

आयकर अपीलीय अधिकरण
मुंबई पीठ "सी"
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री एम.बालगणेश, लेखा सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI M BALAGANESH, ACCOUNTANT MEMBER
आअसं.१४१४/मुं/२०२२ (नि.व. २०१३-१४)
ITA NO.1414/MUM/2022 (A.Y.2013-14)

Deputy Commissioner of Income Tax, अपीलार्थी /Appellant
Central Circle 6 (4), Room No. 1925, 19th Flr.
Air India Building, Nariman Point,
Mumbai-400 021

बनाम Vs.

Indiabulls Housing Finance Limited प्रतिवादी /Respondent
M-62 & 63, First Floor, Connaught Place,
New Delhi-110 001
PAN No. AABCI3612A

आअसं.१४३३/मुं/२०२२ (नि.व. २०११-१२)
ITA NO.1433/MUM/2022 (A.Y.2011-12)

Deputy Commissioner of Income Tax, अपीलार्थी /Appellant
Central Circle 6 (4), Room No. 1925, 19th Flr.
Air India Building, Nariman Point,
Mumbai-400 021

बनाम Vs.

Indiabulls Financial Services Limited प्रतिवादी /Respondent
M-62 & 63, First Floor, Connaught Place,
New Delhi-110 001
PAN No. AAACI8570Q

अपीलार्थी द्वारा /Appellant by : Shri. Dharamvir D. Yadav, Sr. AR

प्रतिवादी द्वारा /Respondent by : Shri. K. Gopal, Advocate

सुनवाई की तिथि/ Date of hearing : 17/10/2022

घोषणा की तिथि/ Date of pronouncement : 31/10/2022



आदेश / ORDER

PER VIKAS AWASTHY, JM:

These two appeals by the Revenue are against two different assessee's from the same group. Since, identical grounds have been raised in both these appeals, these appeals are taken up together for adjudication and are decided vide this common order.

2. These appeals are timed by 130 days. The learned Departmental Representative (DR) submits that the impugned orders were passed during Covid-19 pandemic. The Hon'ble Supreme Court of India after taking cognizance of the hardship faced during this unprecedented time had extended the limitation for filing of the appeal by way of general order in the case, Cognizance for Extension of Limitation, In re, reported as 132taxmann.com 123. Hence, there is no delay in filing of the present appeals. We observe that the appeals have been filed within extended period of limitation, therefore, no delay in filing of the appeals.

ITA No. 1414/MUM/2022 (A.Y.2013-14)

3. This appeal by the Revenue is against the order of Commissioner of Income Tax (Appeals) 54 Mumbai [hereinafter referred to "the CIT(A)"] dated 20/10/2021 for assessment year 2013-14.

4. The Department has raised following grounds in the appeal.

1)"On the facts and in the circumstances of the case and in law, the learned CIT(A) has cred in deleting the addition on account of unexplained expenditure of Rs.35,28,000/-, the details of which were found in the Cash

Transaction Record maintained is an excel sheet by Shri Ashok Sharma, which was found and seized during the search in the case of the Indiabulls Group."

2) "On the facts and in the circumstances of the case and in law, whether the Teurond CIT(A) is justified in relying upon the decision of the Hon'ble Income Tax Settlement Commission under section 245D(4) of the Income tax Act, 1961, dated 30.04.2019, in the case of le other Indiabulls Group entities which has been challenged before the Hon'ble High Court by the revenue, in Writ Petition No. 330 of 2020, as these 16 entities of the Indiabulls Group had not made true and full disclosure before the Hon'ble Commission?"

3) "On the facts and in the circumstances of the case and in law, the learned CITA) has erred in holding that all the entries of the Cash Transaction Record has been offered by the 16 entities of the Indiabulls Group, which had filed applications before the Hon'ble Income Tax Settlement Commission, without quantifying and identifying which of the 16 entities, who were before the Hon'ble Income tax Settlement Commission offered the income relevant to the entries found in the name of the assessee"

4) "On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in allowing the claim of ESOP expenses without appreciating that by issuing shares at below the market price, the assessee company has not incurred any revenue expenditure, rather it resulted in short receipt of share premium which the assessee was otherwise entitled to, on capital account,

5) On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in allowing the claim of ESOP expenses without appreciating that as the receipt of share premium is not taxable, any short receipt of such premium will only be a notional loss and not actual loss requiring any deduction, hence, incurring of such notional loss cannot be considered as expenditure within the meaning of section 37(1) of the Income tax Act. 1961, as there was no "spending" or "paying out or away";

6) "On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in allowing the deduction of education cess of Rs.7,92.16,277/-from the total income of the assessee, in view of

retrospective amendment (w.r.e.f. 01.04.2005) in section 40(a)(i) by the Finance Act, 2022 by way of insertion of "Explanation 3" in section 40(a)(i) w.r.e.f 01.04.2005, which clarifies that the term "x" shall include and shall be deemed to have always included any surcharge or cess, by whatever name called, on such tax."

7) The appellant craves to leave, to add, to amend and/or to alter any of the ground of appeal, if need be.

5. Shri K. Gopal appearing on behalf of the assessee submitted at the out set that the grounds raised by the Revenue in appeal are similar to the grounds decided by the Tribunal in the preceding assessment years in assessee's own case for assessment year 2012-13 in ITA No. 496/MUM/2020 decided on 22/06/2022.

6. Per contra, Shri Dharamvir D. Yadav representing the Department vehemently supported the assessment order and prayed for reversing the findings of CIT(A). However, he fairly admitted that the grounds raised in the present appeal are similar to the grounds considered by the Tribunal in preceding assessment years in assessee's own case.

7. We have heard both sides and have examined orders of the authorities below. In ground No. 1 to 3 of appeal, the Revenue has assailed the findings of CIT(A) in deleting the addition on account of unexplained expenditure of Rs.35,28,000/-. We find that similar grounds were raised by the Department in appeal ITA No. 496/MUM/2022 (Supra). The facts germane to the issue are identical except the amount. The Tribunal upheld the findings of the CIT(A), and dismissed the grounds raised in appeal by the Revenue. The relevant extract of the observations by the Co-ordinate Bench are as under:

“4. We have heard the rival contentions. We have also perused the orders of the lower authorities. Ground no.1 to 3 relates to the addition of ₹70,000/- as unexplained expenditure. We find that identical issue arose in the case of the assessee for A.Y. 2011-12, the learned CIT (A) has deleted the identical addition, the facts in paragraph no. 7.5 of the assessment order shows that the above entries on which the addition has been made were duly recorded in the regular books of account of the assessee and assessee also produced the copies of the relevant books of account showing the withdrawals and deposits. The learned Assessing Officer did not believe the same because of the difference in narration in the bank account. We find that there are identical expenditure which are held to be unexplained expenditure for seven years which has been deleted by the learned CIT (A). Further, it was also the claim of the assessee that the transactions have already been offered as income before the settlement commission. The learned CIT (A) deleted this addition for the reason that the amount has already been considered in income of the assessee and other entities before the settlement commission. In view of this, we do not find any infirmity in the order of the learned CIT (A) in deleting the addition. Merely because the order of the settlement commission has been challenged before the Hon'ble High Court, unless that order is reversed, we do not find any infirmity in the order of the learned CIT (A). Accordingly, ground no. 1 to 3 of the appeal is dismissed.”

(Emphasized by us)

The Revenue has not brought on record any material to show that there is any change in the facts or in nature of transactions in the impugned assessment year. The Commissioner of Income Tax (Appeals) in the impugned order has deleted the addition following its own order for assessment year 2011-12. The CIT(A) has categorically mentioned that the facts are identical in both assessment years. Following the order of Co-ordinate Bench in assessee's own case, ground No. 1 to 3 of appeal by the Revenue are dismissed.

8. In ground No. 4 and 5 of appeal, the Department has assailed the order of CIT(A) in allowing the claim of ESOP expenses. The learned Authorised

Representative (AR) submits that the issue of ESOP expenses was considered by the Tribunal in assessee's own case in ITA No. 4849/MUM/2019 for assessment year 2013-14 decided on 08/03/2021. We find that the Co-ordinate Bench dismissed this ground in an appeal by the Revenue following the decision in assessee's group company in ITA No. 6602/Del/2016 for assessment year 2012-13 decided on 11/03/2020.

The Delhi Bench placing reliance on the decision of Spl. Bench in the case of Biocon Ltd. 155TTJ649 (Bang-Trib) held that the discount under ESOP is allowable deduction u/s 37(1) of the Act. The CIT(A) in the impugned order deleted the addition following the order of CIT(A) in the case of M/s. Indiabulls Financial Services Ltd. (now merged with the assessee Co.) for the A.Y. 2011-12. The CIT(A) categorically observed that there is no change in the facts. The Revenue has not been able to rebut the above observations of the First Appellate Authority. We find no reason to interfere with the finding of the CIT(A) on this issue. Accordingly, ground No. 4 and 5 of the appeal are dismissed.

9. In ground No. 6 of appeal, the Revenue has assailed findings of the CIT(A) in allowing deduction of education cess. The learned AR fairly stated that this issue has been decided against the assessee by the Tribunal in an appeal by the Revenue in ITA No. 496/MUM/2022 (Supra).

10. We find that the Co-ordinate Bench has held that the Explanation 3 inserted by the Finance Act 2022 is effective retrospectively from 1st April 2005, hence, the assessee is not entitled for deduction of education cess. In light of above and the statement made by AR of the assessee, the Revenue succeeds on ground No. 6 of the appeal.

11. In the result, appeal of the Revenue is partly allowed.

ITA No. 1433/MUM/2022 A.Y. (2011-12)

12. This appeal by the Revenue is against the order of Commissioner of Income Tax (Appeals) 54 Mumbai [hereinafter referred to “the CIT(A)”] dated 20/10/2021 for assessment year 2011-12.

13. We find that, the grounds raised by the Revenue in appeal are identical (except for the amounts) to the grounds raised in appeal in ITA No. 1414/MUM/2022 (Supra). Both sides are unanimous in stating that the addition made in the assessment order are arising out of the same set of facts. The assessee is one of the group company of Indiabulls Group.

14. The CIT(A) deleted the addition on account of unexplained expenditure u/s 69C of the Act by observing as under:

“5.3.7. In the case of the appellant, the source of the cash receipts and explanation of the cash expenditure has been explained to be a part of income offered in the case of 16 entities of the Indiabull group. Hence, the addition of Rs.2,50,000/- made u/s 68 and Rs.12,02,000/- u/s 69 of the Act in the hands of the appellant would be case of double addition. In view of the above discussion, addition of Rs.2,50,000/- made u/s 68 and Rs.12,02,000/- u/s 69 of the Act is deleted.” (Emphasized by us)

15. Similar was the reason for deleting addition on account of unexplained expenditure under Section 69C in the case of other group companies. The income was offered to tax by Indiabulls group in proceedings before the Settlement Commission. The assessee is one of the 16 entities wherein the income was offered to tax. The Revenue has not placed on record any contrary

material. Hence, we see no infirmity in findings of the CIT(A) in deleting the addition. Consequently, ground No. 1 to 3 of the appeal are allowed.

16. In ground No. 4 of appeal, the Revenue has assailed the findings of CIT(A) in allowing deduction of education cess. This ground is identical to ground No. 6 decided above in ITA NO. 1414/MUM/2022. For parity of reasons, ground No. 4 of appeal is allowed.

17. In ground No. 5 and 6 of appeal, the Revenue has assailed the order of CIT(A) in allowing the claim of ESOP expenses. The learned AR for the assessee submits that this ground of appeal does not emanate from the additions made in the assessment order passed under section 143(3) read with section 153A of the Act. The learned AR pointed that the issue of ESOP expenses was the subject matter of dispute in respect of the additions made in the original assessment order passed under section 143(3) of the Act, therefore, this ground of the appeal by the Revenue is liable to be dismissed. A perusal of the assessment order dated 18/05/2018 passed under section 143(3) read with section 153A of the Act, reveals that there is no discussion in respect of ESOP expenses. However, while computing total income, the AO has taken total income as determined in the assessment order passed under section 143(3) of the Act. The learned AR has pointed that in assessment order passed u/s 143(3) of the Act, the AO had made addition, the assessee carried the issue in appeal before CIT(A). The CIT(A) decided the issue in favour of assessee. The Department has accepted the same as no further appeal was filed by the Department on this issue. We find that learned CIT(A) in the impugned order has granted relief to the assessee on the ground that the issue of ESOP expenditures stands concluded in proceedings arising out of original assessment order. The



Department has not furnished any contrary material. Since, the issue does not emanate from assessment proceedings u/s 143(3) read with section 153 of the Act, ground No. 5 and 6 of appeal are liable to be rejected, we hold and direct accordingly.

18. In the result, appeal of the Revenue is partly allowed.

Order pronounced in the open court on Monday the 31st day of October, 2022.

Sd/-

(M BALAGANESH)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/Mumbai, दिनांक/Dated: 31/10/2022

M.R. Sonavane

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)/
Sr.Private Secretary
ITAT, Mumbai