on the benefit that the assessee received, clear evidence cannot be insisted upon and the overall business scenario and type of services rendered have to be looked into. We also notice that similar payment made to the very same AE for similar services under the very same agreement, has been accepted to be at Arm's Length in AY 2017-18 & 2018-19. We are, therefore, of the view that it would be just and appropriate to set aside the issue with regard to determination of ALP to the AO/TPO for fresh consideration in the light of law as explained above and the other observations in this order. The AO/TPO will afford opportunity of being heard to the assessee in the set aside proceedings, before deciding the issue."

7.1 In view of the above order of the Tribunal taking a consistent view, we remit the issue to the file of AO/TPO for fresh consideration in the light of above order of the Tribunal.

8. Ground Nos.19 to 27 of the assessee's appeal reads as under:

"II. Grounds relating to payment of Brand Promotion Fee:

19 The learned AO/TPO erred in law and on facts in determining the ALP at NIL in respect of the payment made towards Brand Promotion expenses amounting to INR 22,84,61,026 to Force India Formula One Team Limited;

20 The learned AO/TPO erred in law and on facts in treating payment towards Brand Promotion expenses to Force India Formula One Team Limited as

international transaction *under the provisions of the Act without appreciating the fact that Force India Formula One Team Limited is not an Associated Enterprise under section 92A of the Act and therefore TP provisions are not applicable to the alleged transaction;*

21 The learned AO/TPO has failed to appreciate that in order to invoke the provisions of section 92C the transaction should not only be an international transaction but also has to be with an Associated Enterprise and thus erred in invoking the provisions of section 92C of the Act in respect of Brand Promotion expenses paid to Force India Formula One Team Limited;

22 The learned AO/TPO has made the TP adjustment in respect of Brand Promotion expenses paid to Force India Formula One Team Ltd by erroneously stating that Force India and UBL are controlled by UB Group Chairman, based on mere surmises and conjectures without appreciating the fact that there was no control inter se and thus Force India and UBL have never come in the sweep of definition of Associated Enterprise as contemplated under section 92A of the Act;

23 The learned AO/TPO erred in law and on facts in making the TP adjustment in respect of payment towards Brand Promotion expenses ignoring the commercial and economic rationale of the business of the Appellant;

24 The learned AO/TPO has no jurisdiction to question the commercial expediency for the incurrence of the expenditure and thus Rule 10B(1)(a) does not authorize disallowance of any expenditure on the ground that it was not necessary or prudent for the Appellant to have incurred such expenditure;

25 The learned AO/TPO has made the TP adjustment in respect of Brand Promotion expenses paid to Force India Formula One Team Limited ignoring the submissions and various judicial precedents relied upon by the Appellant during the course of Transfer Pricing Proceedings; and

26 The learned AO/TPO erred in law and on facts in making the TP adjustment on account of Brand Promotion expenses, inasmuch as the TPO has not undertaken any independent analysis of its own to determine the ALP and thus arbitrarily concluded that the ALP is NIL.

27 Without prejudice to the above, the learned TPO erred in not allowing the benefit of the +/-3% range prescribed in the proviso to section 92C(2)."

8.1 Facts of the case are that the Assessee entered into brand promotion agreement dated 28.02.2014 with Force India Formula Once Team Limited, UK ("Force India") for promotion of "United

Breweries Brand" and "Kingfisher Brand". In terms of the agreement, the following branding possibilities were given by Force India:

- Logo / brand of the Assessee shall be displayed prominently on the wings, engine cover and other such designated places;
- Logo / brand of the Assessee shall be displayed on the Driver's suit worn and other such designated places;
- Logo / brand of the Assessee shall be displayed on the merchandised on designated places and also avail various other incidental services;
- All image rights of identified Race and Test drivers like TV rights, etc.
- Two personal appearances of such drivers anywhere in the world; and
- One day attendance of such driver for advertisement and communication purposes.

8.2 Force India was not an AE as per section 92A of the Act however, the Assessee as a matter of precaution included the transaction with Force India as an international transaction in the Form 3CEB. Since the benefits accruing to the Assessee was more than the price paid for the service, the international was held to be at arm's length adopting 'Other method' as MAM.

8.3 The TPO observed that the Assessee had associated with lesser known brand than itself i.e., Force India and no third parties will associate their brands with lesser known brands, no benefit accrued to the Assessee. The TPO relied on its order for earlier AY and treated the ALP of the brand promotion expenses as 'Nil' adopting CUP as the

MAM. The TPO made downward adjustment of Rs.22,84,61,026/- towards brand promotion expenses.

8.4 The DRP relied on its order passed in Assessee's case for AY 2013-14 and 2014-15, and upheld the order passed by the TPO.

i. The primary objection of the Assessee is that Force India is not an AE and hence, the TP adjustment is wrong and void ab-initio;
ii. The Assessee submitted that the submissions made have been disregarded and brushed aside without examining the facts;
iii. The TPO and DRP have erred in characterizing the transaction as 'international transaction';
iv. The TPO for the AY 2016-17 has accepted the submissions of the Assessee and has excluded this transaction after giving show-cause notice;
v. In case of Group company, United Spirits, the same transaction has been accepted as being in ALP and the Tribunal has deleted the addition made under section 37 of the Act;
vi. It is settled principle upheld in several decisions of the Tribunal that the TPO cannot hold the ALP as 'Nil' and that the TPO is required to do a benchmarking analysis as per the Rules;
vii. On the same set of facts, the ALP cannot be held to be 'Nil' when in the earlier AY and subsequent AY, the transaction is accepted by the TPO to be at ALP.

8.5 The Assessee submitted that the issue is covered by the decision of this Tribunal in Assessee's case for AY 2013-14 *[IT(TP)A No.2569/Bang/2017]* and AY 2014-15 *[IT(TP)A No.3144/Bang/2018]* wherein, the Tribunal has remanded the issue to the TPO and has

directed re-examination of the issue whether Force India can be considered as an AE, leaving open, the issue of determination of ALP.

9. The ld. D.R. relied on the order of lower authorities.

10. After hearing both the parties, we are of the opinion that similar issue came before this Tribunal in assessee's own case in ITA No.2569/Bang/2017 in assessment year 2013-14 vide order dated 1.6.2022, wherein held as under:

"24. We have given careful consideration to the rival submissions. We find that in the AY 2016-17 the assessee had addressed a letter dated 27.9.2019 to the TPO submitting that FIFOTL is not an AE, in response to TPO's query dated 25.9.2019. Following was the submission made by the assessee in this regard:-

> *"FORCE INDIA - IS NOT A ASSOCIATED ENTERPRISE*
>
> *In this regard, we would like to submit that Force India Formula One Team Ltd. is not an Associated Enterprise of United Breweries Ltd. The transfer pricing provisions would be applicable only if the relationship of two enterprises qualifies as associated enterprises within the meaning of section 92A of the Income Tax Act.*
>
> *The relationship between United Breweries Limited (UBL) and Force India is not one of those relationships mentioned in 5.92A (2) of the Act. There is no dispute that neither United Breweries Ltd. nor Force India Formula One Team Ltd hold directly or indirectly 26% of the shares having the voting powers in the other entity. Shareholding details of UBL and Force India are appended in Annexure1.*
>
> *It is clear from Annexure-1 details furnished along with this note, that, none of the common directors of UBL and Force India hold more than 26% shares in UBL. So the relationship mentioned in S.92A(2)(b) where the same person or enterprise holds directly or indirectly, shares carrying not less than 26% of the voting power in each of such enterprise, is also not present.*
>
> *Further, it is necessary to appreciate the scheme of section 92A. A plain reading of this statutory provision makes the legal position quite clear. The, basic rule for treating the enterprises as an associated enterprises is set out in section 92A(1). The illustrations in which basic rule finds application are set out in section 92A(2). Section 92A(1) lays down the basic rule that in order to be treated as an "associated enterprise in one*

enterprise, in relation to another enterprise, means an enterprise which participate, directly or indirectly, or through one or more intermediaries, 'in the management or control or capital of the other enterprise' or when 'one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise".

Accordingly, we would like to submit that, UBL is a listed entity and is managed by its board of directors. It is the board's decision (comprising of 3 Directors from UBL, 3 Directors from Heineken and 6. Independent Directors) that over sees on all aspects of the management/operations of the company. Hence, no single person can take a decision with respect to put the capital at risk (or) take any other strategic decisions. Accordingly, no single promoter group has "control/influence" over decisions of the board.

Based on the above facts, our tax auditors have also not considered Force India as an associated enterprise of UBL. Consequently, we request your good self not to consider Force India as an Associated Enterprise of United breweries Limited and to drop the proposal of making any adjustment under section 92CA of the Income Tax Act."

25. The above plea has been accepted by the AO/TPO and no separate bench marking was undertaken for identical transaction in AY 2016-17. We find that the TPO in the impugned assessment year i.e., AY 2013-14, on identical facts has taken a contrary view, which is to the effect that there is an element of indirect control. The DRP has not rendered any finding on this issue. We are of the view that, in the light of order of the TPO for AY 2016-17, the issue requires fresh examination by the TPO. We, therefore, set aside the order of the TPO and direct re-examination of the issue, whether FIFOTL can be considered as an AE? The other issues with regard to determination of ALP are left open, without any adjudication, as the preliminary issue, if decided will render the entire exercise of determination of ALP, academic."

10.1 In view of the above order of the Tribunal, we remit this issue to the file of AO/TPO to examine this issue as laid down by the Tribunal in the judgement cited (supra).

11. Next ground Nos.28 to 36 of the assessee's appeal reads as under:

"III. Grounds relating to Sales Promotion Expenses:

"28 The learned AO/TPO erred in law and on facts in determining the ALP at NIL in respect of the payment made towards Sales Promotion expenses amounting to INR 9,25,00,000 to United East Bengal Football Pvt Ltd;

29 The learned AO/TPO erred in law and on facts in making transfer pricing adjustment in respect of the payment made to United East Bengal Football Pvt Ltd without a specific reference made by the Learned A.0 to the learned TPO in respect of Specified Domestic Transaction and therefore the adjustment made lacks jurisdiction

30 The learned AO/TPO erred in law and on facts in making the TP adjustment in respect of payment towards Sales Promotion expenses ignoring the commercial and economic rationale of the business of the Appellant;

31 The learned TPO has erred in disregarding the commercial contractual agreement between the parties without giving any cogent reason

32 The learned AO/TPO erred in law and on facts in determining the ALP at NIL ignoring the external comparable submitted by the Appellant;

33 The learned AO/TPO erred in law and on facts in concluding that the Appellant has not derived any benefit from incurring the expenses on account of sales promotion/sponsorship ignoring the evidences submitted by the Appellant;

34 The learned AO/TPO has no jurisdiction to question the commercial expediency in incurring the expenditure and thus Rule 10B(1)(a) does not authorize disallowance of any expenditure on the ground that it was not necessary or prudent for the Appellant to have incurred such expenditure;

35 The learned AO/TPO has made TP adjustment in respect of Sales Promotion expenses paid to East Bengal Football Team ignoring the submissions and various judicial precedents relied upon by the Appellant during the course of Transfer Pricing Proceedings

36 Without prejudice to the above, the learned TPO erred in not allowing the benefit of the +/3% range prescribed in the proviso to section 92C(2)."

11.1 Facts of the case are that the Assessee entered into sponsorship agreement dated 23.06.2015 with United East Bengal Football Team Private Limited ("UEBFT") for sponsorship fee of

Rs.9,25,00,000/- for promotion of "United Breweries Brand" and "Kingfisher Brand". In terms of the agreement, the following branding possibilities were available to the Assessee:

i. The AE team will be named 'Kingfisher East Bengal' football team;
ii. Use of AE's team player(s) identification for advertising and promotion of various brands and /or corporate name of the Assessee or brands and / or corporate names of other companies as may be required under any marketing arrangement entered into by the Assessee with any marketing agency;
iii. The advertising opportunities by use of the AE's player(s) identification either as a team or in any combination or as individual members with specific brands in media including but not limited to television, satellite television, cinema, radio, etc.
iv. The AE shall enter into separate agreement(s) with the player(s) to ensure that the players(s) are available to the Assessee or its marketing agency for video shooting of commercials, press conference, photographic sessions both individually and along with other team members, football clinics, coaching camps, exhibition matches, etc for a minimum number of 20 days in a contract year excluding days of travel as and when desired by the Assessee or the marketing agency;
v. Grant to the Assessee facilities for all ground signage on grounds owned / leased by the AE;
vi. Endorsement by Player(s) of sponsors / co-sponsor brands as per FIFA rules and regulations;

vii. Merchandizing opportunities, all digital rights for the AE, Intra club promotional football tournaments and Exhibition matches in India and abroad will be facilitated by the AE;

viii. The Assessee will have the exclusive digital rights for the AE's website address / content generated will be owned by the Assessee. The Assessee will have all IPR related to web including and not limited to such content / application developed;

ix. Branding or players gears (jerseys, shorts, etc) as required by the Assessee or its marketing agency. All such branding including but not limited to design, logo positions, etc will be mutually agreed;

x. Such other advertisement and marketing opportunities that may arise in such sponsorship but not specified above;

xi. The AE will support and facilitate all branding, marketing and promotion initiatives including but not limited to cheerleaders, fan engagements, after match parties, etc.

xii. The AE will provide match tickets for purchase at a discounted rate by all the Assessee's Group Companies for the purpose of their own promotions; and

xiii. The AE will participate in exhibition matches anywhere in India or abroad as organized by the Assessee.

11.2 The Assessee had reported the transaction in the Form 3CEB as a specified domestic transaction. Since the benefits accruing to the Assessee was more than the price paid for the service, the international was held to be at arm's length adopting 'Other method' as MAM.

11.3 The TPO relied on its order for earlier AY 2013-14 and treated the ALP of the sales promotion expenses as 'Nil' adopting CUP as the MAM. The TPO made downward adjustment of Rs.9,25,00,000/- towards sales promotion expenses.

11.4 The ld. DRP relied on its order passed in Assessee's case for AY 2013-14 and 2014-15, and upheld the order passed by the TPO.

12. The ld. A.R. for the assessee submitted as follows:

i. The Assessee submitted that the submissions made before the TPO / DRP have been disregarded without examining the same;
ii. From the order of the TPO itself, it is clear that the decision of the TPO is based on surmises;
iii. In the case of the Group company, United Spirits, the same transaction has been accepted as being at ALP and the Tribunal has deleted the addition made under section 37 of the Act;
iv. It is settled principle upheld in several decisions of the Tribunal that the TPO cannot hold the ALP as 'Nil' and that the TPO is required to do a benchmarking analysis as per the Rules;
v. On the same set of facts, the ALP cannot be held to be 'Nil' when in the earlier AY and subsequent AY, the transaction is accepted by the TPO to be at ALP.

12.1 The Assessee submitted that the issue is covered by the decision of this Tribunal in Assessee's case for AY 2013-14 *[IT(TP)A No.2569/Bang/2017]* wherein, the Tribunal has remanded the issue

to the AO to examine the claim of expenditure in accordance with the provisions of section 40A(2) of the Act.

13. The ld. D.R. relied on the order of lower authorities.

14. We have heard the rival submissions and perused the materials available on record. We are of the opinion that similar issue came for consideration before this Tribunal in assessment year 2013-14 in IT(TP)A No.2569/Bang/2017 vide order dated 1.6.2022 wherein held as under:

"31. We have carefully considered the rival submissions. The issue with regard to whether the transaction of payment of sale promotion expenses to UBEF can be said to be an SDT, we find that the decision of the ITAT in the case of Textport Overseas Pvt.Ltd. (supra) has been confirmed by the Hon'ble Karnataka High Court in the very same case of Texport Overseas Pvt. Ltd. in ITA No.392/2018 order dated 12.12.2019, with the following observations:-

> *"5. Having heard learned Advocates appearing for parties and on perusal of records in general and order passed by tribunal in particular it is clearly noticeable that Clause (i) of Section 92BA of the Act came to be omitted w.e.f. 01.04,2019 by Finance Act, 2014. As to whether omission would save the acts is an issue which is no more res-integra in the light of authoritative pronouncement of Hon'ble Apex Court in the matter of KOBLAPUR CANESUGAR WORKS LTD. v. UNION OF INDIA reported in AIR 2000 SC 811 whereunder Apex Court has examined the effect of repeal of a statute visa-vis deletion/addition of a provision in an enactment and its effect thereof. The import of Section 6 of General Clauses Act has also been examined and it came to be held:*
>
> > *"37. The position is well known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute-book as completely as if it had never been passed, and the statute must be considered as a law that never existed. To this rule, an exception is engrafted by the provisions of Section 6(1), If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the ITA No.2936/Bang/20180 M/s. Sobha City, Bangalore omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted*

afterwards. Savings of the. nature contained in Section 6 or in special Acts may modify the position. Thus the operation of repeal or deletion as to the future and the past largely depends on the savings applicable. In a case where a particular provision in a statute is omitted and in its place another provision dealing with the same contingency is introduced without a saving clause in favour of pending proceedings then it can be reasonably inferred that the intention of the legislature is that the pending proceedings shall not continue but fresh proceedings for the same purpose may be initiated under the new provision."

6. In fact coordinate bench under similar circumstances had examined the effect of omission of sub-section (9) to Section 10B of the Act w.e.f. 01.04.2004 by Finance Act, 2003 and held that there was no saving clause or provision introduced by way of amendment by omitting sub-section (9) of Section 10B. In the matter of GENERAL FINANCE CO. vs. ACIT, which judgment has also been taken note of by the tribunal while repelling the contention raised by revenue with regard to retrospectivity of Section 92BA(i) of the Act. Thus, when clause (i) of Section 92BA having been omitted by the Finance Act, 2017, with effect from 01.07.2017 from the Statute the resultant effect is that it had never been passed and to be considered as a law never been existed. Hence, decision taken by the Assessing Officer under the effect of Section 92BI and reference made to the order of Transfer Pricing Officer-TOP under Section 92CA could be invalid and bad in law.

7. It is for this precise reason, Tribunal has rightly held that order passed by the TPO and. DRP is unsustainable in the eyes of law. The said finding is based on the authoritative principles enunciated by the Hon'ble Supreme Court in Kolhapur Canesugar Works Ltd referred to herein supra which has been followed by Co-ordinate Bench of this Court in the matter of M/s.GE Thermometrias India Private Ltd., stated supra. As such we are of the considered view that first substantial question of law raised in the appeal by the revenue in respective appeal memorandum could not ITA No.2936/Bang/20180 M/s. Sobha City, Bangalore arise for consideration particularly when the said issue being no more res Integra."

32. Since the decision rendered by the Hon'ble High Court of Karnataka is binding on this bench of Tribunal sitting in Bengaluru, we follow the same. Accordingly, we hold that the reference to the TPO in respect of specified domestic transactions mentioned in clause (i) of sec.92BA is not valid, as the said provision has been omitted. Accordingly, we direct the AO to delete the addition relating to specified domestic transactions made u/s 92CA of the Act.

33. We notice that the co-ordinate bench in the case of Textport Overseas (supra) has restored the matter to the file of the A.O. with the direction to examine the claim of expenditure in accordance with the provisions of section 40A(2) of the Act. Following the same, we restore this issue to the file of the AO with the direction to examine the claim of expenditure mentioned above in terms of the provisions of section 40A(2) of the Act. Accordingly, following the binding decision rendered by Hon'ble High Court of Karnataka in the case of Texport Overseas P Ltd (supra), we hold that the reference to the TPO in respect of specified domestic transactions mentioned in clause (i) of sec.92BA is not valid, as the said provision has been omitted. Accordingly, we direct the AO to delete the addition relating to specified domestic transactions made u/s 92CA of the Act. However, as pointed out by Ld D.R, the co-ordinate bench in the case of Texport overseas P Ltd. (supra), has restored the matter to the file of the A.O. with a direction to examine the claim of expenditure in accordance with the provisions of section 40A(2) of the Act. Following the same, we restore this issue to the file of the AO with the direction to examine the claim of expenditure mentioned above in terms of the provisions of section 40A(2) of the Act.

14.1 In view of the above order of the Tribunal, we remit this issue to examine the issue in the light of above order of the Tribunal and remit the issue to the file of AO for fresh consideration.

15. Next ground Nos.37 to 42 of the assessee's appeal are as under:

"IV. Grounds relating to Sales Promotion expenses:

37. The learned AO erred in law and on facts in making a protective addition in respect of the payment made towards Sales Promotion expenses amounting to 1NR 9,25,00,000 to United East Bengal Football Pvt Ltd;

38. The learned AO erred in law and on facts in making a double addition of the same expenditure, by characterizing the addition as "Protective Addition", an addition which is alien to the Income Tax Law.

39. The learned AO erred in law and on facts in making an addition of a transaction which has already been referred to the TPO, ignoring the principle that once a transaction has been referred to the TPO the AO does not have jurisdiction over the transaction

40. While making the so called "Protective addition", the learned AO has erred in holding that these expenses were towards promotion of a generic brand which does not belong to any specific company, which is contrary to the facts

41. Having held thus the expenses are towards the generic brand, the learned AO erred in holding that such an expenditure is a capital expenditure not attributable to the assessee's sales.

42. The learned AO erred in holding that only those expenses which are relatable to sales can be treated as revenue expenses and has erred in surmising that these expenses are not allowable u/s 37."

15.1 Facts of the case are that the AO disallowed the expenses under section 37 of the Act, by holding that the expenses are for promotion of Brand and the brand promotion expenses are Capital expenditure. Further, the AO also opined that the expenses cannot be directly attributable to the Assessee's sales and hence it is to be disallowed.

15.2 The DRP confirmed the protective addition made by the AO.

16. The ld. A.R. submitted as follows:

i) As regards the disallowance of sale promotion expenses made to United East Bengal Football Club, under section 37 of the Act, the Tribunal in the case of *United Spirits Limited [IT(TP)A No. 2701/B/2017, AY 2013-14]* has allowed similar payments made to United Mohan Bagan Football as allowable expenses.

ii) Since the TP adjustment has been deleted by the Tribunal and the issue has been remanded to the AO, the protective addition also needs to be remanded back to the AO, to examine the claim of expenditure in accordance with the provisions of Section 40A(2) of the Act.

16. The ld. D.R. relied on the order of lower authorities.

17. After hearing both the parties, we are of the opinion that this is a protective addition which require to be remanded back since the ALP adjustment of sale promotion has gone back to the AO. The AO has to examine the issue as decided by this Tribunal in assessment year 2013-14 in IT(TP)A No.2569/Bang/2022 for the AY 2013-14 vide order dated 1.6.2022 in para 33 of that order as reproduced earlier.

Accordingly, these grounds of assessee's appeal are partly allowed for statistical purposes.

18. Ground Nos.43 to 48 of the assessee's appeal are reproduced below:

"V. Grounds relating to Brand Promotion expenses:

43. The learned AU erred in law and on facts in making a protective addition in respect of the payment made towards Brand Promotion expenses amounting to INR 22,84,61,026 to Force Indi? Formula One Team Limited;

44. The learned AO erred in law and on facts in making a double addition of the same expenditure, by characterising the addition as "Protective Addition", an addition which is alien to the Income Tax Law.

45. The learned AO erred in law and on facts in making an addition of a transaction which has already been referred to the TPO, ignoring the principle that once a transaction has been referred to the TPO the AO does not have jurisdiction over the transaction

46. While making the so called "Protective addition", the learned AO has erred in holding that these expenses were towards promotion of brand extensions and is therefore a brand related expenditure, which is contrary to the facts

47. Having held thus the expenses are towards promotion of brand extensions, the learned AO erred in holding that such an expenditure is a capital expenditure

48. The learned AO has erred in applying the decision in the case of GMR Projects (P) Ltd, in making the addition without appreciating that the facts of that case and the principles involved therein are totally different from that of the appellant."

19. Facts of the case are that the AO has disallowed the expenses under section 37 of the Act by holding that the expenses are for promotion of Brand and the brand promotion expenses are Capital expenditure. Further, the AO has also opined that the decision rendered by the Tribunal in the case of GMR Projects is squarely applicable to the facts of the Assessee's case.

19.1 The ld. DRP confirmed the protective addition made by the AO.

20. The ld. A.R. for the assessee submitted as follows:

i) As regards the disallowance of Brand Promotion expenses made to Force India Formula One Team, under section 37 of the Act, the Hon'ble Tribunal in the case of *United Spirits Limited [IT(TP)A No. 2701/B/2017, AY 2013-14]* has allowed similar payments made to Force India Formula One, as allowable expenses.

ii) The Assessee submitted that similar issue had come up before this Tribunal in Assessee's case for *AY 2012-13 [IT(TP)A No.481/Bang/2018]* wherein the disallowance of brand promotion fees paid to Force India Formula One Team was made by the AO under section 37 of the Act. The Tribunal has allowed the deduction in respect of brand promotion expenses.

20. The ld. D.R. relied on the orders of the lower authorities.

21. After hearing both the parties, we are of the opinion that this issue has to go back to the AO as the TP adjustment on the same issue in ground Nos.19 to 27 (supra) have been remanded to the file of AO for fresh consideration. In view of this, we remit this issue to the file of AO as remitted by the Tribunal in assessment year 2013-14 in IT(TP)A No.2569/Bang/2022 vide order dated 1.6.2022 in paras 24 & 25 of that order. These grounds are partly allowed for statistical purposes.

22. Ground Nos.49 to 53 of the assessee's appeal are reproduced as under:

VI. Grounds relating to Claim of Additional depreciation on pellets:

49. The learned AO erred in dis-allowing the claim of additional depreciation made on Pellets by categorizing these assets as Furniture & Fixtures

50. The learned AO erred in holding that the Pellets are mere storage devices and hence does not come under Plant and Machinery.

51. The learned AO erred in holding that the Pellets were classified by the assessee under "Furniture & Fixtures" in the earlier years, which is contrary to facts

52. The learned AO erred in relying on so called report of the team to make an usage test, without furnishing the report to the appellant or revealing the contents therein, thereby violating the principles of natural justice

53. The learned AO erred in making the addition without granting an opportunity to the assessee on the issue"

22.1 The facts of the issue are that the issue involved is whether the Plastic crates and Wooden pellets used as storage devices are to be classified as "Plant & Machinery" or as "Furniture & Fixtures" for the purpose of claiming depreciation.

22.2 This issue is discussed at para 4 at pages 7 and 8 of the draft assessment order as follows:

i) The AO has held that the plastic crates and wooden pellets are used to carry empty bottles and hence they fall under the category of "Furniture & Fixtures" and accordingly the AO allowed the depreciation @ 10% applicable for furniture & fixtures and disallowed the balance claim of depreciation.

ii) The AO has also stated that he had sent a team of his officials to inspect the premises to make an "usage test" of the items. The AO has also mentioned (erroneously) that the Appellant

has itself categorized the pellets as "Furniture & Fixtures" in the earlier years.

22.3 The DRP confirmed the disallowance made by the AO.

24. The Assessee submitted that the decision of the AO is wrong, on facts, principles and procedure.

i) The AO is wrong in stating that the crates are used only to store empty bottles. As can be seen from the picture reproduced in the DAO, the crates and wooden pellets are used for the storage of finished goods and movement of goods within the production area. These are not mere storage devices but are essential for stacking empty bottles and finished goods in proper manner to avoid breakages. Accordingly, it is integral to the production process and hence, it should be considered as plant.

ii) The AO is wrong in stating that these pellets and crates were classified by the Assessee under "Furniture & Fixtures" in the earlier years, which is contrary to facts.

iii) The AO has stated that he has relied on the report of the team of officials to make an usage test, without furnishing the report to the Assessee or revealing the contents therein, thereby violating the principles of natural justice.

iv) Further, it is settled principle that the definition of "Plant" is an inclusive definition. The Courts have held that, for allowing depreciation on plant, one should look at the character of the items from the person who is carrying on the business or

profession as the case may be. For instance, books are plant for an advocate's office and he can claim depreciation.

v) In this regard, the ld. A.R. placed reliance on the decision of the Hyderabad Bench of the Hon'ble Tribunal in the case of *The AP State Warehousing Vs The Dy.CIT, Hyderabad*, wherein the assessee had claimed 100% depreciation on wooden crates, but the AO had classified this under plant and machinery and allowed only 25%. The Tribunal held that the wooden crates in the warehouses have a temporary life and they are replaced very frequently and the corporation is rightly entitled to depreciation @100%.

vi) He placed reliance on the decision of the Hon'ble Bombay High Court dated 15.06.2022 in the case of *Parle Bisleri Private Ltd.[ITA No. 252 of 2002]*. In this case, the Hon'ble High Court, after analyzing all the decisions in the matter, has held that the bottles and crates used for bottling the soft drinks manufactured by the assessee fall within the definition of "Plant" contained in section 43(3) of the Act.

vii) The facts of the above case and the principles involved applies squarely to the case of the Assessee.

viii) The Assessee submitted that it has capitalized all these items in the books under the category of 'plant and machinery' as these items are essentials for stacking empty bottles and finished goods in proper manner to avoid breakages. Further, it is used in the movement of raw material and packing material goods within the factory premises. Since the wooden

pallets and plastic crates are used during the course of manufacturing and storing of finished goods and accordingly, the Assessee is eligible for depreciation under 'plant and machinery' and not under 'furniture & fixture'.

25. The ld. D.R. submitted that these pellets and cartons are not 'Plant and Machinery' and for crates which are used for carrying the bottles cannot be granted additional depreciation.

26. We have heard the rival submissions and perused the materials available on record. The ld. A.R. relied on the judgement of Hon'ble Bombay High Court in the case of Parle Bisleri Pvt. Ltd. in ITA No.252 of 2002 dated 15.6.2022, wherein they considered the issue relating to whether bottles and crates could be treated as "plant" within the meaning of section 32(1)(i) of the Act. While answering this question they have observed as under:

"7. We have heard Mr. Jeet Kamdar, the learned Counsel for the Appellant and Mr. Arvind Pinto, learned Counsel for the Respondent.

8. Section 43(3) of the Act as it stood at the relevant time, i.e., assessment year 1989-90 reads thus:

"43(3) "plant" includes ships, vehicles, books, scientific apparatus and surgical equipment used for the purposes of the business or profession."

9. Mr.Kamdar, the learned Counsel for the Appellant submitted that the Tribunal had not followed the decisions of the Andhra Pradesh High Court and Rajasthan High Court, which are directly on the point as to the definition of "Plant" in Section 43(3) of the Act and has erroneously relied on the decision of Supreme Court in the case of Steel City Beverages Ltd., which is on the bare perusal of the same, is distinguishable and is rendered in the context of different enactment having different ambit. Mr Kamdar submitted that for the assessment years 1985-86, 1986-87 and 1988-89, the Tribunal has held in favour of the Appellant/Assessee holding that the Appellant is entitled to depreciation on the bottles and crates as claimed. Mr. Kamdar submitted that even subsequent to the concerned assessment year, i.e. the assessment year 1991-92, the Tribunal has held in favour of the Appellant and only for the assessment year in question, i.e., 1989-90, a different view is taken.

Mr. Kamdar relied upon the following decisions in support of his submissions:

(i) Commissioner of Income - Tax, Andhra Pradesh vs. Taj Mahal Hotel4 ;
(ii) Scientific Engineering House P. Ltd. vs. Commissioner of Income-Tax, Andhra Pradesh5; and
(iii) Commissioner of Income Tax vs. Srikrishna Bottlers (P.). Ltd.6;

10. Mr. Pinto, the learned Counsel for the Respondent - Revenue, on the other hand, contended that the bottles and crates could not, by any stretch of the imagination, be construed as "Plant" as it is not relatable to ships, vehicles, books, scientific apparatus and surgical equipment used for the business or profession. Mr. Pinto submitted that bottles and crates must have some relevance or connection to the categories mentioned in Section 43(3) of the Act to fall under the definition of "Plant". Mr. Pinto submitted that the bottles and crates could not be considered used for the Appellant business, which is manufacturing soft drinks. Mr. Pinto submitted Appendix-I to the Income Tax Rules 1962 framed under Rule 5, wherein the table of Plant and machinery listed does not have any reference to bottles and crates; therefore, they cannot be considered as falling under the definition of "Plant". Mr. Pinto submitted that the decisions of the Rajasthan High Court in the case of Jai Drinks (P.) Ltd. and the Andhra Pradesh High Court in the case of Sri 4 (1971) 82 ITR 44 (SC) 5 (1986) 157 ITR 86 (SC) 6 (2005) 274 ITR 11 (A.P.) Dinesh Sherla 6/14 203-itxa-252-02.doc Krishna Bottlers Pvt. Ltd. are considered by the Supreme Court in the case of Steel City Beverages Ltd., and it is held that the definition of "Plant" will not include bottles and crates and therefore, this decision was rightly followed by the Tribunal.

11. The definition of "Plant", reproduced above, shows that it is an inclusive definition. The Division Bench of Rajasthan High Court in the case of Jai Drinks (P.) Ltd. followed the decision of the Supreme Court in the case of Taj Mahal Hotel, where the Supreme Court, after considering the term "Plant" under the provisions of the Act, observed that the same has to be construed in a wide manner. In Taj Mahal Hotel, the Supreme Court construed the definition of "Plant" as occurring in Section 10(5) of the Indian Income-tax Act, 1922 ("the 1922 Act"), which corresponded to Section 43(3) of the 1961 Act. It was held that had the definition of "Plant" was an inclusive definition, and the intention of the Legislature was to give it a wide meaning which is evident from the fact that articles like books and surgical instruments were expressly included in the definition of "Plant". The Rajasthan High Court also followed the decision of the Supreme Court in Scientific Engineering House (P.) Ltd., wherein while construing the definition of "Plant" in Section 43(3), the question of whether drawings, designs, charts, plans, etc., were within the definition of "Plant" where the assessee's business was to manufacture scientific instruments was answered in favour of the Dinesh Sherla 7/14 203-itxa-252-02.doc assessee. The tests to be applied was also laid down by the Supreme Court in this decision. The Rajasthan High Court in Jai Drinks (P.) Ltd. held that applying the above test indicated by the Supreme Court, there is no escape from the conclusion that the bottles and crates used for bottling the soft drinks manufactured by the assessee fall within the definition of "Plant" contained in section 43(3).

12. An identical issue arose for consideration before the Division Bench of Andhra Pradesh High Court in Sri Krishna Bottlers Pvt. Ltd.. The Division Bench took a review of the case law on the subject and culled out the legal propositions from the overview taken and observed thus:

"From the aforesaid rulings, the following principles can be gathered;
(1) "Plant" in section 43(3) of the Act is to be construed in the popular sense, namely, in the sense in which people conversant with the subject matter with which the section is dealing would attribute to it. The word "plant"

is to be given a "very wide" meaning. In its ordinary sense, it includes whatever "apparatus" is used by a businessman for carrying on his business, but it does not include his stock-in-trade, which he buys or makes for sale. It, however, includes all goods and chattels, fixed or movable, live or dead, which the tradesman keeps for permanent employment in his business. (2) But the building or the "setting" in which the business is carried on cannot be plant. (3) The thing need not be part of the machine used in the manufacturing process but could be merely an apparatus used in carrying on the business but having a "degree of durability". (4) Merely because the Dinesh Sherla 8/14 203-itxa-252-02.doc asset has a passive function in the carrying on of the business, it cannot be said that it is not plant. It may have a passive or an active role. (5) The subject must have a function in the trader's operation and if it has, it is prima facie a plant unless there was good reason to exclude it from that category. It must be a "tool in the trade" of the businessman. (6) Gross materiality or tangibility is not necessary and, in fact, intangible things like ideas and designs contained in a book could be "plant". They fall under the category of "intellectual storehouse". (7) In considering whether a structure is plant or premises, one must look at the finished product and not at the bits and pieces as they arrive from the factory. The fact that a building or part of a building holds the plant in position does not, convert the building into the plant. A piecemeal approach is not permissible, and the entire matter must be considered as a single unit unless, of course, the component parts can be treated as separate units having different purposes. (8) The functional test is a decisive test.

Bearing these principles in mind, we shall approach the facts of the present case. The bottles containing the soft drink cannot be stock-in-trade inasmuch as the bottle by itself is not the subject of sale. The customer or the retailer returns back the bottle to the assessee after the soft drink is consumed. Likewise, the shells which are sent to the customer or dealer also come back with the empty bottles, and they cannot also be stock-in-trade. What is the function these bottles and shells perform in the assessee's trade ? Are they essentially tools in the assessee's business? In our opinion, yes. The bottles are essential tools of the trade for it is through them that the soft drink is passed on from the assessee to the customer. Without these bottles, the soft drink cannot be effectively transported, like the silos in Schofield v. R. and H. Hall Ltd. [1974] 49 TC 538 (CA), Dinesh Sherla 9/14 203-itxa-252-02.doc which are used to store grain and to empty the same, performing a trade function. As pointed out in Dixon v. Fitch's Garage Ltd. [1975] 50 TC 509 (Ch D), the bottles

and the contents are "totally interdependent."So are the shells. The bottles and shells also satisfy the durability test for it is nobody's case that their life is too transitory or negligible to warrant an inference that they have no function to play in the assessee's trade. They are, therefore "plant" for the purposes of the Act."

These two decisions have construed the very definition, which has fallen for consideration in this appeal, and have observed that the bottles and crates would fall within the ambit of the definition of "Plant" under Section 43(3) of the Act.

13. As regards the factual position, that is, use of glass bottles, return of bottles in the manner in which crates are used, the Revenue has accepted the facts of the present case and the factual position in the case of Jai Drinks (P.) Ltd. and Sri Krishna Bottlers Pvt. Ltd. are identical.

14. The Tribunal did not hold against the Appellant making a distinction in the facts on the factual situation but has not followed the decisions of Rajasthan High Court and Andhra Pradesh High Court as above relying on the decision of the Supreme Court in the case of Steel City Beverages Ltd. Therefore, the only question that will arise for consideration is whether the Supreme Court in the case of Steel City Beverages Ltd., has overruled the view taken in the case Dinesh Sherla 10/14 203-itxa-252-02.doc of Jai Drinks (P) Ltd. and Sri Krishna Bottlers Pvt. Ltd. construing the provisions of Section 43 (3) of the Act.

15. The Supreme Court, in the case of Steel City Beverages Ltd., considered the issue of whether the bottles and crates can be construed the definition of "Plant" and held bottles those could not be considered as stock in trade. However, the issue that arose before the Supreme Court under the Bihar Sales Tax Supplementary (Deferment of Tax) Rules 1990. That there is a difference between Bihar Rules and Income Tax Act as was noted by the Supreme Court in the said decision itself observing:

"Therefore, what we have to consider is whether under the 'Deferment Rules' , "plant" would include bottles and crates employed by an industrial unit manufacturing soft- drinks and beverages for carrying on its business. The word plant has a very wide meaning and a variety of articles, objects or things have been held to be plant.

Dictionaries have defined plant as land, building, fixtures, machinery, implements and tools, and apparatus used in carrying on a mechanical operation or an industrial process. This Court in C.I.T. v. Taj Mahal Hotel [1971] 82 ITR 44 and Scientific Engineering House P. Ltd. v. CIT [1986] 157 ITR 86 referred to with approval the observations of Lindley LJ In Yarmouth v. France [1887] 19 QBD 647 that in its ordinary sense plant includes whatever apparatus is used by a businessman for carrying on his business - not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business. In that case, this Court further held that the test to decide whether a particular Dinesh Sherla 11/14 203-itxa-252-02.doc

thing is plant would be : "Does the article fulfil the function of a plant in the assessee's trading activity? Is it a tool of his trade with which he carries on his business? If the answer is in the affirmative, it will be a plant". Learned counsel for the respondents, heavily relying upon this decision, submitted that the High Court was right in interpreting the word plant in the Deferment Rules as including bottles and crates also as they are used by the Company for carrying on its business. We cannot agree with this contention as we are of the view that the High Court was wrong in interpreting the word plant in Rule 2(v) so widely. It failed to consider whether the object and scheme of the Deferment Rules permit such a wide interpretation. The High Court also failed to appreciate that the decisions of this Court in Taj Mahal Hotel [1971] 82 ITR 44 and Scientific Engineering House [1986] 157 ITR 86 were under the Income Tax Act and the observations made and the test indicated therein were in the context of the wide definition of the word plant given in that Act and, therefore, not of universal application. Obviously, if plant is defined differently under a different provision or if the context so requires, it may have to be given a different and a narrower meaning. The Deferment Rules do not define plant and, therefore, what should have been considered by the High Court was what meaning should be given to it in the context of the Deferment Rules."

(emphasis supplied) Thus, the Supreme Court made a categorical distinction between the language employed under the Income Tax Act and the enactment under its consideration. The Supreme Court observed that as regards the Bihar enactment under a different phraseology was used, the definition of "Plant" used in Bihar Rules was not used in a wider Dinesh Sherla 12/14 203-itxa-252-02.doc sense, unlike the Income Tax Act, where it was widely used. The Tribunal, before following the decision of the Supreme Court in Steel City Beverages Ltd., had not adverted to these observations of the Supreme Court at all and, therefore, clearly erred in applying this decision and not following the decisions of the High Courts of Rajasthan and Andhra Pradesh cited before it, which had construed the same provision which was under consideration.

16. The learned Counsel for the Petitioner has placed before us the decisions rendered by different High Courts following the decisions of the Rajasthan High Court in the case of Jai Drinks (P.) Ltd. and the Andhra Pradesh High Court in the case of Sri Krishna Bottlers Pvt. Ltd. that bottles and crates would fall within the definition of "Plant". These are of Commissioner of Income Tax vs. Saurashtra Bottling Pvt. Ltd.7, Commissioner of Income Tax vs. Aqueous Victuals P. Ltd.8 and Joint Commissioner of Income - Tax vs. Anatronics General Co. (P.) Ltd. 9.. The argument of the learned Counsel for the Respondent that bottles and crates could not be included in the definition of the "Plant" because they have no reference to the categories mentioned therein; therefore, cannot be accepted.

17. As regards the contention of the learned Counsel for the 7 (1998) 232 ITR 270 (Guj) 8 (2004) 266 ITR 573(All) 9 (2001) 113 Taxman 511 Dinesh Sherla 13/14 203-itxa-252-02.doc Respondent based on the Income Tax Rules and Depreciation Table is concerned, the Table is only states that certain categories, which are Machinery

and Plants, will have particular rate and rest which fall under the Machinery and Plant will have different rate. Therefore, merely because the bottles and crates do not fall under the categories listed in Item 2 of the Schedule, it cannot be said that they need to be excluded from the definition of "Plant", if they, otherwise fall within the definition of "Plant". It has to be noted that, however, this question had arisen for the assessment year 1989-90 based on the situation therein, and therefore, the question is whether the Tribunal was right in holding against the Appellant for that particular assessment year. As noted in the decision of Sri Krishna Bottlers Pvt. Ltd., as to what would happen if plastic bottles were used or the manner of use is changed in future, those would be the facts of that case.

18. Considering this position, the question of law which is framed as above, will have to be answered in favour of the Appellant/Assessee. Accordingly, the question is answered in favour of the Appellant."

26.1 In our opinion, this judgement was delivered subsequent to the order of lower authorities and they have no occasion to consider this judgement. Being so, in the interest of justice, we remit the issue in dispute to the file of AO/TPO for fresh consideration. If the assets involved before us are similar to the one considered by the Hon'ble Bombay High Court, then the additional depreciation on this is to be allowed. These grounds of assessee's appeal are partly allowed for statistical purposes.

27. Ground Nos.54 to 62 of the assessee's appeal are reproduced as under:

VII. Grounds relating to Commission paid to Shri Vijay Mallya:

54. The learned AO erred in dis-allowing the payment of Commission made to Sri Vijay Mallya, the then Chairman of the Company.

55. The learned AO erred in holding that the Commission payment has been made without any commensurate services rendered, by making surmises without any basis;

56. The learned AO erred in not appreciating that the Commission payments were approved by the Board of Directors and were made after compliance to the necessary provisions of Law

57. The learned AO erred in stating that the commission payments are a ruse for avoiding Dividend distribution tax without appreciating that

these payments are made .o the person in his capacity as Chairman and not as Shareholder.

58. The learned AO erred in not appreciating that these commission payments have been made to all the Directors of the Company and not only to Dr Vijay Mallya

59. The learned AO erred in holding that the payments made to Dr Mallya is not legal even while accepting that the payments made to other directors are legal.

60.The learned AO erred in linking these commission payments to certain payments made towards guarantee commission on certain guarantees given by Dr Mallya, without appreciating that there is absolutely no connection whatever between these two payments;

61.The learned AO erred in working out the market value of the contribution of the chairman of the company without any basis

62.The learned AO erred in making the addition without granting an opportunity to the assessee on the issue;"

27.1 The facts of the issue are that during the year, the Assessee passed a Special Resolution in the AGM authorizing payment of Commission to its Directors, up to One percent of the net profits of the Company. Out of this, it was resolved that 60% will be paid to the Non-executive Chairman, Mr Vijay Mallya and the balance 40% will be paid to the other Directors, who are Independent Directors.

27.2 The AO invoked the provisions of Section 40A(2) and restricted the commission payable to Mr Mallya to the extent paid to independent directors and disallowed the balance amount of Rs.2,04,44,000/- out of Rs,2,29,00,000/- paid to Mr Mallya.

27.3 The ld. DRP confirmed the disallowance made by the AO.

28. The Assessee submitted that the decision of the AO is wrong, on facts, principles and procedure on the following lines:

i) The commission payment is legally valid as it is as per the Special Resolution passed by the AGM of the Company.

ii) The total quantum of Commission is restricted to 1% of net profits of the Company, which is as per Companies Act. Hence the contention of the AO that this was a reason to avoid Dividend Distribution Tax ("DDT") is totally misplaced.

iii) The distribution of the Commission amongst the Directors has been decided by the Directors themselves. The AO has no role in deciding how much commission shall be paid to individual directors.

iv) The AO has wrongly drawn an analogy with the Guarantee Commission paid to Mr Mallya for the guarantees issued by him. This payment is Commission paid to him, in his capacity as a Director and has no relation to the guarantee commission paid in the earlier years.

v) Even if the AO had wanted to invoke the provisions of section 40A(2), he should have examined the role and responsibilities of the Director and then decided if the payment is excessive.

vi) The AO has compared the payments made to the Chairman with that made to independent directors, which is wrong. It is well known that the role of Chairman is very different than that of independent directors.

vii) It is well settled principle, upheld in several decisions that the provisions of Section 40A(2) cannot be invoked mechanically. While invoking the provisions of section 40A(2)(a) of the Act, the AO must bring material on record to demonstrate that the payment made by the Assessee is excessive or unreasonable having regard to the market rate for the goods, services, facilities availed or the business needs of the Assessee or commensurate with the benefit derived by the Assessee.

viii) There are a catena of decisions upholding the principle that the AO should bring on record material to demonstrate that the payment is excessive. Reliance is placed on the following decisions, where the facts are similar to that of the Assessee i.e. commission paid to Director is held as excessive by invoking the provisions of section 40A(2) of the Act:

- *Kirloskar Oil Engines Vs JCIT, ITA Nos. 61 & 406/PUN/2015 (Pune ITAT)*
- *The Bombay Samachar Pvt. Ltd., ITA no. 7171/Mum./2010 and others (Bombay ITAT)*

28.1 The ld. D.R. submitted that there was no evidence to show that the Executive Chairman Mr. Vijay Mallya rendered any services to the assessee so as to give commission to the said person.

29. We have heard the rival submissions and perused the materials available on record. There was no evidence brought on record by the assessee with regard to rendering of any services by Mr. Vijay Mallya to assessee company. In such circumstances, it is not possible to allow any commission payment in the hands of assessee as a business expenditure. Accordingly, addition made by

lower authorities on this count is sustained and these grounds of appeal of the assessee are dismissed.

30. Ground Nos. 63 to 65 of the assessee's appeal are reproduced as under:

VIII. Grounds relating to default u/s 40(a)(i) and or u/s 37 on foreign remittances towards designing of labels:

63. The learned AO erred in disallowing the expenditure under 40(a)(i) for non-deduction of TDS by holding it as Payments towards Royalty.

64. The learned AO erred in holding that the labels designed by the foreign party for the appellant is the intangible property of the foreign party and the appellant has got the right to use the design and therefore qualifies as a Royalty.

65. The learned AO erred in not appreciating that the remittance made is the business income of the foreign party which as no PE or business connection in India"

30.1 The Assessee got its label designed by a UK based company, M/s Claessens International Ltd., and made payment amounting to Rs.41,34,952/- towards the same. The AO held that the label designed by the foreign party is the intangible property of that party and what the Assessee has been given is the right to use the design and hence this payment qualifies as "Royalty" and was liable for TDS. Since TDS has not been done, the payment has been disallowed under section 40(a)(i) of the Act.

30.2 The DRP confirmed the disallowance made by the AO.

31. The Assessee submitted that the decision of the AO is wrong, on facts, principles and procedure on the following lines:

i) This payment was towards getting design of the label done by the foreign firm and is a normal business expense

ii) There is no basis for the AO to surmise that the design is an intangible property of the foreign entity. The AO has made this surmise without calling for the details related to the transaction

iii) The foreign entity has no PE in India or any business connection in India and hence the foreign entity is not chargeable to tax in India. As such, the question of deducting TDS on the payment does not arise.

iv) It has been held by the Tribunals that payment for design and drawings of labels is neither Royalty not FTS.

32. The ld. D.R. submitted that payment was made to M/s. Claessens International Ltd. for designing labels. Labels are part of the identity of company's products. Hence, the assessee has taken due care and hired an international expert to design the labels. The labels designed by M/s. Claessens International Ltd. become its intangible properties. When M/s. Claessens International Ltd. gives the assessee absolute right to use the designs, the payment it receives is basically royalty. Royalty includes payments for giving right to use designs. Owing to this, the payment to M/s. Claessens International Ltd. qualifies as royalty under Article 13 and TDS should have been deducted. As no TDS has been deducted, the expense is disallowed u/s 40(a)(i) of the Act.

33. We have heard the rival submissions and perused the materials available on record. The assessee has made payment to M/s. Claessens International Ltd. to design its labels. The AO has observed that the labels designed by the foreign party is intangible property of that party and the assessee has been given the right to use the design and this payment is to be considered as royalty and the assessee has not deducted TDS u/s 40(a)(i) of the Act. In our opinion, payment towards getting designing the labels of the assessee is just business expenses and there was no make available to the assessee and the recipient have no permanent establishment in India or any business connection in India, hence, in our opinion, foreign entity is not liable for taxation in India. Being so, the question of deduction of TDS u/s 40(a)(i) of the Act is not applicable. Accordingly, we direct the AO to delete this addition.

34. Ground Nos.66 to 67 of the assessee's appeal are reproduced as under:

IX. Grounds relating to default u/s 40(a)(i) and or u/s 37 on foreign remittances towards business promotion:

66. The learned AO erred in disallowing the expenditure under 40(a)(i) for non-deduction of TDS by holding it as Payments towards brand development and therefore capital in nature.

67. The learned AO after having held the expenditure to be capital in nature as erroneously invoked the provisions of Sec 40(a)(i) of the Act"

34.1 Fact of the issue are that as per the facts recorded in the draft assessment order, the Assessee made a payment of Rs.5,15,843 for managing an event. It is the contention of the Assessee that this business promotion expense of the event is business expense. However, the AO has held that this expense is Brand promotion expense and is Capital in nature and disallowed the same.

34.2 The ld. DRP confirmed the disallowance made by the AO

35. The Assessee submitted that the decision of the AO is wrong, on facts, principles and procedure on the following lines:.

i) It is an admitted fact that these expenses were incurred for promoting an event.

ii) The AO has held that this expense is towards brand promotion and hence capital in nature.

iii) It is settled principle, upheld in several decisions that Brand promotion expenses is not Capital in nature but is Revenue in nature and is an allowable business expense.

iv) Reliance is placed on the decisions in the cases of

- *M/s. Fine Jewellery (India) Ltd., ITA No.: 3124/Mum/2011 (Mumbai Tribunal)*
- *Kaya Ltd., I.T.A. No3175/Mum/2013 (Mumbai Tribunal)*

36. We have heard the rival submissions and perused the materials available on record. Similar issue came for consideration before this Tribunal in assessee's own case in ITA No.481/Bang/2018 dated 11.11.2022 wherein held as under:

"11.5 We have heard rival submissions and perused the material on record. Similar issue has been considered by the Tribunal in the case of United Spirits Limited for the AY 2013-2014 in IT(TP)A No. 2701/Bang/2017 (order dated 05.04.2022) wherein it was held as under:-

> *"12.6 We have heard rival submissions and perused the material on record. The AO disallowed the sales promotion and advertisement expenses totally*

amounting to Rs. 44,33,55,403 [36,91,12,995 + 7,42,42,408] for the reason that these expenses are brand promotion expenditures of USL logo, it promotes the brand the assessee, gives enduring benefit and hence capital in nature. The DRP confirmed the action of the AO.

12.6.1 Similar issue has been considered by the Tribunal in assessee's own case for the AY 2012-13 in IT(TP)A No. 489/B/2017 order dated 29.5.2020 wherein it was held as under:-

"45. We have heard Ld D.R on this issue and perused the record. We notice the issue relating to allowability of expenditure incurred on sponsorship of sports event was considered by the Mumbai bench of ITAT in the case of Samudra Developers Pvt Ltd (ITA 5974/Mum/2013 dated 2604-2017) and it was held that the same is allowable as revenue expenditure. For the sake of convenience, we extract below the operative portion of the order passed by Mumbai bench of Tribunal on an identical issue:-

"3. Second ground of appeal pertains to deleting the disallowance on account of sponsorship fees and management fees. In the earlier part of our order, we have mentioned the facts about the various disallowances made by the AO including the capitalisation of sponsorship. Treating it as an intangible asset, he allowed depreciation on it @25%.

3.1. The FAA after considering the elaborate submissions of the assessee, held that it had entered into an agreement with the sports company namely India-Win in the month of March, 2010, that the assessee-group became cosponsor of Mumbai Indian IPL cricket team as an associate partner, that as per the agreement the ground logo of the assessee group was displayed permanently in the cricket stadium is also on the playing gear of the players, that in the terms of the agreement and amount of Rs.4.50 crores was paid towards sponsorship fees during the year under consideration, that the sponsorship fees for different years had been apportioned and allocated to 3 entities of the assessee group which were using the brand logo in the ratio of their respective turnovers during the year, that out of the expenditure of Rs. 2.50 crores and amount of Rs. 21.61 lakhs was allocated to the assessee, that the expenditure incurred on IPL sponsorship did not provide it any benefit of enduring nature, that the expenditure had been incurred year after year by the assessee group with a view to get visibility, that it was in nature of some kind of advertisement expenditure, that same should be allowed as revenue expenditure. Referring to the case of Delhi Cloth and General Mills Co.Ltd.(115 ITR

659) of the honorable Delhi High Court, the FAA allowed the appeal filed by the assessee.

3.1.a. With regard to management fee, the FAA observed that there was no doubt about the genuineness of expenditure, that the expenditure was incurred for availing infrastructure facilities administrative support, like manpower recruitment, HR services, uses of computer, telephone, photo copiers, infrastructure set up etc. in order to carryout business operations smoothly, that the parent company had allocated a certain amount to the account of the assessee in the ratio of its turnover. He finally held that expenditure had to be allowed as revenue expenditure.

3.2. Before us, the DR supported the order of the AO and the AR relied upon the order of the FAA. We find that the assessee group had entered into an agreement with India Win, that it was a co- sponsor of Mumbai Indian IPL team, that it had incurred similar expenditure in the subsequent two years, that out of the total expenditure the assessee had claimed a very small proportion under the head sponsorship expenses. Such an expenditure is for advertising the brand name of the Group. Being a recurring expenditure, it had to be allowed as revenue expenditure. We find that in the case of Delhi Cloth and General Mills Co.Ltd.(supra)the Hon'ble Court had held that expenditure incurred for organizing sports events are allowable items of revenue expenditure as such events publicise the names of the sponsor. The AO was not justified in capitalising the expenses. The entire expenditure was rightly allowed by the FAA as revenue expenditure. After going through the details of expenditure incurred by assessee under the head managerial expenses, we are of the opinion that it had not got any enduring benefit from the expenditure incurred nor did the expenditure create any capital asset. Therefore, we do not want to interfere with the order of the FAA. Considering the above, we decide second ground of appeal against the AO."

46. The Delhi bench of Tribunal has also examined an identical claim in the case of M/s Pepsico India Holdings Pvt Ltd (supra) and the same was allowed as revenue expenditure with the following observations:-

"Re: Disallowance of INR 3,85,15,497/- being sponsorship fees paid to ICC

87. In Grounds No. 7 to 7.3 in I.T.A. No. 1044/DEL/2014 for AY 2009-10, the assessee has challenged the disallowance of INR 3,85,15,497/- being sponsorship fees paid by the assessee to ICC. Our attention was drawn to paras 4 to 4.3 of the final assessment order wherein the said issue has been discussed by the AO. It has been submitted that during

the relevant previous year the assessee entered into an agreement dated 20.08.2008 with ICC Development (International) Limited (ICC) for obtaining sponsorship rights in respect of various ICC cricketing events around the world. The assessee paid an amount of Rs. 3,85,15,497/- for sponsoring cricketing events held during 2008 to ICC. The said amount was proposed to be disallowed by the AO in the Draft Assessment Order, for the following reasons: -

(i) Similar expense has been disallowed in the earlier years as part of the Transfer Pricing Adjustment on account of AMP expenses.

(ii) Assessee has been bearing substantial portion of the fees paid to ICC for acquiring sponsorship rights even though benefit of the same is derived by the other entities of the world.

88. Aggrieved by the addition proposed by the AO, the assessee had filed objections before the DRP. The DRP vide directions dated 20.12.2013 upheld the action of the AO, on the ground, that the expenditure was benefitting all the entities across the globe and hence, it could not be said to have been incurred wholly and exclusively for the business of the assessee.

89. The learned counsel for the assessee submitted that the said disallowance was unwarranted since the said expense was incurred in view of the fact that major viewership of cricket is in the Indian subcontinent. He also referred to various newspapers reports which demonstrated the popularity of the sport in India to support the aforesaid contentions. It was also submitted that the assessee company has consistently promoted its range of products using cricket as an advertising platform. It was also to our notice that payment of sponsorship fees to ICC was remitted by the assessee after deduction of tax at source as instructed by the Income Tax Department. Further, the assessee had obtained the approval of the Ministry of Youth Affairs and Sports for sponsoring the events covered under the agreement. Copy of the order under section 195 of the Act and the approval received from the Ministry of Youth Affairs and Sports has been enclosed at pages 247 to 249 and 224 of the paper-book respectively. He further submitted that the expenditure was wholly and exclusively for the business of the assessee company and had not been disputed by the revenue. Any incidental benefit that may arise to any other person or entity cannot be a bar for allowance of expenditure under section 37 of the Act, as per the settled position of law. Reference in this regard was made to the decisions of the Hon'ble Supreme Court of India in CIT vs. Chandulal Keshavlal & Co. [1960] 38 ITR 601 (SC), Sasson J. David and Co. P. Ltd vs. CIT 118 ITR 261(SC) and SA Builders Ltd. vs. CIT 288 ITR 1(SC). He further

submitted that the Revenue cannot step into the shoes of an assessee to determine the commercial expediency of an expenditure incurred by it.

90. On the other hand, the learned DR relied upon the order of the AO and the DRP in support of his contentions.

91. After considering the rival submissions and on perusal of the impugned orders, we find that, here the disallowance of Rs.3,85,15,497/- has been made on account of sponsorship fee by the assessee to the ICC on the ground that similar expenditure was disallowed in the earlier years as part of Transfer Pricing Adjustment on account of AMP expenses; and secondly, assessee has been bearing substantial portion of the fees to the ICC for acquiring the sponsorship rights even though benefit of the same is derived by either entity of the world. The contention raised by the learned counsel that since major viewer of cricket is an Indian subcontinent looking to its mass popularity in India, the assessee company has been consistently promoting its range of products using cricket as an advertisement platform. The said payment has been made after obtaining the approval of Ministry of Health Affairs and Sports and after deducting TDS u/s.195. Once the expenditure has been incurred wholly and exclusively for the purpose of business which fact has not been disputed by the Department, then even if some incidental benefit which may arise to any other entity cannot be a bar for allowance of expenditure u/s. 37. Under the principle of commercial expediency such an expenditure has to be seen from the angle, whether the decision taken by the assessee for paying sponsorship fees was for the purpose of business or not. Here in this case, the commercial expediency has not been doubted but rather it has been held by the AO that in all the years transfer pricing adjustments has been made on this score and benefit is arising to the other AEs also. What is relevant for an expense to be allowable as revenue expense is that, whether it has been incurred during the course of business and is for the purpose of business. Benefit factor to other related parties is relevant under transfer pricing provision and not while allowability of business expense u/s 37(1). It is well known fact that companies use sports event as a platform to advertise their range of products as it has a very high viewership. Any such incurring of expenditure is ostensibly for promotion of business only and hence, no disallowance is called for.

Accordingly, Grounds No.7 to 7.3 in ITA No.1044/Del/2014 pertaining to A.Y. 2009-10 are allowed."

47. We notice that the co-ordinate benches are consistently holding the view that the expenditure incurred on sponsoring of sports events are intended to promote business only and hence the same is allowable as expenditure. The allowability of brand promotion expenses was

examined by Hon'ble Delhi High Court in the case of Modi Revelon P Ltd (supra) and the relevant discussions made by the High Court are extracted below:-
"22. As far as the second aspect, i.e. expenditure for promotion of the brand is concerned, there is no doubt that the dealer's functions extend to advertising the products of the assessee, manufactured by the sister concern. On this aspect, Section 37 of the Income-tax Act would be relevant. The said provision reads as follows:

"SECTION 37 GENERAL:
(1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".

Explanation : For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.

(2B) Notwithstanding anything contained in sub-section (1), no allowance shall be made in respect of expenditure incurred by an assessee on advertisement in any souvenir, brochure, tract, pamphlet or the like published by a political party.

The applicable test as to what constitutes expenses "laid out or expended wholly and exclusively for the purposes of the business or profession" was explained in Gordon Woodroffe Leather Manufacturing Co. v. CIT [1962] Supp. (2) SCR 211. The correct approach, said the Court, which has to be taken in all such cases is to see whether:

"was the sum of money expended on the ground of commercial expediency and in order indirectly to facilitate the carrying on of the business"

Again, in Sassoon J. David & Co. (P.) Ltd. v. CIT [1979] 118 ITR 261/ 1 Taxman 485 (SC) the Supreme Court outlined the correct test of commercial expediency as the guiding principle to decide whether the expenditure was to facilitate profits, as follows:

(iii) that the sum of money was expended on the ground of commercial expediency and in order indirectly to facilitate the carrying on of the business of the assessee"

In Smith Kline & French (India) Ltd. v. CIT [1992] 193 ITR 582/[1991] 59 Taxman 357 (Kar.), it was held that in normal commercial sense and in common parlance sales promotion and publicity are activities aimed at gaining goodwill in the market. They need not be confined to media propaganda but can involve indirect approaches. The judgment of a Division Bench of this Court in CIT v. Adidas India Marketing (P.) Ltd. [2010] 195 Taxman 256 (Delhi) has recognized that brand promotion exercises undertaken through media campaigns, schemes, programmes etc are essential for propagation of the brand. The necessity (or lack of it) is not something which income tax authorities can go into; as long as it is voluntarily undertaken by the business enterprise for profit earning, it would be entitled to claim relief under section 37(1).

23. In the present case, the AO was conscious of the fact that brand promotion expenses are a necessary ingredient in marketing strategies. Therefore, he allowed about 50 per cent of those expenses. However, the reasoning for disallowance of the rest, i.e. that the assessee could claim only a proportion of such expenses, since advertising expenses were to be borne by the sister concern dealer, and that the proportion was in respect of its territory, was not upheld. This Court does not see any fallacy in the Tribunal's approach or reasoning, on this aspect. One is not unmindful of the concerns of a business which engages in sale of consumer items, and faces continuous competition. Brand promotion enhances the visibility of given products or services, and are often perceived as conferring a competitive advantage on those who adopt those strategies or schemes. Expenditure towards that end is based on pure commercial expediency, which the revenue in this case, ought to have recognised, and allowed. The revenue's arguments on this point too are insubstantial."

48. The observations made by the Hon'ble jurisdictional Karnataka High Court in the case of CIT vs. ITC Hotels (2014)(47 taxmann.com 215) on the concept of "enduring benefit" is relevant here and the same is extracted below:-
"6. The first substantial question of law relates to a sum of Rs.10 lakhs, which were paid by the assessee as a license fee for the use of central court yard, having marble, (for short "Court Yard") in Lallgarh Palace (for short 'Palace'). It appears that there was a Memorandum of Understanding (for short 'MOU') between the Assessee and Maharaja Ganga Sinhji Charitable Trust (for short the "trust"). The assessee, as per the MOU, had acquired a right to use the court yard for their business of hotel, being run in the palace, more efficiently and profitably. The question is whether the expenditure of Rs.10 lakh resulted in any addition to the fixed capital of the assessee. According to the Revenue, the assessee had acquired right to use the court yard apart from the palace, and thus, had acquired an advantage of enduring benefit of a trade. In other words, the expenditure incurred by the assessee for the use of court yard is in the capital field and it cannot be

said to have been incurred to facilitate trading operation of the assessee.

7. Learned Counsel appearing for both the sides placed reliance upon the judgment of the Supreme Court in the case of Empire Jute Co. Ltd. v. CIT [1980] 124 ITR 1/3 Taxman 69, in support of their contentions. Mr. Aravind, learned counsel for the Revenue tried to distinguish the ratio laid down by the Supreme Court in this case on the basis of factual matrix involved therein. As against this, learned counsel appearing for the respondent/assessee placed reliance upon the principle laid down by the Supreme Court in the said judgment.

8. We have perused the judgment. We find ourselves in agreement with the learned counsel appearing for the respondent/assessee. It would be relevant to reproduce the relevant observation made by the Supreme Court, in the said judgment, which, in our opinion, support the case of the respondent/assessee to contend that the expenditure of Rs. 10 lakhs would be on revenue account. The relevant observation in the case of Empire Jute Co. Ltd. (supra) reads thus:

9. 'The decided cases have, from time to time, evolved various tests for distinguishing between capital and revenue expenditure but no test is paramount or conclusive. There is no all embracing formula which can provide a ready solution to the problem; no touchstone has been devised. Every case has to be decided on its own facts, keeping in mind the broad picture of the whole operation in respect of which the expenditure has been incurred. But a few tests formulated by the Courts may be referred to as they might help to arrive at a correct decision of the controversy between the parties.

10. One celebrated test is that laid down by Lord Cave L.C. in Atherton Vs. British Insulated & Helsby Cables Ltd. (1925) 10 Tax Cases 155 (HL), where the learned Law Lord stated :

11. "...when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite condition) for treating such an expenditure as properly attributable not to revenue but to capital".

12. This test, as the parenthetical clause shows, must yield where there are special circumstances leading to a contrary conclusion and,

as pointed out by Lord Radcliffe in CIT v. Nchanga Consolidated Copper Mines Ltd. [1965] 58 ITR 241 (PC) : TC16R.991, it would be misleading to suppose that in all cases, securing a benefit for the business would be, prima facie, capital expenditure "so long as the benefit is not so transitory as to have no endurance at all. There may be cases where expenditure, even if incurred for obtaining advantage of enduring benefit, may, none the less, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit is, therefore, not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case'.

9. It is clear that if the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. In the present case, except the right to use the court yard, no other rights were created in favour of assessee. In other words, the amount paid to the Trust was for the use of the court yard under the MOU for an indefinite future, and therefore, it would be on revenue account. In other words merely because the advantage may endure for an indefinite future would not mean that the expenditure would be on capital account and not revenue. The advance of Rs. 10,00,000/-, in the present case, consists merely in facilitating the assessee's business operations, enabling the management to conduct their Hotel business more efficiently and profitably. We are, therefore, satisfied that the view taken by the Tribunal in answering this question in favour of Assessee and against the Revenue is correct and deserve no interference by this Court."

49. Respectfully following the above cited decisions, we set aside the order passed by AO on this issue and direct him to allow the impugned sponsorship expenses as revenue expenditure."

12.6.2 Following the above order the ITAT in assessee's own case for assessment year 2012-2013 (supra), we allow deduction of sales promotion and advertisement expenses of Rs. 44,33,55,403. As the entire expenses are allowed as revenue expenditure, the question of depreciation does not arise."

11.6 Following the above order of the Tribunal in the case of United Spirits Limited (supra), we allow deduction in respect of brand promotion expenses. It is ordered accordingly."

36.1 In view of the above order of the Tribunal, we direct the AO to allow the deduction towards business promotion expenses incurred by the assessee. These grounds of assessee are allowed.

37. Ground Nos.68 to 70 of the assessee's appeal are reproduced as under:

X. Grounds relating to Expat payment to Heineken Czech Republic:

68. The learned AO erred in dis-allowing the payment made towards re-imbursement of Salary of expatriate experts seconded by the AE by holding it as Fees for Technical services

69. The learned AO erred in relying on the decision in the case of Centrica India Offshore (P.) Ltd V CIT, without appreciating that the facts of the case are different from the facts of the assessee

70. The learned AU erred in making the dis-allowance without appreciating the nuances between Article 7 of the DTAA and Article 12 of the DTAA"

37.1 Facts of the issue are that during the year, the Assessee reimbursed an amount of Rs.43,52,220/- to its AE towards reimbursement of part of the salary costs of a seconded employee. The AO has treated these payments as "Fees for Technical Services (FTS)" liable for TDS and since TDS has not been done, the AO has disallowed these payments, by invoking the provisions of section 40(a)(i) of the Act.

37.2 The DRP confirmed the disallowance made by the AO

38. The Assessee submitted that the decision of the AO is wrong, on facts, principles and procedure on the following lines:

i) As can be seen from the details furnished to the Ld AO, which has been reproduced in the body of the assessment order, these payments represent the details of salary and salary related payments made to the employees who were seconded to the Assessee.

ii) It is pertinent to note that the above amounts form part of Form 16 issued to the employees and TDS under section 192 has been deducted on the above amount. These persons, though seconded by the foreign company, were employees of the Assessee and had been issued appointment letters, copies of which were furnished to the AO. Further, these employees had filed their Return of Income in India and paid taxes on these amounts, by showing these amounts as their individual income.

iii) The AO treated these amounts as "Fee for Technical Services" by relying on the decision of the Delhi High Court in the case of Centrica India Offshore Pvt. Ltd.

iv) In this regard, the assessee submitted that the issue of reimbursement of expenses related to the salary and other expenses of the seconded employees has been decided by the Hon'ble Karnataka High Court in the case of *M/s. Abbey Business Services India Pvt Ltd, ITA No.214 of 2014*, in favour of the taxpayers. The above cited decision applies squarely to the facts of the Assessee's case and being the decision of the

Jurisdictional High Court is binding on the authorities and hence this addition needs to be deleted.

v) Reliance is also by the ld. A.R. on the decision of this Hon'ble Tribunal in the case of *Goldman Sachs Services Private Limited [IT(IT)A Nos. 362 to 369 & 338 to 345/Bang/2020]* and *Scania CV AB (ITA No.3432/Bang/2018)*

39. The ld. D.R. relied on the orders of the lower authorities.

40. We have heard the rival submissions and perused the materials available on record. We are of the opinion that similar issue came for consideration before Hon'ble Karnataka High Court in the case of M/s. Abbey Business Services India in ITA No.214 of 2014 dated 1.12.2020 wherein held as under:

9. We have considered the submissions made by learned counsel for the parties and have perused the record. Before proceeding further, it is apposite to take note of Section 9(i)(vii) and Section 195(1) of the Act, which is reproduced below for the facility of reference:

9(i)(vii) income by way of fees for technical services13 payable by--

(a) the Government ; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.

Explanation 1.--For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that

date if the agreement is made in accordance with proposals approved by the Central Government before that date.

Explanation 2.--For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction16, assembly, mining or like project undertaken by the recipient16 or consideration which would be income of the recipient chargeable under the head "Salaries".

195(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) or section 194LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :

10. After having noticed the relevant statutory provisions, we may take note of relevant clauses of DTAA. Article 5 of DTAA deals with 'permanent establishment'. Article 5(2)(k) describes the expression 'permanent establishment' and furnishing of services including managerial services, other than those taxable under Section 13 within a Contracting State by an enterprise through employees or other personnel. Article 7 deals with business profits and provides that profits of a business of a Contracting State shall be taxable only in that state unless the enterprise carries on business in other contracting state to a permanent establishment situate therein. Article 13 inter alia provides that provisions of paragraphs 1 and 2 of this Article shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base.

11. Now we may advert to the facts of the case in hand. From perusal of the relevant clauses of the agreement as well as the nature of services provided by the assessee under the agreement, it is evident that the assessee had entered into a secondment agreement for securing services to assist assessee in its business. The expenses incurred by the seconded employees which were reimbursed by the assessee is not liable to deduction to tax at source and the aforesaid amount could not be considered as 'fees for technical services'. It is also pertinent to note that secondment agreement constitutes an independent contract of services in respect of employment with assessee. From the perusal of the key features of the agreement, which have been

reproduced by the Commissioner of Income Tax (Appeals), it is evident that the seconded employees have to work at such place as the assessee may instruct and the employees have to function under the control, direction and supervision of the assessee and in accordance with the policies, rules and guidelines applicable to the employees of the assessee. The employees in their capacity as employees of the assessee had to control and supervise the activities of Msource India Pvt. Ltd. Therefore, the assessee for all practical purposes has to be treated as employer of the seconded employees. There is no obligation in law for deduction of tax at source on payments made for reimbursement of costs incurred by a non resident enterprise and therefore, the amount paid by the assessee was not to suffer tax deducted at source under Section 195 of the Act. Similar view has been taken by High Court of Delhi in HCL INFO SYSTEM LTD. supra in respect of salaries paid to foreign technicians on behalf of the assessee.

12. So far as reliance placed by learned counsel for the revenue on the decision of M/S CENTRICA INDIA OFFSHORE PVT. LTD. supra is concerned, from perusal of paragraph 29 of the aforesaid decision, it is evident that the High Court of Delhi considered the issue whether the secondment of employees by BSTL and DEML, the overseas entities fall within Article 12 of India, Canada and Article 13 of India, UK DTAAs, which embody the concept of service permanent establishment. In the instant case, the issue of permanent establishment is not involved. Therefore, the aforesaid decision is not applicable to the fact situation of the case.

In view of preceding analysis, the substantial questions of law framed by a bench of this court are answered against the revenue and in favour of the assessee.

40.1 In view of the above judgement of Hon'ble Karnataka High Court, we are inclined to remit the issue to the file of AO/TPO to decide the issue afresh in the light of above judgement of jurisdictional High Court, since it was not available at the time of passing the orders by lower authorities.

41. Ground Nos.71 to 79 of the assessee's appeal are reproduced as under:

XI. Grounds relating to Disallowance u/s 14A:

*71. "The learned AO has erred in law and on facts in disallowing expenses of **INR 59,87,469/- in** relation to exempt dividend income amounting to INR 9,25,000/-;*

72. The learned AO has erred in law and on facts in invoking Rule 8D of Income Tax Rules, 1962 to compute the expenditure in connection with exempt dividend income ignoring the submissions of the Appellant;

73. The learned AO has erred in law and on facts by invoking Rule 8D without appreciating that the Appellant had not incurred any expenditure to earn the exempt dividend income;

*74. The learned AO has erred in law and on facts by disallowing the expenses of **INR 59,87,469/-** as against the exempt dividend income of INR 9,25,000 which is substantially higher than the exempt income ignoring the various judicial precedents relied upon by the Appellant;*

75. The learned AO has erred in not appreciating that there is no direct nexus between the interest bearing funds and the investments made from which dividend income is earned and thereby erred in making disallowance towards interest expenditure

76. The learned AO has erred in law and on facts by adding strategic investments made for business while computing expenditure for disallowance;

77. The learned AO has erred in law and on facts by considering both investments, generating taxable and non-taxable income, while computing disallowance under section 14A of the Act;

78. Notwithstanding the above, the Learned A.0 erred in not appreciating that the disallowance u/s 14A cannot exceed the amount of exempt income earned;

*79. The learned AO has erred in law and on facts in concluding that INR **59,87,469** should be added back to the book profits for the purpose of 115JB of the Act, without appreciating that for computing profit u/s 115JB, only those items credited and debited in the Books of accounts should be considered;"*

41.1 The facts of the issue are that the AO has made a disallowance of Rs.59,87,469/- under section 14A of the Act in relation to exempt dividend income of Rs.9,25,000/-.

41.2 The ld. DRP confirmed the disallowance made by the AO.

42. The assessee submitted as follows:

i) The Assessee submitted that it is settled principle that while computing the disallowance, the investments made for

strategic business purposes should be excluded. It is also settled principle that only those investments that are generating taxable income should be considered.

ii) Notwithstanding the above, it is settled principle that disallowance under section 14A cannot be more than the exempt income earned. Reliance is placed on the decision of the Hon'ble Bangalore Tribunal in the Assessee's own case for AY 2013-14, where the Tribunal had directed that the disallowance shall be restricted to the exempt income.

iii) As regards the amendments brought about in the Finance Act 2022, the Assessee submits that the amendments are prospective, w.e.f from o1.04.2022 and therefore prospective in application. For this proposition, reliance is placed on the following decisions:

- *Era Infrastructure (India) Ltd, ITA 204/2022 – Delhi High Court*
- *M/s. Maxivision Eye Hospital, ITA No.139/CHNY/2020 (Chennai Tribunal)*

42.1 Hence, the assessee submitted that the disallowance under section 14A should be restricted to the extent of the dividend income, even after the amendment of Finance Act, 2022.

43. The ld. D.R. relied on the order of the lower authorities.

44. We have heard the rival submissions and perused the materials available on record. After hearing both the parties, we are of the opinion that similar issue came in assessee's own case in IT(TP)A No.2569/Bang/2017 dated 1.6.2022 wherein held as under:

"42. We have heard the rival submissions and perused the material on record. It is settled law that disallowance u/s. 14A cannot exceed the amount of exempt income earned by the assessee. The co-ordinate Bench of this Tribunal in the case of GMR Enterprises (supra) has held as under:-

> *"3.4 We have heard rival submissions and perused the material on record. It is settled position of law that disallowance cannot exceed the amount of dividend income earned during the relevant assessment year. In this context, the following judicial pronouncements support the stand of the assessee:-*
>
> *(i) Joint Investments Pvt. Ltd. v. CIT (59 Taxmann.com 295) – it was held that disallowance u/s 14A of the Act is to be restricted to the tax exempt income.*
>
> *(ii) Daga Global Chemicals Pvt. Ltd. v. ACIT [2015-ITRV-ITAT-MUM-123) – has held that disallowance u/s 14A r.w. Rule 8D cannot exceed the exempt income.*
>
> *(iii) M/s.Pinnacle Brocom Pvt. Ltd. v. ACIT (ITA No.6247/M/2012) – has held that disallowance u/s 14A cannot exceed the exempt income.*
>
> *(iv) DCM Ltd. v. DCIT (ITA No.4567/Del/2012) – held that the disallowance u/s 14A of the Act cannot exceed the exempt income.*
>
> *3.5 In view of the above settled position, the amount of disallowance u/s 14A of the I.T.Act needs to be restricted to the extent of exempted income earned during the relevant assessment year. As would be evident that in the facts and circumstances of the present case the amount of exempted income of Rs.27,37,47,187 was earned on investment and consequently the amount of disallowance, if at all, to be made is to be restricted to Rs.27,37,47,187.*
> *3.6 However, in this case, the assessee had made disallowance of Rs.145,02,09,668 voluntarily while filing the return of income. In this context, it is important to refer to the judgment of the Hon'ble Madras High Court in the case of M/s.Marg Limited v. CIT in Tax Case Appeal Nos.41 to 43 & 220 of 2017 (judgment dated 30.09.2020). The Hon'ble Madras High Court followed the judgment of the Hon'ble Karnataka High Court in the case of Pargathi Krishna Gramin Bank v. JCIT[(2018) 95 taxman.com 41 (Kar.)]. In the case considered by the Hon'ble Madras High Court, the assessee therein had made voluntarily disallowance u/s 14A of the I.T.Act more than the dividend income earned and the Tribunal confirmed the disallowance made u/s 14A of the I.T.Act. However, the Hon'ble Madras High Court held that the disallowance u/s 14A of the I.T.Act cannot exceed the exempt income earned during the relevant*

assessment year. The relevant finding of the Hon'ble Madras High Court reads as follow:-

"20. Before parting, we may also note with reference to the Table of disallowance voluntarily made by the Assessee, which is part of the Paper Book before us for the four assessment years in question. In the Table quoted in the beginning of the order, shows that the Assessee himself computed and offered the disallowance beyond the exempted income in the particular year, namely AY 2009-10, as against the dividend income of Rs.41,042/-and the Assessee himself computed disallowance under Rule 8D of the Rules to the extent of Rs.2,38,575/- , which was increased to Rs.98,16,104/- by the Assessing Authority. Similarly, for AY 2012-13, against Nil dividend income, the Assessee himself computed disallowance at Rs.8,50,000/-, which was increased to Rs.2,61,96,790/-.

21. We cannot approve even the larger disallowance proposed by the Assessee himself in the computation of disallowance under Rule 8D made by him. These facts are akin to the case of ***Pragati Krishna Gramin Bank****(2018) 95 Taxman.com 41 (Kar.) decided by Karnataka High Court. The legal position, as interpreted above by various judgments and again reiterated by us in this judgment, remains that the disallowance of expenditure incurred to earn exempted income cannot exceed exempted income itself and neither the Assessee nor the Revenue are entitled to take a deviated view of the matter. Because as already noted by us, the negative figure of disallowance cannot amount to hypothetical taxable income in the hands of the Assessee. The disallowance of expenditure incurred to earn exempted income has to be a smaller part of such income and should have a reasonable proportion to the exempted income earned by the Assessee in that year, which can be computed as per Rule 8D only after recording the satisfaction by the Assessing Authority that the apportionment of such disallowable expenditure under Section 14A made by the Assessee or his claim that no expenditure was incurred is validly rejected by the Assessing Authority by recording reasonable and cogent reasons conveyed to Assessee and after giving opportunity of hearing to the Assessee in this regard.*

22. We, therefore, dispose of the present appeal by answering question of law in favour of the Assessee and against the Revenue and by holding that the disallowance under Rule 8D of the IT Rules read with Section 14A of the Act can never exceed the exempted income earned by the Assesee during the particular assessment year and further, without recording the satisfaction by the Assessing Authority that the apportionment of such disallowable expenditure made by the Assessee with respect to the exempted income is not

acceptable for reasons to be assigned the Assessing Authority, he cannot resort to the computation method under Rule 8D of the Income Tax Rules, 1962."

(underlining supplied)

3.7 In view of the above judgment of the Hon'ble Madras High Court in the case of M/s.Marg Limited v. CIT (supra), it is clear that the disallowance u/s 14A of the I.T.Act cannot exceed the exempt income earned during the relevant assessment year irrespective whether larger amount was disallowed by the assessee u/s 14A of the I.T.Act while filing the return of income. Therefore, the AO is directed to restrict the disallowance u/s 14A of the I.T.Act to Rs.27,37,47,187.

3.8 In the result, ground No.II raised by the assessee is allowed."

43. The assessee in this case has earned a dividend income of Rs.8,57,655 and respectfully following the decision of the coordinate Bench of the Tribunal,(supra), we hold that the disallowance should be restricted to the amount of exempt income earned by the assessee. We direct accordingly."

44.1 In view of the above order of the Tribunal, we direct the AO/TPO to restrict the disallowance to the extent of exempted income earned by the assessee in this assessment year under consideration. Ordered accordingly.

45. Ground Nos. 80 to 83 & 84 to 87 of the assessee's appeal are reproduced as under:

"XII. Grounds relating to Digital Media Expenses made allegedly towards promotion of akhoholic products held as violation of law and public policy:

80. The learned AO erred in dis-allowing the payments made towards advertisements aggregating to INR.10,12,47,072 by erroneously holding that these expenses are in violation of law and public policy

81. The learned AO erred in holding that these payments are in violation of the prohibition Act by wrongly surmising that these advertisement expenses solicit the use of intoxicant

82. The learned AO erred in making disallowance on payments made towards advertisement expenses.

83. The Learned AO has erred in making the addition merely on the surmise that these expenses are in violation of the Prohibition Act, without showing as to how these payments are in violation of the Income Tax Act

XIII. Grounds relating to Expenses incurred on TV advertisements allegedly held as violation of law and public policy:

84. The learned AO erred in dis-allowing the payments made towards advertisements aggregating to INR 26,1.6,12,490 by erroneously holding that these expenses are in violation of law and public policy

85. The learned AO erred in holding that these payments are in violation of law and public policy by wrongly surmising that it promotes an alcoholic product

86. The learned AO erred in holding that the company cannot claim deduction on these expenses, as they are not relatable to business sales, contrary to facts

87. The learned AO has erred in making the addition merely on the surmise that these expenses are in violation of law and public policy, without showing as to how these payments are in violation of the Income Tax Act."

46. With regard to ground Nos.80 to 83, facts of the issue are that the AO disallowed the payments made towards advertisements in Digital Media aggregating to Rs.10,12,47,072/- by erroneously holding that these expenses are in violation of law and public policy, only based on surmises and without showing how these payments are in violation of the Income Tax Act.

46.1 The AO held that these payments are in violation of the Excise laws, by wrongly surmising that the advertisement expenses solicit the use of intoxicant without considering the fact that the Excise department has not held these payments as being violation of the Excise laws.

46.2 The AO held that the advertisement expenses are not allowable, whether it is product promotion or brand promotion, without appreciating the fact that the Appellant does not do any

specific product promotion and brand promotion expenses are in the revenue field and are allowable business expenditure.

47. With regard to ground Nos.84 to 87, facts of the issue are that the AO disallowed the payments made towards TV advertisements aggregating to Rs.26,16,12,490/- by holding that these expenses are in violation of law and public policy, by wrongly surmising that it promotes alcoholic products and represents surrogate advertising and without showing how these payments are in violation of the Income Tax Act.

47.1 The AO held that the assessee cannot claim deduction on these expenses, as they are not relatable to business sales, which is contrary to facts.

47.2 The ld. DRP confirmed the order of the lower authorities.

48. The ld. A.R. also drew our attention to the additional evidence filed by the assessee in paper book volume No.2 from pages 165 to 425 which covers the following documents and prayed that this additional evidence be admitted in the interest of justice:-

S.No.	Contents	Page No.
12.	Ledger – TV – NDTV Goof Times	165
13.	Sample invoices, agreements and supporting documents in relation to TV Airing	166-424
14.	Ledger-TV-Production	425

48.1 The assessee further submitted as follows:

i) The expenditure involved are legitimate business expenditure and validly claimed as revenue expenditure. The Assessee submitted that the business of manufacture of alcoholic products is not illegal but is well regulated within the legal

environment. Further, it is pertinent to note that the Assessee in the TV advertisement and other digital marketing, has not referred to or depicted any alcoholic product for the expenses to be termed as 'illegal'.

ii) The expenses incurred through digital media are not in violation of law and public policy as alleged. The Assessee submitted that Digital media is governed by the Central Board of Film Certification ("CBFC") and Advertising Standards Council of India ("ASCI").

iii) In India, the Ministry of Information and Broadcasting ("I&B") through The Cable Television Networks (Regulation) Act, 1995 ("Cable Television Act") and The Cable Television Networks Rules, 1994 ("Cable Television Rules") as well as other policies and guidelines issued from time to time, have been regulating content on private satellite channels, network of multi system operators, and local cable operators ("LCOs").

iv) Rule 7 of the Cable Television Rules prescribes the advertising code which has to be conformed to by cable operators while broadcasting advertisements through their cable service. Rule 7(2) specifically enlists advertisements that cable operators would not be allowed to broadcast. Rule 7(2) prohibits advertisements that "promotes directly or indirectly production, sale or consumption of cigarettes, tobacco products, wine, alcohol, liquor or other intoxicants."

v) A proviso to the above Rule was inserted through an amendment on 09.08.2006 [G.S.R. 469 (E)][1], which

permitted advertisements of products that use a brand name or logo, which is also used for cigarettes, tobacco products, wine, alcohol, liquor, or other intoxicants, subject to conditions that:

(a) the story board or visual of the advertisement must depict only the product being advertised and not the prohibited products in any form or manner;
(b) the advertisement must not make any direct or indirect reference to prohibited products;
(c) the advertisement must not contain any nuances or phrases promoting prohibited products;
(d) the advertisement must not use particular colours and layout or presentations associated with prohibited products;
(e) the advertisement must not use situations typical for promotion of prohibited products when advertising the other products:

"Provided further that all such advertisement shall be previewed and certified by the Central Board of Film Certification ("CBFC") suitable for unrestricted public exhibition prior to telecast or transmission or retransmission."

- Emphasis supplied

ASCI Code

i) Rule 7 sub-rule (9) was amended on 02.08.2006, which made the ASCI Code compulsory for the regulation of television advertisements. The ASCI is however a self-regulating body for advertising and primarily has the power to pull up an advertiser for any violations against the advertising code. The

Code does not though explicitly mention the requirement of a CBFC certificate to advertise something "surrogate".

ii) The ASCI has provided guidelines for the qualification of brand extensions, which are as under:

a. The product or service should be registered with an appropriate government authority e.g. Central Value Added Tax (CENVAT)/ Value Added Tax (VAT)/ Food and Drug Administration (FDA)/ Food and Safety Standards Authority of India (FSSAI)/ Trade Marks Registry (TM).
b. The availability of the surrogate product in the market must be at least 10% of the leading brand's market share as measured in metro cities where the product is being advertised.
c. The sales turnover of the product or service should exceed Rs 5 crore per annum pan-India or Rs 1 crore per annum per state where the distribution has been established.
d. A valid certificate must have been obtained from an independent organisation such as AC Nielsen or a category-specific industry association before advertising.

iii) This has yet again been notified in a Press Release issued by ASCI on 02.11.2020. The Press Release reiterated that advertisements for brand extensions could not feature anything prohibited by law or that pertained to banned products nor could it refer to or hint at such products. The Press Release was issued to keep a check on advertisements that were being broadcasted during the IPL. Further, the IPL

broadcaster also confirmed that all advertisements were checked for CBFC clearance so that they are not in violation of the Act.

iv) Therefore, the assessee submitted that the advertisements on TV are governed by CBFC and ASCI and the advertisements of the Assessee are cleared / certified by both CBFC and ASCI before it is aired on TV. Under these circumstances, the contention that the advertising done by the Assessee is in violation of law and public policy is wrong, baseless and based on your wrong understanding of law and facts related to the issue.

The summary of our submissions of the assessee are that:

i) The AO has wrongly surmised that the Digital media expenses incurred are in violation of Excise laws, when the Excise department has not said so and has not initiated any action.

ii) The advertisements in Digital media are governed by the Central Board of Film Certification ("CBFC") and Advertising Standards Council of India ("ASCI") and these Government bodies have neither disallowed such advertisements nor held them to be illegal.

iii) The Ministry of Information and Broadcasting has issued guidelines on advertisements to be issued and the Ministry has neither disallowed such advertisements nor held them to be illegal.

iv) Since the concerned departments/ Government agencies have not held these advertisements to be illegal, the AO has wrongly surmised that these expenses are against excise laws and public policy.

v) The AO has wrongly held that both product promotion expenses and Brand promotion expenses are not allowable. While the Assessee does not do any product promotion activities, Brand promotion expenses have been held to be allowable Revenue expenditure by Tribunals.

48.2 The assessee submitted that on this very issue, the Mumbai Tribunal in the case of M/s. Anheuser Busch InBev India Ltd., ITA NOs 941 & 942/MUM/2021 (Mumbai Tribunal) has held as follows:

"no authority who approves the advertising in the television has initiated any proceedings under the Cable Television Networks (Regulation) Act, 1995 as per which assessee has contravened any of the Act of the Cable Television Networks (Regulation) Act or levied any fines/penalties. In absence of any proceedings against the assessee, it clearly indicates that the advertisement made by the assessee in the televisions are within the provisions of the above said Cable Television Networks (Regulation) Act, 1995. Therefore, in the absence of any such proceedings the Income-tax authorities have no jurisdiction to presume that assessee has contravened any provision of the Cable Television Networks (Regulation) Act merely because assessee has several products to market some of them may be prohibited to advertise and others are not. One cannot presume that the assessee is only promoting the products for which advertisements are prohibited as long as the advertisements are allowed to broadcast in the televisions which is approved by the proper authority, the assessee cannot be penalized by invoking the provisions of Cable Television Networks (Regulation) Act, 1995. On a careful consideration of the records, we observe that in the absence of any adverse remark or penalties levied by the broadcasting authorities the Assessing Officer need not go into verification of regular expenditure which assessee was regularly claiming over the years."

49. We have heard the rival submissions and perused the materials available on record. The assessee has filed additional

evidence as above. These additional evidences are produced first time before us and explained that assessee has been prevented by sufficient cause in not filing these additional evidences before the lower authorities. In our opinion, these additional evidences are very important to adjudicate this issue in dispute. Accordingly, we admit these additional evidences for adjudication after admitting for adjudication. In our opinion, it is appropriate to remit the issue in dispute to the file of AO and AO has to see whether assessee has made any direct advertisement with regard to sale and marketing of liquor or assessee made any surrogate advertisement in this respect. If the assessee has made any surrogated advertisement or indirect advertisement not mentioning anything relating to the liquor, the claim of assessee is to be allowed. With these observations, we remit the issue in dispute to the file of AO for fresh consideration.

50. Next ground Nos.88 to 93 are reproduced as under:

"XIV. Grounds relating to Depreciation of Goodwill

88. The learned AO has erred in law and on facts in disallowing Depreciation of INR 1,57,73,310 on Goodwill arising on acquisition of Karnataka Breweries and Distilleries Limited

and other subsidiaries;

89. The learned AO has erred in law and on facts in disallowing Depreciation by blindly relying on the earlier year order, without appreciating the complete facts of the case.

90. The learned AO has erred in law and on facts in disallowing Depreciation ignoring the ruling of Hon'ble Supreme Court and other judicial precedents;

91. The learned AO has erred in law and on facts by not appreciating the fact that Goodwill is an intangible asset thus entitled for depreciation under the provisions of the Act;

92. The learned AO has erred in law and on facts in holding that Goodwill on amalgamation has no value attributable to it

93. The learned AO has erred in law and on facts in not appreciating that it is settled principle upheld by the Hon'ble Supreme court that Goodwill arising on amalgamation is eligible for depreciation under section32(1)"

51. Facts of the issue are that the Assessee in its return of income had claimed an amount of Rs.1,57,73,310/- as depreciation on 'goodwill' at the rate of 25% on the opening WDV of goodwill of Rs.14,95,54,349/-. The Assessee had acquired the brewery 'Karnataka Breweries and Distilleries Limited' through a process of demerger and acquisition at cost of Rs.180.52 crores during the AY 2007-08 and the fair market value of the buildings, land and other assets was at Rs.123.77 crores. The scheme of amalgamation was sanctioned by the High Court of Karnataka vide order dated 11.06.2007 with effect from 01.04.2006. The purchase consideration paid by the Assessee exceeding the fair value of tangible assets and other net current assets was treated as 'goodwill'. The Assessee relied on the decision of the Hon'ble Supreme Court in *CIT v Smifs Securities Ltd [348 ITR 302 (SC)]*

51.1 The AO in the assessment order has held that the Assessee is not eligible to claim depreciation on goodwill. The AO has held that the Assessee's reliance on the decision of the Hon'ble Supreme Court in *CIT v Smifs Securities Ltd (supra)* is not correct and relied on the detailed analysis / reasoning provided in the assessment for AY 2007-08 wherein the claim of the Assessee was rejected. The AO accordingly disallowed depreciation of Rs.1,57,73,310/- claimed by the Assessee on 'goodwill'.

51.2 The ld. DRP followed the decision of this Tribunal in Assessee's cases for AY 2007-08 to 2009-10 vide order dated 30.09.2016 in ITA No.722, 801 and 1065/Bang/2014, and dismissed the grounds of appeal of the Assessee. The CIT(A) upheld the disallowance made by the AO.

52. The assessee submitted that this Tribunal has decided the issue against the Assessee in the cases for AY 2007-08 to 2009-10 (supra) and the decision will apply to the present AY also. The Assessee submitted that it has preferred appeal on the allowability of claim of depreciation before the Hon'ble High Court of Karnataka in ITA No.61/2017 and the same is pending adjudication.

52.1 The Assessee also submitted that a similar issue had also come up before this Tribunal in the Assessee's case of AY 2013-14 where the ground of appeal has been dismissed relying on the earlier decision rendered by this Tribunal for AY 2007-08 to 2009-10.

53. The ld. D.R. relied on the orders of the lower authorities.

54. After hearing both the parties, we are of the opinion that this issue came for consideration before this Tribunal in assessment year 2013-14 in IT(TP)A No.2569/Bang/2017 dated 1.6.2022, wherein held as under:

36. "We have heard both the parties. The coordinate Bench of this Tribunal in the assessee's own case for AY 2007-08 has held that depreciation on goodwill is not allowable based on the facts of the case of assessee. Respectfully following that decision, we hold that depreciation on goodwill is not allowable. Accordingly, these grounds are dismissed."

54.1 In view of the above order of the Tribunal, we are inclined to decide this issue against the assessee and these grounds of the assessee are dismissed.

55. In the result, the assessee's appeal is partly allowed for statistical purposes.

Order pronounced in the open court on 19th May, 2023

Sd/-	**Sd/-**
(Beena Pillai)	**(Chandra Poojari)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 19th May, 2023.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(Judicial)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar,
ITAT, Bangalore.