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

BEFORE SRI MAHAVIR SINGH, JM AND SRI N.K. PRADHAN, AM

ITA No. 4688/Mum/2016

(A.Y. 2008-09)

New Consolidated Construction Company Ltd. Marathon Innova, B1-101, 1st Floor, Opp. Peninsula Corporate park, Off Ganpatrao Kadam Marg, Lower Parel (W), Mumbai-400 013 **PAN No.** AAACN4052E	Vs.	The Dy. Commissioner of Income Tax, Range 2(2)(2), Aayakar Bhavan, Mumbai
Appellant	..	**Respondent**

ITA No. 4787/Mum/2015

(A.Y. 2009-10)

New Consolidated Construction Company Ltd. Marathon Innova, B1-101, 1st Floor, Opp. Peninsula Corporate park, Off Ganpatrao Kadam Marg, Lower Parel (W), Mumbai-400 013 **PAN No.** AAACN4052E	Vs.	The Dy. Commissioner of Income Tax, Range 2(3), Aayakar Bhavan, Mumbai
Appellant	..	**Respondent**

ITA No. 3410/Mum/2015

(A.Y. 2010-11)

New Consolidated Construction Company Ltd. Rahimtoola House, 4th Floor 7, Homji Street, Fort, Mumbai-400 001 **PAN No.** AAACN4052E	Vs.	The Dy. Commissioner of Income Tax (OSD), Range 2(3), Aayakar Bhavan, Mumbai
Appellant	..	**Respondent**

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ITA No. 3784/Mum/2015

(A.Y. 2010-11)

The Asst. Commissioner of Income Tax Circle-2(2)(2), 4th R. No. 545, Aayakar Bhavan, Mumbai-400 020	Vs.	New Consolidated Construction Company Ltd. Rahimtoola House, 4th Floor 7, Homji Street, Fort, Mumbai-400 001 **PAN No.** AAACN4052E
Appellant	..	**Respondent**

ITA No. 5552/Mum/2015

(A.Y. 2011-12)

New Consolidated Construction Company Ltd. Marathon Innova, B1-101, 1st Floor, Opp. Peninsula Corporate park, Off Ganpatrao Kadam Marg, Lower Parel (W), Mumbai-400 013 **PAN No.** AAACN4052E	Vs.	The Addl. Commissioner of Income Tax, Circle 2(2), Aayakar Bhavan, Mumbai
Appellant	..	**Respondent**

Assessee by : Nitesh Joshi, AR

Revenue by : Ram Tiwari, DR

Date of hearing: 06-12-2017 **Date of pronouncement :** 15-12-2017

O R D E R

PER MAHAVIR SINGH, JM:

In these five appeals, one by Revenue and rest four by the Assessee are arising out of the different order of Commissioner of Income Tax (Appeals)-5, Mumbai, [in short CIT(A)] in appeal Nos. IT-270/31/16-17, IT-109/14-15, IT69/13-14/496/14-15, IT-906/13-14 dated 02-05-2016, 15-07-2015,31-03-2015, 19-11. The Assessments were framed by the Deputy

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Commissioner of Income Tax (OSD) & Addl. Commissioner of Income Tax, Circle-2(2), Circle 2(3), Mumbai [in short DCIT, ACIT] for the assessment years 2008-09, 2009-10, 2010-11, 2011-12 vide orders dated 02-12-2010, 27-12-2011, 28-03-2013, 31-01-2014 under section 143(3) of the Income Tax Act, 1961(hereinafter 'the Act').

2. The first common issue in all these appeals of assessee is as regards to the order of CIT(A) confirming the action of the AO in reopening the assessment under section 147 of the Act as well as on merits also holding that the purchases are bogus. For this assessee has raised identical worded grounds in all the years and hence, will take up the facts and ground from AY 2008-09 in ITA No. 4688/Mum/2016 i.e. ground No. 1 to 3 reads as under: -

> *"1. Disallowing a total sum of Rs. 1,25,07,876/- in the reassessment order passed under section 143(3) r.w,s 147 of the Income Tax Act in respect of purchases made from the following parties on the alleged ground that genuineness of the said purchases could not be established.*

Name of the Company	Amount
Top Bricks & Sand Suppliers	8,94,791/-
D N Enterprises	28,46,337/-
Reliance Enterprise	21,42,222/-
Pratik Enterprises	9,98,566/-
Raj Traders	33,94,440/-
Ace International	4,40,445/-
NB Enterprises	11,33,380/-
Neelam Enterprises	6,17,915/-
Sagar Enterprise	39,780/-
Total	**1,25,07,876/-**

> *2. That the Ld. CIT(A) ought to have appreciated that your petitioners' case for the aforesaid yea had*

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gone through a detailed scrutiny and the then assessing officer after satisfying himself with regards to the expenses above S laths passed the order under section 143(3) of the income tax act. Accordingly, the 01(A) ought to have appreciated that the said reopening proceedings are invalid and bad in law on account of the fact: -

a. That there was no 'reason to believe' that the income chargeable to tax had escaped assessment and a mere change in opinion cannot be a basis for reopening of the assessment proceedings.

b. That merely based on information provided by DGIT Investigation which in turn was received from the sales tax department, and not on the basis of independent application of mind by the assessing officer himself, cannot be a basis for reopening.

c. That merely based on general affidavits from above mentioned parties without the name of your petitioners being specifically mentioned cannot be basis to come to a conclusion that there is 'reason to believe' that income has escaped assessment.

That the CIT(A) ought to have appreciated that your petitioners during the scrutiny proceedings have provided various documentations to justify that the said purchases are genuine and not bogus. The documents provided includes:

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• *Ledger Account of the all the above mentioned parties in the books of your assesse.*

• *Invoices raised by all the above mentioned parties*

• *Sank statements showing payments made to the above parties*

• *Delivery challans.*

• *Purchase order*

Also the TIN Number of the said parties was made available and was also reflected on the purchase invoices which establish the identity of the party and the genuineness of the said purchases.

3. At the outset, the learned Counsel for the assessee fairly conceded that in AY 2008-09 and 2009-10, the issue is regarding reopening and under the instructions of the assessee he is not interested in prosecuting the issue of reopening. As the learned Counsel for the assessee has not contested the issue of reopening and fairly conceded, the same can be dismissed as not pressed. Accordingly, we dismiss the issue of reopening as not pressed in these two AYs.

4. Coming to merits of the case, the assessee had made the following purchases from the following parties: -

Name of the company	*Amount respective to their AYrs*			
	2008-09	*2009-10*	*2010-11*	*2011-12*
Top Bricks & Sand Suppliers	*8,94,791*	*1,23,760*		
DN Enterprises	*28,46,337*	*11,11294*		
Reliance Enterprise	*21,42,222*	*18,05,819*		

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Pratik Enterprises	*9,98,566*			
Raj Traders	*33,94,440*			*67,620*
Ace International	*4,40,445*			
NB Enterprises	*11,33,380*			
Neelam Enterprises	*6,17,915*			
Sagar Enterprises	*39,780*			
Bath Classic		*4,89,172*		
Sampark Steels			*17,53,309*	
Prayan Trading Co.			*16,28,635*	*2,57,865*
Karma Ispat			*16,56,887*	*8,29,965*
Total	*1,25,07,876*	*36,92,101*	*50,37,821*	*11,55,450*

5. In all these years, the AO received information from DGIT investigation Mumbai, who in turn received information from Maharashtra Sales Tax Department that the assessee has obtained bogus purchases from hawala dealers, who without actual sale of goods issuing mere bills and the assessee is obtaining these bills. It was the contention of the Revenue that these bills have been used for obtaining bogus purchase bills, so as to reduce the profit of the assessee and pay lower taxes. The AO recorded this fact in Para 4.2 as under: -

> *"4.2 Further earlier a Survey under section 133A was conducted at the business premises of the assessee on 17-01-2013 by DDIT (Inv), Unit-III (2), Mumbai. The reason for conducting the survey was that as per the information provided by the Sales Tax Department, the assessee is allegedly involved in debiting bogus expenditure by procuring bogus bills from different parties over a period of three financial year i.e. 2008-09, 2009-10 and 2010-11. These parties are : Top Bricks & Sand Suppliers, DN Enterprises, Reliance Enterprises, Bath Classic, Pratik Enterprises, Sampark Steels, Prayan Trading Company, Raj Traders, Ace International, NB*

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Enterprises, Neelam Enterprises, Sager Enterprises and Karma Ispat Ltd."

6. The learned Counsel for the assessee stated that no doubt Shri Mahesh M Mudda, executive director and CEO of the company vide his answer to question No. 37 provided invoices for purchase, GRR, Delivery challan, lorry receipts, octroi receipts and weighment slips. But finally, he conceded that he is not interested to claim the purchase and he withdraw the claim vide question No. 56 of his statement and the relevant answer reads as under: -

"Sir, I admit that standard operating procedure has not been followed with respect to purchases made from parties mentioned in Q.No.52 above. I am not in a position to substantiate the claim of the purchases made from thee parties to the tune of Rs. 2,88,98,036/- for all the thee years ad I withdraw my claim of purchases in the respective assessment years and offer it for tax. I will pay the corresponding tax liability at the earliest."

7. The assessee before CIT(A) contended the statement has been retracted but CIT(A) has not accepted the contention of the assessee and confirmed the disallowance made by AO of entire purchases. In Similar fashion in other years also, the CIT(A) disallowed the purchases. Aggrieved, in all the years now assessee is in appeal before us.

8. We have heard the rival contentions and gone through the facts and circumstances of the case. The learned Counsel for the assessee Shri Nitesh Joshi first of all stated that this statement of CEO & Executive Director Shri Mahesh M Mudda, recorded by Revenue during the course of survey, was retracted vide statement under section 131 of the Act dated 17-01-2013 and 18-01-2013, whereby complete evidences were produced

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by him. The learned Counsel for the assessee before us now filed paper book for all these years and stated that complete stock tally is available. However, the learned Counsel conceded that to buy peace of mind he is ready to accept the percentage as consistently applied by the Tribunal in other cases. When a query was put to the learned Sr. Departmental Representative, he also fairly agreed for a reasonable percentage.

9. We find that Hon'ble Gujarat High Court in the case of CIT vs. Smith P. Seth (2013) 356 ITR 451 (Guj), wherein it has applied the profit rate at the rate of 12.5% of the bogus purchases in similar circumstances. Accordingly, we also apply the profit rate of 12.5% of the bogus purchase and direct the AO to compute the income of all these AYrs. and not the entire bogus purchases are to be added. Accordingly, we allow these appeals of assessee partly.

10. In regard to another issue of Purchases disallowed by AO of capital asset in AY 2010-11 and 2011-12, the same finding will apply and AO will disallow 12.5% of the purchased price of these capital goods and balance will be taken to capital account and accordingly, depreciation will be allowed on the assets. This issue of the assessee's appeals is partly allowed as indicated above.

11. The next issue in these cross appeals of assessee and that of Revenue in ITA No. 3410 and 3784/Mum/2015 for AY 2010-11 is as regards to the order of CIT(A) restricting the disallowance of expenses relatable to exempt income under section 14A of the Act read with Rule 8D of the IT Rules 1962 (herein after the 'Rules') amounting to ₹ 29,73,023/- out of the total disallowance of ₹ 50,67,085/-. For this Revenue and assessee has raised following ground: -

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"3. That the Ld. CIT(A) erred in law as well as on the facts of the case in calculating disallowance under section 14A by mechanically applying the provisions of Rule 8D in spite of the fact that a clear basis of the disallowance at Rs. 2,26,732/- was duly filed forming part of Form 3CD annexure Exhibit V which was duly certified by the statutory auditors.

4. That the CIT(A) ought to have appreciated that the provisions of section 14A read with Rule 8D(2)(iii) can be invoked only if the assessing officer is not satisfied with the claim of 14A disallowance worked out by the assessee. Accordingly, the Ld. CIT(A) ought to have appreciated that when your petitioners have provided the basis of disallowance under the provisions of section 14A which has been duly certified by the auditors and not rebutted by the assessing officer in his 143(3) order, the question of applying provisions of rule 8D(2)(iii) in calculating the disallowance under section 14A does not arise."

Revenue

"On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleing the disallowance under section 14A r.w.Rule 8D(1)(ii) by admitting fresh evidence in contravention of Rule 46A of the I.T. Rules."

12. Briefly stated facts are that the assessee has earned dividend income of ₹ 2,35,84,342/- and claim the same as exempt under section 10(38) of the Act. The assessee suo moto has made disallowance of ₹ 2,26,732/- under Rule 8D of the Rules. For this assessee computed 5% of salary to CFO and 50% salary of one accountant executive and 79.1% of

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bank charges paid to ABN Amro Bank. But the AO, has not accepted the disallowance made by the assessee and computed the disallowance under Rule 8D(20(ii) at ₹ 18,67,336/- and under Rule 8D(2)(iii) at ₹ 31,99,755/-. Aggrieved, assessee preferred the appeal before CIT(A). The CIT(A) deleted the disallowance made by AO under Rule 8D(20(ii) completely but retain the disallowance under Rule 8D(2)(iii) at ₹ 29,73,023/- by observing in Para 4.3.1 as under: -

> *"4.3.1 The issue is considered. As explained, it is noted that assessee had made capital infusion of Rs 200 crores during the year relevant to AY 2009-10 and as a result thereof on 04.02.2009 there remained no overdraft balance in assessee's bank account. The term loan too was paid off. Therefore, the source of all those investments, which were made prior to that date 104.02.20091 even by utilizing the loan fund, will have to be taken as on 04.02.2009 and onwards as if made out of its own fund. From the balance sheet it is noted that on 31.03.2010 the total share capital and reserves town fund) amounted to Rs 231.52 crores; the outstanding Loan amounted to Rs 14.56 crores; and the investment stood at Rs 81.55 crores. Thus, it is noted that the own fund of the assessee was much higher than the investments. Further, the investment made after 04.02.2009 were either from its current account I or from overdraft account [in Vijaya Bank]. But on the dates when it was made from I overdraft account, there was a positive balance and therefore its claim that the disallowance of interest expenditure u/s 14.4 could not be made this year is acceptable. In view of these facts, I am of the considered view that disallowance as per Clause (ii) of Rule 8D(2) was not*

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called for. However, there is no infirmity in calculating the administrative cost as per Clause (iii) of Rule 8D(2). The assessee has already added back the amount of Rs 2,26,732/-. Accordingly, the disallowance u/s 14A is confirmed to the extent of Rs 29,73,0231- (i.e. 3199755 - 226732]. The assessee would get relief of Rs 20,94,062/- [1867330 + 2267322]."

Aggrieved, now assessee has challenged the retention of the addition and Revenue has challenged the deletion.

13. We have heard the rival contentions and gone through the facts and circumstances of the case. As regards to the deleting of interest of disallowance under Rule 8D(2)(ii), we find that the assessee's own fund i.e. capital and reserve amounting to ₹ 231.52 crores and investment is at ₹ 81.55 crores. We also have gone through the assessment order and noted that no nexus have been proved by AO or there is no reason given by the AO that this interest bearing funds have been invested in the investments. In such circumstances, the presumption will be that assessee has made investment out of its own funds i.e. capital and reserves which are greater than investments. This view of ours, is supported by the decision of Hon'ble Bombay High Court in the case of CIT vs. HDFC Bank Limited (2014) 366 ITR 505 (Bom.) wherein, it is held that the presumption will go in favour of the assessee, that it has made investment out of its own funds which are sufficient to cover the value of investment, in that case, no disallowance of interest is required to be made under section 14A of the Act read with Rule 8D(2)(ii) of the Rules. When this was confronted to the learned Sr. Departmental Representative, he fairly conceded the position. As the issue is squarely covered in favour of the assessee, respectfully following the Hon'ble Bombay High Court decision in the case of HDFC Bank Limited (supra),

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we confirm the order of CIT(A) by deleting the disallowance of interest under Rule 8D(2)(ii) of the IT Rules made by the AO. This issue of assessee's appeal is allowed and that of the Revenue is dismissed.

14. As regards to the retention of disallowance under Rule 8D(2)(iii) i.e. administrative expense. Of ₹ 29,73,023/-, the learned Counsel first of all stated that no satisfaction is recorded by the AO and once satisfaction is not recorded in term of rule 8D of the Rules, the disallowance is not permissible. For this he stated that the assessee has calculated the disallowance by calculating 5% of the salary of the CFO, 50 % of the salary of one accounts executive and 79.1% of bank charges paid to ABN Amro Bank through which the investment were routed. Further, the assessee suo moto has disallowed a sum of ₹ 2,26,732/-, the expenses relatable to exempt income. The learned counsel took us through the relevant expenditure booked in the profit and loss account and argued that there is no item which can be co-related with the investment giving exempt income. We find force in the arguments of the learned counsel, which is apparent from the records and hence, we delete the disallowance and allow this issue of assessee's appeal.

15. The next issue in ITA No.5552/Mum/2015 for AY 2011-12 in assessee's appeal is as regards to the order of CIT(A) confirming the disallowance of expenses relatable to exempt income under section 14A of the Act read with Rule 8D of the Rules amounting to ₹ 36,95,549/-.

16. At the outset, Ld Counsel for the assessee stated that the AO has simply disallowed the expenses relatable to exempt income under Rule 8D(2)(iii) of the Rules amounting to ₹ 36,95,549/- without recording any satisfaction. The assessee suo moto has disallowed a sum of ₹ 3,54,009/- on account of exempt income. The assessee has earned dividend income of ₹ 3,06,90,116/- and claim the same as exempt under section 10(38) of the Act. The assessee claimed that it has disallowed 5% of salary of CFO

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and 50% salary of Accounts executive and further disallowed 71% of bank charges at ₹ 34,609/- on the basis that the total transaction relating to investment are routed through current account. The learned counsel took us through the relevant expenditure booked in the profit and loss account and argued that there is no item which can be co-related with the investment giving exempt income. We find force in the arguments of the learned counsel, which is apparent from the records and hence, we delete the disallowance and allow this issue of assessee's appeal.

17. **In the result, the appeal of Revenue is dismissed and all the appeals of assessee are partly allowed.**

Order pronounced in the open court on 15-12-2017.

Sd/-	Sd/-
(N.K. PRADHAN)	(MAHAVIR SINGH)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated: 15-12-2017
Sudip Sarkar /Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

Assistant Registrar
ITAT, MUMBAI

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