

आयकर अपीलीय अधिकरण, मुंबई ए खंडपीठ

Income-tax Appellate Tribunal -“A”Bench Mumbai

सर्वश्री राजेन्द्र,लेखा सदस्य एवं अमित शुक्ल न्यायिक सदस्य

Before S/Sh.Rajendra,Accountant Member and Amit Shukla,Judicial Member

आयकर अपील सं./I.T.A./2096/Mum/2014,निर्धारण वर्ष /Assessment Year: 2010-11

DCIT-4(3), 6 th Floor, Room No.649 Aayakar Bhavan Mumbai-400 020.	Vs.	M/s. Kotak Securities Ltd. 1 st Floor, Bakhtawar,229 Nariman Point,Mumbai-400 021. PAN: AAACK 3436 F
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A./1232/Mum/2014,निर्धारण वर्ष /Assessment Year: 2010-11

M/s. Kotak Securities Ltd. Mumbai.	Vs.	DCIT-4(3), Mumbai-400 020.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

Revenue by: Ms. Malathi Sridharan

Assessee by: F.V. Irani

सुनवाई की तारीख / Date of Hearing: 09.03.2016

घोषणा की तारीख / Date of Pronouncement: 11.03.2016

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the order, dated 24/01/2014, of the CIT(A)-8,Mumbai the Assessing officer (AO) and the assessee have filed the cross appeals for the year under consideration raising various grounds of appeals.Assessee-company,engaged in the business of share broking etc.,filed its return of income on 28/09/2010,declaring total income of Rs.3,96,43,36,790/-. The AO completed the assess -ment,u/s.143 (3) of the Act,on 01/03/2013,determining the income of the assessee at Rs.4,08, 95,72,691/-.

I.T.A./1232/Mum/2014:

2.First ground of appeal is against the disallowance of expenses, amounting to Rs.2.41 crores.During the assessment proceedings,the AO found that the assessee had earned dividend income of Rs.82,46,614/- (Rs.54.55 lakhs from equity shares and Rs.27.91 lakhs from preference shares),that the assessee had made no disallowance in the return of income as per the provisions of section 14A of thy Act. Without prejudice the assessee had made a disallowance of Rs. 19.39 lakhs under section 14 A read with rule 8D of the income tax rules 1962 Rules .The assessee submitted that in case disallowance under section 14 A was to be made it should be restricted to Rs. 19.87 Lacs only. However, the AO held that the contention of the assessee regarding strategic investment was not acceptable, that investment in shares/ preference shares required experience and professional skills.Finally,he made a disallowance of Rs. 2.22 crores (Rs. 2.41 crores minus Rs. 19.39 lakhs) under section 14 A read with rule 8D of the rules.

3.Aggreived by the order of the AO, the assessee preferred an appeal before the first appellate authority (FAA). Before him, the assessee made elaborate submissions. After considering the assessment order and the submission of the assessee,he referred to the orders of his predecessors for the earlier years and upheld the disallowance made by the AO.

4. Before us, the Authorised Representative (AR) stated that similar issue had arisen in the earlier years, that the tribunal had restored back the matter to the file of the AO for fresh adjudication. The departmental representative (DR) left the matter to the discretion of the bench.

5. We have heard the rival submissions and perused the material before us we find that while deciding the appeals for the earlier years (ITA////- AY, dated) the tribunal has observed as under:

“We have heard both the parties on this issue and perused the orders of the revenue. Bharati of CIT (A)’s order is relevant to the issue and find that the para 3.5 contains the conclusion of the CIT (A). It is clear from the said paragraph that assessee’s claim of the expenditure on earning of exempt income is not remitted by the revenue. They applied the provisions of section 14 A read with rule 8D mechanically without regulating expressly the claim of Neil expenditure on the exempt income. It is also noticed that the CIT (A) has not attended the assessee’s objections raised in round numbers 1 to 4 and eight sub grounds as well as the written submissions before the CIT (A). Assessing officer failed to record satisfaction on in corrections, if any, of the assessee’s claim in the return and other objections raised in ground number four (A) to 4 (E) of the appeal. On hearing both the parties and on perusal of the said order of the tribunal in the case of Nessus Walch Nagar industries Ltd (supra), we find wide para 10 the tribunal dealt with the similar issue and the tribunal remanded the issue to the file of the assessing officer for fresh adjudication.....

7. Thus, it is the requirement of law that the assessing officer needs to record his satisfaction on incorrectness of the assessee’s claim in the return. Assessing officer has not recorded the same in this case. Therefore, considering the above as well as following the rule of consistency, we are of the opinion that this issue should also be remanded to the file of the assessing officer for fresh adjudication. Assessing officer is directed to record his satisfaction in accordance with law. Further he is directed to attend to the arguments relating to the claim that the impugned investments are for holding control and management of the related companies. Assessing officer is also directed to attend to all the written submissions of the assessee made before CIT (A) to and considered the relevant judgement before deciding the issue. Assessing officer shall grant a reasonable opportunity of being heard of the assessee. Accordingly, ground number one is allowed for statistical purposes.”

Respectfully following the above order of the tribunal for the earlier years, first ground of appeal is decided in favour of the assessee, in part.

6. Second ground of appeal deals with addition made on account of AIR information. As per the AO, the assessee was not able to reconcile the difference pointed out by him with regard to AIR information. Before the FAA, the assessee argued that the AO had not given the assessee an opportunity of cross examination with regard to the transactions appearing in the report. As the assessee did not produce any evidence to prove that the transactions listed in the report did not pertain to it, the FW following the principles of natural justice, directed the AO to re-examine the AIR data. He further held that if the assessee was able to reconcile the difference, no addition should be made. However, if the assessee was not in a position to file a consideration statement the AO could make necessary additions.

7. During the course of hearing before us, AR stated that in the earlier years matter was restored back to the file of the AO by the tribunal. The DR left issue to the discretion of the bench.

We find that while deciding the appeal for the earlier years the tribunal had dealt with the issue as under:

“We have heard both the parties and Paris the orders of the revenue on the issue of reconciliation of AIR data qua the books of accounts of the assessee stop refining his recorded by the assessing officer that no exhaustive exercise of reconsideration is undertaken by him before making the said addition. Assessee is certain. The consideration, if one more opportunity is granted considering the same, we read remand this ground to the file of the assessing officer for fresh adjudication of the issue after granting a reasonable opportunity of being heard to the assessee.

Respectfully, following the above order ground number 2, raised by the assessee is restored back to the file of the AO for fresh adjudication. He is directed to afford a reasonable opportunity of hearing to the assessee. The assessee would produce all the necessary evidences and reconcile the difference. In our opinion direction given by the FW were quite reasonable. Therefore we don't see any infirmity in his order. Ground number two stands partly allowed in favour of the assessee.

I.T.A./2096/Mum/2014

9.First ground of appeal, raised by the AO, deals with depreciation on uninterrupted power supply(UPS). During the course of hearing before us, the representatives of both the sides agreed that the tribunal had decided the issue in favour of the assessee, while adjudicating the appeals for the earlier years. We would like to reproduce the paragraphs 27-28 of the order of the tribunal dated (supra) and same reads as under:

“We have heard both the parties and perused the orders of the revenue authorities as well as the cited order of the tribunal (supra) dated 21 five 2012 on perusal of the said order of the tribunal, we find the similar issue was decided by the tribunal in assessee's own case for the a Y 2006 – 07 and para 13 is relevant. For the sake of completeness of this order, the said para 13 of the tribunal's order dated 21.5.2012 is extrActed as follows

13. We have heard both the parties and perused the records. We find that the issue stands covered by the coordinate bench of the ITAT, Joe the poor in the case of surface finishing equipment (supra). We therefore, following the decision of the coordinate bench, direct the assessing officer to allow the depreciation at the rate of 80% on the UPS instead of 15%. Accordingly, ground number seven is allowed.”

28. Considering the above covered nature of the issue as well as respectfully following the decision of the coordinate bench and also following the principle of consistency, the depreciation at the rate of 80% should be allowed on UPS instead of 15% granted by the assessing officer. Accordingly ground raised by the revenue are dismissed.

Respectfully following the order of the bench for the earlier years ground number one is decided against the AO.

10.Next issue is about marked to market losses (MTM). The DR and the AR, agreed that identical issue had arisen in the earlier years and the tribunal had decided the issue in favour of the assessee, that the FAA had followed the order of the tribunal. We are reproducing the order of the tribunal and it reads as under

“We have heard both the parties and perused the orders of the revenue authorities as well as cited decision of the tribunal and the relevant material placed before us. It is an undisputed fact that the derivatives, which is the subject matter of impugned MTM loss, are commodities of trading account. The same are treated on exchange on par with shares and stock options and futures. The losses are held allowable against the profits of the assessee while the related profit on account of MTM are being ignored considering the consistent method of accounting followed by the assessee. The same is in accordance with guidance note/and accounting standard issued by the ICAI. It is the claim of the assessee that the same consistently accepted by the Department as well. We have also perused the order of the tribunal in the case of Kotak Mahindra investment Ltd (supra), which was decided based on the other decision of the tribunal of Bombay benches we find para three of the said order of the tribunal in the case of

Kotak Mahindra investment Ltd (supra) is relevant and the facts are comparable to the instant case”

After reproducing the order of Kotak Mahindra investment Ltd. the Tribunal further held as under:

“The facts pertaining to decision of the Tribunal in the above mentioned case include that the derived case which is the subject matter of impugned MTM losses was held as stock in trade in the books of accounts in the present case. The profits were not accounted for in the books. On these facts, tribunal held that the MTM loss is liable to be allowed. On the contrary, the revenue has not brought any decision in their support. Therefore, we are of the opinion that the assessee’s claim to mark – two market loss of rupees to, 85, 10, 681/-is liable to be allowed. Therefore the order of the CIT (A) in this regard needs to be preserved accordingly the ground number two raised by the assessee is allowed.”

We find that the facts of the case for the year under consideration are identical to the facts for the earlier years. Therefore, following the order previous years, we uphold the order of the FAA. Ground number two is decided against the AO.

11. Last ground of appeal deals with disallowance made with regard to employee stock option scheme (ESOP). During the assessment proceedings, the AO found that the assessee is a subsidiary of Kotak Mahindra bank Ltd (KMBL), that it was listed company on the Bombay stock exchange and the national stock exchange, that KMBL had formulated ESOP in accordance with SEBI guidelines, 1999, that the scheme provided the employee of the assessee to acquire the equity share of KMBL, that the employees of the assessee were granted option at a discount to the prevailing market price, that the assessee made payment to KMBL in respect of its share of discount and debited such payment to P and L account. The assessee claimed the direction of such is payment on the ground that it was nothing but compensation paid to the employees. However, the AO rejected the claim of the assessee holding that ESOP discounts were incurred in relation to the issue of shares to the employees, that same were not relatable to profits and gains arising or accruing from business/trade, that ESOP discount did not diminish trading/business receipts of the issuing company, that the company did not suffer any pecuniary detriment, that the discount was not incurred towards satisfaction of any trading liability, that share premiums received on issue of shares were items of capital receipt, that there was no specific provision for such direction under section 30 -36 of the Act, that the expenditure was not also allowable under section 37 of the Act, that the expenditure was not revenue in nature, that the appellant company had allotted shares to the employees of the assessee, that the appellant company had an interest in the assessee, that it was only a notional loss and that it was related to the parent company, that the argument of the assessee that the said sum was for retention of employees and was a method of generating than was not acceptable, that the assessee’s reliance on fringe benefit tax right lines had to be rejected, that it was no way related to the deductibility of the notional expenses with respect to the employer. Finally, the AO made a disallowance of Rs. 519.19 lakhs.

12. Aggrieved by the order of the AO, the assessee preferred an appeal before the FAA. Before him it was argued that issue of allowability of ESOP expenses had been deliberated upon extensively by the special bench of the tribunal in the case of Biocon Ltd. (ITA/368-371 and 1206/BANG/2010), that the Tribunal had held that conceptually the discount on issue of ESOP was an allowable deduction in computing taxable income, that the discount was nothing but a part of remuneration packages, that it was neither a short receipt of capital not a capital expenditure, that the discount on issue of ESOP was not a contingent expenditure, that the expenditure was allowable in the hands of the assessee since the amount was already paid.

After considering the submission of the assessee, the FAA held that issue in hand was squarely covered by the order of the Biocon Ltd.(supra).He reproduced the order and facts of the case of Accenture Services Pvt. Ltd.(2110-IIOL-409-ITAT-Mumbai) and held that payment made by the subsidiary company to its holding company for granting of ESOP was a revenue expenditure.He further held that in case, if some of the options remained untested or were not exercise the discount claimed as deduction would be reversed and would be offered for taxation in such later year.

13.Before us,the DR relied upon the cases of Vodafone India services(P.)Ltd (50 Taxmann.com 300)and consolidated African selection Trust Ltd.(8 ITR 88) and supported the order of the AO.The AR referred to the cases of Accenture Services Pvt. Ltd.(supra) and Novo Nordisk India Private Limited (ITA/1275/BANG/2011).

14.We have heard the rival submissions and carriers the matter before us. We find that parent company of the assessee, KMBL,had offered ESOP to the employees of the assessee, that the assessee had made a payment of Rs. 519.19 lakhs to the parent company on account of discount for ESOP,that the AO had rejected the claim made by the assessee.We find that in the case of Biocon Ltd.the issue of allowability of expenditure with regard to ESOP has been deliberated upon at length.The order of the special bench is being followed by other benches. In our opinion the facts of the cases,relies upon by the DR i.e.Vodafone and Consolidated African Selection Process Ltd.(supra)are not relevant for deciding the issue before us. In the case of Vodafone issue to be decided was issue of shares at a premium by assessee to its non-resident holding company and applicability of provisions of chapter X of the Act.In the second case,the company had issued shares to its employees at par value while shares to public were issued at premium. In the case under consideration offer was made by the parent company to the employees of the assessee for ESOP and the assessee had made payment for the discount allowed by the parent company.We would like to refer to the case of Nova Nordisk India Private Limited(supra), wherein the identical issue has been dealt as under;

18. We have considered the rival submissions. It is clear from the facts on record that there was an accrual issue of shares of the parent company by the assessee to its employees the difference between the fair market value of the share of the parent company on the date of issue of shares and the price at which those shares were issued by the assessee to its employees was reimbursed by the assessee to its parent company.This sum so reimbursed was claimed as expenditure in the profit and loss account of the assessee as an employee cost. The law by now is well settled by the decision of the special bench of the ITAT Bangalore in the case of Biocon Ltd in ITA number 248/BANG/2010, AY. 2004-05 and other connected appeals by order dated 16. 07. 2013, wherein it was held that expenditure on account of ESOP is a revenue expenditure and had to be allowed as deduction while computing income. The special bench held that the sole object of issuing shares to employees at a discounted premium is to compensate them for the continuity of their service to the company.By no stretch of imagination,we can describe such discount is either short capital receipt or a capital expenditure. It is nothing but the employees costs incurred by the company. The substance of this transaction is disbursing compensation to the employees for their services for which the form of issuing shares at a discounted premium is that the.

19. In the present case, there is no dispute that the liability has accrued to the assessee during the previous year. The only question to be decided is as to whether it is the expenditure of the assessee or that of the parent company. We are of the view that the observations of the CIT(A) in para 5.6 of his order that these expenses are the expenses of the foreign parent company is without any basis and lie in the realm of surmises. The foreign parent company has a policy of offering ESOP to its employees to attract the best talent as its work force. In pursuance of this policy of the foreign parent company, allowed its subsidiaries/affiliates across the world to issue its shares to the employees. As far as the assessee in the present case which is an

affiliate of the foreign parent company is concerned, the shares were in fact acquired by the assessee from the parent company and there was an actual outflow of cash from the assessee to the foreign parent company. The price at which shares were issued to the employees was paid by the employee to the Assessee who in turn paid it to the parent company. The difference between the fair market value of the shares of the price at which shares were issued to the employees was met by the Assessee. This factual position is not disputed at any stage by the revenue. In such circumstances, we do not see any basis on which it could be said that the expenditure in question was a capital expenditure of the foreign parent company. As far as the assessee is concerned, the difference between the fair market value of the shares of the parent company and the price at which those shares were issued to its employees in India was paid to the employee and was an employee cost which is a revenue expenditure incurred for the purpose of the business of the company and had to be allowed as deduction. There is no reason why this expenditure should not be considered as expenditure wholly and exclusively incurred for the purpose of business of the assessee.

20. We fail to see any basis for the observation of the CIT(A) that the obligation to issue shares at a discounted price to the employees of the Assessee was that of the foreign parent company and not that of the Assessee. Admittedly, the shares were issued to employees of the Assessee and it is the Assessee who has to bear the difference in cost of the shares. The expenditure is necessary for the Assessee to retain a health work force. Business expediency required that the Assessee incur such costs. The parent company will be benefitted indirectly by such a motivated work force. This will be no ground to deny the deduction of a legitimate business expenditure to the Assessee as laid down by the Hon'ble Supreme Court in the case of *Sassoon J. David (supra)*.

21. The reference by the CIT(A) to the provisions of Sec.40A(2)(b) of the Act is again without any basis. The price of the shares of NNAS is arrived at by applying the average market price for the period 3rd October, - 17th October, 2005 in the Copenhagen Stock Exchange. The price so arrived at and the price at which shares are issued to the employees of the Assessee is the benefit which the employees get under the ESOP. The Assessee or its parent company can never influence the stock market prices on a particular date. There is no evidence or even a suggestion made by the CIT(A) in his order. There is no basis to apply the provisions of Sec.40A(2)(b) of the Act.

22. With regard to the decision of the ITAT in the case of Accenture (*supra*), we find that the facts of the case of Accenture (*supra*) are identical. In the case of Accenture (*supra*), the facts were that the assessee company incurred certain expenses on account of payments made by it for the shares allotted to its employees in connection with the ESPP. The AO had disallowed Rs. 9,06,788/- incurred by the assessee on the ground that this expenditure is not the expenditure of assessee company but that expenditure is of parent company and the benefit of such expenditure accrues to the parent company and not assessee. The CIT(A) deleted the addition made by the AO. The CIT(A) found that the common shares of Accenture Ltd. the parent company, have been allotted to the employees of ASPL, the Indian affiliate/Assessee and not to the employees of the parent company. The CIT(A) also found that though the shares of the parent company have been allotted, the same have been given to the employees of the Assessee at the behest of the Assessee. The CIT(A) thus held that it was an expense incurred by the assessee to retain, motivate and award its employees for their hard work and is akin to the salary costs of the assessee. The same was therefore business expenditure and should be allowable in computing the taxable income of the assessee. The tribunal upheld the view of the CIT(A). It can be seen from the decision in the case of Accenture (*supra*) that the shares of the foreign company were allotted and given to the employees of affiliate in India at the behest of the affiliate in India. The CIT(Appeals), however, presumed that the facts in the instant case of the assessee was that the shares were allotted to the employees of the affiliate in India at the behest of the foreign company. This is not the factual position in the assessee's case, as the assessee had on its own framed the NNIPL ESOP Scheme, 2005, to benefit its employees. NNAS may have a global policy of rewarding employees of affiliates with its shares being given at a discount and that policy might be the basis for the Assessee to frame ESOP. That by itself will not mean that the ESOP was at the behest of the parent company. In

any event the immediate beneficiary is the Assessee though the parent company may also be indirect beneficiary of a motivated work force of a subsidiary. We are of the view that the factual basis on which the CIT(Appeals) distinguished the decision of the Mumbai Bench of ITAT in the case of Accenture (supra) is erroneous.

23. With regard to the observations of the CIT(Appeals) that the ESOP actually benefits only the parent company, we are of the view that the expenditure in question is wholly and exclusively for the purpose of the business of the assessee and the fact that the parent company is also benefited by reason of a motivated work force would be no ground to deny the claim of the assessee for deduction, which otherwise satisfies all the conditions referred to in section 37(1) of the Act. The decision of the Hon'ble Supreme Court in the case of Sassoon J. David & Co. (P) Ltd. (supra) and the Hon'ble Karnataka High Court decision in the case of Mysore Kirloskar Ltd. (supra) clearly support the plea of the assessee in this regard.

24. We are of the view that in the facts and circumstances of the present case, the expenditure in question was wholly and exclusively for the purpose of the business of the assessee and had to be allowed as deduction as a revenue expenditure.

Respectfully, following the above order, we hold that the order of the FAA does not suffer from any legal infirmity. So, confirming his order, we decide ground no.3 against the AO.

As a result, appeal filed by the assessee stands partly allowed and the appeal of the AO stands dismissed.

फलतः निर्धारिती की अपील अंशतः मंजूर की जाती है और निर्धारण अधिकारी की अपील नामंजूर की जाती है.

Order pronounced in the open court on 11th March, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक 11 मार्च, 2016 को की गई।

Sd/-

Sd/-

(अमित शुक्ल/ Amit Shukla)

(राजेन्द्र / Rajendra)

न्यायिक सदस्य / JUDICIAL MEMBER

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 11.03.2016.

Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR "A " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ, आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.