

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH KOLKATA

**BEFORE SHRI SAJNAY GARG, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.370/Kol/2022
Assessment Year: 2017-18**

Deputy Commissioner of Income-tax, Circle-5(1), Kolkata	Vs.	Bandhan Bank Ltd., DN-32, Saltlake Sector-V, Kolkata-700091. (PAN: AAGCB1323G)
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Biswanath Paul, CA
Respondent by : Smt. Ranu Biswas, Addl. CIT, DR

Date of Hearing : 11. 01.2023
Date of Pronouncement : 27.03.2023

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the revenue is against the order of Ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi vide order No. ITBA/NFAC/S/250/2021-22/1042054589(1) dated 30.03.2022 passed against the order of ACIT, Circle-6(1), Kolkata u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”), dated 29.12.2019.

2. Ground taken by the revenue is reproduced as under:

“1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A), NFAC has erred in deleting the addition made on account of the disallowance of the expenses incurred in relation to ESOP cost.”

3. Brief facts of the case are that assessee is a banking company and it furnished its return of income on 31.10.2017 reporting total income of Rs.1778,60,46,900/- which was revised on 29.03.2019 at a total income of Rs.1776,97,65,610/-. During the course of assessment, Ld. AO observed that a sum of Rs.5,55,24,417/- is claimed by the assessee as a deduction in the computation of income on account of “*ESOP cost borne by the company.*” Assessee furnished its reply explaining the issue of equity shares to its employees and directors under three ESOS schemes. It was submitted that these options were exercised by those employees who had completed services with the assessee for more than three years on the date of exercise.

3.1. According to the assessee, ESOP options are rewarded to the employees for their loyalty and commitment to the assessee during their service period. In this respect, assessee furnished a list containing details of the employees who had exercised these options along with the value of perquisites added in their respective hands under the provisions of section 17(2)(vi) of the Act. The value of perquisite was computed by taking difference between the exercise price and their market price which has been added to the salary income of the respective employees in the year in which options have been exercised and TDS was done on the same.

3.2. According to the assessee, ESOP cost in the nature of discount given by the assessee to its employees on issue of shares under its ESOS scheme is an allowable business expenditure u/s. 37 of the Act which has been incurred for appreciating and encouraging employees for their loyalty and performance towards the assessee company.

Assessee submitted that discount on option under ESOS is in the nature of employees cost. Assessee placed reliance on several judicial precedents to buttress its contentions. Ld. AO after considering the submissions, treated the ESOP expenses of Rs.5,55,24,417/- as inadmissible and added it to the total income of the assessee. Aggrieved, assessee went in appeal before the Ld. CIT(A) who after dealing with the details of the ESOS schemes and the technicalities involved therein and by placing reliance on the decision of Hon'ble Special Bench of ITAT, Bangalore in the case of BIOCON Ltd. Vs. DCIT (2013) 35 taxmann.com 335, affirmed by the Hon'ble High Court of Karnataka in the case of CIT, LTU Vs. BIOCON Ltd. (2020) 121 taxmann.com 351 (Kar), held that expenditure on ESOP is in the nature of employees cost and is allowable u/s. 37(1) of the Act. Aggrieved, the revenue is in appeal before the Tribunal.

4. Before us, Smt. Ranu Bisawas, Addl. CIT, DR represented the revenue and Shri Biswanath Paul, CA represented the assessee.

5. Ld. Sr. DR referred to the conditions stipulated u/s. 37(1) of the Act and asserted that claim of ESOP expenditure by the assessee does not satisfy the conditions stated therein. Ld. Sr. DR also submitted that assessee has not incurred any expenditure as nothing was going out of the assessee rather it resulted in the short receipt of share premium which the assessee otherwise entitled to and as the receipt of share premium was not taxable, any short receipt of such premium would only amount to a notional loss and not actual loss requiring any deduction u/s. 37(1) of the Act as it was a capital expenditure.

6. Per contra, Ld. AR reiterated the submissions made before the Ld. AO. He stated that difference between the exercise price and fair market price is considered as perquisite in the hands of the employees and added under salary income of the respective employees and is further subjected to TDS as applicable u/s. 192 of the Act. According to him, calculation of perquisite is done as per Section 17(2)(vi) read with Rule 3(8) of the Income Tax Rules, 1962. In this respect all the details relating to name, address, PAN of employees and the calculation of perquisites were submitted before the Ld. AO. It was stated that the discount allowed to the employees is nothing but employee cost to the assessee, which is allowable as expenditure u/s. 37(1) of the Act. Ld. Counsel placed reliance on the decision of Hon'ble Special Bench of ITAT in the case of BIOCON Ltd. Vs. DCIT (Supra) and the judgment of Hon'ble High Court of Karnataka confirming the order of Hon'ble Special Bench in the case of BIOCON Ltd. wherein Hon'ble Court held that discount on issue of ESOP was allowable as a deduction u/s. 37(1) as primary object was not to waste capital but to earn profits by securing consistent service of employees. The head note of the said judgment is reproduced for reference:

"Section 37(1) of the Income-tax Act, 1961 - Business expenditure - Allowability of (Discount of issue of ESOP) - Assessment year 2004-05 - Assessee floated Employees Stock Option Plans (ESOP) - It provided employees discount - There was difference between grant price to employees and market price as on date of grant of ESOPs - ESOPs were vested in employee over a period of four years - Deduction of discount on ESOP over vesting period was in accordance with accounting in books of account, which had been prepared in accordance with SEBI Guidelines - Whether on exercise of option by an employee, actual amount of benefit that had to be determined was only a quantification of liability, which would take place at a future date - Held, yes - Whether discount on issue of ESOPs was not a contingent liability but was an ascertained liability - Held, yes - Whether issuance of shares at a discount would be an expenditure incurred for purposes of section 37(1) as primary object of aforesaid exercise was not to waste capital but to earn profits by securing consistent services of employees and therefore, same could not be construed as short receipt of capital - Held, yes - Whether thus,

discount on issue of ESOP was allowable deduction under section 37(1) - Held, yes [Para 10] [In favour of assessee]"

6.1. Ld. Counsel also referred to the decision of Hon'ble High Court of Delhi in the case of CIT Vs. Lemon Tree Hotels Ltd. in ITA No. 107/2015 dated 18.08.2015 on a similar issue which was considered by the Coordinate bench of ITAT, Delhi in the case of ACIT Vs. People Strong HR Services (P) Ltd. (2022) 134 taxmann.com 351 (Del.Tri.). In this decision, judgments of Hon'ble High Court of Karnataka and of the Hon'ble Special Bench were also considered, allowing the claim of the assessee. Relevant extract from the said decision of ITAT, Delhi is reproduced as under:

"6. After considering the rival submissions and going through the material placed on record, we find that it is now well settled proposition that the issue of allowability of ESOP discount being the difference between the market value of shares and the value at which employees had been given the shares is covered, not only by the decision of Hon'ble jurisdictional High Court in Lemon Tree Hotels Ltd. (supra), but also by the judgement of the Special Bench in the case of Biocon Ltd. (supra). This judgment of special bench has now been approved by the Hon'ble Karnataka High Court vide order dated 11.11.2020 and held that employees' discount represents consideration for services rendered by employees and hence it is a deductible business expenditure and it cannot be equated with share premium and it is to be intended towards profit by securing employees' consistent services. Apart from that, it was further held that it is an ascertain liability since employees' incurred obligation over the distinct period, notwithstanding the fact that exact amount as quantified at the time of exercising options. The Hon'ble Karnataka High Court has also concurred with the view of Hon'ble Delhi High Court in the case of Lemon Tree Hotels Ltd. (supra). Accordingly, we do not find any infirmity in the order of the Id. CIT (Appeals) following the judgement of Hon'ble jurisdictional High Court and also the Special Bench which has now been confirmed by the Hon'ble Karnataka High Court. The appeal of the Revenue is thus dismissed."

6.2. Reference was also made to the decision of Hon'ble High Court of Madras in the case of CIT Vs. PVP Ventures Ltd. 23 taxmann.com 286 wherein also the claim of assessee was allowed.

7. We have heard the rival contentions and perused the material available on record and gone through the judicial precedents referred above. We note that there is no dispute on the quantum of claim by the assessee in respect of ESOP expenses, the issue is on its allowability u/s. 37(1) of the Act which is no longer *res integra* by taking into consideration the judicial precedents referred above including the Hon'ble High Court of Karnataka, Delhi and Madras (supra). The finding given by the Ld. CIT(A) in this respect is reproduced as under:

“Respectfully following the above cited decisions of Hon'ble Delhi High Court in CIT Vs. Lemon Tree Hotels Ltd. and decision of the Hon'ble Karnataka High Court in the case of Biocon Ltd. (supra) and very recent decision dated 07-12-2021 of the Hon'ble ITAT Delhi Bench in the case of ACIT vs. People Strong HR Services (P.) Ltd., it is held that expenditure on ESOP is in the nature of employee cost and hence is allowable u/s. 37(1) as deduction in computing the income under the head profits and gains of business and profession during the vesting period. The ground raised by the appellant regarding this issue is allowed.”

7.1. Considering the facts on record and the judicial precedents referred above as well as going through the analysis of the test contemplated u/s. 37(1) of the Act by the ld. CIT(A), we do not find any reason to interfere with the finding arrived at by the Ld. CIT(A). Accordingly, ground taken by the revenue in this respect is dismissed.

8. In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on 27th March, 2023.

Sd/-
(Sanjay Garg)
Judicial Member

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 27th March, 2023

JD, Sr. P.S.

Copy to:

The Appellant:

1. Appellant:
 2. The Respondent:
 3. CIT(A), (NFAC), Delhi
 4. ACIT, Circle-6(1), Kolkata.
 5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata