

**IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH “G”: NEW DELHI]**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER
(Through Video Conferencing)**

ITA. No. 7539/Del/2017
(Assessment Year: 2014-15)

ACIT, Circle :19 (2), New Delhi.	Vs.	People Strong HR Services Pvt. Ltd., 216 (72B) Lane-12, East Azad Nagar, Krishna Nagar, Delhi-110 051. PAN: AADCP8140Q
(Appellant)		(Respondent)

Assessee by :	Ms. Devika Chaudhary,
Department by:	Shri Prakash Dubey, Sr. D.R.;
Date of Hearing :	07/10/2021
Date of pronouncement :	07/12/2021

ORDER

PER AMIT SHUKLA, J. M.

1. This appeal by the Revenue is filed against the order dated 21.09.2017 passed by the Commissioner of Income Tax (Appeals)-38, New Delhi, for assessment year 2014-15.

2. The following grounds of appeal are raised by the Revenue:-

“1. On the facts and circumstances of the case, the Ld. CIT(A) has erred in deleting the addition Rs. 3,01,60,201/- on account

of disallowance of ESOP expenses by holding the notional discount on shares issued under ESOP scheme as revenue expenditure allowable u/s 37(1) of the I.T. Act, 1961.

2. On the facts and circumstances of the case, the Ld CIT(A) erred in deleting the addition of Rs. 3,01,60,201/- on account of disallowance of ESOP expenses ignoring the fact that allowability of expenditure u/s 37(1) of the Act cannot be determined on the basis of SEBI guidelines. “

3. The facts in brief qua the issue raised are that, the assessee has debited an amount of Rs.3,01,60,201/- on account of amortization of deferred option of a stock option scheme to employees. The ld. Assessing Officer required the assessee to justify the claim for the same in response to which the assessee had stated as under:-

“The assessee had incurred and claimed amount of Rs.30,160,201/- towards cost incurred by it on stock option plan extended to its employees and recognized aforesaid cost in line with GN(A) 18: Guidance Note on Accounting for Employee Share-based Payments issued by the Institute of Chartered Accountants of India (ICAI). As ESOP cost has been incurred by the assessee for the purposes of the business, it do not fall in any category envisaged by the provisions of Section 37 of the Income Tax Act, 1961.

The same treatment is also endorsed by Hon'ble Madras High Court in the matter of CIT-III Chennai vs PVP Ventures Ltd. (Madras)/[2012] 211 Taxman 554 (Madras), which categorically allowed such expenditure considering various aspects of materially similar stock option scheme offered by the assessee company.

The similar position has been upheld by the Income Tax Appellate Tribunal (ITAT), Delhi in ITA No. 4588/Del/2013 for the Assessment Year (AY) 2008-09 and further affirmed by Hon'ble Delhi High Court in CIT vs. Lemon Tree Hotels Ltd in ITA

107/2015, Date-18.08.2015.

Further similar views were expressed by the special bench of ITAT constituted by the president of ITAT in the case of Biocon Ltd. (ITA No. No.368/M/10 & others) which concluded that discount under ESOP is in the nature of employee cost and therefore, deductible during the vesting period on the difference between the market price of shares on the date of grant of options to the employees and the exercise price. However, an upward or downward adjustment to the aforesaid amount is called for depending on the market price at the time of exercise of options. Further, the amount of discount claimed is required to be reversed in relation to the unvested or lapsed options.”

4. The Id. Assessing Officer held that the employees’ compensation as per SEBI guidelines does not include ESOP and held that amortization of deferred employees’ compensation is not expenditure in terms of Section 37 because issue in shares at discount the company had paid out nothing. He further held that the discount represents the difference between the market price and fair market value of the short capital receipt. Even if it were to be considered as expenditure, it could only be in the nature of either notional expenditure or capital expenditure. The assessee had not paid this notional discount and had no liability to make such payment accordingly, the artificial difference in face value of share as compared to so called fair market value of unquoted share cannot be described as expenditure u/s 37(1) of the Act in view of above referred to judicial interpretation of the term “expenditure” u/s 37(1) of the Act. Thus, he disallowed the claim of Rs.3,01,60,201/-.

5. The Id. CIT (Appeals) after quoting the judgement of Hon'ble Special Bench in the case of Biocon Ltd. (supra) and Hon'ble Delhi High Court in the case of CIT vs. Lemon Tree Hotels Ltd (supra) as also in assessment year 2013-14 decided the issue in favour of the assessee. The relevant observations read as under:-

“3.2 I have carefully considered the submissions of appellant, the assessment order and the judicial pronouncements relied upon by appellant. Respectfully following the above cited decisions of Hon'ble Delhi High Court in CIT Vs. Lemon Tree Hotels Ltd. in ITA. 107/2015 dated 18.08.2015 and Special Bench of Hon'ble ITAT Bangalore in the case of Biocon Ltd. supra, as the facts and circumstances are identical. This issue has been decided for AY 2013-14 by me on identical facts. It is held that expenditure on ESOP is in the nature of employee cost and hence is allowable as deduction in computing the income under the head profits and gains of business and profession during the vesting period and Ld. AO is directed to compute the amount of discount allowable as deduction on account of ESOP as per the method given by Hon'ble Special Bench of ITAT in the case of Biocon Ltd. This direction is given as the AO did not examine the calculation of quantum of allowability of deduction claimed. Further, since the appellant company is not a listed entity as in the case of Biocon Ltd., therefore, assessing officer is directed to consider the relevant factors as discussed by Hon'ble Special Bench ITAT Bangalore in the case of Biocon Ltd. in para Nos. 12.1 to 12.3 while deciding the quantum of allowability, after providing sufficient opportunity of being heard to appellant for computing the amount of allowable deduction. Hence, ground of appeal 1 is partly allowed. “

6. After considering the rival submissions and going through the material placed on record, we find that it is now well settled proposition that the issue of allowability of ESOP discount being the difference between the market value of shares and the value at which employees had been given the shares is covered, not only by the decision of Hon'ble jurisdictional High Court **in CIT Vs. Lemon Tree Hotels Ltd.**, but also by the judgement of the Special Bench in the case of Biocon Ltd. (supra). This judgment of special bench has now been approved by the Hon'ble Karnataka High Court vide order dated 11.11.2020 and held that employees' discount represents consideration for services rendered by employees and hence it is a deductible business expenditure and it cannot be equated with share premium and it is to be intended towards profit by securing employees' consistent services. Apart from that, it was further held that it is an ascertain liability since employees' incurred obligation over the distinct period, notwithstanding the fact that exact amount as quantified at the time of exercising options. The Hon'ble Karnataka High Court has also concurred with the view of Hon'ble Delhi High Court in the case of CIT Vs. Lemon Tree Hotels Ltd. (supra). Accordingly, we do not find any infirmity in the order of the ld. CIT (Appeals) following the judgement of Hon'ble jurisdictional High Court and also the Special Bench which has now been confirmed by the Hon'ble Karnataka High Court. The appeal of the Revenue is thus dismissed.

Order pronounced in the open court on: **07/12/2021.**

Sd/-
(ANADEE NATH MISSHRA)
ACCOUNTANT MEMBER

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Dated : 07/12/2021.

MEHTA

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

ASSISTANT REGISTRAR
ITAT, New Delhi.

Date of dictation	7.12.2021
Date on which the typed draft is placed before the dictating member	7.12.2021
Date on which the typed draft is placed before the other member	7.12.2021
Date on which the approved draft comes to the Sr. PS/ PS	7.12.2021
Date on which the fair order is placed before the dictating member for pronouncement	7.12.2021
Date on which the fair order comes back to the Sr. PS/ PS	7.12.2021
Date on which the final order is uploaded on the website of ITAT	7.12.2021
date on which the file goes to the Bench Clerk	7.12.2021
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	