IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "A", BANGALORE

Before Shri George George K, JM and Shri B.R.Baskaran, AM

IT(TP)A No.287/Bang/2021 : Asst.Year 2016-2017

M/s.Kontoor Brands India Private Limited (Formerly known as VF Brands India Private Limited) `Awfis', 1st Floor, Shabari Complex Field Marshan Cariappa Road Shantala Nagar, Ashok Nagar Bengaluru – 560 025. **PAN : AACCV2727L.**	v.	The Dy.Commissioner of Income-tax, Circle 4(1)(1) Bangalore.
(Appellant)		(Respondent)

Appellant by : Sri.V.Nageshwar Rao, ADvocate
Respondent by : Sri.Sumer Singh Meena, CIT (OSD)-DR

Date of Hearing : 11.10.2021	**Date of Pronouncement : 12.10.2021**

O R D E R

Per George George K, JM

This appeal in the instance of the assessee directed against the final assessment order dated 30.04.2021 passed u/s 143(2) r.w.s. 144C of the I.T.Act. The relevant assessment year is 2016-2017.

2. The assessee has raised 30 grounds of appeal. Ground Nos.1 to 3, 29 and 30 are general in nature and no adjudication is called for, hence these grounds are dismissed. Ground Nos.4 to 21 is regarding transfer pricing adjustment of AMP expenses. Ground Nos. 22 to 28 is regarding solitary corporate tax issue, namely, whether design and technical knowhow, vendor network relationship (VR) acquires as part

of slump sales was entitled to depreciation u/s 32(1) of the I.T.Act.

We shall adjudicate the above issues as under:

Transfer Pricing Adjustment : (Ground Nos.4 to 21)

3. All the grounds raised relate to Arm's Length Price (ALP) adjustment made for expenditure incurred by the assessee for advertising, marketing and sales promotion expenses (AMP). The assessee for the relevant assessment year had incurred expenditure amounting to Rs.45.68 crore as advertisement and sales promotion expenses (AMP). In the transfer pricing study, the assessee did not disclose AMP expenses as an item of international transaction. For the relevant assessment year, the assessee had paid royalty of Rs.30.39 crore to its AE and the assessee had followed CUP method to bench mark the same.

3.1 The TPO took the view that the AMP expenses incurred by the assessee is on the higher side and hence, by applying bright line test, split the AMP expenses into routine expenses and non-routine expenses. The TPO chose to adopt "Profit Split Method" to bench mark both royalty and AMP expenses. For this purpose, the TPO re-worked the profit margin of the assessee by considering only routine AMP expenses and the same worked out to 22.10%. The TPO worked out the profit margin of comparable companies without including brand expenses and the average profit margin was worked out to 3.75%. Accordingly, the TPO held that the difference between

22.10% and 3.75% i.e., 18.35% is the non-routine profit. He held that this profit should be shared between the assessee and its AE. The TPO determined the AE's share to be 25% and accordingly worked out AE's share in non-routine profit at Rs.27.85 crore. The aggregate amount of royalty payment and non-routine AMP expenses was Rs.60.36 crore. The TPO accordingly held that the difference between the above said amount of Rs.60.36 crore and Rs.27.85 crore is liable to be adjusted. Accordingly, he adjusted Rs.32.50 crore as transfer pricing adjustment.

3.2 The Ld.Dispute Resolution Panel (DRP) confirmed the TP adjustment made by the AO/TPO.

3.3 Aggrieved, the assessee preferred an appeal to the ITAT. The learned AR submitted that the issue raised is covered by the order of the Tribunal in assessee's own case for assessment year 2015-2016 in IT(TP)A No.2491/Bang/2019 (order dated 16.02.2021). It was submitted that for fresh determination of ALP of AMP expenses the case was restored to the files of AO / TPO by the Tribunal for assessment year 2015-2016. The learned AR stated that similar view may be taken in this case also.

3.4 The learned DR supported the orders of the Income Tax Authorities.

3.5 We have heard rival submissions and perused the material on record. The Tribunal in assessee's own case for assessment year 2015-2016 had restored the issue of ALP

determination for the AMP expenses to the files of AO / TPO for *de novo* consideration. The relevant finding of the Tribunal reads as follows:-

> *"12. The question of bench marking the AMP expenses has been examined and decided by Hon'ble Delhi High Court in the case of Sony Ericsson (supra) and Maruti Suzuki Ltd (381 ITR 117). The bright line test adopted by the TPO has been specifically rejected in the case of Sony Ericsson (supra). The Hon'ble Delhi High Court has held in the case of Maruti Suzuki Ltd (supra) that the revenue needs to establish the existence of international transaction before undertaking benchmarking of AMP expenses. Hence, the approach of the TPO cannot be upheld. Since the TPO has combined Royalty payments also along with AMP expenses while making Transfer pricing adjustments by adopting Residual Profit Split Method, since the existence of international transactions in AMP expenses is required to be shown separately, we are of the view that this issue requires fresh examination at the end of AO/TPO. Accordingly, we set aside the order passed by the AO on AMP expenses and restore the same to the file of AO/TPO for examining it afresh. After affording adequate opportunity of being heard, the AO/TPO may take appropriate decision in accordance with law."*

3.6 In view of the above order of the Tribunal, which is identical to the facts of the instant case, we restore the issue of determination of ALP of AMP expenses to the files of AO / TPO. The AO / TPO is directed to afford a reasonable opportunity of hearing to the assessee and take a decision in accordance with law. It is ordered accordingly.

Corporate Tax Issue (Ground Nos.22 to 27)

4. During the course of assessment proceedings, the AO noticed that the assessee had claimed depreciation of Rs.1,35,90,554 on intangible assets as detailed below:-

Particulars	WDV as on 1 April 2015	Depreciation for the FY 2015-2016
Design and Technical Knowhow	3,02,79,551	75,69,888
Vendor Network Relationship	2,40,82,663	60,20,666
Total depreciation		1,35,90,554

4.1 The A.O. noticed that the assessee had claimed depreciation on the above said intangible assets in the past years also and the same was disallowed on those years by the AO. Accordingly, the AO disallowed the claim of depreciation amounting to Rs.1,35,90,554 for this assessment year also after discussing in detail about the merits of the claim.

4.2 The view taken by the AO was confirmed by the DRP in its directions dated 29.03.3021.

4.3 Aggrieved, the assessee has raised this issue before the Tribunal. The learned AR submitted that an identical issue was considered by the Tribunal in assessee's own case for assessment year 2015-2016 (supra). It was submitted that the Tribunal for assessment year 2015-2016 followed its earlier order for assessment years 2011-2012 and 2008-2009 and decided the issue in favour of the assessee by holding that the assessee is entitled to depreciation on intangible assets.

4.4 The learned Departmental Representative strongly supported the direction of the DRP.

4.5 We have heard rival submissions and perused the material on record. An identical issue was considered in assessee's own case by the co-ordinate Bench of the Tribunal for assessment year 2015-2016. The Tribunal for assessment year 2015-2016 followed the Tribunal order for the assessment year 2011-2012 and held that the assessee is entitled to depreciation on intangible assets mentioned above. The relevant finding of the Tribunal reads as follows:

> *7. We heard Ld. D.R. and perused the record. We notice that an identical issue has been considered in the assessee's own case by the coordinate bench in AY 2011-12 (referred supra) when the name of the assessee was M/s. VF Brands India Pvt. Ltd. For the sake of convenience, we extract below the operative portion of the order of the Tribunal in respect of this issue.*
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> > *"5. Now the issue on merit is regarding allowability of depreciation on intangible assets. On this aspect, the issue is covered by the Tribunal order rendered in the case of DCIT Vs. V.F. Arvind Brands Pvt. Ltd. (supra). Para nos. 12 to 12.5 of this Tribunal order are relevant in this regard and hence, the same are reproduced hereinbelow. "*
> >
> > *12. The next question arises about the allowability of the cost incurred by the assessee in connection with the business. In our view, such deductions cannot be disallowed on a technical basis. Supposing the assessee does not allocate the expenses under the head design and technical know-how and it prefers to allocate the same under the head goodwill. There is no dispute for the depreciation on the goodwill as held by the Honourable Supreme Court in the case of semifs securities Ltd. reported in 348 ITR 302 wherein it was held as under:*
> >
> > *4. Explanation 3 states that the expression 'asset' shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature. A reading the words 'any other business or commercial rights of similar nature' in clause (b) of Explanation 3 indicates that goodwill would fall under the expression 'any other business or commercial right of a similar nature'. The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3(b).*

5. In the circumstances, we are of the view that 'Goodwill' is an asset under Explanation 3(b) to Section 32(1) of the Act.

6. One more aspect needs to be highlighted. In the present case, the Assessing Officer, as a matter of fact, came to the conclusion that no amount was actually paid on account of goodwill. This is a factual finding. The Commissioner of Income Tax (Appeals) ['CIT(A)', for short] has come to the conclusion that the authorised representatives had filed copies of the Orders of the High Court ordering amalgamation of the above two Companies; that the assets and liabilities of M/s. YSN Shares and Securities Private Limited were transferred to the assessee for a consideration; that the difference between the cost of an asset and the amount paid constituted goodwill and that the assessee-Company in the process of amalgamation had acquired a capital right in the form of goodwill because of which the market worth of the assesseeCompany stood increased. This finding has also been upheld by Income Tax Appellate Tribunal ['ITAT', for short]. We see no reason to interfere with the factual finding.

7. One more aspect which needs to be mentioned is that, against the decision of ITAT, the Revenue had preferred an appeal to the High Court in which it had raised only the question as to whether goodwill is an asset under Section 32 of the Act. In the circumstances, before the High Court, the Revenue did not file an appeal on the finding of fact referred to hereinabove.

8. For the afore-stated reasons, we answer Question No.[b] also in favour of the assessee.

12.1 Thus in our considered view there could not have been any dispute regarding the claim of depreciation on the goodwill as discussed above. Therefore, in our considered view, the expenses incurred by the assessee in connection with the business cannot be disallowed merely on the ground that these have been claimed under different nomenclatural. Thus, we hold that the expenses have been incurred for the business then the deduction has to be allowed to the assessee under the provisions of the Act.

12.2 We also note that the assessee has claimed depreciation on the same intangible assets in the immediately preceding year in its income tax return which was processed under section 143(1) of the Act. Thus, it is clear that there was written down value of these intangible assets which were brought forward in the year under consideration. Thus, in our considered view the opening written down value in the year cannot be disputed. In this regard we find support and guidance from the judgment of Hon'ble High Court of Bombay in case of HSBC asset management India Pvt. Ltd. reported in 47 taxmann.com 286 wherein it was held as under:

"Having perused this Appeal Memo including the impugned orders, we are of the opinion that the Delhi High Court judgment has been delivered on 5th November 2012 and the impugned order was passed on 15th June 2011. The Tribunal has essentially based its conclusion on the consistent stand of the Assessee and that of the Assessing Officer. In dealing with the shift in stand for the subject assessment year, the Tribunal found that this claim of depreciation was raised in the assessment year 2003-2004. The Assessee claimed that it is allowable as per the provisions of Income Tax Act on block of assets under the head "intangible assets". The Assessing Officer allowed the claim for that assessment year by an order under Section 143(3) dated 28.03.2006. The Tribunal then, proceeds to hold that when the Assessing Officer had to allow depreciation on the written down value of the block of assets, then, it cannot in the present assessment year dispute the opening written down value of the block of assets nor can he examine the correctness or otherwise of the opening written down value brought forward from the earlier year. The order under Section 143(3) for the assessment year 20032004 continues to operate and no proceedings under the Act were initiated to disturb the same."

12.3 We also note that the Ld. DR have not brought anything on records suggesting that any action against the assessee was taken under section 147 of the Act on account of escapement of income.

12.4 In view of above there remains no ambiguity that the assessee is eligible for the depreciation in respect of the intangible assets as discussed above. Accordingly, we do not find any reason to interfere in the order of Ld. CIT(A).

12.5. Thus, the ground of appeal of the Revenue is dismissed." In AY 2011-12, the Ld CIT(A) had deleted the disallowance of depreciation on intangible assets and hence the Revenue was in appeal before the Tribunal. The coordinate bench, following the decision rendered in 2008-09, confirmed the order of Ld. CIT(A) in deleting the disallowance in AY 2011-12.

8. We notice that the co-ordinate benches are taking a consistent view on this matter. Accordingly, following the above said decision of coordinate bench, we direct the assessing officer to delete the disallowance of depreciation on intangible assets."

4.6 In view of the order of the co-ordinate Bench of the Tribunal in assessee's own case for assessment year 2015-2016, which is identical to the facts of the instant case, we

hold that the assessee is entitled to depreciation of Rs.1,35,90,554 on the above mentioned intangible assets.

Additional Ground

5. The additional ground reads as follow:-

> *"31. Deduction in respect of education cess and secondary higher education cess under section 37(1) of the Income-tax Act, 1961.*
>
> *Based on facts and the circumstances of the case and in law, the Appellant prays that education cess and secondary higher education cess on Income tax paid for the year under consideration ought to be allowed as a deduction under section 37(1) of the Act while computing the total income."*

5.1 For the relevant assessment year the assessee had paid education cess and secondary higher education cess (collectively known as education cess). The assessee omitted to claim the same as an expense in its return of income. In this regard, the assessee filed a petition for admission of additional ground of appeal on 09.10.2021 seeking deduction of the same while computing the total income chargeable to Income-tax. The learned AR submitted that education cess ought to be allowed as a deduction in view of the judgment of the Hon'ble Bombay High Court in the case of Sesa Goa Limited v. JCIT [(2020) 423 ITR 426 (Bom.)].

5.2 The learned Departmental Representative present was duly heard.

5.3 We have heard rival submissions and perused the material on record. The issue raised in the additional ground is a pure legal issue, which does not require any verification

of facts. Therefore, we admit the same for adjudication. The Hon'ble Bombay High Court in the case of Sesa Goa Limited v. JCIT (supra) had held education cess is an allowable expenditure as the word "cess" is conspicuously absent under the provisions of section 40(a)(ii) of the I.T.Act. The relevant finding of the Hon'ble High Court reads as follows:-

> *"23. If the legislature intended to prohibit the deduction of amounts paid by a Assessee towards say, "education cess" or any other "cess", then, the legislature could have easily included reference to "cess" in clause (ii) of Section 40(a) of the I.T.Act. The fact that the legislature has not done so means that the legislature did not intend to prevent the deduction of amounts paid by a Assessee towards the "cess", when it comes to computing income chargeable under the head "profits and gains of business or profession".*

5.4 The Hon'ble High Court also placed reliance on the CBDT Circular dated 18.05.1967, which clarified that upon omission of the term "cess" from the present section 40(a)(ii) of the I.T.Act, only rates or taxes needs to be disallowed, and hence, education cess ought not to be treated as Income-tax to be disallowed u/s 40(a)(ii) of the I.T.Act.

5.5 The Hon'ble Rajasthan High Court in the case of CIT v. Chambal Fertilizers and Chemical Limited (D.B. IT Appeal No.52 of 2018 (judgment dated 31.07.2018) had held education cess is not to be disallowed u/s 40(a)(ii) of the I.T.Act. The relevant finding of the Hon'ble Rajasthan High Court, reads as follows:-

> *"13. On the third issue in appeal no.52/2018, in view of the circular of CBDT where word "Cess" is deleted, in our considered opinion, the tribunal has committed an error in not accepting the contention of the assessee. Apart from the*

Supreme Court decision referred that assessment year is independent and word Cess has been rightly interpreted by the Supreme Court that the Cess is not tax in that view of the matter, we are of the considered opinion that the view taken by the tribunal on issue no.3 is required to be reversed and the said issue is answered in favour of the assessee".

5.6 The Mumbai Bench of the Tribunal in the case of Voltas Limited in ITA No.6612/Mum/2018 (order dated 30.06.2020) had admitted additional ground of appeal with regard to the claim of education cess and adjudicated the matter in favour of the assessee, by following the judgment of the Hon'ble Bombay High Court in the case of Sesa Goa Limited v. JCIT(supra). In the light of the aforesaid judicial pronouncements, we hold that education cess is to be allowed as deduction. It is ordered accordingly.

6. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced on this 12th day of October, 2021.

Sd/-	**Sd/-**
(B.R.Baskaran)	**(George George K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Bangalore; Dated : 12th October, 2021.
Devadas G*

Copy to :
1. The Appellant.
2. The Respondent.
3. The DRP-2, Bengaluru.
4. The Pr.CIT-2, Bengaluru.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore