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

BEFORE SHRI P M JAGTAP , AM & SHRI VIJAY PAL RAO, JM

ITA No. 6175/Mum/2011
(Asst Year 2007-08)

SKOL Breweries Ltd Solitaire Corporate Park 10 Unit No. 1021, 2nd Floor Survey No.131A Chakla Andheri Kurala Road Andheri (E) Mumbai 93	Vs	The Asst Commr of Income Tax Range 8(3), Mumbai
(Appellant)		**(Respondent)**

PAN No.	**AAICS2238R**
Assessee by	Shri C S Aggarwal/Aakash Uppal
Revenue by	Smt Sasmita Misra
Dt.of hearing	18th Dec 2012
Dt of pronouncement	**18th JAN 2013**

ORDER

PER VIJAY PAL RAO, JM

This appeal by the assessee is directed against the assessment order dated 29th July 2011 passed u/s 143(3) r.w.s 144C(13) in pursuant to the directions of the DRP u/s 144C(5) of the I T Act for the Assessment Year 2007-08.

2 The assessee has raised the following concise grounds in this appeal.

1. That the order of the assessment dated July 29, 2011 framed on the directions of learned Dispute Resolution Panel ("DRP") under section 144C(5) of the Act is bad both on facts and in law.

1.1 That in framing the order of the assessment, the Learned Assessing Officer ("Ld. AO") has overlooked the declared return in the revised computation of income and as such, various disallowances made as have been made are on misconceived facts and highly arbitrary and unjustified both on the facts and in law.

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2 The Ld. Assessing Officer while framing the instant assessment has erred in making the following additions / disallowances:

2.1. Club Membership Fees treating the same as 'capital expenditure' ₹16,91,442

2.2 Disallowance made under section 40(a)(ia) of the Act in respect of discounts given to distributors by treating the same as 'commission ₹57,01,01,930

2.3 Disallowance made by invoking the provisions of section 40(a)(i) of the Act r.w.s. 9,195 & 200 of the Act in respect of claim of depreciation on Foster's Brand (being an amortization of capital expenditure) and did not represent the sum chargeable to tax so as to invoke the provisions of section 40(a)(i) of the Act - ₹38,35,20,000

2.4 Disallowance made by invoking section 40(a)(i) of the Act and alleging that the amount reimbursed to SABMi1ler Africa & Asia Pty Ltd (an associated company) is 'Royalty' and disregarding the fact that the expenditure was incurred for annual accounting charges for software of Rs 17,52,862 and Rs 23,86,119 for of up- gradation of software, paid by SAB Miller Africa & Asia Pty Ltd. to M/s Pilog and MIs Syspro Pty. Ltd. - ₹41,39,061

2.5 Disallowance of interest under section 36(1)(iii) of the Act alleging diversion of borrowed funds and advancing at a lesser rate of interest to sister group companies during the course of business by way of business and commercial considerations ₹7 48 58 033

2.6.Enhancement to the total income by enhancing Arm's Length Price in respect of royalty (i.e. technology fees) payment to SABMiller Management (IN) By, Netherlands of Rs 31,75,51,028 and Purchase cost of traded goods to SPA Birra Peroni of Rs 4,34,492 - ₹18 06 07

3. That the Ld. AO erred on facts and in law in initiating the penalty proceedings against the appellant under section 271(1)(c) of the Act.

4. That the Ld. AO while computing the assessed income has erred in computing the total assessed income at Rs. 47,75,15,534 by making an aggregate addition of Rs. 121,49,17,586 to the loss declared by the appellant in its revised computation of total income."

3 Ground nos 1 & 4 are general in nature as well as consequential to the main grounds raised in ground no.2. Therefore, no specific finding is required with respect to grounds nos 1 & 4.

3.1 Ground no.3 is regarding initiation of penalty proceedings u/s 271(1)(c) which is immature and therefore, cannot be admitted.

4 Ground no. 2.1 is regarding disallowance of club membership fee.

4.1 The Assessing Officer has noted from the tax audit report that the assessee has paid a sum of ₹ 16,91,442/- towards club entrance fees and subscriptions. Apart from this, the assessee has also paid cost for club services of ₹ 1,90,104/-. The assessee claimed the club membership fee expenses as has been incurred for the purpose of the business of the assessee company and accordingly, considered a allowable expenses in view of the decisions of the Hon'ble jurisdictional High Court in the case of Otis Elevator Co India Ltd vs CIT reported in 195 ITR 652. The Assessing Officer has questioned the allowability of the expenses being capital in nature in view of the decision of the Hon'ble jurisdictional High Court in the case of CIT vs W I A A Club Ltd (Bom) reported in 136 ITR 569 as well as in the case of CIT vs Diners Business Services Pvt ltd reported in 263 ITR 1. The Assessing Officer has also placed reliance on the decision of the Hon'ble Kerala High Court in the case of Framatone Connector Oen Ltd reported in 294 ITR 559 and accordingly the payment for entrance fee and subscription amounting to ₹16,91,442/- has been treated as capital in nature and the same was disallowed and added to the income of the assessee company.

4.2 Before the DRP, the assessee has submitted that the sum of ₹ 16,91,442/- contains both entrance fees and monthly subscription/expenses. The DRP has recorded its observation in para 3.1 that the assessee has not produced the figure separately and the details produced before them are so sketchy that even the locations of the clubs are not disclosed. It was further observed by the DRP that some holiday resorts have been shown as clubs. Since the assessee has not produced the evidence showing monthly subscription and routine bill payments, the DRP has confirmed the disallowance made by the Assessing Officer.

5 Before us, the ld Sr counsel Shri C S Aggarwal has submitted that these expenses have been incurred in the course of business and thus, enabling the assessee company to hold meetings and conferences with important clients. The ld Sr counsel has referred the details of the expenses at page 157 of the paper book and submitted that the expenses incurred by the assessee is on account of entrance fee and subscription to the various clubs. Therefore, the expenses in question do not contain any expenditure which is incurred other than the club expenses.

5.1 The ld Sr counsel has pointed out that the Assessing Officer disallowed similar expenditure for the AYs 2004-05 to 2006-07 which has been deleted by the ld CIT (A) and the revenue has accepted the order of the Commissioner of Income Tax(Appeals) wherein it has been held that the expenses incurred are not capital in nature and therefore, allowable being of revenue character. The Commissioner of Income Tax(Appeals) while allowing the claim of the assessee for the earlier AYs has followed the decision of the Hon'ble jurisdictional High Court in the case of Otis Elevator Co (I) Ltd (supra). Even in the case of WIAA Club Ltd (supra), the Hon'ble High Court has held that membership fee and subscription paid to clubs is revenue in nature and not capital expenditure. Similar view has been taken in the case of Diners Business Service Pvt Ltd (supra) and the Hon'ble Madras High Court in the case of CIT vs Sundaram Industries Ltd reported in 240 ITR 335 as well as the decision of the Delhi Benches of the Tribunal in the case of Delhi Auto0mobiles Ltd vs DCIT reported in 79 ITD 511.

5.2 On the other hand, the ld DR has relied upon the orders of the authorities below.

6. We have considered the rival submissions as well as the relevant material on record. The Assessing Officer, while disallowing the club expenses on the ground of capital in nature, has relied upon the decision of the Hon'ble jurisdictional High Court in the case of W I A A Club Ltd (Bom) (supra). It is to be noted that in the said case the issue before the Hon'ble High Court was regarding the receipt in the hand of club towards the entrance fee received from the Members. The Hon'ble High Court has held that part of the entrance fee which was a commuted value of annual subscription would be the income and the balance would be a capital receipt. Thus, it is clear that the decision of the Hon'ble High Court is only on the point of the revenue receipt or capital receipt in the hands of the club and not on the point of nature of expenditure in the hands of the Members. The amount, which is a revenue expenditure in the hands of one party may not necessarily be revenue receipt in the hand of counterpart.

6.1 Similarly, a receipt which may be revenue in nature in the hand of one party may not be revenue expenditure in the hand of the counterpart. A simple example thus can be that, if the assessee purchases machinery for its business purposes from the manufacturer/trader, the expenditure in the hands of the assessee is capital in nature whereas the receipt in the hands of the manufacturer/trader of the machinery will be a revenue receipt. Similarly, on sale of plot of land held as asset by an individual, the sale proceeds will be capital receipt whereas if the land in question purchases by a developer , the expenditure in the hands of the developer will be revenue in nature.

6.2 The DRP has confirmed the disallowance by making the observations on the point that the assessee has not filed the details showing separately for monthly subscription and some holiday resorts have been shown as club. The details of the

club and the respective fee and other charges are given at page 157 of the paper as under:

Name of Club	**Entrance fee &** subscriptions	**Cost of club service**
Bangalore Club	333,600	166,130
Century Club	317,214	13,891
Gymkhana Club	26,448	
Kamataka Golf Association	51,178	2,414
Karnataka State Lawn Tennis Association	8,100	
Karnataka Golf Club	340,800	
Palms Town and Country Club,	5,290	3,967
Secunderabad Club	8,812	
Wheeler Club	600,000	3,702
Total	**1,691,442**	**1,90,104**

6.3 It is clear from the details that the expenditure is only towards entrance fee, subscription and other services of the club. The Assessing Officer allowed the expenditure incurred for the services availed from the club and has not doubted the payment of the entrance fee and service charges for the club membership. Therefore, we do not find any discrepancy in the details of the expenditure which is towards entrance fee and subscription of member ship and not for any resort.

6.3 We further note that similar disallowance made by the Assessing Officer for the AYs 2004-05 to 2006-07 has been deleted by the Commissioner of Income Tax(Appeals) and the revenue has accepted the order of the Commissioner of Income Tax(Appeals). The Assessing Officer has not brought out on record that there is a change in the facts and circumstances with respect to the claim of the assessee for the Assessment Year under consideration to that of earlier years 2004-05 to 2006-07. Though, principle of res-judicate is not applicable in the matter of income tax, however, rule of consistency has to be followed as the facts are identical. Since there is no difference in the facts and circumstances with respect to

the claim of the assessee for the Assessment Year under consideration vis-à-vis to the Assessment Years 2004-05 to 2006-07 and when the order of the Commissioner of Income Tax (Appeals) has been accepted by the revenue for the AYs 2004-05 to 2006-07, then the claim of the assessee cannot be disallowed for the Assessment Year under consideration.

7 Ground no.2.2 is regarding disallowance on account of sale discount u/s 40(a)(ia) of the I T Act.

7.1 During the assessment proceedings, the Assessing Officer has observed that the assessee has debited its P&L account by an amount of ₹ 9,82,015,742/- on account of 'sale scheme expenses'. On being asked, the assessee furnished the break up of the sale scheme expenses as under:

Particulars of Expenses	**Amount (Rs)**
Volume/Bulk discounts	272,277,039
Cash Discounts	69,867,001
Sales Price Discounts	570,101,930
Special Discount	28,730,571
Commission on sales	41,039,201
Total	**982,015,742**

7.2 The assessee has submitted before the Assessing Officer that the various types of sale scheme which are prevalent in the beer market under which different discounts were given. The Assessing Officer found that as regards the sale price discounts worth ₹ 57,01,01,930/-, the assessee company has nowhere stated that the nature of cost incurred as discount on sale; but it has been mentioned as 'incentives' given to the distributors as and by way of credit notes. The Assessing Officer further observed that cash discount and the volume/bulk discounts were given in the bill itself whereas in the case of the so-called 'sale price discounts, the

assessee issued credit notes to the beneficiaries, who are the distributors of the assessee. Thus, according to the Assessing Officer, the assessee has paid commission to its distributors under the grab of sale price discount in the form of credit notes.

7.3 After examining the distributorship agreement between the assessee and the distributors, the Assessing Officer held that the arrangements made with the clubs, hotels, distributors and retailers etc., as per the Scheme tantamount to transfer of 'commission in kind' and resultantly the payment of ₹ 57,01,01,930/- on account of sale price discounts made by the assessee company is nothing but in the nature of 'commission' only, thereby attracting the provisions of section 194H of the I T Act. Since the assessee has not deducted the TDS on the aforesaid payment, the Assessing Officer accordingly disallowed the claim u/s 40(a)(ia) of the I T Act.

7.4 The DRP has confirmed the disallowance made by the Assessing Officer by observing that the assessee is silent on the issue of the need to give sales discount to the distributors when volume/bulk discounts, cash discounts and special discounts are already being given to the distributors. It was further observed by the DRP that the assessee is also silent on its practice of not giving the sales discount in the sale bills. These sales discounts have been given at varying rates at different times; therefore, the DRP has observed that it can be inferred from the assessee's conduct that the assessee does some kind of performance evaluation of the distributors and accordingly decides to reward them with credit notes described as sales discounts.

8 Before us, the ld Sr counsel has submitted that the assessee has given discounts to the distributors by issuing credit notes and specifically mentioned as 'discount' on the credit notes and not 'incentive' as held by the Assessing Officer by treating the discount as commission. He has further submitted that the arrangement

between the assessee and the distributor is on principal to principal basis. The ld Sr counsel has further submitted that once the product is sold to the distributor, the assessee does not exercise any ownership over it. Accordingly, distributors are at liberty to sell products at their own prices in accordance with the excise laws. Loss, if any, at distributor premises is not to be made good by the assessee. The assessee recognizes the product sold to the distributors as sales in its books and reduces the stock of the goods in hand. Further, the distributor raises invoices to the ultimate customer on an independent basis and using their own unique sales tax registration number. Thus, the sales made by the distributor to the ultimate customer are made as his own property and not on behalf of the assessee. Hence, the element of principle to agency relationship is not present in this case. In support of his contention, the ld Sr counsel has relied upon the decision of the Hon'ble Delhi High Court in the case of Commissioner of Income-tax v. Jai Drinks P. Ltd reported in 336 ITR 383 wherein it has been held the relationship between the assessee and the distributor is on principal to principal basis and no TDS obligation arises u/s 194H of the I T Act.

8.1 The ld Sr counsel has referred various clause of the agreement and submitted as under:

8.1.1 The assessee is engaged in the business of brewing and bottling of beer in India;

8.1.2 The distributor wishes to distribute and sell the products in the territory and the assessee company desires and offers to appoint the distributor as their distributor for handling, storing, sales and onward despatch of products to customers.

8.1.3 The distributor shall purchase the products from the assessee company and prices may be determined between parties from time to time. Further, for any delay in payment by distributor there is interest liability @ 18% p.a

8.1.4 Distributor shall bare the risk and obligation of collection of payment from the market and the same are to account of distributor.

8.1.5 Distributor shall have no claim against the assessee for any loss on account of delay due to shortage of stocks or delay in transit and which are beyond control of assessee.

8.1.6 Distributor shall have warehousing facilities with adequate storage facilities for storing products.

8.1.7 Distributor will incur its own cost and make arrangements for delivery of products.

8.1.8 Distributor shall assume full responsibility and will bear all costs to comply with local rules and regulations and will indemnify assessee company resulting from non compliance of local regulations.

8.1.10 Distributor will be responsible for all costs to be incurred for distribution of products throughout the territory which includes warehousing, salesman salaries, invoicing, quantity discounts etc.

8.1.11 Arrangement between the parties shall be on principal to principal basis.

8.1.12 On termination of the arrangement, the security deposit paid by the distributor will not be refunded and will be adjusted against any damage.

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8.1.13 The assessee company will not be obligated to buy the stocks of products lying with the distributors.

8.2 The ld Sr counsel has then referred clause 2.9 of the agreement with the distributor which has been placed at page 624 of the paper book and submitted that once the product is delivered by the assessee to the warehouse of the distributor, the distributor shall not complaint against the assessee in respect of any loss occurred to it by raising of any delay in delivery by shortage of stock or delay in transit or delay caused by the customer or direct or for other reason beyond the control of the assessee.

8.3 The assessee has also referred clause 2.6 of the agreement and submitted that the distributor is at liberty to sell the products at any price that are not lower than the purchase price and not higher than the distributors selling wroth. The sales made by the distributor shall be at its own risk and all obligations of collection of payment from the market are to the account of the distributor. He has further submitted that the discount allowed by the assessee to the distributor at different rates whereas the commission is paid at uniform rate. The ld Sr counsel has submitted that the discount and commission are separate and whatever amount of commission paid by the assessee has been separately shown and therefore, both cannot be merged. The ld Sr counsel has pointed out that similar expenditure incurred by the assessee on yearly basis has been allowed by the Assessing Officer for the AYs 2004-05 to 2006-07. The sale price discounts were paid to the distributors on receipt of their credit notes and were credited to their accounts. He has referred the details of the distributors to whom the discount of ₹ 57,02,02,930/- was offered during the year and submitted that the discount has been offered to all the distributors across the country.

8.4 The ld Sr counsel has referred the assessment order and submitted that the Assessing Officer has worked out the commission paid by the assessee at 0.2% to 0.3% and observed that no distributor would work for any product or brand of a particular company at such a lower rate of commission; whereas in this type of business, the commission of at least 2 to 4% is being given to the distributors. The ld Sr counsel has submitted that the Assessing Officer has committed an error while computing the rate of commission because the Assessing Officer took the entire sale instead the sale through the agents to whom commission was paid. The sale discount is given only to the distributors; whereas commission was paid to the agent. The ld Sr counsel has submitted that the Assessing Officer calculated the rate of commission by taking into consideration the entire sales at ₹ 13,384,952,487/- whereas the sales through the DCS appointed is ₹ 17,04,409,000/- only and thus, the percentage of commission arrives at 2.41% which is very much within the rate of 2 to 4% as observed by the Assessing Officer. Thus the ld Sr counsel has submitted that the basis on which the Assessing Officer treated the discount as commission, is not sustainable, in view of the factual error committed by the Assessing Officer while computing the percentage of commission.

8.5 The ld Sr counsel has submitted that in the recent decision the Hon'ble Delhi High Court in the case of CIT vs Mother Diary reported in 249 CTR 559 it has been held that the product sold by Mother Diary to the concessionaire on principal to principal basis and therefore, the payment made to the concessionaire cannot be treated as commission for the services rendered and consequently there was no liability to deduct tax.

8.9 The DRP in its direction while upholding the opinion of the Assessing Officer has further observed that the assessee does some kind of performance evaluation of

the distributors and accordingly decides to reward them with credit notes described as sales discount. The ld Sr counsel has submitted that this observation of the DRP is highly imaginative, speculative and is based on no material. He has contended that there is no basis to allege that the assessee does any kind of performance evaluation of the distributors. There is no such clause or condition in the agreement between the assessee and the distributor from which it could be seen that, what had been paid to the distributors was commission and not sale price discount.

8.10 On the other hand, the ld DR has submitted that the assessee has adopted the modus-operandi in dolling out incentives under the nomenclature of 'sale price discounts', which is other than the discounts mentioned in the invoice. The ld DR has further contended that the discount in question has been given by issuing credit notes to the beneficiaries, who are the assessee's distributors; whereas the so-called commission was given at the time of bulk purchase or at the time of making payment; therefore, the ailed discount given to its distributors in the form of credit notes is nothing but commission on sale. There is no explanation by the assessee as to why the credit note was issued for the alleged discounts and why it has not shown in the invoice. The Assessing Officer has examined the various clauses of the agreement between the assessee and the distributors and found that the assessee is giving incentive to the distributors in order to promote its sales. He has further contended that the language in the agreement clearly shows that the relation ship between the assessee and the distributor is in the nature of principal-agent relationship because the agreement put certain qualification to become company's distributor. Further, the agreement defines and restricting the territory of operations of the distributors and therefore, it implies and they have not given any freedom to sell the goods of the assessee in the area falling outside the defined

territory. The distributors have to conduct promotional, marketing advertising and sponsorship activities according to the sales and marketing strategies of the assessee company. Therefore, the distributor functions under the direct supervision and control of the assessee.

8.11 The ld DR has further submitted that the alleged discount given to the distributor has not been passed on to the retainers/customers/or to the end users; therefore, the said payment cannot be treated as discount. She has relied upon the orders of the authorities below as well as the decision of the Hon'ble Delhi High Court in the case of Idea Cellular Ltd reported in 230 CTR 43 and submitted that the Hon'ble High has observed in the said case that the distributors are not free to sell similar products offered by the competitors of the company. The PMA has complied with all the requirements of ICL in respect of invoicing and accounting, maintaining of brand image and providing monthly sales reports return and other information relating to the business. The distributor store the SIM card and recharge coupons in such a way to clearly indicate at all times that the prepaid SIM card/recharge coupons are owned by ICL and the distributors are not allowed to remove, obscure or delete any mark placed on the products. The ld DR has pointed out that as per the terms of the agreement, all these features are similar in the case of the assessee and therefore, the decision of the Hon'ble Delhi High Court in the case of Idea Cellular Ltd (supra) is applicable.

8.12 She has further referred the order of the DRP and submitted the DRP has considered the facts and circumstances of the case and held that from the conduct of the assessee, it can be inferred that the assessee does some kind of performance evaluation of the distributors and accordingly decides to reward them with credit notes described as sales discount.

9 We have considered the rival submissions as well as the relevant material on record. The assessee has debited a total amount of ₹ 98,20,15,742 in the P&L account on account of 'sale scheme expenses'. The details of various items of the expenses have already been given in the foregoing para. No.7.1

9.1 The Assessing Officer has noted that the assessee has given the incentive/benefit of ₹ 57,01,01,930 by way of credit note to its distributors. Since this amount was not part of the invoice as in the case of other discounts given by the assessee; therefore, the Assessing Officer treated the same as commission and consequently disallowed the same by applying the provisions of sec. 40(a)(ia) on the ground that the assessee has violated the provisions of sec. 194H as no tax was deducted at source.

9.2 The assessee has contended right from the beginning that this amount is discounts given to the distributors and therefore, is not subjected to the provisions of sec. 194H. The main contention of the assessee is that the relationship between the assessee and the distributor is on principal to principal and not principal to agent. In support of its contention, the assessee has relied upon the agreement entered into between the assessee and the distributor wherein it has been specifically mentioned that the relationship between the assessee and the distributors is on principal to principal and the distributors under no circumstance will act as an agent of the assessee. Further, the goods once delivered to the distributors, the title of the same is transfer to the distributor and after the delivery of the goods, the assessee shall have no responsibility as regards the bearing of cost for compliance with local rules and regulations as well as any laws, risk or other obligations or further loss of the goods incurred or suffered by the distributor which is not on account of any infringement or passing off action by any third party.

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9.3 So far as the relationship between the assessee and the distributor as described in the agreement, it is made clear that the sale and purchase of the product shall be on principal to principal basis. We quote clause 8 of the agreement as under:

> "8. Legal status of the parties:
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> *1. It is clearly understood between the parties hereto that the sale and purchase of the products shall be on principal to principal basis.*
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> *2. This agreement shall not be construed as a partnership between the parties hereto or constitute or be deemed to constitute the Distributor as an agent of SKO for any purpose whatsoever and the Distributor shall have no authority or power to bind SKOL or to contract in the name of and create any liability against SKOL in any way for any purpose."*

9.4 Since the relationship between the parties, as per the agreement in relation to the sale and purchase of the product is on principal to principal basis and to that extent the decision of the Hon'ble Delhi High Court in the case of Mother Diary reported in 249 CTR 559(Del) is very much relevant.

9.5 However, the issue in the case of the Mother Diary (supra) was regarding the amount being the difference between Invoice price on which the Mother Diary sells milk products to the concessionaires and the sale price at which the concessionaires sells the product to the consumers. Therefore, so far as the amount, which is the difference between the discounted invoice price and MRP at which the concessionaries sells the milk is concerned, the same cannot be treated as commission as held by the Hon'ble Delhi High Court In para 12 as under:

> *"12. The Revenue challenges the aforesaid orders of the Tribunal relying upon s. 194H of the Act. It is not in dispute before us in the present case that there has been no redrafting of the agreements and that the copies of the agreements found during the survey on 9th Dec., 2004 and the agreements produced before the AO in the course of the proceedings which have given rise to the present appeals were the same. There is no reference in the orders passed by the AO under s. 201(1)/(1A) to any change in the terms between*

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the agreements found during the survey and those produced before them in the course of the proceedings under s. 201(I)/(1A). We have to therefore, proceed on the basis of the terms of the agreement as they have been discussed in the orders of the I T authorities as well as the orders of the Tribunal that falls for consideration is whether the agreements between the assessee and the concessionaires gave rise to the relationship of to principal or relationship of principal to agent. On a fair reading of all the clauses of the agreement as have been referred to in the orders of the Tribunal as well as those of the IT authorities, we are unable to say that the view taken by the Tribunal is erroneous. It is a well settled proposition that if the property in the goods is transferred and gets vested in the concessionaire at the time of the delivery then the is thereafter liable for the same and would be dealing with theii1n his own right as a principal and not as an agent of the dairy. The clauses of the agreements show that there is an actual sale, and not mere delivery of the milk and the other products to the concessionaire. The concessionaire purchases the milk from the dairy. The dairy raises a bill on the concessionaire and the amount is paid for. The dairy merely fixed the MRP at which the concessionaire can sell the milk. Under the agreement the concessionaire cannot return the milk under any circumstance, which is another clear indication that the relationship was that of principal to principal. Even if the milk gets spoiled for any reason after delivery is taken, that is to the account of the concessionaire and the dairy is not responsible for the same. These clauses have all been noticed by the Tribunal. The fact that the booth and the equipment installed therein were owned by the dairy is of no relevance in deciding the nature of relationship between the assessee and the concessionaire. Further, the fact that the dairy can inspect the booths and check the records maintained by the concessionaire is also not decisive. As rightly pointed out by the Tribunal the dairy having given space, machinery and equipment to the concessionaire would naturally like to incorporate clauses in the agreement to ensure that its property is properly maintained by the concessionaire, particularly because milk and the other products are consumed in large quantities by the general public and any defect in the storage facilities, which remains unattended can cause serious health hazards. These are only terms included in the agreement to ensure that the system operates safely and smoothly. From the mere existence of these clauses it cannot be said that the relationship between the assessee and the concessionaire is that of a principal and an agent. That question must be decided, as has been rightly decided by the Tribunal, on the basis of the fact as to when and at what point of time the property in the goods passed to the concessionaire. In the cases before us, the concessionaire becomes the owner of the milk and the products on taking delivery of the same from the dairy. He thus purchased the milk and the products from the dairy and sold them at the MRP. The difference between the MRP and the price which he pays to the dairy is his income from business. It cannot be categorized as commission. The loss and gain is of the concessionaire. The dairy may have fixed the MRP and the price at which they sell the products to the concessionaire but the products are sold and ownership vests and is transferred to the concessionaires. The sale is subject to conditions and stipulations. This by itself does not show and establish principal and agent relationship. The supervision and control required in case of agency is missing."

9.6 In the case in hand, so far as the difference of the invoice price on which the assessee has sold the goods to the distributor and the sale price on which the distributor has sold the goods to the retailers or consumer is concerned, the relationship between the assessee and the distributor on principal to principal basis and the decision of the Hon'ble Delhi High Court in the case of Mother Diary (supra) is relevant and applicable.

9.7 However, dispute in the case in hand is not regarding the difference between the invoice price and he sale price; but the same is regarding the amount of incentive/so called discount given by the assessee by way of credit note which is not adjusted or mentioned in the invoice. It is also an undisputed fact that the assessee has shown the sale turnover as per the invoice raised by the assessee and as such this amount of benefit by way of credit note was not reduced from the sale turnover, even for the purpose of sales tax return. The assessee has claimed that the said amount has been given only as a discount to the distributor; whereas the revenue has treated the same as commission paid by the assessee to the distributor; though the action of the Assessing Officer in computing the rate of commission by taking into consideration the entire sale is not justified because the commission amount admitted by the assessee was paid against the sale through agents/distributors only. Therefore, we find substance in the contention of the ld Sr counsel that if the commission has to be taken into consideration against the sale through the agent appointed by the assessee then the percentage of the commission to the sale comes to 2.41% and which is very much within the rate of 2 to 4 % prevailing in the industry as observed by the Assessing Officer.

10 The dispute before us is whether the amount paid by the assessee through credit note is discount or commission.

10.1 So far as the claim of the assessee is concerned that the said amount is discount, we find that as per the distributorship agreement, the assessee sold the products at the price given in the invoice and the distributor is at liberty to sell the products at any price that are not lower than the purchase price and not higher than the distributors selling worth/MRP. Though, as per clause 4.4 of the agreement, the assessee reserves the right to give discount on primary invoicing to the distributor; but with the condition that the same will have to be passed to retailer. It is an undisputed fact that the amount of so called discount, by way of credit note has not been passed on to the retailer. Therefore, the said benefit is not as per the agreement.

10.2 There is no provision in the agreement for such a discount, which is over and above the invoice price; therefore, the present amount claimed as discount given by the assessee to the distributor is not as per the obligations under the agreement.

10.3 The ld Sr counsel for the assessee has relied upon the decision of the Hon'ble Gujarat High Court in the case of Ahmedabad Stamp Vendors Association vs Union of India reported in 176 CTR 193 wherein the Hon'ble High Court took note of the following facts;

(a) The licensed vendor has to pay less the discount at the rate provided in the Gujarat Stamps Supply and Sales Rules 1987.

(b) The said liability of the Stamp Vendor to pay the price less the discount is not dependent upon or contingent to the sale of the stamp paper by the Licensed Vendor.

(c) The licensed vendor would not be entitled to get any compensation or refund of the price if the stamp papers were to be lost or destroyed.

(d) The Gujarat Stamps Supply and Sales Rules themselves contemplate that what the licensed vendor does, while taking delivery of the stamp papers from the Government offices, is purchasing the stamp papers.

10.4 The Hon'ble High Court has observed that if the licensed vendors were mere agents of the Statement Government, no sales tax would have been levyable when the stamp vendors sell the stamp papers to the customers because it would be 'sale' by the Government through the stamp vendors. However, entry 84 has been specifically provided in Schedule I to the Gujarat Sales Tax Act for exempting sale of stamp papers by the licensed vendors. Therefore, it was held by the Hon'ble High Court that it is clear that although the Government has imposed a number of restrictions on the licensed stamp vendors regarding the manner of carrying on the business, the stamp vendors are required to purchase the stamp papers on payment of price less the discount on principal to principal basis and there is no contract of agency at any point of time. The discount made available to the licensed stamp vendors under the provisions of the Gujarat Stamps Supply and Sales Rules 1987 does not fall within the expression 'commission' or 'brokerage' u/s section 194H of the I T Act.

10.5 The Hon'ble Gujarat High Court while arriving at the conclusion has considered various decisions of the Supreme Court as well as High Courts and particularly the decision of the Hon'ble Supreme Court in the case of Bhopal Sugar Industries Ltd vs STO reported in 40 STC 42. The Hon'ble High Court has quoted the observation of the Hon'ble Supreme Court in the said decision as under:

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"The essence of the matter is that in a contract of sale, title to the property passes on to the buyer on delivery of the goods for a price paid or promised. Once this happens the buyer becomes the owner of the property and the seller has no vestige of title left in the property. The concept of a sale has, however, undergone a revolutionary change, having regard to the complexities of the modern times and the expanding needs of the society, which has made a departure from the doctrine of laissez faire by including a transaction within the fold of a sale even though the seller may by virtue of an agreement impose a number of restrictions on the buyer, e.g. fixation of price, submission of accounts, selling in a particular area or territory and so on. These restrictions per se would not convert a contract of sale into one of agency, because in spite of these restrictions the transaction would still be a sale and subject to all the incidents of a sale. A contract of agency; however, differs essentially from a contract of sale inasmuch as an agent after taking delivery of the property does not sell it as his own property but sells the same as the property of the principal and under his instructions and directions. Furthermore, since the agent is not the owner of the goods, if any loss is suffered by the agent he is to be indemnified by the principal. This is yet another dominant factor which distinguishes an agent from a buyer pure and simple. In Halsburys Laws of England, Vol. 1, 4th Edn., in para 807 at p. 485, the following observations are made :

> *The relation of principal and agent raises by implication a contract on the part of the principal to reimburse the agent in respect of all expenses, and to indemnify him against all liabilities, incurred in the reasonable performance of the agency, provided that such implication is not excluded by the express terms of the contract between them, and provided that such expenses and liabilities are in fact occasioned by his employment."*

10.6 After considering the said decision of the Hon'ble Supreme Court, the Hon'ble Gujarat High Court has made a reference to the distinction between the 'commission' and 'discount' as explained in law dictionaries and in judicial pronouncement. The definition of commission as given in the Black's law dictionary that;

> *"the recompense, compensation or reward of an agent, salesman, executor, trustee, receiver, factor; broker or bailee, when the same is calculated as a percentage on the amount of his transactions or on the profit to the principal. This was further elaborated in the decision of the Weiner vs Swales reported in 217 Md 123; as a fee paid to an agent or employee for transacting a piece of business or performing a service."*

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10.7 The discount; in general sense, all allowance or deduction made from a gross sum on any account whatever; in a more limited and technical sense, the taking of interest in advance.

10.8 It was further elaborated as a deduction from an original price or debt, allowed for paying promptly or in cash.

10.9 The Hon'ble Gujarat High Court has also considered the distinction between the commission and discount as explained by the Hon'ble Bombay High Court in the case of Harihar Cotton Pressing Factory vs CIT reported in 39 ITR 594 wherein it has been explained the expression;

> *"commission" has no technical meaning but both in legal and commercial acceptation of the term it has definite signification and is understood as an allowance for service or labour in discharging certain duties such four instance of an agent, factor, broker or any other person who manages the affairs or undertakes to do some work or renders some service to another. Rebate, on the other hand, is a remission or a payment back and of the nature of a deduction from the gross amount."*

10.10 The Hon'be High Court has also considered the decision of the Hon'ble Apex Court in the case of Cromandel Fertilisers Ltd vs Union of India reported in 17 ELT 607 wherein the Hon'ble Apex Court has applied the aforesaid principles and observed that;

> *'the trader discounts given to the dealers by the manufacturer were held to be liable to be deducted from the price charged to the dealers for the purpose of arriving at the excisable value of the goods; but the commissions given to the agents were held to be not deductible from the price for the purpose of arriving at the excisable value of the goods."*

10.11 It is clear from the various decisions as considered by the Hon'ble Gujarat High Court that a discount is given from the gross price and it occur at the instance of sale and purchase between the manufacturer and the distributor/dealer. Whereas the commission is in the nature of refund or compensation for performing

some task or business by one person on behalf of the other and in case of sale and purchase of goods, the commission is accrued at the instance of further sales by the dealer or distributor. Thus, the discount given to the trader or distributor by the manufacturer would be liable to be deducted from the price charged to the dealer or distributor for the value of the goods under the sales tax and excise Act.

11 In the case in hand, the undisputed fact is that the amount of so called discount has not been reduced from the value of price charged by the assessee from the distributor for the purpose of excise and sales tax.

11.1 The Assessing Officer has relied upon the decision of the Hon'ble Delhi High Court in the case of Commissioner of Income-tax v. Idea Cellular Ltd. reported in 325 ITR 148 wherein the Hon'ble High Court has also discussed the definition of commission as well as discount and also the difference between two terms/expression. There is no dispute that there is no necessity for a formal contract of agency it may be implied which could arise from the act and conduct of the parties or situation in which the parties are put as observed by the Hon'ble Supreme Court in the case of Lakshminarayan Ram Gopal and Son Ltd. v. Government of Hyderabad reported in 25 ITR 449.

12 In the case in hand, it is manifest from the records as well as from the facts and circumstances of the case that the benefit/incentive given by the assessee through credit note is certainly not in the nature of discount because the discount is always given at the time of transaction of sale and purchase between the manufacturer and the distributor/dealer and the said amount is required to be reduced from the gross price and therefore, the sale price is always ex-discount.

12.1 On the other hand, the commission is given only after the completion of the task or services or the sale, if it is on sale of products by the distributor or dealer to the retailer or consumers. When the distributor records the purchase price without reducing the amount of so called discount, then the said benefit allowed by the assessee to the distributor, would not partake the character of discount.

12.2 The assessee recognizes the revenue from sale as per invoice/bills at which the goods were sold to the distributor and the amount of so called discount is separately treated as expenditure on account of sale scheme expenses and under specific head 'sale price discount' and accordingly, debited to the P&L account. This clearly brings out the case of the assessee from the ambit of discount. For sales tax purpose also the assessee has shown sale price without reducing such so called discount.

12.3 It appears that the benefit given under the sale scheme expense may be for marketing and sales promotion of the products by the distributor which does not pass on to the retailer or the end user of the products. Thus, the benefit given by the assessee does not percolate to the retailer or to the end user and limit to the distributor cannot be said in the nature or character of 'discount'.

12.4 The dispute in the case in hand is not regarding the income arising due to the difference between the MRP and the price as invoiced to the distributor; but it relates to the incentive given by the assessee in addition to the margin on the purchase and sale of goods. Therefore, even if the relationship between the assessee and the distributor is that of principal to principal, so far as the price and sale of products is concerned, the incentive/benefit given by the assessee to the

distributor is not accruing from transaction of sale and purchase; therefore, cannot be regard as income by way of purchase and sale of product.

12.5 In simple words, when a purchase is made on discounted price, the benefit is called discount; whereas when an incentive or benefit or compensation is given for undertaking of task/job services provided or on sale of goods by one person on behalf of others, then it is called commission.

12.6 As we have already noted that the amount in question paid by the assessee to the distributor is not as per the agreement between the parties; therefore, the said payment is out side the terms of agreement. The agreement contemplates the price of the goods to be mutually agreed by the parties and as per the invoice price by the assessee. Thus, as per the agreement, the invoice price of the goods would be agreed price. The income of the distributor due to the difference between the invoice price and sale price is business income of the distributor and not In dispute before us.

12.7 Section 194H talks about the payment to a recipient which is the income by way of commission or brokerage and does not talk about the relationship between the payer and the payee necessarily be of a principal and agent. The explanation to sec. 194 elaborates the terms commission or brokerage by including any payment received or receivable directly or indirectly a person acting on behalf of another person. Thus, it is clear that the provisions of sec. 194H do not require any formal contract of agency.

12.8 The relationship between the parties depends on the act performed by the parties and facts and situation in which the parties are working.

13 In the case in hand, though the assessee has claimed that the discount was given to the distributor under the sale scheme expenses; however, when this amount is not as per the obligation under the contract, then the assessee was required to produce the relevant records and material in support of its claim that such scheme of giving the benefit/incentive to the distributor was duly approved by the Board of Directors of the assessee company.

13.1 The assessee has failed to produce any material such as the scheme under which the benefit has been given to the distributors. Though the said benefit/incentive is not discount as held in the foregoing paras; however, in the absence of the scheme under which such benefit/incentive was given, it is not possible to give a conclusive finding whether it is commission or not. Accordingly, in the facts and circumstances of the case, we set aside this issue to the record of the Assessing Officer to verify and examine the relevant record as to be filed by the assessee and then to decide this issue as per law.

14 Ground no.2.3 is regarding disallowance in respect of claim of depreciation on Foster's Brand u/s 40(a)(i).

14.1 During the financial year 2006-07 relevant to the Assessment Year under consideration, the assessee has purchased Foster's Brand from Foster's Australia and has capitalised the same in the fixed assets schedule under the head 'trade marks/brands' at ₹ 167,95,92,000/-. The Assessing Officer issued notice to the

assessee to show cause as to why the deprecation on Foster's brand capitalised by it under the head fixed assets should not be disallowed since the assessee company has not withheld the taxes while making the payment to Foster's Australia

14.2 The assessee has contended before the Assessing Officer that the issue regarding the taxability of Foster's brand Intellectual property is pending before the Hon'ble Delhi High Court in the case where the Foster's Australia has challenged the order of the Authority for Advance Ruling (AAR). The Hon'ble High Court has stayed the order of the AAR vide interim order dated 22.9.2008. The Assessing Officer did not accept the contention of the assessee and held that the payment of ₹ 153,40,80,000/- made by the assessee to the Foster's Australia for acquisition of trademarks and the Foster's brand intellectual property, though capitalised by the assessee company in the books of account, the said payment attracting provisions of sec. 195 r.w.s 200 failure of which attracts the provisions of sec. 40(a)(i) of the I T Act. Accordingly, the Assessing Officer has disallowed the claim of depreciation @ 25% amounting to ₹ 38,35,20,000/-.

14.3 Before the DRP, the assessee contended that the Ruling of AAR in the case of Foster's Australia Ltd vs CIT cannot be considered as the same has been stayed by the Hon'ble Delhi High Court. It was further contended that there is no provisions for disallowance of depreciation u/s 40(a)(i) of the I T Act. The DRP has disallowed the claim by observing that since the payment for the asset was purchased by making a illegal payment, its value has to be taken at nil.

15 Before us, the ld Sr counsel has submitted that the provisions of sec. 40(a)(i) do not apply to the capital expenditure. The assessee cannot be penalised under the provisions sec.40(a)(i) of the Act for the failure to deduct tax till the liability of tax

on particular income is crystallised. He has pointed out that the Ruling of AAR, in the case of Foster's Australia Ltd., has been challenged before the Hon'ble Delhi High Court and by the interim order dated 22.9.2008, the Hon'ble High Court has stayed the application of the ruling pronounced by AAR. Since the liability to deduct tax on Foster's brand has still not crystallized as the matter is pending before the Hon'ble Delhi High Court, the assessee cannot be penalised for non deduction of tax u/s 40(a)(i).

15.1 The ld Sr counsel has further contended that the asset is owned by the assessee and the same has been utilised by it and thus, it is eligible to claim deprecation u/s 32(1)(ii) of the IT Act. Even otherwise, as per Explanation 5 to section 32 of the Act, it is obligatory on the part of the Assessing Officer to allow the depreciation whether the assessee has claimed or not. The ld Sr counsel has further contented that even otherwise, no income accrues or is deemed to accrue or arise in India on sale of equipments/trade mark/brand name.

15.2 The ld Sr counsel for the assessee has submitted that in the instant case, the assessee has claimed deduction neither on any interest nor for royalty, fee for technical services or other services chargeable under the Act. The assessee has claimed deprecation by the amount paid to Foster's Australia for purchase of brand being capital asset. Under the provisions of sec. 40(a)(i), the amount paid and claim as deduction is not allowable deduction on the assumption that the said sum was chargeable to tax. But, in the instance case, deduction is being sought by the assessee by way of depreciation and not on capitalised sum of asset. The ld Sr counsel has then submitted that there is a distinction between a claim when made of a deduction of the capitalized sum and the deduction claimed of a sum allowable to it u/s 32(1)(ii) of the Act. In support of his contention, the ld Sr counsel

has relied upon the decision of the Delhi Benches of the Tribunal in the case of SMS Demag (P) Ltd vs DCIT reported in 38 SOT 496 and submitted that the Tribunal has given a finding on an identical issue of applicability of section 40(a)(i) for the claim of deduction u/s 32 of the Act. The Tribunal has held that the provisions of sec. 40(a)(i) are not applicable for the claim of deduction u/s 32 of the Act. Accordingly, the Assessing Officer was not justified in disallowing the claim of deprecation on account of provisions of sec. 40(a)(i) of the Act. The ld Sr counsel has also relied upon the order of the Hon'ble Punjab & Haryana High Court in the case of CIT vs Mark Auto Industries in ITA No.57 of 2009.

15.3 As regards the observations of the DRP that the assessee has purchase the asset by making illegal payment, the ld SR counsel has submitted that the payment has been duly approved by the RBI. Therefore, the observations of the DRP are contrary to the record and without any basis. Non deduction of tax does not make the payment illegal.

15.4 On the other hand, the ld DR has relied upon the order of the Assessing Officer and submitted that as per the provisions of sec. 195 of the I T Act, the assessee ought to have deducted the tax while making the payment to Foster's Australia. The Assessing Officer has already decided the issue of taxability of the amount in India; therefore, the provisions of sec. 40(a)(i) are attracted. She has relied upon the decision of the Chennai Benches of the Tribunal in the case of Frontier Offshore Exploration (India) Ltd vs DCIT, reported in 118 ITD 494 as well as the order of the Mumbai Benches of the Tribunal in the case of Sterling Televisions Asian Region Ltd vs DCIT reported in 99 ITD 91(Mum).

16 We have considered the rival submissions and carefully perused the relevant material on record. The Assessing Officer has disallowed the claim of depreciation on the ground that the assessee has not withheld the tax while remitting the amount despite the ruling of AAR in the case of Foster's Australia Ltd reported 302 ITR 289 whereby it has been held that the said amount is taxable as income in India. The question of taxability of the said payment in the hand of Foster's Australia Ltd is sub-judice before the Hon'ble Delhi High Court in the writ petition filed by Foster's Australia Ltd challenging the order of the AAR. Since the operation of the order of the AAR has been stayed by the Hon'ble High Court till the disposal of the matter; therefore, it is not appropriate to give any finding or expression on the question of taxability of the said amount in India when the issue is sub-judice before the Hon'ble High Court.

16.1 As regards the alternative plea of the ld Sr counsel for the assessee that since the assessee has not claimed the entire amount as revenue expenditure; but has capitalized the same and claimed only depreciation u/s 32(1)(ii); therefore, provisions of sec. 40(a)((i) shall not apply. Section 40(a)(i) contemplates that any interest, royalty, fee for technical services or other sum chargeable under this act, which is payable outside India as it is relevant for the case in hand on which tax is deductible at source under Chapter XVII –B and such tax has not been deducted or, after deduction, has not been paid, the amount of interest, royalty, fee for technical services and other sum shall not be deducted in computing the income chargeable under the head "profits & gains of business or profession". This condition of deductibility has been stipulated u/s 40 notwithstanding anything to the contrary in section 30 to 38 of the Act. Sec. 40 begins with non-obstante clause; therefore, it is an overriding effect t the provisions of sec. 30 to 38 of the I T Act. The question arises

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is whether any amount paid outside India or to the Non Resident without deduction of tax at source and the assessee has capitalized the same in the fixed assets and claimed only depreciation is subjected to the provisions of sec. 40(a)(i) or not ?. We quote the provisions of sec. 40(a)(i) as under:

> ***40.*** *Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",—*
>
> *(a) in the case of any assessee—*
>
> *[(i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable,—*
>
> *(A) outside India; or*
>
> *(B) in India to a non-resident, not being a company or to a foreign company,*
>
> *on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200 :*
>
> ***Provided*** *that where in respect of any such sum, tax has been deducted in any subsequent year or, has been deducted in the previous year but paid in any subsequent year after the expiry of the time prescribed under sub-section (1) of section 200, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.*
>
> *Explanation.—For the purposes of this sub-clause,—*
>
> *(A) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;*
>
> *(B) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;*

16.2 It is manifest from the plain reading of provisions of sec. 40(a)(i) that an amount payable towards interest, royalty, fee for technical services or other sums

chargeable under this Act shall not be deducted while computing the income under the head profit and gain of business or profession on which tax is deductible at source; but such tax has not been deducted. The expression 'amount payable' which is otherwise an allowable deduction refers to the expenditure incurred for the purpose of business of the assessee and therefore, the said expenditure is a deductible claim. Thus, section 40 refers to the outgoing amount chargeable under this Act and subject to TDS under Chapter XVII-B. There is a difference between the expenditure and other kind of deduction. The other kind of deduction which includes any loss incidental to carrying on the business, bad debts etc., which are deductible items itself not because an expenditure was laid out and consequentially any sum has gone out; on the contrary the expenditure results a certain sums payable and goes out of the business of the assessee. The sum, as contemplated under sec. 40(a)(i) is the outgoing amount and therefore, necessarily refers to the outgoing expenditure. Depreciation is a statutory deduction and after the insertion of Explanation 5 to sec. 32, it is obligatory on the part of the Assessing Officer to allow the deduction of depreciation on the eligible asset irrespective of any claim made by the assessee. Therefore, depreciation is a mandatory deduction on the asset which is wholly or partly owned by the assessee and used for the purpose of business or profession which means the depreciation is a deduction for an asset owned by the assessee and used for the purpose of business and not for incurring of any expenditure.

16.3 The deduction u/s 32 is not in respect of the amount paid or payable which is subjected to TDS; but is a statutory deduction on an asset which is otherwise eligible for deduction of deprecation. Depreciation is not an outgoing expenditure and therefore, the provisions of sec. 40(a)(i) of the Act are not attracted on such

deduction. This view has been fortified by the decision of the Hon'ble Punjab & Haryana High Corut in the case of M/s Mark Auto Industries Ltd (supra) in pars 5 & 6 as under:

> *"5. Adverting to questions (ii) and (iii), the issue which arises for consideration is whether the assessee could be disallowed claim for depreciation under Section 40(a)(i) of the Act on the ground that the payments made for technical know-how which had been capitalized, no tax deduction at source has been made thereon. The Tribunal while accepting the plea of the assessee, in para 3, had noticed as under:*
>
> > *"3. Ground no.4 is against deletion of an addition of Rs6,88,1751- made by the AO on account of deduction of depreciation on technical know-how as the assessee failed to deduct tax in accordance with the provision contained in section 40(a)(i). The finding of the learned CIT(A) was that the assessee had incurred, expenditure by way of technical know-how, which was capitalized amount as made in the return of income. Since the assessee had not claimed deduction for the amount paid, the provisions contained in section 40(a) (i) were not attracted. The learned DR could not find any fault with this direction of the CIT(A) also although she referred to page 4 of the assessment order, where it was mentioned that the tax deducted in respect of the payment was made over to the Government in the subsequent year and, therefore, depreciation could not be deducted on the capital expenditure incurred by the assessee. In reply, the learned counsel pointed out that the expenditure by way of technical knw-how was capitalized and it was not claimed as revenue expenditure. Therefore, there was also no reason to disallow depreciation on such capitalized amount as the aforesaid provision does not deal with deduction of depreciation. Having considered arguments from both the sides, we are of the view that there is no error in the order of the learned CIT(A) which requires correction from us. Thus, this ground is also dismissed."*
>
> *6. Learned counsel for the revenue was unable to substantiate that in the absence of any requirement of law for making deduction of tax out of the expenditure on technical know how which was capitalized and no amount was claimed as revenue expenditure, the deduction could be disallowed under Section 40(a)(i) of the Act. Accordingly, no infirmity could be found in the order passed by the Tribunal which may warrant interference by this Court. Thus, both the questions are answered against the revenue and in favour of the assessee."*

16.4 In view of the above discussion as well as following the decision of the Hon'ble Punjab & Haryana High Court, we decide this issue in favour of the assessee and against the revenue.

17 Ground no.2.4 is regarding disallowance for not withholding of taxes on payment made on account of license fees u/s 40(a)(i) of the Act.

17.1 The assessee has made payment of ₹ 41,39,061/- to SAB Mille A&A(Pty) Ltd, which is a group company towards Syspro License Fees. The assessee was asked to show cause as to why the expenditure incurred by it on the payment of Syuspro License fees should not be disallowed as the assessee has not withheld the tax on the said payment. In response, the assessee submitted that the payment made by it does not fall within the definition of 'royalty' as defined u/s 9(1)(vi) of the Act. The Assessing Officer did not accept the explanation of the assessee and held that the payment of ₹ 41,39,061/- made by the assessee to the group company namely SAB Miller A&A)(Pty) Ltd towards Syspro License fee is royalty and thereby attracting the provisions of sec. 195 r.w.s 200 failure of which attracts the provisions of sec. 40(a)(i) of the Act. Accordingly, the Assessing Officer disallowed the said amount of ₹ 41,39,061/- u/s 40(a)(i) of the Act.

17.2 The ld Sr counsel for the assessee has submitted that the payment made by the company is only for use of copyrighted article and no copyright has been transferred to the assessee. Accordingly, payment made by the company is on account of Syspro License fee does not come under the purview of 'royalty' as per DTAA between India and South Africa.

17.3 The ld Sr counsel has further contended that the expenditure in question was annual charges for up-gradation of syspro accounting software. Thus, the assessee incurred expenditure by way of payment of license fee paid to M/s SAB Miller A&A (Pty) Ltd. Thus, the expenditure incurred for accessing the syspro accounting

software, report generation charges in syspro, customizing suspro so as to enable electronic fund transfer facility used by the assessee.

17.4 The ld Sr counsel has further submitted that even if for the sake of arguments, the said expenditure is treated as royalty, then the same does not fall under Explanation 2 to sec. 9(1)(vi) as mentioned in Clause A of explanation to section 40(a). The ld Sr counsel has referred Explanation 2 to section 9(1)(vi) and submitted that the payment in question does not fall in any of the categories provided under the Explanation 2; because the payment is for computer software. The ld Sr counsel has thus, submitted that though it is not admitted that the said payment is royalty; however, the same otherwise falls under Explanation 4 to sec. 9(1)(vi); the payment in question does not fall under clause (2) of section 9(1)(vi). Therefore, the provisions of sec 40(a)(i) does not apply to the said payment in view of Explanation to the said section wherein it has been specifically mentioned that royalty shall have the same meaning as in the Explanation 2 to sub.sec. (1) of sec. 9 . In support of his contention, the ld Sr counsel referred the decision of the Tribunal in the case of Sonata Information Technology vs DCIT vide dated 7.9.2012 in ITA No.1507/Mum/2012 and submitted that an identical issue has been considered and decided by this Tribunal by holding that when the Explanation 4 of sec. 9(1)(vi) has not been incorporated in the definition of royalty as provided under Explanation to sec. 40(a)(ia), then the payment falls under the Explanation 4 of sec 9(1) (vi) would not attract the provision of sec. 40(a)(ia) of the Act.

17.5 Alternatively, the ld Sr counsel has submitted that since the payment was made to the group company as reimbursement of expenses incurred by the group entity; therefore, there is no element of mark-up or income in the said payment. In support of his contention, he has relied upon various decisions wherein it has been

held that reimbursement of expenditure on the cost to cost basis without income element embedded is not subjected to tax deduction u/s 195 of the Act.

17.6 On the other hand, the ld DR has submitted that the assessee has made the payment towards transfer of rights including the grant of license; therefore, the payment would be in the nature of royalty u/s 9(1)(vi) of the Act. The ld DR has further submitted that the payment was made by the assessee for Syspro License; therefore, the same is for right to intellectual property embedded in the said software. She has relied upon the orders of the authorities below and submitted that the Assessing Officer has placed reliance on the decision of the Hon'ble Gujarat High Court in the case of Commissioner of Income-tax v. Ahmedabad Manufacturing and Calico Printing Co. reported in 139 ITR 806 as well as the decision of the Hon'ble Calcutta High Court in theca e of N V Phillips v CIT reported in 172 ITR 521 wherein it has been held that the dictionary meaning of the term 'royalty' including the payments periodic or at a time for use by one person for certain exclusive rights belonging to another person. Therefore, the payment for use of specialised knowledge is in the nature of royalty. The ld DR has further submitted that since the recipient has business connection in India; therefore, both the income arising in India as well as outside India is taxable in India. The ld DR has referred the order of the DRP and submitted that the software is an intellectual property right and the assessee made periodical payments for use and maintenance to the owner of the right, therefore, the said payment is in the nature of royalty.

18 We have considered the rival submissions as well as the relevant material on record. First we will take up the alternative plea of the ld Sr counsel for the assessee that since the payment is towards reimbursement of the cost and no element of

income is embedded in the same; therefore, the assessee is not liable to deduct tax as per sec. 195 of the Act.

18.1 It is pertinent to note that the expenditure is not for any payment to the group company towards the services or goods provided by the group company; but is for computer software taken from a third party and the payment made by the assessee is routed through its group company. Thus, if the contention of the assessee is accepted, then the provisions of sec. 40 can be circumvented by simply following the modus-operandi to make the payment to the third party not directly but through intermediary and giving the colour of reimbursement of the cost to the intermediary.

18.2 We have carefully perused the details of reimbursement to the group company namely SAB Miller A&A)(Pty) Ltd as well as the invoice and found that the payment made by the assessee to its group concern is nothing but the payment to third party routed through group concerned. Therefore, we do not find any substance or merit on the alternative contention of the assessee that the said payment is only reimbursement and not subjected to tax u/s 195.

19 Now, we turn to the main contention raised by the ld Sr counsel for the assessee that since the payment for computer software which does not fall under the definition of royalty as provided under Explanation 2 to sec. 9(1)(vi) and therefore, the provisions of sec. 40(a)(i) are not applicable on the said payment in view of the Explanation 2 to sec. 40(a)(i) of the Act. We find force in the contention of the ld Sr counsel for the assessee that the provisions of sec. 40(a)(i) applicable in respect of the payment, inter-alia royalty defines under Explanation. As per clause A of Explanation to sec. 40(a)(i), the royalty shall have the same meaning as in the Explanation 2 to section 9(1)(vi).

19.1 We confined ourselves to the definition and meaning of the term royalty because the Assessing Officer has treated the payment as in the nature of royalty as per provisions of sec. 9(1)(vi) and not for fee for technical services. As it is clear from the Clause A of Explanation to sec. 40(a)(i), the meaning of the royalty for the purpose of sec. 40 has to be taken as given in the Explanation 2 to sec 9(1)(vi). We quote Explanation 2 to sec. 9(1)(vi) as under:

> ***[Explanation 2.—****For the removal of doubts, it is hereby declared that "business connection" shall include any business activity carried out through a person who, acting on behalf of the non-resident,—*
>
> *(a) has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident, unless his activities are limited to the purchase of goods or merchandise for the non-resident; or*
>
> *(b) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident; or*
>
> *(c) habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident:*
>
> ***Provided*** *that such business connection shall not include any business activity carried out through a broker, general commission agent or any other agent having an independent status, if such broker, general commission agent or any other agent having an independent status is acting in the ordinary course of his business :*
>
> ***Provided further*** *that where such broker, general commission agent or any other agent works mainly or wholly on behalf of a non-resident (hereafter in this proviso referred to as the principal non-resident) or on behalf of such non-resident and other non-residents which are controlled by the principal non-resident or have a controlling interest in the principal non-resident or are subject to the same common control as the principal non-resident, he shall not be deemed to be a broker, general commission agent or an agent of an independent status*

19.2 It is clear from the above Explanation that the payment for transfer of any right to use or right to use of computer software does not fall within the meaning of royalty as provided under Explanation 2 to sec. 9(1)(vi) of the Act. Rather, the

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payment for transfer of right for use or right to use of computer software has been defined as royalty under Explanation 4 as under:

> ***[****Explanation 4.—For the removal of doubts, it is hereby clarified that the expression "through" shall mean and include and shall be deemed to have always meant and included "by means of", "in consequence of" or "by reason of".*

19.3 An identical issue has been considered by the Coordinate Bench of the Tribunal in the case of Sonata Information Technology Ltd vs DCIT in ITA No. 1507/Mum/2012 in para 30 as under:

> *"30. However, there are two more issues which require further examination. One is that the Hon'ble Special Bench of the ITAT considered the issue of section 40(a)(ia) in the case of Merilyn Shipping & Transports vs. ADCIT (16 ITR Trib. (1) Viz)in ITA No.477/Viz/2008 for assessment year 2005-06 dated 29.3.2012 and held that the word "payable" used in the section refers to only the amount outstanding as on 31st March and not the amount paid by the date. The learned Counsel placed on record the details of the outstanding amount as under:*
> *Details of amount paid and payable as on 31/03/2008 for purchase of software in respect of the amounts disallowed under section 40(a)(ia) of the I.T. Act 1961:*

S.No	***Name of the party***	***Total amount disallowed (excl. of local taxes***	***Paid before 31.03.2008 (excl. local taxes)***	***Payable as on 31.03.2008 (excl. local taxes)***
1	*Oracle India Pvt. Ltd*	*1,114,471,630*	*768,167,218*	*346,304,412*
2	*BEA systems India Private*	*108,922,200*	*93,631,520*	*15,290,680*
3	*IBM India Private Limited*	*436,492,087*	*428,949,124*	*7,542,963*
4	*Ingram Micro India Pvt Ltd*	*176,188,548*	*149,500,880*	*26,687,668*
5	*Redington India Ltd*	*60,107,319*	*60,103,840*	*3,479*
6	*Hewelett Packard India*	*38,406,545*	*22,986,317*	*15,420,228*
7	*Others*	*63,323,265*	*47,018,483*	*16,304,782*
	Total	***1,997,911,595***	***1,570,357,383***	***427,554,212***

> *As can be seen from the above the total amount paid to various software developers is `.1,99,79,11,595/- out of which `.1,57,03,57,383/- was paid before 31-03-2008. The outstanding amount was only `.42,75,54,212/-. Subject to verification of the amounts, in case the payments are considered as royalty covered by section 9(1)(vi), then the disallowance under section 40(a)(ia) can only be restricted to the amount outstanding as payable as on*

31/03/2008 as per the principles laid down by Special Bench in the case supra."

19.4 In the absence of any contrary decision brought before us, we follow the decision of the Coordinate Bench of this Tribunal and accordingly held that when the royalty for transfer of right to use of computer software does not fall under Explanation 2 to sec. 9(1)(vi); but the same falls under Explanation 4 to sec. 9(1)(vi), then in view of the Explanation to sec. 40(a)(i), the said amount cannot be disallowed under the provisions of sec. 40(a)(i) of the Act.

20 Ground no.2.5 is regarding disallowance of interest for diversion of funds to the group companies u/s 36(1)(iii) of the I T Act.

20.1 The Assessing Officer has noted from the Schedule 10 of the financial statements that there is a closing balance as on 31.3.2007 in respect of the advances given to its group companies as under:

i) MBL Investment Ltd ₹ 11,07,85,131/-
ii) SAB Miller India Ltd ₹ 71,62,470/-

20.2 The Assessing Officer further noted that during the year, the assessee has obtained fresh loans to the tune of ₹ 133,43,30,625/- from various banks. The Assessing Officer has observed that the assessee has borrowed funds at a higher rate of interest whereas it has charged merely 6% to its group companies on the funds diverted to them without proving the business expediency of advancing such loans. Accordingly, the proportionate amount of interest worked out at ₹. 7,48,58,033/-was disallowed.

20.3 Before us, the ld Sr counsel for the assessee has submitted that the advances have been made by the assessee on account of commercial expediency as the funds have been utilized by its group concern for their business purposes. The

assessee has charged interest on the amount of advances given by it to SAB Miller (A&A) Pty Ltd. As regards the advance MBL Investment Ltd, major portion has been repaid by it to the assessee. Further, the assessee charged interest on the balance amount receivable from MBL Investment Ltd. The ld Sr counsel has further submitted that interest paid on the borrowed funds in the preceding years has been allowed by the Assessing Officer in the earlier years and when there is no change in the circumstances, then, the Assessing Officer cannot disallow the interest for this year. He has further submitted that the amount advanced to the group concern was out of mixed funds and therefore, it cannot be presumed that the said transfer was out of borrowed funds. The Ld Sr counsel has referred the schedule to the financial statements giving the details of loans and advances as well as the details of interest on loans. The ld Sr counsel has submitted that in the case of MBL Investment Ltd, the balance as on 31.3.2007 stood reduced from ₹. 126,96,71,422/- to ₹ 11,07,85,131/- which shows that during the year the advances was recovered and therefore, there is a reduction in the advances given.

20.4 As regards SAB Miller India Ltd ,the advance was given to enable them to discharge their liabilities and for making the payment as filing fee with the Registered of Companies and other business expenses. Therefore, the said advance was for the purpose of business and in view of the decision of the Supreme Court in the case of SA Builders reported in 288 ITR 1 when the amount was given for the purpose of the business of the subsidiary company and the Hon'ble Supreme Court has held that no business man needs to be compelled to maximise his profit and the authorities should put themselves in the shoes of the assessee and consider what a prudent businessman would do.

20.5 The ld Sr counsel has submitted that there are loans taken during the AY 2003-04 and the Tribunal has set aside the issue to the record of the Assessing Officer and in the giving effect order, the AO did not disallow any interest. Therefore, when the AO has not disallowed any interest as finally accepted the claim of the assessee for the AY 2003-04, then in the similar circumstances for the AY under consideration no disallowance can be called for.

20.6 The ld Sr Counsel has further contended that when the advance has not been given from the borrowed funds as no nexus between the borrowed funds and the advances given by the assessee to the group companies, then it cannot be presumed that such advance was given out of borrowed funds. He has relied upon the decision of the Hon'ble Karnataka High Court in the case of Commissioner of Income-tax v. Sridev Enterprises reported in 192 ITR 165 and submitted that the calculation has been made by the Assessing Officer as per the Annexure C on net basis; whereas the table would show opening debit balance was at ₹ 126,96,71,420/- whereas the interest has been disallowed by adopting the balance which are lower than the said sum; therefore, when the balance is reduced, no disallowance can be made.

20.7 On the other hand, the ld DR has submitted that there is no dispute that the assessee has taken fresh loan during the year to the tune of ₹. 1,36,362,625/- and the assessee has also advanced funds to its group concerns at lower rate than the rate on which the assessee has taken the loan; therefore, the Assessing Officer has calculated the amount on differential rate of interest on the amount advanced by the assessee to its sister concern. The assessee could not prove the business expediency. She has further submitted that the Assessing Officer has pointed out in the assessment order that the sister concerns were making profits as the assessee has

returned the loss, which clearly shows that there is no business expediency in giving advances to the sister concern which resulted loss incurred by the assessee.

21 We have considered the rival submissions as well as the relevant material on record. The Assessing Officer disallowed a sum of ₹. 7,48,58,033/- on account of interest because the assessee is paying higher interest on the loans taken from the bank whereas the assessee has diverted the funds to its two group companies namely MBL Investment Ltd & NBI and SAB Miller (A&A) Pty Ltd., and charged merely 6% of interest from these companies. Thus the differential interest on the diverted funds given to the group companies has been calculated by the Assessing Officer as per Annexure C of the assessment order.

21.1 The assessee has mainly contended that the balance of diverted funds given to MBL Investment Ltd ., is reduced; therefore, it cannot be presumed that the borrowed funds has been diverted to the group companies. We find that there is an opening outstanding balance of advance given to MBL Investment Ltd at ₹. 121,85,23,943/-. Therefore, it is clear that the said amount was not diverted during the year under consideration; but its stands as balance brought forward from the earlier years.

21.2 As it is clear from the order of the earlier year that the Assessing Officer has not disallowed any interest expenditure on this account while passing the giving effect order in pursuant to the order of this Tribunal; therefore, as far as the opening balance is concerned, no disallowance of interest is called for. However, we note that during the year, the outstanding balance as noted by the Assessing Officer on June 2006 and Sept 2006 as well as Nov 2006 was increased and therefore, only the differential amount which was advanced by the assessee during the year under

consideration can be taken into consideration for disallowance of interest, if the same has been given out of the borrowed funds.

21.3 There is no dispute that during the year under consideration the assessee has borrowed a sum of Rs. 133,43,30,625/-; but it is not clear whether the said borrowed fund has been directly utilized by the assessee for advance loans to the group companies at lower rate. If the assessee is having other funds, apart from the borrowed funds, when the additional amount was advanced to the group companies during the year under consideration, then it cannot be said that the borrowed fund was used for giving advance to the group companies at lower rate of interest.

21.4 It is also manifest from the records that the closing balance of advance given to MBL Investment Ltd has reduced drastically to ₹ 11,07,85,133/-; therefore, ultimately the assessee has received back the amount from the group concerns and the closing balance is less than the opening balance which means no disallowance on account interest can be made either on the opening balance or on the closing balance which is less than the opening stock. Therefore, if any disallowance on account of interest at all can be made, the same can be made only to the extent of the amount of advance given by the assessee during the year under consideration and only to the extent of the period for which, the said advance remains with the group concerns because, finally the closing balance is less than the opening balance. No record or material has been produced by the assessee before us to show that the advance was given to the group companies for commercial expediency; therefore, in the absence of any material to substantiate the claim of the assessee mere submission cannot be accepted. The Assessing

Officer is directed to reconsider this issue after taking into consideration the relevant facts and observations.

21.5 As regard the advance to SAB Miller (A&A) Pty Ltd., it is clear from the Annexure C that the opening balance was negative of ₹ 5,03,185/- and the closing balance was at ₹. 71,62,471/- therefore, it is discernible from the records that the assessee has advanced to the extent of closing balance to the group companies; though the different amounts were advanced at different point of times for which the Assessing Officer has calculated the interest.

21.6 However, this issue has not been examined on the aspect whether the assessee was having its own sufficient funds other than the borrowed funds to advance these amounts to the group companies namely M/s SAB Miller (A&A) Pty Ltd., and M/s MBL Investment Ltd. Hence, this issue is set aside to the record of the Assessing Officer with the direction to examine the issue by taking into account all the relevant facts and availability of the assesse's owned funds as well as the above observations. Accordingly, this ground is partly allowed for statistical purpose.

22 Next ground is regarding Transfer Pricing adjustment on account of ALP.

22.1 The assessee is engaged in the manufacturing and marketing of beer in Indian market. The assessee is using technical know-how provided by SAB Millers Management for manufacturing of beer. During the financial year 2006-07 relevant to the assessment year under consideration, the assessee entered into the following international transactions with its Associated Enterprises (AEs)

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Sl No.	Particulars	Amount	Name of the AE
1	Payment of License fee	31,75,51,028	SAB Miller Management (IN)BV
2	Purchase of traded goods	4,34,492	SAP Birra Peroni
3	Cost reimbursements payable	1,46,52,856	SAB Miller Plc, SAB Miller Asia & Africa BV and SAB Miller Finance BV
4	Cost reimbursements receivable	2,09,57,497	SAB Miller Plc, SAB Miller Asia & Africa BV and SAB Miller Finance BV

22.2 The Assessing Officer made a reference u/s 92CA(1) of the I T Act to the TPO on 3.7.2009 for determination of the ALP. Consequently, the TPO vide order passed u/s 9CA(3) dt 29th Oct 2010 has made an adjustment of ₹. 18,06,07,120/- to the ALP in relation to international transactions of royalty payments entered into by the assessee with the AE. In the TP study, the assessee has adopted CUP method as most appropriate method for benchmarking the international transactions relating to the payment of license fee, cost reimbursement payable and cost reimbursement receivable. The assessee has adopted TNMM method for the benchmarking its international transactions in relation to the purchase of traded goods. The TPO rejected the CUP method adopted by the assessee in relation to license/royalty and adopted the TNMM method as most appropriate method for benchmarking the transactions by selecting its own comparables.

23 Before us, at the outset the ld Sr counsel has submitted that in the AY 2008-09 and 2009-10, the CUP method adopted by the assessee has been accepted by the TPO being the most appropriate method for determination of the ALP in relation to the international transactions on the payment of royalty. Therefore, the ld Sr counsel has submitted that when the cup method was accepted as the most

appropriate method in the subsequent year, then why it should not be accepted for the year under consideration.

23.1 The ld Sr counsel has further submitted that the TPO has erred in aggregating the transactions of the assessee for the purpose of determining of ALP; whereas as per the TP guidelines and OECD guidelines as well as, as held in various decisions that the ALP should be determined on separate international transactions on segment wise. The ld Sr counsel has further submitted that the international transactions of the assessee constitute only 3.9% of the total operating cost; Hence, the transactions cannot be aggregated for the purpose of determination of ALP. The ld Sr counsel has further contended that as per the FDI policy, automatic approval is granted to all industries for foreign technical collaboration agreement, if the royalty payment is limited to 5% for domestic sales and 8% for export sales. The assessee has paid royalty of ₹. 31,75,51,028/- as computed at 5% of net sales (-) standard bought out components and landed cost of the imported goods. Thus, the payment of royalty by the assessee is at ALP as within the range of the payment as per FDI policy for automatic approval.

23.2 The ld Sr counsel has emphasized that the method adopted by the TPO and aggregation of the transactions cannot be accepted as most appropriate method in relation to the payment of royalty because the TPO has not compared the percentage of payment on the gross sales. The earning of profit may be result of many other factors such as administrative cost, employee cost; therefore, principle determined by the TPO is erroneous; because TNMM is the not most appropriate method. Further, the transaction by transaction analysis is required to be done and only international transactions are required to be tested. In support of his contention, he has relied upon the various decisions of the Tribunal and submitted

that it is settled proposition that the international transaction should be decided on the basis of analysis carried on transaction by transaction separately. The aggregation of different business activity as held by the Tribunal is not appropriate and the ALP principle should be applied on transaction by transaction basis.

23.3 The ld Sr counsel has further pointed that the royalty paid by the assessee @ 2.5% on gross sale or 5% on sale as per the agreement; therefore, even the rate of royalty on gross sales is substantially less in comparison to the royalty paid by the comparables as selected by the assessee in the subsequent years. The ld Sr counsel has also submitted that the trading transaction, which is very negligible, should have been benchmarked separately by using TNMM method and after giving adjustment. The assessee has also entitled for benefit of + - 5% as provided under the law.

23.4 On the other hand, Shri Ajeet Kumar Jain, the ld CIT-DR has submitted that the assessee is manufacturing and selling beer. The adjustment was made by the TPO with respect to two international transactions namely license fee/royalty and purchase of goods. The ld DR has referred TP study of the assessee and submitted that the assessee has relied upon the FDI policy vide Press Note no.9 of 2000 of dated 8th Sept 2000 for bench marking of ALP in relation to royalty payment. In fact the assessee has not used any method as prescribed under the I T Act and Rules. Therefore, it is wrong to say that the assessee has adopted CUP method for the purpose of bench marking its royalty payment. Since the assessee has not provided the relevant data in respect of uncontrolled transactions comparables to the international transactions of the assessee; therefore, the cup method cannot be considered as the most appropriate method in the absence of data. In support of his contention, the ld DR has relied upon the decision of the Mumbai Benches of the Tribunal in the case of Cobat India vs DCIT vide order dated 31.5.2011 and

submitted that the Tribunal has observed that the cup method cannot be regarded as most appropriate method for determining ALP of the royalty paid by the assessee to USA base AE as there is no data available in respect of uncontrolled transactions which are similar or at least closely similar to the transactions of the assessee with its AE.

23.5 As regards the reliance placed on the Press Note no. 9 of 2000 by the Ministry of Commerce and Industry in relation to FDI policy and permitting the remittance of the amount not exceed 5% of domestic sale and 8% of export sales towards the payment of royalty outside India, the ld DR has submitted that the ALP has to be computed as per the provisions of the I T Act and Rules. He has referred rule 10B(1)(a) and submitted that the rule prescribed that the price paid by the assessee is required to be compared with the price paid in a comparable uncontrolled transactions subject to some adjustments for difference.

23.6 The ld DR has also referred the OECD Transfer Pricing Guidelines 2010 and submitted that as per the TP guidelines, the price charged in a controlled transaction is compared to the price charged in a comparable uncontrolled transaction in comparable circumstances The ld DR has further contended that the assessee has not compared the price of controlled transactions. The assessee has merely stated that since the payments are within the statutory limits by the Govt of India for the payment of royalty, such payments by the assessee meet the ALP standard which is as per the provisions of law. Such standard of the assessee is not in conformity with the provisions of law. The purpose of press note or approvals is not to create a benchmark for the purpose of Indian transfer pricing regulations. The approval is essentially concerned with the outflow of the foreign exchange and not with the benchmarking exercise which is the requisite of the transfer pricing

regulations. In support of his contention, he has relied upon the decision of the Hon'ble Delhi High Court in the case of Nestle India Ltd reported in 337 ITR 103 wherein the Hon'ble High Court has observed that the Tribunal is not correct in observing that since the permission is given by the RBI, the reasonableness and genuineness of the expenditure could not have been gone into by the Assessing Officer.

23.7 The ld DR has also relied upon the decision of the Ahmedabd Benches of the Tribunal in the case of M/s Bisaza India Pvt Ltd wherein the Tribunal has held that the TPO has erred in computing the ALP in respect of the payment of royalty by relying the Press Note no.9 of 2000. Thus, the ld DR has submitted that the Press Note which allowed the outflow the foreign exchange is not relevant for the purpose of determination of ALP as per IT Act and therefore, no reliance can be placed on the said press note. Thus, the ld DR has submitted that when the assessee has not furnished the data in relation to comparable uncontrolled transactions, then the CUP method cannot be considered as the most appropriate method.

23.8 The ld DR has filed a copy of Standard Industrial Classification (SIC) code List and submitted that even for the AYs 2008-09 and 2009-10, the assessee has not selected the correct comparables which are in the same business and deals with the same product.

23.9 In rebuttal, the ld AR has submitted that at the time of preparing the TP study for the AY under consideration, the relevant data was not available in the public domain though subsequent year data was available and therefore, the assessee furnished the same and the revenue has not disputed the cup method as the most appropriate method for determination of the ALP in respect of royalty payment.

24 We have considered the rival submissions as well as the relevant material on record. There is no dispute that the assessee did not furnish the comparable data in respect of uncontrolled transactions which are similar to the transaction of the assessee as to that of AE. The assessee has merely relied upon the Press Note no.9 of 2000 issued by the Ministry of Commerce and Industry in respect of FDI policy allowing the percentage of royalty in foreign exchange.

24.1 We are in agreement with the contention of the ld DR that the pres note issued regarding FDI policy and prescribing the percentage of the royalty to the sales allowed under automatic route and cannot substitute as ALP to be determined under the provisions of the Act and Rules. FDI policy permitting certain percentage of payment of royalty is only for remittance of the amount in foreign exchange and therefore, such permission given in an entirely different context and purpose cannot be considered as relevant for determination of the ALP under I T Act.

24.2 The Hon'ble Delhi High Court in the case of Nestle India Ltd has held that the purpose of such permission is given by the RBI is totally different . The RBI is only concerned with the foreign exchange and, therefore, would look into the matter from that point of view. The RBI, at the time of giving such permission would not keep in mind the provisions of the I T Act and that is the function of the income tax authorities and, cannot be validly go into such an issue.

24.3 Similarly view has been taken by the Ahmedabad Benches of the Tribunal in the case of Bisaza India P Ltd (supra). When a proper mechanism is provided under the provisions of the I T Act and Rules for determination of the ALP, then the approval by other than the I T Authorities, for the purpose of remittance/outflow of

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the foreign exchange, does not ipso facto, partake the character of ALP, which has to be determined as per TP regulations. Hence, we do not find any substance or merit in the assesse's stand that when the payment of royalty is within the prescribed limit of press note no.9 of 2000 FDI policy, the same is at ALP.

24.4 As regards the adjustment made by the TPO by determining the ALP; since the assessee did not furnish the relevant data of comparables transactions and TPO itself has selected the comparables which are as under:

1	Blossom Industries Ltd	Prowess	12.62%
2	Champagne Indage Ltd	Prowess	25.09%
3	Empee Distilleries Ltd	Prowess	4.08%
4	Jagtjit Industries Ltd	Prowess	-1.39%
5	Mohan Meakin Ltd	Prowess	0.53%
6	Radico Khaitan Ltd	Prowess	6.85%
7	Shaw Wallace & Co Ltd	Prowess	-1.89%
8	Silver Oak (India)Ltd	Prowess	9.16%
9	Tilaknagar Industries Ld	Prowess	14.52%
10	United Breweries Ltd	Prowess	6.97%
	Arithmetic Mean	Prowess	7.65%

24.5 It is manifest from the order of the TPO that the adjustment was made on the basis of comparing entity level result of the assessee with the entity level result of the comparables by applying TNMM method. There is no dispute that the international transaction in the case of the assessee constitutes only 3.93% of the total operating cost. Therefore, comparing the entity level result of the assessee with the entity level result of the comparables is absolutely in contravention of the provisions of the Transfer Pricing regulations as provided under the I T Act. In any case the international transaction has to be compared with the benchmarking as arrived at by taking into consideration the comparables of uncontrolled transaction. Therefore, the TPO proceeded in total disregard to the relevant provisions of the TP

regulations by comparing entity level results of the assessee instead of comparing only the international transactions.

24.6 Moreover, in the subsequent year i.e 2008-09 & 2009-10 the cup method as adopted by the assessee for benchmarking its international transactions has not been disputed by the revenue. Further, when the relevant data are now available, as stated by the ld Sr counsel, then it is appropriate to determine the ALP by adopting the same method as it was accepted in the subsequent year. Accordingly, in the interest of justice, we set aside the issue of determination of the ALP to the record of the Assessing Officer to decide the same by adopting the cup method. The Assessing Officer is free to determine the ALP by considering the appropriate comparables and then decide the issue as per law.

25 In the result, the appeal of the assessee is partly allowed.

Order Pronouncement in the Open Court on this 18th day ofJan 2013

Sd/- Sd/-

(P M JAGTAP) Accountant Member	**(VIJAY PAL RAO)** Judicial Member

Place: Mumbai : Dated: 18th,Jan 2013

Raj*

Copy forwarded to:

1	Appellant
2	Respondent
3	CIT
4	CIT(A)
5	DR

/TRUE COPY/
BY ORDER

Dy /AR, ITAT, Mumbai