

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'A', BANGALORE**

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI JASON P BOAZ, ACCOUNTANT MEMBER**

**ITA No.931(B)/2014
(Assessment year : 2009-10)**

The Deputy Commissioner of Income-tax
Circle-12(5), Rasthrothana Bhavan,
Bangalore

Appellant

Vs

M/s Millennium Beer Industries Ltd.,
(since amalgamated with United Breweries Ltd.,
No.24, UB Tower, UB City, Vittal Mallya Road,
Bangalore-560 001

PAN No.AAACI12816F

Respondent

**Revenue by : Shri G.R.Reddy, CIT, DR-I
Assessee by : Shri D. Anand, Advocate**

**Date of hearing : 16-09-2015
Date of pronouncement : 04-11-2015**

ORDER

PER SHRI JASON P BOAZ, AM:

This appeal by the revenue is directed against the order of the
CIT(A)-IX New Delhi dated 10-02-2014 for the assessment year 2009-10.

2. ORDER ON PETITION FOR CONDONATION OF DELAY IN FILING
APPEAL;

2.1 Along with the appeal, revenue has filed an application for condonation of delay in filing this appeal before the Tribunal. It is submitted that the order of the learned CIT(A)-IX, New Delhi dated 10-02-2014, was received in the Office of the jurisdictional CIT-II, New Delhi on 11-03-2014 and therefore, the appeal ought to have been filed on or before 10-05-2014 but was filed on 26-06-2014, thereby leading to a delay of 44 days in filing the appeal. In the petition, revenue submits that the delay was not attributable to the department due to the fact that the case on hand was transferred from Delhi to Bangalore and the CIT-II, New Delhi forwarded the order of the learned CIT(A) to the Bangalore office on 02-05-2014 and the same was received in the Office of CIT, Bangalore-III on 19-05-2014 only. It is prayed that delay in filing the appeal be condoned as it was neither willful nor intentional and was only due to the factual circumstances, laid out above surrounding the transfer of this case from New Delhi to Bangalore.

2.2 The learned AR for the assessee had no objection, if the delay in filing the appeal was condoned.

2.3 We have heard both parties and perused and carefully considered revenue's petition for condonation of the delay in filing this appeal. After due consideration of the reasons adduced for the delay in filing the appeal and the attendant factual circumstances, we are of the view, that this is a fit case for condonation of delay in filing this appeal

before the Tribunal. We therefore, condone the delay and admit the appeal for hearing and adjudication.

3. The facts of the case, briefly, are as under;

3.1 The assessee, a company engaged in the manufacture and sale of Beer, filed its return of income for assessment year 2009-10 on 25-09-2009 declaring loss of Rs.10,57,50,801/-. The return was processed u/s 143(1) of the IT Act, 1961 (in short 'The Act') and the case was subsequently taken up for scrutiny. The assessment as concluded u/s 143(3) of the Act vide order dated 30-12-2011 wherein the assessee's income/loss was determined at (-) Rs.41,54,088/- in view of the following additions/disallowances to the returned loss of Rs.10,57,50,801/-.

<i>i) On account of capitalization of good will</i>	<i>Rs. 10,12,955</i>
<i>ii) On account of cash payments u/R 6DD</i>	<i>Rs. 5,83,758</i>
<i>iii) Disallowance u/s 40A(2)</i>	<i>Rs.10,00,00.000</i>

3.2 Aggrieved by the order of assessment dated 30-12-2011 for assessment year 2009-10, the assessee preferred an appeal before the CIT(A)-IX, New Delhi. The learned CIT(A), disposed the appeal vide order dated 10-02-2014 allowing the assessee partial relief.

4. Revenue being aggrieved by the order of the CIT(A)-IX, New Delhi dated 10-02-2014 for assessment year 2009-10, has preferred this appeal raising the following grounds;

“1. The order of the ld.CIT(A) is opposed to law and facts of the case.

2. On the facts and circumstances of the case the learned CIT(A) erred in directing the AO to delete the disallowance of depreciation on goodwill without appreciating the fact that the same is not admissible as per the provisions of Section 32(1), as goodwill is not defined as an intangible asset.

3. On the facts and circumstances of the case learned CIT(A) erred in allowing the cash payments in excess of Rs.20,000 which is absolutely contrary to the provisions of section 40A(3) r.w.r.6DD.

4. On the facts and in the circumstances of the case the learned CIT(A)a erred in allowing the payment of Rs.10 Crores made by the assessee to the holding company M/ United Breweries Ltd. despite binging on record the clinching findings of the AO in para-7.1 of his order wherein the AO has rightly concluded that the payment to the holding company is excessive and unreasonable in view of the sanctioned scheme by the BIFR and the responsibility of the holding company to revive the loss making subsidiary company.

5. *On the facts and in the circumstances of the case the learned CIT(A) erred in allowing the payment of Rs.10 Crores made by the assessee to the holding company M/s United Breweries Ltd. by wrongly placing reliance on the order of Apex Court in the case of M/s Glaxo Smith Kline Asia P.Ltd. wherein the facts are different than the instant case.*

6. *For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) in so far as it relates to the above grounds may be reversed and that of the AO may be restored.*

7. *The appellate craves leave to add, alter, amend and/or delete any of the grounds mentioned above”.*

5. The grounds at sl.no.1,6 & 7 are general in nature and therefore, no adjudication is called for thereon.

6. Ground no.2 Depreciation on goodwill

6.1 In this ground the revenue assails the impugned order of the learned CIT(A), in deleting the disallowance of depreciation on goodwill without appreciating the fact that the same is not admissible as per the provisions of Section 32(1) of the Act, as goodwill is not defined as an intangible asset. The learned DR was heard in support of the grounds.

6.2 Per contra, the learned AR for the assessee supported the order of the learned CIT(A) in deleting the disallowance of depreciation on goodwill made by the AO. The learned AR submitted that revenue's appeal on this issue is liable to be dismissed, as the same issue has been held in favour of the assessee by the decisions of the ITAT, Delhi Benches in the assessee's own case for the assessment year 2004-05 and 2005-06 in ITA Nos.2889,2890(Del.)/2009 dated 02-11-2012 and for assessment years 2002-03, 2006-07 and 2007-08 in ITA Nos.1968 to 1970/Del/2012 dated 23-12-2013.

6.3.1 We have heard the rival contentions of both parties and perused and carefully considered the material on record, including the judicial pronouncements cited and placed reliance upon by the assessee. We find that this issue is covered in favour of the assessee by the decision of the ITAT Delhi Bench in the assessee's own case for assessment years 2002-03, 2006-07 and 2007-08 in ITA Nos.1968 to 1970/Del/2012 dated 23-12-2013, wherein at para 3 & 4 thereof the Tribunal has held as under;

“ 3. We have heard both parties and perused the material placed before us. We find this issue to be covered in favour of the assessee by the decision of ITAT in assessee's own case for AY: 2004-05 & 2005-06 vide ITA No.2889 & 2890/Del/2009 wherein the ITAT held as under;

“7. In the light of view taken by the Hon’ble Apex Court that ‘Goodwill’ is an asset under Explanation 3(b) to Section 32(1) of the Act, we have no hesitation in vacating the findings of the learned CIT(A) and accordingly , direct the AO to allow the claim of depreciation on goodwill in terms of aforesaid decision of the Hon’ble Apex Court. Consequently, ground no.3 and 4 in the appeal for the AY: 2004-05 and ground no.s.2 to 4 in the appeal for the AY: 2005-06 are allowed. Since we have allowed the claim of the assessee on merits in the AY: 2004-05, ground nos.1 & 2 relating to validity of reopening of the assessment become academic in nature and are, therefore, treated as infructuous”.

4. Respectfully following the above order of the Tribunal, we direct the AO to allow the claim of depreciation on goodwill. Accordingly, the assessee’s appeals are allowed”.

6.3.2. Following the decision of the ITAT-Delhi Bench in the assessee’s own case for AY: 2002-03, 2006-07 and 2007-08 in ITA Nos.1968 to 1970/Del/2012 dated 23-08-2013, we uphold the finding of the learned CIT(A) in directing the AO to allow the assessee’s claim of depreciation on goodwill. Consequently, ground no.2 of the revenue’s appeal is dismissed.

7. Ground no.3 – Disallowance u/s 40A(3) r.w. Rule 6DD

7.1 In this ground revenue assails the order of the learned CIT(A) in allowing the assessee's claim as being contrary to the provisions of Sec.40A(3) r.w. Rule 6DD in respect of cash payments in excess of Rs.20,000/-. It is contended by the learned DR, that the AO had rightly made the disallowance u/s 40A(3) of the Act, as the assessee could offer no plausible justification for making cash payments as freight to truck drivers who brought raw material to the Brewery at odd hours i.e late night or early mornings. The learned DR submitted that in the above factual circumstances, the finding of the learned CIT(A) on this issue be reversed and that of the AO be restored.

7.2 Per contra, the earned AR for the assessee supported the finding of the learned CIT(A) in deleting the disallowance u/s 40A(3) r.w.Rule 6DD in the facts and circumstances of the case. The learned AR reiterated submissions made before the learned CIT(A) and contended that except for raising this ground, the revenue has not been able to controvert the finding of the learned CIT(A) on this issue.

7.3.1 We have heard the rival contentions and perused and carefully considered the material on record. The disallowance of Rs.5,83,758/-was made by the AO u/s 40A(3) r.w. Rule 6DD as he was of the view that the assessee was unable to put forth plausible justification for making payments in cash for freight to truck drivers.

7.3.2. Before the learned CIT(A), the assessee inter-alia submitted that these payments were made as freight to truck drivers for duties of delivery of raw materials to the brewery at odd hours i.e. late night or early morning and as they would not accept payments through cheque. After considering the explanation put forth by the assessee we agree with the view of the learned CIT(A) that considering the nature of the assessee's business the explanation put forth by the assessee that freight charges are paid in cash to the truck drivers for expenses on road like diesel, food, minor repair and the balance to truck operators for freight sometimes for more than one truck, which sometimes is in excess of Rs.20,000/- cannot be held to be unreasonable. We observe that revenue, except for raising the ground, has failed to bring on record any material evidence to controvert the findings of the learned CIT(A) on this issue and in this view of the matter, we uphold the finding of the learned CIT(A) on this issue. Consequently, revenue's ground at sl.no.3 is dismissed.

8. Grounds 4 & 5: Disallowance u/s 40A(2).

8.1 In these grounds revenue assails the finding of the learned CIT(A) in the impugned order in deleting the addition/disallowance made by the AO on account of payment of Rs.10.00 Crores by the assessee to the holding company, M/s United Breweries Ltd., despite the AO, rightly rendering a finding that this payment is excessive and unreasonable in view of the sanctioned scheme by the BIFR by which it was the

responsibility of the holding company to revive the assessee, which was its loss making subsidiary. It is also contended that the learned CIT(A), in allowing the said payment of Rs.10.00 Crores by the assessee to its holding company M/s United Breweries Ltd. had wrongly placed reliance on the decision of the Hon'ble Apex Court in the case of Glaxo Smith Kline Asia Pvt. Ltd (Supra) (SLP Civil No.18121/2007) wherein the facts were different from those of the case on hand. The learned DR was heard in the matter and he placed strong reliance on the findings in the order of the AO.

8.2 Per contra, the learned AR for the assessee placed reliance on the finding of the learned CIT(A) in the impugned order in deleting the disallowance of Rs.10.00 Crores u/s 40A(2) of the Act, and submitted that no interference was called for. In support of its claim for these payment of Rs.10.00 Crores to M/s United Breweries Ltd. ('UBL') to be allowed, the learned AR reiterated the submissions made before the learned CIT(A) and placed reliance on the decision of the ITAT Chennai Bench in the case of M/s Empee Breweries Ltd. in ITA No.1295/Mds/2012 dated 214-02-2013 wherein on similar facts payment of Rs.4.00 Crores by the assessee in that case to UBL, for provisions of technical and management advice and consultancy by which it had received services and intangible benefits by association with UBL, was held to be allowable.

8.3.1. We have heard the rival contentions and perused and carefully considered the material on record including the judicial decisions cited. At the outset, we observe that the payment of Rs.10.00 Crores by the assessee to UBL has not been doubted. It is seen that the assessee has paid this amount of Rs.10.00 Crores to UBL in pursuance of technical and management advisory and consultancy agreement for which the assessee submits it has received services and intangible benefits through its association with UBL such as, purchase of key materials, negotiation with bankers to get term loans at competitive rates, co-ordination with distributors to meet the demand and supply, designing of packing material, supply of imported items like hops/foils, co-ordination with engineers for optimum utilization of plant and machinery and attendant intangible benefits. According to the assessee, this business arrangement has resulted in savings in purchase of various items, price hike for its products with its volume of sales increasing from 649,609 HL in FY 2007-08 to 823,596 HL in FY 2008-09 and thereby reducing its losses.

8.3.2 The contention of the AO after making various observations was that the payment to UBL was excessive and unreasonable and not wholly and exclusively for the business of the assessee and therefore, invoked the provision of Sec.40A(2) of the Act to disallow the payment. The assessee was in the business of manufacture and trading of Beer and

there is no doubt that UBL, its holding company to whom the said payment was made for rendering of technical, management advisory and consultancy services, was a major player in this business. In this factual matrix, the claim of the assessee is that it has got tremendous benefits on account of its association with UBL, in terms of both service and intangible benefits. We find that the assessee had produced before both the AO and the learned CIT(A) details of services rendered by UBL which reasonably demonstrates the business purpose behind its association with UBL and indicated that there is commercial expediency of business in making such payment to UBL. Further, UBL has acknowledged receipt of the amount of Rs.10.00 Crores for technical, management, advisory and consultancy services rendered to the assessee and pays taxes thereon at the maximum marginal rate. As against this, the assessee is a loss making company, and therefore, we find that there is substance in the averments of the learned AR that if this transaction had not gone through, revenue would have been at a disadvantage. In this regard, we concur with the learned CIT(A)'s observation that this transaction between the assessee and the UBL, being tax neutral, both the assessee as well as UBL do not get any tax benefit therefrom and therefore, hold that the AO has not been able to establish in the order of the assessment that there was any tax avoidance plan involved in this transaction. The factual matrix of the case indicate that the assessee paid the sum of Rs.10.00 Crores to UBL for technical, management and consultancy services

received as per the agreement with UBL, the receipt of which UBL has acknowledged as being for technical, advisory, management and consultancy services rendered by it to the assessee. In respect of the issue of commercial expediency of the aforesaid payment of Rs.10.00 Crores to UBL, we are of the view that this has been clearly established in the factual matrix of the case by the various benefits the business of the assessee received (Supra) as laid out above. We do not find merit in the AO's contentions to the contrary the view of the observations of the Hon'ble Apex Court in the case of S.A.Builders (288 ITR 1) (SC), wherein it has been held that revenue could not sit in the chair of a businessman and decide that he is to carry out his business in a particular manner.

8.3.3 The AO had invoked the provisions of Sec.40A(2) of the Act, to make the disallowance of the said payment of Rs.10.00 Crores by the assessee to UBL on the grounds that the said payment was unreasonable and excessive. As per the provisions of Sec.40A(2) of the Act, for making a disallowance there under, the AO should have some justification for doing so based on comparables and benchmarking to establish the existence and extent of the excessive and unreasonableness of the payments. We find from the order of assessment that the AO has not been able to prove that the payment of Rs.10.00 Crores by the assessee to UBL was either unreasonable or that the quantum of payment was excessive and not commensurate with the services rendered to it by UBL.

8.3.4. In the context of the facts and circumstances of the case as discussed above, we have had occasion to peruse the order of the ITAT Chennai Bench of the Tribunal in the case of M/s Empee Breweries Ltd. in ITA No.1295/Mds/2012 dated 14-02-2013 cited by the assessee, and find that a similar issue on similar facts of payment of Rs.4.00 Crores by that assessee to UBL as fees for technical, advisory and management services rendered as per agreement between the parties, being disallowed by the AO as not being for business purposes was considered and held in favour of the assessee at para-18 and 19 thereof as under;

“ 18. We have perused the orders and heard the rival submissions. In the first place, what we notice is that the payment itself was not doubted. Assessee indeed paid a sum of Rs.4.00 Crores to M/s UBL . As per assessee, it had received services and intangible benefits through its association with M/s UBL. Argument of the learned DR is that the payment made was not wholly and exclusively for the purpose of the business of the assessee. Admittedly, assessee was in the business of manufacturing and trading of liquor. There can be no doubt that M/s UBL, to whom the payment was made, was also a major player in this business. In fact, holding company namely M/s Millennium Alcobev Pvt. Ltd. (MAPL) was itself co-owned by M/s UBL along with certain other persons. Therefore, claim of the assessee that it had tremendous benefits on account of its association with M/s UBL cannot be brushed aside. No doubt, assessee had produced some e-mail

communication and an agreement entered with M/s IOC for purchase of furnace oil for justifying the benefits it had received through its association with M/s UBL, before the CIT(A). However, in our opinion, these were at best corroborative evidence and were not stand alone evidence. Assessee had during the course of assessment proceeding produced before the AO details of the services rendered by M/s UBL. In our opinion, even de hors the records produced by the assessee before the learned CIT(A), it could reasonably demonstrate the business purpose behind its association with M/s UBL. Assessee might not have been able to produce before the AO specific evidence, but nevertheless M/s UBL has acknowledged that Rs.4.00 Crores was received by it for services rendered. Nevertheless, it had furnished a workout of its savings due to help of M/s UBL which was also disbelieved by the AO. There might have been lingering doubt in the mind of the AO as to why such amounts were paid to M/s UBL, but in our opinion, a mere suspicion without further evidence would not be a ground for disallowing a claim where actual payments were indeed effected. Further, learned CIT(A) has given a clear finding that the transaction was revenue neutral. M/s UBL had a returned interest income of Rs.80,19,22,970/- on which it had paid tax at maximum marginal rate, as noted by the CIT(A). If the sum of Rs.4.00 Crores was not received by it, tax payable by the said company would have only gone down. As against this, assessee had returned loss of Rs.1.08 Crores and therefore, there is much strength in the argument of learned AR that if the transaction had not gone through,

revenue would only have been at a disadvantage. We cannot say that the reply given by the assessee to the queries made by the AO which has been produced at para-11 above were such that, it called for a disallowance of the amount. Fact of the matter is that assessee paid the sum as per the agreement and receipt thereof was acknowledged by M/s UBL. Such payments were also acknowledged by the recipient as received for the technical, advisory and management fees rendered by them. Hon'ble Apex Court in the case of S.A.Builders L:td (Supra) has held that revenue could not by itself sit in the chair of a businessman and could not insist that every businessman should do his business in such a manner to earn maximum rate of profits. As for the reliance placed by the learned DR on the decision of the Hon'ble Calcutta High Court in Jayshree Tea & Industries Ltd (Supra), in the said case the question was allowability of retrenchment compensation in one of the 21 units run by the assessee, which was closed. Tribunal held it to be not allowable. On assessee's appeal, their Lordship held it be allowable, since expenditure incurred was for making the business which continued after closure of an unit, viable. In our opinion, this case will only support the case of the assessee here. We are therefore of the opinion that learned CIT(A) was justified in deleting the disallowance. No interference is called for.

19. Ground no.3 of the revenue is dismissed”.

8.3.5 We find from a perusal of the aforesaid decision of the Chennai Bench of the ITAT in the case of M/s Empee Breweries Ltd. (Supra) that the facts of that case and the issue involved are similar to the facts of the case on hand and the finding therein in-principle is equally applicable to the facts of the case on hand. Therefore, taking into consideration the facts and legal circumstances of the case on this issue as discussed from para 8 to 8.3.4 of this order (Supra) and following the aforesaid decision of the ITAT Chennai Bench in the case of M/s Empee Breweries Ltd. (Supra), we uphold the decision of the learned CIT(A) in deleting the disallowance made by the AO. Consequently, revenue's grounds at sl.nos.4 & 5 are dismissed.

9. In the result, revenue's appeal for assessment year 2009-10 is dismissed.

Order pronounced in the open Court on the 4th November, 2015.

Sd/-
(VIJAY PAL RAO)
JUDICIAL MEMBER
D a t e d : 04-11-2015
Place: Bangalore
am*

Sd/-
(JASON P BOAZ)
ACCOUNTANT MEMBER

Copy to :

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- 4 CIT
- 5 DR, ITAT, Bangalore.
- 6 Guard file

By order

AR, ITAT, Bangalore