

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

BEFORE SHRI PRAMOD KUMAR (VICE PRESIDENT)  
AND  
SHRI SAKTIJIT DEY (JUDICIAL MEMBER)

I.T.A. No.7501/Mum/2018  
(Assessment year 2013-14)

ACIT, Circle-7(2)(2), Mumbai	vs	M/s Network 18 Media & Investment Ltd, 414, 1 <sup>st</sup> Floor, Empire Complex Senapati Bapat Marg, Lower Parel, Mumbai-400 013 PAN :AABCS2472G
<b>APPELLANT</b>		<b>RESPONDENT</b>

Appellant by	Shri Vijaykumar Subramanyam, DR
Respondent by	Shri Nimesh Vora, AR

Date of hearing	25-06-2021
Date of pronouncement	22-09-2021

**ORDER**

**Per Saktijit Dey (JM):**

This is an appeal by the revenue against order dated 09-10-2018 of learned Commissioner of Income Tax (Appeals)-57, Mumbai, for the assessment year 2013-14.

2. In grounds 1,2 and 3, the revenue has challenged the decision of learned Commissioner (Appeals) in reducing the corporate guarantee fee to 0.5% as against 1.5% determined by the Transfer Pricing Officer (TPO, hereinafter).

3. Briefly the facts are, in course of proceedings before the TPO, he noticed that the assessee has provided corporate guarantee to its overseas Associate Enterprise (AE, hereinafter), viz. M/s B.K. Holdings Ltd, Mauritius, which was not reported in 3CEB report. When called upon to explain as to why such transaction relating to provision of corporate guarantee has not been benchmarked, the assessee stated that the transaction being in the nature of shareholders' activity, cannot be regarded as an international transaction. The TPO, however, did not accept the contention of the assessee and proceeded to benchmark the transaction with AE by determining arm's length price of guarantee commission @1.5% of the amount on which such guarantee was provided and proposed an adjustment of Rs.1,99,80,691/-. The adjustment so proposed was added back to the income of the assessee. Assessee challenged the aforesaid addition before learned Commissioner (Appeals). Following her decision on identical issue in assessee's own case for Assessment Year 2012-13, learned Commissioner (Appeals) directed the assessing officer to restrict the guarantee commission to 0.5% and delete the balance amount.

4. Having considered rival submissions, we do not find any infirmity in the aforesaid decision of learned Commissioner (Appeals). The Hon'ble jurisdictional High Court in case of CIT vs Everest Kento Cylinders Ltd (2015) 58 taxmann.com 254 (Bom), has upheld the decision of the Tribunal in charging guarantee commission on corporate guarantee at 0.5%. The same view was expressed by the Hon'ble jurisdictional High Court in case of CIT vs M/s GlennmarkPharmaceuticals Ltd in Income Tax Appeal No.1203 of 2014 by judgement dated 2<sup>nd</sup> February, 2017. The aforesaid decision of the jurisdictional High Court was upheld by the Hon'ble Supreme Court while deciding the appeal of the revenue in Civil Appeal

No.12632 of 2017 on 11-120-2018. In view of the aforesaid, we uphold the decision of learned Commissioner (Appeals) on this issue. Grounds are dismissed.

5. In ground 4, revenue has challenged the deletion of disallowance made by the assessing officer on account of deduction claimed on employee stock option (ESOP) expenditure.

6. Briefly the facts are, in course of assessment proceedings, the assessing officer noticed that the assessee has debited an amount of Rs.73,53,010/- towards expenditure on account of ESOP. Being of the view that ESOP expenses have not crystallized during the year and has been claimed on notional basis, the assessing officer disallowed the same. Assessee contested the aforesaid disallowance before the first appellate authority. Following her decision in assessee's own case in Assessment Year 2012-13, learned first appellate authority allowed assessee's claim.

7. We have considered rival submissions and perused materials on record. The short issue before us is, whether ESOP expenditure is allowable u/s 37(1) of the Act. We find, while deciding identical issue in assessee's own case in Assessment Year 2012-13, learned Commissioner (Appeals), following the decision of ITAT, Bengaluru Special Bench in case of M/s Biocon Ltd vs DCIT 90 DTR (Bang)(SB)(Trib) 289 allowed assessee's claim of deduction by holding that ESOP expenditure is not a contingent liability; hence, is an allowable deduction under section 37(1) of the Act. We have also noted, identical issue has been decided in favour of the assessee in Assessment Year 2008-09 vide ITA No.4545/Del/2015 dated 19-06-2019. It is worth mentioning, the decision of the ITAT Special Bench in case of M/s Biocon Ltd vs DCIT (supra) has been upheld by the Hon'ble Karnataka High Court in case of CIT vs Biocon Ltd reported in [2020]

121 taxmann.com 351(Kar). In view of the aforesaid, we uphold the decision of learned Commissioner (Appeals) while dismissing the ground raised.

8. In ground 5, the assessee has challenged deletion of disallowance made by the Assessing Officer under section 14A r.w.r. 8D.

9. Briefly the facts are, in course of assessment proceedings, the assessing officer noticed that during the year under consideration, the assessee has received exempt income by way of dividend amounting to Rs.9,09,40,281/ and long term capital gain of Rs.40,53,95,643/- on sale of shares of Den Networks Ltd.

Whereas, in the computation of total income the assessee suo motu disallowed an amount of Rs.11,68,95,186/-. Being of the view that the suo motu disallowance made by the assessee is not in accordance with rule 8D, the assessing officer proceeded to compute disallowance in terms of the said rule. In the process, he computed disallowance of Rs.55,77,41,735/- comprising of the following:-

I.	Direct expenses u/r 8D(2)(i)	Rs. 2,02,99,546/-
II.	Interest expenditure u/r 8D(2)(ii)	Rs.40,75,90,511/-
III.	Administrative expenditure u/r 8D(2)(iii)	Rs.11,98,51,678/-

After reducing suo motu disallowance computed by the assessee, the assessing officer made a net disallowance of Rs.43,08,46,549/-. Assessee contested the aforesaid disallowance before the first appellate authority. Following the order passed by her in assessee's own case in Assessment Year 2012-13 and observing that the suo motu disallowance made by the assessee is

more than the exempt income earned during the year, learned Commissioner (Appeals) deleted the disallowance.

10. We have considered rival submissions and perused materials on record. As could be seen from the summary of average value of exempt income yielding investments, interest free fund available and disallowance computed under section 14A filed before us by the learned Counsel for the assessee, the assessee had sufficient interest free fund available with it. Therefore, no disallowance of interest expenditure can be made. Further, we also agree with assessee that disallowance under rule 8D(2)(iii) can only be made on the average value of assets yielding exempt income during the year. It is the case of the assessee that if disallowance under rule 8D(2)(iii) is computed on the average value of exempt income yielding investments, it will work out to Rs.64,24,889/- only. Whereas, assessee, suo motu, has disallowed Rs.11,68,95,186. We find substantial force in the aforesaid submissions of the assessee. Further, the contention of the assessee that the shares of DEN Network has no cost to the assessee as it was received by gift/voluntary contribution is acceptable. In view of the aforesaid, we uphold the decision of learned Commissioner (Appeals). This ground is dismissed.

11. In ground 6, the revenue has challenged the deletion of disallowance made under section 14A r.w.s. rule 8D while computing book profit under section 115JB of the Act.

12. Having heard rival submissions, we are in agreement with learned Commissioner (Appeals) that while computing books profit under section 115JB of the Act, the assessing officer cannot invoke the provisions of section 14A r.w.r. 8D for making adjustment to the book profit. This legal proposition has been laid

down in case of ACIT vs Vireet Investments (P) Ltd (2017) 82 taxmann.com 415 (Del)(Trib)(SB).Though, the assessing officer is empowered to disallow expenditure incurred for earning exempt income in terms of Explanation 1(f) of section 115JB; however, such expenditure must have a direct nexus with the earning of exempt income and not something which is computed under rule 8D r.w.s. 14A of the Act. Therefore, we do not see any reason to interfere with the decision of learned Commissioner (Appeals) on the issue. Ground is dismissed.

13. Ground 7 and 8 being general grounds, are dismissed.

14. In the result, appeal is dismissed.

Order pronounced on 22/09/2021.

Sd/-

sd/-

<b>(PRAMOD KUMAR)</b>	<b>(SAKTIJIT DEY)</b>
<b>VICE PRESIDENT</b>	<b>JUDICIAL MEMBER</b>

Mumbai, Dt : 22/09/2021

Pavanan

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4. The CIT(A)
5. The DR, ITAT, Mumbai
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By Order

Asstt. Registrar, ITAT, Mumbai