

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "C", BANGALORE**

Before Shri George George K, JM & Ms.Padmavathy S, AM

ITA No.1354/Bang/2018 : Asst.Year 2013-2014

M/s.Flight Raja Travels Pvt.Ltd. Block B, Level 04, Magnolia Outer Ring Road, Manyata Embassy Business Park, Nagawara, Bangalore – 560 045. PAN : AABCF0520E.	v.	The Assistant Commissioner of Income-tax, Circle 3(1)(1) Bengaluru.
(Appellant)		(Respondent)

Appellant by : Smt.Sheetal Borkar, Advocate
Respondent by : Sri.Kannan Narayanan, Addl.CIT-DR

Date of Hearing : 16.03.2022	Date of Pronouncement : 18.03.2022
-------------------------------------	-----------------------------------------------

ORDER

Per George George K, JM :

This appeal at the instance of the assessee is directed against CIT(A)'s order dated 12.03.2018. The relevant assessment year is 2013-2014.

2. The grounds raised read as follows:-

“1. The Learned. CIT (A) erred in passing the order in the manner which he did.

2. The learned CIT (A) erred in disallowing employees stock option expenses incurred for the benefit of the employees including directors without proper appreciating the explanation of the Appellant.

3. The learned CIT (A) erred in not following various decision relied by the Appellant.

4. The learned CIT (A) ought to have appreciated that the Appellant had to follow SEBI directions, which is statutory body with regard to employees stock option and accordingly claimed the same as ascertain liabilities for deduction.

5. *The learned CIT (A) further ought to have appreciated that the shares were issued to the employees only for the interest of business of the Appellant to induce employees to work in the least interest of Appellant and hence same was in the course of business and for the purpose of business and same ought to have being allowable u/s 37 of the Act.*

6. *The learned CIT (A) further failed to appreciate that the option given was exercised by the employees hence the liability in this behalf got ascertained and same ought to have being allowed in toto.*

7. *Without prejudice, the additions/disallowances made are excessive and ought to be reduced substantially.*

8. *For these and other grounds of appeal may be raised at the time of hearing, the appellant prays that the appeal may be allowed.”*

3. The brief facts of the case are as follows:

The assessee is a company, engaged in the business of online based selling of travel products and solutions. For the assessment year 2013-2014, the return of income was filed on 30.11.2013 declaring a loss of Rs.12,86,42,391. The return was selected for scrutiny by issuance of notice u/s 143(2) of the I.T.Act. During the course of assessment proceedings, the A.O. noticed that the assessee had debited an amount of Rs.31,51,995 to profit and loss account towards “Employees Stock Option Expenses”, which includes an amount of Rs.18,54,502 pertaining to prior years. The assessee’s claim on this issue was disallowed in the previous assessment years, namely, A.Ys 2010-2011 to 2012-2013. The A.O. for A.Y. 2010-2011 to 2012-2013 by placing reliance on the CBDT Circular No.9/2007 dated 20.12.2007 held that the shares are allotted to the employees from the share capital of the company, hence, no deduction is allowable in

computing the taxable income of the assessee as there is no expenditure has been incurred. In view of the past years disallowance, the A.O. directed the assessee to explain why ESOP expenses should not be disallowed for the relevant assessment year also. The assessee filed objections, which is reproduced at para 3 of the assessment order. The A.O., however, rejected the contentions of the assessee by observing as under:-

“1. The CBDT had clarified in circular No.9/2007 dated 20/12/2007, FAQ No.16 that if the shares are allotted to the employees from the share capital of the company, no deduction is allowable in computing the taxable income of the company since no expenditure has been incurred by it. Further when asset is acquired by allotting shares as consideration, there is no `expenditure`. What happens is that share capital is increased and instead of capital coming in as cash, it comes in the form of assets. Thus, deduction may not be available to corporate assesseees if they allot shares as consideration as issue of shares is not an `expenditure`.

The case laws relied upon by the assessee company are also found to be not squarely applicable on the facts and circumstances of the case in hand. In the light of the above discussion, and amount of Rs.31,51,995/- is disallowed and added back to returned income.”

4. Aggrieved, the assessee filed an appeal before the first appellate authority. The CIT(A) rejected the contention of the assessee by observing that for actual vesting of shares in the employee, a minimum period of four year service is required to be rendered by the employee after the date of grant of option to such employee, and therefore, it was concluded that the vesting of shares would be only beyond the relevant assessment year. Without prejudice, the CIT(A) also held that if vesting was in a graded manner over a period of four years, then the assessee would be eligible to claim deduction of only

Rs.6,45,597 instead of Rs.31,51,995 claimed by the assessee in its profit and loss account. [refer para 4.5 of the impugned order of CIT(A)]

5. Aggrieved by the order of the CIT(A), the assessee has filed this appeal before the Tribunal. The assessee has filed a paper book comprising of 19 pages enclosing therein the financial statement of the assessee for the relevant assessment year, the case laws relied, etc. The learned AR reiterated the submissions made before the Income Tax Authorities.

6. The learned Departmental Representative supported the order of the A.O. and the CIT(A).

7. We have heard rival submissions and perused the material on record. The Special Bench of the Bangalore Tribunal in the case of Biocon Limited v. DCIT reported in (2013) 35 taxmann.com 355 (Bangalore) (SB) had held that discount on share under the ESOP is an allowable deduction. It was further held by the Tribunal that for computing the quantum of deduction, the same is to spread over a period of vesting. The Hon'ble jurisdictional High Court in the case of CIT v. Biocon Limited reported in (2021) 430 ITR 151 (Kar.) had confirmed the Special Bench order of the Tribunal. For computing the deduction in relation to the ESOP over the vesting period, the CIT(A) has listed out certain relevant facts. For ready reference, the same is reproduced below:-

Date of grant of option	17.04.2009
Fair value of the share at the time of grant of option	Rs.13.02 per share
The price at which shares were offered to employee	Rs.11.70 per share
Discount offered to the employee	Rs.1.32 per share
No.of grants given to Shri Vinay Gupta under ESOP	19,52,943
Total discount offered to Shri Vinay Gupta through ESOP	RS.25,82,389
Total vesting period for being eligible to ESOP	4 years

7.1 The CIT(A) has gone through various clauses in the scheme of ESOP and held that employee has the right of vesting only after completion of service of four years. The CIT(A) alternatively also held that the vesting if it is to be considered in a graded manner over a period of four years, the allowable deduction for the relevant assessment year is only Rs.6,45,597 instead of Rs.31,51,995. The assessee has not placed on record the stock of option plan 2009, namely, "Flight Raja Employees Stock Option Plan 2009" nor the further amended plan vide "Flight Raja Employees Stock Option Plan 2013" (ESOP). The Hon'ble High Court in the case of CIT v. Biocon Limited (supra) had held that deduction of discount on ESOP is to be spread over the vesting period in accordance with the accounting in the books of account. The relevant finding of the Hon'ble jurisdictional High Court in the case of CIT v. Biocon Limited (supra) reads as follow:-

"9. In the instant case, the ESOPs vest in an employee over a period of four years i.e., at the rate of 25%, which means at the end of first year, the employee has a definite right to 25% of the shares and the assessee is bound to allow the vesting of 25% of the options. It is well settled in law that if a business liability has arisen in the accounting year, the same is permissible as deduction, even though, liability may have to quantify and

discharged at a future date. On exercise of option by an employee, the actual amount of benefit has to be determined is only a quantification of liability, which takes place at a future date. The tribunal has therefore, rightly placed reliance on decisions of the Supreme Court in Bharat Movers supra and Rotork Controls India P. Ltd., supra and has recorded a finding that discount on issue of ESOPs is not a contingent liability but is an ascertained liability.

10. From perusal of [Section 37\(1\)](#), which has been referred to supra, it is evident that an assessee is entitled to claim deduction under the aforesaid provision if the expenditure has been incurred. The expression 'expenditure' will also include a loss and therefore, issuance of shares at a discount where the assessee absorbs the difference between the price at which it is issued and the market value of the shares would also be expenditure incurred for the purposes of [Section 37\(1\)](#) of the Act. The primary object of the aforesaid exercise is not to waste capital but to earn profits by securing consistent services of the employees and therefore, the same cannot be construed as short receipt of capital. The tribunal therefore, in paragraph 9.2.7 and 9.2.8 has rightly held that incurring of the expenditure by the assessee entitles him for deduction under [Section 37\(1\)](#) of the Act subject to fulfillment of the condition.

11. The deduction of discount on ESOP over the vesting period is in accordance with the accounting in the books of accounts, which has been prepared in accordance with Securities And Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999.”

7.2 As mentioned earlier, the assessee has not produced the employee stock option plan 2009 and the amended plan, hence, we are not in a position to determine whether the vesting was in a graded manner over the period of four years or not. Therefore, in the interest of justice and equity, the matter is restored to the files of the A.O. The A.O. is directed to follow the judgment of the Hon'ble jurisdictional High Court in the case of CIT v. Biocon Limited (supra). The A.O. shall afford a reasonable opportunity of hearing to the assessee.

The assessee shall cooperate with the A.O. for the expeditious disposal of the matter. It is ordered accordingly.

8. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced on this 18th day of March, 2022.

Sd/-
(Padmavathy S)
ACCOUNTANT MEMBER

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 18th March, 2022.
Devadas G*

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT(A)-3, Bangalore.
4. The Pr.CIT-3, Bangalore.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore