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

\+ **[ITA No.149 of 2008]**

RESERVED ON: 21.02.2011
% PRONOUNCED: 25.03.2011

**COMMISSIONER OF INCOME TAX . . . APPELLANT**
Through : Ms. Rashmi Chopra, Advocate

VERSUS

**PEPSICO INDIA HOLDINGS PVT. LTD. …RESPONDENT**
Through: Mr. C.S. Aggarwal, Sr. Advocate with Mr. Vishal Kalra and Mr. Prakash Mumar, Advocates.

**CORAM :-**

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

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

**A.K. SIKRI, J.**

1. On 21st February, 2011 when the arguments in this case were heard at the after notice stage and orders reserved, following order was passed:-

> "Two issues are involved in this appeal, one pertains to the deletion of the additions made by the ITAT on account of MODVAT credit receivable and its addition to the value of the closing stock. It could not be disputed by the learned counsel for the Revenue that this issue is covered by a judgment of the Supreme Court in the case of ***Commissioner of Income Tax*** Vs. ***Indo Nippon***, 261 ITR 275. In fact, in the case of the assessee only on this aspect, earlier appeal ITA 291/2008 filed by the Revenue which pertains to the assessment year 1996-97 was dismissed by this Court following the aforesaid judgment.
> Mr. Aggarwal, learned Senior Counsel for the

> subsequent assessment year 2001-02 onwards as per which the AO has accepted the exclusive method regularly followed by the assessee and no adjustment has been made in this regard. This would show that the method adopted by the assessee showing the closing stock in the aforesaid manner has been consistently followed and has been accepted by the Department. For all these reasons, in so far as this aspect is concerned, no question of law arises.
>
> The arguments heard in detail on other question of law which pertains to accepting the valuation of assets of the five vendor companies."

2. This order makes it clear that though various question of law are proposed, in respect of other questions raised, this Court was of the opinion that substantial question of law does not arise. The question on which the arguments were heard namely which pertains to accepting the valuation of assets of five vendor companies, following question has been raised in the appeal:-

> "Whether the Ld. ITAT erred in law and on merits in directing the Assessing Officer to accept the valuation of assets acquired by the assessee from five vendor companies on the basis of valuation report as shown in the relevant agreements?"

3. The circumstances under which this question has come up for our consideration may be narrated at this stage.

4. Pepsico India Holdings Private Limited (hereinafter referred to as 'the assessee') is a company engaged in the business of manufacture of soft drinks. The assessee had filed return declaring loss of ₹ 4,99,89,940/- on 30th November, 1995 and the same was processed under Section 143 (1) (a) of the Income-Tax Act (hereinafter referred to as the 'Act') vide intimation dated 27th March, 1996. The assessee acquired manufacturing assets and other assets, land and building at various locations and started its

name Pepsi, Mrinda, Teem, 7up, Everyvess and Slice. During t course of assessment proceedings, the Assessing Officer noticed that assessee had claimed to have purchased only fixed assets although the assessee had purchased five companies as running business. The AO noticed that the assessee had purchased the running plant of the abovementioned franchisees and the purchase was made to eliminate these companies from the market for future competition to establish the monopoly of the assessee in competition with other soft drinks manufacturers like Coco-Cola. The AO further held that the land value has been suppressed by the assessee and the price of plant and machinery was inflated to claim excess depreciation and that the agreement between the assessee and the franchise's for sale and purchase of the assets was a collusive agreement. The AO had increased the value of the land by 50% on estimated basis and the value of bottles and crates was reduced by 50% and transferred the cost of non-competition. Taking over of a running business, cost of the retrenchment compensation to the plant and equipments and reduced the cost of acquisition by 25%.

5. As mentioned above, we are not taking note of other additions made by the Assessing Officer as they are not relevant to the present appeal. The assessee had filed appeal before the CIT (A) which was dismissed holding that the units acquired by the assessee were working as bottling plants and stopped the manufacturing of aerated drinks only after the assets of these units were acquired by the assessee. The CIT (A) held that AO was justified in deciding the value of the assets acquired by the assessee from the seller-bottling company and disallowed the part of depreciation.

6. Still aggrieved, the assessee filed second appeal before t Income Tax Tribunal. This time the assessee succeeded as the Tribunal has allowed the appeal of the assessee by holding that the acquisition of specified assets shown by the assessee was duly supported by the relevant agreement as well as report of the registered valuer and the action of the Assessing Officer in distributing and refusing the same without any evidence in support was not sustainable. The Tribunal has, thus directed the AO to accept the valuation of the different assets acquired by the assessee from the five vendor companies as shown in the relevant agreement and supported by the valuation reports. It is this order of the Tribunal which is in appeal before us.

7. Before we deal with the respective submissions of the learned counsels on the either side, it would be of benefit to take note of the some more facts, leading to the acquisition of the assets of the five vendor companies. As mentioned above, the assessee company is in the business of manufacturing of soft drinks and the soft/aerated drinks are marketed by the assessee under the brand name Pepsi, Mrinda, Teem, 7up, Everyvess and Slice etc. The assessee had given franchisee to various distributors who manufacture these products and marketed the same. Five of these companies were M/s Residency Foods & Beverages Ltd, M/s Voltas Ltd & Pure Beverages ltd. M/s City Drinks P. Ltd., M/s Falcon Beverages (Pvt.) Ltd and M/s Jennys Agro Foods Ltd. It is not in dispute that they were bottling the aforesaid aerated soft drinks under the same brand names as specified above which belonged to the assessee. It appears that these companies which were having their manufacturing units for the

running into losses. It was for this reason that the agreement w reached between the assessee company and said five companies whereby the assessee acquired manufacturing assets and other assets such as land and building situated at various locations. For acquisition of these assets, the assessee paid due consideration. In order to show the value of the fixed assets, namely plant and machinery as well as land and building and to claim deprecation thereupon, the assessee filed valuation reports in respect of these assets before the AO. These valuation reports were given by the registered valuers and on that basis, the assessee had declared the value of different assets and claimed depreciation thereupon. The AO dug certain holes in the said valuation reports and found some shortcomings therein to reject the valuation as given by the registered valuers. He also found that the plastic crates and glass bottles had been valued or the basis of the condition and quality of the plastic crates and glass bottles at the plants and, therefore, the basis adopted by the assessee for valuation of the assets was not correct. According to him, the valuer had not given any reference of purchase price of the plant and machinery, book value of land and building and original cost of the assets to the seller. In his opinion, the replacement cost has been worked out without making reference to any specific criterion and life of assets has been determined arbitrarily based on the estimates only. Further, the replacement values of the assets taken by the valuer had not been linked with the original cost to the seller. Going by these considerations, he increased the value of land by 50% on estimated basis, reduced the value of bottle and crates by 50% and reduced the cost of acquisition

of plant and machinery by 25%. The CIT (A) while confirming t aforesaid order of the AO found the following determinative factors:-

(i) Before the assessee acquired these units from the five companies, their business were in running condition and they were working as franchisee of the assessee. Thus when these functioning units were acquired, acquisition of good will of those units cannot be denied.

(ii) Since these units were taken in working condition, it can be presumed that the assessee paid something as compensation to these units to stop manufacturing of aerated drinks.

(iii) Likewise, as the seller bottling companies had paid compensation to their employees, it can be presumed that some compensation must have been paid by the company to these employees.

(iv) Though the assessee had stated that seller bottling companies were independent of the assessee, the fact remains that they were franchisee of the assessee and must have been under the influence of the assessee.

(v) The AO had asked the assessee to produce the registered valuation officer before him for verification of the methodology of valuation of different assets, but he was not produced on the pretext of paucity of time.

8. On the aforesaid basis, the action of the AO in restricting the depreciation was upheld by the CIT (A). The ITAT while upsetting the order of the two authorities below has given the following rationale:-

(i) Only specific assets were produced by the assess company as on at an agreed price as per agreements entered into with the said companies. The agreements clearly showed that what was purchased was only the specified assets and not the ongoing business of these business and consolidated price for acquisition of the assets specified in the agreement was paid. This price was supported by the valuation report of the registered valuers. It was thus not a case where running business of the companies were taken over, as wrongly held by the Assessing Officer and CIT (A).

(ii) There was no question of acquiring any good will as those companies were the franchisee of the assessee only and were bottling the products in the brand name of the assessee. Therefore, the question of goodwill does not arise as the goodwill in any case from very beginning belongs to the assessee itself.

(iii) The valuation report which was submitted by the registered valuers gave the basis for valuing different assets as well as the bifurcation. No significant defect was pointed out by the AO in these valuation reports.

(iv) The method of valuation adopted by the registered valuers was the well accepted method.

(v) There was no basis for the AO to deflate the value

the agreement and at the same time deflated t value on bottles and crates by 50%.

(vi) The cost paid by the assessee for the purchase of these assets was the actual cost and the assessee as per the provisions of Section 43 (6) of the Act it was rightly adopted for the purpose of claiming depreciation. Likewise, there was no question of making payment of non-compete fees, inasmuch as these five companies were not in a competing business but in fact were the franchisee of the assessee itself. Therefore, there was no threat of any competition to the assessee from these companies.

9. After hearing the learned counsel for the parties, we are of the opinion that the approach of the Tribunal in addressing the issues was in accordance with law and has come to a correct conclusion. It is not in dispute that specified lump sum consideration is paid for acquisition of specified assets by the assessee to the vendor companies. This consideration is paid as stipulated in the agreements entered into between the parties. The Assessing Officer or the CIT (A) assumed certain things which were non-existing. It was assumed that some consideration for goodwill must have been paid or the payments to the employees of the vendor companies must have been borne by the assessee. There was neither any material to arrive at this conclusion nor there were any circumstances from which this could be legitimately inferred or

valuation report. Furthermore, as mentioned above, t consideration was actually paid which represented only the cost of these assets and thus the assessee could legitimately claimed depreciation on the said cost as per Section 43 (6) of the Act. For bifurcation of the cost, valuation of the assets was required for which valuation reports were produced. The ITAT recorded the following reasons to support its conclusion that valuation report was wrongly rejected:-

> "While disputing the valuation shown by the registered valuer in his valuation report it was noted by the AO that the valuation of land had been made on the basis of local enquiries without giving any comparable instances of sale or purchase. As regards valuation of building he observed that the same was made by adopting plinth area method whereas the machinery had been valued on the basis of present replacement cost after consideration depreciation and average life of the assets. The learned CIT (A) while supporting the action of the AO on this count further noted in his impugned order that no reference was made by the valuer to original purchase price of plant and machinery book value of land& building and also the original cost of assets to the bottlers. He also noted that method of replacement value taken by the valuer had not been linked with the original cost to the seller. In our opinion, when the valuation of machinery was done by the valuer on the basis of present valuation cost after taking into consideration the depreciation of the said machinery as well as average life thereof the original cost of the said machinery to the seller was hardly of any relevance and therefore, there was no reason to refer to such original cost as well as book value thereof. What was relevant for the purpose of valuation as adopted by the valuer was the present replacement cost of the machinery and there was nothing brought on record either by the AO or by the learned CIT (A) to show that the values so adopted by him were not the present replacement cost of the concerned machinery. Moreover, the average life of the machinery as well as the depreciation thereof on the basis of actual use having been duly considered by the

purpose of valuation of plant & machinery was a well-recognised and well-accepted method and there was no material defect or deficiency pointed out therein to doubt or dispute the same. Similarly, the plinth area method adopted by the valuer for the valuation of building again was well-recognized method and no defect whatsoever was pointed out by the authorities below in the method so adopted. Even the valuation of plastic crates and glass bottles was done by the valuer on the basis of condition and quality of plastic crates and glass bottles available at the plant and the basis so adopted by the valuer being fair and reasonable, there was no justifiable reason to find fault with the same. As regards the valuation of land and building, the learned counsel for the assessee has pointed out before us that the agreement for transfer thereof being an immovable property was duly registered on payment of requisite stamp duty and the valuation shown was accepted by the registering authority. Having regard to all these facts and circumstances, we are of the view that the defects or deficiencies allegedly pointed out by the authorities below in the valuation report were not material enough to reject the said valuation report especially when there was no evidence material brought on record to dispute the said valuation. As a matter of fact the orders of the authorities below show that the adverse inference drawn by them while doubting or disputing the valuation report was mainly based on assumption and surmises without there being any evidence/material to support and substantiate the same. In these circumstances, we are of the view that no meaningful purpose would be served from the examination of valuer and it is not expedient to restore the matter to the file of the assessing Officer for conducting such examination as sought by the learned AR in the facts and circumstances of the present case including the fact that sufficient opportunity was apparently afforded by him to the assessee to produce the valuer during the course of assessment proceedings."

10. This approach is in accordance with law laid down by the courts in various judgments including in ***Kalooram Govindaram*** *Vs.* ***Commissioner of Income-Tax, Madhya Pradesh***, 57 ITR 335,

***Another*** 263 ITR 706 and ***State of Orissa*** Vs. ***Maharaja Shri B.D. Singh Deo***, 76 ITR 690.

11. That apart, we find no reason, justification or rationale for the Assessing Officer to inflate the value of land by 50% and reduced the value of bottles and crates by 50%. In fact, while doing so, the AO does not give any basis or the yardsticks adopted by him.

12. In the facts of this case, therefore, we are of the opinion that the ITAT has rightly held that the depreciation was allowable and we thus answer the question in favour of the assessee and against the Department and accordingly dismissed this appeal.

**(A.K. SIKRI)**
**JUDGE**

**(M.L. MEHTA)**
**JUDGE**

**MARCH 25, 2011**
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