

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH,
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 3348/DEL/2019 [A.Y 2009-10]

M/s Pepsico India Holdings Pvt Ltd
Level 306, Pioneer Square,
Sector 62, Near Gold Course
Extension Road, Gurgaon

Vs. The D.C.I.T.
Central Circle 12
New Delhi

PAN: AAACP 1272 G

(Applicant)

(Respondent)

Assessee By : Shri K.M. Gupta, Adv
Ms. Shruti Khimta, AR

Department By : Smt. Neetika Bansal, CIT- DR

Date of Hearing : 30.05.2022

Date of Pronouncement : 30.05.2022

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order of the
ld. CIT(A) - 2 New Delhi dated 18.01.2019 pertaining to Assessment
Year 2009-10.

2. The grievances of the assessee read as under:

"1. On the facts and the circumstances of the case and in law, the Ld. Commissioner of Income Tax (Appeals)-2, New Delhi [Ld. CIT(A)] has erred in confirming the additions made by the Deputy Commissioner of Income-Tax, Circle 12, New Delhi (Ld. AO) for provision for leave encashment amounting to INR 59,93,900 while computing book profits under Section 115JB of the Act, disregarding the fact that the same is computed on actuarial basis and allowed by the Commissioner of Income Tax (Appeals) in Assessee's own case for AY 2008-09.

2. On the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in confirming the disallowance made by the Ld. AO, amounting to INR 1,25,13,054 incurred on improvements made to leasehold premises, holding the same to be of enduring nature, while disregarding the fact that the expenses of similar nature has been allowed by the Commissioner of Income Tax (Appeals) in Assessee's own case for AY 2008-09.

2.1 On the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in confirming the findings of the Ld. AO that the depreciation should be allowed at the rate of 10% as against the 100% depreciation claimed by the Appellant alleging that the improvements made to leasehold premises give enduring benefit to the Appellant.

2.2 Without prejudice to the ground number 2 and 2.1 above, on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not allowing the entire expenditure of INR 1,39,10,628 as revenue expenditure under Section 30 or Section 37(1) of the Act.

3. On the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in confirming the disallowance made by the Ld. AO, amounting to INR 1,25,13,054, incurred on improvements made to leasehold premises while computing book profits under Section 115JB of the Act.

3.1. On the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating that the amount of INR 1,39,10,628 is not charged to Profit and loss account for the year under consideration hence addition under section 115JB of the Act is otherwise not legally tenable.

4. On the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in confirming the disallowance made by the Ld. AO, amounting to INR 20,10,501 towards depreciation claimed under Section 32 of the Act on non-compete fee.

5. On the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in confirming the disallowance made by the Ld. AO, amounting to INR 20,10,501 towards depreciation claimed on non-compete fee under Section 32 of

the Act while computing book profits under Section 115JB of the Act."

3. At the very outset, the Id. counsel for the assessee stated that the issues raised in the grounds were there in earlier years also and this Tribunal/High Court has considered the same and have decided the issues.

4. The Id. DR placed strong reliance on the findings of the lower authorities.

5. We have given thoughtful consideration to the orders of the authorities below and have carefully perused the decisions relied upon and brought to our notice during the course of arguments.

6. Briefly stated, the facts of the case are that the assessee company is engaged in trading and manufacturing of soft drink beverages, aerated and aerated Pepsi, Mirandi, lemon, 7up, Mountain dew, slice, Acquaafina etc and snacks food items like Kurkure, potato chips, cheetos, Lehar namkeen etc.

7. The assessee-company is also engaged in providing loans to the companies involved in the business of manufacture of soft drinks.

8. During the course of scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has created provision for gratuity of Rs. 8,51,24,302/- and for leave encashment Rs. 59,93,900/. The Assessing Officer found that provision of Rs. 9,11,18,2020/- was added back by the assessee while calculating income under normal provisions of the Act. However, the same were not added while computing book profit u/s 115JB of the Act. The assessee was asked to explain the same.

9. In its reply, the assessee stated that provision for gratuity and leave encashment were created scientifically on the basis of actuarial valuation and, therefore, in the nature of ascertained liability. Strong reliance was placed on the decision of the Hon'ble Supreme Court in the case of Bharat Earth Movers 245 ITR 428 and in the case of Metal Box Company of India Ltd 73 ITR 53.

10. Submissions of the assessee were duly considered by the Assessing Officer who was of the firm belief that though the actuarial valuation may be on scientific basis, but this does not make it actual ascertained liability.

10. Dismissing the claim of the assessee, the Assessing Officer went on to make addition of Rs. 8,51,24,302/- and Rs. 59,93,900/- totaling to Rs. 9,11,18,202/- u/s 115JB of the Act.

11. The Id. CIT(A), following the order of his predecessor in Assessment Year 2008-09, confirmed the addition of Rs. 59,93,900/- on account of leave encashment and deleted the addition of Rs. 8,51,24,302/-.

12. When the matter travelled upto the Tribunal, this Tribunal in ITA No. 4077/DEL/2015 and 4102/DEL/2015 vide order dated 14.01.2020 upheld the deletion of the addition on account of gratuity and remanded the matter relating to the provision for leave encashment for verification of actuarial valuation and respectfully following the findings of the co-ordinate bench, we direct the Assessing Officer to

verify whether any suo moto addition was made by the assessee and whether the valuation of the liability is based on actuarial valuation and decide the issue afresh as held in earlier Assessment Year. This ground is allowed for statistical purposes.

13. Next grievance relates to the disallowance of depreciation of lease hold improvements allowed @ 10% instead of 100% claimed by the assessee under normal provisions of the Act.

14. During the course of scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has debited Rs. 1,39,10,628/- under the head "Expenditure" on lease hold improvement on which it claimed 100% depreciation.

15. The assessee was asked to justify its claim.

16. The assessee, in its reply, explained that it has incurred expenditure on improvements to leasehold premises at Bangalore amounting to Rs. 1,39,10,628/-.

17. The assessee brought to the notice of the Assessing Officer that an identical issue has been decided by the Hon'ble High Court in favour of the assessee for Assessment Years 1997-98 and 2000-01.

18. After considering the submissions of the assessee, the Assessing Officer observed that it is true that the assessee has incurred these expenses to obtain business advantages by adding new installation but it is not true to say that these were not of capital in nature. According to the Assessing Officer, these installations are of such nature which will give advantage of enduring nature to the assessee and as such, it should be treated as capital in nature.

19. The Assessing Officer further observed that even the Hon'ble High Court has not accepted the contention of the assessee as it is, but has treated only some of the items included in total lease as of revenue in nature and, accordingly, made addition of Rs. 1,25,13,054/- which was confirmed by the Id. CIT(A).

20. Before us, the Id. counsel for the assessee vehemently stated that the assessee had given a complete list in its tax audit report which has not been examined by the Assessing Officer. It is the say of the Id.

counsel for the assessee that if the Assessing Officer had examined the tax audit report, then the observation made by him with respect to the decision of the Hon'ble High Court of Delhi would not be required.

21. We have carefully perused the orders of the authorities below and have also gone through the decision of the Hon'ble Delhi High Court. It is true that the Hon'ble High Court of Delhi, while adjudicating the quarrel, has upheld the findings of the Tribunal holding that the Tribunal has given fact finding on the items as revenue in nature.

22. It is true that in its tax audit report, the assessee has given a list of items which are of revenue in nature but the same has not been examined by the Assessing Officer. Therefore, in the interest of justice and fair play, we restore this issue to the file of the Assessing Officer. The Assessing Officer is directed to examine the details given in the tax audit report and decide the issue afresh after affording reasonable and sufficient opportunity of being heard to the assessee. This ground is allowed for statistical purposes.

23. Next grievance relates to disallowance of depreciation on non-compete fees under normal computation and u/s 115JB of the Act.

24. While scrutinizing the return of income, the Assessing Officer found that the assessee has claimed depreciation @ 25% on account of non-compete fees, which was treated as intangible asset.

25. The claim of the assessee did not find any favour with the Assessing Officer who disallowed the same.

26. The assessee carried the matter before the Id. CIT(A) but without any success.

27. At the very outset, we have to say that this is not the first year of claim of depreciation. In fact, depreciation has been claimed on the written down value of the intangible asset.

28. Secondly, this quarrel was considered by this Tribunal in ITA Nos. 4077/DEL/2015 and 4102/DEL/2015 vide order dated 14.01.2020 and the same reads as under:

“25 Ground No. 6 of Revenue’s appeal relate to the disallowance of depreciation on the noncompete fees paid by the assessee. Ld. CIT(A), as a matter of fact, observed that depreciation on the capitalized noncompete fee was allowed in the earlier years and therefore the same cannot be disallowed in this year.

26. We have gone through the details of the noncompete fees incorporated at page No. 70 of the paper book which clearly reveals that for the earlier years, namely, 2005-06 to 2007-08 the Revenue accepted the depreciation claimed at Rs. 63,54,176/-, Rs. 47,65,632/-, and Rs.35,74,224/-, but in respect of the assessment year 2008-09 the depreciation on the capitalised noncompete fee claimed that Rs.26,80,668/-was disallowed. Reasoning given by the Assessing Officer to disallow this claim is that the issue hinges around the interpretation of the phrase “business or commercial rights of similar nature” used in clause (ii) of section 32, and a careful reference to the language of the provisions in section 32 makes it clear that all the specific awards that a preceding general words “business or commercial rights of similar nature” are related to a class of rights which are intellectual property rights whereas the alleged payment is for noncompete fee. Further, according to the learned Assessing Officer the right to noncompete acquired by

the assessee is only a right in personam and therefore the assessee is not entitled to claim depreciation on the noncomplete fee. Learned Assessing Officer does not refer to any change of circumstances from the earlier years so as to deviate from the view that was taken for earlier years. We therefore do not find anything illegality or irregularity in the Ld. CIT(A) following the view taken for the earlier years under identical circumstances. Ground No. 6 is accordingly devoid of merits and is dismissed."

29. Respectfully following the findings of the co-ordinate bench [supra], we direct the Assessing Officer to delete the impugned addition. This ground is accordingly allowed.

30. In the result, the appeal of the assessee in ITA No. 3348/DEL/2019 is allowed in part for statistical purposes.

The order is pronounced in the open court on 30.05.2022.

Sd/-

**[ASTHA CHANDRA]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 30th May, 2022.

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
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