

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI**

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

ITA No. 3231/Del/2019
Asstt. Year: 2009-10

DCIT, Central Circle-7, New Delhi. Pin 110 055	Vs.	PepsiCo India Holdings Pvt. Ltd. Level 3-6, Pioneer Square, Sector-62, Near Golf Course Extension Road, Gurgaon, Haryana Pin 122 001.
(Appellant)		(Respondent)

Assessee by:	Shri K.M. Gupta, Adv. Ms Shruti Khimta, AR
Department by :	Shri Vivek Vardhan, Sr.DR
Date of Hearing	02/02/2023
Date of pronouncement	14/02/2023

ORDER

PER ASTHA CHANDRA, JM

The appeal filed by the Revenue is directed against the order dated 18.01.2019 of the Ld. Commissioner of Income Tax (Appeals) – 2, New Delhi (**"CIT(A)"**) pertaining to Assessment Year (**"AY"**) 2009-10.

2. The Revenue has taken the following grounds of appeal:-

- “1. The order of Ld. CIT(A) is not correct in law and facts
2. On the facts and circumstances of the case, the Ld. CIT(A) has erred in law in deleting the addition of Rs. 8,51,24,302/- made by the A.O on account for gratuity as unascertained liability u/s 115JB.

3. *On the facts and circumstances of the case, the Ld. CIT(A) has erred in law in restricting the addition upto Rs. 1,69,88,579/- made by the AO on account of disallowances u/s 14A r.w.r. 8D under the normal provision of the Act.*
4. *On the facts and circumstances of the case, the Ld. CIT(A) has erred in law in restricting the addition upto Rs. 1,69,88,579/- made by the AO on account of disallowances u/s 14A r.w.r.8D under book profit u/s 115JB of the Act.*
5. *On the facts and circumstances of the case, the Ld. CIT(A) has erred in law in deleting the addition of Rs. 7,81,061/- made by the AO on account of disallowances of depreciation on computer peripherals as well as book profit u/s 115JB.*
6. *On the facts and circumstances of the case, the Ld. CIT(A) has erred in law in deleting the addition of Rs. 43,63,385/- made by the AO on account of disallowance of additional depreciation.”*

3. The brief facts of the case are that the assessee company is engaged in the trading and manufacturing of soft drink beverages aerated and non-aerated snacks food items. It is also engaged in providing loans to the companies involved in the business of manufacture of soft drink. It e-filed its return for AY 2009-10, on 29.09.2009 declaring income at Nil after setting of brought forward depreciation/loss of Rs. 47,64,75,666/- under normal provisions and Rs. Nil under section 115JB of the Income Tax Act, 1961 (**the “Act”**) after setting of lower of the brought forward depreciation/business loss, profits. The return was processed under section 143(1) of the Act on 11.03.2011. The case was selected for scrutiny. The statutory notices were issued and served upon the assessee, in response to which various replies, documents and explanations were filed. The Ld. Assessing Officer (**“AO”**) finalised the assessment on 28.03.2013 under section 143(3) of the Act determining Nil income under normal provisions and loss of Rs. 48,97,01,846/- under section 115JB of the Act including therein certain additions/disallowances. On appeal by the assessee before the Ld. CIT(A), certain additions/disallowances were deleted. It is against the relief granted by the Ld. CIT(A) in respect of said additions /

disallowances that the Revenue has come up in appeal before the Tribunal and all the grounds relate thereto.

4. We have heard the Ld. Representative of the parties and perused the records. Both the parties agreed that the issues raised by the Revenue are covered in assessee's favour. We proceed to consider them hereinafter.

5. Ground No. 1 is of general nature and needs no adjudication.

6. Ground No. 2 relates to addition of Rs. 8,51,24,302/- made by the Ld. AO on account of gratuity as unascertained liability under section 115JB which stands deleted by the Ld. CIT(A). The Ld. AO has discussed this issue in para 6 on page 5 of his order. The Ld. AO found that during the year the assessee created provision for gratuity of Rs. 8,51,24,302/- which was not added while computing book profit under section 115JB. On query made by the Ld. AO, the assessee submitted that provision for gratuity was created scientifically on the basis of actuarial valuation and was therefore, in the nature of an ascertained liability and furnished a copy of actuarial certificate in support. The assessee also placed reliance on the decision of the Hon'ble Supreme Court in Metal Box Company of India Ltd. vs. Their Workmen 73 ITR 53(SC).

6.1. The submission of the assessee was not acceptable to the Ld. AO. For the reasons recorded by him in paras 6.1 to 6.3 of his order, he added the impugned provision for gratuity to the income of the assessee under section 115JB of the Act holding that it is not an ascertained liability. On appeal, relying on the decision of Hon'ble Delhi High Court in CIT vs. Hewlett Packard Pvt. Ltd. (2008) 314 ITR 55 (Del.) and the order of the Ld. CIT(A) on the point for AY 2008-09, the Ld. CIT(A) decided in favour of the assessee. The Revenue, being aggrieved is before the Tribunal.

6.2. It has been brought to our notice by the parties that the Tribunal vide order dated 14.01.2020 in ITA No. 4102/Del/2015 for AY 2008-09 (copy at page 353-355 of Paper Book) remanded the issue and restored it to the file

of the Ld. AO for verification of the actuarial valuation. The Ld. AO verified the actuarial valuation report filed by the assessee. In his order under section 254 r.w.s 143(3) of the Act dated 15.09.2020 the Ld. AO allowed the assessee's claim (copy appears at page 362-363 of Paper Book). In the year under consideration as well, the assessee has submitted actuarial valuation report before the Ld. AO which has not been verified. We, therefore, remit the issue and restore it back to the file of the Ld. AO for verification of the said actuarial valuation and allow the claim of the assessee provided the report, on verification, is found to be in order. We order accordingly.

7. Ground No. 3 relates to disallowance of expenses under section 14A of the Act. The Ld. AO discussed this issue in para 8 of his order. On being asked why certain expenses be not disallowed under section 14A r.w. rule 8D, the assessee replied that during the year the assessee earned dividend income of Rs. 1,69,88,579/- on strategic business investments of Rs. 1,34,25,76,500/- in earlier years and claimed exemption under section 10(34) of the Act. It was also stated that the assessee has suo-motto disallowed an amount of Rs. 3,15,10,378/- under section 14A of the Act, though section 14A of the Act is not applicable to the assessee as no expenditure has been incurred to earn dividend income.

7.1. The contention of the assessee was not acceptable to the Ld. AO who for the reasons recorded by him held that having regard to the accounts of the assessee, the provisions of section 14A did apply and worked out disallowance of Rs. 53,57,98,28/- under rule 8D and reducing therefrom the suo-motto disallowance of Rs. 3,15,10,378/- added Rs. 2,20,69,450/- to the income of the assessee under section 14A r.w. rule 8D under normal provisions of the Act.

7.2. On appeal, the Ld. CIT(A) noted that the assessee has earned dividend of Rs. 1,69,88,579/- and therefore, following the decision in the cases of Maxopp Investment and Chettinad Logistics, the Ld. CIT(A) held that disallowance under section 14A cannot exceed the exempt income earned

i.e. Rs. 1,69,88,579/-. Since the assessee had already added back Rs. 3,15,10,378/- no further disallowance is required.

7.3 Dissatisfied the Revenue is in appeal before the Tribunal.

7.4. The facts are not in dispute. The assessee has earned exempt dividend income of Rs. 1,69,88,579/- during the year. It is also an admitted position that the assessee has itself worked out disallowance of Rs. 3,15,10,378/- which it added back to its income suo-motto. In assessee's own case disallowance under section 14A has been restricted upto exempt income only in AY 2008-09 by the Tribunal in its order dated 14.01.2020 in ITA No.4077/Del/2015. The order of the Ld. CIT(A) is in accord with the decision (supra) of the Tribunal. We, therefore, hold that no interference is called for. The ground of the Revenue is, therefore rejected.

8. Ground No. 4 relates to disallowance of expenses under section 14A of the Act read with rule 8D while computing book profits under section 115JB of the Act. The Ld. AO disallowed an amount of Rs. 2,20,69,450/- under section 14A in computing book profits under section 115JB of the Act. On appeal, the Ld. CIT(A) restricted the addition upto Rs.1,69,88,579/-. Since the assessee had already added back Rs. 3,15,10,378/- suo-motto, the Ld. CIT(A) held that no further disallowance is required. The Revenue is aggrieved.

8.1. The contention of the assessee has been that no disallowance under section 14A r.w. rule 8D of the Rules can be made while computing book profits under section 115JB of the Act as Explanation to that section does not specifically mention section 14A of the Act based on the decision of Special Bench of the Tribunal in ACIT vs. Vireet Investment (P) Ltd.(2017) 82 taxmann.com 415 (Delhi-Trib) (SB). The assessee's contention has been upheld by the Tribunal in assessee's own case in ITA No. 4077/Del/2015 dated 14.01.2020 for AY 2008-09. In this view of the matter, there is no substance in this ground of the Revenue which we hereby reject.

9. Ground No. 5 relates to disallowance of depreciation of Rs. 7,81,061/- on computer peripherals as well as book profits under section 115JB of the Act. The Ld. AO discussed this issue in para 10 on page 21 of his order. The Ld. AO observed that similar expenses were categorised as office equipment and therefore he disallowed excess claim of depreciation amounting to Rs. 7,81,061/-. On appeal, the Ld. CIT(A) noted that the Ld. AO negated the assessee's claim of depreciation on computer peripherals @ 60% totalling Rs. 16,49,416/- and allowed depreciation thereon @ 15% only of Rs. 7,81,061/-. Following the decision of Ld. CIT(A) in AY 2008-09 and the decision of the Tribunal in Steel Authority of India vs. Addl. CIT he decided the issue in favour of the assessee.

9.1. Aggrieved, the Revenue is in appeal before the Tribunal.

9.2. Submission of the assessee is that the issue is no longer res-integra. It is covered in favour of the assessee by the decision of the Hon'ble Supreme Court in CIT vs. M/s. Birlasoft Ltd. in Appeal No. 2645/2012 and the decision of the Hon'ble Delhi High Court in CIT vs. BSES Rajdhani Powers Ltd. in ITA No. 0266/2010. However, we find that identical issue came up for consideration before the Tribunal in assessee's own case in AY 2008-09 and the Tribunal in para 24 of its order dated 14.01.2020 in ITA No. 4102/Del/2015 upheld the contention of the assessee that UPS, Printer and Projector form part of computer peripherals and directed the Ld. AO to re-compute the depreciation in respect of the above 3 items @ 60%. The facts and pleading remaining the same in the year under consideration, following the decision (supra) of the Tribunal we direct the Ld. AO to re-compute the depreciation on the above 3 items only @ 60% and modify the assessment accordingly.

10. Ground No. 6 relates to disallowance of additional depreciation of Rs. 43,63,385/- made by the Ld. AO. The Ld. AO discussed this issue in para 5 at page 4-5 of his order. It would be seen that the Ld. AO has re-computed the depreciation by taking into consideration the depreciation for AY 1995-

96 and 1996-97 which was not claimed by the assessee and additionally allowed the depreciation of Rs. 43,63,385/- and reduced it from the income.

10.1. On appeal, the Ld. CIT(A) allowed this issue in favour of the assessee by following the order of the Ld. CIT(A) for AY 2008-09 which he reproduced in para 6.15 of the appellate order. The Revenue is dissatisfied and is before the Tribunal.

10.2. Before us, the Ld. AR submitted that the issue stands decided by the order of the Ld. CIT(A) for AY 1995-96 to 2008-09 and by the decision of the Tribunal in favour of the assessee for AY 1997-98 to 2001-02 and by the Hon'ble Delhi High Court for AY 1998-99. It is further submitted that there is no change in facts or in law in the year under consideration.

10.3. Nothing has been brought to our notice by the Ld. DR to enable us to take a different view. We, therefore, uphold the order of the Ld. CIT(A) and reject this ground being devoid of any legal substance.

11. In the result, the appeal of the Revenue is partly allowed for statistical purposes.

Order pronounced in the open court on 14th February, 2023.

sd/-

**(N.K. BILLAIYA)
ACCOUNTANT MEMBER**

sd/-

**(ASTHA CHANDRA)
JUDICIAL MEMBER**

Dated: 14/02/2023

Copy forwarded to-

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT 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	
Date of dispatch of the Order	