**IN THE INCOME TAX APPELLATE TRIBUNAL**
**"C" BENCH: BANGALORE**

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

| IT(TP)A No.345/Bang/2021 |
|---|
| Assessment Year: 2016-17 |

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|---|---|---|
| M/s. United Breweries Limited<br>UB City, UB Tower, Level 4<br>No.24, Vittal Mallya Road<br>Bangalore 560 001<br><br>**PAN NO : AAACU6053C** | **Vs.** | JCIT<br>Special Range-7<br>Bangalore |
| **APPELLANT** | | **RESPONDENT** |

| ITA No.308/Bang/2023 |
|---|
| Assessment Year: 2017-18 |

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| M/s. United Breweries Limited<br>UB City, UB Tower, Level 4<br>No.24, Vittal Mallya Road<br>Bangalore 560 001<br><br>**PAN NO : AAACU6053C** | **Vs.** | DCIT<br>Circle-7(1)(1)<br>Bangalore |
| **APPELLANT** | | **RESPONDENT** |

| | | |
|---|---|---|
| **Appellant by** | : | Shri Ankur Pai, A.R. a/w<br>Shri K.R. Vasudevan, A.R. |
| **Respondent by** | : | Shri Saravanan B., DR |

| | | |
|---|---|---|
| **Date of Hearing** | : | 28.08.2023 |
| **Date of Pronouncement** | : | 29.08.2023 |

**O R D E R**

**PER CHANDRA POOJARI, ACCOUNTANT MEMBER:**

IT(TP)A No.345/Bang/2021 for the assessment year 2016-17 by the assessee is directed against final assessment order passed by the AO u/s 143(3) r.w.s. 144C(13) r.w.s. 144B of the Income-tax Act,1961 ['the Act' for short] dated 30.4.2021 and ITA No.308/Bang/2023 for the assessment year 2017-18 is directed against order of CIT(A) (NFAC) dated 14.2.2013 passed u/s 250 of

the Act. Certain issues are common in both these appeals, hence, these are clubbed together, heard together and disposed of by this common order for the sake of convenience.

2. Facts of the case in IT(TP)A No.345/Bang/2021 for the assessment year 2016-17 are as follows:

2.1 The assessee is a limited company engaged in the business of manufacture and sale of beer under different brands like 'Kingfisher' and 'UB'. The assessee for the AY 2016-17 filed its return of income on 29.11.2016 declaring total income Rs.461,47,05,660/-. The case of the Appellant was thereafter selected for scrutiny assessment.

**As per Transfer Pricing Order:**

2.2 The learned Transfer Pricing Officer ("TPO") has passed the transfer pricing ("TP) order dated 30.10.2019 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. | Payment of Royalty | 2,55,70,901 |
| *B* | *Specified Domestic Transaction* | |
| 1. | Sales promotion expenses paid to United East Bengal Football Team Private Limited ("UEBFT") | 10,25,00,000 |
| **Total** | | **18,80,70,901** |

The TPO accordingly made TP adjustment of Rs.18,80,70,901/- in the order passed under section 92CA of the Act.

**As per Draft Assessment Order ("DAO"):**

2.3 The learned Assessing Officer ("AO") passed the DAO on 31.12.2019 and proposed the following disallowances / additions to the returned income of the assessee:

| Particulars | Amount in Rs. |
|---|---|
| TP adjustment as per section 92CA | 18,80,70,901 |
| Additional depreciation on pellets and cartons | 30,13,782 |
| Commission and Director remuneration paid to Mr Vijay Mallya | 2,86,08,711 |
| Payments to UBHL | 18,38,74,342 |
| Reimbursement of expat salary | 2,56,41,788 |
| Disallowance under section 14A of the Act | 61,00,440 |
| Disallowance of digital media expenses | 11,72,76,395 |
| Disallowance of TV advertisement expenses | 30,61,08,223 |
| Disallowance of sponsorship expenses | 92,33,00,000 |
| Depreciation on goodwill | 1,18,29,983 |

The AO accordingly proposed to assess the income of the assessee at Rs.640,40,30,225/- against the income of Rs.461,47,05,660/- declared by the assessee in its returned income. The assessee being aggrieved by the additions proposed by the AO in the DAO, filed its objections before the Dispute Resolution Panel ("DRP").

**As per DRP:**

2.4 The DRP rejected the objections of the assessee and confirmed the additions proposed in the DAO. The DRP vide directions dated 23.03.2021 directed the AO to complete the assessment.

**As per Final Assessment Order:**

2.5 The AO completed the assessment on 30.04.2021 by passing the order under section 143(3) read with section 144C(13) read with section 144B of the Act. The AO confirmed the additions proposed in the DAO as per the directions of the DRP. The AO accordingly assessed the income of the assessee at Rs.640,40,30,225/- against the income of Rs.461,47,05,660/- declared by the assessee in its returned income. The assessee being aggrieved by the disallowances / additions made in the assessment order by the AO passed pursuant

to the directions of the ld. DRP, has challenged the same in appeal before the Tribunal.

3. Facts of the case in ITA No.308/Bang/2023 for the assessment year 2017-18 are as follows:

3.1 The assessee is a limited company engaged in the business of manufacture and sale of beer under different brands like 'Kingfisher' and 'UB'. The Appellant for the AY 2017-18 file its return of income on 29.11.2017 declaring total income Rs.382,81,64,370/-. The case of the assessee was thereafter selected for scrutiny assessment.

**As per Transfer Pricing Order:**

3.2 The learned Transfer Pricing Officer has passed the transfer pricing order dated 29.01.2021 under section 92CA of the Act and concluded that the international transactions of the assessee were at arm's length and no adjustment was warranted.

**As per Assessment Order:**

3.3 The learned Assessing Officer passed the assessment order on 22.04.2021 and made the following disallowances / additions to the returned income of the assessee:

| Particulars | Amount in Rs. |
|---|---|
| Additional depreciation on pellets and cartons | 43,25,322 |
| Commission and Director remuneration paid to Mr. Vijay Mallya | 70,41,443 |
| Payments to UBHL | 15,20,63,311 |
| Reimbursement of expat salary | 3,62,34,473 |
| Disallowance under section 14A of the Act | 2,54,85,000 |
| Depreciation on goodwill | 88,72,487 |
| Disallowance of digital media expenses | 17,95,97,760 |
| Disallowance of TV advertisement expenses | 34,35,36,727 |
| Disallowance of sponsorship expenses | 661,27,35,644 |

The AO accordingly proposed to assess the income of the assessee at Rs.1122,29,03,119/- against the income of Rs. 382,81,64,370/- declared by the assessee in its returned income.

3.4 The assessee being aggrieved by the additions made by the AO in the assessment order, challenged the same in appeal before the CIT (Appeals).

**As per CIT(A):**

3.5 The CIT(A) vide order dated 14.02.2023 partly allowed the appeal of the assessee. The CIT(A) rejected all the grounds raised by the assessee except the ground pertaining to disallowance under section 14A wherein, the CIT(A) directed the AO to restrict the disallowance to the exempt income. The assessee being aggrieved by the order of the CIT(A) upholding the additions made by the AO, has challenged the same in appeal before this Tribunal.

**As per Rectification Order:**

3.6 Since there were certain apparent mistakes in the assessment order, the assessee had filed rectification application under section 154 of the Act before the AO.

3.7 The AO vide order dated 14.02.2023 has rectified the following mistakes in his order:

| Particulars | Amount as per AO order | Amount after rectification |
|---|---|---|
| Payments to UBHL | 15,20,63,311 | 4,15,04,955 |
| Disallowance under section 14A of the Act | 2,54,85,000 | 25,48,500 |
| Disallowance of sponsorship expenses (before depreciation) | 703,22,73,164 | 7,03,22,731 |

3.8 The AO accordingly assessed the income of the assessee at Rs.519,01,98,509/- against the income of Rs.1122,29,03,119/- determined in the assessment order. The Assessee has filed the appeal in IT(TP)A No.308/Bang-2023 before this Tribunal challenging the additions made by the AO in the assessment order and sustained by the ld. CIT(A).

4. Ground Nos.1 to 7 in the appeal for the assessment year 2016-17 and ground Nos.1 to 3 in the appeal for the assessment year 2017-18 appeals are common which are general in nature, which do not require any adjudication.

5. Next ground No.8 to 18 raised in appeal for the assessment year 2016-17 are reproduced below:

***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 INR 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 AO/ 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 TP 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*

5.1 The crux of the issue in these grounds is with regard to disallowance of payment of management fee.

5.2 After hearing both the parties, we are of the opinion that this issue came for consideration before this Tribunal in assessee's own case in assessment year 2015-16 in IT(TP)A No.2532/Bang/2019 dated 19.5.2023, wherein the Tribunal held as under:

"*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."*

5.3 In view of the above, the issue in dispute is remitted to the file of AO/TPO on similar directions.

6. Ground Nos.19 to 27 raised in appeal for the assessment year 2016-17 are reproduced as under:

*II. **Grounds relating to Sales Promotion Expenses***

*19. The learned AO/TPO erred in law and on facts in determining the ALP at NIL in respect of Sales Promotion expenses amounting to INR 10,25,00,000 paid to Kingfisher East Bengal Football Team P Ltd;*

*20. The learned AO/TPO erred in law and on facts in making the adjustment, ignoring the commercial and economic rationale of the business of the Assessee;*

*21. The learned TPO erred in disregarding the commercial contractual agreement by surmising that the assessee has made sales promotion expenses in order to run a football club.*

*22. The learned AO/TPO erred in law and on facts in determining the ALP at NIL ignoring the external comparable submitted by the Assessee;*

*23. The learned AO/TPO erred in holding that the rendering of services has not been demonstrated*

*24. The learned AO/TPO erred in stating that the sales promotion expenses is like running a football club and that the Assessee has not derived any benefit from incurring the expenses on account of sales promotion/sponsorship;*

*25. The learned AO/TPO has no jurisdiction to question the commercial expediency in incurring the expenditure and cannot disallow any expenditure on the ground that it was not necessary for the Assessee to incur such expenditure;*

*26. The learned AO/TPO erred in making the adjustment, ignoring the submissions made and judicial precedents relied upon by the Assessee*

*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).*

6.1 The crux of the above grounds is with regard to disallowance of sales promotion expenses.

6.2 After hearing both the parties, we are of the opinion that this issue came for consideration before this Tribunal in assessee's own case in IT(TP)A No.2532/Bang/2019 cited (supra), wherein the Tribunal held as under:

"*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)."*

6.3 In view of the above, the issue in dispute is remitted to the file of AO/TPO on similar directions.

7. Ground Nos.28 to 33 raised in appeal for the assessment year 2016-17 which are similar to ground Nos.4 to 7 of the appeal in assessment year 2017-18 (Concise ground No.2) are reproduced as under:

***(AY 2016-17):***
***Grounds relating to Payment of Royalty***

*28. The learned AO/TPO erred in law and on facts in determining the ALP at NIL in respect of the payment made towards royalty of INR 2,55,70,901 to HBBV.*

*29. The learned AO/TPO erred in law and on facts in making the adjustment towards royalty ignoring the agreement for payment of the same;*

*30. The learned AO/TPO erred in law and on facts in not considering the evidences provided by the assessee regarding deputation of executives from Heineken from time to time to check the quality, supervise the production and carry out the inspection of the brewery units.*

*31. The learned AO/TPO erred in holding that the taxpayer has not substantiated the basis for the payment of royalty and whether any benefits are derived by the AE from the use of the trademark to boost sales.*

*32. The learned AO/TPO erred in making the adjustments, ignoring the submissions made and various judicial precedents relied upon by the assessee.*

*33. 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).*

7.1 The crux of above grounds is with regard to disallowance on payment of royalty.

7.2 After hearing both the parties, we are of the opinion that similar issue came for consideration in assessee's own case in IT(TP)A

No.2569/Bang/2017 dated 1.6.2022 wherein the Tribunal has 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 Rand 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."*

7.3 In view of this, the issue in dispute is remitted to AO/TPO on similar directions.

8. Next ground Nos.34 to 38 in assessment year 2016-17 which are similar to ground nos.4 to 7 (Concise ground no.2) in assessment year 2017-18 are with regard to claim of additional depreciation on pellets, which are reproduced as under:

***(AY 2016-17):***
***Grounds related to Additional depreciation on Crates and Pellets***

*34. The learned AO erred in disallowing the claim of additional depreciation on Crates and Pellets by categorizing these assets as Furniture & Fixtures*

35. *The learned AO erred in holding that these are mere storage devices and hence does not come under Plant and Machinery.*

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

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

38. *The learned AO erred in considering these assets as having the same functionality test as carton boxes/cardboard boxes.*

***(AY 2017-18):***
***Additional depreciation on Crates & Pellets – Rs.43,25,322/-***

4. *The Ld CIT(A) erred in upholding the disallowance of claim of additional depreciation of Rs.43,25,322/-made by the Ld AO on crates and pellets by categorizing these assets as 'Furniture & Fixtures' relying on the directions of the Dispute Resolution Panel ("DRP") rendered for AY 2016-17.*

5. *The Ld CIT(A) and the Ld AO erred in holding that these assets are mere storage devices and hence do not come under 'Plant and Machinery'.*
6. *The CIT(A) erred on facts in holding that the crates and pellets are used only for transportation and movement of raw materials and finished goods.*

7. *The CIT(A) erred in not appreciating the facts of the case, while distinguishing the case law cited by the Appellant.*

***Concise ground in AY 2017-18:***

2. *The Ld CIT(A) erred in upholding the disallowance of additional depreciation on crates and pellets by categorizing the same as 'Furniture & Fixtures' instead of as 'Plant and Machinery'.*

8.1 After hearing both the parties, we are of the opinion that similar issue came for consideration before this Tribunal in assessment year 2015-16 in IT(TP)A No.2532/Bang/2019 cited (supra), wherein the Tribunal held as under:

**"***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."*

8.2 In view of the above, taking a consistent view, this issue is remitted to the file of AO/TPO for fresh consideration on similar directions in both these assessment years.

9. Next ground Nos.39 to 48 in assessment year 2016-17 and ground Nos.8 to 14 in assessment year 2017-18 (Concise ground Nos.3 to 5) are reproduced below:

***(AY 2016-17):***
***Grounds related to Payments made to Mr Vijay Mallya***

8. *The Learned A.O erred in disallowing the following payments made to Mr Vijay Mallya*

   *i) Commission : Rs 2,83,18,711*
   *ii) Director Sitting Fee Rs 2,90,000*

9. *The learned AO erred in disallowing the Commission payment made to the then Chairman of the Company.*

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

11. *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*

12. *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 to the person in his capacity as Chairman and not as Shareholder.*

13. *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 Mr Vijay Mallya*

14. *The learned AO erred in holding that the payments made to Mr Vijay Mallya is not legal even while accepting that the payments made to other directors are legal.*

15. *The learned AO erred in linking these commission payments to certain payments made towards guarantee commission on certain guarantees given by Mr VijayMallya, without appreciating that there is no connection whatever between these two payments;*

16. *The learned AO erred in disallowing the Director's sitting fee on the pretext of the on-going litigations against Mr. Vijay Mallya and the DRT order, without appreciating that the ongoing litigation against Mr Mallya has nothing to do with the assessee claiming deduction;*

17. *The learned AO erred in making the addition without granting proper opportunity to the assessee on the issue;*

***(AY 2017-18):***
***Commission and Director sitting fee paid to Mr Vijay Mallya - Commission of Rs 64,22,343/- and Sitting fee of Rs 6,19,100/-***

8. *The Ld CIT(A) erred in upholding the order of the Ld AO disallowing the Commission payment of Rs.64,22,343/- under section 36(1)(ii) read with section 40A(2) of the Act treating the same as excessive and unreasonable by relying on the DRP direction rendered for AY 2016-17.*

9. *The Ld CIT(A) and Ld AO erred in holding that the Commission payment has been made without any commensurate services rendered, by making surmises without any basis.*

10. *The Ld CIT(A) and Ld AO erred in not appreciating that the payments were made to all the Directors of the Company, as per the approval of the Board of Directors and after compliance to the necessary provisions of Law and not only to Dr Vijay Mallya.*

11. *The Ld CIT(A) and Ld 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.*

12. *The Ld CIT(A) erred in not appreciating that the commission payments were not actually paid but were withheld due to restraint order of DRT.*

13. *The Ld CIT(A) erred in upholding the order of the Ld AO disallowing Sitting fee of Rs.6,19,100/- made to the then Chairman of the Appellant Company by relying on the DRP directions of AY 2016-17.*

14. *The CIT(A) erred in not awaiting the remand report of the Ld AO and erred in issuing directions in contravention of section 251 of the Act.*

***Concise grounds in AY 2017-18:***
***Commission and Director sitting fee paid to Mr Vijay Mallya:***

3. *The Ld CIT(A) erred in upholding the disallowance of Commission payment made to Mr Vijay Mallya, treating it as excessive without appreciating that the payments were made after compliance to the provisions of Law and erred in not appreciating that the payments were not actually paid but were withheld due to restraint order of DRT.*

4. *The Ld CIT(A) erred in linking these commission payments to guarantee commission payment made in earlier years, when there is no connection between the two.*

5. *The Ld CIT(A) erred in upholding the disallowance of Sitting fee paid to Mr Mallya, without awaiting the remand report issuing directions in contravention of law.*

9.1 The crux of the above grounds is with regard to payment made to Shri Vijay Mallya. This expenditure includes commission payment & Director Sitting Fees. With regard to payment of commission fees, this issue came for consideration in assessment year 2015-16 in assessee's own case in IT(TP)A No.2532/Bang/2019 cited (supra), wherein the Tribunal held as under:

**"***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."*

9.2 In view of this, payment of commission to Vijay Mallya is to be disallowed in both the assessment years. However, the contention of ld. A.R. is that with regard to payment of Director Sitting Fees, it cannot be disallowed on the basis of DRT order in September, 2005. In our opinion, the DRT being the statutory authority, the restriction imposed by DRT is binding with assessee as such payment of sitting fees cannot be made to Vijay Mallya. Accordingly, this issue is also decided against the assessee in both the assessment years. These grounds of appeal in both the assessment years are dismissed.

10. Next ground Nos.49 to 52 in assessment year 2016-17 and ground Nos.15 to 18 (Concise ground Nos.6 & 7) in assessment year 2017-18 are with regard to payment to UBHL, which are reproduced as under:

***(AY 2016-17):***
***Grounds related to Payments made to UBHL***

18. *The learned AO erred in disallowing various payments made to UBHL, aggregating to Rs 18,38,74,342 only on the ground of on-going litigations and the restraint order of DRT;*

19. *The learned AO erred in not appreciating that the payments made to UBHL are all business related transactions and are valid business expenditure and therefore allowable expenditure;*

20. *The learned AO erred in not appreciating that these payments are made in the regular course of business and erred in disregarding the evidences submitted and the submissions made in this regard;*

21. *Notwithstanding the above, the Learned AO erred in including an amount of Rs 2,95,27,021 which was a receipt for the appellant from sale made to UBHL and is not liable to be included in disallowance;*

***(AY 2017-18):***

***Payment to United Breweries Holding Company (UBHL)– Rs.15,20,63,311/-***

15. *The Ld CIT(A) erred in upholding the order of the Ld AO disallowing the entire payment of Rs.15,20,63,311/- made to UBHL under section 37(1) of the Act, on the erroneous surmise that all payments to UBHL has been ordered to be withheld by DRT by relying on the directions of the DRP for AY 2016-17.*

16. *The Ld CIT(A) and the Ld AO erred in not appreciating that the payments towards rent, royalty and common area expenses were all business-related transactions and valid business expenditure and therefore allowable expenditure.*

17. *The Ld CIT(A) and the Ld AO erred in not appreciating that the restraint order of DRT was only in relation to Dividend payments, which have been withheld in compliance to the order.*

18. *The CIT(A) erred in not awaiting the remand report of the Ld AO and erred in remanding the issue, in contravention of section 251 of the Act to the Ld AO for verification, without any decision/ direction on the substantive issue.*

***Concise grounds in AY 2017-18:***
***Payment to United Breweries Holding Company ("UBHL"):***

6. *The Ld CIT(A) erred in upholding the disallowance of the entire payment made to UBHL, without appreciating that the restraint order was only for Dividend payments and the payments towards rent, royalty and common area expenses were all valid business expenditure.*

7. *The CIT(A) erred in not awaiting the remand report of the Ld AO and erred in remanding the issue for verification, without any direction on the issue.*

10.1 The assessee made various payments to UBHL with regard to purchase of beer, sales promotion expenses, rent, royalty, reimbursement received, quality complaints and other common area expenses reimbursed, dividend paid. This expenditure was disallowed by the lower authorities by invoking explanation 1 to section 37 of the Act and also on account of DRT's order not to make any payment to Shri Vijay Mallya and UBHL in which Shri Vijay Mallya has direct interest. In our opinion, the direction of the DRT is binding on the assessee and ought not to have made any payment to UBHL or Shri Vijay Mallya. Being so, we do not find any infirmity in disallowing this expenditure by lower authorities. The same is confirmed. These grounds of appeal in both the assessment years are dismissed.

11. Next ground nos.53 to 56 in assessment year 2016-17 and ground nos.19 to 23 (Concise ground no.8) in assessment year 2017-18 are with regard to reimbursement of expat payments, which are reproduced as under:

***AY (2016-17):***
***Grounds related to reimbursement of Expat payments***

22. *The learned AO erred in disallowing the payments made towards re-imbursement of Salary and other payments made to expatriate experts seconded by the AE, by holding it as Fees for Technical services*

23. *The learned AO erred in holding that the seconded employees remained employees of the AE, totally disregarding the facts of the case;*

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

25. *The learned AO erred in making the disallowance without appreciating the nuances between Article 7 and Article 12 of the DTAA;*

***AY 2017-18:***

***Reimbursement to Heineken towards Expat payments – Rs.3,62,34,473/-***

*19. The Ld CIT(A) erred in upholding the order of the Ld AO disallowing under section 40(a)(i) of the Act, the payment of Rs.3,62,34,473/-made by the Appellant to Heineken towards reimbursement of Salary and other related payments of expatriate experts seconded by the AE.*

*20. The Ld CIT(A) erred in holding the subject payments were Fees for Technical Services ("FTS") and liable for TDS by relying on the DRP directions of AY 2016-17 despite accepting that the payment was reimbursement of expense.*

*21. The Ld CIT(A) and Ld AO erred in relying on the decision in the case of Centrica India Offshore (P.) Ltd V CIT and other cases, without appreciating that the facts of those cases are different from the facts of the Appellant.*

*22. The Ld CIT(A) and Ld AO erred in making the disallowance without appreciating the nuances between Article 7 of the DTAA and Article 12 of the DTAA.*

*23. The Ld CIT(A) erred in not considering the case laws of the Jurisdictional Court, submitted by the Appellant wherein similar payments have been held to be not-taxable.*

***Concise grounds in AY 2017-18:***

***Reimbursement towards Expat payments:***

*8. The Ld CIT(A) erred in upholding the disallowance of the reimbursement of Salary of seconded expatriates as Fees for Technical Services ("FTS") without considering the decisions of the Hon'ble Jurisdictional High Court on the issue.*

11.1 After hearing both the parties, we are of the opinion that similar issue came for consideration before this Tribunal in assessee's own case in assessment year 2015-16 in IT(TP)A No.2532/Bang/2019 cited (supra) wherein the Tribunal held as under:

**"***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."*

11.2 In view of the above order of the Tribunal, this issue is remitted to the file of AO/TPO on similar directions.

12. Next ground Nos.57 to 61 in assessment year 2016-17 are with regard to disallowance u/s 14A of the Act, which are reproduced as under:

***AY (2016-17):***
***VIII Grounds related to disallowance u/s 14A***

*26. The learned AO erred in law and on facts in disallowing expenses of INR 61,00,440/- in relation to exempt income of INR 9,35,500 ;*

*27. 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 income ignoring the submissions of the Assessee;*

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

*29. The learned AO has erred in law and on facts by invoking Rule 8D without `appreciating that there is no nexus between the investments that yielded exempt income and interest bearing funds raised by the assessee;*

*30. The learned AO has erred in making the disallowance ignoring the settled principles that the disallowance cannot be more than the exempt Income earned.*

12.1 After hearing both the parties, we are of the opinion that similar issue came for consideration before this Tribunal in assessment year 2015-16 in assessee's own case in IT(TP)A No.2532/Bang/2019 cited (supra), wherein the Tribunal held as under:

**"***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."*

12.2 In view of the above order of the Tribunal, we direct the AO/TPO to restrict the disallowance to the extent of exempted income. At the time of hearing, the ld. D.R. submitted that there was amendment brought in Finance Act, 2022 and it should be applied retrospectively. However, in our opinion, this amendment is prospective in nature i.e. w.e.f. 1.4.2022 and as held by Hon'ble Delhi High court in the case of Era Infrastructure India Ltd. in ITA No.204/2022 (Del.) and also by judgement of Chennai Bench of this Tribunal in the case of M/s. Maxivision Hospital in ITA No.139/Chny/2020 dated 22.7.2022. In view of this, we reject the arguments of ld. D.R. These grounds of appeals of the assessee are partly allowed.

13. Next ground Nos.62 to 66 in assessment year 2016-17 and ground Nos.29 to 35 in assessment year 2017-18 are with regard to digital media expenses made allegedly towards promotion of alcoholic products held as violation of law and public policy, which are reproduced as under:

***(AY 2016-17):***

***Grounds related to expenses allegedly in violation of Law and Public Policy - Digital media expenses***

*31. The learned AO erred in disallowing the payments made towards advertisements aggregating to Rs.11,72,76,395 by erroneously holding that these expenses are in violation of law and public policy*

*32. 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*

*33. The learned AO erred in holding that the advertisement expenses are not allowable, whether it is product promotion or brand promotion, without appreciating the fact that the assessee does not do any specific product promotion and brand promotion expenses are in the revenue field and are allowable business expenditure.*

*34. The learned AO has erred in making the addition 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.*

*35. The learned AO has erred in not considering that the assessee does not do any "Above the line" advertisement of liquor products*

***(AY 2017-18):***

***Expenses made in violation of Law – Digital Media of Rs.17,95,97,760/- and TV advertisement expenses of Rs.34,35,36,727/-***

*29. The Ld CIT(A) erred in upholding the order of the Ld AO disallowing the payments of Rs.17,95,97,760/- made towards digital media advertisements and payments of Rs.34,35,36,727/- towards TV advertisement expenditure by erroneously holding that these expenses are in violation of law and public policy relying on the DRP directions of AY 2016-17.*

*30. The Ld CIT(A) and Ld AO erred in holding that the payments are made in violation of the Prohibition Act by wrongly surmising that these advertisement expenses solicit the use of intoxicant.*

*31. The Ld CIT(A) and Ld AO erred in holding 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, and the expenses are in the revenue field which are allowable business expenditure.*

*32. The Ld CIT(A) and Ld AO have erred in making the addition on the surmise that the expenses are in violation of the Prohibition Act, without showing as to how these payments are in violation of the Income-tax Act.*

*33. The Ld CIT(A) and Ld AO have erred in not considering that the Appellant does not do any "Above the line" advertisement of liquor products.*

*34. The Learned CIT(A) erred in not appreciating that in the decision cited by the Appellant, the Hon'ble Tribunal has given a finding on the substantive issue and applies squarely to the facts of the Appellant's case*

*35. The Learned CIT(A) erred in relying on a decision, whose facts are totally different and not applicable to the Appellant's case*

13.1 Similar is the ground nos. 67 to 70 in assessment year 2016-17 and Concise ground nos.10 to 12 in assessment year 2017-18 with regard to expenses incurred on TV Advertisement allegedly held as violation of law and public policy, which are reproduced as under:

***AY (2016-17):***
***Grounds related to expenses allegedly in violation of Law and Public Policy - TV advertisements***

*36. The learned AO erred in disallowing the payments made towards advertisements aggregating to Rs. 30,61,08,223 by erroneously holding that these expenses are in violation of law and public policy*

*37. The learned AO erred in holding that these payments are in violation of law and public policy by wrongly surmising that it promotes alcoholic products and represents surrogate advertising*

*38. 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*

*39. 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.*

***(Concise grounds in AY 2017-18):***
***Expenses made towards Digital Media and TV advt expenses:***

*10. The Ld CIT(A) erred in upholding the disallowance of payments made towards digital media advertisements and TV advertisements by erroneously holding that these expenses are in violation of law and public policy.*

*11. The Ld CIT(A) erred in holding that these expenses are not allowable, without appreciating that these expenses are revenue in nature and allowable expenses.*

*12. The Learned CIT(A) erred in not considering the decision of the Hon'ble Tribunal on the issue, by erroneously holding that there is no finding on the substantive issue and erred in relying on a decision, whose facts are different.*

13.2 After hearing both the parties, we are of the opinion that similar issue came for consideration in assessment year 2015-16 in IT(TP)A No.2532/Bang/2019 cited (supra), wherein the Tribunal has held as under:

**"***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."*

13.3 In view of the above order of the Tribunal, the issue in dispute is remitted to the file of AO for fresh consideration.

14. Next ground Nos.71 to 75 in assessment year 2016-17 and ground Nos.36 to 41 (Concise ground Nos.13 to 14) in assessment year 2017-18 are with regard to substantial addition in respect of sponsorship expenses, which are reproduced as under:

***(AY 2016-17):***
***Grounds related to Disallowance of Sponsorship Expenses***

*40. The learned AO erred in holding the sponsorship expenses as brand promotion expenses and further erred in holding that these expenses are capital in nature, totally disregarding the facts of the case and the decisions of the judicial authorities in this regard;*

*41. The learned AO erred in not appreciating that these expenses are valid business expenditure incurred in the normal course of business and are purely in the revenue field;*

*42. The learned AO erred in holding that these expenses are capital expenditure not attributable to the Assessee's sales.*

*43. Notwithstanding the above, the learned AO erred in considering the depreciation @ 12,5 % on the amounts so capitalized, without any reason or finding*

*44. The learned AO erred in making a protective addition in respect of the payment of Rs. 10,25,00,000 to Kingfisher East Bengal Football Pvt Ltd, thereby making a double addition of the same expenditure, an addition which is alien to the Income Tax law.*

***(AY 2017-18):***
***Sponsorship expenses – Rs.52,10,29,015/-***

*36. The Ld CIT(A) erred relying on the DRP directions for AY 2017-18 for upholding the disallowance of the sponsorship expenses to the extent of Rs.52,10,29,015/-made by the Ld AO, treating the same as brand promotion expenses and further erred in holding that the expenses are capital in nature.*

*37. The Ld CIT(A) and the Ld AO have erred in totally disregarding the facts of the case and the decisions of the judicial authorities cited by the Appellant in this regard.*

*38. The Ld CIT(A) and the Ld AO erred in not appreciating that the expenses are valid business expenditure incurred in the normal course of business and are purely in the revenue field.*

*39. The Ld CIT(A) and the Ld AO erred in holding that these expenses are capital expenditure not attributable to the Appellant's sales.*

*40. The Learned CIT(A) erred in not considering the decisions cited by the Appellant, which are squarely applicable to the Appellant's case*

*41. The Ld CIT(A) erred in not awaiting the remand report from the Ld AO and erred in confirming the action of Ld AO in considering the depreciation @ 12.5 % on the amounts so capitalized which is without any reason or finding.*

***(Concise grounds in AY 2017-18):***
***Sponsorship expenses:***

*13. The Ld CIT(A) erred in upholding the disallowance of sponsorship expenses, treating the same as brand promotion expenses and capital in nature, without considering the judicial decisions on the issue.*

*14. The Ld CIT(A) erred in not awaiting the remand report from the Ld AO and erred in confirming the depreciation @ 12.5 %, without any reason.*

14.1 After hearing both the parties, we are of the opinion that similar issue came for consideration before this Tribunal in assessee's own case in IT(TP)A No.2532/Bang/2019 cited (supra), wherein the Tribunal has held as under:

**"***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*."

14.2 In view of this, we direct the AO to allow deduction towards business promotion expenses incurred by the assessee after examining the genuineness of the expenditure and decide the issue afresh in the light of above order of the Tribunal. Ordered accordingly.

15. The assessee has also raised grounds connected to the above expenditure with regard to disallowance on the basis of sponsorship expenses on protective basis.

15.1 After hearing both the parties, we are of the opinion that similar issue came for consideration in assessee's own case in IT(TP)A No.2532/Bang/2019 cited (supra), wherein the Tribunal has held as under:

**"***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."*

15.2 In view of the above order of the Tribunal, this issue is remitted to the file of AO on similar directions.

16. Next ground Nos.76 to 80 in assessment year 2016-17 and ground Nos.24 to 28 (Concise ground no.9) in assessment year 2017-18 are with regard to depreciation and goodwill, which are reproduced as under:

***(AY 2016-17):***
***Grounds related to Depreciation of Goodwill***

*45. The learned AO has erred in law and on facts in disallowing Depreciation of Rs. 1,18,29,983 on Goodwill arising on acquisition of Karnataka Breweries and Distilleries Limited and other subsidiaries;*

*46. 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.*

*47. 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;*

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

*49. 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*

***(AY 2017-18):***
***Depreciation on Goodwill – Rs.88,72,487/-***

*24. The Ld CIT(A) erred in upholding the order of the Ld AO disallowing depreciation of Rs.88,72,487/-on Goodwill arising on acquisition of Karnataka Breweries and Distilleries Limited and other subsidiaries by relying on the DRP directions of AY 2016-17.*

*25. The Ld CIT(A) and Ld AO have erred in law and on facts in disallowing depreciation by relying on the earlier year order, without appreciating the complete facts of the case.*

*26. The Ld CIT(A) and Ld AO have 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.*

*27. The Ld CIT(A) and Ld AO have erred in law and on facts in holding that Goodwill on amalgamation has no value attributable to it.*

*28. The Ld CIT(A) and Ld AO have erred in law and on facts in not appreciating the settled principle upheld by the Hon'ble Supreme Court that Goodwill arising on amalgamation is eligible for depreciation under section 32(1) of the Act.*

***(Concise ground in AY 2017-18):***
***Depreciation on Goodwill:***

*9. The Ld CIT(A) erred in upholding the disallowance of depreciation on Goodwill arising on acquisition of companies, by erroneously holding that Goodwill on amalgamation has no value attributable to it.*

16.1 After hearing both the parties, we are of the opinion that similar issue came for consideration in assessee's own case in IT(TP)A No.2532/Bang/2019 cited (supra), wherein the Tribunal has held as under:

"*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."*

15.2 In view of the above order of the Tribunal, this ground is rejected and dismissed in both assessment years on similar lines.

17. In the result, the appeals of the assessee are partly allowed for statistical purposes.

Order pronounced in the open court on 29th Aug, 2023

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

Bangalore,
Dated 29th Aug, 2023.
VG/SPS

Copy to:

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

By order

**Asst. Registrar,**
**ITAT, Bangalore.**