**IN THE INCOME TAX APPELLATE TRIBUNAL**
**DELHI BENCH 'F' NEW DELHI**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER**
**AND**
**SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No. 1262/Del/2016**
**AY: 2009-10**

| | | |
|---|---|---|
| **M/s Nine Dot Nine Mediaworx Pvt. Ltd.,**<br>**N-154, Panchsheel Park,**<br>**New Delhi-110017**<br>**(PAN: AAFCM1910P)** | **vs** | **Income Tax Officer,**<br>**Ward 13(3),**<br>**New Delhi.** |

**ITA No. 863/Del/2016**
**AY: 2009-10**

| | | |
|---|---|---|
| **Income Tax Officer,**<br>**Ward 18(3),**<br>**C.R. Building,**<br>**New Delhi.**<br>**(Appellant)** | **vs** | **M/s Nine Dot Nine Mediaworx Pvt. Ltd.,**<br>**New Delhi-110017**<br>**(Respondent)** |

**Department by**: Shri Atiq Ahmed, Sr. DR
**Assessee by**: Shri Ved Jain, Adv.
Shri Ashish Goel, CA

**Date of hearing: 01.05.2018**
**Date of pronouncement: 30.07.2018**

**ORDER**

**PER SUDHANSHU SRIVASTAVA, J.M.**

ITA No. 863/Del/2016 is preferred by the department against the order dated 23.12.2015 passed by the Ld. CIT (A)-20, New Delhi for assessment year 2009-10 whereas ITA No. 1262/Del/2016 is the assessee's cross appeal for the same year.

2. Brief facts of the case are that the assessee company is engaged in the business of organizing events, consulting and related services. The return of income was filed declaring loss of Rs. 4,50,71,693/-. Initially, the return was processed u/s 143(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") and subsequently, the case was selected for scrutiny. During the course of assessment proceedings, the Assessing Officer noticed that the assessee had claimed legal and professional charges of Rs. 2,48,12,998/- in its profit and loss account, out of which Rs. 68,25,331/- had been paid to three non-resident Indian parties on which the assessee had not deducted tax at source. The Assessing Officer made a disallowance u/s 40(a)(i) of the Act in respect of this payment and made an addition of Rs. 68,25,331/- to the income of the assessee. Further, the Assessing Officer also made a disallowance of Rs. 5,02,462/- u/s 14A r/w Rule 8D. Apart from this, the Assessing Officer also made an addition of Rs. 10,88,621/- in respect of alleged capital expenditure which had been debited to the profit and loss account. The Assessing Officer also made a disallowance of Rs. 5,30,996/- u/s 43B of the Act which pertained to unpaid service tax. Apart from this, the Assessing Officer made a disallowance of Rs. 5,85,782/- being *ad*

*hoc* disallowance @ 25% of the total expenses on conferences and seminars. The Assessing Officer also made a disallowance of Rs. 1,02,69,572/- u/s 40(A)(2)(b) of the Act with respect to salary paid to Directors. The assessment was completed at a loss of Rs. 2,52,68,929/-.

2.1 Aggrieved, the assessee approached the Ld. First Appellate Authority who partly allowed the assessee's appeal by deleting the disallowance u/s 14A amounting to Rs. 5,02,462/-. The ld. CIT (A) also deleted the disallowance of Rs. 5,30,996/- which was made u/s 43B of the Act. Further, the Ld. CIT (A) also deleted the *ad hoc* disallowance of Rs. 5,85,782/- with respect to conference and seminar expenses. The Ld. CIT (A) gave partial relief with respect to the disallowance of the directors' salaries by holding that a sum of Rs. 40 lakh was reasonable and fair to be allowed to the directors. Thus, the disallowance was reduced to Rs. 62,69,572/-. Apart from this, the Ld. CIT (A) upheld the Assessing Officer's action in disallowing legal and professional charges paid to non-resident Indian parties without deduction of tax at source. The Ld. CIT (A) also upheld the Assessing Officer's action in disallowing expenditure of Rs. 10,88,621/- by holding the same as being capital in nature.

2.2 Now, both the department and the assessee are in cross appeals before the ITAT and the grounds raised by respective parties read as under: -

ITA No. 1262/Del/2016 (Assessee's Appeal):

*"1. On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (Appeals) [CIT(A)] is bad both in the eyes of law as well as on facts.*

2. *(i) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the disallowance of Rs.68,25,33M- made by the AO on account of non-deduction of TDS on professional charges paid by the assessee to the non-resident invoking provisions of section 40(a)(i) of the Act.*
*(ii) that the above disallowance has been confirmed rejecting the contention of the assessee that assessee is not liable to deduct TDS in view of the Double Taxation Avoidance agreement between the India and the other countries US and UAE.*

*(iii) That the above disallowance has been confirmed rejecting the remand report of the AO in which AO himself admitted that transactions are not liable for TDS.*

*(iv) That the above disallowance has been confirmed in surmises and conjectures without appreciating the facts of the case.*

3. *(i) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the disallowance of salary paid to the directors to the extent of Rs.62,69,572/- made by the AO by invoking provisions of section 40A(2)(b) of the Act.*

*(ii) That the disallowance has been confirmed despite the expenses being incurred wholly and exclusively for the purposes of business.*

4. *(i) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the disallowance of expenditure of Rs.10,88,621/- made by the AO treating the same as capital expenditure.*

*(ii) That the said disallowance has been confirmed despite the fact that such expenditure is exclusively incurred for the purpose of business and revenue in nature."*

ITA No. 861/Del/2016 (Department's Appeal):

*"1. Whether on the facts and circumstances of the case & in law, the Ld. CIT(A), has erred in deleting the addition made under section 14A read with Rule 8D amounting to Rs. 5,02,462/- ignoring the CBDT Circular 5/2014 in which has clarified the scope of section 14A introduced by Finance Act 2001 that disallowance under section 14A read with rule 8D can be made even when no exempt income earned during the year under consideration?*

*2. Whether on the facts and circumstances of the case & in law, the CIT(A), has erred in ignoring the decision of Hon'ble Supreme Court of India in the case of CIT Vs. Rajendra Prasad Moody reported in 115 ITR 519?*

*3. Whether on the facts and circumstances of the case & in law, the CIT(A) has erred in deleting the 25% of expenses on account of conference and seminar amounting to Rs.5,85,782/- ignoring the facts these expenses were incurred on watching opening ceremony of the Olympics and were not laid out or expended wholly and exclusively for the purpose of the business and the assessee had not discharged its onus u/s 37 of the Act?*

*4. Whether on the facts and circumstances of the case & in law, the CIT(A), has erred in reducing the director remuneration from Rs.1,02,69,572/- to Rs 62,69,572/-*

*ignoring the fact that the assessee company has incurred huge losses, director's remuneration was increased without approval from the board of directors and the assessee has not discharged its onus u/s 40(A) (2) (b) of the Act?*

*5. That the order of the Ld. CIT(A) is erroneous and is not tenable on facts and in law."*

3. The Ld. AR submitted that ground no. 1 in assessee's appeal was general in nature. With respect to ground no. 2 of the assessee's appeal which challenged the action of the Ld. CIT (A) in sustaining the addition of Rs. 68,25,331/- with respect to legal and professional charges by invoking the provisions of section 40(a)(i) of the Act, it was submitted that the assessee had duly submitted before the Assessing Officer the copies of invoices raised by the three parties and also copies of the relevant Double Taxation Avoidance Agreements entered into between India and the respective countries but the same was not considered by the Assessing Officer and was also simply brushed aside by the Ld. CIT (A). It was submitted that in view of Article 15 of the Double Taxation Avoidance Agreement, independent professional services rendered by non-resident Indians were not taxable in India and, therefore, the provisions for deduction of tax at source were not applicable. He drew our attention to the documents submitted in respect of the three parties which had been filed before the

Assessing Officer and which were placed in the paper book at pages 43 to 69. It was submitted that these replies contained relevant extracts of the Double Taxation Avoidance Agreement between India and US and India and UAE. It was submitted that all these documents and evidences as well as the relevant provisions of the Double Taxation Avoidance Agreement clearly showed that the assessee was not under legal obligation to deduct tax at source on these payments. Our attention was also drawn to the remand report submitted by the Assessing Officer on this issue and placed at pages 473 to 476 of the paper book and it was submitted that even the Assessing Officer had accepted in the said remand report that considering the Double Taxation Avoidance Agreement between India and UAE as well as India and USA, the assessee was not under an obligation to deduct tax at source on payment of Rs. 47,42,000/- made to Mr. Renee Mauborgne and Rs. 17,67,150 to Mr. Shashi Tharoor. It was submitted that in view of the acceptance by the Assessing Officer, these disallowances deserved to be deleted. In respect of the remaining disallowance, it was submitted that the same was in the nature of reimbursement on which tax was not required to be deducted at source.

3.1 With respect to ground no. 3 of the assessee's appeal challenging sustenance of disallowance with respect to directors' remuneration, it was submitted that ground no. 4 of the department's appeal was related to this. The Ld. AR submitted that during the year, the assessee company had incurred an amount of Rs. 1,02,69,572/- on account of directors' remuneration to four persons viz. S/Shri Ashish Kumar Gupta, Anuradha Das Mathur, Kanak Ranjan Ghosh and Vikas Gupta. It was also submitted that the remuneration had been paid to these four people in the subsequent assessment years as well and the department had accepted the same in subsequent assessment orders. Our attention was drawn to the assessment orders of the company in respect of assessment years 2010-11, 2011-12 and 2012-13 in this regard wherein no disallowance had been made. It was further submitted that as far as the allegation of the Assessing Officer that no payment had been made in the preceding assessment years was concerned, since the immediately preceding year was the first year of operation of the company and there were no sales, no remuneration to the directors had been made. Our attention was also drawn to the employment agreements with the four directors, their educational

qualifications and the copy of their income tax returns from their previous employment/s and it was submitted that the directors were highly qualified and were competent enough to be paid such remuneration as had been paid to them. It was further submitted that these directors had earlier worked with companies such as Hero Corporate Services Ltd., Coca Cola Inc., International Market Assessment India Pvt. Ltd. and Mckinsey and Company Inc. and, therefore, the remuneration paid to them was at par with what was being paid in these industries. It was also submitted that these documents were duly submitted before both the lower authorities and neither of them had pointed out any error or discrepancy in any of these documents. The Ld. AR again drew our attention to the remand report submitted by the Assessing Officer before the Ld. CIT (A) wherein the Assessing Officer has not disputed the genuineness of the payment but has only mentioned that the assessee had not produced the employment agreements etc. at the time of assessment proceedings. It was also submitted that another objection of the Assessing Officer in the remand report was that the payment was not evidenced by Board resolutions. It was submitted that the same is available on record and is available on paper book pages

184 to 185 and, therefore, this allegation of the Assessing Officer was incorrect. Ld. AR also submitted that the Ld. CIT (A) had not given any cogent reason for deleting a portion of the disallowance and by holding that Rs. 40 lakh appears to be a reasonable and fair amount of remuneration.

3.2 With respect to ground no. 4 of the assessee's appeal challenging the substance of addition of Rs. 10,88,621/- by treating the same as capital expenditure, it was submitted that this amount was paid to K.P.M.G. India. It was submitted that out of the total amount, Rs. 3,06,181/- was directly paid by M/s Helion Ventres Pvt. Ltd. on which TDS had been deducted and this amount was reimbursed by the assessee to M/s Helion Ventres Pvt. Ltd. It was further submitted that the balance amount was paid directly by the assessee to K.P.M.G. India on which amount the tax had duly been deducted. The Ld. AR further submitted that this amount had been incurred for carrying out due diligence and valuation of the business which was expenditure in the normal course of business and did not give any enduring benefit to the assessee.

4. Coming to the department's appeal, the Ld. AR submitted that as far as ground nos. 1 and 2 of the department's appeal

were concerned, the Ld. CIT (A) had deleted the disallowance of Rs. 5,02,462/- made u/s 14A of the Act by holding that the Assessing Officer has not recorded any satisfaction before invoking Rule 8D. It was submitted that the Hon'ble Apex Court has also held in the case of Godrej & Boyce Manufacturing Company Ltd. vs. DCIT reported in 394 ITR 449(SC) that the law postulates the requirement of a satisfaction in the Assessing Officer that having regard to the accounts of the assessee, it was not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It was submitted that therefore, in view of the judgment of the Hon'ble Apex Court, the order of the Ld. CIT (A) on this issue deserved to be upheld.

4.1 With respect to ground no. 3 of the department's appeal, challenging the deletion of addition of Rs. 5,85,782/- being *ad hoc* disallowance of 25% of the conference and seminar expenses, the Ld. AR submitted that the assessee had duly submitted the details of the total expenditure of Rs. 23,43,490/- before the Assessing Officer and the Assessing Officer had also issued the notices u/s 133(6) of the Act to two of the parties to whom the payments had been made, viz. M/s Imperial and M/s Habitat World, who had duly confirmed the transaction with the assessee

and had also furnished complete details with regard to the conferences and seminars hosted. It was also submitted that the disallowance had been made on *ad hoc* basis without pointing out any defect in the books of the assessee which had been duly audited prior to the submission of the return. It was also submitted that the Ld. CIT (A) had deleted the addition after duly considering the facts of the case and, therefore, the adjudication of the Ld. CIT (A) on this issue also deserved to be upheld.

5. In response, the Ld. Sr. DR placed extensive reliance on the assessment order and read out relevant portions from the same. With respect to issues being raised in the assessee's appeal, the Ld. Sr. DR also placed reliance on the concurrent findings of the Ld. CIT (A). With respect to the department's appeal, the Ld. Sr. DR vehemently argued that the Ld. CIT (A), while allowing relief to the assessee, had completely ignored the factual findings recorded by the Assessing Officer.

6. We have heard the rival submissions and perused the material available on record. We take up the department's appeal first. Ground nos. 1 and 2 challenge the act of the Ld. CIT (A) in deleting the addition of Rs. 5,02,462/- made by the Assessing Officer by invoking the provisions of section 14A of the

Act read with Rule 8D of the Income Tax Rules. It is seen that the Assessing Officer had made the disallowance by stating that since the assessee has not incurred any expense attributable to the dividend income of Rs. 17,61,574/-, therefore, disallowance u/s 14A was to be calculated in terms of Rule 8D of the Income Tax rules. It is seen that on a specific query raised by the Assessing Officer, the assessee had submitted before the Assessing Officer that no expenses were incurred by it in earning the dividend income. The Ld. CIT(A) deleted the impugned addition by observing that the Assessing Officer had not recorded any satisfaction before invoking the provisions of Rule 8D. The requirement of recording of satisfaction by the Assessing Officer in case the Assessing Officer is not satisfied with the claim of the assessee is now settled by the judgment of the Hon'ble Apex Court in the case of Godrej & Boyce Company Ltd. vs. DCIT reported in 394 ITR 449 (SC) wherein the Hon'ble Apex Court has held as under:-

> *"37. We do not see how in the aforesaid fact situation a different view could have been taken for the Assessment Year 2002-2003. Sub-sections (2) and (3) of Section 14A of the Act read with Rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing*

*Officer is not satisfied with the claim of the assessee. Whether such determination is to be made on application of the formula prescribed under Rule 8D or in the best judgment of the Assessing Officer, what the law postulates is the requirement of a satisfaction in the Assessing Officer that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It is only thereafter that the provisions of Section 14A(2) and (3) read with Rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable"*

6.0.1 It is our considered opinion that once the assessee has submitted before the Assessing Officer that no expenditure had been incurred for earning the dividend income, the Assessing Officer was under legal obligation to demonstrate as to how he was not satisfied with the contention of the assessee and only, thereafter, he could have proceeded to make a disallowance. As is evident from the assessment order, the satisfaction of the Assessing Officer before invoking provisions of section 14A r/w Rule 8D is missing. The Ld. CIT (A) has also taken a similar view while deleting the disallowance. Under the circumstances, we find no reason to interfere with the findings of the Ld. CIT (A) in this regard and accordingly, ground nos. 1 and 2 of the department's appeal are dismissed.

6.1 Coming to ground no. 3 of the department's appeal which challenges the deletion of *ad hoc* disallowance @25% of the conferences and seminars expenses, it is seen that the Assessing Officer had made the *ad hoc* disallowance by alleging that these expenses were bogus, highly inflated and excessive. However, the Assessing Officer has not pointed out any specific defect in the details/accounts submitted by the assessee. It is also pertinent to note that the Assessing Officer had made inquiries from two parties viz. M/s Imperial and M/s Habitat World in respect of payments made to them by issuing notices u/s 133(6) of the Act and it is a matter of record that these two parties had confirmed the transactions with the assessee. It is well settled by now that *ad hoc* disallowance cannot be made unless specific defects are brought on record by the Assessing Officer. This is not the case in the present appeal before us. There is a plethora of judicial rulings wherein it has been held that *ad hoc* disallowance without specific pinpointing of defect is not sustainable. A few of them are:-

(a) ITAT Delhi in the case of ACIT v. Amtek Auto Ltd. [2006] 112 TTJ 455

(b) ITAT Delhi in the case of Sh. Gagan Goyal v. JCIT in ITA No.

1514/Del/2015 dated 02.08.2016

(c) ITAT Delhi in the case of Sh. Devender Kumar v. ITO in ITA No.3239/Del/2014 dated 30.08.2016

6.1.1 Therefore, in view of these judicial pronouncements, we again find no reason to interfere with the findings of the Ld. CIT (A) on this issue and we dismiss ground no. 3 of department's appeal.

6.2 Coming to ground no. 4 of the department's appeal which challenges the deletion of Rs. 40 lakh by the Ld. CIT (A) in respect of directors' remuneration, it is seen that this ground is identical to ground no. 3 of the assesee's appeal wherein the assessee is challenging the corresponding sustenance of disallowance to the tune of Rs. 62,69,572/- out of total remuneration of Rs. 1,02,69,572/-. The Ld. AR has drawn our attention to voluminous evidences filed before both the lower authorities in respect of directors' remuneration. However, a perusal of the orders of both the both the lower authorities makes it apparent that these evidences were not considered by the lower authorities at all. The Assessing Officer has made the disallowance by invoking the provisions of section 40 A(2)(b) of the Act by alleging that neither the company has benefitted from

the appointing of the directors nor have the directors been appointed after Board approval. However, as to how the Assessing Officer has reached this conclusion has not been elaborated. Further, the Board resolution approving the appointing of directors passed in the extraordinary general meeting is available on record. The Ld. CIT (A) also did not undertake the exercise of examining the evidences but rather addressed the issue in a casual way by holding that remuneration of Rs. 40 lakh was fair and reasonable. The Ld. CIT (A) has also not elaborated as to how he has reached the conclusion that an amount of Rs. 40 lakh was fair and reasonable towards payment of directors' remuneration. Accordingly, in view of the lack of examination with respect to this issue by both the lower authorities, we deem it appropriate to restore the issue to the file of the Assessing Officer to re-examine evidences which have been submitted in this regard after giving proper opportunity to the assessee to present its case. Accordingly, ground no. 4 of the department's appeal and ground no. 3 of the assessee's appeal are allowed for statistical purposes.

7. In the result, the appeal of the department stands partly allowed.

8. Coming to the assessee's appeal, ground no. 1 being general in nature is not being adjudicated upon.

8.1 Coming to ground no. 2 which challenges the sustenance of addition of Rs. 68,25,331/- made by the Assessing Officer by invoking provisions of section 40(a)(i) of the Act, it is seen that the Assessing Officer in his remand report has himself accepted that in view of the provisions of Double Taxation Avoidance Agreements between India and US and India and India and UAE, the payment to Mr. Renee Mauborgne amounting to Rs. 47,52,000/- and of Rs. 17,67,150 to Mr. Shashi Tharoor did not attract the rigors of provisions for deduction of tax at source. The Ld. CIT (A) seems to have ignored this admission by the Assessing Officer in the remand report. In view of the comments of the Assessing Officer in this regard as contained in the remand report, we delete the disallowance of Rs.47,52,000/- and Rs. 17,67,150/-. The Assessing Officer is directed to delete these additions. We also note that the remaining payment of Rs. 3,06,181/- was made to M/s KPMG Helion which was in the nature of reimbursement on which TDS had also been deducted by them. Accordingly, no further tax was required to be deducted on this reimbursement. Thus, this amount of Rs. 3,06,181/- is

also directed to be deleted and the Assessing Officer is directed to allow consequential relief. Thus, ground no. 2 of the assessee's appeal stands allowed.

8.2 Coming to ground no. 4 of the assessee's appeal which challenges the action of the Ld. CIT (A) in sustaining the addition of Rs. 10,88,621/- by treating the payment made for carrying out due diligence and valuation of business as capital expenditure, it is seen that this disallowance was made relying upon the comments of the tax auditor in the tax audit report wherein the auditor has mentioned at sl. No. 17(a) of the audit report in Form 3CD that the assessee had incurred this expenditure which was of capital nature. Ld. CIT (A) has also sustained this addition by placing reliance on the comments of the auditor as aforementioned. Although the Ld. AR has argued vehemently against the sustenance of this addition, he could not substantiate his arguments by any cogent evidence which could demonstrate that this expenditure was capital in nature. The copies of invoices placed at paper book pages 55 and 55A show that invoice of Rs. 3,06,181/- was raised for professional services rendered in connection with Project Quest and the other invoice for Rs. 7,82,440/- was raised for professional services rendered

in connection with Project Chip. However, the nature of the services rendered is not discernible from these invoices. In view of the inability of the assessee to demonstrate as to how these invoices pertained to capital expenditure, we are unable to differ with the findings of the lower authorities in this regard and we dismiss ground no. 4 of the assessee's appeal.

9. Accordingly, the appeal of the assessee stands partly allowed.

10. In the result, both the appeals stand partly allowed.

Order pronounced in the Open Court on 30th July, 2018.

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| **(N.K. BILLAIYA)** | **(SUDHANSHU SRIVASTAVA)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

Dated: 30th JULY, 2018
'GS'

Copy forwarded to: -

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

By Order

ASSTT. REGISTRAR

| | |
|---|---|
| Date of dictation | |
| Date on which the typed draft is placed before the dictating Member | |
| Date on which the typed draft is placed before the Other Member | |
| Date on which the approved draft comes to the Sr.PS/PS | |
| Date on which the fair order is placed before the Dictating Member for pronouncement | |
| Date on which the fair order comes back to the Sr.PS/PS | |
| Date on which the final order is uploaded on the website of ITAT | |
| Date on which the file goes to the Bench Clerk | |
| Date on which the file goes to the Head Clerk | |
| The date on which the file goes to the Assistant Registrar for signature on the order | |
| Date of dispatch of the Order | 1 |