IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD

BEFORE SMT. ANNAPURNA GUPTA, ACCOUNTANT MEMBER
& SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER

I.T.A. Nos.142&143/Ahd/2024
(Assessment Years: 2010-11 & 2011-12)

Axis Bank Ltd., "Trishul", 3rd Floor, Opp. Samtheshwar Mahadev, Nr. Law Garden, Ellisbridge, Ahmedabad-380006	Vs.	Assistant Commissioner of Income Tax, Circle-1(1)(1), Ahmedabad
[PAN No.AAACU2414K]		
(**Appellant**)	..	(**Respondent**)

I.T.A. Nos.48&49/Ahd/2024
(Assessment Years: 2010-11 & 2011-12)

Assistant Commissioner of Income Tax, Circle-1(1)(1), Ahmedabad	Vs.	Axis Bank Ltd., "Trishul", 3rd Floor, Opp. Samtheshwar Mahadev, Nr. Law Garden, Ellisbridge, Ahmedabad-380006
[PAN No.AAACU2414K]		
(**Appellant**)	..	(**Respondent**)

Appellant by :	Shri Tushar Hemani, Sr. Advocate & Shri Parimalsinh B. Parmar, A.R.
Respondent by:	Dr. Darsi Suman Ratnam, CIT DR

Date of Hearing	18.07.2024
Date of Pronouncement	24.07.2024

O R D E R

PER SIDDHARTHA NAUTIYAL - JUDICIAL MEMBER:

These are Cross appeals filed by the Assessee and Department against the order of Commissioner of Income Tax (Appeals) (in short "CIT(A)", National Faceless Appeal Centre (in short "NFAC"), Delhi vide separate orders dated 29.11.2023 and 04.12.2023 passed for Assessment Years 2010-11 and 2011-12. Since common facts and issues for consideration are involved for

the years under consideration, the cross appeals for both assessment years are being taken up together.

We shall first take up the assessee's appeal for Assessment Year 2010-11

2. The assessee has taken the following grounds of appeal:

> *"**1. Disallowance in relation to administrative expenses under Section 14A read with Rule 8D of the Income-tax Act, 1961 (Tax effect- Rs. 65,88,045)***
>
> *1.1 The learned AO and Hon'ble CIT(A) erred in disallowing the administrative expense under Section 14A r.w. Rule 8D(2)(iii) over and above the suo-moto disallowance of administrative expenses of Rs. 1.93 crores.*
>
> *1.2 The learned AO and Hon'ble CIT(A) erred in not appreciating the fact that all the operating expense/ administrative expenses have been allocated to exempt income on a reasonable basis while computing suo-moto disallowance under Section 14A and accordingly, no further disallowance of administrative expenses is warranted.*
>
> *1.3 The learned AO and Hon'ble CIT(A) erred in rejecting the suo-moto disallowance made by the Appellant without providing any cogent reasons for the same having regard to the accounts of the Appellant.*
>
> *1.4 The learned AO and Hon'ble CIT(A) erred in not appreciating the fact that the majority of investments made by the Appellant are in the nature of stock in trade and accordingly, the provisions of Section 14A shall not be applicable to such investments in line with judicial precedents and not appreciating the submission with respect to proportionate disallowance in the ratio of exempt and taxable amount was without prejudice basis*
>
> *1.5 The learned AO and Hon'ble CIT(A) erred in not relying upon favourable judgements of Hon'ble Tribunal and Gujarat HC up to AY 2009-10 and Supreme Court judgement for AY 2003-04 in the Appellant's own case.*
>
> *1.6 The learned AO and Hon'ble CIT(A) has erred in not appreciating that Appellant has sufficient own funds which are far more than the amount of investment in shares and securities which yield exempt income and thereby erred in holding that a portion of operating expense should be attributable to investments which fetch exempt income.*
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> ***2. Disallowance in relation to interest expenses under Section 14A read with Rule 8D of the Income-tax Act, 1961 (Tax effect - Rs. 8,24,56,452)***

2.1 The Hon'ble CIT(A) erred in holding that the ground of appeal relating to disallowance of interest expenses under Section 14A does not emanate from Ld. AO's order. However, the Ld. AO., while computing total income as assessed under Section 143(3) read with Section 254 of the Act, has not provided relief in respect of disallowance of interest expenses under Section 14A and accordingly, the said ground of appeal does emanate from the order of Ld. AO.

2.2 The Hon'ble CIT(A) erred in failing to appreciate that the Ld. AO has not followed the observations and decision of the Hon'ble ITAT with respect to disallowance of interest expenses to the extent of Rs. 24.26 crores under Section 14A r.w. Rule 8D.

2.3 The learned AO and Hon'ble CIT(A) grossly erred in not following the observations and decision of the Hon'ble ITAT with respect to disallowance of interest expenses to the extent of Rs. 24.26 crores under Section 14A r.w. Rule 8D.

2.4 The learned AO and Hon'ble CIT(A) failed to appreciate that the Hon'ble ITAT has relied upon the decision of the Hon'ble ITAT in the Bank's own case for AY 2008-09 in ITA No. 251/Ahd/2012, wherein the disallowance under Section 14A on account of interest had been deleted by the Hon'ble ITAT. The Ld. AO and Hon'ble CIT(A) failed to appreciate that the Hon'ble ITAT has quashed the disallowance for AY 2010-11.

2.5 The learned AO and Hon'ble CIT(A) also failed to appreciate that Hon'ble ITAT in Appellant's own case for AY 2012-13 to 2015-16, has deleted disallowance of interest expenses relying on the Hon'ble ITAT's order in appellant's own case for AY 2010-11. Further, while passing the order giving effect to ITAT order for AY 2012-13 to AY 2015-16, the learned AO had given the relief for 14A interest, however, the same was not allowed for AY 2010-11, even though the facts of AY 2010-11 are similar to AY 2012-13 to AY 2015-16.

2.6 Without prejudice to the above, even on merits, the learned AO and Hon'ble CIT(A) has erred in not appreciating that Appellant has sufficient own funds which are far more than the amount of investment in shares and securities which yield exempt income and thereby erred in holding that a portion of interest expense should be attributable to investments which fetch exempt income.

2.7 The learned AO and Hon'ble CIT(A) has erred in not appreciating that Appellant also has sufficient non-interest bearing current account balances/ sufficient net interest earned during the year, which are far more than the amount of investment in shares and securities which yield exempt income and thereby erred in holding that a portion of interest expenses should be attributable to investments which fetch exempt income.

The appellant craves leave to add, to amend, alter, delete and/or modify the above grounds of appeal on or before the final date of hearing."

3. Before us, the Counsel for the assessee submitted that the assessee shall not be pressing for Ground No. 1 with respect to disallowance under Section 14A vis-à-vis "administrative expenses".

4. Accordingly, the ground raised by the assessee with respect to disallowance under Section 14A vis-à-vis "administrative expenses" is being dismissed as not pressed.

Ground No. 2 of the assessee's appeal relates to disallowance of interest under Section 14A of the Act vis-à-vis "interest component"

5. The brief facts of this Ground of Appeal are that assessee company filed its return of income for A.Y. 2010-11 on 07.09.2010 declaring a total income at Rs. 43,15,45,21,002/-. The first assessment order under Section 143(3) of the Act was passed on 26.02.2013 assessing the total income of the assessee at Rs. 44,82,61,63,918/- after making additions / disallowances of Rs. 2,61,960,802/- under Section 14A of the Act.

6. Thereafter, against the assessment order under Section 143(3) of the Act, dated 26.02.2013, the assessee preferred an appeal before the Ld. CIT(A). The Ld. CIT(A) vide order No. CIT(A) -10/DCIT Circle- 1/265/2015-16 dated: 04.01.2016 partly allowed the assessee's appeal. Thereafter, the assessee preferred further appeal before ITAT.

7. The ITAT vide its order in ITA No. 311/Ahd/2016 dated 28.10.2021 made certain observations with regards to disallowance under Section 14A of the Act, which are reproduced for ready reference:

"8.1 The order of the Ld. CIT(A) for the Assessment Year 2008-09 has been reversed by the order of this ITAT in ITA No. 251/Ahd/2012 vide order dated 24/06/2017 by observing as under:

5. After giving a thoughtful consideration to the facts in issue, we find that from the balance sheet of the assessee for the year under consideration, the capital balance is at Rs. 360 crores and the free reserves are at Rs. 8411 crores totaling to Rs. 8051 crores. Against this, we find that the tax free investment at Rs. 651 crores. Thus, it can be safely concluded that the assessee was having sufficient own funds to make the tax free investment, the Hon'ble High Court of Bombay in the case of Reliance Utilities and wer Ltd. 313 ITR 340 has held that if there are mixed funds then the power presumption would be that the investments have been made out of interest free funds. This ratio of the Hon'ble High Court of Bombay was subsequently followed in the case of HDFC Ltd. 266 ITR 505. As mentioned elsewhere, the assessee was having sufficient own funds to meet out the tax free investment. Drawing support from the decision of the Hon'ble High Court of Bombay (supra), we do not find any merit in considering the interest expenses for the computation of disallowance u/s. 14A of the Act. To this extent, we set aside the findings of the Id. CIT(A) and direct the A.O. to delete the addition of Rs. 29,35,41,415/-.

16. However, in our considered opinion, administrative expenses need to be disallowed and since the assessee has made suo moto disallowance of Rs. 63,84,525/- in our considered opinion, this should meet the ends of justice. We, accordingly, confirmed the suo moto disallowance of Rs. 63,84,525/-. Ground no. 2 is accordingly dismissed and the additional ground raised by the assessee is a/so dismissed.

8.2 The fact of the case on hand seems identical to the fact of the case as discussed above in ITA No. 251/Ahd/20l2 (Supra). However, before parting it is pertinent to note that the ITAT has not given any detailed findings based on reasons with respect to the administrative expenses disallowed under the provision of Rule 8D(2)(iii) of Income Tax Rules. The assessee has made suo moto disallowance of Rs. 1,06,38,000/- without any basis. Accordingly, a question was put up to the ld. AR for the assessee at the time of hearing to explain the basis of making the disallowance of Rs. 1,06,38,000/- but he failed to provide any information. Rather the Ld. AR requested to set aside the issue to the file of the AO to allow one more opportunity to the assessee to furnish the details concerning the basis adopted for disallowance of Rs. 1,06,38,000/- only under rule 8D(2)(iii) of Income Tax Rules.

9. The Ld. DR has not raised any objection if the matter is set aside to the file with respect to administrative expenses as per the provisions of law.

10. Indeed, the onus lies upon the assessee to justify the expenses incurred in exempt income. If the assessee failed to discharge the onus, the only option available to Revenue is to make the disallowance by resorting the provisions of Rule 8D of Income Tax Rules. However, in the interest of justice, fair play and keeping in view to the fact that assessee has made suo moto disallowance of Rs. 1,06,38,000, we are

inclined to extend one more opportunity to the assessee to provide the basis of such disallowance by furnishing the necessary details. Accordingly, the issue with respect to administrative expenses is set aside to the file of AO for fresh adjudication as per the provision of law. Hence, the ground of appeal of the assessee is partly allowed for statistical purposes."

8. Further, it would also be useful to reproduce the relevant extracts of the observations made by ITAT in assessee's own case for Assessment Year 2008-09 vide order dated 24.06.2017 with respect to disallowance under Section 14A of the Act, on which reliance was placed by ITAT for assessment year 2010-11:

"14. Before us, the ld. counsel for the assessee vehemently stated that the A.O. has computed the disallowance which is mainly on account of interest expenses. It is the say of the ld. counsel that the assessee was having sufficient own funds for making tax free investment/therefore, there is no question of considering interest expenses for the computation of the impugned disallowance. Per contra, the ld. D.R. strongly supported the findings of the A.O. and also objected to the additional ground raised by the assessee for the deletion of suo moto disallowance of Rs. 63,84,525/-.

15. After giving a thoughtful consideration to the facts in issue, we find that from the balance sheet of the assessee for the year under consideration, the capital balance is at Rs. 360 crores and the free reserves are at Rs. 8411 crores totaling to Rs. 8051 crores. Against this, we find that the tax free investment at Rs. 651 crores. Thus, it can be safely concluded that the assessee was having sufficient own funds to make the tax free investment. The Hon'ble High Court of Bombay in the case of Reliance Utilities and Power Ltd. 313 1TR 340 has held that if there are mixed funds then the presumption would be that the investments have been made out of interest free funds. This ratio of the Hon'ble High Court of Bombay was subsequently followed in the case of HDFC Ltd. 266 ITR 505. As mentioned elsewhere, the assessee was having sufficient own funds to meet out the tax free investment. Drawing support from the decision of the Hon'ble High Court of Bombay (supra), we do not find any merit in considering the interest expenses for the computation of disallowance u/s. 14A of the Act. To this extent, we set aside the findings of the Id. CIT(A) and direct the A.O. to delete the addition of Rs. 29,35,41,415/-.*"*

9. In the set aside proceedings, while passing the assessment order, the assessing officer, ostensibly again added the disallowance under Section 14A of the Act, which was made in the first assessment order, in the computation of income, at page 6 of the assessment order. In appeal filed by the assessee

against the assessment order passed by the assessing officer, Ld. CIT(Appeals) did not allow the appeal of the assessee by observing that the aforesaid disallowance is not coming from the contents of the assessment order. While dismissing the assessee's appeal with respect to this ground, Ld. CIT(Appeals) made the following observations:

> *"**8. GROND OF APPEAL NO. 2: Disallowance u/s14A- Interest (INR 24.25 crores):** Vide this ground of appeal, the appellant has stated that the AO has disallowed Interest Expenses u/s 14A r.w. Rule 6D in spite of the fact that hon'ble ITAT in its order for A.Y 2010-11 in assessee's own case has allowed the appeal in assessee's favour.*
>
> *8.1 I find that this ground of appeal does not emanate from the AO's order under section 143(3) r.w.s. 254 of the Act dated 29-12-2022 for A.Y.2010-11 as there is no discussion in this regard in the body of said order. There is no separate addition/disallowance made by the AO on this issue in the aforesaid order dated: 29.12,2022. Therefore, no cause of action arises on this issue.*
>
> *Hence, the ground of appeal No. 2 is Dismissed."*

10. The assessee is in appeal before us against the aforesaid order passed by Ld. CIT(Appeals) confirming the disallowance made by the assessing officer under Section 14A of the Act. Before us, the Counsel for the assessee submitted that from the contents of the order passed by the Tribunal in the assessee's own case for assessment year 2010-11, the Tribunal has clearly given relief to the assessee on this issue, and therefore, Ld. CIT(Appeals) erred in facts and in law in holding that this issue/disallowance is not emanating from the assessment order. In this case, it was submitted that the assessing officer had clearly erred in facts and in law in not following the directions of ITAT in assessee's own case for assessment year 2010-11. Accordingly, Ld. CIT(Appeals) erred in facts and in law in not allowing the appeal of the assessee on this issue.

11. In response, DR placed reliance on the observations made by the assessing officer and Ld. CIT(Appeals) in their respective orders.

12. We have heard the rival contentions and perused the material on record. In our considered view, on going through the contents of order passed by ITAT in the assessee's own case for assessment year 2010-11 (relevant extracts of the order have been reproduced in the preceding part of this order), we observe that the Tribunal has categorically given relief to the assessee on this issue on the ground that the assessee's own funds are far in excess of the investments made in funds yielding exempt income. Accordingly, the Tribunal in assessee's own case for assessment in 2010-11 (by following the decision of ITAT in assessee's own case for assessment year 2008-09) has held that so far as disallowance of interest under Section 14A of the Act is concerned, no disallowance is called for under Section 14A of the Act.

13. Accordingly, looking into the instant facts, we are hereby allowing assessee's appeal against disallowance of interest under Section 14A of the Act.

14. Since identical facts and issues for consideration are involved for assessment year 2011-12 as well, the assessee's ground of appeal with respect to disallowance of administrative expenses under Section 14A of the Act is dismissed as not pressed and the assessee's ground of appeal with respect to disallowance of interest expenses under Section 14A of the Act is allowed.

Now we shall come to Department's appeal for Assessment Year 2010-11

15. The sole/single issue for consideration is regarding the disallowance of ESOP expenses, which was allowed by the Ld. CIT(Appeals) in favour of the assessee.

16. The brief facts relating to this Ground of Appeal is that assessee had raised an additional ground before the Hon'ble ITAT and claimed deduction on account of Employees Stock Option Scheme (ESOP) expenses of Rs. 250.63 crores while computing its total income. The ITAT has restored back the said issue to the file of AO to examine the same as per the provisions of the I.T Act. The AO observed that the assessee, as part of it's policy of rewarding it's employees and key management people, has formulated an Employee Stock Option Plan (ESOP) Scheme in accordance with the Securities and Exchange Board of India Guidelines, 1999/Securities and Exchange Board of India (Share Based Employee Benefits) Regulations under the name and style of "Axis Bank Limited Employees Stock Option Scheme Grant". During the year under consideration the assessee claimed ESOP expenditure of Rs. 250.63 crores being difference between **market price as on date of exercise of options and the exercise price** (i.e. the market price on the grant date) as a deduction for computing its income under the head 'profits and gains from business or profession'. For claiming such expenditure, reliance was placed by assessee on the decision of Hon'ble Bangalore Special Bench in case of **Biocon Ltd. 144 ITD 21**. The assessee vide its letter dated 04.04.2022 submitted its reply before the AO which was not found acceptable by the AO as according to the Ld. Assessing Officer, the decision relied upon by the assessee was not applicable, looking to the facts of assessee's case. The AO observed that in the facts of the case of the case of Biocon decision supra, the assessee had floated

ESOP under which it granted option of shares with face value of Rs. 10 at the same rate by claiming that market value of such share on the date of grant of option was Rs. 919, thereby claiming the total discount per option at Rs. 909/-. The difference between market price and exercise price as on the date of grant of option was claimed as revenue expenditure to be spread over the vesting period. However, the treatment followed by the assessee was in line with provisions of Section 2(15A) of the Indian Companies Act, 1956 which defined ESOP to mean the option given to the whole-time Directors, Officers or employees of a company, which gives such Directors, officers or employees the benefit or right to purchase or subscribe at a future date, the securities offered by the company at a predetermined price.' The AO was of the view that the crux of the above decision was that discount on issue of ESOP shall be allowed as revenue expenditure. **Such discount represented difference between the market price of options and exercise price as on the date of grant of option.** The AO has observed that in the present case, the assessee seeks to claim an expenditure of Rs. 250.63 crores which represents **difference between market price as on date of exercise of option and actual exercise price**. Further, Assessing Officer invited reference to the provisions of Section 2(15A) of the Indian Companies Act, 1956 which defines ESOP to mean the option given to employees which gives them the right to purchase or subscribe to securities at a future date **but at a predetermined price**. Therefore, the AO was of the view that in view of such Section, **the option shall be granted at a predetermined price**. Even in the decision relied by the assessee in case of Biocon, it has been clarified that the discount eligible to be allowed as revenue expenditure shall be the difference between market price of the shares at the time of the grant of option and actual exercise price. Such difference is calculated on the basis of **predetermined price** as on the date of grant of

option and has been allowed as revenue expenditure. The assessee in the present case, while computing discount, **has erred in taking market price on the date of exercise of option**. **Such market value has to be taken on the date of grant of option. If discount in the present case is calculated considering market price of option as on the date of grant of option and actual exercise price, it is observed that there is no actual discount passing on to the employees of the assessee company which means that market price on the date of grant of option and actual exercise price are the same**. **Hence, no benefit has actually been offered to the employees in terms of discount**. Therefore, no discount has actually been offered to the employees in the present case and value of discount calculated by taking market value as on the date of exercise of option is incorrect. The AO was also of the view that the reply of the assessee was also not acceptable on merits as the assessee had failed to substantiate as to **how the expenditure that the company was incurring or laying out**. The expenses of Rs. 250.63 crores claimed by the assessee is the difference between the market value of share as computed under the guidelines of SEBI and the value at which the share are issued to employees. While issuing the shares under ESOP, the company is choosing to either receive securities premium of a lower amount or no securities premium when compared to that of which it would have received during a normal course of share issue. **Hence there is no expenditure that the company was incurring or laying out**. **The issue of shares was also not crystallized till the date on which the employee exercised the option and hence any expenditure debited during the vesting period remained contingent in nature**. The AO was of the view that the ESOP expense even if treated as **expenditure was a capital expenditure since securities premium being a capital item**. The AO has relied on the decision of the Delhi ITAT in the case

of **ACIT Vs Ranbaxy Laboratories ITA Nos. 2613 & 3871** in which it was held that the ESOP expense debited to P&L **is notional in nature** since the assessee has neither laid out or expended any amount while choosing to receive no/ lesser securities premium. The alternative argument that this ITAT has supported is since the receipt of securities premium is not chargeable to tax being a capital receipt any short collection of securities premium should also be considered as capital outlay and cannot be allowed as expenditure. The Delhi ITAT in the case of Ranbaxy (Supra) has relied on the various court rulings which have held that shares issued against assets/ Technical know-how contributed by shareholders cannot be claimed as revenue expenditure. The AO was also of the view that the assessee has made its claim merely only on the basis of the SEBI Guidelines but the deduction was not permissible under the Income-tax Act **unless a liability has either been paid or arisen during the year**. Hence the AO concluded that the claim of the assessee in respect of ESOP was not acceptable. In view of the above discussion, the fresh claim of the assessee towards ESOP expenses of Rs. 250.63 crores was rejected by the AO.

17. The assessee filed appeal before Ld. CIT(Appeals) against the aforesaid order of the Ld. Assessing Officer. Ld. CIT(Appeals) allowed the appeal of the assessee on this issue by relying upon decision of ITAT Special Bench in the case of **Biocon Ltd vs. DCIT [2013] 25 ITR(T) 602 (Bangalore-Trib.) (SB)**. While allowing the appeal of the assessee, Ld. CIT(Appeals) made the following observations:

> *"9.2 Having considered the factual matrix of the case, I find that the Appellant had raised the claim for deduction of ESOP for first time as additional ground with ITAT relying upon decision in the case of **Biocon Ltd vs DCIT [2013] 25 ITR(T) 602 (Bangalore-Trib.) (SB).** The issue was remanded back to AO by the Hon'ble ITAT since the lower authorities had not got an opportunity to examine the same as per the*

provisions of the Act. The AO vide his aforesaid order dated: 29.12.2022 has thereafter disallowed the claim of The Appellant. The AO has rejected the claim for ESOP mainly on the following issues/reasoning:

1. The Appellant had erred in claiming discount being difference between market price as on date of exercise of option and actual exercise price.

2. No actual expenditure is incurred or laid out by the Appellant. - Even if it is treated as expenditure, it is a capital expenditure since securities premium is a capital item.
3. The AO has invoked and relied on the decision in the case of ACIT vs. Ranbaxy Laboratories ITA No 2613 & 3871

I also find that the submission of the assessee is that the claim of discount on ESOP has to be allowed in view of the Special Bench decision in the hon'ble Tribunal case of ***Biocon Ltd. v. Deputy Commissioner of Income-tax (LTU), Bangalore [2013] 35 taxmann.com 335 (Bangalore - Trib.) (SB).*** *In this regard, the appellant has further relied on the following case laws:*

1. *Mahindra & Mahindra Ltd. v. DCIT [IT Appeal No. 1449 (Mum) of 2016 & Oths]*

2. *Tata Capital Limited Vs. DCIT [ITA Nos. 7058 and 7059/Mum/2017, ITA Nos. 59 and 60/Mum/2018*

3. *JCIT v. RBL Bank Limited (ITA Nos.509 & 510/PUN/2023)*

9.2.1 In nutshell, the submission of the appellant is that the Appellant has claimed deduction of ESOP cost of Rs. 250.63 crores, being the discount given to the employee considering the difference between market price as on date of exercise of options and the exercise price relying on the decision of Special Bench of Tribunal in case of Biocon (supra) which has been subsequently upheld by Karnataka High Court in CIT v. Biocon Ltd. [2020] 121 taxmann.com 351 (Karnataka)]. The Hon'ble Special Bench of the Tribunal in the case of Biocon Ltd (supra) while ruling in favour of the taxpayer observed as under:

i) The discount under ESOP is in the nature of employees cost and is hence deductible as a business expenditure under Section 37 of the Act.

ii) The amount of discount being the difference between the market price as on date of exercise and the exercise price is eligible as deduction.

iii) The amount of deduction claimed by the company on ESOP should match with the quantum of perquisite in the hands of the employee.

1. *No accounting principle can be determinative in the matter of computation of total income under the Act.*

I find that the case law in the case of ***Ranbaxy Laboratories*** *Ltd., supra has been considered and disapproved by the hon'ble Special Bench in the case of* ***Biocon Ltd.***

*Therefore, the AO's reliance on the decision in the case of **Ranbaxy Laboratories** Ltd., supra is misplaced. The hon'ble Special Bench in the case of **Biocon Ltd.** has considered all the possibilities in para 11.1.6 and 11.1.7 of its order including the one involving the case of the assessee and has held that subsequent adjustment of discount is required with respect to market price as on the date of exercise of option and the same would also be available as deduction. It has also been held by the Hon'ble ITAT that discount on ESOP being a general expense is allowable u/s 37(1) during the years of vesting on the basis of percentage of vesting during such period.*

*In view of the foregoing discussion and respectfully following the hon'ble Special Bench in the case of **Biocon Ltd.,** supra which has been upheld by the Hon'ble Karnataka High Court in CIT v. Biocon Ltd. [2020] 121 taxmann.com 351 (Karnataka), I am of the considered view that the Appellant's claim of deduction of ESOP cost is an allowable expense u/s 37(1) of the Act. The AO is accordingly, directed to follow the hon'ble Special Bench in the case of **Biocon Ltd.,** supra which has been upheld by the Hon'ble Karnataka High Court in CIT v. Biocon Ltd. [2020] 121 taxmann.com 351 (Karnataka) and allow the Appellant's claim of deduction of ESOP cost subject to verification of discount figure of Rs. 250.63 crores in line with the decision of Biocon Ltd., Supra the correctness of which has not been commented upon by the AO in his assessment order.*

Hence, the Ground of appeal No.3 is Allowed."

18. The Department is in appeal before us against the order passed by Ld. CIT(Appeals) deleting the addition in the hands of the assessee. The learned DR raised several contentions before us in respect of the order passed by the Ld. CIT(Appeals). Firstly, the Ld. DR submitted that the case of the assessee is not covered by the decision of Tribunal special bench in the case of Biocon supra. The Ld. DR submitted that the assessing officer has clearly brought about the distinction between the facts of the assessee's case and the facts in the case of Tribunal special bench in the case of Biocon supra, wherein, it has been pointed out that in the instant case, the discount claimed by the assessee was difference in **market price of options and exercise price as on the date of grant of option**, whereas in the case of Biocon supra, the ESOPs had been issued in terms of provisions of Section 2(15A) of the Indian Companies Act, 1956 which defines ESOP to mean the option given to employees which gives them right to purchase or subscribe to securities at a future date **but at a predetermined price**. Therefore, the AO was correct in taking the view, **the**

option shall be granted at a predetermined price, so as to be eligible for deduction. Secondly, the Ld. DR submitted that during the entire course of assessment proceedings, the assessee has failed to submit the relevant ESOP scheme under which the aforesaid deduction was claimed as revenue expenditure. The Ld. DR pointed out that the assessee has launched multiple ESOP schemes over various years and there is no clarity whatsoever as to under with specific ESOP scheme the assessee has claimed the aforesaid deduction. The Ld. DR submitted that it was the duty of the assessee to clearly bring out the relevant ESOP scheme at the time of assessment proceedings and how the scheme was complying with the guidelines under the Companies Act and in absence of such clarity, Ld. CIT(Appeals) erred in facts and in law in granting relief to the assessee by relying on the decision of special bench of Tribunal in the case of Biocon supra.

19. In response, the Counsel for the assessee submitted that the terms of ESOP scheme was such that the difference between the market price as on the date of grant of stock options and the market price as on date of exercise were claimed as a revenue expenditure. During the course of assessment proceedings, the assessee had furnished a detailed chart of the specific employees of the company to whom such discount was offered. The Counsel for the assessee submitted that a perusal of the chart submitted before the assessing officer clearly shows that there was a substantial difference between the market price as on the date of grant of option and the market price as on the date of exercise of such option by the assessee and therefore, the employee's of the assessee company had clearly benefitted in terms of discount. Secondly, the Counsel for the assessee submitted that in the instant case, the discount was not claimed on a notional basis but on the date of actual exercise of such option by

the employees. Therefore, it was submitted that the case of the assessee stands on a better footing since the loss is not on a notional basis, but has been claimed by the assessee as on the date of actual exercise of stock options by the employees of the assessee company after meeting the specific requirements under the ESOP scheme. The Counsel for the assessee drew our attention to page 361 onwards of the paper book and submitted that the assessee had submitted a detailed chart giving the details of employees to whom such benefit of ESOP scheme was given by the assessee. Further, it was submitted that the aforesaid benefit granted to employees and the ESOP scheme has been reflected as "perquisites" in the hands of their employees and the assessee has also deducted taxes at source at appropriate rates, at the time of disbursing such ESOP benefit to its employees. Further, the Counsel for the assessee submitted that the law as it stands as on the date is that this issue is squarely covered in favour of the assessee by the decision of Tribunal Special Bench in the case of Biocon supra and such decision has also been confirmed by the Karnataka High Court, in favour of the assessee. Further, the decision on which reliance was placed by the assessing officer while disallowing the claim of the assessee has been duly considered by the Special Bench Tribunal decision in the case of Biocon supra and relief was allowed to the assessee. The Counsel for the assessee submitted that ESOP scheme under which the benefits were provided to its employees was forming part of the Annual Report, for the year under consideration (reference page to 25 of paper book submitted before us), the calculation of ESOP cost along with details of option price, exercise price, grant date and exercise date was duly furnished before the assessing officer during the course of assessment proceedings (pages 316-611 of the paper book) and the ESOP expenses are allowable in view of various judicial precedents on the subject.

20. We have heard the rival contentions and perused the material on record. On going to the facts of the instant case, we observe that the law that stand as on date on the allowability of ESOP expenses has been decided in favour of the assessee by the Tribunal Special Bench in the case of **Biocon Ltd 35 Taxman.com 335** and this decision was later confirmed by the Karnataka High Court in the case of **CIT v Biocon Ltd 40 ITR 151**, wherein the Karnataka High Court held that on exercise of option by an employee, actual amount of benefit that had to be determined was only a quantification of liability, which would take place at a future date and hence discount on issue of ESOPs was not a contingent liability but was an ascertained liability. Further, the Karnataka High Court held that issuance of shares at a discount would be an expenditure incurred for purposes of Section 37(1) as primary object of aforesaid exercise was not to waste capital but to earn profits by securing consistent services of employees and therefore, same could not be construed as short receipt of capital and thus, discount on issue of ESOP was allowable deduction under Section 37(1). The Mumbai ITAT in the case of **IPCA Laboratories Ltd 161 taxmann.com 511 (Mumbai - Trib.)**, following the decision of Karnataka High Court held that ESOP compensation expenditure incurred by assessee is an allowable deduction under Section 37(1). The ITAT Hyderabad in the case of **Nagarjuna Construction Co. Ltd 159 taxmann.com 538 (Hyderabad - Trib.)** again decided this issue in favour of the assessee by holding that discount on issue of ESOPs i.e., difference between grant price and market price on shares as on date of grant of options was allowable deduction under Section 37(1) of the Act. In the case of **Fortune Park Hotels Ltd. 159 taxmann.com 1217 (Delhi - Trib.)**, the Delhi ITAT held that ESOP expenses are allowable as per ESOP scheme and further such expenses had been duly taxed in hands of employees as “perquisites” and

included in Form-16 of employees and due TDS was deducted by assessee treating them as salary.

21. The law on the subject, therefore, is unanimous as various tribunals by following the decision of Biocon Ltd, Karnataka High Court have decided the issue in favour of the assessee. Secondly, we observe that the ESOP scheme under consideration was part of the Annual Report of the assessee and further the specific details of ESOP benefit granted to its employees had been duly disclosed to the assessing officer during the course of assessment proceedings, being the difference between the market price of shares at the time of grant of option to these employees and the market price of such shares as on the date of exercise by employees of the assessee company. Therefore, even from this perspective, the expenses so claim were not contingent the nature, since the assessee had claimed the ESOP expenses at the time of actual exercise of option by its employees, during the year under consideration. It is also noteworthy that the assessee had reflected such ESOP expenses as "perquisites" in the hands of its employees and TDS at appropriate rate had also been deducted by the assessee company at the time of grant of ESOP benefits to its employees. Accordingly, in view of the judicial precedents on the subject as on date, which have consistently taken the view that ESOP expenses are allowable in the hands of assessees under Section 37 of the Act and looking into the facts of the assessee's case, as highlighted above, we are of the considered view that Ld. CIT(Appeals) has not erred in facts and in law in deciding this issue in favour of the assessee.

22. In the result, the appeal of the Department is dismissed.

23. Since the facts and issues for consideration, for both the assessment years before us are identical, the appeals of the assessee and Department for assessment year 2011-12 are also decided, accordingly keeping in view of our observations in the preceding paragraphs.

24. In the combined result, the appeal of the assessee is partly allowed and the appeal of the Department is dismissed.

This Order pronounced in Open Court on	**24/07/2024**

Sd/-	**Sd/-**
(ANNAPURNA GUPTA)	**(SIDDHARTHA NAUTIYAL)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad; Dated 24/07/2024

TANMAY, Sr. PS ***TRUE COPY***

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad