IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E', NEW DELHI

BEFORE SH. SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER

ITA No.4976/Del/2014
Assessment Year: 2008-09

McCain Foods India Pvt. Ltd., C-6 SDA Commercial Complex, New Delhi	**Vs.**	DCIT, Circle-6(1), New Delhi
PAN :AAACM4861G		
(Appellant)		**(Respondent)**

And
ITA No.5754/Del/2014
Assessment Year: 2008-09

DCIT, Circle -6(1), New Delhi	**Vs.**	McCain Foods India Pvt. Ltd., C-6 SDA Commercial Complex, New Delhi
		PAN :AAACM4861G
(Appellant)		**(Respondent)**

And
ITA No.4977/Del/2014
Assessment Year: 2009-10

McCain Foods India Pvt. Ltd., C-6 SDA Commercial Complex, New Delhi	**Vs.**	DCIT, Circle -6(1), New Delhi
PAN :AAACM4861G		
(Appellant)		**(Respondent)**

Assessee by	Sh. Sumeet Sareen, CA
Department by	Sh. Gaurav Sharma, Sr.DR

Date of hearing	30.08.2018
Date of pronouncement	23.10.2018

ORDER

PER O.P. KANT, AM:

The cross appeals of the assessee and the Revenue for assessment year 2008-09 are directed against order dated 16/07/2014 passed by the Ld. Commissioner of Income-tax (Appeals)-IX, New Delhi [in short 'the Ld. CIT(A)']. The appeal of the assessee for assessment year 2009-10 has been preferred against order dated 17/07/2014 passed by the same Ld. CIT(A). As common and identical grounds are involved in the appeals, same were heard together and disposed off by way of this consolidated order for convenience.

ITA Nos. 4976/Del/2014 (Assessee) & 5754/Del/2014 (Revenue)

2. First, we take up the cross appeals of the assessee and the Revenue for assessment year 2008-09. The grounds raised in ITA No. 4976/Del/2014 by the assessee are reproduced as under:

> *"That, on the facts and circumstances of the case and in law, the Ld. Commissioner of Income-tax (Appeals)-IX, New Delhi ["CIT(A)"], erred in concurring with the view of the assessing officer and thereby upholding the disallowance of excess depreciation (of Rs.27,28,319/-) and additional depreciation (of Rs.1,09,13,279/-) aggregating to Rs.1,36,41,598/- claimed by the appellant, on the ground that the electrical fittings are covered under the category of 'Furniture and Fixtures' and do not form part and parcel of 'Plant & Machinery'."*

2.1 The grounds raised in ITA No.5754/Del/2014 by the Revenue are reproduced as under:

1. *Whether on the facts and circumstances of the case & in law, the Ld. CIT(A) erred in deleting the disallowance made by the AO of Rs. 27,75,932/- by grossly ignoring the*

reasons advanced by the assessing officer and totally relying upon the decision of his predecessor in assessee's case for earlier assessment years?

2. *Whether on the facts and circumstances of the case & in law, the Ld. CIT(A) erred in allowing relief to the assessee by deleting the disallowance of depreciation claim of the assessee on building amounting to Rs. 1,84,37,305/- by relying upon the additional evidence accepted and without giving opportunity to the assessing officer as per provisions of Rule 46A.?*
3. *That the order of the Ld. CIT(A) is erroneous and is not tenable on facts and in law.*
4. *That the grounds of appeal are without prejudice to each other.*
5. *That the appellant craves leave to add, alter, amend or forego any ground(s) of the appeal raised above at the time of the hearing.*

3. Briefly stated facts of the case as culled out from the order of the lower authorities are that the assessee company was incorporated on 22/03/1996 and was engaged in the business of frozen foods, mainly frozen 'french fries' , which were sold mainly to "McDonald" and retailed through various grocery shops. For the year under consideration, the assessee filed return of income on 30/09/2008, declaring loss of Rs.24,82,07,887/-. The case was selected for scrutiny and notice under section 143(2) of the Income-tax Act, 1961 (in short 'the Act') was issued and complied with. The assessment under section 143(3) of the Act was completed on 12/12/2011 after making certain additions/disallowances to the returned income (loss). Aggrieved, the assessee filed appeal before the Ld. CIT(A), who partly allowed the appeal. Aggrieved by the order of the Ld. CIT(A), both the assessee and the Revenue are in appeal before the Tribunal raising the respective grounds as reproduced above.

4. In the sole ground, the assessee has raised the issue of not allowing depreciation of Rs.27,28,319/- and additional depreciation of Rs.1,09,13,279/- aggregating to Rs.1,36,41,598/- on the electrical fittings/installation.

4.1 The facts qua the issue in dispute are that from the Tax Audit Report (TAR) filed by the assessee, the Assessing Officer observed addition to electric installation. The Assessing Officer found that the assessee included the said electric installation under the category of 'plant and machinery' and claimed depreciation at the rate of 15% amounting to Rs.81,84,959/-. According to the Assessing Officer, as the depreciation rates prescribed under section 32 of the Act vide new Appendix – I, under Rule 5 of Income-tax Rules, 1962 (in short 'the Rules") depreciation at the rate of the 10% is applicable on tangible assets for 'furniture and fixtures' which includes electrical fitting. The 'electrical fittings' have been further clarified to include electrical wiring, switches, sockets, other fittings and fan etc. Thus, in view of the Assessing Officer, the 'electrical installation' was eligible for depreciation at the rate of 10% only. He worked out the excess depreciation disallowable amounting to Rs.27,28,319/-. Further, the Assessing Officer observed claim of the assessee of additional depreciation at the rate of 20% on the above 'electrical installation'. According to the Assessing Officer, as per section 32(iia) of the Act additional depreciation is allowable only on new plant and machinery and the electrical installation not being part of plant and machinery, the additional depreciation was not allowable. Accordingly, he disallowed the

claim of the additional depreciation of Rs.1,09,13,279/- of the assessee.

4.2 Before the Ld. CIT(A), the assessee submitted that the assets under the category of electrical fitting comprised of electrical transformer and its fittings, industrial lighting, plugs, site electricity cost, which are part and parcel of plant and machinery. The assessee submitted that accounts of the assessee were audited by a reputed firm affiliated to "Price Water House Coopers" and thus proper regard should be given to the Audit Report and depreciation should be allowed at the rate of 15% instead of 10% allowed by the Ld. AO. The Ld. CIT(A), however, rejected the claim of the assessee holding that electrical fittings are independent of plant and machinery installed and same can be used for several machines at the same time. The Ld. CIT(A) observed that when a plant or machine is replaced, the electrical fitting of the building and the connection to the main transformer remain the same and does not move along with the 'plant and machinery'. Thus according to him, the electrical installations stands as a separate asset and cannot be treated at par with plant and machinery.

4.2 Before us, the Ld. counsel of the assessee filed a paper book containing pages 1 to 44 and submitted that the Ld. CIT(A) has not understood the nature of expenditure incurred. The Ld. counsel submitted a summary of the total expenditure incurred of Rs.5,47,70,995/-. The Ld. counsel also referred to details of the expenses filed on page 39 to 40 of the paper book. In view of the submission, the Ld. counsel submitted that the entire expenditure was incurred by the assessee towards plant and

machinery setting up and automation work. According to him, the entire plant works on an integrated model and the process from start to finish is fully automated. He submitted that expenditure incurred is integral part of plant and machinery and without said installation, the plant and machinery cannot function and therefore accordingly, the depreciation at the rate of 15% and additional depreciation at the rate of 20% should be allowed on the electric installation. The Ld. counsel alternatively submitted that issue may be restored to the file of the Assessing Officer for verifying each expenditure covered under the category of electric installation so as to confirm that same is integral part of plant and machinery.

4.3 The Ld. DR, on the other hand, relied on the order of the lower authorities and submitted that it cannot be established from the detail of the expenses that electric installations are integral part of plant and machinery.

4.4 We have heard the rival submissions and perused the relevant material on record, including the details of assets filed in the paper book of the assessee. The summary of the items of electrical installation submitted by the assessee is reproduced as under:

Type of Expenses	Vendor S.No.	Amount (Rs)
Plant Automation expenses	Vendor S.No 1	2,90,53,003
Control Cable and Power Work to integrate and connect the assembly line, Power Factor Automation and High Voltage Installation work	Vendor S.No 2, 3 and 4	1,83,10,329

Power Charges paid to Uttar Gujarat Vidyut Board and Gujarat Electricity Board during Plant commissioning and Trial runs	Vendor S.No 5 and 10	27,93,404
Heat Trace System for full assembly line - Supply and Supervision costs	Vendor S.No 6 and 11	21,14,712
Electrical Engineering Design Costs	Vendor S.No 9	554,912
Labour costs for Electrical Work	Vendor S.No 7	611,317
Other electrical work connected to Plant and Machinery Set up.	Vendor S. No 8 and 12 to 20	13,33,318
GRAND TOTAL		**5,47,70,995**

4.5 The claim of the assessee that these items of electrical fittings form part of "plant and machinery" whereas according to the Revenue same falls under the category of "furniture and feature". It is evident from the above table that expenses have been incurred on power charges paid to Gujarat electricity board, engineering design and labour cost for electrical work. On perusal of page 39 to 40 of the paper book, we find that assessee has paid Rs.5,59,899/- for false ceiling, Rs.5,54,490/- paid for electricity cost during plant commissioning and trial, Rs.45,486/- for boundary and leveling of electric post etc. Thus, from these details, it cannot be ascertained that expenses have been incurred specific to any plant and machinery and the electric installation is integral part of the Plant and Machinery. In view of the above facts and circumstances and considering the alternative prayer of the assessee, we feel it appropriate to restore this issue to the file of the Ld. Assessing Officer, to verify each item of expenditure claimed under the category of "electrical

installation" along with bills and vouchers and if required, commission may be issued to an "Electrical Engineer" for verifying whether the items of electrical installation constitute integral part of plant and machinery, and then the issue in dispute may be decided in accordance with law. It is needless to mention that the assessee shall be afforded adequate opportunity of being heard. The sole ground of the appeal of the assessee is accordingly allowed for statistical purposes.

5. The ground No. 1 of the appeal of the Revenue relates to disallowance of Rs.27,75,932/- made by the Assessing Officer holding that the seed development or agronomic expenditure is capital expenditure in nature. The assessee incurred expenses on improvement of the quality of the potato grown in India which inter alia also included seed development, better production method, lease rental of land, fertilizers, pesticides, irrigation cost expenses, labour and tractors expenses etc. According to the assessee, those expenses were incurred wholly and exclusively for the purpose of the business of the company and being directly related to its business, allowable as business deduction. The Assessing Officer observed that in assessment year 2002-03 this expenditure was treated as capital expenditure, which was confirmed by first appellate authority; however, the Tribunal allowed the claim of the assessee. The appeal filed by the Revenue before the Hon'ble High Court was dismissed on account of low tax effect and, thus, to keep the issue alive he made the addition in dispute.

5.1 The Ld. CIT(A) following the decision of the Tribunal deleted the addition observing as under:

> *"5.3 The reason given by the AO and the submission of the appellant are considered. As held by AO, the issue allowability of seed development/ agronomy expenditure as Revenue expenditure has never became final as the issue has not been decided on merits by the higher judicial authorities. However, there is no reference made to the Hon'ble High Court against the order of the Hon'ble ITAT in assessee's case for A Y. 2006-07. Thus, as on date, as per record, the order of my Ld. Predecessor CIT(A) and the order of the Hon'ble ITAT on this issue is good in law. If there is any decision received from the Hon'ble High Court on this issue, the AO may follow the decision accordingly. In the order of Ld. CIT(A) for A.Y 2006-07 in assessee's own case, it is held that since the potatoes grown have been sold for more than Rs 2 crores and the receipt is offered for taxation, this is a trading operation and accordingly, the expenses incurred should be considered as revenue. Confirming the order of Ld. CIT(A), the Hon'ble ITAT in ITA No. 4671/Del/2009 vide order dated 28.02.2011, it is held that, "it can be very well concluded that these expenses are directly related to the business activity of the assessee. Hence, the expenditure involved has to be allowed as revenue expenditure.". In view of the decision of the Hon'ble ITAT in this case, the addition made is deleted and the ground of appeal is allowed."*

5.2 Before us, the Ld. DR relied on the order of the Assessing Officer and submitted that expenses incurred are for the enduring benefit and, therefore, liable to be treated as capital expenditure, not to be allowed as business expenditure.

5.3 On the contrary, the Ld. counsel of the assessee submitted that in assessment year 2007-08 also, the Tribunal endorsed the addition deleted by the Ld. CIT(A) and in further appeal, the Hon'ble Delhi High Court affirmed the finding of the Tribunal. According to the Ld. counsel, the issue in dispute, is thus squarely covered in favour of the assessee.

5.4 We have heard the rival submission and perused the relevant material on record. The assessee has submitted a copy of the decision dated 13/11/2017 of the Hon'ble Delhi High Court

(ITA 965/2017) in the case of the assessee for assessment year 2007-08. The relevant finding of the Hon'ble High Court is reproduced as under:

> *"3. The second question relates to seed development/ agronomy expenditure which was treated as capital in nature by the AO. The CIT(A) took a contrary position; that was endorsed by the ITAT being pure finding of fact. The Court is of the opinion that no substantial question of law arises."*

5.5 In view of the above facts, it is evident that issue in dispute has been decided in favour of the assessee by the Tribunal and which has been affirmed by the Hon'ble High Court holding the same as mere finding of fact. Thus, respectfully following the above, we uphold the finding of the Ld. CIT(A) on the issue in dispute. The ground No.1 of the appeal of the Revenue is accordingly dismissed.

6. In ground No. 2, the Revenue has challenged deletion of disallowance of depreciation on building amounting to Rs.1,84,37,305/- by relying on the additional evidences submitted by the assessee. The contention of the Revenue is that the Assessing Officer has not been provided opportunity to examine the additional evidences, as required under Rule 46A of the Income-tax Rules, 1962 (in short 'the Rules').

6.1 The facts qua the issue in dispute are that on the issue of disallowance of depreciation in dispute, the assessee filed additional evidences before the Ld. CIT(A), which he forwarded to the Assessing Officer. The Assessing Officer objected to admission of the additional evidences but he did not furnish any comment

on the merit of the additional evidences. The Ld. CIT(A) accepted the additional evidences, however, did not provide opportunity to the Assessing Officer to give his comment on the merit of the additional evidences. The relevant finding of the Ld. CIT(A) on the issue in dispute is reproduced as under:

> *"7.3 The reason given by AO, and the submission of the appellant are considered. The appellant submitted four documents to prove the case.*
>
> *i. Copies of electricity bills*
>
> *ii. Letter to Dy. Director, Industrial Safety & Health written by appellant*
>
> *iii. Copy of Machinery Installation Certificate by a Chattered Engineer.*
>
> *iv. A copy of the certificate given by Chattered Engineer regarding completion of the building as on 20.03.2007.*
>
> *The documentary evidences to substantiate the claim of depreciation on the building submitted u/r 46A are admissible at the appellate stage as the appellant as these documents are crucial for deciding the case. The documents furnished by the appellant can be admitted under Rule 46A to decide the issues involved on merit. In the case of CIT vs. Virgin Securities Credits P. Ltd. (2011) 332 ITR 396 (Del.) the jurisdictional High Court held that evidence crucial in disposal of case can be admitted. Since, the documents filed by the appellant before the CIT(A) are of the nature that may advance the interest of justice and show that there was no justification for addition made, the same need to be admitted and considered. The documents have evidentiary value and hence, these are admissible u/r 46A. In view of the fact that, admission of additional evidence is not equal to giving the relief it only provides an appellant an added and honest chance of being examined on merits. Since there is no more power of set aside to CIT(A), additional evidence becomes crucial in taking decisions. It can be seen from the assessment order that at no point of time the AO made any attempt to comment on the quality of evidence furnished u/r 46A and no show cause notice was issued to appellant regarding proposed addition.*
>
> *The appellant also argued that, the AO allowed the depreciation on plant and machinery installed in building and used for the manufacturing purpose. Thus, disallowing the claim of depreciation on building is in clear contradiction of the AO's action itself and this*

> *substantiates that disallowance of depreciation on building is made on conjectures & surmises disregarding the good and positive evidences furnished. Since, the plant and machinery have been put to use and production processes carried out, the preponderance of probability regarding completion of the building is more an in favour of the appellant. The AO also failed to bring into record any evidence to contradict the fact that the building was not completed. In the facts and circumstances of the case, the addition made is deleted and the ground of appeal is allowed."*

6.2 Before us the Ld. DR submitted that in view of the decision of the Hon'ble Delhi High Court in the case of CIT Vs Manish Buildwell Private Limited (245 CTR 397), wherever additional evidences are admitted at the first appellate stage, without providing opportunity to the Assessing Officer for furnishing his comments and without any verification at his end, the requirement of Rule 46A(3) are not satisfied. Accordingly, he submitted that issue in dispute may be restored back either to the Ld. CIT(A) or to the Assessing Officer.

6.3 The Ld. counsel, on the other hand, submitted that the Ld. CIT(A) duly forwarded the additional evidences filed by the assessee to the Assessing Officer, and, therefore, the Ld. CIT(A) cannot be faulted for deciding the issue after considering the submissions of the assessee.

6.4 We have heard the rival submissions and perused the relevant material on record. The undisputed fact in the case is that the Assessing Officer objected admission of additional evidence and the Ld. CIT(A) after admitting the additional evidences, has not sought any comment from the Assessing Officer on the merit of the additional evidences. In identical circumstances, the Hon'ble Delhi High Court in the case of Manish Buildwell P. Ltd. (supra) has observed as under:

"24. *In the present case, the CIT(A) has observed that the additional evidence should be admitted because the assessee was prevented by adducing them before the AO. This observation takes care of cl. (c) of sub-r. (1) of r. 46A. The observation of the CIT(A) also takes care of sub-r. (2) under which he is required to record his reasons for admitting the additional evidence. Thus, the requirement of sub-rs. (1) and (2) of r. 46A have been complied with. However, sub-r. (3) which interdicts the CIT(A) from taking into account any evidence produced for the first time before him unless the AO has had a reasonable opportunity of examining the evidence and rebut the same, has not been complied with. There is nothing in the order of the CIT(A) to show that the AO was confronted with the confirmation letters received by the assessee from the customers who paid the amounts by cheques and asked for comments. Thus, the end result has been that additional evidence was admitted and accepted as genuine without the AO furnishing his comments and without verification. Since this is an indispensable requirement, we are of the view that the Tribunal ought to have restored the matter to the CIT(A) with the direction to him to comply with sub-r. (3) of r. 46A. In our opinion and with respect, the error committed by the Tribunal is that it proceeded to mix up the powers of the CIT(A) under sub- s. (4) of s. 250 with the powers vested in him under r. 46A. The Tribunal seems to have overlooked sub-r. (4) of r. 46A [sic-s. 250] which itself takes note of the distinction between the powers conferred by the CIT(A) under the statute while disposing of the assessee's appeal and the powers conferred upon him under r. 46A. The Tribunal erred in its interpretation of the provisions of r. 46A vis-à-vis s. 250(4). Its view that since in any case the CIT(A), by virtue of his coterminous powers over the assessment order, was empowered to call for any document or make any further enquiry as he thinks fit, there was no violation of r. 46A is erroneous. The Tribunal appears to have not appreciated the distinction between the two provisions. If the view of the Tribunal is accepted, it would make r. 46A otiose and it would open up the possibility of the assessees' contending that any additional evidence sought to be introduced by them before the CIT(A) cannot be subjected to the conditions prescribed in r. 46A because in any case the CIT(A) is vested with coterminous powers over the assessment orders or powers of independent enquiry under sub-s. (4) of s. 250. That is a consequence which cannot at all be countenanced.*

25. *For the above reasons, we answer the substantial questions of law framed in para 21 above, in favour of the Revenue and against the assessee. The issue relating to the addition of Rs. 1,61,67,600 made under s. 68 of the Act is restored to the CIT(A) who shall comply with the requirements of r. 46A and take a fresh decision on the merits of the addition in accordance with law."*

6.5 In view of the above decision, the matter required to be restored to the file of the Ld. CIT(A) for complying the requirements of Rule 46A(3) and provide opportunity to the Assessing Officer. However, while dealing with the earlier ground, we have restored the issue in dispute involved in that ground to the file of the Assessing Officer. Thus, to avoid simultaneous proceedings at multiple levels, we feel it appropriate to restore this issue also to the file of the Assessing Officer along with direction to the assessee to produce all evidences on the issue in dispute before the Assessing Officer. The Assessing Officer, thereafter may decide the issue in dispute in accordance with law after providing adequate opportunity of being heard to the assessee. The ground No. 2 of the appeal of the Revenue is accordingly allowed for statistical purposes.

7. Grounds no. 3 & 4 are general in nature, hence not required to adjudicate upon.

ITA No.4977/Del/2014

8. Now, we take up the appeal of the assessee having ITA No. 4977/Del/2014 for assessment year 2009-10. The sole ground raised by the assessee is reproduced as under:

> *"That, on the facts and circumstances of the case and in law, the Learned Commissioner of Income-Tax (Appeals)-lX, New Delhi ["CIT(A)"], erred in concurring with the view of the assessing officer and thereby upholding the disallowance of excess depreciation of Rs. 4,19,478/- claimed by the appellant, on the ground that the electrical fittings are covered under the category of 'Furniture and Fixtures' and do not form part and parcel of 'Plant & Machinery' by following the rationale adopted as per the Assessment order in the previous assessment year i.e. 2008-09."*

8.1 The above ground being identical to the ground raised by the assessee in ITA No.4976/Del/2014 for assessment year 2008-09, which we have adjudicated in earlier paras, we restore the issue in dispute to the file of the Assessing Officer along with the direction to the assessee to produce all necessary details and evidences in support of its claim before the Assessing Officer. The Assessing Officer is directed to decide the issue in accordance with law after providing adequate opportunity of being heard to the assessee. The ground of the appeal is accordingly allowed for statistical purposes.

8. In the result, both the appeals of the assessee are allowed for statistical purposes and the appeal of the Revenue is partly allowed for statistical purposes.

Order is pronounced in the open court on 23rd October, 2018.

Sd/-	Sd/-
SUDHANSHU SRIVASTAVA	**O.P. KANT**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 23rd October, 2018.
RK/-(D.T.D.)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi