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

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 5671/DEL/2018 [A.Y. 20103-11]

Hindustan Coca Cola Beverages Pvt. Ltd., 13, Abul Fazal Road, Bengali Market New Delhi	Vs.	Addl. CIT, Special Range-4, New Delhi

PAN : AAACH 3005M

ITA No. 5810/DEL/2018 [A.Y. 2010-11]

Addl. CIT, Special Range-4, New Delhi	Vs.	Hindustan Coca Cola Beverages Pvt. Ltd., 13, Abul Fazal Road, Bengali Market New Delhi
		PAN : AAACH 3005 M
(Applicant)		(Respondent)

Assessee By	:	Shri Sachit Jolly, Adv Ms. Soumya Singh, Adv
Department By	:	Shri Wasim Arshad, CIT- DR

Date of Hearing	**:**	**12.07.2023**
Date of Pronouncement	**:**	**18.07.2023**

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

The above cross appeals by the assessee and Revenue are preferred against the order of the ld. CIT(A) - 42, New Delhi dated 29.06.2018 pertaining to Assessment Year 2010-11. Both the appeals were heard together and are disposed of by this common order for the sake of convenience and brevity.

2. The assessee, in its appeal, has challenged the disallowance on account of:

(i)	Non-compete fees	Rs.2 0271,336/-
(ii)	Reversal of provision towards bad and doubtful debt	Rs.8, 34,21,291/
(iii)	Amount paid for traffic, challans	Rs.2 ,18,81,852/-.
(iv)	Deposit from customers	Rs.1,58,09,01,589/-

3. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the ld. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules

and have also perused the judicial decisions relied upon by both the sides.

4. The facts of the case are that the assessee is engaged in the business of manufacturing of beverages. While scrutinizing the return of income, the Assessing Officer found that the assessee has claimed deduction of Rs. 2,02,71,336/- on account of non-compete fee amortized in the computation of income.

5. The assessee was asked to justify its claim and the assessee relied upon the decision of the Hon'ble Supreme Court in the case of Empire Jute Company 124 ITR 1. It was explained that the payment of non-compete fees has been done to the shareholders/contractors of the bottling companies to facilitate the conduct of the assessee's business more efficiently and more profitably, leaving the fees untouched.

6. The Assessing Officer found that this issue has been discussed in the earlier A.Y also and claim of assessee was not found to be acceptable. Taking a leaf out of the previous assessment history on this issue, the Assessing Officer made addition of Rs. 2,02,71,336/-

7. The assessee carried the matter before the ld. CIT(A), but without any success

8. Before us, the ld. counsel for the assessee fairly conceded that in the earlier A.Y, this issue has been decided against the assessee.

9. Though the ld. counsel for the assessee conceded, yet the ld. DR went on to give a different colour to the disallowance made by the AO

10. We have carefully perused the orders of the authorities below. We find that this Tribunal, in assessee's appeal for A.Y 2008–09 in ITA No. 3448/DEL/2015 has considered a similar disallowance vide Ground No. 2 of the appeal and held as under:

> "16. We have considered rival submissions and perused the materials on record. The dispute between the parties is whether the non-compete fees paid by the assessee to some of the parties is in the nature of revenue or capital expenditure. On perusal of facts and materials on record, we find that this is a recurring dispute between the parties from assessment years 1999-2000 onwards and has been consistently decided against the assessee, even by the Tribunal. In this regard, we may refer to the following observations of the Tribunal in order dated 12.04.2023, while deciding assessee's appeal

for assessment years 2004-05 to 2007-08 in ITA No. 6605/Del/2014 & Ors. :

"5.1 Issue no. 1: Disallowance of non compete fee is issue arising from the fact that assessee had acquired running businesses of various bottlers companies. Thus, restricting them from sharing their knowledge and know how in relation to the acquired business for specified period. The assessee claimed deduction for the same as deferred revenue expenditure on amortized basis over the period of non-competition. In the assessment order for assessment year 2001-02, being the first year of payment, the assessing Officer disallowed the proportionate deduction on the ground that non compete fee was capital expenditure, resulting in benefit of enduring nature, and therefore, not an allowable as revenue deduction.

5.1.1 Learned CIT(A) had upheld the order of Ld. AO and the issue was carried forward in the assessment year 2002-03 where Tribunal had upheld the view of learned Tax Authorities below. However, the assessee's appeal in this regard stands admitted before Hon'ble Delhi High Court. Subsequently, the appeals for 2001-02 and 2003-04 have been admitted on the same substantial question of law by Hon'ble Delhi High Court.

5.1.2 That being the states of facts of the legacy issue, the propriety requires to follow the rules of consistency as there is nothing to differ. Thus, the issue is decided against the assessee. Consequently, the grounds in that regard raised in the respective A.Y. stand dismissed."

17. Thus, facts being identical, respectfully following the consistent view expressed by the Tribunal on identical issue arising in assessee's own case, we uphold the decision of learned first appellate authority. Grounds raised are dismissed. "

11. Respectfully, following the decision of the coordinate bench [supra[, this ground is dismissed.

12. Next ground relates to the addition on account of reversal of provision towards bad debts.

13. The Assessing Officer noticed that as per the computation of income, the assessee has reduced a sum of Rs. 8,34,21,291/-. The assessee was asked to explain and justify the reasons for making such provisions and writing it back.

14. The assessee explained that as per the accounting policy and receivables past due for more than 90 days needs to be provided. It was explained that this amount is offered for tax while computing tax-free income after making provisions for doubtful receivable. It was pointed out that this amount represents the provisions which were made in the earlier year but since these were unascertained, the amount was added in the computation of the income of the relevant year.

15. The Assessing Officer observed that the details provided by the assessee are scanty and also failed to explain why the provision was created and why it has been written back. The Assessing Officer was of the opinion that the claim is clearly inadmissible and denying the same made the addition of Rs. 8,34,21,291/-.

16. The assessee carried the matter before the ld. CIT(A) but without any success.

17. Before us, the ld. counsel for the assessee, vehemently stated that in the earlier year, the provision was created, but since it was unascertained, therefore, added back in the computation of income,

but provision continued in the books of account and since during the year liability was ascertained, provision brought forward was reversed. It is the say of the ld. counsel for the assessee that the ld. CIT(A) himself has accepted that the issue at hand is a case of reversal of provision of which Income has already been offered in the earlier years, therefore, action of the Assessing Officer /ld. CIT(A) has resulted into double addition of the same amount.

18. Per contra, the ld. DR strongly supported the findings of the Assessing Officer.

19. We have carefully perused the orders of the authorities below. Provision was created in the earlier year and it was written back in that year is not in dispute. The ld. CIT(A) has admitted that the issue in hand is a case of reversal of provision of which income has already been offered in the earlier year. Therefore, we fail to understand why the addition has been sustained by the ld. CIT(A).

20. In A.Ys 2008–09 and 2009–10 also, similar issue arose but no disallowance was made in this regard as the ld. CIT(A) has deleted the disallowance and no appeal has been filed by the revenue against the

decision of the ld. CIT(A). Considering the past history and considering the totality of the facts, we do not find any merit in the addition. We, therefore, direct the Assessing Officer to delete the disallowance of Rs. 8,34,21,291/-. This ground is allowed.

21. Next ground relates to the disallowance of traffic challans of Rs. 2,18,81,852/-

22. The Assessing Officer noticed that the assessee has paid traffic challans and was asked to show cause why it should not be disallowed

23. On receiving no plausible reply, the Assessing Officer made addition which was confirmed by the ld. CIT(A).

24. Before us, ld. counsel for the assessee pointed out that a similar disallowance was considered by this Tribunal in ITA No. 3448/DEL/ 2015 for A.Y 2008-09 vide ground No. 4 of that appeal and deleted the disallowance.

25. The ld. DR could not bring any distinguishing decision in favour of the revenue.

26. We have carefully perused the orders of the authorities below. We find force in the contention of the ld. counsel for the assessee. Similar disallowance was considered by this Tribunal in A.Y 2008-09. Relevant findings read as under:

> "23. In ground no. 4, the assessee has challenged the disallowance of Rs.41,32,403/- representing payment made towards traffic rule violation. On perusal of record, it is observed, the assessee incurred expenses of Rs.41,32,403/- towards traffic challans for violation of certain rules/regulation. Being of the view that the payment made was for an offence and prohibited by law, the Assessing Officer held that the deduction claimed is not allowable as they fall under the exception provided under Explanation 1 to section 37(1). Though, the assessee contested the said disallowance before the first appellate authority, however, the disallowance was sustained.
>
> 24. We have considered rival submissions and perused the materials on record. From the facts on record, it is evident that the traffic challans were issued for violating traffic rules relating to no-entry areas, no parking zones etc. The issue which arises for consideration is, whether such payments made were for an offence or is prohibited by law. We find, the aforesaid issue has been decided in case of DCIT Vs. Bharat C Gandhi, 46 SPT 258 (Mum. Trib.). In the aforesaid decision, the Coordinate Bench while dealing with identical issue of payment of compounding fee for violation of provision under the Motor Vehicles Act, 1988 and Rules thereunder has held that such expenditure is allowable as business expenditure under section

37(1) of the Act. Thus, following the decision of the Coordinate Bench (supra), we delete the disallowance. Ground no. 4 is allowed.

27. Respectfully, following the decision of the coordinate bench, the Assessing Officer is directed to delete the disallowance of Rs. 2,18,81,852/-. This ground is accordingly allowed.

28. Next addition is on account of deposits from customers.

29. The underlying facts in the issue show that the assessee is accepting deposit from customers like distributers/retailers etc as a security deposit. The amount lying as security deposit is at Rs.1,84,15,10, 571/-.

30. The assessee was asked to furnish party wise details of such deposits and also their confirmations to prove claimants of such deposits.

31. The assessee did not furnish any party wise details and no confirmation of any party was furnished. The details of such security deposit from A.Y. 2002-03 is as under:

A.Y	Opening Balance [In Rs.]	Closing balance [In Rs.]
2010-11	152,93,72,281	184,15,10,571
2009-10	182,20,52,443	152,93,72,281
2008-09	173,18,80,205	182,20,52,443
2007-08	164,16,87,433	173,18 80,205
2006-07	155,54,96,436	164,16,84,433
2005-06	146,68,76,742	155,54,96,436
2004-05	144,21,16,424	146,68,76,742
2003-04	158,09,01,589	165,98,59,900
2002-03	171,13,56,928	158,09,01,589

32. On perusal of the above details, the Assessing Officer observed that accumulated deposits are increasing and have increased from Rs.158 crores to Rs.184 crores. The Assessing Officer was of the opinion that the amount outstanding at Rs.1,58,09,01,589/- is more than eight years and concluded that there is no claimant of this huge amount and went on to make addition of the same u/s 41(1) of the Act.

33. The assessee challenged the addition before the ld. CIT(A) and vehemently contended that section 41(1) of the Act do not apply on the facts of the case. The ld. CIT(A), though convinced that section 41(1) is not applicable, but proceeded to apply provisions of section 41(2) and 43(6) of the Act and directed the AO to justify the WDV of block of assets of bottles and crates by reducing deemed sale and discarded value of Rs.1 58.09 crores.

34. Before us, the both the assessee and the revenue are in appeal against such decision of the ld. CIT(A).

35. The ld. counsel for the assessee vehemently stated that though the ld. CIT(A) accepted that section 41(1) of the Act does not apply, but grossly erred in applying provisions of section 41(2) and 43(6) of the Act.

36. We are of the considered view that section 41(2) of the Act was inserted W.E.F 1.04.1998 to provide for a levy of balancing charge in respect of certain depreciable assets, namely, building, machinery, plant or furniture which is owned by the assessee in respect of which depreciation is claimed u/s 32(1)(i) of the Act, that is, assets of an undertaking engaged in generation or generation and distribution of power which was, or has been used for the purpose of business.

37. It is clear that section 41(2) of the Act applies only if the assets are owned by the power generating undertaking and since the assessee is not a power generating company, the ld. CIT(A) grossly erred in applying provisions of Section 41(2) of the Act.

38. Coming to the applicability of provision of Section 41(1) of the Act which is also not applicable on the facts of the case, as twin conditions have to be satisfied (i) deduction in respect of a trading liability should be claimed in the previous year and (ii) the subsequent year liability must be written back effectively resulting into a benefit.

39. Facts on record show that the assessee has not claimed any trading liability. Containers and bottles are shown under the head “Current Assets” and deposits are shown as “Liabilities”. There is no evidence brought on record to show that liability has ceased to exist. In our considered view, the cessation of liability can only occur either by operation of law or debtors unequivocally declaring his intention to not honour his liability when payment is demanded by the creditor.

40. For this proposition we draw support from the decision of the Hon'ble Supreme Court in the case of Sugauli Sugar Works [P] Ltd 102, taxmann 713 and the onus is on the revenue to bring on record tangible evidence to show that liability has ceased to exist, especially when it is continued to be shown in the books of accounts of the assessee.

41. Thus, considering from all possible angles, neither provisions of section 41(1) of the Act apply [Assessing Officer fails] nor provisions of section 41(2) and 43(6) of the Act [CITA fails]. This ground by the assessee is allowed and similar grievance in revenue's appeal is dismissed.

42. In the result the appeal of the assessee in ITA No. 5671/DEL/2018 is partly allowed.

43. Coming to the appeal by the Revenue, the first grievance is in relation to the deletion of addition made by the Assessing Officer on account of delayed payment to PF/ESI amounting to Rs. 2,48,279/-.

44. This quarrel is now settled by the decision of the Hon'ble Supreme Court in favour of the Revenue and against the assessee by the decision in the case of Checkmate Services [Pvt] Ltd 448 ITR 518. Respectfully following the same, the findings of the ld. CIT(A) are reversed. Ground No. 1 is allowed.

45. Second grievance relates to the deletion of addition of Rs. 9,29,17,122/- made on account of inventory loss and leakages.

46. Facts on record show that while scrutinizing the return, the Assessing Officer noticed that the assessee has debited Rs. 9,29,17,122/- on account of inventory loss and leakages. The Assessing Officer found that in the immediately previous year, the assessee has debited Rs. 5,90,53,380/-. The assessee was asked to furnish details and also how the figure of leakage is arrived at.

47. On receiving no plausible reply, the Assessing Officer made addition of Rs. 9,29,17,122/-.

48. The assessee carried the matter before the ld. CIT(A) and strongly contended that there is no dispute that inventory loss/leakage is based on regular method of accounting. It was explained that the inventories are valued at cost or market value, whichever is lower and the same is factored in the closing stock declared by the assessee. It was explained that inventory loss is wholly a business expenditure.

49. After considering the facts and submissions, the ld. CIT(A) was convinced that the inventory loss is actually write off and not based on estimation and deleted the addition.

50. Before us, the ld. DR strongly supported the findings of the Assessing Officer and reiterated that no details were furnished by the assessee.

51. Per contra, the ld. counsel for the assessee reiterated what has been stated before the lower authorities.

52. We have carefully perused the orders of the authorities below. The undisputed fact is that since the assessee is engaged in the business of manufacturing and distribution of non-alcoholic beverages which are perishable in nature, these beverages are supplied in glass and plastic bottles which are susceptible to breakage. Such breakage and expiry of the products leads to inventory losses which was at Rs. 9,29,17,122/- in the year under consideration.

53. We find that the write off of inventory is based on actual loss and not on estimation. Therefore, in our considered view, the ld. CIT(A) was correct in allowing the same as business expenditure. Such action of the ld. CIT(A) cannot be faulted with. This ground is dismissed.

54. Next grievance relates to the deletion of addition of Rs. 7,81,31,170/- made on account of repair and maintenance.

55. The Assessing Officer observed that the assessee debited Rs. 43,40,62,060/- wherein the immediate previous year the assessee company has debited Rs. 28,98,62,640/- and there is steep increase of 53% in these expenses whereas the turnover of the assessee company has increased by 35% only.

56. The assessee was asked to furnish details of these expenses with supporting vouchers.

57. On receiving no plausible reply, the Assessing Officer made addition of Rs. 7,81,31,170/- being the difference between increase of expenditure vis a vis increase in sales 53% - 35% = 18%.

58. The assessee strongly agitated the matter before the ld. CIT(A) and contended that the ratio chosen by the assessee is not only illogical but has nothing to do with steep increase in repairs and maintenance.

59. After considering the facts and submissions, the ld. CIT(A) found that the basis of the addition is not acceptable and deleted the same.

60. The ld. DR strongly supported the findings of the Assessing Officer.

61. Per contra, the ld. counsel for the assessee relied upon the findings of the ld. CIT(A).

62. We have carefully perused the orders of the authorities below. There is no dispute that the expenses have increased by 53% if compared to the immediately preceding year. It is also a fact that sales have increased by 35% but what is not acceptable is the comparison of the increase in sales with increase in repairs and maintenance expenses etc.

63. In our considered opinion, difference of 18% between 53% and 38% has no logic without pointing out any error or defect in the books of account which are audited and no adverse inference has been pointed out by the auditors.

64. Considering the facts in totality, we do not find any reason to interfere with the findings of the ld. CIT(A). This ground is dismissed.

65. Next ground relates to the deletion of addition of Rs. 1,58,09,01,589/- made by the Assessing Officer u/s 41(1) of the Act.

66. This issue has been elaborately discussed by us in assessee's appeal [supra]. For our detailed discussed therein, this ground is dismissed.

67. In the result, the appeal of the Revenue is partly allowed.

68. To sum up, in the result the appeal of the assessee in ITA No. 5671/DEL/2018 and the appeal of the Revenue in ITA No. 5810/DEL/2018 are partly allowed.

The order is pronounced in the open court on 18.07.2023.

Sd/-	**Sd/-**
[ANUBHAV SHARMA**]**	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 18th JULY, 2023.

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

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Date on which the fair order is placed before the Dictating Member for pronouncement	
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