

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'B', NEW DELHI**

**Before Sh. Amit Shukla, Judicial Member**

**Dr. B. R. R. Kumar, Accountant Member**

**(Through Video Conferencing)**

**ITA No. 7187/Del/2017 : Asstt. Year : 2013-14**

Curadev Pharma Pvt. Ltd., H-3/63, First Floor, Vikaspuri, New Delhi-110018	Vs	ACIT, Circle-6(2), New Delhi
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AADCC8368D</b>		

**Assessee by : Sh. S. Vasudevan, Adv.  
Revenue by : Sh. Ajay Kumar, Sr. DR**

**Date of Hearing: 04.08.2021**

**Date of Pronouncement: 01.11.2021**

**ORDER**

**Per Dr. B. R. R. Kumar, Accountant Member:**

The present appeal has been filed by the assessee against the order of Id. CIT(A)-15, New Delhi dated 17.12.2015.

2. Following grounds have been raised by the assessee:

*"1. That on the facts and in the circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) (hereinafter referred to as 'Ld. CIT(A)') erred on facts and in law by confirming the disallowances made by the Ld. Assessing Officer (hereinafter referred to as 'Ld. AO').*

*2. That on the facts and in the circumstances of the case, the Ld. CIT(A) erred on facts and in law by confirming the disallowance made by the Ld. AO of the expenses incurred under employee stock option (hereinafter referred to as 'ESOP') scheme amounting*

to Rs. 96,30,345/- and consequently adding it to the total income of the Appellant.

2.1. That on the facts and in the circumstances of the case, the Ld. CIT(A) erred in observing that the Appellant did not furnish evidence of vesting and disbursal of ESOP in as much as the Ld. CIT(A) failed to understand the scheme of grant of the ESOP as evidenced by the Agreements entered into by the Appellant with its eligible employees. Also, the Ld. CIT(A) failed to take note of the pro-rata claim of expenditure charged over the period of vesting of the ESOP in the audited financial statements. Further, the Ld. CIT(A) has failed to take note of the fact that the actual allotment of ESOP will take place only upon exercise of the option at the end of vesting period.

2.2. That on the facts and in the circumstances of the case, the Ld. CIT(A) erred in observing that the Appellant failed to furnish evidence of tax deduction at source at the time of paying the exercise price. The Ld. CIT(A) has failed to take into account the fact that there was no exercise of option during the AY under consideration. The liability to deduct tax at source, if any, would arise only upon exercise of options by the employees.

2.3. That on the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that the Appellant did not provide the list of employees to whom ESOP had been granted in as much as no such specific information was sought from the Appellant. The Ld. CIT(A) has failed to take into account that material particulars relating to ESOPs, including the number of eligible employees, was provided as part of notes to accounts (note 27) in the financial statements for the relevant AY.

2.4. That on the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that the ESOP expenses incurred by the Appellant are at best notional expenses as the same have not been actually incurred.

2.5. That on the facts and in the circumstances of the case, the Ld. CIT(A) failed to appreciate the true intent of the definition laid under Section 37(1) of the Income Tax Act, 1961 hereinafter referred to as 'the Act') in as much as by undertaking to issue shares at discount premium, the Appellant does not pay anything to its employees, but incurs obligation of issuing shares at a discounted price on future date in lieu of their services, which is nothing but deductible expenditure u/s 37(1) of the Act.

2.6. That on the facts and in the circumstances of the case, the Ld. CIT(A) erred in not appreciating that such disallowance of expenditure would result in taxation of such amount twice, once in the hands of the employees as perquisite and secondly in the hands of the appellant.

3. That on the facts and in the circumstances of the case, the Ld. CIT(A) erred on facts and in law in upholding the disallowance made by the Ld. AO of business product and research development expenses (hereinafter referred to as 'R&D expenditure') incurred by the Appellant amounting to Rs. 64,59,150/- that the same is not in the nature of revenue expenditure and further the said expenditure is also not capital expenditure.

3.1. That on the facts and in the circumstances of the case, the Ld. CIT(A) erred on facts and in law confirming the finding arrived at by the Ld. AO that the R&D expenditure incurred by the Appellant is not revenue expenditure under section 37(1) of the Act by ignoring the fact that the said expenditure had been incurred wholly and exclusively for the purpose of business.

3.2. That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in stating that the Appellant had admitted that these expenses were in the nature of capital expenditure. The Ld. CIT(A) has failed to take note of the categorical submission of the Appellant that the R&D expenditure were in the nature of revenue expenditure.

*3.3. That on the facts and in the circumstances of the case, the Ld. CIT(A) erred on facts and in law in ignoring the detailed submissions of the Appellant which clearly explain the business activity of the Appellant and that it is for the said business activity that it entered into a research/consultancy agreement.*

*3.4. That on the facts and in the circumstances of the case, the Ld. CIT(A) erred on facts and in law in holding that the Appellant failed to provide evidence of payment made for consultancy work in as much as the genuineness of the transaction/payment was neither doubted by the Ld. AO nor by the Ld. CIT(A) and thus no query with regard to payment as ever raised.*

*3.5. Without prejudice to the grounds above, the Ld. CIT(A) erred in not appreciating that even if the R&D expenditure is not considered as revenue expenditure under section 37(1), the same is deductible as per section 35(1)(iv) r.w.s. 35(2)(ia) of the Act."*

### **ESOP**

3. The assessee instituted the Curadev Employee Stock Option Scheme (ESOP) on 01.04.2010. The Scheme was instituted as a compensation to attract and retain talented employees, to enhance productivity, to motivate employees and increase employees' interest in the Appellant's business. The Scheme provides for the grant of such number of shares to its employees as determined by the board of directors from time to time. As per the Scheme and agreements entered by the appellant with its employees, 20% of the employee stock options vest every year and thus 100% vesting would take place over a period of 5 years.

4. As per this scheme, shares are vested with an exercise price of Rs. 10 per share, i.e. the face value. The shares have

been valued by registered valuers at different dates varying from Rs.548.51 to 549.48 for the total options numbering 77950. The assessee claimed the value of such vested options amounting to Rs.96,30,345/- which was in the nature of employee compensation and claimed the same as revenue expenditure. The Assessing Officer disallowed the expenditure holding that they are the notional expenses and capital in nature and hence not allowable u/s 37 of the Income Tax Act, 1961. The Assessing Officer held that the ESOP discount is not a deductible expenditure.

5. The Id. CIT(A) affirmed the action of the Assessing Officer holding that the assessee has not furnished evidence of vesting done with respective employees in F.Y. 2012-13, and also on the fact that no evidence of TDS on the payment of exercise price. The Id. CIT(A) has also held that the assessee has failed to furnish the evidences of the list of total number of employee. The Id. CIT(A) relied on various case laws which have been perused by us.

6. The Co-ordinate Bench of ITAT in the case of DCIT Vs. Integrated Cleanroom in ITA No. 428/Hyd./2020 vide order dated 17.09.2021 dealing with the similar issue held as under:

*"23. We have considered the rival submissions as well as the relevant material on record. There is not dispute that for the year under consideration the assessee did not claim the deduction in respect of the payment made to the parent company on account of Employees Stock Option and compensation. However we find that an identical issue has been considered in assessee's own case for the Assessment Year 2008-09 and it was held that it is an allowable*

*deduction. Therefore, so far as the issue of allowability of the deduction is concerned it has been decided in favour of the assessee by this tribunal by following the decision of the Special Date of Judgment 16-8-2018, ITA No. 241/2017 The Pr. Commissioner of Income Tax - 7 & Anr. Vs. The Hon'ble High Court of Delhi in ITA 107/2015 in the case of CIT vs Lemon Tree Hotels Ltd. vide order dated 18.08.2015 has adjudicated as under:*

*"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 Assessing Officer ('AO') by way of disallowance of the expenses debited as cost of Employees Stock Option ('ESOP') in profit and loss account? <http://www.itatonline.org> ITA No. 107/2015 Page 2 of 23. 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.*

*The Hon'ble ITAT Delhi in the case of Ranbaxy Laboratories has also decided the issue subsequently in the favour of the assessee for AY 2008-09 in ITA No. 196/Del/2013 vide order dated 25-4-2016 as reported in 68 taxmann.com 322.*

*Thus, the Hon'ble ITAT of Hyderabad, the jurisdictional Bench has already decided the issue holding ESOP expenses as allowable u/s. 37(1) and further as the Hon'ble High Courts of Delhi and Karnataka have also decided the issue of allowability of ESOPs as revenue*

*expenditure, therefore the ESOP expense claimed by the appellant has to be allowed in principle accordingly.*

*As regards the quantum of allowance, the appellant has calculated the ESOPs on the basis of market value of Rs. 505 and has charged the employees Rs. 100 (face value being Rs. 10 and security premium Rs. 90). The difference has been considered as an expense and the relevant perquisite has been ITA No. 428/Hyd/2020 AY 2017-18 DCIT vs. M/s Integrated Cleanroom Technologies Pvt. Ltd. accounted for in the hands of employees and the same have been taxed in their hands and due TDS has been deducted by the appellant.*

*The Assessing Officer however has taken the value as per book value by considering the value around Rs. 335/- and the Assessing Officer has commented that the valuation taken at Rs. 505/- is very high. The appellant has followed the DCF method and no fault has been found in the same by the Assessing Officer with regard to the parameters considered for the said valuation and the AO simply brushed aside that it is based on future projections. DCF method is a method prescribed by the Income Tax Act and the valuation requires future projections, therefore, the act of the AO in not examining and not finding anything improper and merely rejecting the value was incorrect. The appellant has also justified the financials considered for DCF method in its submission dated 18.02.2020 in the para 6. The same is reproduced as under:*

*From the above statement actuals are little higher than the valuation as per DCF method and hence the estimates are reasonably good and are not made with intention to value share at higher price to claim expenses at a higher rate.*

*From above, it is noted that the three years average cash flow as taken by the valuer for DCF method at the time of issuance was*

*31.95, whereas as per actual as on today, the three years cash flow is 32.29. Thus, the DCF method has estimated a fair value of the company by considering correct financials.*

*In view of the above, the method adopted by the appellant is reasonable and therefore there is no change required in the valuation. To sum up, the ESOP expenses are allowable and the ESOP has been calculated at a fair value and therefore the sum of Rs. 2,31,02,829/- is allowable as revenue expenditure."*

7. The Hon'ble Madras High Court in the case of CIT Vs. Vs. M/s. PVP Ventures Limited T. Nagar, Chennai in TC(A). No. 1023 of 2005, vide order dated 19.06.2021, while the order has been passed in relation to appeal against the order u/s 263, we find that the issue of the allowability of the expenditure pertaining to ESOP has been clearly dealt by the Hon'ble High Court. The relevant portion is as under:

*"11. As regards the second issue which is now canvassed before this Court viz., on the issue of expenditure of 66.82 lakhs towards the issue of shares to the Employees Stock Option is concerned, the Tribunal pointed out that the shares were issued to the employees only for the interest of the business of the assessee to induce employees to work in the best interest of the assessee. The allotment of shares was done by the assessee in strict compliance of SEBI regulations, which mandate that the difference between the market prices and the price at which the option is exercised by the employees is to be debited to the Profit and Loss Account as an expenditure. The Tribunal pointed out that what had been adopted was not notional or contingent as had been submitted by the Revenue. Pointing out to the Employees Stock Option Plan, the Tribunal in its order stated that it was a benefit conferred on the employee. So far as the company is concerned, once the option was*

*given and exercised by the employee, the liability in this behalf got ascertained. This was recognized by SEBI and the entire Employees Stock Option Plan was governed by guidelines issued by SEBI. On the facts thus found, the Tribunal held that it was not a case of contingent liability depending on the various factors on which the assessee had no control. The expenditure in this behalf was an ascertained liability, thus the expenditure incurred being on lines of the SEBI guidelines, there could be no interference in the relief granted by the Assessing Authority for the expenditure arising on account of Employees Stock Option Plan. This expenditure incurred as per SEBI guidelines and granted by the Officer could not be considered as erroneous one calling for exercise of jurisdiction under Section 263 of the Act."*

8. In the case of CIT Vs. Lemon Tree Hotels Ltd. in ITA 107/2015 order dated 18.08.2015, the Hon'ble Jurisdictional High Court allowed the ESOP expenditure as expenses has revenue expenditure. The relevant portion of the order is as under:

*"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 Assessing Officer ('AO') by way of disallowance of the expenses debited as cost of Employees Stock Option ('ESOP') in profit and loss account? <http://www.itatonline.org> ITA No. 107/2015 Page 2 of 2 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."*

9. Since, it can be gauged from the above judgments that the expenditure incurred in connection with the ESOP is treated as revenue expenditure, we hereby allow the ground of appeal on this issue. Since, the grounds have been allowed on merits of the case in principle, the additional evidences filed by the assessee are not required to be considered by this Court.

**R&D Expenditure:**

10. With regard to the R&D expenditure, the same has been disallowed by the AO and enhanced by the Id. CIT(A) in absence of the relevant details. The assessee has filed additional evidences under Rule 29 of the ITAT rules, 1963. The submission of the assessee before the Tribunal is as under:

*"The Ld. CIT(A) confirmed and enhanced the disallowance made by Ld. AO of the R&D expenditure incurred by the Appellant.*

*With respect to the disallowance of R&D expenditure, the Ld. CIT(A) passed the order confirming the disallowance made by the Ld. AO and further enhancing the same without even affording it an opportunity of being heard. The same is apparent from a reading of Para 4.5.I.2. of the order of the Ld. CIT(A) wherein the disallowance and enhancement has been made on an entirely new ground that the Appellant has not submitted the details of:*

- a. the outcome of the consultancy services obtained and the outcome of research*

- b. the Appellant has failed to correlate the consultancy agreement with its business; and*
- c. the Appellant has failed to provide evidence of payment made for consultancy work with statutory deduction under law.*

*It is submitted in this regard that the abovementioned issues were not even raised by the Ld. AO inasmuch as the genuineness of the expenditure was not doubted by it. Neither did the Ld. CIT(A) raised these issues during the course of hearing before it and the same is apparent inasmuch as there is no recording of a statement in the order by the Ld. CIT(A) in its order that the Appellant was asked to submit the answers/details on the abovementioned points.*

*That by mentioning the above points with respect to the expenditure incurred by the Appellant on R&D, the Ld. CIT(A) has nothing but doubted the genuineness of the expenditure without even affording it an opportunity of being heard. It is in this regard that when there was no specific question as to the genuineness of the expenditure incurred that the Appellant had no opportunity to adduce the documents as evidence challenging the grounds on which disallowance has been made by the Ld. CIT(A). Therefore, the Appellant had no occasion to furnish all the relevant evidences to factually counter the allegations and unexpected disallowance to the returned income.*

*We, therefore, now request this Hon'ble Tribunal to admit additional evidences in accordance with the Rule 29 of the Income Tax Appellate Tribunal Rules, 1963, in support of the Appellant Company's claim in respect of the following grounds that are the subject matter of the said appeal...*

*The Appellant is engaged in the business of small molecule discovery and thus undertakes biotech research & development activities on a*

*continuous basis. Such research is either done independently or in collaboration with the other research institutes.*

*In the AY 2012-13, the Appellant entered into a collaboration agreement with Greenwich University Enterprises Limited, UK, to jointly carry out research work for a novel preparation of an injectable form of B- Cyclodextrin drug. The duration of the research project was an year, starting from August 2011 and ending in July 2012, as stipulated in the agreement. As per the terms of collaboration agreement, the Appellant was to pay the stipulated amount to GUE as research fees. Accordingly, for the AY under consideration the Appellant paid an amount of Rs. 64,59,150/- as research consultancy fee to GUE.*

*The Ld. AO disallowed the claim said expense on the ground that it is capital in nature and results in creation of an intangible asset, being in the nature of capital asset as mentioned in Section 32(1)(ii) of the Act. Accordingly, under the erroneous assumption that section 32(1)(ii) of the Act is applicable, the Ld. AO after allowing depreciation at the rate of 25% on the said amount of Rs. 64,59,150/-, disallowed an amount of Rs. 48,44,362/-.*

*Aggrieved by the order of the Ld. AO the Appellant preferred an appeal before the Ld. CIT(A). The Ld. CIT(A) upheld the order of Ld. AO and disallowed the entire amount of Rs. 64,59,150/- stating that the Appellant failed to qualify for deduction both under Section 37(1) as well as Section 35(1)(iv) r.w.s 35(2)(ia) of the Act.*

*The Ld. CIT(A) further stated that the Appellant has not submitted the details of:*

- the outcome of the consultancy services obtained and the outcome of research*

- the Appellant has failed to correlate the consultancy agreement with its business; and
- the Appellant has failed to provide evidence of payment made for consultancy work with statutory deduction under law

Ignoring the detailed submissions of the Appellant and without providing it an opportunity of being heard, on the issue under consideration, the Ld. CIT(A) passed the order.

*Additional Evidence*

Therefore, it has become necessary and imperative for the Appellant to furnish the following documentary evidence in support of its grounds of appeal against the action of the Ld. CIT(A).

The particulars and the Page No. of the Paper Book at which the document has been enclosed is indicated below:

<b>Sl. No.</b>	<b>Particulars</b>	<b>Pg. No. in Paper Book</b>
2.	Copy of Form 15CA for the FY 2012-13 relevant to AY 2013-14 as evidence of making payment of the research fee and	2-7
3.	As proof of outcome of the research:	8-14
	- Copy of the receipt generated from filing of the application for grant of patent	8-9
	- Copy of the relevant extract of the application filed in the US for grant of Patent	10-11
	- Copy of the relevant extract of the application filed in Europe for grant of Patent	12-13
	- Chart providing a list of countries where application for grant of Patent has been filed.	14

In view of the above facts, we pray that this Hon'ble Tribunal may allow the Appellant to produce the above documents as evidence and in the interest of fairness and justice, it is requested that the said

*additional evidence be admitted and the appeal be adjudicated accordingly.”*

11. We have gone through the facts on record. The Id. DR vehemently objected to the admission of additional evidences. On going through the evidences, we have come to a conclusion that the queries raised by the Id. CIT(A) would be answered in proper prospective and the interest of justice would be well served by admitting the additional evidences. Since, the revenue did not have the benefit of going through the evidences, we hereby remand the matter to the file of the Id. CIT(A) to take into consideration the evidences filed and to pass a speaking order in accordance with the provisions of the Act.

12. In the result, the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 01/11/2021.

Sd/-

**(Amit Shukla)**  
**Judicial Member**

**Dated: 01/11/2021**

\*Subodh Kumar, Sr. PS\*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**ASSISTANT REGISTRAR**