IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D" NEW DELHI

BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER

आ.अ.सं/.I.T.A No. 6896/Del/2018

निर्धारणवर्ष/Assessment Year: 2015-16

ACIT **Circle 1, LTU, NBCC Plaza, Pushap Vihar, Sector-5, Delhi.**	**बनाम** **Vs.**	**Nestle India Ltd.** **M-Block, Nestle House, DLF City, Phase-II, Jacaranda Marg, Gurgaon, Haryana.**
		PAN No. AAACN0757G
अपीलार्थी Appellant		**प्रत्यर्थी/Respondent**

&

आ.अ.सं/.I.T.A No. 7220/Del/2018

निर्धारणवर्ष/Assessment Year: 2015-16

Nestle India Ltd. **M-Block, Nestle House, DLF City, Phase-II, Jacaranda Marg, Gurgaon, Haryana.**	**बनाम** **Vs.**	**ACIT** **Circle 1, LTU, NBCC Plaza, Pushap Vihar, Sector-5, Delhi.**
PAN No. AAACN0757G		
अपीलार्थी Appellant		**प्रत्यर्थी/Respondent**

निर्धारितीकीओरसे **/Assessee by**	**S/Shri Ajay Vohra, Sr. Adv.,** **Neeraj Jain & Saksham Singhal, Advs.**
राजस्वकीओरसे **/Revenue by**	**Shri Anand Kumar Kedia, CIT DR** **&** **Shri Sanjay Kumar, Sr. DR**

सुनवाईकीतारीख/ Date of hearing:	18.10.2022
उद्घोषणाकीतारीख/Pronouncement on	26.12.2022

आदेश /O R D E R

PER SAKTIJIT DEY, J.M.

Captioned cross appeals arise out of order dated 27.08.2018 of learned Commissioner of Income Tax (Appeals)-22, New Delhi pertaining to assessment year 2015-16.

ITA No. 7220/Del/2018 Assessee's appeal:

2. In ground no. 1 to 1.3, assessee has challenged the disallowance of deduction claimed under section 14A of the Income Tax Act, 1961 read with Rule 8D(2)(iii).

3. Briefly the facts are, the assessee is a resident corporate entity engaged in the business of manufacturing and sale of food products. For the assessment year under dispute, the assessee filed its return of income on 27.11.2015 declaring income of Rs.1810,02,10,310/- under the normal provisions of the Act and book profit of Rs.1899,93,02,372/- under section 115JB of the Act. In course of assessment proceeding, the Assessing Officer noticed that in the year under consideration the assessee had earned exempt income by way of dividend amounting to Rs.9,52,34,562/-, whereas, *suo motu* it has disallowed an amount of Rs.17,34,693/- under Rule 8D(2)(iii) of the Rules.

4. Being of the view that the disallowance made by the assessee is not in accordance with Rule 8D(2), the Assessing Officer proceeded to disallow an amount of Rs.1,98,01,584/- comprising of Rs.20,20,046/- towards interest expenditure under Rule 8D(2)(ii) and administrative expenditure of Rs.1,77,81,538/- under Rule 8D(2)(iii). Assessee contested the aforesaid disallowance before learned Commissioner (Appeals). Relying upon the decision of the First Appellate Authority in assessee's case in assessment year 2014-15, learned Commissioner (Appeals) deleted the disallowance of interest expenditure made under Rule 8D(2)(ii). Whereas, he sustained the disallowance of Rs.1,77,81,538/- made under Rule 8D(2)(iii).

5. Being aggrieved, the assessee is before us. Shri Ajay Vohra, learned Sr. Counsel appearing for the assessee submitted that while deciding identical issue in assessee's own case in assessment year 2009-10 to 2014-15 the Tribunal has held that the disallowance should be restricted to the computation provided by the assessee. He submitted, the issue is squarely covered by the decisions of the Tribunal. He submitted, as per the computation of the assessee for the impugned assessment year, the disallowance has to be

restricted to Rs.17,34,693/- as was done in the earlier assessment years.

6. The learned Departmental Representative, though, agreed that the issue is covered by the earlier decisions of the Tribunal, however, he relied upon the observations of learned Commissioner (Appeals).

7. We have considered rival submissions and perused materials on record.

8. It is the case of the assessee that it is a cash rich company, hence, no interest expenditure can be disallowed under Rule 8D(2)(ii). As regards the disallowance made under Rule 8D(2)(iii), it is the case of the assessee that the only expenditure which can be attributed towards the earning of exempt income is the salary expenditure, which the assessee has computed at Rs.17,34,693/-.

9. On perusal of material placed before us, we find, while deciding identical issue in assessee's own case in assessment year 2009-10 the Tribunal in ITA No. 2020/Del/2014 and another dated 22.07.2020 has held that disallowance under section 14A read with Rule 8D(2)(iii) can be made in respect of cost of treasury operations amounting to Rs.8,34,934/-. We have further observed, identical

view was reiterated by the Tribunal while deciding the issue in assessee's case in assessment years 2010-11 to 2014-15 vide order dated 31.07.2020 passed in ITA Nos. 4916/Del/2014 and others. There being no difference in factual position with reference to the issue in dispute in the impugned assessment year, respectfully following the decisions of the Tribunal in assessee's own case, as discussed above, we direct the Assessing Officer to restrict the disallowance to Rs.17,34,693/-, the amount voluntarily disallowed by the assessee under Rule 8D(2)(iii). Grounds are allowed.

10. In addition to the main grounds, the assessee has raised the following additional ground:

> *"The Appellant prays that the Dividend Distribution Tax ("DDT") of INR 662,445,221 paid under section 115-O of the Income Tax Act, 1961 ("the Act") at the rate of 16.99/19.99 percent on dividends declared and paid by the Appellant to its non-resident shareholders namely Nestle S.A. and Maggi Enterprises Limited, both tax residents of Switzerland is in excess of the rate of 10 percent prescribed under Article 10 of the Double Taxation Avoidance Agreement between India and Switzerland."*

11. It is the case of the assessee that on the dividend declared and paid to its overseas shareholders, namely, Nestle S.A. and Maggi Enterprises Ltd., who are residents of Switzerland, the assessee has paid Dividend Distribution Tax (DDT) under section 115-O of the Act @ 16.99/19.99 %. However, as per India –

Switzerland Double Taxation Avoidance Agreement (DTAA) the rate of tax on the dividend paid to the non residents as per the laws of Switzerland is lesser than the rates prescribed under section 115-O of the Act. Thus, it is the case of the assessee that the excess amount paid under section 115-O of the Act has to be refunded.

12. Before us, learned Sr. Counsel appearing for the assessee submitted that Benches of the Tribunal have expressed divergent views on the issue, hence, matter is pending for decision before Special Bench. He submitted, the ground may be admitted and the issue may be restored back to the Assessing Officer for deciding keeping in view the position of law to be declared by the Special Bench of the Tribunal and the Hon'ble High Court.

13. The learned Departmental Representative agreed for restoration of the issue to the Assessing Officer.

14. Having considered rival submissions, we find, the issue raised in the additional ground is a purely legal issue, which can be decided based on the facts available on record. Therefore, we are inclined to admit the additional ground. However, keeping in view the submissions of the parties, we restore the issue raised in the additional ground to the Assessing Officer for adjudication by

applying the ratio to be laid down by the Special Bench of the Tribunal or by any other higher judicial authority. This ground is allowed for statistical purpose.

15. In the result, appeal is partly allowed.

ITA No. 6896/Del/2018 (Revenue's appeal):

16. In ground no. 1, Revenue has challenged deletion of addition of Rs.145,02,44,097/- made by the Assessing Officer on account of part disallowance of General License Fee.

17. Briefly the facts are, in course of assessment proceedings, the Assessing Officer noticed that the assessee has paid an amount of Rs.362,56,10,243/- to M/s Societe des Products Nestle S.A., Switzerland (SPN) towards General License Fee for procuring technical knowhow and assistance for manufacture and sale of various products, such as, Nescafe, Nestea, Maggi, Kitkat, Munch, Lactogen, Polo, Everyday, Milkmaid, etc. Observing that the ratio of royalty to net profit is quite disproportionate to the net profit over the years, the Assessing Officer opined that the assessee was not doing business for itself but for the Associated Enterprise to whom the General License Fee was paid. He further observed that in the preceding assessment year, the Assessing Officer holding similar view

that the General License Fee/Royalty paid is high and excessive has disallowed 40% out of the Fee paid. Following the same methodology, the Assessing Officer disallowed 40% of the General License Fee in the impugned assessment year as well. In other words, he made a disallowance of Rs.145,02,44,097/-. Assessee contested the aforesaid disallowance before learned Commissioner (Appeals). Noticing that the issue is squarely covered by decisions of Tribunal as well as Hon'ble Delhi High Court in assessee's case in earlier assessment years, learned Commissioner (Appeals) deleted the disallowance.

18. Before us, it is a common point between the parties that the issue is squarely covered not only by the decisions of the Tribunal but even by the decision of the Hon'ble High Court in assessee's own case.

19. Having considered rival submissions, we find from the facts on record that the departmental authorities have decided the issue following the history of such disallowance made in assesse's own case. It is observed that for the first time the issue came up for consideration before the Tribunal in assessee's own case in an appeal preferred by the Revenue for the assessment year 1997-98. While deciding the appeal the Tribunal upheld the decision of the First

Appellate Authority allowing assessee's claim. Thereafter, the Tribunal expressed identical view while deciding appeals for assessment years 2010-11 to 2014-15 in ITA Nos. 4916/Del/2014 and others dated 31.07.2020. The following observations of the Tribunal in this regard would be relevant:

> *"6.1 The next issue under challenge by the Department is the action of the Ld.CIT (A) in deleting the ad hoc disallowance @40 % of the license fee paid by the assessee company to M/s Societe Des Produtis Nestle, SA Switzerland. The Assessing Officer made the following disallowance in respect of the license fee for the different years under consideration:*
>
> | *Asst. Years.* | *License Fee* |
> |---|---|
> | *2010- 11* | *Rs. 73,40,98,815/-* |
> | *2011- 12* | *Rs. 90,77,99,068/-* |
> | *2012- 13* | *Rs. 1,06,54,85,768/-* |
> | *2013- 14* | *Rs. 1,17,83,98,395/-* |
> | *2014- 15* | *Rs. 1,25,91,03,440/-* |
>
> *6.2 The Ld. CIT (A), however, deleted the disallowance by relying on various orders of the Hon'ble High Court and the Tribunal in assessee's own case. It is seen that this issue is squarely covered in favour of the assessee by the orders of the Honble High Court and the Tribunal in assessee's own case in earlier Asst. Years. We also note that this issue was also decided in favour of the assessee by dismissing the Department's ground in immediately preceding Asst. Year: 2009-10 by a Co-ordinate Bench of this Tribunal. The relevant observations of the ITAT in this regard are contained in paragraphs 7.4, 7.4.1 & 7.4.2 of the said order and the same are reproduced here in under for a ready reference:*
>
> > *"7.4 Coming to the remaining issues in the Department's appeal, Ground No.1 challenges the action of the Ld. CIT (A) in deleting the addition of Rs.61,01,74,000/- made on account of license fee. It is seen that the Assessing Officer, following the order of his predecessor for the immediately preceding assessment*

year 2008-09, disallowed on ad hoc basis 40% of the general license fee paid by the assessee to M/s Societe des Produtis Nestle, S.A. Switzerland for use for know-how and technical assistance, alleging that the same was excessive and not reasonable and had not been incurred for the purposes of business of the assessee. The Ld. CIT (A) on appeal, relying on the various orders of the Hon'ble High Court and the Tribunal in assessee's own case deleted the disallowance.

7.4.1 It is seen that this issue is covered in favour of the assessee by the following orders of the Hon'ble High Court and the Tribunal rendered in assessee's case in the earlier Assessment Years as under:

Assessment Years	Authority Passing Order	Appeal No.	Date of order
1997-98	ITAT	*ITA NO.4545/Del/2000*	*10.01.2005*
1998-99	ITAT	*ITA NO.2239/Del/2002*	*10.01.2005*
1999-00	ITAT	*ITA NO.2755/Del/2003*	30.04.2007
2000-01	ITAT	*ITA NO.2714/Del/2004*	15.06.2007
2001-02	ITAT	*ITA NO. 1979/Del/2006*	27.03.2009
2002-03	ITAT	*ITA NO. 1980/Del/2006*	27.03.2009
2003-04	ITAT	*ITA NO. 1612/Del/2006*	24.07.2009
2004-05	ITAT	*ITA NO. 3096/Del/2006*	24.07.2009
2005-06	ITAT	*ITA NO. 319/Del/2006*	22.03.2010
2006-07	ITAT	*ITA NO. 4477/Del/2006*	18.11.2011
2007-08	ITAT	*ITA NO. 4669/Del/2006*	03.01.2014
2008-09	ITAT	*ITA NO. 4670/Del/2006*	03.01.2014
1997-98 to 2000-01 and 2005-06	*Delhi High Court*	*ITA NO. 662/2005, ITA No. 1202/2005, ITA NO. 96/2008, ITA No. 294/2008, ITA No. 288/2011,*	11.05.2011
2006-07	*Delhi High Court*	*ITA NO. 644/Del/2012*	21.11.2012
2007-08	*Delhi High Court*	*ITA NO. 502/Del/2014*	10.09.2014
2008-09	*Delhi High Court*	*ITA NO. 532/Del/2014*	10.09.2014

7.4.2 The Ld. CTT-DR also could not controvert this fact. Therefore, in view of the binding judicial precedents in asssessee's own case as enumerated above, we find no reason to interfere with the findings of the Ld. CIT (A) on the issue.

Accordingly, Ground No. 1, of the Department's appeal stands dismissed. "

6.2.1 Accordingly, in view of the above binding judicial precedents in asseessee's own case and on identical facts, we uphold the findings of the Ld. CIT (A) on the issue and dismiss the ground raised by the Department vis a vis license fee in all the years under consideration."

20. As could be seen from the aforesaid observations of the Coordinate Bench, the issue has been consistently decided in favour of the assessee not only by the Tribunal but by the Hon'ble Jurisdictional High Court. Facts being identical, respectfully following the decision of the Tribunal and the Hon'ble Jurisdictional High Court, as noted above, we uphold the decision of learned Commissioner (Appeals) by dismissing the grounds raised.

21. In ground no. 2 Revenue has raised the issue of deletion of disallowance of interest expenditure made under Rule 8D(2)(ii). While deciding ground no. 1 to 1.3 in assessee's appeal earlier, we have observed that learned Commissioner (Appeals) having factually found that the assessee had sufficient interest free fund available with it to take care of investments made in exempt income yielding assets has deleted the disallowance made under Rule 8D(2)(ii). No contrary material has been brought to our notice by learned Departmental Representative to disturb the decision of learned Commissioner (Appeals).

22. In view of the aforesaid, we uphold the decision of learned Commissioner (Appeals) by dismissing the ground raised.

23. In ground no. 3 Revenue has challenged the deletion of disallowance of Rs.9,42,919/-, being depreciation claimed on pollution control equipment.

24. Briefly the facts are, in course of assessment proceedings, the Assessing Officer while examining assessee's claim of depreciation noticed that the assessee has claimed depreciation @ 100% amounting to Rs.14,50,644/- on pollution control asset. Following the decision taken by the Assessing Officer in the past assessment years, the Assessing Officer observed that the assessee could not establish that the equipments on which the depreciation was claimed are in the nature of pollution control equipment. Thus, following the pattern of the past assessment years, the Assessing Officer allowed depreciation @ 15% resulting in disallowance of Rs.9,42,990/-. Assessee contested the above said disallowance before learned Commissioner (Appeals). Having found that similar disallowance made in assessment year 2014-15 was deleted by him, learned Commissioner (Appeals) deleted the disallowance.

25. We have considered rival submissions and perused materials on record. It is evident, this is a recurring issue between the parties since assessment year 2009-10. While deciding the issue in assessment years 2010-11 to 2014-15 in the order referred to above, the Tribunal has held as under:

> *"6.4 The only issue now remaining in the bunch of appeals is depreciation on pollution control equipment and energy saving devices. The Assessing Officer has denied depreciation on pollution control equipment and energy saving devices on the ground that the assessee could not establish that the pollution control equipment and energy saving devices were put to use by the assessee. The following disallowances were made by the Assessing Officer in respect of depreciation on such equipment and devices in the years under appeal as under:*

Assessment Year	Disallowance of license fee	Disallowance of depreciation on pollution control equipment (in Rs.)
2010-11	73,40,98,815	17,27,059
2011-12	90,77,99,068	17,27,059
2012-13	1,06,54,85,768	2,59,26,734
2013-14	1,17,83,98,395	4,50,01,287
2014-15	1,25,91,03,440	41,66,502

> *6.4.1 However, the Ld. CIT (A) has deleted these disallowances in all the years under consideration before us. We note that this issue is also covered in favour of the assessee by the order of the Co-ordinate Bench of the ITAT in assessee's own case for Asst. Year: 2009-10 wherein the Tribunal has upheld the findings of the Ld. CIT (A) in deleting the said depreciation disallowance made by the Assessing Officer. The relevant findings of the Tribunal are contained in paragraph 7.6 of the order of the ITAT and the same is being reproduced herein under for a ready reference:*
>
> > *"7.6 Ground No.4 of the Department's appeal challenges the action of the Ld. CIT (A) in deleting the disallowance of Rs. 33,90,330/- made by the Assessing Officer by denying the claim of the depreciation in*

respect of energy saving and pollution control equipment on the ground that it was not put to use. It is seen that the Assessing Officer disallowed the claim of depreciation by alleging that the assessee has only established the factum of purchase of assets and not the condition of assets being put to use. The Assessing Officer further observed that comparative results were not submitted to establish that assets were energy saving and pollution control equipment. It is also seen that no adverse observation had been made by the Assessing Officer with respect to the purchase and installation of such assets. In addition to this, the assessee had also submitted certificates from Chartered Engineers to the effect that the assets purchased fall within the category of Air Pollution Control Equipment, Water Control Equipment, Energy Saving Devices and Renewable Energy Devices. These certificates submitted by the assessee have been taken note of by the Assessing Officer but have not been commented upon. It is not in dispute that the assets fall within the description of the assets referred to in the Income Tax Rules which contains the deprecation schedule. The only objection of the Assessing Officer seems to be that the assets had not been put to use and that the assessee could not furnish comparative results. However, provisions of Sec. 32 of the Act do not mandate such requirement. To assume that having purchased and installed the energy saving devices and pollution control equipment but not putting the same to use is, thus, just a baseless surmise and conjecture which stands negated by the certificates from the Chartered Engineers. Therefore, it is our considered opinion that the Ld. CIT (A) was absolutely correct in holding that having installed the devices, the assessee had extensively put the assets to use for the purposes of business and that under the law, the assessee was not required to monitor the outcome of use of such items in its business. The Hon'ble Delhi High Court in the case of CIT vs. Insilco Ltd. reported in 2009 ITOL 115-HC-DEL had held that it would be more appropriate to understand the expression 'use' as comprehending cases where the machinery is kept ready by the owner for its use in its business. Therefore, we find no reason to interfere with the findings of the Ld. CIT (A) on this issue also and we dismiss ground No.4 of the Department's appeal."

6.4.2 Therefore, in view of the findings of the Co-ordinate Bench in assessee's own case for Asst. Year: 2009-10 as aforesaid, we dismiss the ground raised by the Department on the issue of disallowance of depreciation on pollution control equipment and energy saving devices in all the five years under appeal."

26. Facts being identical. Respectfully following the decisions of the Tribunal in assessee's own case, as discussed above, we uphold the decision of learned Commissioner (Appeals) on the issue. Ground raised is dismissed.

27. In the result, appeal is dismissed.

28. To sum up, assessee's appeal is partly allowed and Revenue's appeal is dismissed.

Order pronounced in the open court on 26/12/2022

Sd/-	Sd/-
(G.S. PANNU)	**(SAKTIJIT DEY)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 26.12.2022

**Kavita Arora, Sr. P.S.*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi