आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'K', मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCHES "K", MUMBAI

Before Shri Shamim Yahya, AM & Shri Ram Lal Negi, JM

ITA No.1024/Mum/2017 : Asst.Year 2012-2013

M/s.Fractal Analytics Private Limited Level 7, Silver Metropolis Western Express Highway Goregaon (East), Mumbai – 400 063. **PAN : AAACF4502D.**	**बनाम**/ Vs.	Asst.Commissioner of Income-tax Circle 9(3)(2) Mumbai.
(अपीलार्थी /Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी **की ओर से /Appellant by : Shri Ajit Kumar Jain**

प्रत्यर्थी **की ओर से /Respondent by : Shri Jayant Kumar**

सुनवाई की तारीख / **Date of Hearing : 25.07.2017**		घोषणा की तारीख / **Date of Pronouncement : 21.09.2017**

आदेश / O R D E R

Per Shamim Yahya, AM

This appeal by the assessee is directed against the order of Assessing Officer pertaining to assessment year 2012-2013 passed pursuant to the direction of the Dispute Resolution Panel, Mumbai ("DRP" for short) u/s 144C(5) dated 29.11.2016.

2. The grounds of appeal read as under:-

The grounds stated hereunder are independent of, and without prejudice to one another.

1. On the facts and in the circumstances of the case and in law, the order passed by the learned Assessing Officer ('AO'), the directions issued by the Hon'ble Dispute Resolution Panel ('DRP') and the order passed by the learned Transfer Pricing Officer ('TPO') are bad in law and liable to be quashed as they are not in accordance with law;

2. On the facts and circumstances of the case and in law, the learned AO erred in assessing the total income of the Appellant at INR 9,64,54,610;

3. On the facts and circumstances of the case and in law, the learned AO and the Hon'ble DRP have erred in confirming the action of the learned TPO in making an adjustment of Rs 5,60,02,461 to the price charged in relation to the international transactions carried out by the Appellant by:

3.1 disregarding the transfer pricing documentation maintained by the Appellant and the submissions made by the Appellant;

3.2 rejecting the plea for use of multiple year data as specified in Proviso to rule 10B(4) of the Rules;

3.3 considering the Appellant as the tested party as against the Associate Enterprises ('AE') which was considered as the tested party by the assessee in its TP study report;

3.4 re-characterizing the Appellant as aKPO service provider instead of ITeS service provider;

3.5 rejecting functionally comparable companies to the AE, as selected in the transfer pricing documentation;

3.6 conducting a fresh search and arbitrary selecting companies as comparables without considering the fact that their functions undertaken, assets employed and risks borne were not comparable to those of the Appellant while determining the arm's length price;

3.7 not considering the segmental profit and loss account maintained by the Appellant;

3.8 not considering the overall profitability of the Fractal group;

3.9 not restricting the adjustment to the transactions entered with associated enterprises.

3.10 not granting the benefit of 5 per cent range while computing the arm's length price;

3.11 not granting economic adjustments while computing the margins of the companies while determining the arm's length price.

In view of the above, the Appellant prays that Transfer Pricing adjustment made by the Learned AO and confirmed by the Hon'ble DRP in line with the order of the TPO is incorrect and ought to be deleted.

On the facts and in the circumstances of the case and in law, the Learned AO has erred in not considering the additional allowance of the Appellant and the Hon'ble DRP has further erred in denying the deduction under section 37(1) of the Act for ESOP Compensation expenses considering the same as capital and contingent in nature.

In view of the above, the Appellant prays that the allowance not considered by the Learned AO and denied by the Hon'ble DRP is incorrect and ought to be allowed. ...

5. On the facts and in the circumstances of the case and in law, the Learned AO has erred in levying consequential interest under section 234B and 234C of the Act.

The Appellant prays before your Honour to direct the Learned AO to delete the levy of interest under section 234B and 234C of the Act.

6. On the facts and in the circumstances of the case and in law, the Learned AO has erred in initiating the penalty proceedings with regards to the Transfer Pricing adjustment.

The Appellant prays that the additions made by the learned AO pursuant to the directions issued by the learned DRP be deleted and consequential relief be granted.

The Appellant craves leave to add, alter, amend and/or withdraw any of the above grounds of appeal and to submit such statements, documents and papers as may be considered necessary either at or before the hearing of this appeal as per law."

3. Learned Counsel of the assessee submitted that out of the above grounds, several grounds are general in nature and some are consequential in nature. He submitted that he is pressing only the issues relating to transfer pricing adjustment and disallowance of deduction u/s 37(1) for ESOP compensation expenses.

Issue relating to Transfer Pricing Adjustment

4. Brief facts of the case are as under:-

4.1 Fractal Analytics Pvt. Ltd. (hereinafter referred to as 'the Assesses'), is engaged in providing business process and back office services to customers through its wholly owned subsidiary company in USA.

4.2 The international transaction entered by the Assessee with its AEs during the year under consideration are given as under:

Sr. No.	Particulars	Amount (Rs.)	Method Selected
1.	Rendering of business process and back office services	31,95,33,719	TNMM
2	Reimbursement of expenses	1,66,66,364	-

4.3 The TP report provided detailed functional and economic analysis of the international transaction entered into by the assessee. In the TP report the assessee has considered Associated Enterprise ('AE') i.e. Fractal Analytics inc. ('Fractal USA') as the tested party. Transactional Net Marginal Method ("TNMM") was considered as the most appropriate method taking operating profit to Sales ("QP/Sales") ratio as the PLI.

4.4 The Assessee identified 6 comparable companies and arrived at the weighted arithmetic mean OP/Sales of 7.52% as against OP/Sales of 3.28% of the AE in assessee's own case.

4.5 The TPO proposed an adjustment of Rs. 5,60,02,461 to the total income in respect of the international transaction of the Assessee by taking the assessee as the tested party and adopting a different set of KPO comparable companies. Further the AO proposed an adjustment of Rs.1,13,579 for disallowance u/s 14A. Hence, the total adjustment/ disallowance worked out to Rs. 5,61,16,040.

5. Assessee filed objections against the above, before the DRP. After considering the assessee's submission, DRP gave following directions:-

> *5.2.1 We have considered the facts of the case and submissions made by the assessee. As far as the objection relating to TPO's choice of selecting the assessee as the tested party rather than the AE as done by the assessee in its TPSR is concerned, we find that the TPO has based his action on the findings given in A.Y, 2011-12. Other than stating that the TP method which could be most reliable and in less complex way be applied to the AE, no substantiation has been done and hence, the objection is ab initio rejected.*

5.2.2 The assessee has next raised the objection that the TPO has considered the assessee as a KPO Company where as the assessee is an ITeS company and as per the comparables given by the assessee of various ITeS Companies, the ALP should be at 15.14 % of the Transaction and accordingly the assessee's operating margin considering its AE segment being at 20.03%, the transactions pertaining to rendering of business process and back-office services were at arm's length. However, taking the KPO companies into account, the TPO held the assessee to be a KPO and therefore, made TP adjustment considering the ALP to be at 35.16 %.

5.2.2 We have gone through the submission of the assessee and reject the claim of the assessee that it is an ITeS service provider and not a KPO company. It is seen that the main activity of the assessee company is to provide Analytic Solutions to lower the cost of customer acquisition, to improve brand performances, improve multi dimensional reporting, understand consumer behavior, and many other analytical services. From the rendering of above services it is clear that the assessee is a Knowledge Process Outsourcing company which analyses various fields of business of its client and gives a report of its analyses to the client for better functioning of their business and hence, assessee is a KPO. We, therefore, uphold the action of TPO in rejecting Informed Technologies, e4e Healthcare, ICRA and Caliber Point as comparables which are ITeS /rating/research companies.

5.2.3 We also find that the comparables of KPO companies were given by the assessee itself and TPO had rejected only Datamatics Global to which assessee has objected. We further find that the same was functionally different and hence, considering the fact that the assessee had itself given the comparables, the TP adjustment considering the ALP @ 35.16 % made by the TPO by including Eclerx Services and Accentia Technologies (refer para 4.10 of TPO) is upheld and the assessee's ground of objection is rejected."

6. Consequently the Assessing Officer made transfer pricing adjustment of Rs.5,60,02,461 to the income of the assessee.

7. Against the above order, the assessee is in appeal before us.

8. We have heard both the Counsel and perused the records. Learned Counsel of the assessee submitted that he will confine his argument with regard to the transfer pricing adjustment to the selection of comparables.

9. In this regard, learned Counsel of the assessee confined his argument to the exclusion of M/s.Eclerx Services from the comparables. He submitted that detailed submission in this regard had been made to the authorities below (Paper Book page 65-70). However, authorities below have not countered the same. Learned Counsel submitted that assessee is engaged in providing analytical solution. As against this Eclerx Services is supporting its clients with two market-focused business units, viz., Financial Services and Sales and Marketing Support Services. The functions of Eclerx Services are diverse comprising of consulting, business analysis and solution testing which is dissimilar to that of the assessee. Furthermore, learned Counsel submitted that the segmental details of its operation are not available. That this company is having abnormal high profits. He further claimed that the said company had 4000 employees while assessee employs only 200 employees. In this regard learned Counsel placed following case laws:-

(i) Delhi High Court decision in the case Pr.CIT v. Actis Global Services Private Limited [ITA No.417/2016 order dated 05.08.2016]

(ii) Delhi High Court decision in the case of Rampgreen Solutions Private Limited [ITA No.102/2015 order dated 10.08.2015]

10. Accordingly learned Counsel submitted that because of absence of segmental data and the diverse nature of activity which Eclerx Services engaged into, it should not be included in the comparables.

11. Per contra, the learned Departmental Representative submitted that the functional analysis shows that the assessee is providing high end analytical solution. It is also a K.P.O. He submitted that the functions are broadly similar. The learned DR further submitted that high profit is not a ground for rejection.

12. Upon careful consideration, we note that assessee is engaged in providing analytical solutions to its AEs to lower the cost of customer acquisition, to improve brand performances, improve multi dimensional reporting, understand consumer behavior, and many other analytical services. As against the above, we find that Eclerx Services is engaged into diverse range of activities which includes financial services and sales and marketing support services. Its functions primarily are consultancy, business analysis and solution testing. Thus, M/s.Eclerx Services is engaged into various functions and segments. Its segmental data are not available. In following case laws it has been held that the company should be rejected as comparable as its segmental data are not available:-

(i) M/s.Capital IQ Information Systems (India) Pvt. Ltd. v. ACIT [ITA No.124/Hyd/2014]
(ii) M/s.Excellence Data Research Pvt. Ltd v. ITO [ITA No.159/Hyd/2014]

13. Furthermore we note that in the case of Rampgreen Solutions Private Limited (supra) has held that although super profits could not be the only reason to exclude the comparable, however, Hon'ble High Court had expounded that in such circumstances it may be necessary to bear in mind the super normal profits in a certain cases indicated functional dissimilarity. That a wide deviation in the PLI amongst selected comparables could be indicative that the comparables selected are either materially dissimilar or the data used is not reliable. The Hon'ble High Court in the decision noted the findings of Special Bench of the Tribunal in the case of Maersk Global Centres (India) Pvt. Ltd. wherein it was noted that Eclerx Services is engaged in data analytical, data processing services, pricing analytics, bundling optimization, content operation, sales and marketing support, product data management, revenue management. Furthermore it is noted that Eclerx Services also offered financial services such as real-time capital markets, middle and back-office support, portfolio risk management services and various critical data management services.

14. The observation of the learned DRP that assessee and Eclerx Services are KPOs and hence comparable is also not sustainable. The Hon'ble Delhi High Court in the case of Actis Global Services Private Limited (supra) had held that even though both being KPOs two entities are not comparable if they were catering to different types of business.

15. From this it is amply clear that the said diverse activities are not comparable with the service of providing analytical solution rendered by the assessee. Moreover though some functions are similar, there are lot of other functions by M/s.Eclerx Services which arenot done by the assessee. Hence,

absence of segmental data make comparability not feasible. In these circumstances and in the facts and circumstances discussed above considering the precedents as above, we are of the considered opinion that Eclerx Services is not comparable in this case to that of the assessee because of diverse nature of its functions. A large number of them are dissimilar to that of the assessee and the fact that proper segmental data are not available. Hence, holding that Eclerx Services cannot be taken as a comparable in this regard, we remit the issue to the TPO to make the computation afresh after excluding Eclerx Services as a comparable, and making further computation as per law.

16. Ground relating to disallowance u/s 37(1) for ESOP compensation expenses is not dealt with in the draft order of the Assessing Officer. However, the issue relating to this has been dealt with by the DRP. The DRP on this issue has dealt with as under:-

> *"4.2.1 We have considered the facts of the case and submissions made by the assessee, The assessee in the return of income filed had disallowed Rs.24,02,383/- on account of ESOP Compensation Expenses. However, during the course of assessment proceedings, the assessee requested the AO to consider the same and allow it as expenses based on various case laws.*
>
> *4.2.2 The AO has not commented about the application made by the assessee to allow the ESOP compensation expenses disallowed in the return of income in the assessment order.*
>
> *4.2.3 We have gone through the submission made by the assessee and from the same it is observed that the assessee had suo motu disallowed the ESOP compensation expenses in its return of income and later had claimed for relief before the AO, However, we note that the expenses incurred towards ESOP Compensation are capital in nature and do not have any revenue impact. Secondly, the expenses incurred*

towards ESOP Compensation are contingent in nature which may or may not have any future impact on the assessee's profit & loss account.

4.2.4 Hence, since the ESOP Compensation Expenses are not revenue expenditure as per section 37(1) and the said expenditure only has capital impact in the books of the assessee, the said ground of objection is rejected."

17. Against this, the assessee is in appeal before us.

18. We have heard both the Counsel and perused the records. Learned Counsel of the assessee submitted that Rs.24 lakh expended on ESOP was disallowed by the assessee itself erroneously in the return. But later on assessee gave letter in this regard to the Assessing Officer. Learned Counsel submitted that the issue now stands covered in favour of the assessee by the decision of Special Bench in the case of Biocon Limited v. DCIT [(2013) 35 taxmann.com 335 (Bangalore) (SB). He pleaded that quantification can be done in this regard as per the guidelines given in the Special Bench decision. He also referred to Mumbai ITAT decision in the case of HDFC Bank Limited v. DCIT 61 Taxmann.com 361, wherein the said decision of the Special Bench in the case of Biocon Limited (supra) was followed.

19. Per contra, the learned Departmental Representative submitted that ESOP related to share premium is in capital field even after Special Bench decision. For this, he relied upon the Hon'ble jurisdictional High Court decision in the case of Vodafone India Services (P) Ltd. v. Union of India, writ petition No.871 of 2014 vide order dated October 10, 2014.

20. Upon careful consideration, we find that allowability of ESOP expenditure u/s 37(1) was elaborately considered by the Special Bench in the case of Biocon Limited (supra). We may refer to the exposition in brief as under (Head Note only):-

HELD :

Whether discount under ESOP is a short capital receipt

There is no doubt that the amount of share premium is otherwise a capital receipt and, hence, not chargeable to tax in the hands of company. If a company issues shares to the public or the existing shareholders at less than the otherwise prevailing premium due to market sentiment or otherwise, such short receipt of premium would be a case of a receipt of a lower amount on capital account. It is so because the object of issuing such shares at a lower price is nowhere directly connected with the earning of income. It is in such like situation that the contention of the revenue would properly fit in, thereby debarring the company from claiming any deduction towards discounted premium. [Para 9.2.6]

- It is quite basic that the object of issuing shares can never be lost sight of. Having seen the rationale and modus operandi of the ESOP, it becomes out-and-out clear that when a company undertakes to issue shares to its employees at a discounted premium on a future date, the primary object of this exercise is not to raise share capital, but to earn profit by securing the consistent and concentrated efforts of its dedicated employees during the vesting period. Such discount is construed, both by the employees and company, as nothing but a part of package of remuneration. In other words, such discounted premium on shares is a substitute to giving direct incentive in cash for availing the services of the employees. There is no difference in two situations viz., one, when the company issues shares to public at market price and a part of the premium is given to the employees in lieu of their services

and two, when the shares are directly issued to employees at a reduced rate. In both the situations, the employees stand compensated for their effort. It follows that the discount on premium under ESOP is simply one of the modes of compensating the employees for their services and is a part of their remuneration. Thus, the contention of the revenue that by issuing shares to employees at a discounted premium, the company got a lower capital receipt, is bereft of any force. By no stretch of imagination, such discount can be described as either a short capital receipt or a capital expenditure. It is nothing but the employees cost incurred by the company. [9.2.6]

- The revenue also canvassed a view that an expenditure denotes "paying out or away" and unless the money goes out from the assessee, there can be no expenditure so as to qualify for deduction under section 37. Section 37(1) provides that an expenditure must be laid out or expended wholly and exclusively for the purpose of business so as to be eligible for deduction. There is absolutely no doubt that section 37(1) talks of granting deduction for an 'expenditure'. However, it is pertinent to note that this section does not restrict paying out of expenditure in cash alone. When the definition of the word "paid" under section 43(2) is read in juxtaposition to section 37(1), the position which emerges is that it is not only paying of expenditure, but also incurring of the expenditure which entails deduction under section 37(1) subject to the fulfilment of other conditions. Therefore, by undertaking to issue shares at discounted premium, the company does not pay anything to its employees, but incurs obligation of issuing shares at a discounted price on a future date in lieu of their services, which is nothing but an expenditure under section 37(1). [Para 9.2.7]

Whether discount is a contingent liability

- It is a trite law that deduction is permissible in respect of an ascertained liability and not a contingent liability. From the stand point of the company, the options under ESOP vest

with the employees at the rate of 25 per cent only on putting in service for one year by the employees. Unless such service is rendered, the employees do not qualify for such options. In other words, rendering of service for one year is sine qua non for becoming eligible to avail the benefit under the scheme. Once the service is rendered for one year, it becomes obligatory on the part of the company to honour its commitment of allowing the vesting of 25 per cent of the option. It is at the end of the first year that the company incurs liability of fulfilling its promise of allowing proportionate discount, which liability would actually be discharged at the end of the fourth year when the options are exercised by the employees. [Para 9.3.2]

- The principle laid down in the case of Bharat Earth Movers v. CIT [2000] 245 ITR 428/112 Taxman 61 (SC) was that a liability definitely incurred by an assessee is deductible notwithstanding the fact that its quantification may take place in a later year. The mere fact that the quantification is not precisely possible at the time of incurring the liability would not make an ascertained liability a contingent. Almost to the similar effect is the judgment of the Supreme Court in the case of Rotork Controls India (P.) Ltd. v. CIT [2009] 314 ITR 62/180 Taxman 422. [Paras 9.3.3 and 9.3.4]

- Considering the facts of the present case in the backdrop of the ratio laid down by the Supreme Court in Bharat Earth Movers (supra) and Rotork Controls India (P.) Ltd. (supra), it becomes vivid that the mandate of these cases is applicable with full force to the deductibility of the discount on incurring of liability on the rendition of service by the employees. The factum of the employees becoming entitled to exercise options at the end of the vesting period and it is only then that the actual amount of discount would be determined, is akin to the quantification of the precise liability taking place at a future date, thereby not disturbing the otherwise liability which stood incurred at the end of each year on availing the services. It is, therefore, held that

the discount in relation to options vesting during the year cannot be held as a contingent liability. [Paras 9.3.5 and 9.3.6]

Whether deduction is allowable

- Also, it is discernible from the above provisions of Fringe Benefit tax that the legislature itself contemplates the discount on premium under ESOP as a benefit provided by the employer to its employees during the course of service. If the legislature considers such discounted premium to the employees as a fringe benefit or 'any consideration for employment', it is not open to argue contrary. Once it is held as a consideration for employment, the natural corollary which follows is that such discount i) is an expenditure; ii) such expenditure is on account of an ascertained (not contingent) liability ; and iii) it cannot be treated as a short capital receipt. Therefore, discount on shares under the ESOP is an allowable deduction. [Para 9.4.1]

Quantum of deduction

- An employee becomes entitled to the shares at a discounted premium over the vesting period depending upon the length of service provided by him to the company. In all such schemes, it is at the end of the vesting period that option is exercisable albeit the proportionate right to option is acquired by rendering service at the end of each year. [Para 10.3]

- Similar is the position from the stand point of the company. An obligation falls upon the company to allot shares at the time of exercise of option depending upon the length of service rendered by the employee during the vesting period. The incurring of liability towards the discounted premium, being compensation to employee, is directly linked with the span of service put in by the employee. It, therefore, transpires that a company, under the mercantile system can lawfully claim deduction for total discounted premium representing the employees cost over the vesting

period at the rate at which there is vesting of options in the employees. [Para 10.4]

- Therefore, it is apparent that the company incurs liability to issue shares at the discounted premium only during the vesting period. The liability is neither incurred at the stage of the grant of options nor when such options are exercised. [Para 10.5]

- Considering the questions of 'when' and 'how much' of deduction for discount on options is to be granted, it is held that the liability to pay the discounted premium is incurred during the vesting period and the amount of such deduction is to be found out as per the terms of the ESOP scheme by considering the period and percentage of vesting during such period. Therefore, deduction of the discounted premium is to be allowed during the years of vesting on a straight line basis. [Para 10.8]

Subsequent adjustment to discount

- Regarding the adjustment of discount when the options remain unvested or lapse at the end of the exercise period, it is but natural that there is no employee cost to that extent and, hence, there can be no deduction of discount qua such part of unvested or lapsing options. But, as the amount was claimed as deduction by the company during the period starting with the date of grant till the happening of this event, such discount needs to be reversed and taken as income. It is so because logically when the options have not eventually vested in the employees, to that extent, the company has incurred no employee cost. And if there is no cost to the company, the tentative amount of deduction earlier claimed on the basis of the market price at the time of grant of option ceases to be admissible and, hence, needs to be reversed. [Para 11.1.3]

- The second situation is when the options are exercised by the employees after putting in service during the vesting period. In such a scenario, the actual amount of

remuneration to the employees would be only the amount of actual discounted premium at the time of exercise of option. The Supreme Court in the case of CIT v. Infosys Technologies Ltd. [2008] 297 ITR 167/116 Taxman 204 held that the allotment of shares to employees under ESOP, subject to a lock in period of five years and other conditions could not be treated as a perquisite as there was no benefit and the value of benefit, if any, was unascertainable at the time when options were exercised. [Para 11.1.4]

- From the provisions of section 17(2), two things surface. First, that the perquisite arises on the 'allotment' of shares and second, the value of such perquisite is to be computed by considering the fair market value of the shares on 'the date on which the option is exercised' by the assessee as reduced by the amount actually paid. The position that such amount was or was not taxable during some of the years in the hands of the employees is not relevant in considering the occasion and the amount of benefit accruing to the employee under ESOP. Any exemption or the deductibility of an allowance or benefit to employee from taxation does not obliterate the benefit itself. It simply means that the benefit accrued to the assessee but the same did not attract tax. The position has now been clarified beyond doubt by the legislature that the ESOP discount, which is nothing but the reward for services, is a taxable perquisite to the employee at the time of exercise of option, and its valuation is to be done by considering the fair market value of the shares on the date on which the option is exercised. [Para 11.1.4]

- It is palpable that since the remuneration to the employees under the ESOP is the amount of discount with respect to the market price of shares at the time of exercise of option, the employee cost in the hands of the company should also be with respect to the same base. [Para 11.1.5]

- The amount of discount at the stage of granting of options with respect to the market price of shares at the time of

grant of options is always a tentative employee cost because of the impossibility in correctly visualizing the likely market price of shares at the time of exercise of option by the employees, which, in turn, would reflect the correct employees cost. Since the definite liability is incurred during the vesting period, it has to be quantified on some logical basis. It is this market price at the time of the grant of options which is considered for working out the amount of discount during the vesting period. But, since actual amount of employee cost can be precisely determined only at the time of the exercise of option by the employees, the provisional amount of discount availed as deduction during the vesting period needs to be adjusted in the light of the actual discount on the basis of the market price of the shares at the time of exercise of options. [Para 11.1.6]

Taxation vis-à-vis accounting principles

- The submissions put forth by the assessee that, in the absence of any specific provision in the Act, the accounting principles should be followed for determining the total income of the assessee are not acceptable. What is true for accounting purpose need not necessarily be true for taxation. Taxation principles are enshrined in the legislature. Power to legislate lies with the Parliament. Accounting standards or Guidance Note or Guidelines etc., issued by any autonomous or even statutory bodies including the Institute of Chartered Accountants of India, or the SEBI are meant only to prescribe the way in which the transactions should be recorded in books or reflected in the annual accounts. These guidelines do not have the force of an Act of Parliament. Since the subject matter of tax on income falls in the Union List as per Part XI of the Indian Constitution, it is only the Parliament which can legislate on its scope. [Para 11.2.3]

Conclusion

- In the present case, the assessee-company was a closely held company in the previous year relevant to the

> assessment year 2003-04 and as such there was no question of listing of its shares and having some market price at the time of grant of options. Ordinarily, the amount of discount on premium which is written off over the vesting period represents the market price of the shares listed on the stock exchange on the date of grant of option as reduced by the price at which option is given to the employees. However, since there was no availability of any market price of such shares on the date of grant of option as the company came to be listed on a stock exchange in a subsequent year, the assessee-company took the market price of the share on the date of grant of option at Rs.919. No material worth the name was placed on record to indicate as to how a share with face value of Rs.10 had been valued at Rs.919 for claiming deduction towards discount at Rs.909 per share. This aspect of valuation of shares at Rs. 919 per share needs to be examined by the Assessing Officer. [Para 12.2]

21. No contrary decision of higher judicial forum on the issue of allowability of ESOP expenses has been shown to us. The decisions referred by the learned Departmental Representative from the jurisdictional High Court in the case of Vodafone India (supra) is not on the subject of deductibility of ESOP expenditure. In the said decision of Hon'ble jurisdictional High Court has held that issue of shares at a premium by the assessee to its non-resident holding company does not give rise to any income from an admitted international transaction and thus there is no provision to apply Chapter X in such a case. Hence this decision does not support the case of the Revenue.

22. We note that the above decision of the Special Bench is germane and was not before the authorities below. Accordingly, we remit the issue to the

file of the Assessing Officer. The Assessing Officer shall consider and quantify the amount allowable as per the decision and guideline mentioned in the decision of Special Bench in the case of Biocon Limited(supra). Needless to add, assessee should be granted adequate opportunity of being heard.

23. In the result, this appeal filed by the assessee stands partly allowed.

Order pronounced on this 21st day of September, 2017.

Sd/-	**Sd/-**
(Ram Lal Negi)	**(Shamim Yahya)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक Dated : 21.09.2017
Devdas*

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**