

**In the Income-Tax Appellate Tribunal,
Delhi Bench 'E', New Delhi**

**Before : Shri Amit Shukla, Judicial Member And
Shri L.P. Sahu, Accountant Member**

**ITA No. 3837/Del/2015
Assessment Year: 2011-12**

Dy. CIT, Circle 12(1), New Delhi. (Appellant)	vs.	M/s. Info Edge India Ltd., GF-12A, 94, Meghdoot Building, New Delhi. (Respondent)
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Appellant by	Sh. Sridhar Dora, Sr. DR
Respondent by	Sh. Deepesh Jain, CA Sh. Meenal Goyal, CA

Date of Hearing	27.11.2018
Date of Pronouncement	02.01.2019

ORDER

Per L.P. Sahu, A.M.:

This is an appeal filed by the Revenue against the order dated 31.03.2015 of ld. CIT(A)-4, New Delhi for the assessment year 2011-12 on the following grounds :

"1. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition made by A.O. on account of disallowance of Employee stock option scheme Compensation of Rs.1,76,67,000/-.

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition made by the A.O. on account of disallowance u/s. 14A r.w.s. Rule 8D of Rs.12,86,407/-.

2. The brief facts of the case are that the assessee filed its return of income on 29.09.2011 declaring total income at Rs.120,91,67,280/-. The case was selected for scrutiny and statutory notices were issued to the assessee. Subsequently, the return was revised declaring the income of Rs.120,65,90,546/-. In the scrutiny proceedings, the Assessing Officer observed that the assessee has charged in the profit and loss account, an amount of Rs.1,76,67,000/- as Employees Stock Option Scheme Compensation. In this regard, the assessee submitted that the Employees Stock Option Scheme Compensation is an allowable expenditure and he relied on the judgment of CIT vs. Biocon Ltd. vs. ITAT, 35 taxmann.com 335 (Bangalore Tribunal) (SB). The Assessing Officer did not accept the submissions of the assessee and held that Employees Stock Option (ESOP) would not be treated as a Revenue expenditure, but it is a capital expenditure and there is no any flow of funds, therefore, no actual expenditure has been incurred by the company either in the form of capital expenditure or Revenue expenditure. Accordingly, the Assessing Officer added a sum of Rs.1,76,67,000/- to the total income of the assessee.

3. The Assessing Officer further noticed that on perusal of balance sheet that the assessee has made investment in shares/mutual funds to the tune of Rs.296,87,04,000/- has on 31.03.2011. He also noticed from the computation of income that the assessee has made suo moto disallowed Rs.68,11,786/- u/s. 14A and in the tax audit report, the tax auditor has computed the disallowance u/s. 14A at Rs.93,70,518/-. In this regard, the assessee submitted computation of disallowance u/s. 14A which was examined by the AO and noted that the assessee has not taken value of all eligible investment,

income from which will yield income not forming the part of total income for taxation. The assessee also submitted the details as required by the Assessing Officer and the AO after relying the decision of ITAT Special Bench, New Delhi in the case of M/s. Cheminvest Ltd., ITA No. 87/Del/2008 and CBDT Circular No. 05/2014 dated 11.02.2014. He recomputed the disallowance as per Rule 8D of the IT Rules and total resultant disallowance came to Rs.80,98,193/-. Accordingly, the Assessing Officer made addition u/s. 14A read with Rule 8D of Rs.12,86,407/- (80,98,193 – 68,11,786). Feeling aggrieved, the assessee appealed before the Id. CIT(A) who accepted the appeal of the assessee and directed the Assessing Officer for recomputation as per findings of the Id. CIT(A). Aggrieved from the order of the Id. CIT(A), the Revenue is in appeal before the Tribunal.

4. The Id. DR relied on the order of the AO and submitted that the Id. CIT(A) has wrongly treated as Revenue expenditure the Employees Stock Option which has been debited into the profit and loss account of assessee. The Revenue has not accepted the judgment of Hon'ble ITAT Special Bench in the case of CIT vs. Biocon Ltd. and has filed appeal before the High Court. The Assessing Officer has examined the issue in detail in the assessment order and therefore, the order of the Assessing Officer should be restored. It was next submitted in respect of ground No. 2 that the observation of the Assessing Officer is correct that the assessee has not considered all those investments on which exempt income has been received while disallowing the amount u/s. 14A read with Rule 8D. The case laws relied by the Id. CIT(A) are not applicable to the present facts of the case.

5. On the other hand, the ld. AR relied on the order of the ld. CIT(A) and reiterated the submissions made before him.

6. After hearing both the parties and perusing the entire materials available on record, we observe in respect of ground No. 1 that the ld. CIT(A) has done a good reasoned order which does not call for any interference. The findings reached by the ld. CIT(A) are reproduced below for ready reference :

“6.2. The ground No. 2 is covered by my own order for AY 2008-09, 2009-10 & 2010-11, in which following the decision of Ld. CIT(A)-XXX in favour of the appellant for A.Y. 2007-08, which was on the basis of the decision of the Madras High Court in the case of PVP Ventures Ltd.(supra), and of the Chennai ITAT in the case of SSI Ltd. Vs. DCIT [85 TT] 1049], ESOP expenses were held as revenue in nature.

6.3. I find that the Ld. AO has heavily relied upon the decision in the case of M/s VIP Industries Ltd. Vs DCIT & Ranbaxy Laboratories Vs Addl.CIT 124 TTJ (Del) 771 and held that since the ESOP expenses were in the nature of loss to the capital, the same were capital loss and not revenue expenditure. The Ld. AO has also held that the SEBI Guidelines is not a prerogative for determining the allowability under the Income Tax Act. Furthermore, the AO was of the view that as the Central Govt., has not notified Accounting Standards in the matter of ESOP, such expenses cannot be allowed on the amortization basis. The Ld. AO has disregarded the decision of ITAT Spl. Bench, Bangalore in the case of M/s Biocon Ltd. (supra) on the ground that the same was challenged before the Hon'ble Karnataka High Court.

6.3.2 The Ld. AO has held such expenses as capital in nature and not as actual expenditure and relying upon the decision in the case of Addl. CIT Vs Ranbaxy Laboratories Ltd. reported in 124 TTJ 771 (Del) had disallowed these expenses. The Hon'ble ITAT (Spl. Bench), Bangalore, subsequently, in the case of Biocon Ltd. {2013} 35 taxmann.com 335 (Bang)(SB) had comprehensively over viewed the legal position in the light of accounting and taxation principles and have disagreed with the views expressed by the Division Bench of Ranbaxy Laboratories (supra).

6.3.3 The Hon'ble Special Bench, Bangalore(SB) in its decision made the following observations which address the key reservations of the Ld. A.O.:

“when a company undertakes to issue shares to its employees at a discounted premium on a future date, the primary object of this exercise is not to raise share capital but to earn profit by securing the consistent and concentrated efforts of its dedicated

employees during the vesting period. Such discount is construed, both by the employees and company, as nothing but a part of package of remuneration".... Para 9.2.6

"There is no difference in two situations viz., one, when the company issues shares to public at market price and a part of the premium is given to the employees in lieu of their services and two, when the shares are directly issued to employees at a reduced rate. In both the situations, the employees stand compensated for their effort.".... Para 9.2.6

"When section 43(2) of the Act is read in conjunction with section 37(1), the meaning of the term 'expenditure' turns out to be the same as is there in the afore quoted part of the definition under section 2(h) of the Expenditure Act, 1957, viz., not only 'paying out' but also 'incurring'. Coming back to our context, it is seen that by undertaking to issue shares at discounted premium, the company does not pay anything to its employees but incurs obligation of issuing shares at a discounted price on a future date in lieu of their services, which is nothing but an expenditure u/s 37(1) of the Act".... Para 9.2.7

"discount in relation to options vesting during the year cannot be held as a contingent liability."... Para 9.3.6

"The incurring of liability towards the discounted premium, being compensation to employee, is directly linked with the span of service put in by the employee. It, therefore, transpires that a company under the mercantile system can lawfully claim deduction for total discounted premium representing the employees cost over the vesting period at the rate at which there is vesting of options in the employees.".... Para 10.4

"Reverting to the questions of 'when' and 'how much' of deduction for discount on options is to be granted, we hold that the liability to pay the discounted premium is incurred during the vesting period and the amount of such deduction is to be found out as per the terms of the ESOP scheme by considering the period and percentage of vesting during such period."... Para 10.8".

6.3.4 The Hon'ble Spl. Bench, ITAT Bangalore, on comprehensive review of the legal position in the matter, after taking into account the relevant accounting principles did not follow the decision of Hon'ble Delhi ITAT in the case of Ranbaxy Laboratories Ltd. (supra) and of Hon'ble ITAT Mumbai in the case of VIP Industries Ltd. (supra). The Hon'ble Special Bench also considered the decision of Hon'ble Madras High Court in the case of PVP Ventures (supra), in which the views taken by the Chennai Bench in the case of SSI (supra) was upheld, where discount on ESOP was held as allowable deduction, by holding as under:

"We, therefore, sum up the position that the discount under ESOP is in the nature of employees cost and is hence deductible during the vesting period w.r.t. the market price of shares at the time of grant of options to the employees. The amount of discount claimed as deduction during the vesting period is required to be reversed in relation to the unvesting/lapsing options at the appropriate time. However, an adjustment to the income is called for at the time of exercise of option by the amount of difference in the amount of discount calculated with reference the market price at the time of grant of option and the market price at the time of exercise of option. No accounting principle can be determinative in the matter of computation of total income under the Act. The question before the Special Bench is thus answered in affirmative by holding that discount on issue of Employee Stock Options is allowable as deduction in computing the income under the head 'Profits and Gains of Business or Profession'."

6.3.5 During the course of appellate proceedings, the appellant was also asked to furnish the details of working of the Scheme of ESOP expenditure. In response, the appellant submitted that the correct computation of allowance for ESOP comes at Rs 12.32 Crores in the light of the computation scheme approved by the Hon'ble ITAT (SB) in the case of Biocon Ltd. (supra): It was submitted that as on the date of filing of the return of income the benefit of the ruling by the Hon'ble Special bench, ITAT in the above case was not available, the appellant made a much lower claim of Rs 1.76 Crs. based on its own interpretation. The Ld Counsel submitted that in view of the fact that the said Biocon decision is now available the appellant may be allowed the deduction in respect of ESOP expenses based on the said decision, in which it was held that the amount of ESOP expenditure calculated by taking the difference between the market price of the shares of the company and the offer price to the employee is to be proportionately allocated over the vesting period of such option, which in the appellant's computation comes at Rs 12.32 Crs.

6.3.6 On careful consideration of the above, and respectfully following the Hon'ble Madras High Court in the case of PVP Ventures (supra) and of the Special Bench, Bangalore(S.B.) in the case of M/s Biocon Ltd. (supra), I allow the claim of the appellant for treating the ESOP expenses as revenue in the nature. Since there is no contrary High Court decision, the decision of Special Bench of ITAT in the matter, is a binding precedent. The AO is directed to verify the quantum of the deduction based on guidelines laid down by the Hon'ble Spl. Bench in the case of M/s Biocon Ltd. (supra) on verification of the details of the eligible employees, who had left the job before exercising the option and reduce such amount for ascertaining the correct amount of liability for the current year and allow the deduction accordingly".

7. From the above order of Id. CIT(A), it is clear that the Id.CIT(A) has relied on various decisions and has per the decisions relied by the Id. CIT(A),

the ESOP has been treated as Revenue expenditure. The Revenue did not bring any contrary decision against the Special Bench decision in case of Biocon Ltd. (supra). It is not the case of Revenue that the decision of Special Bench of ITAT has been either set aside or reversed by Hon'ble Karnataka High Court. Keeping all these facts in view, we find that the Id. CIT(A) has rightly decided the issue in favour of the assessee with certain directions to the AO. For want of any contrary material on record, we do not find any infirmity in the order of the Id. CIT(A) on this count. Accordingly, ground No. 1 raised by the Revenue deserves to fail.

8. As far as the disallowance u/s. 14A is concerned, we find that the Id. CIT(A) while deciding this issue has directed the Assessing Officer to recomputed the disallowance u/s. 14A, after considering the primary object of investment made in the subsidiary companies. For this, the Id. CIT(A) has recorded the decision of Hon'ble Delhi High Court in the case of CIT v. Oriental Structural Engineering Pvt. Ltd., 216 Taxman 92 & the decision of Mumbai Bench of Tribunal in Garware Wall Ropes vs. ACIT (ITA No. 5408/Mum/2012. We, however, find that Hon'ble Supreme Court in the case of Maxopp Investment Ltd. v. CIT(2018) 91 taxman.com 154 (SC) has categorically held that the dominant object for which the investment into the shares is made by the assessee may not be relevant. It is also held that the investment made in order to gain control of the investee company would not be relevant factor in determining the issue u/s. 14A of the IT Act. We, however, observe from the order of the Assessing Officer that the assessee in his computation of disallowance u/s. 14A filed before the Assessing Officer has not even included such investments, from which he has earned the exempted income. We,

therefore, send the matter back to the file of the Assessing Officer to recomputed the disallowance u/s. 14A read with Rule 8D, after considering the decision of Hon'ble Apex Court in the case of Maxopp Investment (supra). The assessee is also directed to furnish complete details of investments as required by the assessing officer for correct computation of disallowance u/s. 14A. Accordingly, this ground is allowed for statistical purposes.

9. In the result, the appeal of the Revenue is partly allowed for statistical purposes.

Order pronounced in the open court on 02.01.2019.

Sd/-

(Amit Shukla)
Judicial member

Sd/-

(L.P. Sahu)
Accountant Member

Dated: 02.01.2019

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Copy of order forwarded to:

(1)	<i>The appellant</i>	(2)	<i>The respondent</i>
(3)	<i>Commissioner</i>	(4)	<i>CIT(A)</i>
(5)	<i>Departmental Representative</i>	(6)	<i>Guard File</i>

By order

Assistant Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi