

IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "D" : DELHI]

BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER
A N D
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A No.9031/Del/2019
निर्धारणवर्ष/Assessment Year: 2015-16

M/s. GE India Industrial Pvt. Ltd. [Formerly known as GE India Exports Pvt. Ltd.] A-18, First Floor, Okhla Industrial Area, Phase-II New Delhi - 110 020.	<u>बनाम</u> Vs.	JCIT, Special Range : 4, New Delhi.
PAN No. AAACG4901D		
अपीलार्थी /Appellant		प्रत्यर्थी/Respondent

निर्धारितकीओरसे /Assessee by :	Shri Sachit Jolly, Adv. & Ms. Sachit Jolly, Adv.;
राजस्वकीओरसे / Department by :	Shri Vizay B. Vasanta, [CIT] - D. R.;

सुनवाईकीतारीख/ Date of hearing :	24/08/2023
उद्घोषणाकीतारीख/Pronouncement on :	21/11/2023

आदेश /O R D E R

PERC.N. PRASAD, J.M. :

1. This appeal is filed by the assessee against the assessment order dated 24.09.2019 passed under section 143(3) read with

section 144C(5) of the Income Tax Act, 1961 (the Act) pursuant to the directions of the DRP dated 23.07.2019 under section 144C(5) of the Act for the assessment year 2015-16.

2. In the appeal the assessee challenged the final assessment order passed by the Assessing Officer pursuant to direction of DRP in not allowing deduction for the Employee Stock Option Plan (ESOP) of expenses under section 37(1) of the Act.

3. The ld. Counsel for the assessee, at the outset, submits that the issue in appeal is squarely covered by the decision of the jurisdictional High Court in the case of PCIT Vs. New Delhi Television Limited [(2017) 398 ITR 57 (Del.)] and also the decision of the Hon'ble Karnataka High Court in the case of CIT (LTU) & Another Vs. Biocon Ltd. [(2021) 430 ITR 151 (Kar.)] wherein the issue of as to whether the ESOP of expenses are allowable deduction under section 37(1) of the Act has been decided in favour of the assessee. The ld. Counsel further referred to DRP directions and submits that the claim of the assessee was not allowed for the reason that the Revenue filed SLP against the decision of the Hon'ble Delhi High Court in the case of PCIT Vs. New Delhi Television Limited (supra).

4. The ld. Dr submits that the expenses claimed by the assessee are only contingent liability and, therefore, the same are not allowable deduction under section 37(1) of the Act.

5. Heard rival contentions perused the decision of the jurisdictional High Court in the case of PCIT Vs. New Delhi

Television Limited (supra) and the decision of the Hon'ble Karnataka High Court in the case of CIT (LTU) & Another Vs. Biocon Ltd. (supra). An identical issue came up for adjudication by the jurisdictional High Court in the case of PCIT Vs. New Delhi Television Limited (supra) and the jurisdictional High Court held that the discount under ESOP is a deductible expenditure under section 37(1) of the Act and it is not a contingent liability. We further observe that the Hon'ble Karnataka High Court affirming the Special Bench decision of the Tribunal held 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 employees stock option plans 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 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 a 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, the provisions of section 37(1) of the Act would be attracted. It is also pertinent to note that section 37 does not envisage incurrance 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 pre-determined price. In an employees stock option plan 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 employees stock option plans vest in an employee over a period of four years, i.e., at the rate of 25 per cent., which means at the end of first year, the employee has a definite right to 25 per cent. of the shares and the assessee is bound to allow the vesting of 25 per cent. 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 the 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 employees stock option plans is not a contingent liability but is an ascertained liability.

10. From a 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 "expendi- ture" 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 fulfilment of the condition.

11 The deduction of discount on employees stock option plan over the vesting period is in accordance with the accounting in the books of account, 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 placed by the Revenue in the case of CIT v. Infosys Technologies Ltd. [2008] 297 ITR 167 (SC) is concerned, it is noteworthy that in the aforesaid decision, the Supreme Court was dealing with a pro- ceeding 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 afore- said 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 employees stock option plans. Section 17(2)(iiia) was inserted by Finance Act, 1999 with effect from April 1, 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) sup- port the case of the assessee as the assessee has incurred a definite legal liability and on following the mercantile system of accounting, the discount on employees stock option plans has rightly been debited as expenditure in the books of account. 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 the assessment year 2009-10 onwards the Assessing Officer has permitted the deduction of employees stock option plan expenses and in view

of law laid down by the Supreme Court in Radhasoami Satsang v. 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.”

6. Ratio of these decisions applies to the assessee’s case. Thus respectfully following the aforesaid decisions we allow the claim of the assessee. Ground Nos. 2 to 4 of grounds of appeal of the assessee are allowed.

7. Ground No. 5 of grounds of appeal of the assessee is without prejudice and since ground Nos. 2 to 4 of the assessee are allowed by us, this ground is only academic and no need for adjudication.

8. In the result, appeal of the assessee is partly allowed as indicated above.

Order pronounced in the open court on : 21/11/2023.

Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Sd/-
(C. N. PRASAD)
JUDICIAL MEMBER

Dated : 21/11/2023.

MEHTA

Copy forwarded to :-

1. Appellant;

2. Respondent;
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi.

Date of dictation	16.11.2023
Date on which the typed draft is placed before the dictating member	20.11.2023
Date on which the typed draft is placed before the other member	21.11.2023
Date on which the approved draft comes to the Sr. PS/ PS	21.11.2023
Date on which the fair order is placed before the dictating member for pronouncement	21.11.2023
Date on which the fair order comes back to the Sr. PS/ PS	21.11.2023
Date on which the final order is uploaded on the website of ITAT	21.11.2023
Date on which the file goes to the Bench Clerk	21.11.2023
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	