* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **I.T.A. No.574/2007**

% Date of Decision: 09.03.2011

The Commissioner of Income Tax – V .... Appellant
Through: Ms. Rashmi Chopra, Advocate for the Revenue.

Versus

Pepsico India Holding Pvt. Ltd. .... Respondent
Through: Mr.C.S. Aggarwal, Sr. Advocate with Mr.Prakash Kumar and Mr.Vishal Kalra, Advocate for the respondent/assessee.

CORAM:
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether reporters of Local papers may be allowed to see the judgment? No
2. To be referred to the reporter or not? No
3. Whether the judgment should be reported in the Digest? No

A.K. SIKRI, J. (ORAL)
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1. This appeal pertains to the assessment year 1998-99 wherein the following questions of law are proposed:-

   (i) Whether the learned Tribunal erred in allowing amortization of the preliminary expenses of ₹8,02,000/- (representing 1/10th of total expenses) eligible for deduction under Section 35D of the Act before the commencement of business operations?

(ii) Whether in the facts & circumstances of the case the learned ITAT erred in deleting the addition made by the AO on account of excess consumption of sugar and manufacturing of extra soft drinks sold outside the books of accounts by relying on extraneous considerations?

(iii) Whether the order of the learned ITAT is liable to be set aside on the ground that it erroneously records that the revised certificate was accepted by the AO while the Remand Report of the AO clearly mentions that even on the consideration of the revised certificate, an excess consumption of sugar by 1259 tonnes calculated on the basis of revised certificate of auditors and figures of consumption provided by the assessee?

(iv) Whether the learned ITAT erred in holding the MODVAT credit is not to be included in the valuation of closing stock?

(v) Whether the learned ITAT erred in deleting the addition of Rs.2,22,96,100/- on account of MODVAT credit receivable on closing stock of raw material?

(vi) Whether the provisions of Explanation 5 to Section 32(i) of Income Tax Act, 1961 inserted w.e.f. 01.04.2002 requiring the AO to compulsorily compute depreciation is clarifcatory in nature?

2. In so far as first is concerned, the Assessing Officer disallowed the amortization of the expenses of ₹8,02,000/- under Section 35D of the Income-Tax Act. The Assessing Officer wrongly presumed that the expenses incurred were the fee payable on account of increase in share capital. It is a matter of record

arrived at by the Income Tax Appellate Tribunal as well that the expenses incurred were on the registration of the company and thus incurred before the commencement of business operation. On this basis they were amortized for a period of ten years and 1/10th of the expenditure reached ₹8,02,000/- was claimed in this year. We also find that in the subsequent assessment year, the expense was allowed by the ITAT against which no appeal was preferred.

3. In these circumstances, there is no reason to disallow the same as it is clear that the Revenue had accepted to amortize the aforesaid expense over a period of ten years and, therefore, for all these ten years, the expenditure is eligible for deduction under Section 35D of the Act. No question of law arises.

4. The second issue which is proposed in this appeal relates to the alleged excess consumption of sugar.

5. The Assessing Officer while carrying out the assessment observed that in the manufacture of soft drinks, sugar is one of the major ingredients apart from soft drinks concentrate. He noticed that the assessee had shown consumption of sugar of 3,22,18,000 kilograms for production of 3,43,31,000 cases of soft

drinks giving an average of 938 kilograms of sugar per 1000 cases of soft drinks. The Assessing Officer also found that in the preceding year the total production was 2,76,26,000 cases for which sugar to the tune of 2,01,42,000 kilograms was consumed which was giving an average consumption of 729 kilograms of sugar per 1000 cases of soft drinks. On this basis, the Assessing Officer calculated that average consumption of sugar had increased by 209 kilograms per 1000 cases of soft drinks which was 28.67% higher than the preceding year. The Assessing Officer did not dispute the actual consumption of the sugar. However, curiously he concluded that since the consumption of sugar was higher by 28.67%, it would have resulted in higher production of the soft drinks by 28.67%. Thus instead of accepting the figure of production of 3,43,31,000 cases of soft drinks given by the assessee, the Assessing Officer inflated the same by 23.54% and concluded that the total soft drinks produced by the assessee would be to the tune of 4,88,27,00,000 instead of 3,43,31,000 cases as declared in Schedule 18 of the balance sheet. On this figure as declared in Schedule 18, 23.54% thereof was added as out of book sales and in this manner addition of ₹1,14,93,87,580/- was made by the Assessing Officer.

6. In appeal, the CIT(A) denounced this approach of the Assessing Officer, wherein he held that the alleged increase in the consumption of sugar would necessarily lead to increase in production and making of the addition on that basis. CIT(A), however, was of the opinion that there was in fact excess consumption of sugar in the year in question. As per CIT(A), the excess consumption was to the tune of 1259 tonnes. This figure was arrived at on the basis of calculations made by the Assessing Officer wherein it was found that total consumption of sugar was 27056 tonnes against 32218 tonnes reported in the earlier year in the audit report. The AO had further noticed that appellant had itself reported a consumption of 26231 tonnes whereas the auditors in their revised certificate had worked out actual consumption at 27056 tonnes. It was further stated that sugar consumption for manufacturing of Mirinda and Mangola had been taken at higher figure as compared to consumption for these two items for the assessment order 1997-98. After applying the formula for sugar consumption for the assessment years 1997-1998 and 1998-1990, the AO worked out the total consumption of sugar for assessment year 1998-1999 at 25797 tonnes. In this manner, according to the Assessing Officer, the

excess consumption of sugar was 1259 tonnes (27056 -25797). The CIT(A), in these circumstances, asked the respondent/assessee to explain the discrepancy of 1259 tonnes sugar consumption. According to the CIT(A), the respondent was unable to give any satisfactory explanation of the excess consumption of sugar and, therefore, he took the excess consumption to the tune of 1259 tonnes and made the addition by taking average price of sugar at ₹14.17 per kg., i.e., ₹1,78,44,446/-. The CIT(A) thus modified the order by deleting the figure of ₹1,14,93,87,580/- arrived at by the Assessing Officer and substituting the same by ₹1,78,44,446/-.

7. Both Revenue as well as the Assessee preferred appeals to the ITAT against the aforesaid order. Insofar as the Revenue is concerned, it was aggrieved against the relief given by the CIT(A). The ITAT rejected the appeal of the Revenue and rightly so. As already pointed out above, even if we proceed on the assumption that there was excess consumption of sugar, there was no rational basis for presuming that the respondent would have manufactured more soft drinks and the production of these soft drinks were suppressed. It is an admitted case that the Assessee was maintaining the regular books of accounts and no

discrepancy in the books of accounts was found. Assessee is also maintaining the records of stocks. The product of the assessee is also excisable. Furthermore, for higher production sugar is not the only ingredient and it is nowhere pointed out that other ingredients used were also consumed in excess. This was thus a totally illogical conclusion arrived at by the Assessing Officer and rightly rejected by the CIT(A) as well as ITAT.

8. In these circumstances, the only question is, as to whether there was excess consumption of sugar? After going into the minute calculations about the consumption, the ITAT has found that there was no discrepancy and the difference of 1259 tonnes as stated by the AO and accepted by CIT(A) was merely on presumptions. The consumption of 2631 tonnes was worked out on the basis of rates applicable in the assessment year 1997-98. The Tribunal also accepted the contention of the assessee that that the assessee was also maintaining the record for the consumption and no discrepancy therein was pointed out. The order of the Tribunal further reveals the manner in which the arithmetic error was pointed out by it. Though this order discusses this aspect in much detail and it is not necessary to go into the same, suffice it to state that 434 tonnes was attributed

to standard consumption and 826 tonnes due to wastage thereby accounting for the alleged excess consumption.

9. This is a pure finding of fact arrived at by the Tribunal holding that there was no excess consumption of sugar and, therefore, the addition made by the CIT(A) was also rightly deleted by the ITAT.

10. The third issue pertains to the depreciation allowed by the CIT(A) as well as ITAT. The contention of the Revenue is that explanation 5 to Section 32 (i) of the Income Tax, which is inserted with effect from 01.04.2002 was clarificatory in nature and therefore the Assessing Officer has rightly disallowed the depreciation. Fact remains that in the previous years, i.e., in the year 1995-1996 and 1996-97, the Assessee had not claimed any depreciation. When the assessment order in question was in the assessment year 1997-1998, bringing down the value of the asset purchased by showing notional depreciation for the year 1995-96 and 1996-97 and allowing the depreciation on the written down value in this manner would be clearly wrong when the depreciation in the previous years has not been claimed at all. Thus, the question raised by the Revenue clearly becomes academic and does not arise for consideration.

11. The last issue is in respect of MODVAT credit, which stands concluded against the Revenue by 261 ITR 275, ***CIT v. Indo Nippon.***

12. This appeal is accordingly dismissed.

A.K. SIKRI, J.

M.L.MEHTA, J.

MARCH 9, 2011
Skb/Dev