

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, MUMBAI**

**BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA Nos.1738 & 1739/Mum/2023
(A.YS. 2016-17 & 2017-18)**

M/s Avendus Capital Private Limited Platina 9 th Floor, Plot No. C-59, Bandra Kurla Complex, Bandra (East), Mumbai – 400 051	Vs.	Assistant Commissioner of Income Tax, Central Circle 2(1) Pratishtha Bhavan, Old CGO Annexe M.K. Road, Mumbai - 400020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AABCC2404Q		
Appellant	..	Respondent

Appellant by :	Ashish Mehta & Sahil Sheth
Respondent by :	Manoj Kumar Sinha

Date of Hearing	03.08.2023
Date of Pronouncement	10.08.2023

आदेश / O R D E R

Per Amarjit Singh (AM):

Both these appeals filed by the assessee are directed against the common order of ld. CIT(A)-48, Mumbai for assessment years 2016-17 & 2017-18 based on common issue on identical facts therefore, for the sake of convenience these appeals are adjudicated together by taking ITA No. 1738/Mum/2023 as a lead case and its finding will be applied mutatis mutandis to the other appeal.

ITA No. 1738/Mum/2023

- “1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals)-48, Mumbai (“Ld. CIT(A)”) erred in

confirming the action of the learned assessing officer ("td. AO") in making disallowance of INR 1,67,97,854/ on account of Employees Stock Option Plan ("ESOP") claimed by the Appellant under section 37(1) of the Income-tax Act, 1961 ("IT Act")

2. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the action of the Ld. AO in making disallowance of INR 89,63,694/- under section 14A of the IT Act read with Rule 8D of the Income-tax Rules, 1962 ("IT Rules") by merely applying the Rule 8D formula without appreciating the facts of the Appellant.*
3. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the action of the Ld. AO in making disallowance of INR 89,63,694/- in the 'book profits' under section 115JB of the IT Act by invoking provisions of section 14A of the IT Act read with Rule 8D of the IT Rules.*
4. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the action of the Ld AO in levying interest under section 234C and 234D.*

The Appellant craves leave to add, alter, amend, delete all or any of the grounds of appeal before or at the time of hearing."

2. The fact in brief is that return of income declaring total income of Rs.30,77,08,160/- was filed on 30.11.2016. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on 07.07.2016. During the course of assessment the assessing officer noticed that assessee company has debited an amount of Rs.167,97,854/- in the profit and loss account as Employee Stock Option Plan (ESOP) expenses. The assessing officer asked the assessee vide notice u/s 142(1) dated 10.11.2018 to explain why the same should not be treated as capital expenses. The assessee explained that similar expenses it had claimed in assessment year 2009-10 and 2010-11 and the ITAT has decided the issue for both the years in its favour. The assessee further explained that in the scheme of ESOP's the company gives an option to its employees to purchase its securities at a price lower than the market price. This was a practise which was exercised in order to benefit the employees in order to retain the employees and reward them for their contribution in the growth of the company. It is

also explained that its employees were the main assets, therefore, ESOP was issued to them purely from business perspective would qualify as business expenditure and the same was entitled to deduction under the guidelines prescribed by the Institute of Chartered Accountant of India. Therefore, the assessee claimed that ESOP issued to the employees was revenue expenditure for the company in the interest of the business of the company so that talent is retained in the company so as to enable company to perform and compete in the market place.

However, the assessing officer has not agreed with the submission of the assessee company. The assessing officer was of the view that in the scheme of ESOP, the company gives an option to its employee to purchase its securities at a price lower than the market price. As per the scheme, the difference between the exercise value and the market value was paid by the company. Therefore, the assessing officer was of the view that ESOP expenses were of capital nature, and cannot be allowed u/s 37 of the Act. Accordingly, the assessing officer has disallowed the total expenses of Rs.167,97,854/- and added to the total income of the assessee.

3. Aggrieved, the assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has dismissed the appeal of the assessee.

4. Heard both the sides and perused the material on record. In the assessment order passed u/s 143(3) of the Act the assessing officer treated the ESOP expenses as capital expenditure and disallowed the claim of deduction as revenue expenditure of the assessee company. During the year under consideration the assessee company had granted options to its employees under the scheme of ESOP's to purchase its securities at a price lower than the market value price. The assessee had followed the intrinsic value-based method of accounting for stock options granted based on the Guidance Note on Accounting for Employees Share-based payments issued by ICAI. The assessee company

during the course of assessment explained that ESOP issued to the employees was revenue expenditure for the company in the interest of the business of the company so that talents of the employees is retained in the company to perform and compete in the market place. During the course of appellate proceedings before us the Id. Counsel has submitted that identical issue on similar facts has been adjudicated by the ITAT Mumbai in the case of the assessee itself for assessment year 2009-10 & 2011-12 vide ITA No. 4542/Mum/2013, 2010-11 vide ITA No. 5679/Mum/2015. With the assistance of the Id. Representative we have perused the decision of ITAT as referred supra and relevant part of the decision is reproduced as under:

“5. We have carefully perused the orders of the authorities below and the decision of the Tribunal brought to our notice. The grievance of the assessee is that the Ld. CIT(A) erred in confirming the disallowance of Rs. 1,20,47,684/- claimed u/s. 37(1) of the Act towards Employee Stock Option Plan (ESOP) expenses as capital expenditure. An identical issue was considered by the Tribunal Special Bench Bangalore in the case of Biocon (supra) has held that ESOP expenses is an allowable deduction u/s. 37(1) of the Act. The same view was followed by ITAT Pune Bench in the case of Sandvik Asia (supra). Respectfully following the decision of the Co-ordinate Benches, we set aside the order of the Ld. CIT(A) and direct the AO to allow the ESOP expenses as revenue expenditure.”

Following the decision of ITAT as above the ground no.1 of the assessee is allowed.

Ground No. 2: Disallowance u/s 14A r.w.Rule 8D:

5. During the course of assessment on perusal of the balance sheet the assessing officer noticed that assessee has shown current investment of Rs. 206,63,60,222/- and not current investment amounting to Rs.114,05,48,442/-. However, the assessee has made suo-moto disallowance u/s 14A r.w.rule 8D at Rs.557,184/- only. Therefore, the assessing officer has computed disallowance as per Sec.

14A r.w.Rule 8D to the amount of Rs.95,20,878/- and after reducing the suo-moto disallowance of Rs.557,184/- further disallowance of Rs.89,63,694/- was made u/s 14A of the Act.

6. Aggrieved, the assessee filed the appeal before the ld. CIT(A). However, the ld. CIT(A) has dismissed the ground of appeal of the assessee by referring the amendment made by Finance Act 2022 to Sec. 14A by inserting a non-obstante clause that the provision of this section shall apply and shall be deemed to have always applied in a case where exempt income has not accrued or arisen or has not been received during the previous year relevant to assessment year and the expenditure has been incurred during the said previous year in relation to such exempt income.

7. Heard both the sides and perused the material on record. The ld. Counsel has contended that assessee has not earned any exempt income during the year under consideration. The Hon'ble Delhi High Court in the case of Chem Investment Ltd. Vs. CIT (2015) 61 taxman.com 18 (Del) held that provision of Sec. 14A will not be applied in case no exempt income is received or receivable during the relevant previous year. We find that the Hon'ble Delhi High Court in the case of PCIT Vs. Era Infrastructure (I) Ltd. (ITA No. 204/2022) held that amendment made by Finance Act 2022 to Sec. 14A by inserting non-obstante clause and explanation will take effect from 01.04.2022 and cannot be presumed to have retrospective effect. Therefore, following the judicial findings as supra we delete the addition made by the assessing officer u/s 14A of the Act.

Ground No. 3: Adding disallowance u/s 14A in computing book profit u/s 115JB of the Act:

8. During the course of assessment the assessing officer has added the amount of disallowance made u/s 14A of the Act of Rs.89,63,694/-

to the book profit computed as per the provisions of Sec. 115JB of the Act.

9. The assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has dismissed the appeal of the assessee.

10. Heard both the sides and perused the material on record. We find that special bench of ITAT Delhi in the case of ACIT Vs. Vireet Investment Pvt. Ltd. (2017) 82 taxmann.com 415 (Delhi Tribunal) (SB) held that disallowance made u/s 14A cannot be added for computing book profit u/s 115JB of the Act. Therefore, we find that decision of ld. CIT(A) in sustaining the addition is not justified. Accordingly, this ground of appeal of the assessee is allowed.

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

ITA No. 1739/Mum/2023

Ground No. 1

12. Since the facts and issue involved in this ground of appeal is similar to the ITA No. 1738/Mum/2023 as adjudicated supra in ground no. 1 therefore applying the finding of ITA No.1738/Mum/2023 as mutatis mutandis this ground of appeal of the assessee is also allowed.

Ground No. 2

13. Since the facts and issue involved in this ground of appeal is similar to the ITA No. 1738/Mum/2023 as adjudicated supra in ground no. 2 therefore applying the finding of ITA No.1738/Mum/2023 as mutatis mutandis this ground of appeal of the assessee is also allowed.

Ground No. 3

14. Since the facts and issue involved in this ground of appeal is similar to the ITA No. 1738/Mum/2023 as adjudicated supra in ground no. 3 therefore applying the finding of ITA No.1738/Mum/2023 as mutatis mutandis this ground of appeal of the assessee is also allowed.

15. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open court on 10.08.2023

Sd/-

Sd/-

(Aby T Varkey)
Judicial Member

(Amarjit Singh)
Accountant Member

Place: Mumbai

Date 10.08.2023

Rohit: PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,
Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench,
Mumbai.