

**IN THE INCOME TAX APPELLATE TRIBUNAL DELHI
BENCH 'I-1', NEW DELHI**

**BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND SH. KUL BHARAT, JUDICIAL MEMBER**

(THROUGH VIDEO CONFERENCING)

ITA Nos. 6558/Del/2018 & 612/Del/2019
Assessment Years : 2013-14 & 2012-13

DCIT Circle – 1 Noida PAN : AABCD 1821 C	Vs.	Jubilant Foodworks Ltd. Plot No.1-A, Sector – 16A, Noida, Uttar Pradesh
(APPELLANT)		(RESPONDENT)

CO Nos. 44 & 43/Del/2021
Assessment Years : 2013-14 & 2012-13

Jubilant Foodworks Ltd. Plot No.1-A, Sector – 16A, Noida, Uttar Pradesh	Vs.	DCIT Circle – 1 Noida
(APPELLANT)		(RESPONDENT)

Assessee by	Shri K. M. Gupta, Adv. Ms. Shruti Khimta, A.R.
Revenue by	Shri Surender Pal, CIT (DR)

Date of hearing:	22.11.2021
Date of Pronouncement:	08.12.2021

ORDER**PER ANIL CHATURVEDI, AM :**

These appeals by the Revenue and cross objections by the assessee are preferred against the orders of the Commissioner of Income Tax (Appeals)-43 & 44, New Delhi dated 13.07.2018 & 28.11.2018 pertaining to Assessment Years 2013-14 & 2012-13 respectively.

2. At the outset, Learned AR submitted that the issue involved in all the appeals are identical except for the year and amounts involved and, therefore, the submissions made by him for one year would be applicable to the other years. Before us, both the parties submitted that appeal for A.Y. 2013-14 be taken up because CIT(A) while deciding the issue in A.Y. 2012-13 has followed his order for A.Y. 2013-14. It was further submitted that the issues raised in Revenue's appeal and the Cross Objection of the assessee are identical in A.Y. 2012-13 & A.Y. 2013-14 and the arguments made would be applicable for both the years. Ld DR did not controvert the aforesaid submissions of Ld AR. In view of the aforesaid submissions of the Counsel, we for the sake of convenience, proceed to dispose of all the appeals by a consolidated order but for the sake of reference, refer to the facts for A.Y. 2013-14 in ITA No.6558/Del/2018.

3. The relevant facts as culled from the material on records are as under :

4. Assessee is a company which is stated to have entered into franchisee agreements with Domino's and Dunkin Donuts Group for operating up of Domino's and Dunkin Donut's store with an exclusive right for sale in India. Assessee electronically filed its return of income for A.Y. 2013-14 on 29.11.2013 declaring total income at Rs.146,53,33,815/-. The case was taken up for scrutiny and thereafter assessment was framed u/s 143(3) r.w.s 144C of the Act vide order dated 09.02.2017 and the total income was determined at Rs.232,84,63,600/-. Aggrieved by the order of AO, assessee carried the matter before CIT(A) who vide order dated 13.07.2018 in Appeal No.273/2016-17 granted substantial relief to the assessee. Aggrieved by the order of CIT(A), Revenue is now in appeal and has raised the following grounds:

- “1. That the Ld. CIT(A) has erred in law and on facts by treating the expenditure of Rs. 47,37,14,260/- being leasehold improvement made by assessee as revenue in nature.*
- 2. The appellant craves to leave, add, alter and amend any of the grounds of appeal on or before hearing.*
- 3. That the order of the Ld. CIT(A) deserves to be set aside and the order of the AO be restored.”*

5. Assessee has raised Cross Objection vide CO No.44/Del/2021 and the grounds raised reads as under:

1. *“On the facts and in the circumstances of the case and in law, the order passed by the Commissioner of Income Tax (Appeal)-44, New Delhi (hereinafter referred to as ‘Ld. CIT(A)’)* u/s 154 r.w.s 250 of the Income Tax Act, 1961, dated 13.07.2018 is erroneous and bad in law to the extent prejudicial to Appellant.
2. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A)/AO/TPO erred in law by invoking the provisions of Chapter X of the Act and erroneously held that provisions of section 92A (2)(g) of the Act in respect of the transaction of the Appellant with the third parties namely Domino Pizza Overseas Franchise BV (DPOF), Domino Pizza International Franchising Inc. (DPIF) & Dunkin Donuts Franchising LLC (DDFL).*
3. *That the Ld. CIT(A)/TPO erred incorrectly holding that entities with whom Appellant has undertaken transaction payment of royalty are Associate Enterprises of the Appellant in complete disregard of the judicial precedents.*
4. *On the facts and in the circumstances of the case and in law, the appellant is eligible to claim deduction for ESOP Expenses in view of Hon’ble Bangalore Tribunal Special Bench in the case of Biocon Ltd. vs. DCIT (LTU) 35 taxmann.com 335 (2013) and computed inconformity with SEBI/ICAI Guidelines.*
5. *On the facts and in circumstances of the case and provisions of law, the Appellant is eligible to claim the deduction of ‘education cess’ and ‘secondary and higher education cess’ paid, while computing its income under the head ‘Profits and Gains from Business and Profession’ for the year under consideration.”*

We first proceed with the appeal of Revenue in ITA No.6558/Del/2018 for A.Y. 2013-14 :

6. The sole controversy is with respect to treatment of expenditure on account of leasehold improvement considered by AO as capital expenditure.

7. During the course of assessment proceedings and on perusing the computation of income, AO noticed that assessee had claimed deduction u/s 37 of the Act of Rs.47,37,14,260/- on account of leasehold improvements. Assessee was asked to justify the claim of expenditure as Revenue in nature. Assessee made the submissions which was not found acceptable to AO. AO noted that assessee has done massive level improvements costing a very huge amount resulting into the creation of assets, meeting with the international parameters for obtaining and running the stores of Dominos Pizza and Dunkin Donuts – chain of restaurants and takeaways which according to AO has resulted into creation of asset with the nature of Infrastructure Improvement which materially extend the useful life or increase the value of the infrastructure. He was of the view that the expenditure being in the nature of extensive renovation and beautification of the stores, results into an enduring benefit to the assessee. He therefore held the expenditure incurred to be of capital in nature requiring capitalization. He therefore denied the claim of Revenue expenditure but however allowed the depreciation at 15%

amounting to Rs.710,57,139/- and thus disallowed the net expenditure of Rs.40,26,57,121/-.

8. Aggrieved by the order of AO, assessee carried the matter before CIT(A). CIT(A) after considering the submissions of the assessee decided the issue in favour of the assessee and while deciding the issue has noted that assessee is a franchise of 'Domino's Pizza' and 'Dunkin Donuts' and had take on lease bare shell premises of various entities during the year under consideration. In order to run a Dominos outlet having a specific ambience and outlook, assessee was required to make extensive modifications in the premises that was obtained on lease and the modification did not create any new asset. He has further noted that the process of setting up new stores to be a continuous process thereby implying that by every year some new stores are setup and thus the expenditure on renovation and repairs of stores assumes the character of revenue in nature. He has further given a finding that assessee cannot carry out his business in a store which is any different from a store of Domino's pizza outlet and for this reason also the expenditure incurred by the assessee falls u/s 37(1) of the Act as being one which is necessary for business. CIT(A) thereafter relying on the decision of Hon'ble Delhi High Court in the case of **CIT vs. Hi Line Pens (P.) Ltd. [2008] 175 taxman 132 (DHC)** held expenses to be revenue in nature. Aggrieved by the order of CIT(A), Revenue is now before us.

9. Before us, Learned DR took us to the findings of ITO and supported the order of AO. He also placed reliance on the decision rendered by Hon'ble Delhi High Court in the case of **Bharat Gears Ltd. Vs. C.I.T. in [2011] 337 ITR 368 (Del.)**

10. Learned AR on the other hand reiterated the submissions made before the lower authorities and supported the order of CIT(A).

11. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the treatment of expenditure which has been considered by AO to be of capital in nature as against the claim of the assessee of being revenue in nature. We find that CIT(A) after considering the detailed submissions of the assessee has given a finding that considering the nature of business of the assessee, the modifications done in the various lease premises taken by the assessee for the purpose of business did not create any new asset, the expenditure of renovation and repairs of stores assumed a character of revenue in nature and the expenditure incurred by the assessee was necessary for the purpose of business and squarely fall u/s 37(1) of the Act. Before us, no fallacy in the findings of CIT(A) has been pointed out by Revenue. The case law relied upon by Revenue is distinguishable on facts and therefore not applicable to the present facts of the assessee.

In such circumstances, we find no reason to interfere with the order of CIT(A) and **thus the Ground of Revenue is dismissed.**

12. In the result, appeal of the Revenue is dismissed.

We now proceed with ITA No.612/Del/2019 for A.Y. 2012-13:

13. Before us, both the parties have submitted that the issue raised in A.Y. 2012-13 is identical to that of A.Y. 2013-14. We have hereinabove while deciding the appeal for A.Y. 2013-14 for the reasons stated therein have dismissed the appeal of the Revenue. We for similar reasons also dismiss the appeal of the Revenue for A.Y. 2012-13. Thus **the ground of the Revenue is dismissed.**

14. In the result, appeal of the Revenue is dismissed.

Now we take up Cross Objection No.44/Del/2021 for A.Y. 2013-14 :

15. Before us, Learned AR submitted that for A.Y. 2012-13 & 2013-14, assessee vide Ground No.3 is making fresh claim with respect of allowability of ESOP expenses and vide Ground No.4 is making fresh claim with respect to allowance of deduction of 'education cess' and 'secondary and higher education cess' paid.

16. With respect to the aforesaid claims, it is the submission that the aforesaid issues are purely legal issues and the material facts are on record to adjudicate the issue and as such no fresh evidence or material is warranted. The Learned AR submitted that in the interest of justice the additional grounds be admitted and the same be adjudicated along with other grounds. For the admission of additional ground he placed reliance on the decision of Hon'ble Apex Court in the case of National Thermal Power Company vs. CIT reported in (1998) 229 ITR 383.

17. Learned DR however did not seriously objected to the application of admission of additional ground.

18. On the issue of admission of additional grounds, we have heard the rival submissions and perused the materials on record. We find force in the argument of Learned AR that the ground raised is legal in nature. Hon'ble Apex Court in the case of National Thermal Power Company Ltd. (supra) has held that the purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. It has further held that if as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, there is no reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on

record in respect of the item. In view of the aforesaid, we admit the additional ground of appeal.

19. Before us, at the outset, Learned AR submitted that Ground No.1 is general in nature therefore require no adjudication. In view of the aforesaid submissions **ground No.1 is dismissed.**

20. **Ground No.2 & 2.1** is with respect to holding the applicability of the provisions of Section 92A(2) of the Act to the transactions of the assessee with Domino's Pizza Overseas Franchise BV (DPOF), Domino's Pizza International Franchising Inc. (DPIF) & Dunkin Donuts Franchising LLC (DDFL).

21. Before us, at the outset, Learned AR submitted that TPO held Dunkin Donuts as Associated Enterprise of the assessee and therefore the transaction of the payment of Franchise fee was subject to reference to Transfer Pricing Officer for determination of Arm's Length Price under Chapter – 10 of the Act. He submitted that when the matter was carried before CIT(A), CIT(A) upheld the order of TPO with respect to the payment of franchise fee to be subject to Transfer Pricing Regulation but however on the quantum of addition made u/s 92CA (3) of the Act, he decided the issue in favour of the assessee against which the Revenue is not in appeal. In view of these facts, he submitted that the issue be decided accordingly.

22. Learned DR on the other hand did not controvert the submissions made by Learned AR but however supported the order of TPO.

23. We have heard the rival submissions and perused the materials available on record. Before us, Learned AR has fairly admitted that though CIT(A) had held the transaction by the assessee with DPOF/DDIF and DDFL to be subject to Transfer Pricing Regulation, but on the quantum of addition, he has decided the issue in favour of the assessee. In such a situation, we are of the view that the issue has been rendered academic and therefore requires no adjudication. **We therefore dismiss the ground of CO of the assessee.**

24. **Ground No.3** is with respect to the claim of deduction for ESOP Expenditure.

25. Learned AR submitted that during the year assessee instituted JFL Employee's Stock Option Scheme (ESOP 2011) in addition to the Employee's Stock Option Plan 2007 which were still in force. During the year under consideration, the employees were allotted equity shares upon exercise of stock option under the Employee's Stock Option Plan 2007 (ESOP 2007). The Employee's Stock Option Scheme is governed by the SEBI Regulation as assessee is a Public Ltd. Company listed on BSE & NSE. He submitted that accounting value of ESOP expenditure is

accounted as employee compensation and amortised and claimed over the vesting period as per SEBI Guidelines and Guidance note issued by ICAI. He submitted that assessee company to account for ESOP expenditure had followed “Intrinsic value” method which is one of the method provided under SEBI guidelines which resulted into no charge of ESOP expenses in the P&L account for the year under consideration as the market price prior to the date of meetings of the Board of Directors in which the options were granted/shares were issued was equivalent to grant price. However the use of ‘fair value’ method computed in accordance with SEBI Guidelines resulted into charge of Rs.3,12,63,000/-, the disclosure of which has been made in the Audited Financial Statements. He submitted that on account of Nil expenditure charged to Profit and Loss account for the year under consideration for ESOP expenditure, no deduction was claimed by the assessee in the return of income. However allowance of the ESOP expenditure had been a subject matter of litigation not only with respect to its allowance as Revenue expenditure but also with respect to the quantum to be allowed in the year of grant, vesting and exercise year. He submitted that the aforesaid controversies has been settled by decision of Special Bench of Tribunal in the case of **Biocon Ltd. Vs DCIT (LTU) 35 taxmann.com 335 (2013)**. He submitted that as per the aforesaid decision of Special Bench of Tribunal in the case of Biocon Ltd. (supra), discount under ESOP is in the nature of employees cost and hence deductible during the vesting period

and the allowance of ESOP expenses is to be computed for in the respective financial year's with respect to the market price of shares at the time of grant of options to the employees. Further, ESOP expenses needs to be adjusted in relation to the unvesting/lapsing options at the appropriate time meaning thereby that the amount already claimed as ESOP expenses in earlier years on vesting needs to be reversed in subsequent years in which unvesting/lapsing options occurred in the books of accounts and the claims should be made accordingly for tax purposes. In the case of assessee, as per the prescribed intrinsic value method, no deduction was claimed in the return of income for the year under consideration but however assessee had issued ESOP to various employees. He further submitted that the assessee has duly deducted tax at source on the perquisite value on exercise of such ESOPs in the hands of the employee on the amount of discount being the difference between market price on the date of exercise by the employees and the exercise price at the time of grant in accordance with the provision of Act. He submitted that in view of the aforesaid decision of Special Bench in the case of Biocon Ltd. (supra), the ESOP expense is allowable. He therefore submitted that AO be directed to grant the claim of ESOP expenditure.

26. Learned DR on the other hand did not controvert the submissions made before us but however submitted that the

issue needs to be examined by the lower authorities and therefore the matter may be remitted to AO for deciding the issue.

27. We have heard the rival submissions and perused the materials available on record. The issue in the present ground is with respect to the claim of ESOP expenditure. It is an undisputed fact that no claim of ESOP expenses was made by the assessee in the return of income nor was it claimed before the lower authorities. Assessee is now claiming the deduction of ESOP expenses in view of the decision of Special Bench of Tribunal in the case of Biocon Ltd. (supra). The assessee having issued shares to its employees upon exercise of stock options under Employee's Stock Option Scheme is not disputed. We find that Special Bench of the Tribunal in the case of Biocon Ltd. vs. DCIT (35 Taxmann.com 335 (2013) SB) has *inter alia* held that the discount on issue of Employees Stock Options is allowable deduction in computing the income under the head "profit and gains of business". It is also a fact that since the claim was never claimed by the assessee before the lower authorities, there is no finding on the issue by the AO/CIT(A). In such a situation, we are of the view that the issue needs to be examined. We therefore restore the issue back to the file of AO to decide it after considering the submissions of the assessee and in accordance with law. Needless to state that AO shall grant adequate opportunity of hearing to the assessee. Assessee is also directed

to promptly furnish the details called for by the AO. **Thus the ground of assessee is allowed for statistical purposes.**

28. **Ground No.4** is with respect to the claim of 'education cess' and 'secondary and higher education cess' paid by the assessee.

29. This is an additional ground claimed by the assessee. Before us, Learned AR submitted that during the relevant assessment year, assessee had paid education cess amounting to Rs.1,22,36,659/- which was not claimed as deduction while filing the return of income. The assessee now claims it as deduction in view of the decision of Hon'ble Rajasthan High Court in the case of **Chambal Fertilizers and Chemicals Ltd. vs. CIT (Appeal No. 52/2018 order dated 03.07.2018)** and the decision of Hon'ble Bombay High Court in the case of **Sesa Goa Ltd. vs. JCIT (Tax Appeal No.17/2013 and others dated 28.02.2020)**. Learned AR thus submits that education cess being not in the nature of tax and not being a disallowable expenditure u/s 40A(2) of the Act, the claim of its deduction be allowed.

30. Learned DR on the other hand did not controvert the submissions made by Learned AR.

31. We have heard the rival submissions and perused the relevant materials available on record. The issue in the present ground is with respect to 'education cess' and secondary and

higher education cess'. It is assessee's contention that the aforesaid payment of cess was not claimed as deduction while filing the return of income. We find that Hon'ble Bombay High Court in the case of Sesa Goa Ltd. (supra) after considering CBDT Circular No. F. No.91/58/66-ITJ (19) dated 18th May 1967 has held that provision of Section 40a(ii) of the Act does not include "cess" & consequently, "cess" whenever paid in relation to business is allowable as deductible expenditure. It further observed that though the claim of deduction of education cess and higher and secondary education cess was not raised in the original or revised return but when it is claimed before the appellate authorities, the appellate authorities is bound to consider such claim.

32. Before us, Revenue has not placed any contrary binding decision in its support. In such situation, we, relying on the aforesaid decision of Hon'ble Bombay High Court in the case of Sesa Goa (supra) hold that the expense on education cess to be allowable expense and therefore, we direct the AO to allow the claim of assessee in accordance with law. **Thus, ground of Cross Objection of the assessee is allowed.**

33. As far as the Co of the assessee for A.Y. 2013-14 is concerned, before us, Learned AR had submitted that the issue raised are identical to that of A.Y. 2012-13. We have hereinabove,

while deciding the CO of the assessee for A.Y. 2012-13 and for the reasons stated hereinabove allowed the CO of assessee. We for similar reasons allow the CO of assessee for A.Y. 2013-14. **Thus the CO of the assessee is allowed.**

34. In the result, appeals of Revenue are dismissed and Cross Objections of assessee are allowed.

Order pronounced in the open court on 08.12.2021

Sd/-

**(KUL BHARAT)
JUDICIAL MEMBER**

Date:- 08.12.2021

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Copy forwarded to:

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

Sd/-

**(ANIL CHATURVEDI)
ACCOUNTANT MEMBER**

ASSISTANT REGISTRAR
ITAT NEW DELHI