IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E' NEW DELHI

BEFORE SHRI H. S. SIDHU, JUDICIAL MEMBER
SHRI T. S. KAPOOR, ACCOUNTANT MEMBER

ITA No.3831/Del/2016
Assessment Year:2011-12

M/s Oxigen Services India (P) Ltd., G-4, Community Centre, Building, C-Block, Naraina Vihar, New Delhi.	Vs.	Dy.C.I.T., Circle-13(1), New Delhi
(Appellant)		(Respondent)

Appellant by	Ms. Gargi Sethee, Advocate Shri Satyan Sethee, Advocate
Respondent by	Ms. Rachna Singh, Sr. D.R.
Date of hearing	16/04/2019
Date of pronouncement	18/04/2019

O R D E R

PER T. S. KAPOOR, A.M.

This is an appeal filed by the assessee against the order of Learned CIT(A) dated 11/05/2016. In this appeal the assessee has raised the following grounds:

"That on the facts and the circumstances of the case and in law, Commissioner of Income tax (Appeals)-7, New Delhi [briefly "the CIT(A)"] has erred in upholding the disallowance of Rs.23,92,281/- in respect of ESOP scheme, following its order for the assessment year 2010-11.

2.That on the facts and the circumstances of the case and in law, the CIT(A) has erred in and not following the order of Special Bench in Biocon Ltd. v. Dy. CIT(LTU) [2013] 155 TTJ (Bang-SB) 649 = 35 taxmann.com 335, wherein DCIT v. Ranbaxy Laboratories Ltd. (2009) 124 TTJ (Del) 771 was duly considered and distinguished.

3. That on the facts and the circumstances of the case and in law, the CIT(A) has erred in holding that neither any expenditure was incurred nor is there any specific provision to allow deduction of expenditure on ESOP scheme.

4. That on the facts and the circumstances of the case and in law, the CIT(A) ought to have allowed the ground relating to carry forward and setoff of losses, inasmuch as, the issue was purely legal and as such, there was no warrant to remand the issue to the Assessing Officer."

2. At the outset, Learned A.R. submitted that the issue of ESOP scheme taken by the assessee in ground No. 1 to 3 is covered in favour of the assessee vide order of the Tribunal in the case of the assessee itself in I.T.A.No.3318 to 3320 where vide order dated 16/03/2018 had decided the issue in favour of the assessee. In this respect our specific attention was invited to para 9 to 12 of the Tribunal order. As regards the other issue relating to carry forward and set off of losses, Learned A.R. submitted that though the Learned CIT(A) has remitted the issue back to the Assessing Officer for verification but the Assessing Officer has not given effect to the order of Learned CIT(A).

3. Learned D.R., on the other hand, supported the order of the authorities below.

4. We have heard the rival parties and have gone through the material placed on record. We find that the ground No. 1 to 3 related to the issue of disallowance of Rs.23,92,281/- in respect of ESOP scheme. We find that in the case of the assessee itself, the issue has been decided in favour of the assessee on the grounds raised by the assessee which are reproduced below:

"1. That on the facts and the circumstances of the case and in law, Commissioner of Income tax (Appeals)-7, New Delhi [briefly "the CIT(A)"] has erred in disallowing deduction of INR 2,33,11,692/- in respect of Employee Stock Option Plan ('ESOP') scheme, holding that the issue is covered against the

Appellant by the order in Dy. CIT v. Ranbaxy Laboratories Ltd. (2009) 124 TTJ (Del) 771.

1.1 That on the facts and the circumstances of the case and in law, the CIT(A) has erred in not following the order of Special Bench in Biocon Ltd. v. Dy. CIT(LTU) [2013] 155 TTJ (Bang-SB) 649, wherein, ITAT order in Ranbaxy Laboratories Ltd. (supra) was duly considered and distinguished.

1.2 That on the facts and the circumstances of the case and in law, the CIT(A) has erred in holding that neither any expenditure was incurred nor is there any specific provision to allow deduction of expenditure on ESOP scheme.

2. That on the facts and the circumstances of the case and in law, the CIT(A) has erred in not allowing deduction of INR 20,00,000/- being the non refundable deposit paid to Indian Railway Catering and Tourism Corporation Ltd. (IRCTC), for the purpose of business of the Appellant.

2.1 That on the facts and the circumstances of the case and in law, the CIT(A) did not appreciate that expenditure by way of non refundable deposit to IRCTC did not provide any enduring benefit of capital nature, rather, it was purely revenue expense incurred wholly and exclusively for the purpose of business.

2.2 Without prejudice, on the facts and the circumstances of the case and in law, the CIT(A) having treated non refundable deposit to IRCTC as intangible asset and allowing depreciation @25%, erred in quantifying the depreciation at INR 4,00,000/- instead of INR 5,00,000/-. Necessary relief deserves to be allowed."

The relevant findings of Hon'ble Tribunal, as contained in para 9 to 12, are reproduced below:

"9. We have heard the rival submissions and have perused the record and various orders on which reliance was placed and are of the view that the case is squarely covered by the decision in Biocon Ltd. (supra). In Lemon Tree Hotels Ltd v. Addl. CIT (ITA No.4588/Del/2013 dated 23.6.2014), which has been affirmed by Hon'ble Delhi High Court, the Tribunal has given following reasons to allow similar expenditure:

"The question whether employee stock option cost incurred by the employer company is an allowable expenditure as per section 37 of the Act is no longer res-integra. The Special Bench of the Tribunal in Biocon Ltd. Vs. DCIT vide order dated 16th July 2013 (36 CCh 268, Bangalore Special Bench of the Tribunal) has held that the discount on issue of Employee Stock Option is an allowable deduction in computing the income under the head „Profit and gains of business or profession". The relevant "ratio decidenti" of the Special Bench is reproduced below:

9.4.1 There is another important dimension of this issue. Chapter XII_H of the Act consisting of section 115WB, mean any privilege, service, facility or amenity directly or indirectly provided by an employer to his employees (including former employees) by reason of their employment." Charging section 115WA of this Chapter provides that :"In addition to the income-tax charged under this Act, there shall be charged for every assessment year .... fringe benefit tax in respect of fringe benefits provided or deemed to have been provided by an employee to his employees during the previous year……"Section 115WB gives meaning to the expression fringe benefits. Sub-section (1) provides that for the purposes of this chapter, „fringe benefits means any consideration for employment as provided under clause (a) to (d), clause (d), which is relevant for our purpose, states that: „any specified security or sweat equity shares allotted or transferred, directly or indirectly, by the employer free of cost or at concessional rate to his employees (including former employee or employees), shall be taken as fringe benefit. Explanation to this clause clarifies that for the purposes of this clause, -(i) "specified security" means the securities as defined in clause (h) of section 2 of the securities contracts (Regulation) Act, 1956 (42 of 1956) and, where employees" stock option has been granted under any plan or scheme thereof, includes the securities offered under such plan or scheme. Thus it is discernible from the above provisions of the Act that the legislature itself contemplates the discount on premium under ESOP as a benefit provides by the employer to its 11 employees during the course of service. If the legislature considers such discounted premium to the employees as a fringe benefit or „any consideration for

employment". It not open to argue contrary. Once it is held as a consideration for employment, the natural corollary which follows is that such discount i) is an expenditure ii) such expenditure is on account of an ascertained (not contingent) liability; iii) it cannot be treated as a short capital receipt. In view of the foregoing discussion, we are of the considered opinion that discount on shares under the ESOP is an allowable deduction.

……..

10.8 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. We, therefore, agree with the conclusion drawn by the tribunal in SSI Ltd."s case allowing deduction of the discounted premium during the years of vesting on a straight line basis, which coincides with out above reasoning.'"

10. Against the aforesaid order of the Tribunal, Hon'ble Delhi High Court has dismissed the appeal filed by the Department observing that:

"2. The question sought to be projected by the Revenue is whether the ITAT erred in deleting the addition of Rs.1,28,19,169/- made by the Assesssing Officer ('AO') by way of disallowance of the expenses debited as cost of Employees Stock Option ('ESOP') in profit and loss account?

3. The Court has been shown a copy of the decision dated 19th June 2012 passed by the Division Bench of Madras High Court in CIT-III Chennai v. PVP Ventures Ltd. (TC(A) No. 1023 of 2005) where a similar question was answered in favour of the Assessee by holding that the cost of ESOP could be debited to the profit and loss account of the Assessee. This Court has also in its decision dated 4th August 2015 in ITA No.2 of 2002 (CIT v. Oswal Agro Mills Ltd.) held that the expenditure incurred in connection with issue of debentures or obtaining loan should be considered as revenue

expenditure.

4. In the circumstances, the impugned order of the ITAT answering the question in favour of the Assessee is affirmed."

11. Respectfully following the order of the Hon'ble Delhi High Court in Lemon Tree Hotels Ltd dated 18.8.2015 and the order of the Special Bench in Biocon Ltd. (supra), we set aside the order of the Ld. CIT(A) on this issue and direct the Assessing Officer to allow claim of ESOP expenses.

12. Since ground No.1 to 1.2 for the assessment years 2009-10 and 2010-11 involve identical issue, therefore, for the same reasons, assessee's appeal for the assessment years 2009-10 and 2010-11 is allowed."

5. In view of the above facts and circumstances and in view of the judicial precedents, ground No. 1 to 3 are allowed.

6. Coming to ground No. 4, we find that Learned CIT(A) has already remitted the issue back to the Assessing Officer for verification. Learned A.R. argued that inspite of the direction of Learned CIT(A) the Assessing Officer has not carried out any verification. In this respect we do not find that any finding can be adjudicated as the issue already stands allowed for statistical purposes in favour of the assessee and assessee needs to get the verification done at the end of the Assessing Officer. Accordingly, ground No. 4 is dismissed.

7. In the result, the appeal is partly allowed.

(Order pronounced in the open court on 18/04/2019)

Sd/.	**Sd/.**
(H. S. SIDHU)	**(T. S. KAPOOR)**
Judicial Member	**Accountant Member**

Dated:18/04/2019
*Singh

Copy of the order forwarded to :

1. The Appellant
2. The Respondent.
3. Concerned CIT
4. The CIT(A)
5. D.R., I.T.A.T.,