

IN THE INCOME TAX APPELLATE TRIBUNAL  
Mumbai "A" Bench, Mumbai.

Before Shri Narendra Kumar Choudhry(JM)  
& Shri Omkareshwar Chidara (AM)

I.T.A. No. 4215/Mum/2023 (A.Y. 2017-18)

ACIT, Circle 6(1)(2) Room No. 506 5 <sup>th</sup> Floor, Aayakar Bhavan, M.K. Road Mumbai-400 020.	Vs.	M/s. Ask Wealth Advisors Pvt. Ltd. Birla Aurora, 16, Level Office Floor 9, Dr. Annie Besant Road, Worli Mumbai-400 030.  PAN : AAFCA9124M
(Appellant)		(Respondent)

Assessee by	Shri J.D. Mistry
Department by	Shri Manoj Kumar Sinha
Date of Hearing	26.06.2024
Date of Pronouncement	23.09.2024

ORDER

Per Omkareshwar Chidara (AM) :-

The Revenue filed an appeal for A.Y. 2017-18 with the following grounds of appeal :

1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is erred in 01. directing the AO to delete the addition of Rs.4,27,13,709/- made by the u/s 37(1) of the IT Act, 1961 on account of expenditure claimed by the assessee on ESOP without appreciating the facts of the case and the AO's noting that while implementing the ESOP the company did not follow the generic vesting scheduled of ESOP and thereby defeat the very purpose of the ESOP Scheme.
2. Whether on the facts and circumstances of the case and in law, the Ld. CITA) is erred in directing the AO to delete the addition of Rs.5,72,25,778/- made by the AO while computing the Book Profit u/s 115JB of the IT Act, 1961 on account of the lower of the brought forward business loss or unabsorbed depreciation without appreciating the facts that the assessee company has already claimed such deduction multiple times in earlier assessment years i.e. AY 2013-14 & AY 2016-17.

3. The Appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored

2. The first ground of appeal relates to disallowance of expenditure claimed on ESOP shares by the appellant. The learned Assessing Officer (Ld. AO for short) disallowed deduction claimed towards ESOP because the said amount of Rs. 4,27,13,709/- was not debited to the profit and loss account, but claimed as deduction in computation of income. Secondly, the assessee claimed this deduction for the first time in the second revised return on 23.1.2018. The assessee has submitted that all the details relating to ESOP scheme and after careful perusal of the details, a notice u/s. 143(2) of the Income Tax Act (the Act for short) was issued to the company. The Ld. AO has given detailed questionnaire to the company asking them to provide details of ESOP granted to the employees, vesting schedule and option exercised in pursuance of ESOP scheme, whether such scheme continued subsequently also. The Company was asked to as to why ESOP is not made applicable to all employees. In response to this notice, the company filed all the details required as per notice. After getting details from the company the Ld. AO has noted that the assessee has not debited discount of ESOP of Rs. 4,27,13,709/- to the profit and loss account and hence such expenditure cannot be debited in the books of account. The Ld. AO is of the view that since there is no actual outcome of cash from the company's hand, such deduction is not allowable. The Ld. AO also noticed that such expenditure was not claimed in the original return as well as first revised return, but claimed for the first time only in the second revised return and the deduction was claimed in "computation of income". It was also noticed by the Ld. AO that the ESOP was granted only to select 14 employees by the compensation committee. The Company has explained that such option was granted having regard to the business necessity and exigency. But the Ld. AO is not satisfied with the explanation of the company and held that ESOP scheme is a just an eyewash wherein the shares were issued below fair market value to a handful of top employees in a highly biased manner and in complete disregard to the

business exigencies and hence cannot be seen as a valid ESOP scheme of other companies. To sum up, the Ld. AO held that the discount on ESOP claimed by the assessee-company cannot be allowed for the following reasons:

“5.9 To sum up, the Discount on ESOP claimed by the assessee cannot be allowed for following reasons:

The Discount on ESOP is just a notional expenditure, and even if the same is considered as an expenditure, it would be in nature of capital expenditure.

The inclusion of such discount on ESOP as Perquisite in hands of the employees is irrelevant to decide allowability in hands of the company, and also there is no additional tax payment by such employee due to inclusion as Perquisite since such perquisite value would be added to cost of shares in hands of the employee.

The decision of Biocon Ltd. (supra) is distinguishable for reasons stated above.”

3. Thus, the Ld. AO deleted the expenditure claimed on discount of ESOP in computation of income of Rs. 4,27,13,709/- and added back the same to the total income of appellant-company while completing the assessment order.

4. Aggrieved by this addition, the assessee-company filed an appeal before the Ld. CIT(A) and the Ld. CIT(A) deleted the addition. At paragraph 4.2, page 40 of the Ld. CIT(A)'s order, the Ld. CIT(A) has held that the word “expenditure” used in section 37 of the Act is not necessarily confined to the money which was actually paid out. It covers liability which has accrued and or which was incurred although it may have to be discharged at future date. This also includes an amount which relates a “loss”, even though the said amount has not gone out from the pocket of the appellant. The Ld. CIT(A) deleted the addition made by the Ld. AO by relying on the Special Bench decision of the ITAT in the case of Biocon Ltd., which was held in favour of the assessee and subsequently confirmed by Hon'ble Karnataka High Court in the case of Biocon Ltd., 430 ITR 151, wherein the Departmental appeal was dismissed. Hon'ble Delhi High Court in the case of PCIT Vs. NDTV,

Hon'ble Madras High Court in the case of PVP Venture Ltd., Hon'ble Jurisdictional ITAT of Mumbai in the case of Morgan Stanly Advantage Services Pvt. Ltd. Vs. CIT (ITA No. 1083/Mum/2021 dated 27.6.2022 and Hon'ble Jurisdictional Mumbai Tribunal in the case of Goldman Sachs (India) Securities Pvt. Ltd. Vs. DCIT (ITA No. 6912/Mum/2012, 222/Mum/2014) it was held that ESOP expenditure is an allowable deduction under the head "profits and gains or profession". Since the ESOP expenditure is an allowable deduction as per the above Judgement, the Ld. CIT(A) deleted the addition. The Ld. AO has mentioned in the assessment order that the decision of Biocon Ltd. has not become final and not accepted by the Department, addition was made. But as on today, there are several decisions in favour of the assessee and against the Revenue, the Ld. CIT(A) followed those decisions and deleted the addition made by the Ld. AO. The Ld. AO has held that the assessee has not passed an entry in its books of account with regard to discount of ESOP granted to the employees and hence expenditure is not deductible. The Ld. CIT(A) countered the argument of the Ld. AO by relying on the decision of Hon'ble Supreme Court in the case of Taparia Tools Ltd. Vs. JCIT (372 ITR 605), wherein Hon'ble Apex Court has held that the assessee claimed entire interest paid upfront was held to be deductible expenditure in one year. Hon'ble Apex Court has held that merely because a different treatment was given in the books of account cannot deprive assessee for claiming expenditure as deduction. Similarly, the Ld. CIT(A) quoted other cases law too and deleted the addition made by the Ld. AO.

5. Aggrieved by the deletion in the appeal, the Revenue filed further appeal before the ITAT with following grounds of appeal mentioned in page 1 of this order.

6. During the hearing proceedings before the ITAT Mumbai, Ld. DR has relied on the assessment order.

7. Ld. AR of the assessee-company filed a paper book in which it was submitted that there are several decisions in favour of the assessee-company for justification of claim of ESOP expenditure. The assessee-company filed ESOP scheme, details and justification for liability of deduction being discount on issue of shares under ESOP, copy of sample grant letter issued for exercise of ESOP, employee-wise details of shares, copy of valuation report of shares issued, copy of Form 16 issued to the employees evidencing perquisite tax paid on exercise of ESOP etc. On going through the paper book, it is held that the ESOP scheme is genuine and all the required legal formalities were taken care. The case of Biocon on which heavy reliance was placed by the assessee-company squarely covers the issue. Apart from this case of Biocon, several cases of Jurisdictional Tribunal in the case of Morgan Stanly (supra), Hon'ble Mumbai Tribunal in the case of ACIT Vs. Network 18 Investment (ITA No. 7501/Mum/2018), Hon'ble Mumbai Tribunal's decision in the case of Kotak Mahindra Bank (ITA No. 698/Mum/2016), and Hon'ble Delhi High Court decision in the case of PVR Ltd. (ITA no. 564/2012), it was held that the difference between the offer price of ESOP and market price of shares is allowable as Revenue expenditure u/s. 37 of the Act.

8. In view of the several decisions mentioned above, it is held that the assessee-company is entitled for expenditure claimed towards ESOP scheme. Addition made by the Ld. AO is deleted relating to ESOP scheme.

9. Second addition made by the Ld. AO relates to computation of book profit u/s. 115JB of the Act, on account of lowest of brought forward business loss or unabsorbed depreciation.

10. The Ld. AO has disallowed the deduction claimed u/s. 115JB of the Act and added back the amount of Rs. 5,72,25,778/- because the Ld. AO is of the view that the deduction was rightly claimed in A.Y.2013-14 and thereafter is no rational of claiming the same again in A.Y. 2016-17 & 2017-

18. The Ld. AO held that the assessee-company has not claimed the same deduction u/s. 2014-15 and 2015-16 correctly.

11. Aggrieved by this disallowance, assessee-company filed an appeal before the Ld. CIT(A). The Ld. CIT(A) after referring to explanation 1 to section 115JB(1) of the Act held that the assessee-company is entitled for deduction u/s. 115JB(1) of the Act as claimed. After quoting several decisions, the Ld. CIT(A) allowed the appeal of the assessee-company.

12. Not satisfied with the order of the Ld. CIT(A), the Revenue has instituted an appeal before the ITAT by saying that the Ld. CIT(A) erred in directing the Ld. AO to delete the addition made by the AO while computing book profit u/s. 115JB of the Act without appreciating the fact that the assessee-company has already claimed such deduction multiple times in earlier years i.e. A.Y. 2013-14 & 2016-17.

13. Ld. DR relied on the assessment order and above grounds of appeal and pleaded that the disallowance made by the Ld. AO may be confirmed.

14. Ld. AR of the assessee-company filed a paper books in which a table was prepared to demonstrate year wise brought forward business losses and depreciation losses at page No. 162 of the paper book. Ld. AR argued that from A.Y. 2013-14 onwards there was no depreciation loss and hence no such claim was made. It was argued further that the assessee-company has got unabsorbed business loss only from A.Y. 2013-14 onwards and hence only unabsorbed business loss was claimed and unabsorbed depreciation loss was shown as Nil. Ld. AR of the assessee-company relied on the Hon'ble Jurisdictional ITAT decision of Goa Airlines India Ltd. Vs. DCIT (ITA No. 3788/Mum/2018 order dated 13.1.2021) related to A.Y. 2014-15, where it was held as under:

6.5 The Hon'ble Jurisdictional ITAT in the case of Go Airlines (India) Limited Vs DCIT [ITA No. 3788/Mum/2018 Date of Judgement/Order, 13/01/2021 Related Assessment Year : 2014-15] has held as under:

"3.2. We find that we are now concerned with the computation of book profits u/s.115JB of the Act wherein one of the items eligible for reduction would be the lower of brought forward cash loss or brought forward depreciation loss as per books of accounts. We find that provisions of Sections 32(2) and 72 of the Act explicitly provide that the amount would be carried forward for set off in the succeeding years and it should be arrived at after deducting the amounts to which effect has already been given. We find that such provisions are apparently not present in computing the book profits u/s.115JB of the Act. We find that what is contemplated in Clause (iii) of Explanation 1 to Section 115JB of the Act is the simple numerical figure being the amount of loss brought forward or unabsorbed depreciation whichever is less. Hence, it could be safely concluded that it is a simple determination of numerical amount which would be eligible for reduction from net profit for the purposes of arriving at the book profit u/s.115JB of the Act. We also find that most crucial expression used in the said Clause (iii) of Explanation 1 to Section 115JB of the Act would be "as per books of accounts". Hence, unless the entire loss as per books of accounts gets wiped out by profits earned in subsequent years, the said loss would continue to remain in the balance sheet of the assessee i.e. "books of accounts" and would be eligible for reduction in accordance with Clause (iii) of Explanation 1 to Section 115JB of the Act, while computing book profits u/s.115JB of the Act. We find that this issue is no longer res-integra in view of the decision of the Coordinate Bench of Kolkata Tribunal in the case of DCIT vs. Binani Industries Ltd., reported in 178 TTJ 658, wherein the undersigned was the author, wherein it was held as under:-

3. The second issue to be decided in this appeal is as to whether the assessee is entitled for reduction of Rs. 2,18,09,000/- being the lower of unabsorbed depreciation or business loss as per books of accounts from the computation of book profits u/s 115JB of the Act in the facts of the case.

3.1. The Learned AO held that there was no loss available for reduction from the book profits u/s 115JB of the Act and hence the sum of Rs. 2,18,0,9000/-reduced by the assessee was not considered for reduction by the Learned AO. On first appeal, the said reduction was granted by the Learned CITA by relying on certain case laws. Aggrieved, the revenue is in appeal before us on the following ground:-

(ii) That the Ld. CIT(A) has erred in Law as well as in facts and circumstances of the case in directing to reduce the Book Profit u/s 115JB by an amount of Rs.2,18,09,000/- when the admissible amount, i.e., lower of 'unabsorbed depreciation' or 'business loss' was actually 'NIL'.

3.2. The Learned DR vehemently supported the order of the Learned AO. In response to this, the Learned AR argued that the finding given by the Learned AO that the loss as per books of accounts once reduced from book profits in earlier years would not be available for reduction in the subsequent years. He stated that the losses would continue to remain in the books of accounts till it is wiped out by profits derived by the assessee. Accordingly, he argued that the assessee company is very much entitled for reduction of least of the cash loss or depreciation loss as per books of accounts from book profits for computation u/s 115JB of the Act.

3.3. We have heard the rival submissions and perused the materials available on record. We are in agreement with the arguments of the Learned AR that the losses ( both cash loss and depreciation loss) would continue to remain in the books of ITA No.144/Kol/2013-A-AM M/s. Binani Industries Ltd 13 accounts till it is wiped off by earning profits by the assessee company and accordingly the same would be available for reduction from book profits u/s 115JB of the Act. We hold that the least of the cash loss or depreciation loss once adjusted / reduced from book profits in earlier assessment years, do not vanish out of the books until it is wiped out by profits in subsequent years. Till such time, the losses would only continue to remain in the books. We hold that for the purpose of computation of book profits u/s 115JB of the Act, every year the situation of least of cash loss and depreciation loss needs to be worked out and reviewed and accordingly the understanding of the Learned AO that such loss once adjusted in earlier year is no longer available for set off is misconceived. Hence we do not find any infirmity in the order of the Learned CIT(A) in this regard. The Ground No.2 raised by the revenue is dismissed.

3.3. In view of the aforesaid observations and respectfully following the aforesaid judicial precedent, we direct the ld. AO to grant reduction of unabsorbed depreciation amounting to Rs.8,48,95,742/- and re-compute the book profits u/s.115JB of the Act thereon. Accordingly, the ground No I raised by the assessee is allowed.”

15. In the case of Owens Corning India Ltd. Vs. ITO, Mumbai Bench of the ITAT vide ITA No. 461 & 849/Mum/2009, it was held that the aggregate amount of unabsorbed depreciation or brought forward losses of all the years should be taken together and whichever is lower figure should be adopted for the purpose of computing book profit u/s. 115JB and it cannot be considered on year to year basis. Moreover, Hon'ble ITAT Delhi in the case of PVR Pictures Vs. DCIT also held that Explanation (1) to section 115JB used expression “unabsorbed depreciation” which has distinct connotations vis-à-vis total depreciation. So the claim of the assessee made in the return of

income being lower of the unabsorbed depreciation and business loss deserves to be set off against current year book profit in terms of provisions of section (3) of Explanation 1 to section 115JB of the Act. Since there is nothing in Explanation (1) to section 115JB of the Act to suggest that while computing brought forward loss or unabsorbed depreciation, the working is to be done on year to year basis, the working done and consequent disallowance by the Ld. AO is deleted. Hence, the assessee-company's claim u/s. 115JB of Rs. 5,72,25,778/- is upheld.

16. In the result Departmental appeal is dismissed.

Order pronounced in the open court on 23<sup>rd</sup> September, 2024.

Sd/-  
(Narender Kumar Choudhry)  
Judicial Member

Sd/-  
(Omkareshwar Chidara)  
Accountant Member

Mumbai : 23.09.2024

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai.
6. Guard File.

//True Copy//

PS

BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai