IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH : KOLKATA

[Before Hon'ble Shri J.Sudhakar Reddy, AM & Hon'ble Shri S.S. Viswanethra Ravi, JM]

I.T.A Nos. 1431&1432/Kol/2014

Assessment Years : 2001-02 & 2003-04

ACIT, Circle-5 (2), Kolkata.	-vs-	M/s Hindusthan National Glass & Industries Ltd. (formerly known ACE Glass Containers Ltd.) [PAN: AADCA 4384 P]
(Appellant)		(Respondent)

For the Appellant : Shri P.K. Srihari, CIT
Shri Sallong Yaden, Addl. CIT

For the Revenue : Shri D.S.Damle, FCA

Date of Hearing : 15.05.2018

Date of Pronouncement : 27.06.2018

ORDER

Per J.Sudhakar Reddy, AM

Both the appeals are filed by the revenue and are directed against a separate order of the Commissioner of Income Tax(Appeals), CC-2, Kolkata, passed on 31.03.2014 u/s 250 of the Income Tax Act, 1961 (the Act).

2. The assessee is a company and is engaged in the business of manufacturing glass bottles.

3. **I.T.A. No. 1431/Kol/2014**

The grounds of appeal are as under:

1. "That on the facts and in circumstances of the case, the CIT(A) erred on facts as well as in law in holding that disallowance of Rs. 2.22 crore on account of 'Inventory Written off was not warranted by accepting additional evidence which was not produced before the AO. at the time of assessment, which is clearly a violation of Rule-46A".

2. "That on the facts and in circumstances of the case, the CIT(A) erred in holding that payment of commission of Rs. 34,92,603/- is allowable expenditure by accepting additional evidences which were not produced before the AD. at the time of assessment, ignoring the fact that this is violation of Rule-46A".

3. "That on the facts and in circumstances of the case, the CIT(A) erred in law as well as on facts in holding that addition of Rs. 14,26,50,526/- on account of law GP rate was not warranted by accepting additional evidence which was not produced at the time of assessment, ignoring the fact that there was sharp fall in GP from 13.09% to 2.14% in comparison to previous year and also violated the provisions of Rule 46A".

4. "That on the facts and in circumstances of the case, the CIT(A) erred on facts as well as in law in holding that addition on account of difference in finished goods of Rs. 8,62,26,753/- was not correct following the decision for the earlier year for the AY. 1999-2000 & 2000-2001, ignoring the fact that each AY. is separate proceedings and principal of 'res-judicata' is not applicable in this case".

5. That the appellant craves for leave to add, alter or withdraw any ground or grounds of appeal before or at the time of hearing of the appeal.

4. The ld. DR Mr. P.K. Srihari on ground nos. 1, 2 3, submitted that the assessee had not filed any details before the ld. AO and the Ld. CIT(A) has simply sent a letter to the AO, when the assessee had furnished additional evidences. The AO wrote back to the Ld. CIT(A) requesting that no additional evidence should be admitted. Despite such request the Ld. CIT(A) admitted additional evidence and adjudicated the issue in favour of the assessee without granting any opportunity to the AO to examine these additional evidences and give his opinion. He relied on the decision of Hon'ble Gauhati High Court in the case of CIT vs. Ranjit Kumar Chawdhury in 288 ITR 179 (Gau) and the judgment of the Hon'ble Mumbai ITAT in the case of Miss. Susmita Sen in I.T.A. No.

5132/Mum/2008 order dated 19.03.2008 and submitted that admission of additional evidence is bad in law. He further submitted that the issue is a question of fact and the Ld. CIT(A) should have investigated the facts by himself or should have directed to AO to conduct the investigation of these facts. He submitted that the Ld. CIT(A) has simply allowed the claim of the assessee for the reason that, the AO has not submitted a report. As per the Ld. CIT DR, administrative action should have been initiated by the Ld. CIT(A) against the AO, if the AO has not replied to this letter. He submitted that this issue should be set aside to the AO for fresh adjudication.

5. On ground no. 4 he submitted that the Ld. CIT(A) has simply allowed the claim of the assessee by applying the principles of *res judicata*. He argued that it is well settled that the principles of *res judicata* does not apply to income tax proceedings.

6. The ld. Counsel for the assessee submitted that on ground no. 1 fresh evidence was filed on the issue of inventory written off and the Ld. CIT(A) admitted the same by passing a speaking order. He supported this order admitting additional evidence. On ground nos. 2 & 3 he submitted that no new evidence whatsoever was filed by the assessee and hence both the ground nos. 2 and 3 are factually incorrect and misconceived.

7. He submitted that the appeal was lying for 10 years before the Ld. CIT(A) and remand report was called for from the Assessing officer and despite repeated reminders the assessing officer has not responded to the requisition of a remanded report and consequently the Ld. CIT(A) considered the evidence on record and submissions made by the assessee and granted relief. He pointed out that the ld. DR could not controvert the factual findings of the Ld. CIT(A) on merits. Hence he argued that the findings of the Ld. CIT(A) should be upheld and the appeal of the revenue dismissed.

8. On ground no. 4 he relied on the order of the Ld. CIT(A) and submitted that he had followed the order of his predecessor for the assessment year 1999-2000 and for the year 2000-01 and granted relief to the assessee. He submitted that the fact remaining the same, on the principle of consistency no disallowance could be made. Hence he prayed that the order of the Ld. CIT(A) should be upheld.

9. We have considered the rival submissions. On a careful consideration of the facts and circumstances of the case, a perusal of the papers on record, orders of the authorities below and case law also cited, we hold as follows.

10. We find from the record that the case was transferred from New Delhi to Kolkata vide order passed u/s 127 of the Act on 17.05.2012. The Ld. CIT(A), Central-2, Kolkata received the appeal on18th March, 2014 and the order has been passed on 31.03.2014. This is within 12 days of receipt of the file by the Ld. CIT(A) on transfer from another charge. At para 5 of his order for assessment year 2001-02 the Ld. CIT(A) refers to the letters written by the Ld. CIT(A) to the AO calling for the remand report. All these letters were written in the year 2003 and 2004. No request was called for after receipt of the filed by the Ld. CIT(A). Hence in our view ground no.1 should be set aside to the file of the AO for fresh adjudication in accordance with law as opportunity need to be given to the AO to verify the matter.

11. Coming to ground nos. 2 and 3 there is no additional evidence whatsoever, produced or filed by the assessee before the Ld. CIT(A). Hence the ground itself is misconceived. Be as it may the factual findings of the Ld. CIT(A) on these grounds could not be disputed by the ld. DR. the Ld. CIT(A) at para 9 and 12 could held as follows:

> *"9. I have considered the submission of the appellant and perused the assessment order. On careful consideration of the facts, I am of the opinion that the AO was not justified in disallowing the amount of commission which was in excess of the amount of*

the commission paid in the preceding year i.e. Rs. 34,92,603/-. In the assessment order the AO had made the disallowance only for the reason that the reply filed by the assessee was not found satisfactory. However, I am of the opinion that for this reason, disallowance cannot be made. He has not stated as to why the reply of the appellant was not satisfactory. It is observed that in the course of assessment proceedings, the appellant had submitted party-wise details of commission payment. Such details contain the name of the agents, rate of commission and amount of commission. The AO had not made any enquiry from the agents to prove that the claim of the appellant company was not correct. Merely for the reason that in the year under consideration there was no increase in the turnover in comparison to the preceding year, it does not mean that the amount of commission payment can also not be increased. Further, there is no basis or reason that the AO had allowed the payment of commission to the extent paid in the preceding year. It means that the AO had admitted that the appellant did make the payment of the commission on sales. However, if the AO was of the opinion that the amount of commission was on higher side or the entire claim was not genuine then he should have brought some material on record to prove that the increase in the amount of payment was not genuine. Under the circumstances, it is held that the AO was not justified in making the disallowance on account of payment of commission and he is directed to delete the same. The ground no. 3 is allowed.

The above demonstrates that no additional evidence was filed. Hence ground no. 2 is dismissed by upholding this finding of the Ld. CIT(A). On ground no. 3 the Ld. CIT(A) held as follows:

12. I have considered the submission of the appellant and perused the assessment order. It is observed that in the course of assessment proceedings, the appellant submitted the reasons due to which there was sharp fall in the gross profit margins. The appellant also submitted a comparative chart of turnover and expenses for the year under consideration and the immediately preceding year. It is observed that there was decline in the production and as a result there was decline in the turnover also. There was decline in the consumption of the raw material as well. However, there was increase in the operating expenses mainly under the heads 'salaries, wages, bonus & gratuity' and power and fuel'. The AO was of the opinion that since there was increase in the expenses under these two heads and hence there must be increase in the production rather than decrease in the production as claimed by the appellant. However, I am of the opinion that there is no logic in this observation of the AO. It is not necessary that if in a manufacturing unit the expenses on account of salary and power and fuel etc. had been increased in comparison to the preceding year then there must be increase in the production. It is observed that the AO has not doubted the genuineness and correctness of production, sales turnover or any of the operating expenditure. He has not rejected the book results of the appellant company by invoking the provisions of section 145 of the Act. Once, he has accepted the book results and the accounts which were duly audited, I am of the opinion that no addition could be made on account of gross profit. It is observed that in none of the preceding or subsequent assessment years the gross profit declared by the company had been doubted. In subsequent years

also there was loss but the same was accepted by the AO as the accounts of the appellant company were duly audited. The AO has brought no material to prove that either the appellant company had suppressed the production and the sales turnover or inflated the expenses. He did not reject the books of accounts to estimate the gross profit. Further, he did not prove that the explanation submitted by the appellant giving reasons for decline in the gross profit margin was not correct. Under the circumstances, I am of the opinion that the AO was not justified in making addition on account of gross profit and same is directed to be deleted. The ground no. 4 is allowed."

As can be seen from the above there is no additional evidence. The factual finding could not be controverted the ld. DR. Hence, we uphold the findings and dismiss the ground no. 3 of the revenue appeal.

12. Ground no. 4 the Ld. CIT(A) in his order, as the issue of addition on account of difference is finished goods held as follows:

"15. I have considered the submission of the appellant and perused the assessment order. I have also gone through the order of the Ld. CIT(A) for the assessment year 1999-2000 and the assessment order for the assessment year 2000-01. On perusal of point no. 14(b) of Notes of Account, it is observed that the auditor had stated that there were differences between the quantities of finished goods as per the physical count and as per the book records, which were on account of broken glasses. Thus, the auditor had specified that the difference was due to breakage and not for any other reason. Further, on point no. 24, the auditor had given information in regard to sales and stocks of finished goods both quantity-wise and value-wise. In the note given, the auditor specified that the breakage and spoilage of 8451 (previous year 8408 MT) have not been considered in the quantities indicated above. Thus, it is apparent that the difference of 8451 MT in the year under consideration was only due to breakage and spoilage. In the immediately preceding year i.e assessment year 2000-01, such difference was 8408 MT. In the course of assessment proceedings, the appellant explained the reasons for shortage as per the note given by the auditor. However, the AO did not appreciate the facts explained by the appellant. In the assessment year 1999-2000, in the course of assessment proceedings, it was observed by the AO that the assessee company had claimed breakage and spoilage of finished goods at 6069 MT. The AO was of the opinion that the breakage claimed by the company was excessive and unverifiable and hence he allowed the claim to the extent of 50% and value of the balance 50% was added to the income. Aggrieved, the assessee company filed an appeal before the Ld. CIT(A). The Ld. CIT(A)-XVI, New Delhi, considering the facts of the case and the explanation of the assessee allowed the claim on account of breakage and spoilage of finished goods vide Appeal No. 37/02-03 dated 13.03.2003. It is observed that in the assessment year 2000-01, the appellant company had shown shortage on account of breakage and spoilage at 8408 MT. In that assessment year, the

AO after considering the submission of the assessee company as well as the order of the Ld. CIT(A) in assessment year 1999-2000 allowed the claim of the company and no addition was made on this count. In the year under consideration the facts are exactly similar as in assessment year 1999-2000 and 2000-01. Hence, it is held that the AO was not justified in making addition on account of shortage in finished goods due to breakage and spoilage. He is directed to delete the addition made by him. The ground no. 5 is allowed."

13. The Ld. DR could not controvert these facts and findings of the Ld. CIT(A). Though res judicata is not applicable to income tax proceedings, when there is no difference in the facts, the Courts have held that the principle of consistency has to be applied. We do not find any infirmity in the order of the Ld. CIT(A). We uphold these findings and dismiss the ground no.4 of the revenue appeal.

14. Ground no. 5 is general in nature and does not require any specific adjudication. Hence this appeal of the revenue is allowed in part.

15. **Now take up in I.T.A. No. 1432/Kol/2014**

The grounds of appeal are as follows:

1. "That on the facts and circumstances of the case, the CIT(A) erred on facts as well as in law in holding that addition on account of reduction in 'Value of Inventory' of Rs. 91,94,216/- was not warranted by accepting additional evidences not produced at the time of assessment, which is clearly a violation of Rule 46A".

2. "That on the facts and circumstances of the case, the CIT(A) erred in law as well as on facts in allowing Rs. 4,12,458/- expenditure on account of 'Computer software' as revenue expenditure, ignoring the fact that the 'software' was for longer period having benefit of enduring nature as decided by the Pune bench of ITAT in the case of Sudarsan Chemical wherein, it is held that expenditure on software is capital in nature"

3. "That on the facts and in circumstances of the case, the CIT(A) erred on facts as well as in law in holding that disallowance of bad debt of Rs. 29,60,481/- was not warranted by accepting additional evidence in the form of party wise details which was not furnished before the A.O. which is clearly a violation of Rule 46A":

4. "That on the facts and in circumstances of the case, the CIT(A) erred in law as well as on facts in holding that 'reduction in inventory' of Rs. 91,94,216/- was not eligible to be considered for computing book profit u/s 115JB, ignoring the fact that the 'reduction in inventory' of Rs. 91,94,216/- which was wrongly deleted has to be considered for computing book profit u/s 115JB".

5. That the appellant craves for leave to add, alter or withdraw any ground or grounds of appeal before or at the time of hearing of the appeal.

16. Regarding the issue of 'reduction in value of inventors' the Ld. CIT(A) at para 5 and 5.1 of his order held as follows:

5. I have considered the submissions of the appellant and perused the assessment order. It is observed that the fact that the appellant had consistently been valuing its inventory; following the principle of 'Lower of the cost or net realizable value'; is not in dispute. In the assessment order even the AO has admitted that the appellate company followed this method of valuation. The AO rejected the claim of value of the inventory shown by the appellant only on the ground that in arriving at net realizable value the appellant, on ad-hoc basis had reduced value of various items @ 25% or 60% or 100%. In the course of appellate proceeding, the appellant company furnished detailed working statements of the valuation of inventory lying in stock as submitted before the AO wherein item wise particulars of different materials in stock was provided. From these statements it is observed that the appellant had identified individual items of hardware tools spares etc. having cost of Rs. 4,66,11,530/- which were found to be slow moving or non-moving nature. Cost of these items was reduced by 25%. Similarly, the appellant had identified refractories having cost of Rs. 2,12,21,765/- which had remained un-moved or become obsolete and in respect thereof reduction @ 60% in the cost was effected in the books. The appellant also identified obsolete items of stores, spares and materials and in respect thereof 100% reduction in the cost was effected. From the details furnished, it is found that the total reduction in the value of inventory carried out in books was Rs. 2,61,94,216/- where against Rs. 1,70,00,000/- provision had already been created in the earlier years. The net off of the said provision against reduction in the value of inventory debited to the profit and loss account for the year under appeal which was Rs. 91,24,216/-.

5.1. On perusal of working submitted by the appellant before the AO as well as in the course of appellate proceedings, I am of the opinion that the appellant had identified numerous items of slow moving, non-moving and obsolete stock of

materials and spares. Having regard to the state in which the items were found, the appellant had reduced cost of such inventory by adopting varying rates of reduction. Hence, I am of the opinion that it cannot be said that the appellant company had reduced the value of the inventory in ad-hoc manner. It is further observed that a similar issue was considered by the Ld. CIT(A)-IV, Delhi in the appellant's own case for the assessment year 2000-01 in the IT appeal no. 24/03-04 dated 20.05.2009. In that year the appellant had similarly made provision for reduction in the value of old stock for Rs. 83,81,625/- in respect of inventory at Rishikesh Plant. The AO disallowed the assessee's claim in assessment year 2000-01 as well because he found that the items of inventories lying in stock for very long time were valued after discounting the cost by 80% or 20% or 10%. In the course of appeal the assessee similarly explained the reasons for adopting the varying rates of reduction in relation to different inventory items and justified adoption of such varying rates. After considering the assessee's submissions, detailed working statements and after applying ratio laid down in the case of Bharat Commerce & Industries Ltd. in (244 ITR 246 Del), the Ld. CIT(A) allowed the claim of the assessee company in assessment year 2000-01. The Ld. CIT(A) held that the appellant made provision for reduction in the value of stock on scientific basis and the valuation of inventory was not made on ad-hoc basis as alleged by the AO. Adjustments were found to be made with reference to specific items and quantities of the stock and not on some vague basis. The method of valuation was therefore considered by the Ld. CIT(A) to be scientific and definite. The Ld. CIT(A) also relied on the decision of the ITAT Delhi Bench in assessee's own case for assessment year 1997-98 in I.T.A. No. 4107/Del/2001 dated 21.04.2005, wherein similar issue was decided in favour of assessee. In view of the above, I am of the opinion that the AO was not justified in making the disallowance of Rs. 91,94,216/- on account of reduction in value of slow moving/non-moving inventories. He is directed to delete the disallowance made by him. The ground no. 1 is allowed."

17. The above demonstrates that no additional evidence was filed by the assessee. before the Ld. CIT(A) on this issue. Hence this ground is misconceived. Even otherwise, on merits the findings of the Ld. CIT(A) have not been controverted by the ld. DR. Hence we uphold the same and dismiss the ground no. 1 of the revenue.

18. Ground no. 2 is on the issue of rate of depreciation allowable on printers and UPS/inventories i.e. computer accessories.

19. The Ld. CIT(A) followed the proposition of law laid down by the ITAT, Kolkata Benches in the case of ITO vs. Samiran Majumdar in 98 ITD 119 and allowed 60% depreciation on these computer accessories. We see no infirmity in the same. Hence we uphold the same and dismiss the grounds of appeal.

20. Ground no. 3 is against the deletion of disallowance of bad debts. The assessee has written off bad debts during the year. This issue is adjudicated at para 14 of the Ld. CIT(A) wherein he held as follows:

> *"14. We have considered the submission of the appellant and perused the assessment order. I have also gone through the party wise details of bad debts written off and the judicial decisions relied upon by the appellant. It is observed that the appellant could not submit the party-wise details of the bad debts before the AO for the reason stated above. However, the said details were submitted in the course of appellate proceedings. It is observed that an opportunity was allowed to the AO by the CIT(A) vide letter dated 14.07.2009 to offer his comments on the details submitted by the Appellant. But, no comments were offered by the AO. On perusal of the party-wise details of the bad debts, it is observed that these were the parties to whom the appellant company had sold glass bottles in earlier years. Thus, the debts were the trade debts which were credited to the profit and loss account in the earlier years. These debts were written off by the appellant company in the year under appeal. Hence, the claim of the appellant is allowable u/s 36(1)(vii) read with section 36(2) of the Act. In the case of TRF Ltd. 323 ITR 397 (S C), The Hon'ble Apex Court has held that the claim u/s 36(1)(vii) of the Act is allowable once the assessee writes off debts as bad debts in its accounts and no further conditions need be satisfied. In the case appellant, the trade debts had been written off in the books of accounts in the year under consideration and hence allowable as deduction. In view of the above facts, and respectfully following the decision of the Hon'ble Supreme Court, I direct the AO to delete the disallowance made by him on account of bad debts. The ground no. 4 is allowed."*

21. We find no infirmity in these findings of the Ld. CIT(A). No additional evidence has been filed before the Ld. CIT(A) and hence the ground is misconceived and dismissed.

22. The last grounds is on the issue of computing book profits u/s 115JB and the Ld. CIT(A) at page 15 directed the AO that the provision for reduction of slow moving goods should be reduced from computation of book profits u/s 115JB of the Act.

Consistent with the view taken by us while adjudicating ground no.1 of the assessee's appeal, we uphold the order of the Ld. CIT(A) and dismiss this ground of the revenue.

23. Ground no. 5 is general in nature and does not require any specific adjudication.

24. In the result, the both these appeals of the revenue are dismissed.

Order pronounced in the Court on 27.06.2018

Sd/-	Sd/-
[S.S.Viswanethra Ravi]	[J.Sudhakar Reddy]
Judicial Member	Accountant Member

Dated : 27.06.2018
SB, Sr. PS

Copy of the order forwarded to:
1. DCIT, Circle-5, Kolkata, P-7, Chowringhee Square, 3rd Floor, Kolkata-700069.
2. M/s Hindustan National Glass & Industries Ltd. (formerly known ACE Glass Containers Ltd.)
2, Red Cross Place, Kolkata-700001.
3..C.I.T.(A)- , Kolkata 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches