

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
MS. KAVITHA RAJAGOPAL (JUDICIAL MEMBER)

ITA No. 7807/MUM/2019
Assessment Year: 2015-16

Thomas Cook (India) Ltd.,
A Wing, 11th floor, Marathon
Futurex, N.M. Joshi Marg,
Lower Parel (East),
Mumbai-400013.

PAN No. AAAC 4050 C
Appellant

Vs.

Dy. CIT-1(3)(2),
Room No. 540, 5th floor,
Aayakar Bhavan, M.K.
Road,
Mumbai-400020.

Respondent

Assessee by : Mr. Ketan Ved
Revenue by : Ms. Richa Gulati, DR

Date of Hearing : 30/05/2023
Date of pronouncement : 31/05/2023

ORDER

PER OM PRAKASH KANT, AM

This appeal by the assessee is directed against final assessment order dated 30.10.2019 passed by the Dy. Commissioner of Income-tax Circle-1(3)(2), Mumbai [in short 'the Ld. Assessing Officer'] for assessment year 2015-16 pursuant to the direction of the Ld. Dispute Resolution Panel (DRP) dated 28.09.2019, which was further rectified on 06.12.2019. The grounds raised by the assessee are reproduced as under:



1. *The Assessing Officer / Dispute Resolution Panel (DR) erred in The Id. A0 erred in disallowing Rs. 76,98,652/- under section 14A read with Rule 8D of the Income tax Rules, 1962 without appreciating that no direct or indirect expenditure was incurred by the company for earning exempt income;*

2. *The Assessing Officer / Dispute Resolution Panel erred in The Id. A0 erred in disallowing Rs. 76,98,652/- under section 14A read with Rule 8D of the Income tax Rules, 1962 under section 115JB of the Act without appreciating that Section 14A the Act cannot be extended and read into section 115JB which is a complete code in Itself;*

3. *The Assessing Officer / DRP erred in making disallowing Rs.8,70,45,135/- pertaining to discount on Employee Stock Option Plan (being the difference of market price at the time of grant of option and exercise price) claimed over the vesting period under section 37(1) of the Act;*

4. *The Assessing Officer / DRP erred in not allowing additional claim of discount on Employee Stock Option Plan (being difference between market price at the time of, exercise of options and market price at the time of grant of options), of Rs.10,01,36,178/- claimed under section 37(1) of the Act. The Assessing officer / DR erred in holding that additional claim of deduction, not made in the return of income, cannot be directly made before the Assessing officer / DRP.*

5. *The learned A has erred in not granting the refund of excess Dividend DistributionTax (DDT) of Rs. 83,50,980/-;*

6. *The Id. Assessing Officer / DR erred in proposing to levy penalty under section 271(1)(c) of the Act for furnishing inaccurate particulars of income;*

7. *The Id. Assessing Officer / DRP erred in levying interest under section 234B and section 234C of the Act;*

2. Briefly stated, facts of the case are that the assessee company is engaged in the business of authorized foreign exchange



dealer, travel agent, tour and operator and other associated services. For the year under consideration, the assessee filed return of income on 30.11.2015 declaring total income at Rs.52,56,47,110/-. The case was selected for scrutiny and statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. In view of the international transactions carried out by the assessee with its Associated Enterprises (AE) during the year under consideration, the determination of arm's length price of those transactions was referred to the Ld. Transfer Pricing Officer (TPO). The Ld. TPO proposed an adjustment of Rs.3,79,01,11,500/- on account of short recovery of share dividend distribution tax u/s 115A of the Act. The Ld. Assessing Officer in the draft assessment order proposed this transfer pricing adjustment for addition. The Ld. Assessing Officer also proposed additions on other issues, *inter alia*, disallowance u/s 14A of the Act, the disallowance of employee's share option scheme expenses etc. The assessee preferred objections against the draft assessment order before the Ld. DRP. The Ld. DRP vide order dated 28.09.2019 r.w.s. the rectification order dated 06.12.2019 issued direction to the Ld. Assessing Officer. Pursuant to the direction of the Ld. DRP, the Ld. Assessing Officer passed the impugned final assessment order. In the said impugned final assessment order, the Ld. Assessing Officer deleted the transfer pricing adjustment as per the direction of the Ld. DRP, however retained the disallowance for employees share option scheme expenses as well as disallowance u/s 14A r.s.r. 8D of the



Income Tax Rules, 1962. The Ld. DRP also rejected the additional ground of the assessee for claim of expenses in the nature of discount on employees stock option plan (being it is between market price at the time of exercise of the option and market price at the time of grant of option) amounting to Rs.100,136,178/- u/s 37(1) of the Act, which was not claimed at the time of filing of return of income.

2.1 Aggrieved with the final assessment order, the assessee is before the Tribunal by way of raising grounds as reproduced above.

3. Before us, the assessee has filed a Paper Book containing pages 1 to 150.

4. The ground No. 1 of the appeal of the assessee relates to disallowance u/s 14A of the Act in the final assessment order. The Assessing Officer made disallowance u/s 14A r.w.r. 8D as under:

“10.12 In view of the above direction of Hon’ble DRP-2, Mumbai, the assessee vide its submission dated 18.10.2019, furnished the computation of disallowance to be made u/s 14A r.w.s. 8D of the Act as under:

S. No.	Particulars	Amount (Rs.)
1.	Direct expenses attributable	--
2	Interest Expenses X Average Investment	76,89,652/-
	Average of Total assets	
	22,83,88,171/- X 62,53,18,827/- 18,55,07,05,474/-	
3.	0.5% of Average Investments i.e. (Rs.62,53,18,827/-)	31,26,594/-
	Total	1,08,25,246/-



4.1 The only dispute between the assessee and the Assessing Officer is in respect of proportionate disallowance under Rule 8D(2)(ii) of the Income-tax Rules, 1962 (in short 'the Rules'). Before the Ld. DRP the assessee contended that the investment in the mutual funds aggregating to Rs.1,19,15,487/- was made out of own resources. The Ld. DRP after considering the submission of the assessee rejected the contention of the availability of own funds mainly on the ground that the assessee failed to provide availability of the funds at the time of investment in mutual funds. The relevant finding of the Ld. DRP is reproduced as under:

“6.3.6 We now advert to the disallowance of proportionate interest expenditure proposed by the Assessing Officer under rule 8D(i) of the Rules and examine the claim of the assessee with the aid of evidences adduced before us especially in view of the decisions of Hon'ble Jurisdictional High Court relevant for adjudication of the issue at hand. The assessee's prime argument is that rule 8D(2) (il) would not apply in case where investments have been made from interest-free funds available and, such interest-free funds were available with it. In this connection, the twin position taken vide letter dated 23.07.2019, is as under:

(i) own funds exceeded the investments during the year as per particulars furnished for March 31, 2015 and that position of free funds in AY 2015-16 should be considered, and

(ii) with respect to the position of interest-free funds in the year of making the investments, the same was said to be 'dated' as they were acquired vide several restructuring and, hence, it was difficult to collate details of interest-free funds as on the date of investment.

6.3.7 The difficulty in accepting the contention of the assessee due is evident. The verification of the adequacy of



self-generated funds for making investments is a two-fold one. Firstly, it has to be ascertained when the investments) in the tax-exempt income yielding investments/shares were actually made and, secondly, what was the position of funds at that point of time. The appellant has admittedly made investment in mutual funds, but is unable to provide the any particulars whatsoever as to how the said investments could be said to be made out of own funds. In this backdrop, asserting that it was in possession of a greater amount of interest-free funds is merely a facile claim and nothing more. In our humble view, what is of paramount importance is the position of investible funds, own and/or borrowed at the time of making the investments and not at a time posterior to the event - which in this case, is the year for which scrutiny assessment was made. In any case, the position of funds on the first/last day of the assessment year under consideration is not germane unless all the investments yielding exempt income were acquired in the very same assessment year - which is not the fact of this case. The assessee has also collaterally argued that if the Assessing Officer wants to make a disallowance under section 14A of the Act on account of interest, then he has to prove that there is nexus between the borrowed funds and the investments made. This is not tenable. The basic details/documents as to when the relevant investments were made, has to be first made available by the assessee since these are in its exclusive knowledge alone. Moreover, there is the claim made by the assessee, which it has to support cogently, that no interest-bearing funds were used for this purpose. Hence, the initial onus lies on it to lead the primary details linking the investment with the nature of funds deployed, and only when the same is adequately discharged, does it shift to the Assessing Officer to make his inferences as warranted by law. In other words, there is no negative onus straightway on the Assessing Officer to lead the foundational facts. For this reason, the contention of the appellant that the Assessing Officer has not brought on record anything which proves that there was any expenditure incurred towards earning exempt income cannot be approved. At the risk of repetition, it has to be stated that the exercise of determining the source of investment in specific investments made in prior years



cannot conceivably be done on the basis of fund-net investment position as at the Opening and the Balance Sheet date of the financial year under scrutiny.

6.3.8 The appellant has relied on the decision of the Hon'ble Bombay High Court in Commissioner of Income-tax vs Reliance Utilities & Power Ltd. (2009] reported in 178 Taxman 135, where it has been held that if there be interest-free funds available sufficient to meet its investments and at the same time, the assessee had raised a loan, it can be presumed that the investments were from the interest-free funds available. That is, if there are funds available both interest-free and overdraft and/or loans taken, then a presumption would arise that investments would be out of the interest-free fund generated or available, if the interest-free funds were sufficient to meet the investments. The aforesaid principle laid down is unquestioningly binding. However, a vital fact unnoticed by the assessee is that in the Reliance Utilities & Power Lid. decision (supra), the Respondent had made investment in the sister concerns during January, 2000 to March, 2000. In other words, the requisite co-relation between investments made and the source of funds was in existence, enabling, therefore, a co-relation between investments and nature of funds. Thus, there could be no denying the fact that to apply the above principle laid down by the Hon'ble High Court, it is necessary to examine the sufficiency of material available to raise the presumption in the favour of the assessee as to availability of own fund at the relevant point of time. The Hon'ble Jurisdictional High Court, in para (5) of the order, recorded the facts of the said case as below (emphasis supplied):

«5.From the order of the Assessing Officer the assessee in respect of disallowance of interest amounting to Rs. 4.40 crores preferred an appeal to the CIT (Appeals). It was the contention of the assessee that the assessee had invested Rs. 389.60 in Reliance Gas Limited and Rs. 1.01 in Reliance Strategic Investments Limited. The assessee themselves were in the business of generation of power. The companies in which the investments were made, were in the energy sector. Investments were made mainly during January, 2000 to March, 2000.It was the submission of the



assessee that they had earned regular business income from distribution of power and investments made were in the companies in energy sector and were with a view to build long-term business prospects. Investments were in the regular course of business and accordingly no part of interest can be disallowed when the fund is utilized for the purpose of business. It was also pointed out that respondent had borrowed Rs. 43.62 crores by way of issue of Debentures and the said amount was utilized as capital expenditure and inter-corporate deposit. It was the submission that no part of the interest bearing fund have gone into investments in the two companies. Insofar as funds are concerned it was pointed out that income from operation of the company was Rs. 418.04 crores which was evenly distributed.

Considering this, till December, 1999 the appellant had earned Rs. 313.53 crores from its operation. It had raised capital of Rs. 7.90 crores and had also received interest-free deposit of Rs. 10.03 crores. Also it had recovered Rs. 39.04 from its debtors.

6.3.9 It was in this context, that the Hon'ble High Court observed that "Firstly, we are not concerned with the balance sheet as of 31-3-1999. What would be relevant would be balance sheet as on 31-3-2000. Apart from that, the learned counsel has been unable to point out to us from the balance sheet that the balance sheet as on 31-3-1999 showed that the shareholders funds were utilized for the purpose of fixed assets. To our mind the profit and loss account and the balance sheet would not show whether shareholders funds have been utilised for investments. The argument has to be rejected on this count also.

6.3.10 The Hon'ble High Court has further, noted in para (9) of the said order that "Apart from that we have noted earlier that both in the order of the CIT (Appeals) as also the Appellate Tribunal, a clear finding is recorded that the assessee had interest-free funds of its own which had been generated in the course of the year commencing from 1-4-1999. Apart from that in terms of the balance sheet there was a further availability of Rs. 398.19 crores including Rs. 180 crores of share capital. In this context, in our opinion,



the finding of fact recorded by CIT (Appeals) and ITAT as to availability of interest-free funds really cannot be faulted."

6.3.11 We may observe here that in respect of the investments made during the period of January to March 1999, there was a finding of fact by the AO that "till December, 1999 the appellant had earned Rs. 313.53 crores from its operation", which provided a crucial evidential insight as to the presumption that there was sufficient material to conclude that the assessee had sufficient own funds to make the investment yielding tax-free income in the immediate coming months. As against this, in the case before us we have a mere financial year-wise details of the own fund and the investments made, which in our considered view is inadequate and lacks the sufficiency as material to raise the presumption that the assessee had sufficient own fund at the time of making the investments. Once the assessee is unsuccessful in this regard, the formula incorporated in rule 8D(i) of the Income-tax Rules, 1962 would inevitably come into play for making the estimate.

6.3.12 Thus, it is not possible to ignore the exercise of determining without any haziness as to whether interest-bearing funds or interest-bearing funds were greater at the time when the underlying investments were made. The undeniable inability of the assessee to furnish the particulars of when the tax-exempt investments were made would lead precisely to the situation where the application of the formula engrafted in rule 8D(2)(il) would mandatorily come into play for estimating the proportionate disallowance of interest expenditure. The estimation formula prescribed in the statute was inserted in contemplation of a situation similar to the one that is before us, where the assessee for whatever reasons, is unable to give the aforesaid details at the time of making the tax-free investments. Ex consequenti, the Assessing Officer is statutorily obliged to apply the provisions of section 14A(2) of the Act in such a situation and, therefore, bound to follow the prescribed method as per 8D(2)(il) of the Rules. Given the enunciation of law by the Hon'ble Bombay High Court, a discussion on other case laws relied upon the assessee becomes academic in nature.



6.3.13 On the other hand, in *Bharath Beedi Works (P.) Ltd vs Addl. CIT, Range-2, Mangalore*[2016] reported in 74 taxmann.com 95, the Hon'ble Karnataka High Court noted the finding of the Appellate Commissioner which were as under (emphasis supplied):

"I have considered the rival contentions carefully. I find that the argument of the appellant is vague in as much as when the AO has asked to prove that the appellant has own funds to substantiate the investment as and when the investments are made the appellant is only trying to explain the opening and figures of the current year share capital and reserves and surplus. I find strength in the argument of the AO. Further, since the appellant could not explain the connected expenditure to the satisfaction of the AO is clearly forthcoming in arriving at the estimation. Hence, I am inclined to confirm the addition and the grounds are dismissed."

6.3.14 Thereafter, in the aforesaid decision, the Hon'ble Karnataka High Court observed that the burden has not been discharged satisfactorily by the appellant and the Assessing Officer had correctly proceeded to apply the formula provided under rule 8D(2)/ section 14A of the Act.

6.3.15 The assessee claimed that funds received from sale of short term investment were utilized for the purchase of short term investment in mutual funds. This is not borne out from any evidence, irrefutable or otherwise. There is no calculation to show that all the interest expenditure incurred for the year pertains to working capital loans taken and it is not possible to do so in face of the fact that it is not known whether or not the income-yielding investments were sourced from borrowed funds or not. For this reason, the tentative claim of the assessee that interest expenditure of Rs. 22.83 crores "mainly comprises" of interest on Commercial Paper, NCD and Bank Overdraft is untenable.

6.3.16 The assessee has pressed one more indirect argument in its attempt to show that there is no nexus between interest expenditure and investment in subsidiaries. It claimed that the downstream investments by investing-cum-operating entities are required to be made



by bringing requisite monies from abroad and domestic debt borrowings were not permitted as per the applicable Press Notes issued by the Ministry of Finance. We are unable to be persuaded by this as it is difficult to fathom a a reason for not submitting the details of investment in its position and instead relying on tangential, circumstantial and hypothetical explanations to get over this fundamental factual deficiency. No immunity under the Act can be granted for examining the facts merely because some other law, rules or regulation prescribes something. Had this been so, then the Legislature would have provided for this exception in the rule itself. We are also unable to accept its sweeping, purely theoretical claim that no person would ever utilize borrowings for making investment in mutual funds (current investments) as the return on mutual funds is "generally lower" than the borrowing cost. There may be some obvious situations in which this assertion is untrue, such as parking of borrowed "idle" funds in short-tenure investments till they are redeployed for the purpose they were borrowed or a general expectation of earning returns greater than the interest cost based on market reports or analysis.

6.3.17 In the light of the discussion as foregoing, we find that the averments made to canvass the claim that it had adequate interest-free, self-generated funds to make the investments, are not firmly established and tangibly supported by credible documents, but based on presumptions and general surmises. This being the factual position, we are of the considered view that the facts available before us could not be held as sufficient to raise the presumption and, hence, the application of rule 8D(2) (ii) of the Rules by the Assessing Officer in the case of the appellant cannot be rejected. We direct accordingly."

5. Before us, the Ld. Counsel of the assessee reiterated that own funds being more than investment, it is presumed that investment has been made out of own funds. The Ld. Counsel provided detail of own funds and investment as under:

Particulars	Amount (in Rs.)
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Equity	36,56,18,756
Reserves and Surplus	1122,07,91,830
Total :	1158,64,10,586
Investment	309,90,65,124
Earning exempt income	(125,06,37,654 + 184,84,27,470)

5.1 The Ld. Counsel further relied on the decision of the Hon'ble Supreme Court of **South India bank v. CIT reported in (2021) 140 taxmann.com 178** wherein it is held that in cases where interest free own funds exceed investment in tax free securities, then disallowance u/s 14A r.w.r. 8D(2)(ii) is not warranted.

6. On the other hand, the Ld. Departmental Representative (DR) relied on the finding of the Ld. DRP and submitted that availability of own funds has to be examined at time of investment in assets, which are eligible for yielding exempted income and not in the year of the scrutiny.

7. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The issue in dispute in the case is the year of availability of the interest free funds with the assessee. According to the Ld. DRP it could be examined in the year of making the investment, whereas assessee has provided the detail of the funds as on 31.03.2015 i.e. in relation to assessment year under consideration. We are of opinion that availability of the fund has to be examined at the time of investment in assets eligible for yielding exempted income and not subsequently. The Ld. Counsel of the assessee submitted that if



issue is restored back to the file of the Ld. Assessing Officer, the assessee will file details of availability of funds at the time of making investment in mutual funds from year to year. In view of undertaking by the Ld. Counsel of the assessee and interest of substantial justice, we set aside the finding of the DRP or finding of the Assessing Officer in the final assessment order pursuant to the Ld. DRP, and restore the matter back to the Ld. Assessing Officer for providing one more opportunity to the assessee for submitting the documentary evidence in support of availability of interest free funds at the time of making investment in assets eligible for yielding exempted income. The ground No. 1 of the appeal of the assessee is accordingly allowed for statistical purposes.

8. The ground No. 2 of the appeal relates to disallowance u/s 14A r.w.r. 8D while computing book profit u/s 115JB of the Income-tax Act, 1961.

9. We find that on this issue the grievance of the assessee is that the Assessing Officer wrongly added the disallowance of Rs.2,08,08,691/- made u/s 14A to the book profit computed made u/s 115JB of the Act. Before us, the Ld. Counsel of the assessee submitted that no addition could be made in view of the decision of the Special Bench in the case of **ACIT v. Vireet Investment Pvt. Ltd. in (17) 58 ITR 313, Delhi Tribunal Special Bench**, wherein it is held that disallowance u/s 14A cannot be added while computing



book profit u/s 115JB of the Act. On the contrary, the Ld. DR relied on the order of the lower authorities.

10. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that the Ld. DRP has referred to the various decisions in the impugned order and also referred to the decision of the Vireet Investment Pvt. Ltd. (supra). The Ld. DRP has retained the addition mainly for the reason that DRP proceedings are in continuation of the assessment proceedings and therefore to keep the matter alive objection of the assessee in this regard were rejected. The relevant observation of the Ld. DRP are reproduced as under:

“6.3.23 We may observe here that the process before the DR is a continuation of assessment proceeding as it is only the draft assessment order which is being challenged before it. The final assessment order is yet to be passed by the Assessing Officer. Hence, the DRP is not an appellate authority and the proceeding before the DR is continuation of assessment proceedings. This view is fortified by the decision of the division bench of the Hon'ble High Court of Bombay in the Writ Petition No. 1877 of 2013 in the case of Vodafone India Services Pvt. Ltd. vs. Additional Commissioner of Income Tax & Ors. (2014) reported in 264 CTR 0030. We find that the Assessing Officer has taken one of the possible views on this aspect because Hon'ble Delhi High Court in the case of CIT vs Goetze (India) Ltd. (supra) held that computing the book profit under section 115 JB of the Act, the necessary disallowances under section 14A of the Act are required to be made. In the given facts and the prevailing judicial cleavage on this contentious issue, circumstances of the case, we do not find any infirmity in the order of the Assessing Officer in keeping the matter alive. The objection of the assessee in this regard is accordingly rejected.”



10.1 In our opinion, the issue in dispute is covered by the decision of the Special Bench of the Tribunal in the case of Vireet Investment Pvt. Ltd. (supra) and the Ld. DRP has retained the addition only on the ground that DRP is not for appellate proceedings and continuation of the assessment proceedings. However, the issue in dispute being covered by the binding precedent in the case of Vireet Investment Pvt. Ltd. (supra). The addition made by the Assessing Officer is directed to be deleted the ground of appeal of the assessee is accordingly allowed.

11. The ground No. 3 of the appeal of the assessee relates to disallowance of discount of employee stock option plan (being difference between exercise price and at the time of grant of addition amended of Rs.8,70,45,135/-.

12. Briefly stated facts qua the issue in dispute are that the assessee claimed employee stock option claim expenses of Rs.8,70,45,135/- in the profit and loss account. According to the Assessing Officer these expenses were in the nature of capital expenditure and being contingent in nature, samewere not allowable in the year under consideration. The assessee on the other hand contended that discount of expenses amounting to Rs.8,70,45,135/- was claimed as revenue expense. The ESOP scheme was introduced with an objective to attract and retain its human talent by motivating the employees to contribute to the business activities and to inculcate a sense of belongingness and



instill a feeling of ownership in them. The ESOP scheme made during the year was accounted by the difference between the market price and the price at which the shares were offered to the employees as cost thereof on the date of grant of options. The discount on issue of shares was claimed over the vesting period. The detail of ESOP aggregating to Rs.8.70 crores reproduced by Ld. DRP in the impugned order, is extracted as under:

7.2.3 *The assessee stated that the ESOP discount aggregating to Rs.8.70 crores has been claimed as under:*

Particulars	Scheme 2013	Execom ESOP
Date of Grant	05-Sep-13	05-Dec-13
Market Price	54.80	82.30
Exercise Price	49.32	1.00
Vesting Period (years)	3.00	4.00
Charge to P&L per share	5.48	81.30
Number of Options granted	8,48,210	42,02,438
Total charge	0.47 crores	34.16 crores
Charge per year	0.15 crores	8.5 crores
Total charge for year 2014-15		8.70 crores

13. Before the ld DRP, the assessee relied on the decision of the Special Bench Bangalore Tribunal in the case of Biocon Ltd (2013) 35taxmann.com 335, wherein it is held that amount of ESOP compensation recognized in the book under the applicable accounting guidelines will be deductible u/s 37(1) of the Act. The Ld. DRP however noted that proceedings before it are in continuance of the assessment proceedings and the decision of the Special Bench have been appealed by the Department before the Hon'ble Karnataka High Court and therefore, the addition proposed by the Assessing Officer was directed to be retained in the final



assessment order. The relevant finding of the Ld. DRP is reproduced as under:

“7.3.1 We have carefully considered the arguments advanced. The case of the assessee rests on the arguments that the same was considered in the decision of Id. Bangalore Tribunal in Biocon Ltd v DCIT (SB) (supra). It has also been argued that as the value of perquisite was taxable in the employee's hands, a disallowance in the hands of employer will mean double taxation. In this connection, we note that the said decision of the Id. Special Bench has been appealed against by the Department and is awaiting the decision of the Hon'ble Karnataka High Court which has admitted the Question of Law raised. We also note the number of judicial authorities that have been cited by the Assessing Officer and the assessee.”

14. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. Before us, the Ld. Counsel of the assessee submitted that subsequent to the passing of the order of the Ld. DRP the Hon'ble Karnataka High Court in the case of CIT v. Biocon Ltd -21 taxmann.com 351 has upheld the finding of the Special Bench Tribunal in the case of CIT v. Biocon Ltd (supra). The relevant finding of the Hon'ble Karnataka High Court is reproduced as under:

6. We have considered the submissions made by learned counsel for the parties and have perused the record. The singular issue, which arises for consideration in this appeal is whether the tribunal is correct in holding that discount on the issue of ESOPs i.e., difference between the grant price and the market price on the shares as on the date of grant of options is allowable as a deduction under [Section 37](#) of the Act. Before proceeding further, it is apposite to take note of [Section 37\(1\)](#) of the Act, which reads as under:



Section 37(1) says that any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head, "Profits and Gains of Business or Profession".

7. Thus, from perusal of Section 37 (1) of the Act, it is evident that the aforesaid provision permits deduction for the expenditure laid out or expended and does not contain a requirement that there has to be a pay out. If an expenditure has been incurred, provision of Section 37(1) of the Act would be attracted. It is also pertinent to note that Section 37 does not envisage incurrence of expenditure in cash.

8. Section 2(15A) of the Companies Act, 1956 defines 'employees stock option' to mean option given to the whole time directors, officers or the employees of the company, which gives such directors, officers or employees, the benefit or right to purchase or subscribe at a future rate the securities offered by a company at a free determined price. In an ESOP a company undertakes to issue shares to its employees at a future date at a price lower than the current market price. The employees are given stock options at discount and the same amount of discount represents the difference between market price of shares at the time of grant of option and the offer price. In order to be eligible for acquiring shares under the scheme, the employees are under an obligation to render their services to the company during the vesting period as provided in the scheme. On completion of the vesting period in the service of the company, the option vest with the employees.

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.

12. So far as reliance place by the revenue in the case of CIT VS. INFOSYS TECHNOLOGIES LTD. is concerned, it is noteworthy that in the aforesaid decision, the Supreme Court was dealing with a proceeding under [Section 201](#) of the Act for non deduction of tax at source and it was held that there was no cash inflow to the employees. The aforesaid decision is of no assistance to decide the issue of allowability of expenses in the hands of the employer. It is also pertinent to mention here that in the decision rendered by the Supreme Court in the aforesaid case, the Assessment Year in question was 1997-98 to 1999- 2000 and at that time, the Act did not contain any specific provisions to tax the benefits on ESOPs. [Section 17\(2\)\(iiia\)](#) was inserted by [Finance Act](#), 1999 with effect from 01.04.2000. Therefore, it is evident that law recognizes a real benefit in the hands of the employees. For the aforementioned reasons, the decision rendered in the case of Infosys Technologies is of no assistance to the revenue. The decisions relied upon by the revenue in Gajapathy Naidu, Morvi Industries and Keshav Mills Ltd.



supra support the case of assessee as the assessee has incurred a definite legal liability and on following the mercantile system of accounting, the discount on ESOPs has rightly been debited as expenditure in the books of accounts. We are in respectful agreement with the view taken in PVP Ventures Ltd. And Lemon Tree Hotels Ltd. Supra.

13. It is also pertinent to mention here that for Assessment Year 2009-10 onwards the Assessing Officer has permitted the deduction of ESOP expenses and in view of law laid down by Supreme Court in [Radhasoami Satsang vs. CIT](#), (1992) 193 ITR 321 (SC), the revenue cannot be permitted to take a different stand with regard to the Assessment Year in question.

In view of preceding analysis, the substantial questions of law framed by a bench of this court are answered against the revenue and in favour of the assessee. In the result, we do not find any merit in this appeal, the same fails and is hereby dismissed.

14.1 Respectfully following the finding of the Hon'ble Karnataka High Court(supra), the Ld. Assessing Officer is directed to delete the addition. The ground of appeal of the assessee is accordingly allowed.

15. In ground No. 4, the assessee has prayed for admitting the claim of discount of ESOP (difference between market price at the time of exercise and market price at time of grant of option) amounting to Rs.10,01,36,178/-. This ground was raised before the Ld. DRP as additional ground however, the Ld. DRP rejected the contention mainly on the ground that proceedings before the DRP are in the continuance of the assessment proceedings and not in the nature of the appellate proceedings and therefore, claim cannot



be admitted otherwise then filing revised return of income. The relevant finding of the Ld. DRP is reproduced as under:

“8.3.7 The assessee relied on the decision of the Hon'ble Bombay High court in the case of Pruthvi Brokers & Shareholders (ITA No 3098/2010), which relying on the decisions of the National Thermal Power Company Limited [1998] (229 IT 383), held that the Id. Tribunal had a jurisdiction to examine a question of law which arose from the facts as found by the lower authorities and had a bearing on the tax liability of the company. We have perused the said decision of the Hon'ble Bombay High Court and find that the same is not an authority for the proposition that an addition ground can be mechanically and automatically be accepted. The Hon'ble Bombay High Court observed that the appellate authorities have the discretion whether or not to permit such additional claims to be raised and that the exercise of discretion was entirely different from the existence of jurisdiction.”

16. We have heard rival submissions of the parties and perused the relevant material on record. We find that the Ld. DRP has rejected the additional claim mainly on the ground that proceedings before the Ld. DRP are in continuance of the assessment proceedings and not in the nature of appellate proceedings and therefore, the Ld. DRP was not authorized to admit such an additional claim otherwise then by revised return of income. However, the Tribunal being appellate authority is entitled to admit such a claim if same is purely being legal in the nature and no investigation of the fresh facts is required. Before us, the Ld. Counsel of the assessee has filed all details in respect of claim and submitted that all such details were filed before the Ld. DRP and therefore, same are available on record. In view of the facts and



circumstances, we admit this claim of the assessee relying on the decision of the Hon'ble Bombay High Court in the case of CIT v. Pruthvi Brokers & Shareholders (ITA No. 3098/2010)and restore the matter back to the file of the Ld. Assessing Officer for examining the claim in accordance with law after verifying the documentary evidence submitted by the assessee. The ground No. 4 of the assessee is accordingly allowed for statistical purposes.

17. The ground No. 5 of the appeal, the assessee relates to refund of excess of dividend distribution tax amounting to Rs.88,50,980/-. Before us, the Ld. Counsel of the assessee fairly conceded that this issue is covered against the assessee by the decision of the Tribunal, Special Bench in the case of Total Oil India P Ltd in ITA No. 6997/Mum/2019 for assessment year 2016-17. The relevant finding of the Tribunal Special Bench (supra) is reproduced as under:

CONCLUSION:

83. For the reasons give above, we hold that where dividend is declared, distributed or paid by a domestic company to a non-resident shareholder(s), which attracts Additional Income Tax (Tax on Distributed Profits) referred to in Sec.115-O of the Act, such additional income tax payable by the domestic company shall be at the rate mentioned in Section 115 O of the Act and not at the rate of tax applicable to the non-resident shareholder(s) as specified in the relevant DTAA with reference to such dividend income. Nevertheless, we are conscious of the sovereign's prerogative to extend the treaty protection to domestic companies paying dividend distribution tax through the mechanism of Special Bench - Total Oil India Pvt. Ltd.



DTAAs. Thus, wherever the Contracting States to a tax treaty intend to extend the treaty protection to the domestic company paying dividend distribution tax, only then, the domestic company can claim benefit of the DTAA, if any. Thus, the question before the Special Bench is answered, accordingly.

17.1 Respectfully following the finding of the Special Bench Tribunal (supra), the ground of appeal of the assessee is dismissed.

18. The ground No. 6 relates to initiation of penalty u/s 271(1)(c) of the Act which being premature at this stage, the ground is dismissed as infructuous. The ground No. 7 relates to levy of interest u/s 234B and 234C of the Act. As far as interest u/s 234B is concerned same is consequential and therefore, grounds related to the same is dismissed as infructuous. As far as levy of interest u/s 234C is concerned, which is a matter of verification by the Assessing Officer. We accordingly direct the Assessing Officer to verify the levy of interest u/s 234C of the Act in accordance with law after providing adequate opportunity of being heard to the assessee. The ground No. 7 of the appeal is accordingly partly allowed for statistical purposes.

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

Order pronounced in the open Court on 31/05/2023.

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER



Mumbai;

Dated: 31/05/2023

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Assistant Registrar)

ITAT, Mumbai