

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E', NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No.4389/Del/2016
Assessment Year: 2007-08

M/s. Nestle India Ltd., M-Block Nestle House, DLF City, Phase-II, Jacaranda Marg, Gurgaon	Vs.	ITO(OSD) LTU, NBCC Plaza, Pusp Vihar, Sector-V, New Delhi
PAN :AAACN0757G		
(Appellant)		(Respondent)

Appellant by	Shri Ajay Vohra, Sr. Advocate, Shri Neeraj K. Jain, Adv.
Respondent by	Ms. Rakhi Vimal, Sr.DR

Date of hearing	08.01.2020
Date of pronouncement	17.01.2020

ORDER

PER O.P. KANT, AM:

This appeal by the assessee is directed against the order dated 22.06.2016 passed by the learned Commissioner of Income Tax (Appeals), 22, New Delhi [in short 'learned CIT(A)'] raising the following grounds:

1. *That the Commissioner of Income Tax (Appeals) [CIT(A)] erred on facts and in law in holding that a sum of Rs.37,47,358/-, being 5% of the exempt dividend income earned by the appellant during*

the relevant previous year was disallowable under section 14A of the Income-tax Act, 1961 [The Act'].

- 1.1 *That the CIT (A) erred on facts and in law in holding as aforesaid without establishing any proximate relationship between the expenditure incurred and the dividend income earned and not appreciating that no expenditure was actually incurred in earning the exempt dividend income.*
- 1.2 *Without prejudice, that the disallowance if any should have been restricted to Rs.5,83,685/- as per calculation provided by the appellant.*
2. *That, without prejudice, the CIT(A) erred on facts and in law in not restricting the disallowance under section 14A of the Act to Rs.23,55,952/-, being the amount disallowed in the original assessment proceedings.*
- 2.1 *That the CIT(A) erred in law in stating that once the matter is restored back to the file of the AO for de-novo assessment, the AO's discretion is not limited to the addition made in the original assessment unless the ITAT specifically mentions in its order.*

The appellant craves leave to add, to alter, amend or vary the above grounds of appeal at or before the time of hearing.

2. Briefly stated facts of the case are that the assessee filed return of income on 29.10.2007, declaring total income of Rs.4,36,49,710/-. The assessment under section 143(3) of the Income-tax Act, 1961 (in short "the Act") was completed on 30.03.2015 at total income of Rs.4,76,80,22,462/-, wherein disallowance of license fees of Rs.40,07,44,800/- and disallowance under section 14A, amounting to Rs.23,55,952/- was made. On further appeal, the ld. CIT(A) vide his order dated 04.07.2012 deleted the disallowance of license fees of Rs.40,07,44,800/-, however, upheld the disallowance under Section 14A to Rs.22,14,685/-. On further appeal by the assessee

the Tribunal in ITA No. 4669/Del/2012 and 4670/Del/2012, dated 03.01.2014 dismissed the appeal of the Department in respect of license fees but restored the issue of disallowance under Section 14A of the Act to the Assessing Officer for deciding de-novo after giving reasonable opportunity to the assessee of being heard. In compliance to the direction of the Tribunal, the Assessing Officer allowed various opportunities to the assessee. Though initially no compliance was made by the assessee of the opportunity granted by the Assessing Officer vide his letter dated 23.07.2014 and 20.01.2015, however, at the end of the proceedings representative of the assessee attended and filed submission. He identified the expenses of Rs.5,83,685/- by apportioning cost of running the treasury operations of the assessee for disallowance u/s 14A of the Act. The suo motu disallowances of Rs.5,83,685/- proposed by the assessee was not accepted by the Assessing Officer and he proposed the disallowance in proportion of the exempt income to the total income plus exempt income. The ld. Assessing Officer arrived at the proportion of 1.68% which he applied over the interest expenses and administrative expenses and worked out disallowance of Rs.1,01,656/- towards interest expenses indirectly attributable to earning of the exempt income and Rs. 1,80,87,686/- as administrative expenses attributable to exempt income. The computation of disallowance made in para 7 of the assessment order is reproduced as under:

Dividend income exempted		Rs.7,49,47,159	✓
Total assessed income		Rs.4,36,49,21,710	✓
Indirect Interest expenses		Rs.60,51,000	
Total administrative expenses		Rs.1,07,66,48,000	✓
(1,89,281,000+16,00,39,000+2,39,19,000+9,03,65,000+31,68,04,000+29,62,40,000)			
Proportionate Exempt Income	=	<u>Exempt income</u>	
		(Total income + Exempt income)	
Proportionate Exempt Income	=	<u>Rs.7,49,47,159</u>	
		(Rs.4,36,49,21,710+ Rs.7,49,47,159)	
	=	<u>Rs. 7,49,47,159</u>	
	=	(Rs.4,43,98,68,869)	
	=	0.00168X100	
	=	<u>1.68%</u>	

Calculation of disallowances u/s 14A

1. Interest expenses indirectly attributable = 1.68% of Rs.60,51,000 = Rs.1,01,656
 2. Administrative expenses attributable to exempt income = 1.68% of Rs. 10,76,48,000 = Rs.1,80,87,686
- Total Disallowances u/s 14A = Rs.1,81,89,342/-

2.1 On further appeal, the ld. CIT(A) deleted the addition of Rs.1,01,656/- out of interest payment following his finding in the case of the assessee for assessment year 2001-12. Regarding the administrative expenses, the ld. CIT(A) rejected the contention of the assessee of disallowance not exceeding Rs.31,833/-. The break-up of disallowance was given by the assessee as under:

Particulars	Amount (in Rs.)
Exempt Income (A)	74,947,000
Gross Receipts as per P & L	
Add: Excise Duty	3025,77,58,000
Total Receipts (B)	119,35,89,000
Proportion (Aim)	024%
Disallowance:	
Interest Expense 60,51,000	14,419
Administrative Expenses 107,66,48,000	8,283
Treasury Staff Cost 38,31,879	9,131
Total Disallowance	31,831

2.2 The Id. CIT(A) rejected the basis of calculation of the disallowance by the assessee in para 5.1 of the impugned order which is reproduced as under:

“5.1 As evident from the above, it is not understood how the above figure has been arrived at. As far as the figure of Rs.9131/- is concerned, it is 0.24% of the treasure staff cost of Rs.38,31,879/-. However, the figure of treasury staff cost is not verifiable. As regards the figure of Rs.8283/- the administrative expenses have been mentioned in the above table as Rs.107,66,48,000/- and Rs.8283/- is only .0008% of the same.

2.3 Being not satisfied with the computation of disallowance of administrative expenses, the CIT(A) estimated 5% of the dividend income of Rs.7,49,47,159/- which was worked out to Rs.37,47,358/- towards the earning of exempt income. The relevant para of the impugned order is reproduced as under:

“5.2 Considering the above factual background and the argument of the appellant that the total administrative expenses of Rs.107,66,48,000/- also included various expenses which have no connection with the earning of exempt dividend income like contract manufacturing charges, training expenses, insurance rates and taxes, rent, etc. the method adopted for computation of disallowance by the AO is substituted by an estimated disallowance out of the exempt income earned. Therefore, the disallowance is confirmed at 5% of the dividend income earned of Rs.7,49,47,159/- which comes to Rs.37,47,358/-“

3. Before us, the Id. counsel of the assessee filed a paper-books containing pages 1 to 118 and submitted that the Id. Assessing Officer has made disallowance even more than the amount which was disallowed in the original assessment proceedings. He submitted that the Assessing officer was not justified in computing the disallowance of administrative

expenses in proportion of the exempt income. He submitted that even calculation made by the Assessing Officer is also not correct. He further submitted that there is no basis of estimation of 5% of the dividend income as expenses related to the exempt income by the ld. CIT(A). The ld. Counsel referred to page 41 of the paper-book wherein the basis of the suo motu disallowance made before the AO of Rs.5,83,685/- has been worked out. The Ld. counsel for the assessee further submitted that the assessee has segregated the cost of the staff engaged in treasury operations on the basis of the estimated time spent by them in the investment activity in the mutual fund. He submitted that in case of estimated time spent by officer, 18.75% is treated towards mutual fund activity whereas in case of the other treasury staff time is estimated at 6.75% towards mutual fund activity. He further submitted that other expenses have also been estimated in respect of the staff cost. According to him, the assessment year being prior to assessment year 2008-09, the disallowance is to be computed on reasonable basis rather than under Rule 8D. He submitted that the disallowance made by the assessee on scientific basis must be accepted.

4. On the other hand, ld. DR submitted that the Assessing Officer has provided ample opportunity to the assessee, however, the assessee only at the fag end of the proceeding, provided the calculation of disallowance of Rs.5,83,687/-. She referred to relevant pages of the paper-book and submitted that no scientific basis has been provided for estimating the number of persons engaged in the treasury staff and

percentage of the time spent by them on the mutual fund activity. She submitted that the percentage time spent has been estimated without any basis. She also submitted that the basis of estimation of other expenses towards earning exempt income is also not proper. She submitted that in Rule 8D administrative expenses are disallowed in percentage terms of investment of the tax payers. In view of the arguments, she submitted that the estimation of 5% of exempt income is most reasonable and the same should be upheld.

5. We have heard the rival submissions of the parties and perused the relevant material on record. In first round of the proceedings, no suo motu disallowance was made by the assessee under section 14A and the Assessing Officer made disallowance of Rs.23,55,952/-. In second round of proceedings, the Assessing Officer has estimated the disallowance of administrative expenses in proportion to the exempt income to the total income plus exempt income. This calculation has been rejected by the ld. CIT(A), however, he confirmed 5% of the dividend income towards disallowance for administrative expenses. The contention of the assessee that it has worked out the disallowance of administrative expenses on scientific and reasonable manner. The working of the assessee available on page 41 of the paper-book is reproduced as under:

Treasury Staff	Staff Cost	Whether involved in MF activity (Y/N)	Estimated Time spent for MF Activity * •	Proportionate Expenses
Treasurer	1,653,196	y	6.25%	103,325
Manager	717,034	y	6.25%	44,815
Executive	789,572	y	6.25%	49,348

Officer	579,057	y	18.75%	108,573
Officer	93,020	N	NA	NA
	3,831,879			306,061
Other Expenses				
Other Staff related expenses	2,070,021			
Preparation Expense	214,515			
Electricity Expense	27,505			
Rent Expense	49,132			
Profession and legal Expenses	510,472			
Building Maintenance	100,524			
Telecommunication Expenses	90,915			
Postage Expense	55,323			
Office Expenses	54,850			
Travelling Expense	164,689			
Training & Meeting Expenses	116,498			
Other Expenses	21,405			
	3,475,849		##	277,624
		Total Expense		583,685

* The company does not have employees who are exclusively involved in the activities related to earning dividend income.

Other expenses have been allocated in the ratios of staff cost.

5.1 On perusal of the above table, we find that the assessee has segregated staff cost of Rs.38,31,879/-. Further time spent for mutual fund activity in case of three Staffs (Treasure, Manager, Executive) have been estimated to 6.25% and in case of one person (officer) has been estimated to 18.75% but no basis has been given for adopting the time spent by those persons. No such details were even produced before the Assessing Officer. The disallowance of Rs.2,22,674/- out of other expenses has been estimated in ratio of staff cost but no details of the calculation in this regard has been provided in the table.

5.2 We find that the assessee as well as the ld. AO/CIT(A) has made disallowance on estimate basis. As the assessee has not maintained separate books of account or not identified

expenses separately towards earning the exempt income, there is no alternative exact estimation. The assessee has estimated the disallowance on the basis of estimation of man hours spent towards the investment in mutual fund activity. The ld. AO has estimated the expenditure for earning exempt income in proportion of exempt income to total income including exempt income. The ld. CIT(A) has estimated the disallowance at 5% of exempted income. We find the legislature has approved the similar disallowance for administrative expenses w.e.f. assessment year 2008-09 under Rule 8D(2)(iii) as (0.5%) of average investment in assets yielding exempt income. The Hon'ble Delhi High Court in the case of ACB India Ltd. Vs. ACIT [ITA No. 615 of 2014, Order dated 24th March, 2015] and the Special Bench of the Tribunal in ACIT Vs. Vireet Investment Pvt. Ltd. (ITAT-Delhi) (Special Bench) [ITA No. 502/Del/2012 (for AY: 2008-09), Order date 16.06.2017], has restricted the disallowance towards administrative expenses under Rule 8D(2)(iii) to 0.5% of the assets which yielded exempt income during the year. In our opinion, the estimation of 0.5% of assets which yielded exempted income during the year would be a most reasonable estimate for identifying the administrative expenditure for earning the exempt income. We, accordingly, direct the Assessing Officer to compute the disallowance in view of our above direction, however, the disallowance, if any, computed in this manner should be restricted to disallowance of Rs.23,55,952/-, which was made by the Assessing Officer in

original assessment proceedings. The grounds of appeal are accordingly allowed partly for statistical purposes.

6. The appeal of assessee is accordingly allowed for statistical purposes.

Order pronounced in the open court on 17th January, 2020.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER

Dated: 17th January, 2020.

RK/-(D.T.D.)

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi