IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B', NEW DELHI

BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No.2176/Del/2023
Assessment Year: 2018-19

DCIT **Central Circle – 18** **Delhi**	**Vs.**	**Ms Delhivery Pvt. Ltd.** **N-24-N34, S-24-S-34, Air Cargo Logistics Centre-II, Opposite Gate 6 Cargo Terminal IGI Airport, South West, New Delhi-110037** **PAN No.AAPCS9575E**
(APPELLANT)		**(RESPONDENT)**

Appellant by	Sh. T. James Singson, CIT DR
Respondent by	Sh. K. M. Gupta, Advocate

Date of hearing:	06/12/2023
Date of Pronouncement:	06/12/2023

ORDER

PER N. K. BILLAIYA, AM:

This appeal by the revenue is preferred against the order of the CIT(A)-27, New Delhi dated 08.05.2023 pertaining to A.Y.2018-19.

2. The revenue has raised the following grounds :-

1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) is right in not sustaining the disallowance of deduction claimed on account of Employee

Stock Option Scheme (ESOP) expenses amounting to Rs. 51.48.28,498/-, even when it is clear that the assessee company did not incur any expenses either actual or notional on account of grant of options or exercise of such options.

2. Whether on the facts and in the circumstances of the case, the 1.d. CTT(A) is right in allowing the deduction of Rs S1.48.28.498 on account of ESOP expenses ignoring the fact that these expenses have not become ascertained liability of the assesse company during the year under consideration.

3. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) is correct in not sustaining the disallowance, ignoring the fact that premium on share capital is a capital receipt and not liable to taxation and similarly, loss on issue of shares at a price less than its fair market value is a notional capital loss and no deduction for it can be allowed to the assessed.

4. Whether on the facts and in the circumstances of the case, the Ld, CIT(A) is right in deleting the addition of Rs. 62.72.719/- on account of undisclosed income as per provision of Section 56(2)(vii) of the IT Act r.w.r 11UA, even when the assessee company did not get valuation report of shares from merchant banker or failed to disclose their book value as per the said section and rule.

5. (a) Whether on law and facts of the case the order of the Ld. CIT(A) is erroneous and not tenable in law and on facts.

(b) The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal.

3. At the very outset the Counsel for the assessee stated that the issue raised vide ground No.1 to 3 have been considered by this Tribunal in assessee's own case in ITA No.1734 and 1735/Del/2023 for A.Y. 2015-16 and 2017-18 and this Tribunal has decided the issue in favour of the assessee and against the revenue.

4. The DR fairly conceded to this.

5. We have carefully perused the orders of the CIT(A) and find force in the contention of the Counsel. The impugned issues were considered by the coordinate Bench in its order (supra) and the relevant findings read as under :-

> *"8. Against this direction, the id. AR argued that the issue of allowability of the ESOP expenses is no more res-integra, the Special Bench of Bangalore Tribunal in the case of Biocon Limited ([2013] 35 taxmann.com 335) held that discount on shares under the ESOP is an allowable deduction for the following words:*
>
> *"...11.3 We, therefore, sum up the position that the discount under ESOP is in the nature of employees cost*

and is hence deductible during the vesting period w.r.t. the market price of shares at the time of grant of options to the employees. The amount of discount claimed as deduction during the vesting period is required to be reversed in relation to the unvesting/ lapsing options at the appropriate time. However, an adjustment to the income is called for at the time of exercise of option by the amount of difference in the amount of discount calculated with reference the market price at the time of grant of option and the market price at the time of exercise of option. No accounting principle can be determinative in the matter of computation of total income under the Act. The question before the special bench is thus answered in affirmative by holding that discount on issue of Employee Stock Options is allowable as deduction in computing the income under the head 'Profits and gains of business or profession",'

9. The decision of the Hon'ble Special Bench has been affirmed by the Hon'ble Karnataka High Court in the case of CIT vs. Biocon Ltd.

10. Further, it was argued that the allowance of ESOP expenses being revenue expenditure and being deductible under section 37(1) of the Act was considered in the below cases:

> PCIT Vi Lemon Tree Hotels (P.) Ltd. - [2019) 104 taxmann.com 26 (Delhi) PCIT V. New Delhi Television Ltd. [2018] 99 taxmann.com 401 (Delhi)

> SSI Limited V. Deputy Commissioner of Tax [(2004) 85 TTJ10491

> Murugappa Management Services Ltd. [2013] 40 taxmann.com 451 (Chennai - Trib.)

11. it was brought to our notice that the order relied by the ld, PCIT in the case of Ranbaxy Laboratory Ltd. Vs. Addl. CIT (2009) 124 TTJ 771: (2009) 26 DTR 420 stands considered by Special Bench wherein the case of Ranbaxy Laboratory Ltd. Vs. Addl. CIT has been examined in the case of Biocon Limited supra) which has been confirmed by the Hon'ble Karnataka gh Court and hence the order relied upon by the Id. PCIT is no ore good law. Hence, we hold that the directions given in the der u/s 263 are not valid.

6. Respectfully following the findings of the coordinate Bench (supra) we decline to interfere with the findings of the CIT(A) the ground No.1 to 3 are dismissed.

7. The underlying facts in ground No.4 are that during the course of the scrutiny assessment proceedings the AO noticed that 5263 equity shares was issued by the assessee company at a premium to its employees who are resident of India. The AO

observed that since the assessee is not traded on exchanges its incumbent upon the assessee to get its share valued at fair market value. The assessee was asked to furnish fair market value of shares. In its reply the assessee contended that the said notification dated 24.05.2018 is not applicable in its case. The AO rubbished the claim of the assessee and concluded that the assessee did not get valuation of its shares from merchant banker as per provision of section 56 (2) (viib) of the Act r.w.r. 11 UA issuing shares to its employees during the year under consideration and completed the proceedings by holding that the assessee has raised share capital at more than fair market value of the equity shares and made addition of Rs.6272719/-.

9. Assessee agitated the matter before the CIT(A) and reiterated its claim that the CBDT notification is not applicable on the facts of the case for the year under consideration.

10. After considering the facts and the submissions the CIT(A) was of the opinion that the AO is not correct in rejecting the valuation report of independent CA only on the basis that it was not prepared by the merchant banker as required by the CBDT notification No. 23/2018 issued on 24.05.2018.

11. Before us the DR strongly supported the findings of the AO. The Counsel reiterated what has been stated before the lower authorities.

12. We have given a careful consideration to the orders of the authorities below. The said notification of the CBDT was published in the official gazette on 24.05.2018, therefore, it cannot applied before the date of notification in the gazette, therefore, cannot be applied for the impugned assessment years. The findings of the CIT(A) cannot be faulted with. This ground is also dismissed.

13. In the result, the appeal filed by the revenue is dismissed.

14. Decision announced in the open court on 06.12.2023.

Sd/-
(ASTHA CHANDRA)
JUDICIAL MEMBER

Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER

NEHA
Date:- .12.2023
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI