

**IN THE INCOME TAX APPELLATE TRIBUNAL "C"  
BENCH, MUMBAI**

**BEFORE HON'BLE SH. SANDEEP GOSAIN, JM &  
HON'BLE SH. N. K. PRADHAN, AM**

आयकरअपीलसं./ I.T.A. No. 7637/Mum/2016  
(निर्धारणवर्ष / Assessment Year: 2008-09)

DCIT Cir -7(3)(1) R. No. 669A, Aayakar Bhavan, M. K. Road, Mumbai-400 020	<b>बनाम/ Vs.</b>	M/s People Infocom Pvt. Ltd. (now know as M/s Mauj Mobile Pvt. Ltd.) 205, Shiv-e-numh, 2 <sup>nd</sup> floor, Dr. Annie Besant Road, Mumbai-400 018
स्थायीलेखासं ./जीआइआरसं ./PAN No. AADCP5658H		
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri Abi Rama Karthkiyen, DR
प्रत्यर्थीकीओरसे/Respondentby	:	Shri R. S. Samaria, AR
सुनवाईकीतारीख/ Date of Hearing	:	07.06.2019
घोषणाकीतारीख / Date of Pronouncement	:	18.06.2019

आदेश / ORDER

**Per Sandeep Gosain, Judicial Member:**

The present Appeal has been filed by the revenue against  
the order of Commissioner of Income Tax (Appeals)-13,

Mumbai, dated 14.10.16 for AY 2008-09 on the grounds mentioned herein below:-

- 1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was correct in allowing ESOP expenses of Rs. 1,81,54,711 relying on the decision of the Hon'ble ITAT in the case of Biocon Ltd vrs. DCIT (35 Taxmann 335) and assessee's own case in ITAT No. 69990/Mum/13 dated 21.10.15 for AY 2007-08 without appreciating the fact that the decision of the Hon'ble ITAT have not been accepted by the Department?*
- 2. The appellant craves leave to amend or alter any ground and/or add new grounds which may be necessary.*

2. The solitary ground raised by the revenue relates to challenging the order of Ld. CIT(A) in allowing ESOP expenses of Rs. 1,81,54,711 relying on the decision of the Hon'ble ITAT in the case of Biocon Ltd vrs. DCIT (35 Taxmann 335) and assessee's own case in ITAT No. 69990/Mum/13 dated 21.10.15 for AY 2007-08.

3. At the very outset, Ld. AR appearing on behalf of the assessee submitted that the issue in the present case has already been decided by Hon'ble ITAT In ITA No. 6990/Mum/13 for AY 2007-08 in assessee's own case.

4. Whereas on the contrary, Ld. DR submitted that the decision of Hon'ble ITAT in assessee's own case has not been accepted by the department. It was also submitted that Hon'ble ITAT had passed its order by relying upon the decision in the case of **Biocon Ltd vrs. DCIT (35 Taxmann 335)**, but in the said case, the matter was restored back to the file of AO for necessary verification.

5. We have heard the counsels for both the parties at length and we have also perused the material placed on record, judgment cited by the parties as well as the orders passed by the revenue authorities. We noticed that Spl. Bench of ITAT in the case of **Biocon Ltd. Vrs. DCIT** had held as under:-

*11.3 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'.*

#### **SOME RELEVANT FACTORS IN ASSESSEE'S CASE**

**12.1** *Having answered the question in affirmative, let us examine its applicability to the facts of the appellant's case. It has been seen above that the authorities below refused to grant deduction of the discount at the very threshold. Resultantly, the verification of the correctness of calculation of*

*discount stood ousted. Since we have overturned such view in above terms, the verification of calculation in accordance with our directions becomes imperative. We, therefore, set aside the impugned orders on this issue and remit the matter to the file of the AO for finding out the correct amount of deduction accordingly.*

**12.2** *It would be imperative to highlight certain points having bearing on the issue which have come to our notice during the course of hearing. The AO is directed to look, inter alia, into these aspects in quantifying the amount of eligible deduction.*

*a. The assessee-company was a closely held company in the previous year relevant to the assessment year 2003-2004 and as such there was no question of the listing of its shares and having some market price at the time of grant of options. Ordinarily, the amount of discount on premium which is written off over the vesting period represents the market price of the shares listed on the stock exchange on the date of grant of option as reduced by the price at which option is given to the employees. However, presently there is no availability of any market price of such shares on the date of grant of option as the company came to be listed on a stock exchange in a subsequent year. On a*

*pointed query, the Id. AR furnished the details of such claim by showing that it granted 71,510 options with discount of Rs. 909 per option making total discount at Rs. 6.50 crore. He stated that the face value of shares is at Rs. 10 against which the deduction for discounted premium over the vesting period has been claimed at Rs. 909, meaning thereby that the market price of the share on the date of grant of option was taken at Rs. 919. No material worth the name has been placed on record to indicate as to how a share with face value of Rs. 10 has been valued at Rs. 919 for claiming deduction towards discount at Rs. 909 per share. This aspect of valuation of shares at Rs. 919 per share needs to be examined by the Assessing Officer.*

*b. We have held above that the deduction of the discounted premium is to be claimed over the vesting period. The assessee claimed deduction for discount amounting to Rs. 3.38 crore for the A.Y. 2003-04. On being called upon to furnish bifurcation of such claim, the assessee filed a chart showing its detail comprising of four amounts. First amount of Rs. 1.62 crore has been shown as the first tranche of 25% option. Second amount of Rs. 81.25 lakh as the second tranche of 25% option; third amount of Rs. 54.16 lakh as the third tranche of 25% option and the last amount of Rs. 40.62 lakh as the fourth tranche of 25% option. We are*

*unable to understand as to how the last three amounts can qualify for deduction at the end of the first year itself. On a specific query, it was stated by the Id. AR that the assessee claimed deduction for the proportionate part of discount for the second, third and fourth year at the end of the first year itself because 25% of options vested in the employees at the end of the first to fourth year each. This defies all logics and rationalities. When the options vest equally over a period of four years, it is but natural that the company would incur equal liability for the discounted premium @ 25% of total discount on receipt of services of the employees at the end of each year. The way in which the assessee has claimed deduction runs contrary even to the SEBI Guidelines, which also provide for deduction on straight line basis. The manner of the assessee's claiming deduction has resulted in needlessly increasing the amount of deduction for the first year at the cost of deduction for the subsequent three years. It needs to be set right by apportioning the total amount of the discounted premium evenly over the vesting period of four years.*

*c. It has been noticed above that the stage for the grant of deduction of discount is on the respective vesting of the options. In ESOP 2000, the vesting takes place @ 25% after each year of service. It means that*

*the first part of 25% deduction would be available on the completion of one year from the date of grant of option. The assessee was required to indicate the date of grant of options in respect of which deduction has been claimed in the instant year. Two letters granting options to Shri Murali Krishnan K.N. and Neville Bain have been randomly filed which are dated 2nd April, 2002. If the options are granted on 2nd April, 2002, then 25% of the total option shall vest in the employees at the end of the first year from this date, which date would be 1st April, 2003. As such, the amount would become deductible in the previous year relevant to assessment year 2004-2005 and not 2003-2004. The Id. AR contended that though these letters are dated 2nd April, 2002, but in fact the options were granted on 1st April, 2002. The correct date of grant and vesting needs to be verified at the AO's end.*

*d. The Id. AR has stated that the amount of discount claimed as deduction in the earlier years in respect of unvesting/lapsing options has been reversed at the relevant time. There is no finding either in the assessment or the impugned order in this regard. This fact should also be verified by the AO to ensure that the overall expenditure booked by the company is restricted only to the extent of the exercised options.*

*12.3 The AO will decide the instant issue in the fresh proceedings as per our above directions on the legal question before this special bench and by considering, inter alia, the aforementioned case-specific factual scenario dealt with in para 12.2. above. Needless to say, the assessee, who will have liberty to lead any fresh evidence in its defence, will be allowed a reasonable opportunity of hearing.*

6. Apart from that Ld. CIT(A) had also considered the findings of the Coordinate Bench of ITAT in Assessee's own case in ITA no. 6990/Mum/13 for AY 2007-08 and had referred to para 13 on page no. 31 of the said order, which is reproduced below:-

*We hold that this discount of Rs.81,93,150/- on issue of ESOP being revenue expenditure is squarely covered in favour of the assessee company by decision of Hon'ble Special Bench , Bangalore Tribunal in the orders of Biocon Limited(supra) which is binding on us. Respectfully following the decision of Hon'ble Special Bench, Bangalore Tribunal in Biocon Limited(supra), we decide this issue in favour of the assessee company and against the Revenue that 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 share 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 to the market price at the time of grant of option and the market price at the time of exercise of option. Thus, we hold that discount on issue of Employees Stock option is allowable as deduction in computing the income under the head 'Profit and gains of Business or Profession' in light of decision by Hon'ble Special Bench ,Bangalore Tribunal in the case of Biocon Limited (supra)*

7. After having gone through the facts of the present case as well as considering the orders passed by revenue authorities and submissions made by both the parties, we find that the present case is fully covered by the order of Hon'ble ITAT in assessee's own case and also the subsequent decision of the Coordinate Bench in ITA no. 5132 & 5133/Mum/16 for AY 2010-11 & 2011-12 and also taking into consideration the decision of the Coordinate Bench in ITA No. 6690 & 6986/Mum/13 for AY 2007-08 & 2008-09, we find no reasons to interfere into or

deviate from the findings recorded by Ld. CIT(A) as the same are based on the orders passed by the Coordinate Bench of ITAT, hence we are of the view that the findings so recorded by Ld. CIT(A) are judicious and are well reasoned. Resultantly, these grounds raised by the revenue stands dismissed.

8. In the net result, the appeal filed by the revenue stands **dismissed** with no order as to cost.

*Order pronounced in the open court on 18<sup>th</sup> June 2019.*

*Sd/-*

(N. K. Pradhan)

लेखासदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated :

*Sr.PS. Dhananjay*

*Sd/-*

(Sandeep Gosain)

न्यायिकसदस्य / Judicial Member

18.06.2019

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File  
आदेशानुसार/ BY ORDER,

**उप/सहायकपंजीकार (Dy./Asstt.Registrar)**  
**आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai**