



IN THE INCOME TAX APPELLATE TRIBUNAL

"K" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI N.K. PRADHAN, ACCOUNTANT MEMBER

ITA no.1205/Mum./2016
(Assessment Year : 2011-12)

Asstt. Commissioner of Income Tax
Circle-11(1)(2), Mumbai

..... Appellant

v/s

Anheuser Busch InBev India Ltd.
(Earlier known as SABMiller India Ltd.)
Unit no.301/302, 3rd Floor
Dynasty Business Park, "B" Wing
Andheri Kurla Road, Aneheri (E)
Mumbai 400 059 PAN-AAICS2238R

..... Respondent

ITA no.1738/Mum./2016
(Assessment Year : 2011-12)

Anheuser Busch InBev India Ltd.
(Earlier known as SABMiller India Ltd.)
Unit no.301/302, 3rd Floor
Dynasty Business Park, "B" Wing
Andheri Kurla Road, Aneheri (E)
Mumbai 400 059 PAN-AAICS2238R

..... Appellant

v/s

Asstt. Commissioner of Income Tax
Circle-11(1)(2), Mumbai

..... Respondent

Assessee by : Shri Rajan R. Vora a/w
Shri Hemen Chandariya
Revenue by : Shri Anand Mohan

Date of Hearing – 20.11.2019

Date of Order – 18.02.2020

ORDER**PER SAKTIJIT DEY. J.M.**

These cross appeals arise out of assessment order dated 28th January 2016, passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 (for short "*the Act*") in pursuance to the directions of learned Dispute Resolution Panel(DRP)-2, Mumbai, pertaining to the assessment year 2011-12.

ITA no.1205/Mum./2016
Assessee's Appeal

2. Ground no.1, relates to the addition of ₹ 26,22,23,865, on account of transfer pricing adjustment made on payment of management fee to the Associated Enterprise (AE).

3. Brief facts are, the assessee, formerly known as SABMiller India Ltd., is a resident company and is engaged in the business of brewing, packaging, distribution, marketing and selling of Beer. It is stated that this Group created its presence in India in the year 2002 through the assessee. Thereafter, the Group made various acquisitions of local operational and non-operational breweries in India including the Indian subsidiary of the Foster's Group. The acquired breweries were later merged / de-merged into the assessee company. Following the process of various business acquisitions, the assessee had entered into

a Technology Transfer Agreement (TTA) with SABMiller Management (IN) B.V. with the sole object of obtaining the technical knowhow and to support the technical needs for brewing and manufacturing of beer during the initial years of its operations in India. As per the terms of TTA, the assessee was supposed to receive technical knowhow in the form of methods, procedure, process, formulae, specifications, including technical and engineering specification, recipes, trade secrets, technology manuals, technical information which enables the assessee to brewing and manufacturing beer. Over a period of time, the assessee acquired various breweries in India and upgraded its facilities in accordance with the business strategy in India. In the meanwhile, the Indian companies had started manufacturing and brewing certain local Indian Brands for which no technical knowhow was required from the SABMiller Group. Considering the fact that there was continuous growth of the Indian business and substantial capital investment made by the assessee over the years, the need for technical support from the SABMiller Group was substantially reduced and ultimately the TTA was terminated in the financial year 2009-10. Based on the termination of the TTA, the assessee and SABMiller Group entered into a General Service Agreement (GSA) for obtaining various business services on a centralized basis consistent with the standard practice adopted by the group for other countries. As per the

terms of the agreement, the assessee during the year under consideration paid an amount of ₹ 26,22,23,865, to its AE towards provision of various services, such as, general, managerial and consultancy services, technical services and information technology related services. On a reference being made by the Assessing Officer, the Transfer Pricing Officer wanted to verify the arm's length nature of the payment made by the assessee to its AE towards the aforesaid intra group services. In response to the query raised by the Transfer Pricing Officer, it was submitted by the assessee that the payment towards intra group services was made as per the Group transfer pricing policy and the cost has been allocated on a reasonable basis of time spent, head count, number of users (for information technology related services), etc. and charged to the assessee on a cost plus mark-up basis. It was submitted, the cost base relating to the service provided to the assessee has been clarified and certified by the independent auditor and was found to be at arm's length under Transactional Net Margin Method by treating the AE as the tested party. It was submitted, the AEs' operating profit to operating cost is 3% as against the margin of the comparables @ 4.87% in respect of information technology services. Whereas, in respect of non-IT services assessee's margin is 5% as against the margin of the comparables at 5.75%. After perusing the submissions of the

assessee, the Transfer Pricing Officer observed that before accepting assessee's claim that the payment made towards intra group services is at arm's length, the assessee has to justify the benefits derived by it and also has to furnish the cost base of the cost on which mark-up was charged by the AE. To prove the benefit test, the Transfer Pricing Officer called upon the assessee to furnish the following details: –

- i) Whether the services were requested for;*
- ii) When and how they were rendered by the A.E;*
- iii) Copy of the written agreement; and*
- iv) At what rate the services are available in local market.*

4. Further, he called upon the assessee to furnish real time server data to substantiate the receipt of services. As observed by the Assessing Officer, the assessee vide submissions dated 11th November 2014 and 19th January 2015, explained the nature of service received and the benefits derived therefrom. Further, the assessee submitted, copies of e-mail correspondences, group presentations, cost center reports, margin variance analysis, etc. to prove the cost allocation and receipt of service. Further, the assessee also furnished a certificate from an independent auditor certifying the basis of allocation of cost and appropriate allocation keys. After considering the submissions of the assessee, the Assessing Officer was, however, not convinced and directed the assessee to co-relate the cost of specific activity

conducted by the AE for the benefit of the assessee. Further, he called upon the assessee to demonstrate the basis of allocation of cost, the activity for which they were incurred and the benefit accruing to the assessee. The Transfer Pricing Officer observed, some of the e-mail correspondence show that some services have been rendered, but it is not clear whether such services have any value and if so, the cost incurred for that and the benefit derived by the assessee. Further, he observed, the assessee has to demonstrate that the payment made by the assessee towards services received would be similar to the payment an independent entity would have paid for such services. As alleged by the Transfer Pricing Officer, the assessee could not furnish any evidence to clarify the issues raised by him. He observed, the assessee could not furnish any real time data to prove that the services were actually received. Thus, ultimately, relying upon the decision of the Hon'ble Delhi High Court in CIT v/s Cushman and Wakefield India Pvt. Ltd., ITA no.475 of 2012, dated 23rd May 2014, he determined the arm's length price of the transaction relating to the payment made towards intra group service as nil and the entire payment of ₹ 26,22,23,865, was suggested as adjustment to the arm's length price. On the basis of transfer pricing adjustment made by the Transfer Pricing Officer, the Assessing Officer framed the assessment order adding back the amount of ₹ 26,22,23,865. Against the draft

assessment order so passed, the assessee raised objections before the DRP. However, learned DRP did not interfere with the findings of the Transfer Pricing Officer.

5. The learned Authorised Representative submitted, the Transfer Pricing Officer while determining the arm's length price of the intra group services at nil has not applied any one of the prescribed methods. He submitted, under the Group Service Agreement the assessee has received various services relating to general, managerial and consultancy services, technical services, information technology services, etc. He submitted, as per the terms of the agreement, SABMiller Group provides specialized services as well as global strategies and policies that are aimed at assisting its operations in accordance with local revenues. He submitted, as per the group transfer pricing policy, cost had been allocated on a reasonable basis, such as, time spent, head count, number of users, etc., and chargeable to the assessee on full cost plus mark-up basis, however, ultimately no mark up was charged. He submitted, in the course of proceedings before the Transfer Pricing Officer, the assessee had submitted that supporting documents / evidences to demonstrate that management group services have actually been rendered as well as received. Further, he submitted, the assessee has also demonstrated that availing group services have resulted in benefits accruing to the

assessee and the cost allocation methodology adopted by the group is genuine, scientific, logical and reasonable and has been audited and certified by an independent Accountant. He submitted, while making such payment to the group, the assessee has also deducted tax at source under section 195 of the Act. The learned Authorised Representative submitted, the services provided by the Group including broad guidelines on ways of working to ensure standard approaches for functions at operational level with the aim of achieving optimal efficiency. The learned Authorised Representative submitted, the services rendered are financial consulting, improved personnel strategy, business advisory services, corporate affairs, marketing, technical consulting, computer advisory services and data processing, intellectual property services, etc. He submitted, the payment made by the assessee towards intra group services was on actual basis as per the cost incurred and on actual utilization of services. He submitted, cost has been allocated on the basis of allocation keys and all evidences relating to cost base as well as allocation keys were filed before the Transfer Pricing Officer / DRP. He submitted, the assessee cannot avail these services from any outside agency for maintaining confidentiality. To support his argument, the learned Authorised Representative drew our attention to the GSA, the details of cost allocation along with allocation keys. Further, he submitted, an

independent auditor after verifying the cost base and allocation fees has also certified it. He submitted, though, as per the terms of GSA, the cost charged is to be with a mark-up but subsequently mark-up has been reversed and the payment has been made on the basis of actual cost incurred by the Group. The learned Authorised Representative submitted, various evidences furnished by the assessee were either not looked into or were rejected without proper examination and application of mind. He submitted, as per the statutory provisions, the mandate of the Transfer Pricing Officer is to only determine the arm's length price of a particular transaction. He submitted, the Transfer Pricing Officer cannot step into the shoes of the Assessing Officer to either look into the commercial expediency or benefit derived. He submitted, while the assessee has benchmarked the transaction applying TNMM, the Transfer Pricing Officer has determined the arm's length price at nil without following any method at all. He submitted, if the Transfer Pricing Officer was not satisfied with the benchmarking of the assessee, he should have determined the arm's length price by applying any other appropriate method, which is not the case. Thus, he submitted, the determination of arm's length price by the Transfer Pricing Officer at nil is without authority of law. The learned Authorised Representative submitted, the management group services were not only rendered but also received

by the assessee. Further, he submitted, the services received by the assessee have resulted in benefit. He submitted, the assessee did not opt for availing the services from a third party as the processes and services are unique to SABMiller Group and confidentiality has to be maintained. He submitted, the services are essential for smooth running of the business. In case, the assessee would have availed such services from a third party, it would have to pay more and more over the third party very likely may not have the specialized knowledge in comparison to the quality of services rendered by the Group. Thus, he submitted, in the given circumstances, the amount paid by the assessee should be considered to be at arm's length. Without prejudice, he submitted, while computing arm's length price the Transfer Pricing Officer cannot question the commercial wisdom of the assessee and must restrict him to determine the arm's length price of the transaction. He submitted, it is totally irrelevant on the part of the Transfer Pricing Officer to examine whether the assessee benefits from such services or not. Finally, the learned Authorised Representative submitted, in case of assessee's AE the Authority for Advance Ruling (AAR) has given a ruling holding that it has provided technical and managerial services. In support, the learned Authorised Representative also relied upon the following decisions:—

- i) *CIT v/s EKL Appliances Ltd. [2012] 345 ITR 241 (Del. HC);*

- ii) *Knorr-Bremse India (P) Ltd. v/s ACIT, [2016] 380 ITR 307 (P&H);*
- iii) *Merck Limited v/s DCIT, ITA no.1946/Mum./2014) dated 31st March 2016;*
- iv) *Det Norske Veritas A/S v/s ADIT, ITA no.200/Mum./2014, dated 29.02.2016;*
- v) *Dimension Data India Pvt. Ltd. v/s DCIT, ITA no.2280/Mum./2016) dated 16th August 2017;*
- vi) *UCB India Pvt. Ltd. v/s DCIT (ITA no.1218/Mum./2014, dated 18.05.2016;*
- vii) *Schneider Electric India Pvt. Ltd. v/s DCIT, ITA no.209/Ahd./2015 dated 31.05.2017;*
- viii) *Festo Controls Pvt. Ltd. v/s DCIT [2014] 150 ITD 305;*
- ix) *Dresser-Rand India Pvt. Ltd. v/s ACIT, [2011] 141 TTJ 385;*
- x) *TNS India Pvt. Ltd. v/s ACIT, ITA no.944/Hyd./2007, dated 22.01.2014;*
- xi) *TNS India Pvt. Ltd. v/s DCIT, ITA no.604/Hyd./2014, dated 13.02.2015; and*
- xii) *Knorr-Bremse India (P) Ltd. v/s ACIT, ITA no.5886/Del./2012, dated 23.08.2016.*
- xiii) *INA Bearings India Pvt. Ltd. v/s DCIT, [2019] 108 taxmann.com 198 (Pune) (Trib.).*
- xiv) *M/s. Ipsos Research Pvt. Ltd. V/s ACIT, ITA no.1361/Mum/2017 dated. 11.12.2019,*

6. The learned Departmental Representative submitted, though, there is an agreement between the assessee and its AEs towards rendering of services and the payment to be made for such services have been specified, however, the question which requires to be

examined is, whether such an arrangement or agreement between the assessee and the AEs would override the transfer pricing provisions as contained in Chapter-X of the Act. Drawing our attention to sub-section (2) of section 92 of the Act, he submitted, it empowers the Assessing Officer to determine the arm's length price of benefit, service or facilities. He submitted, there is no restriction imposed on the Transfer Pricing Officer to only determine the arm's length price or cost of expenditure allocated. He submitted, the cost or expenditure allocated or apportioned as a result of any agreement has to be determined having regard to the arm's length price of the benefit, services or facilities provided to any AE. Therefore, the Transfer Pricing Officer has no alternative but to ascertain the benefit derived from the entire arrangement entered into by the assessee as well as the actual services received from the AE. He submitted, unless the receipt of service as well as benefit accruing is ascertained, the Transfer Pricing Officer cannot determine the arm's length price vis-a-vis an independent enterprise. Therefore, it would be wrong to say that the Transfer Pricing Officer cannot enter into the arena of actual receipt of service or the benefit derived therefrom. In support of such contention, he relied upon the decision of the Hon'ble Delhi High Court in Sony Ericson Mobile Communications India Pvt. Ltd. v/s CIT, [2015] 55 taxmann.com 240 (Del.). The learned Departmental Representative

submitted, merely because the assessee and the AE have entered into an agreement and the payments have been made in terms of the agreement, it cannot debar the Transfer Pricing Officer from making adjustment on the basis of Transfer Pricing provisions. He submitted, though, it may be a fact that the assessee has furnished voluminous details relating to intra group services, however, both the Transfer Pricing Officer and the DRP after closely examining such evidences, have concluded that the arm's length price of such services has to be determined at nil. He submitted, the nature of evidences furnished by the assessee in the form of e-mail, debit notes, etc., are actually general correspondences, notice and exchange of information between the assessee and the AEs. They do not show any specific and distinct instances of services rendered by the AEs requiring separate payment to be made by the assessee. He submitted, none of the evidences furnished by the assessee demonstrate any benefit received from such services rendered by the AE. He submitted, the assessee even has not furnished quantification of services to justify the price paid in an arm's length situation. He submitted, the assessee was unable to provide details of cost paid for each services stated to have been availed. He submitted, although the assessee has stated that the cost incurred by the AE has been reimbursed on pre-defined allocation basis however it

does not relate to service rendered. In support of such contention, he relied upon the following decisions:-

i) *CIT v/s Cushman and Wakefield India Pvt. Ltd., [2014] 46 taxmann.com 317 (Del.); and*

ii) *Fosroc Chemicals India Pvt. Ltd., [2015] 58 taxmann.com 85 (Bang.).*

7. Proceeding further, the learned Departmental Representative submitted, as per the OECD guidelines, the aspects which require examination are, whether intra group services in fact have been provided and secondly, what should be the intra group charge for such services for tax purpose with regard to the arm's length principle. He submitted, the assessee firstly has to prove that the services were actually rendered and received and secondly, the quantification of such services in terms of actual expenditure incurred and commensurate benefit therefrom has been done on a proper basis. At the third stage, it requires to be seen if the payment made by the assessee is at arm's length. He submitted, if the assessee fails at the first or second stage of providing actual rendering and receiving of services and quantification of such services in terms of actual expenditure incurred and commensurate benefit derived therefrom, it is not necessary for the Transfer Pricing Officer to proceed to the third stage of determining the arm's length price as he will be unable to do so. In

support of such contention, the learned Departmental Representative relied upon the following decisions:-

- i) *Sony Ericsson Mobile Communications India Pvt. Ltd. v/s CIT, [2015] 55 taxmann.com 240 (Del.);*
- ii) *CIT v/s Cushman and Wakefield India Pvt. Ltd., [2014] 46 taxmann.com 317 (Del.);*
- iii) *Deloitte Consulting India Pvt. Ltd. v/s DCIT, [2012] 22 taxmann.com 107 (Mum.); and*
- iv) *Fosroc Chemicals India Pvt. Ltd. v/s DCIT, [2015] 58 taxmann.com 85 (Bang.) (Trib.).*

8. We have considered rival submissions in the light of the decisions relied upon and perused the material on record. The fact culled out from record would reveal that the assessee has entered into a group service agreement (GSA) with SABMiller Management (IN) B.V., for availing certain services. As could be seen from the aforesaid agreement, a copy of which is placed in the paper book, companies of the group availed such services relating to financial consulting, improved personnel strategy, business advisory services, corporate affairs, marketing, technical consulting, computer advisory services and data processing and intellectual property services, etc. The agreement also provides that such services can be provided by procuring them from other companies in the group or even from third party. It is also mentioned in the agreement that the provision of such service would be at the request of the recipient. As per the terms of

agreement, the cost of service provided to different entities in the group would be charged with a mark-up and the allocation of such expenditure to the recipient should be on the basis of allocation keys which could vary according to the nature of service being provided. The agreement also provides, all information whether tangible or intangible including any formula, pattern, compilation, method, technique or process relating to the service rendered which is not generally known to the public would be treated as confidential. The agreement also provides that in consideration of the supply of service, a fee would be charged on the basis of cost incurred together with a mark-up to be determined as per Schedule-(II) of the agreement and on the basis of invoice raised by the service provider.

9. Thus, from the aforesaid facts, it is clear that the nature of services to be provided at the request of the service recipient as well as the payment to be made for such service is regulated by the terms of the agreement. In fact, the Transfer Pricing Officer has also not disputed the aforesaid factual position. It is also a fact on record that the assessee in its transfer pricing study report has conducted economic analysis of the price paid to the A.E. towards service received by adopting TNMM as the most appropriate method. Further, the assessee has undertaken comparability analysis by selecting independent comparables from the database and considering the

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

<i>Description of services</i>	<i>Description of the document</i>	<i>Benefits derived by SABMiller India</i>	<i>Paper book Reference</i>
<i>Financial Consulting</i>	<i>Presentation outlining Group approach for financial capability assessment and improvement planning. The document provides a detailed plan to assess the abilities of the finance team</i>	<i>Provides SABMiller India with the templates to be used for capturing and calculating the capability level of the team. The provision of templates means SABMiller India does not have to incur</i>	<i>590-613 For other supporting evidences, please refer submissions dated 11th November 2014 and 19th January</i>

	<i>in India and how to improve what the team can achieve in the future.</i>	<i>time and resource to create them.</i> <i>The templates have supported Finance team development in India as they make commercial decisions.</i>	<i>2015 (enclosed as Item 8 and 10 of the Paper book at Page no.394 and 554 respectively)</i>
<i>Improved Personnel Strategy</i>	<i>As part of Organizational Development there is a training program, Global Action Learning Program ("GALP"), and Derek Jones, the Indian Marketing Director attended part of a 3 week long global leadership program with approx. 35 participants. The workshop addressed 5 real strategic challenges faced by the SABMiller ExCom.</i> <i>As one example, Derek attended a training session on 'what capability needs to be built to become a best practice Point of Purchase Off Trade executor'.</i> <i>In particular how this capability is going to be created within SABMiller and with 3rd parties. Attachment 2.4 shows the attendee list for the GALP training sessions as well as slides describing the initiative.</i>	<i>This training program has been used by SABMiller India to improve the off-trade position of the company which helps SABMiller India increase revenue compared to the market segment.</i> <i>This type of training is highly bespoke and only comes from having these centres of excellence and sharing Group learnings.</i>	<i>854-856</i> <i>For other supporting evidences, please refer submissions dated 11th November 2014 and 19th January 2015 (enclosed as Item 8 and 10 of the Paper book at Page no.394 and 554 respectively)</i>
<i>Marketing</i>	<i>Miller high life brand development</i> <i>SABMiller Group helps SABMiller India in undertaking a market study for a product launch of Miller High Life in India.</i>	<i>Group Marketing helps SABMiller India in undertaking a market study in order to ascertain the need for introducing a global brand in India, understanding the preferred tastes of the</i>	<i>871-896</i> <i>For other supporting evidences, please refer submissions dated 11th November 2014 and 19th January 2015 (enclosed as</i>

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

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

		<i>benchmarking data which they can then target to reduce costs and environmental impact - including being given suggestions that have been identified elsewhere in the group.</i>	<i>554 respectively)</i>
<i>Business Advisory Services</i>	<i>An engineering note on environmental and health issues with respect to paint coatings which are used to protect steel structures.</i>	<i>Supports SABMiller India business in securing the inputs that are needed while building and provides guidance on energy and climate security by improving the management of internal resources.</i>	<i>1381-1392 For other supporting evidences, please refer submissions dated 11th November 2014 and 19th January 2015 (enclosed as Item 8 and 10 of the Paper book at Page no.394 and 554 respectively)</i>

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

<i>Application</i>	<i>Service Description</i>
<i>Activity learning database (ALD)</i>	<i>ALD is used to enable the marketing insights team to use lessons from previous activates to inform future objective and activity planning. It is an application that captures information as a part of the cycle planning process from both group and local country marketing teams</i>
<i>Career Framework</i>	<i>The Career framework project is used to allow individuals to plot their future careers using pre-mapped career models for each functional area (as approved by functional leaders and SMEs). It is a model whereby employees can define the shape of their current and aspired-to-roles.</i>

<i>Financial Controls Management (FCM)</i>	<i>FCM is used as the central repository for documentation and processes that relate to internal controls. It is a web-based application that facilitates compliance with Sarbanes-Oxley. It is used in sites that do not have the Global template as their core financial controls system</i>
<i>Knowledge library</i>	<i>Knowledge library is used to provide a central focal point for members of the SABMiller marketing community to share knowledge with the rest of that community. It is hosted on SharePoint</i>
<i>Manufacturing KPI</i>	<i>Global Evaluation Manufacturing (GEM) is used to ensure alignment and compliance to the principles of the Manufacturing Way and is owned by Group Technical. It is a Web based application for tracking best practices across breweries.</i>
<i>Media Library</i>	<i>"Media Library is used to store images and Video clips to be used for competition and reporting purposes. This is an externally hosted site and can be accessed by SABMiller employees worldwide via single sign on functionality added to SharePoint</i>
<i>Office communicator</i>	<i>"Office communicator is used to provide presence awareness and instant messaging functionality throughout the SABMiller organization to users who have been enabled on AD. It is an application that is built in to your laptop set up</i>
<i>Supplier Audit System</i>	<i>"SAS provides a single source of master reference data to be used for the generation of Audit Scorecard Excel templates and a central online store of completed Audit Scorecards for global reporting. It is a centralized system that can be accessed globally within SABMiller</i>
<i>Technical DMS</i>	<i>"Tech DMS is used to manage documents using an automated process for the approval and publication of controlled and part controlled documents as defined by ISO9001. It is a secure system for the technical department</i>

11. It is further relevant to observe, the assessee had furnished documentary evidences before us which clearly demonstrate that in the course of proceedings before the Transfer Pricing Officer, the assessee had not only furnished the details of services rendered under the GSA, but the break-up and quantification of such expenditure with specific allocation keys. In contrast to the details/information furnished by the assessee, including the independent benchmarking done in the transfer pricing study report by following an approved method, on a perusal of the order passed under section 92CA(3) of the Act by the

Transfer Pricing Officer, it is very much clear that the Transfer Pricing Officer has not done any independent benchmarking as per the mandate of section 92C r/w rule 10B even after rejecting the transfer pricing analysis of the assessee under TNMM. Further, the finding of the Transfer Pricing Officer is not only ambiguous, but contradictory as, though, he himself has stated that copy of e-mails and reports filed before him show that some services have been rendered, however, in the same breath he says that whether such services have any value and, if so, the cost incurred for that and the benefit derived by the assessee has not been proved. The Transfer Pricing Officer while determining the arm's length price of the transaction at nil has apparently not followed any one of the prescribed method under section 92C r/w rule 10B. Rather, he has determined the arm's length price at nil on a purely ad-hoc and presumptive basis by stating that the assessee has failed to demonstrate the rendition of service and benefit derived by it as well as the quantification of such services.

12. It is trite law, as per the mandate of Chapter-X of the Act, the Transfer Pricing Officer is required to determine the arm's length price of a specific international transaction. Section 92C of the Act prescribes certain methods for determining the arm's length price. Whereas, rule 10B lays down the mode and manner of computation of arm's length price under different methods prescribed under section

92C of the Act. A careful reading of the order passed by the Transfer Pricing Officer would make it clear that, while determining the arm's length price of intra group services at nil he has not followed any one of the prescribed methods. Therefore, the determination of arm's length price at nil cannot be accepted, as it is not in accordance with the statutory provisions which the Transfer Pricing Officer is duty bound to follow. More so, when the Transfer Pricing Officer himself has admitted that the evidence on record does show that some services have been rendered. If the Transfer Pricing Officer was not convinced with the benchmarking done by the assessee under the TNMM, after rejecting the same he should have conducted an independent benchmarking by following any one of the prescribed methods to determine the arm's length price of the intra group services which he himself, to some extent, acknowledges to have been received by the assessee.

13. It is relevant to observe, the Hon'ble Delhi High Court in EKL Appliances (supra), has held that it is not necessary for the assessee to show that any legitimate expenditure incurred by it was also incurred out of necessity. It is also not necessary for the assessee to show that any expenditure incurred by him for the purpose of business carried on by him has actually resulted in profit or income either in the same year or in any of the subsequent years. The burden is initially on

the assessee to determine the arm's length price. When the assessee determines the arm's length price following one of the methods, the Transfer Pricing Officer has to determine the arm's length price by following any one of the methods if he does not agree with the benchmarking of the assessee. In the aforesaid decision, the Hon'ble High Court has also taken note of the decision rendered the Hon'ble Punjab & Haryana High Court in Cushman and Wakefield India Pvt. Ltd. (supra). The Co-ordinate Bench in Merck Ltd. (supra), after analyzing the facts held that if the material on record show that the assessee in terms of the agreement was entitled to received a package of services and in fact such services were received, just because the services were too general in the perception of the Transfer Pricing Officer or just because the assessee did not avail them from outside agency, cannot be a reason to hold that services were not rendered at all. The Bench held that when it is established that under the agreement, the assessee had right to receive services as and when required and receipt of service is reasonably established, the payment made is for the rights accruing to the assessee for the bundled services under the contract and not for each service on ala karte basis. The Bench held that in case the Transfer Pricing Officer is able to demonstrate that the consideration for similar service under the CUP method is nil, he can very well do so. However, when the assessee

benchmarks the transaction under TNMM basis, unless the Revenue authorities can demonstrate that some other method of ascertaining the arm's length price would be more appropriate method, they cannot discard the method adopted by the assessee and determine the arm's length price at nil without following any method. Ultimately, the Bench following the decision of the Hon'ble Delhi High Court in EKL Appliances (supra) held that arm's length price adjustment made by being contrary to the scheme of the Act cannot be sustained. In case of CIT v/s Johnson & Johnson Ltd., ITA no. 1030/2014, dated 7th March 2017, the Hon'ble Jurisdictional High Court has reiterated the same legal proposition by holding that the Transfer Pricing Officer is mandated by law to determine the arm's length price by following one of the methods prescribed under section 92C r/w rule 10B.

14. In the facts of the present case, the Transfer Pricing Officer admits that the evidences brought on record demonstrate that some services were actually received by the assessee. However, he has failed to determine the arm's length price by following any one of the prescribed method. Thus, for the aforesaid reason, the adjustment made by the Transfer Pricing Officer cannot be sustained. In fact, very recently in INA Bearings India Pvt. Ltd. v/s DCIT, (supra) and in case of M/s. Ipsos Research Pvt. Ltd. V/s ACIT, (supra), the Tribunal has again disapproved the determination of arm's length price at nil by the

Transfer Pricing Officer without following any one of the methods prescribed under the statute. Thus, keeping in perspective the ratio laid down in the judicial precedents cited before us, we have to hold that the adjustment made by the Transfer Pricing Officer by determining the arm's length price of Intra Group Services at nil is contrary to the statutory provisions, hence, cannot be sustained.

15. It is worth mentioning, assessee's AE, SABMiller Management (IN) B.V. had approached the AAR seeking ruling on various issues relating to the nature and character of services rendered under the GSA. After analyzing the terms and conditions of the erstwhile TTA and the present GSA as well as various evidences available on record, the AAR found that there is not much difference between the nature of services provided under the TTA and GSA. The AAR has observed that SABMiller management (IN) B.V., (the AE), is providing specialized services to fulfill the exclusive needs of the Indian companies for manufacture of beer under its brand name and not offering a standard service for general use. The AAR has observed that the AE is providing technical consulting and setting-up/up gradation of the manufacturing facilities and brewing/manufacture of beer as also procurement of raw material and identifying markets, etc., which are the core activities of the AE and its Indian companies. The AAR has also observed that while providing technical services, the AE has provided such service through

human intervention by training the personnel of Indian Companies through various programs, models and by allowing online access to secret information. The AAR has observed that the services rendered by the AE are not merely managerial, but are also technical service. The AAR has observed that it is inconceivable that world class beer can be manufactured and plant and machinery up-graded and maintained by mere managerial / administrative instructions. It was also observed that the AE not only holds training program, but through computer advisory services and secure databases it allows restricted access to the personnel of the India companies to streamline their business activities. The AAR has observed that the services provided by the AE both under the TTA as well as GSA specialized and technical services for the setting up of and maintenance of plant and machinery specific to the beer industries as well as brewing of beer through technical consultancy services. The AAR observed, as per the GSA, the foreign AE provides the Indian company access to online databases and through secret passwords for utilizing the resources. The access to IT online platform provided to the Indian companies conveys privileged secret information to which the access control standard applies and is provided to defined users with unique user ID. They have also observed that AE is also providing engineering support services through online links. The AAR observed, various services rendered

under the GSA can be classified as technical services and fee is charged as consideration for the provision of technical and consultancy services, skill, knowledge, knowhow, process, etc., made available to the Indian companies. Thus, after threadbare analysis of the TTA and GSA as well as other material on record, the AAR ultimately in ruling dated 6th June 2018, in AAR no.1199 of 2011, has held as under:-

"11. In view of the foregoing discussion, the questions posed to us for a Ruling are answered as under:-

1. The amount receivable by the Applicant from SKOL Breweries Limited and SABMiller Breweries Private Limited (i.e., Indian Companies) under the Group Service Agreement towards Financial Consulting, Improved Personal Strategy, Business Advisory Services, Corporate Affairs, Marketing, Technical Consulting, Computer Advisory Services and Data Processing and Intellectual Property Services are in the nature of "Fees for Technical Services", within the meaning of the term in Article-12 of the DTAA between India and the Netherlands.

2. The amount receivable by the Applicant from Indian Companies for "Computer Advisory and Data Processing Services" is also chargeable to tax as "Royalty" under the DTAA between India and the Netherlands."

16. Thus, from the aforesaid ruling of the AAR, it becomes absolutely clear that not only the AE has rendered services to the assessee under GSA, but the assessee is also in receipt of such services and has also benefited by such services. In fact, it has been submitted by the learned Authorised Representative that while making payment towards intra group services, the assessee has also deducted tax at source

under section 195 of the Act. Thus, all these facts clearly go to prove that the assessee, indeed, has received certain specified services from the AE and payments have been made in consideration of such services. Therefore, the services rendered by the AE to the assessee certainly have some value attached to it which requires benchmarking under any of the methods prescribed under the statute. It is manifest, though, Transfer Pricing Officer accepts that some services have been rendered, however, he has made a general observation that such services do not have any value and has proceeded to determine the arm's length price on a purely on ad-hoc basis. Whereas, the reading of the AAR ruling, referred to above, clearly demonstrate that highly specialized services, in fact, were rendered by the AE to its Indian subsidiary. Thus, on the basis of facts available on record, we have no hesitation in holding that the determination of arm's length price at nil is without any legal sanctity, hence, cannot be sustained. Accordingly, following the judicial precedents cited before us, we delete the addition made in this regard.

17. In ground no.2, the assessee has challenged the disallowance of ₹ 34,81,60,500, under section 40(a)(ia) of the Act.

18. Brief facts are, during the assessment proceedings, the Assessing Officer noticed that the assessee has debited an amount of ₹

70,84,40,897, to its Profit & Loss Account as sales scheme expenditure. After calling for necessary details and examining them, the Assessing Officer was of the view that the discount offered to distributors has to be treated as commission and since the assessee has not deducted tax at source on such amount, it has to be disallowed under section 40(a)(ia) of the Act. Therefore, he called upon the assessee to explain why the amount of ₹ 34,81,60,500. Though, the assessee objected to the proposed disallowance by submitting that the payment made is not in the nature of commission, hence, not covered under section 194H of the Act, however, rejecting the submissions of the assessee the Assessing Officer disallowed the amount under dispute under section 40(a)(ia) of the Act. While considering assessee's objection on the issue, learned DRP noted that while deciding identical issue in assessee's own case for the assessment years 2007-08 and 2008-09, the Tribunal has restored the issue to the Assessing Officer for fresh adjudication. Stating that the assessee has not brought to its notice any record and material in support of its claim of giving discount to the distributors duly approved by the Board of Directors, they held that assessee's claim is inadmissible.

19. The learned Authorised Representative submitted, while deciding identical issue in assessee's own case for the assessment years 2007-

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

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

21. We have considered rival submissions and perused the material on record. It is evident, the discount given to the distributors was disallowed under section 40(a)(ia) of the Act primarily for the reason that it is in the nature of commission, hence, comes within the purview of section 194H of the Act, requiring deduction of tax at source. As noted by us, though, learned DRP has stated that while deciding similar issue in assessee's own case, the Tribunal has restored the matter to the Assessing Officer for fresh adjudication, however, they ultimately held the claim of the assessee inadmissible. Undisputedly, identical issue arose in assessee's own case for the assessment years 2007-08, 2008-09 and 2009-10. While deciding the issue in assessment year 2007-08 in ITA no.6175/Mum./2011, dated 18th January 2013, the Tribunal has restored the issue to the Assessing Officer for fresh adjudication. Identical view was expressed by the Tribunal while deciding the issue in assessment years 2008-09 and 2009-10. Pertinently, while implementing the direction of the Tribunal in assessment year 2007-08, the Assessing Officer vide order dated 30th December 2016, has allowed assessee's claim of discount given to the distributors which is evident from the copy of the order placed in the paper book. It is also the submissions of the learned Authorised Representative that though similar disallowance was made by the Assessing Officer in the assessment years 2013-14 and 2014-15,

however, the DRP has allowed assessee's claim by deleting the disallowance. Considering the fact that while deciding identical issue in assessee's own case for the assessment year 2007-08, 2008-09 and 2009-10, the Tribunal has restored the issue to the Assessing Officer for fresh adjudication with specific direction, we are inclined to follow the same and restore the issue to the Assessing Officer for fresh adjudication with similar direction. Suffice to say, if similar claim made by the assessee was allowed by the Assessing Officer in assessment year 2007-08 and by the DRP in assessment years 2013-14 and 2014-15, then there should not be any difficulty in allowing assessee's claim.

22. In ground no.3, the assessee has challenged the disallowance of commission paid for an amount of ₹ 2,30,66,201.

23. Brief facts are, in the course of assessment proceedings, the Assessing Officer noticed that the assessee has debited an amount of ₹ 19,07,53,069, to the Profit & Loss Account towards commission on sales. After calling for necessary details and examining them, the Assessing Officer observed that the assessee has not furnished requisite details showing deduction of tax at source. Further, he observed that as per assessee's submissions, the commission of ₹ 19,07,53,069, includes accruals at the yearend amounting to ₹

2,30,66,201. Being of the view that the amount of ₹ 2,30,66,201, being a commission on sales is subject to deduction of tax at source, which the assessee has not done, the Assessing Officer disallowed the amount under section 40(a)(ia) of the Act.

24. The DRP also sustained the disallowance made by the Assessing Officer.

25. The learned Authorised Representative submitted, in the subsequent years, the assessee has duly deducted and deposited the applicable TDS upon receipt of invoice from the agents. Thus, he requested for restoration of the issue to the Assessing Officer for verification and necessary adjudication.

26. The learned Departmental Representative has no objection for restoration of the issue to the Assessing Officer.

27. Having considered rival submissions, we are of the view that assessee's claim that the accruals of ₹ 2,30,66,201, was subjected to deduction of tax at source on receipt of invoice in subsequent years requires factual verification at the end of the Assessing Officer. Accordingly, we restore the issue to the Assessing Officer for fresh adjudication after verifying the material available on record or to be filed by the assessee and decide the issue in accordance with law after

due opportunity of being heard to the assessee. Ground is allowed for statistical purposes.

28. In ground no.4, the assessee has raised the issue of short grant of TDS credited for an amount of ₹ 33,558.

29. After considering the submissions of the parties, we direct the Assessing Officer to verify the TDS as per Form no.26AS, and grant credit to the assessee in accordance with law. This ground is allowed for statistical purposes.

30. In the result, assessee's appeal is partly allowed.

ITA no.1738/Mum./2016
Revenue's Appeal

31. In ground no.1, the Revenue has challenged the deletion of disallowance of ₹ 12,13,48,125, under section 40(a)(ia) of the Act.

32. Brief facts are, during the assessment proceedings, the Assessing Officer noticed that in the financial year 2006-07, the assessee claimed to have purchased Foster's Brand from Foster's Australia, and has capitalized the same in the fixed assets scheduled under the head trademarks / brands. In the subsequent year, the assessee continued to claim depreciation @ 25% on the said asset. He observed that while completing the assessment for the assessment year 2007-08, the cost

of brand was disallowed under section 40(a)(ia) of the Act and accordingly, depreciation claimed of ₹ 12,13,48,125 was also disallowed. While deciding assessee's objection on the issue, the DRP having found that while deciding assessee's appeal on identical issue in assessment year 2007-08, 2008-09 and 2009-10, claim of depreciation has been allowed, followed the same and allowed assessee's claim of depreciation.

33. We have considered rival submissions and perused the material on record. Learned Counsels appearing for the parties have fairly submitted before us that similar disallowance made by the Assessing Officer in the preceding assessment years have been deleted by the Tribunal while deciding the appeals filed by the assessee. On a perusal of the relevant orders passed by the Tribunal for the assessment years 2007-08, 2008-09 and 2009-10 in assessee's own case, as placed in the paper book, we find that identical disallowance made by the Assessing Officer in the preceding assessment years have been deleted. Facts being identical, following the consistent view of the Co-ordinate Bench in assessee's own case for the assessment years 2007-08, 2008-09 and 2009-10, we uphold the decision of learned DRP on the issue. This ground is dismissed.

34. In grounds no.2 and 3, the Revenue has challenged the deletion of disallowance of tax deducted on interest expenditure incurred in foreign currency amounting to ₹ 78,03,184.

35. Brief facts are, during the assessment proceedings, the Assessing Officer noticed that the assessee has debited an amount of ₹ 11,53,60,052, to the Profit & Loss Account towards interest on external commercial borrowings (ECB). Further, from the audit report he found that the auditor has clarified that the aforesaid amount includes withheld tax of ₹ 78,03,184. Being of the view that the tax withheld cannot be claimed as expenditure, the Assessing Officer disallowed the same.

36. While deciding the objection on the issue, the DRP following the decision of the Tribunal in CIT v/s BOB Cards Ltd., [2013] 56 SOT 232 (Mum.), held that since the assessee has agreed to borne the tax liability of the payee, it has to be allowed as expenditure. Accordingly, the DRP deleted the addition made by the Assessing Officer.

37. The learned Departmental Representative submitted, the facts relating to the issue have not been properly examined as neither the Assessing Officer nor the DRP has examined whether there was any agreement between the assessee and the payees towards incurring the tax liability of the payee. He submitted, it also needs to be

examined whether the TDS amount borne by the assessee was included in the income of the payee. Thus, he submitted, the issue may be restored back to the Assessing Officer for fresh adjudication.

38. The learned Authorised Representative on the other hand strongly supporting the decision of the DRP submitted that there is an agreement with the payee and all the facts and material relating to withholding of tax was submitted before the Assessing Officer as well as the Transfer Pricing Officer. Therefore, there is no need for restoration of issue to the Assessing Officer again.

39. We have considered rival submission and perused the material on record. As could be seen, the assessee had entered into a borrowing arrangement with Standard Chartered Bank on a net of tax basis. As per the terms of the agreement, the assessee has computed TDS on a net of tax basis and no tax has been separately debited to the Profit & Loss Account. It is also a fact on record that as per the borrowing arrangement, the tax liability, if any, on payment of interest has to be borne by the assessee. Therefore, the tax withheld has to be allowed as expenditure to the assessee. In view of the aforesaid, we do not find any infirmity in the directions of the DRP. Ground is dismissed.

40. In the result, Revenue's appeal is dismissed.

41. To sum up, assessee's appeal is partly allowed and Revenue's appeal is dismissed.

Order pronounced in the open Court on 18.02.2020

Sd/-
N.K. PRADHAN
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 18.02.2020

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai