

(2024) 05 ITAT CK 0075

Income Tax Appellate Tribunal (Delhi B Bench)

Case No: Income Tax Appeal No. 3489/DEL/2023

Dy. C.I.T.

APPELLANT

Vs

CBRE South Asia Private Ltd

RESPONDENT

Date of Decision: May 31, 2024**Acts Referred:**

- Income Tax Act, 1961 - Section 37(1)

Hon'ble Judges: Saktijit Dey, (VP); Naveen Chandra, (AM)**Bench:** Division Bench**Advocate:** Kshitij Bansal, Jaskaran Singh, Vivek Kumar Upadhyay**Final Decision:** Dismissed

Judgement

1. This appeal by the Revenue is preferred against the order of the NFAC, Delhi dated 06.10.2023 pertaining to A.Y. 2018-19.

2. The solitary ground raised by the department is as under:

"Whether the Ld. CIT(A) has erred on facts and in law in deleting the addition amounting to Rs. 3,77,40,366/- being expenses incurred on Employee Stock Option (ESOP) scheme whereas the assessing officer has categorically held in the order that such expenses are notional and contingent in nature and are not allowable."

3. Briefly stated, the facts of the case are that the assessee is a private limited company engaged in the business of providing services in the area of real estate related consultancy, site management, professional advisory, project management. For the year under consideration, the assessee filed its return of income on 30.11.2018 declaring total income of Rs. 2,15,08,30,700/-.

4. The Assessing Officer in the course of scrutiny assessment sought justification for debiting an expense of Rs. 3,77,40,366/- on account of ESOP. Not convinced by the assessee explanation that the shares of the parent company in USA have been allotted as ESOP to assessee's employees in India and the assessee has paid for these stocks options to the parent company, the AO disallowed the expense on ESOP on the ground that it is notional and contingent in nature.

5. Aggrieved, the assessee went in appeal before the Id CIT(A). The CIT(A) relying on the decisions of the Hon'ble Jurisdictional High Court of Delhi in case of Lemon Tree Hotels Ltd (supra) and jurisdictional Tribunal in case of ACIT v. Cvent India Pvt. Ltd. (ITA No. 523/Del/2020), gave relief to the assessee.

6. Aggrieved, the revenue is in appeal before us on the ground that ESOP expenses claimed as expense by the assessee and cross charged by its parent entity in USA are notional and contingent in nature.

7. The Id DR reiterated the findings of the AO and relied on his order.

8. The Id AR of the assessee submitted that the assessee debited the share-based expenses of Rs. 4,57,97,006/- in its P&L A/c on the basis of the fair value of ESOPs as on grant date and amortized on graded vesting period. This expense was actually been disallowed by the assessee in its ROI. Instead, the assessee claimed the actual cost incurred of Rs. 3,77,40,366/- based on the ESOPs actually exercised by its employees and the corresponding amount of invoices raised by CBRE Inc. The Id counsel of the assessee submitted that the supporting invoices from assessee's parent entity were also placed on record before the Assessing Officer to substantiate that the expenses were actually incurred by the assessee. However, the Assessing Officer disallowed the aforesaid claim of ESOP alleging inter-alia that the expenses are notional and contingent in nature.

9. The Id counsel of the assessee, further argued that the parent entity, CBRE Inc. recharges the ESOP expense to the assessee based on the market prices prevailing on exercise date of grant of shares actually exercised during the current year by employees of assessee. He submitted that the ESOP amount is not notional or contingent as it was determined and actually paid during the year and therefore be allowed. In support of his arguments, the assessee relied upon the following decisions:

(i) Hon'ble jurisdictional High Court in case of CIT v. Lemon Tree Hotels Ltd. ITA 107/2015

(ii) Hon'ble High Court of Madras CIT vs PVP Ventures Ltd. [2012] 211 Taxmann 554

(iii) Bangalore Special Bench in case of Biocon Ltd 144 ITD 21 (Bang)

iv) ITAT Delhi ACIT v Cvent India Pvt Ltd ITA no 523/Del/2020

10. Per contra the Id. DR relied upon the order of the Assessing Officer.

11. After hearing the rival submission and perusing the relevant material on record, we find that the issue of allowability of expense on account of ESOP is succinctly summarized in the following relevant extracts of the Id. CIT(A)'s order, reproduced as follows:

"I have carefully perused the assessment order. I find that this issue i.e. allowability of ESOP expenses u/s 37(1), has been decided in favour of the assessee by Hon'ble Jurisdictional High Court of Delhi and Hon'ble High Court of Madras. In a recent decision, the Hon'ble Jurisdictional ITAT Delhi in the case of ACIT Vs Cvent India Pvt. Ltd., ITA No. 523/Del/2020, date of Order 24/02/2023 has placed reliance on the decisions of Hon'ble High Courts of Delhi and Madras and has held that the ESOP expenses are allowable business expenses u/« 37(1) of the Act. Relevant part of the order is reproduced below;

A perusal of the assessment order shows that the AO has disallowed the expenditure u/s 37(1) of the Income Tax Act on two counts viz, expenditure had not crystallized and expenditure was not capital in nature. In regard to the former the appellant contended that the expenditure had been actually incurred by the appellant company and cross charges in this regard had been paid to the parent company

10. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the allowability of expenses towards ESOP expenses. AO had disallowed the expenditure by holding it to be capital in nature and not allowable u/s 37(1) of the Act. We find that CIT(A) after considering the various High Court's and Tribunal's decisions cited in the order held the ESOP expenses to be allowable u/« 37(1) of the Act. Before us, Revenue has not placed any material on record to point out any fallacy in the findings of CIT(A) nor has placed any contrary binding decision in its support. In such a situation, we find no reason to interfere with the order of CIT(A) and thus the ground of Revenue is dismissed."

Thus, respectfully following the decisions of Hon'ble Jurisdictional High Court of Delhi in the case of CIT vs. Lemon Tree Hotels Ltd. (ITA 107/2015) and Hon'ble Jurisdictional ITAT Delhi in the case of ACIT vs Cvent India Pvt. Ltd.(supra), Ihold that the ESOP expenses of Rs. RS.3,77,40,366/- is allowable u/s37(1) of the Act. Accordingly, the addition of Rs. RS.3,77,40,366/- is directed to be deleted. Ground is, thus, allowed."

12. The Hon'ble Jurisdictional High Court of Delhi in the case of Lemon Tree Hotels Limited [supra] has held as under:

“2. The question sought to be projected by the Revenue is whether the ITAT erred in deleting the addition of Rs. 1,28,19,169/- made by the Assessing Officer ('AO') by way of disallowance of the expenses debited as cost of Employees Stock Option ('ESOP') in profit and loss account?

3. The Court has been shown a copy of the decision dated 19th June 2012 passed by the Division Bench of Madras High Court in CIT-III Chennai v. PVP Ventures Ltd. (TC(A) No. 1023 of 2005) where a similar question was answered in favour of the Assessee by holding that the cost of ESOP could be debited to the profit and loss account of the Assessee. This Court has also in its decision dated 4th August 2015 in ITA No.2 of 2002 (CIT v. Oswal Agro Mills Ltd.) held that the expenditure incurred in connection with issue of debentures or obtaining loan should be considered as revenue expenditure. 4. In the circumstances, the impugned order of the ITAT answering the question in favour of the Assessee is affirmed.”

13. The Hon'ble Karnataka High Court in the case of CIT Vs. Biocon Ltd [supra] has held as under:

“10. From perusal of Section 37(1), which has been referred to supra, it is evident that an assessee is entitled to claim deduction under the aforesaid provision if the expenditure has been incurred. The expression 'expenditure' will also include a loss and therefore, issuance of shares at a discount where the assessee absorbs the difference between the price at which it is issued and the market value of the shares would also be expenditure incurred for the purposes of Section 37(1) of the Act. The primary object of the aforesaid exercise is not to waste capital but to earn profits by securing consistent services of the employees and therefore, the same cannot be construed as short receipt of capital. The tribunal therefore, in paragraph 9.2.7 and 9.2.8 has rightly held that incurring of the expenditure by the assessee entitles him for deduction under Section 37(1) of the Act subject to fulfillment of the condition.”

14. In view of the discussion above, we find that allowability of the ESOP expenses actually incurred and cross charged by the parent from an assessee has been decided in favour of the assessee in a plethora of cases including the Hon'ble jurisdictional High Court and the Coordinate Bench of ITAT Delhi Benches. Respectfully following the decision of the Hon'ble High Courts [supra] and Delhi ITAT (supra), we decline to interfere with the findings of the Id. CIT(A) and dismiss the ground raised by the Revenue.

15. In the result, the appeal of the Revenue in ITA No. 3489/DEL/2023 stands dismissed.