आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'बी' मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL " B" BENCH, MUMBAI

सर्वश्री, नरेन्द्र कुमार बिल्लैय्या, लेखा सदस्य एवं, संजय गर्ग न्यायिक सदस्य के समक्ष

BEFORE SHRI N.K. BILLAIYA, AM AND SHRI SANJAY GARG, JM

आयकर अपील सं./I.T.A. No.1/Mum/2011

(**निर्धारण वर्ष** / Assessment Year :2007-08

M/s. NESCO Ltd., Nesco Estate Western Express Highway, Goregaon (E), Mumbai-400 063	**बनाम**/ Vs.	The ACIT 9(2), Mumbai
Appellant		Respondent

आयकर अपील सं./I.T.A. No.9104/Mum/2010

(**निर्धारण वर्ष** / Assessment Year :2007-08

The ACIT 9(2), Mumbai	**बनाम**/ Vs.	M/s. NESCO Ltd., Nesco Estate Western Express Highway, Goregaon (E), Mumbai-400 063
Appellant		Respondent

C.O. No. 79/Mum/2010

(Arising out of I.T.A. No.9104/Mum/2010

(**निर्धारण वर्ष** / Assessment Year :2007-08

M/s. NESCO Ltd., Nesco Estate Western Express Highway, Goregaon (E), Mumbai-400 063	**बनाम**/ Vs.	The ACIT 9(2), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACN 1222E		
(अपीलार्थी /**(Cross Objector**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से/ **Revenue by:**	Shri R.K. Sahu
प्रत्यर्थी की ओर से/**Respondent by:**	Shri Haresh P. Shah

सुनवाई की तारीख / Date of Hearing : 25.03.2014
घोषणा की तारीख /Date of Pronouncement : 25.03.2014

आदेश / O R D E R

PER N.K. BILLAIYA, AM:

ITA No. 1/Mum/2011 & ITA No. 9104/M/10 are cross appeals by the assessee and the Revenue against the very same order of the Ld. CIT(A)-20, Mumbai dt. 28.10.2010 and C.O. No. 79/M/2012 is filed by the assessee arising out of ITA No. 9104/M/2010.

ITA No. 1/Mum/2011 – Assessee's appeal

2. Grievance of the assessee is two-fold. First grievance relates to the disallowance of expenditure u/s. 14A of the Act and the second grievance is the denial of the claim of extra VRS of Rs. 21,83,256/-.

3. During the course of the assessment proceedings, the Assessing Officer noticed that the assessee has shown dividend income of Rs. 1,89,44,473/- which has been claimed as exempt income. The assessee was asked to explain why disallowance u/s. 14A as computed under Rule 8D of the I.T. Rules be not made. The assessee submitted that disallowance u/s. 14A is not applicable as the investments made by the assessee are not from borrowed capital.

4. The AO did not accept this contention of the assessee and relying upon the decision of the Special Bench of the Tribunal in the case of Daga Capital Management Pvt. Ltd., in ITA No. 8057/M/2003, the AO

proceeded to compute the disallowance as per Rule 8D and accordingly a sum of Rs. 12,26,731/- was disallowed u/s. 14A of the Act.

5. The assessee carried the matter before the Ld. CIT(A) and reiterated that it did not incur any expenditure in earning the dividend income. After considering the facts of the case, the Ld. CIT(A) observed that application of Rule 8D is w.e.f assessment year 2008-09 as per the decision of the Jurisdictional High Court in the case of Godrej & Boyce Manufacturing Co. Ltd. Vs DCIT 328 ITR 81. However, at the same time, the Ld. CIT(A) was of the firm belief that the AO is competent to determine and disallow such expenditure as may be reasonable having proximate nexus with the exempt income. The Ld. CIT(A) confirmed the additions made by the AO holding that there was nothing wrong to make a reasonable estimate based on the method prescribed under Rule 8D.

6. Aggrieved by this, the assessee is before us. The Ld. Counsel for the assessee strongly submitted that computation of disallowance read with Rule 8D is against the decision of the Jurisdictional High Court and therefore the additions sustained by the Ld. CIT(A) deserves to be deleted.

7. Per contra, the Ld. Departmental Representative relied upon the findings of the lower authorities.

8. We have carefully perused the orders of the lower authorities. It is not in dispute that the AO has invoked Rule 8D for computing the disallowance. We find that the Ld. CIT(A) , though agreed that Rule 8D is not applicable for the year under consideration , yet confirmed the disallowance which was computed as per Rule 8D.

9. In our considered view, this issue needs to be decided afresh. We, therefore, restore this issue back to the files of the AO. The AO is directed to compute the disallowance , if any , without invoking Rule 8D and after giving reasonable and sufficient opportunity of being heard to the assessee. Ground No 1 is allowed for statistical purpose.

10. During the course of the assessment proceedings, the AO noticed that the assessee has filed revised computation of income requesting for deduction of Rs. 21,83,256/- from the income returned for the reason that it had made VRS payment during the year at Rs. 2,28,94,986/- whereas in the original computation of income filed with the return of income, it claimed deduction of only Rs. 2,07,11,730/-. The claim of the assessee was not accepted by the AO. The AO was of the opinion that the claim should have been made by filing a revised return of income.

11. Aggrieved by this, the assessee carried the matter before the Ld. CIT(A). The Ld. CIT(A) dismissed assessee's claim holding that the impugned claim was made only through a letter in the course of the assessment proceedings which was neither preceded nor followed by a revised return of income. The Ld. CIT(A) further observed that it is not a case of the assessee that denying the claim a question of law has arisen. The Ld. CIT(A) confirmed the action of the AO.

12. Aggrieved by this, the assessee is before us. The Ld. Counsel for the assessee strongly argued that the claim of the assessee was made lawfully and is fully supported by necessary evidence.

13. The Ld. Departmental Representative relied upon the findings of the Ld. CIT(A).

14. After carefully perusing the orders of the lower authorities, we find that the claim was not considered by the AO for the reason that it was not claimed through a revised return of income but only through a revised computation of income. In our humble opinion, this issue needs to be examined afresh. We, therefore, restore this issue back to the files of the AO. The AO is directed to consider the claim of the assessee as per the provisions of law , after giving reasonable opportunity of being heard to the assessee.

15. In the result, the appeal filed by the assessee is allowed for statistical purpose.

ITA No. 9104/M/10 – Revenue's appeal

16. The sole grievance of the Revenue is that the Ld. CIT(A) erred in deleting the addition of Rs. 6,45,637/- being 10% of the Miscellaneous expenses claimed.

17. This appeal by the Revenue is not maintainable because the tax effect involved in this appeal is less than Rs.3 lakhs as per the limit prescribed by the CBDT vide Instruction No.3 of 2011 for filing of appeal by the Revenue before the Tribunal. In such a situation the appeal filed in contravention of such limit cannot be sustained. This view is duly supported by the decision in the case of ACIT Vs. Satish Chandra, 10 SOT 383. Similar view has been taken by the Bombay High Court in the case of CIT Vs. Camco Colour Co. 254 ITR 565, wherein it has been held that the tax effect involved in the appeal filed by the Revenue being less than the monetary limit as prescribed in Board Circular, the same is not maintainable.

18. Accordingly, in view of the Circular of 2011 as applicable to the appeals filed earlier, the Hon'ble jurisdictional High Court has held in the case of CIT Vs Madhukar K Inamdar (HUF) reported in 318 ITR 149 that the appeals filed by the Revenue prior to the Circular shall also be governed the monetary limit of this circular. Similar view has been reiterated by the Mumbai Bench of the Tribunal vide order dated 29.04.2011 in ITO Vs India Safety Vaults Ltd., in ITA No. 648-651/M/2010. Respectfully following the precedents, we hold that the appeal filed by the Revenue cannot be taken up for decision on merits as the tax effect in this case is admittedly less than Rs. 3.00 lacs. We, therefore, dismiss the appeal filed by the Revenue as not maintainable.

C.O. No. 79/Mum/2012

19. Before us, the Ld. Counsel for the assessee stated that he is not pressing the Cross Objection. The C.O is accordingly dismissed as not pressed.

20. In the result, the appeal filed by the assessee is allowed for statistical purpose and the cross appeal filed by the Revenue is dismissed and the cross objection filed by the assessee is dismissed.

Order pronounced in the open court on 25th March, 2014

आदेश की धोषणा खुले न्यायालय में दिनांकः 25.3.2014 को की गई ।

Sd/-	Sd/-
(SANJAY GARG)	(N.K. BILLAIYA)
न्यायिक सदस्य/JUDICIAL MEMBER	लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 25.3.2014

व.नि.स./ *RJ* , Sr. PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**