आयकर अपीलीय अधिकरण "एफ" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI

श्री शक्तिजीत दे ,न्यायिक सदस्य **एवं**
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।

BEFORE SHRI SAKTIJIT DEY, JM AND SHRI MANOJ KUMAR AGGARWAL, AM

आयकरअपीलसं./I.T.A. No.6479/Mum/2016
(**निर्धारणवर्ष /** Assessment Year:2012-13)

Assistant Commissioner of Income Tax- 4(3)(1) Room No.649, 6th Floor, Aaykar Bhavan, M.K. Road Mumbai-400 020	**बनाम**/ Vs.	**JM Financial Institutional Securities Ltd.** (now merged with JM Financial Limited) 7th Floor, Cnergy Appasaheb Marathe Marg Prabhadevi, Mumbai-400 025
स्थायीलेखासं./जीआइआरसं./**PAN/GIR No.AABCA-2496-G**		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

&

आयकरअपीलसं./I.T.A. No.6891/Mum/2016
(**निर्धारणवर्ष /** Assessment Year: 2012-13)

JM Financial Institutional Securities Ltd. (now merged with JM Financial Limited) 7th Floor, Cnergy Appasaheb Marathe Marg Prabhadevi, Mumbai-400 025	**बनाम**/ Vs.	**Deputy Commissioner of Income Tax- 4(3)(1)** Mumbai
स्थायीलेखासं./जीआइआरसं./**PAN/GIR No.AABCA-2496-G**		
(अपीलार्थी/**Appellant**)	:	(अपीलार्थी/**Appellant**)

Revenue by	:	Pooja Swaroop, Ld. JCIT-DR
Assessee by	:	K. Shivram & Aditya Ajgaonkar, Ld. AR's

सुनवाई की तारीख/ **Date of Hearing**	:	26/07/2018
घोषणा की तारीख / **Date of Pronouncement**	:	03/10/2018

आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member)

1. These are cross appeals for Assessment Year [AY] 2012-13 which contest the order of the Ld. Commissioner of Income-Tax (Appeals)-9 [CIT(A)], Mumbai, *Appeal No.CIT(A)-9/Cir.4/302/2015-16* dated 16/08/2016 on separate grounds of appeal. The assessee, vide application dated 19/07/2018, pleaded for admission of additional grounds of appeal. However, the same has not been urged during hearing before us and therefore, the same stand dismissed in *limine.* First we take up assessee's appeal ITA No.6891/Mum/2016, wherein the following grounds of appeal has been urged:-

A. ADDITION BY WAY OF DISALLOWANCE OF EXPENDITURE INCURRED IN RESPECT OF THE EMPLOYEES STOCK OPTION SCHEME ('THE ESOP") BY WAY OF THE PAYMENTS MADE TO THE HOLDING COMPANY RS.1,32,60,846/-

1. On the facts and I the circumstances of the case and in law, the Honourable Commissioner of Income Tax (Appeals)-9 ["the CIT(A)"] erred in confirming the action of the Deputy Commissioner of Income Tax-4(3)(1) ("the DCIT") and disallowing the expenditure incurred in respect of ESOP aggregating to Rs.1,32,60,846/- alleging the same to be a capital expenditure.

2. The learned CIT(A) and the DCIT failed to appreciate that the Appellant has incurred the expenditure on ESOP only with a view to retain its employees, and as a reward to their contributions and the loyalty for serving the Appellant, accordingly qualifying as business expenditure incurred in the ordinary course of business and there has been no increase in the capital of the Appellant.

3. The learned CIT(A) erred in confirming the action of the DCIT in alleging that the vesting period of the Stock Option would start from Financial Year 2012-13 as against 21st April, 2011 ignoring the facts and submissions made by the Appellant in this regard.

4. *The learned CIT(a) and the DCIT also failed to follow the various judgments in favour of the Appellant, passed by the Jurisdictional ITAT and the other ITAT across the country while passing the order.*
5. *In view of the above, the learned DCIT be directed to delete the entire addition made on account of expenditure on ESOP aggregating to Rs.1,32,60,846/-*

The assessment for impugned AY was framed by *Ld. Deputy Commissioner of Income Tax 4(3)(1), Mumbai [AO] u/s 143(3) of the Income Tax Act, 1961* on 30/03/2015 wherein the income of the assessee has been assessed at Rs.939.20 Lacs after certain additions and disallowances as against returned income of Rs.753.29 Lacs filed by the assessee on 26/09/2012. As evident from the grounds of appeal, the assessee is aggrieved by disallowance of *"Employees Stock Option Plan" (in short ESOP)* expenditure of Rs.132.60 Lacs stated to be paid by the assessee to its holding company for the benefit of assessee's employees.

2. The assessee being *resident corporate assessee* was engaged in the business of *shares / stock broking, advisory and other financial services.* During assessment proceedings it was noted that the assessee made a payment of Rs.132.60 Lacs to its ultimate holdings company *M/s JM Financial Limited* and claimed the same under the head *'Employee Benefit Expenses*'. It was submitted that the holding company had formulated an *ESOP* scheme for grant of stock option and as a corollary, has granted stock options to the employees of the assessee company also. The assessee, accordingly, paid / reimbursed differential amount of *issue price vs. market price* of the said option shares to its holding company. The

assessee vide letter dated 12/03/2015 defended the same by submitting that the *ESOP* scheme was in respect of participation by the employees of the assessee company in the scheme of the ultimate holding company *M/s JM Financial Limited* and the assessee paid the state amount to the holding company. However, the same could not convince Ld. AO for the following reasons:-

a) *ESOP discounts are incurred in relation to issue of shares to employees. They are not relatable to profits and gains arising or accruing from a business / trade. The Apex Court decision in the case of Punjab State Industrial Devl. Corp. Ltd. (1997) 225 ITR 792 (SC) and Brooke Bond India Ltd., (1997) 225 ITR 798 (SC) have held that expenditure resulting in "increase in capital" is not an allowable deduction even if such expenditure may incidentally held in business of the company.*

b) *ESOP discount does not diminish trading/ business receipts of the issuing company. The company does not suffer any pecuniary detriment. To claim a charge against income, it should inflict a detriment to the financial position. ESOP is voluntary scheme launched by the employers to issue shares to employees. The intention is to only give a 'stake' to the employees in the organization.*

c) *This discount is not incurred towards satisfaction of any trade liability as the employees have not given up anything to procure such ESOP.*

d) *Share premiums obtained on issue of shares are items of capital receipts. When such premium is forgone, it cannot be claimed as an 'expenditure wholly and exclusively laid out or expended for the purposes of the trade.'*

e) *It is further worthwhile to note that the scheme of ESOP involves four stage, namely, granting of options, vesting of options, exercise of options and sale of shares. The assessee company at the stage of grant, merely expresses an intent or a wish and exercise by the concerned employee, after the vesting period only draws the employer to a binding obligation of entering into an enforceable contract of sale. Therefore, the accrual of expenditure is not from the date of grant but only from the date of exercise of the option by the employee. In the instant case, the assessee has not correlated the amount of actual loss incurred on such exercise by the employees.*

f) *There is no specific provision for such deduction from sections 30 to 36 of the Income Tax Act. So the residuary section 37 only comes to play and the primary condition for allowance under this section is the existence of Revenue expenditure wholly and exclusively incurred for the purposes of the business. As elaborated in the above point, there is neither any real expenditure at the stage of grant or otherwise, nor the expenditure can be qualified as Revenue in nature.*

g) In this case, the shares of the parent holding company are claimed to have been allotted to the employees of the assessee company. The parent company also has an interest in retaining the employees of its subsidiary and hence the notional loss if at all, is related to the parent company. And in no way, the assessee company's contribution to the parent company in this regard is having any direct nexus with respect to the ESOP expenses. It is worthwhile noting here that the assessee company has never purchased any shares from the holding company. (Decision of Accenture Services P. Ltd Vs DCIT, Circle 3(1), Mumbai in 2010 TIOL-409ITAT-Mumbai is distinguished).

During the course of proceedings, the assessee, vide letter dated 30/03/2015 raised a new argument that the vesting period of *Stock Options* began from 21/04/2011 and the impugned amount of Rs.1.32 crores was the proportionate cost of 346 days for the period 21/04/2011 to 31/03/2012. However Ld. AO, upon perusal of assessee's communication before TDS Officer, noted that the vesting period was to start from FY 2012-13. Finally, not convinced and placing reliance on certain judicial pronouncements, Ld. AO disallowed the same.

3. The Ld. CIT(A) also rejected the claim of the assessee by observing as under:-

6.3 I have considered the stand of the AO and the submissions of the appellant. It is seen that the stock options were issued at an exercise price of Rs.1/- per stock as against the prevailing market price of Rs.31.50. On examination of notes to the financial statements, under note-32, it is found that the auditors have given a specific remark that the assessee had made payment of Rs.1,32,60,846/- to the ultimate holding company, JM Financial Ltd and claimed the same under the head, Employee Benefit Expenses vide note 22 of the P& L Account. This ESOP scheme was formulated for grant of stock option and as corollary, the appellant had granted stock options to the employees of the assessee company. The payments were related to the differential amount of issue price and market price of the said option shares which were reimbursed to the holding company by the assessee company.

It is further seen that the company does not suffer any pecuniary loss or detriment on account of ESOP. It is also not a trade liability. Share premiums obtained on the issue of such shares are the items of capital receipts and when such premium are foregone, it cannot be claimed as expenditure wholly and exclusively revenue in nature. The whole process consists of four stages namely, granting of options, vesting of options, exercise of options and sale of shares. Further there is no specific provisions of such claim of expenses to be allowed as deduction u/s 30 to 36 of the IT Act, 1961. Another aspect of such scheme is that the parent company also has an interest in retaining the employees of its subsidiary and hence, notional loss if at all, is related to parent company.

It is further seen from the para 4.5 of the assessment order that as per communication received by the AO vide letter No. DCIT-TDS-2(1)/JM.Fin.Inst/JuriAO/s.201/2013-14 dated 04.03.2014 according to which, the vesting period of ESOP in the assessee's case is to start from financial year 2012-13 i.e. assessment year 2013-14 whereas, the present appeal relates to AY 2012-13 financial year being 2011-12. In view of this, it cannot be said that this difference of offer price of the actual cost of shares and market price of the share, can be treated as any remuneration to the employees for their continuity in service of the appellant company. It can be also seen that the appellant has claimed such expenses or difference without substantiating that it actually amounted to short receipt of share premium. Since the receipt of share premium is not taxable, any short receipt of such premium by the appellant can be only notional loss and not actual loss. It is also not clear that the employees will not get right in shares till completion of the period prescribed and the expenditure claimed to be is contingent and not actual or real.

In view of this, the case laws referred and applied by the Ld. AR cannot be applied to the present facts of the case. Further, the nature of scheme of ESOP of the appellant is more akin to Sweat Equity Shares schemes and therefore, the same cannot be allowed as decided by the Hon'ble ITAT Mumbai in the case of Future Agrovet Ltd. Vs Addl. CIT Range-9(1) Mumbai (2015) 63 Taxmann.com 140, where it was decided as under:

> *7.We have heard the rival contentions and perused the record. We notice that both the tax authorities have placed reliance on the decision rendered in the case of Ranbaxy Laboratories Ltd. (supra). A perusal of the discussions made by Ld. CIT(A) about the facts prevailing in Ranbaxy Laboratories Ltd would show that the issue considered therein was different one, i.e., the assessee therein claimed the difference between the 'market value' of shares and the 'issue price' as expenditure. However, in the instant case, the assessee has issued shares at free of cost and hence the entire value of shares is treated as part of employee benefit and accordingly the value of sweat equity shares was claimed as deductions.*
>
> *8.Before us, the Ld. AR mainly placed reliance on the provisions of Fringe benefit tax to contend that the assessee, having paid the fringe benefit tax,*

should be allowed to claim the value of sweat equity shares as deduction. The Ld. AR invited our attention to Circular No.8 of 2005 dated 29-08-2005 issued by the CBDT giving clarifications about the Fringe Benefit Tax. The Ld. AR invited our attention to the question No.35 and the answer given to it wherein it is clarified that the fringe benefit tax is not payable on the portion of expenses, which were disallowed. Accordingly, the Ld. AR drew an inference, apparently on reverse interpretation, that if the Fringe benefit tax is accepted, then the expenditure is allowable as revenue expenditure. We are unable to agree with the said contentions. As submitted by Ld. DR, the income from business has to be necessarily computed in terms of sec. 28 to 43 of the Act. The computation of fringe benefit tax is a subsequent exercise. Accordingly, if any expenditure is disallowed while computing the business income, then the assessee may not be liable to pay the fringe benefit tax. This position has been made clear by the CBDT in the answer to Q.No.35 given in Circular No.8 of 2005, wherein it is stated that the fringe benefit tax is payable only on the amount allowed under the provisions of Income Tax Act. Hence, in our view, the assessing officer was right in holding that the question of allowability of the impugned claim should be independently tested in terms of the provisions of sec. 37(1) of the Act. Further our attention was invited to the provisions of sec. 115WKA which provide for recovery of fringe benefit tax by the employer from employee and also to the provisions of sec.115WKB of the Act which states that the fringe benefit tax so recovered shall be deemed to be the tax paid by such employee in respect of the value of fringe benefit as determined u/s 1115WC(1)(ba) of the Act. Hence, a specific question was put to the Ld AR as to whether the above said employees have disclosed the value of sweat equity shares as their respective income, the Ld. A.R submitted that they have not declared the same as their respective income. In any case, the methodologies prescribed in the provisions relating to Fringe benefit tax for payment/recovery of tax may not be relevant to determine about the deductibility of an expenditure u/s 37(1) of the Act.

9.Now we shall examine the definition given for "Sweat equity shares" in the Explanation below to sec. 115WB (1) of the Act

> *"Sweat equity shares" means equity shares issued by a company to its employees or directors at a discount or for consideration other than cash for providing know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called.'*

Thus, it is seen that the Sweat Equity Shares is issued for consideration "Other than cash" for providing know-how or for making available rights in the nature of intellectual property rights or value additions. Thus, the employees or directors should provide "intangible assets" of the nature

specified in the above said definition to the company for obtaining the equity shares at a "discount or "for consideration other than cash". If shares are issued at "free of cost" without acquiring any intangible assets of the nature specified in the above said definition, in our view, the same would not fall in the category of" Sweat Equity Shares."

10.The notes of accounts attached to the Balance sheet as at 31.3.2008, which is place at page 27 of the paper book, states about the issue of sweat equity shares, as under: -

> *"During the year the Company has issued equity shares of Rs.50,00,000/- each (5,00,000 equity shares of Rs.10/- each) to Mr. Narendra Baheti (Managing Director) and Mr. Rajendra Baheti (Zonal Head – North Zone) as per Board resolution dated 14th November, 2007. The shareholders had passed a special resolution in the extraordinary general meeting held on 29th December, 2007 to authorize such allotment. The shares were allotted on 16th January, 2008. The sweat equity shares have been issued for consideration other than cash for providing professional services."*

Thus it is seen that the assessee has issue equity shares for providing "Professional services", which has been considered as value addition by the assessee company. This fact has further been elaborated in the report dated 18-10-2007 given by M/s Doogar & Associates, Chartered Accountants who had valued the consideration for proposed issue of Sweat Equity Shares to both the employees. In the said report, it is stated that the business concept of selling staples such as Sugar, Rice, Pulses, Wheat/Atta etc., in open drums was introduced by Mr. Baheti (one of the employees) for the first time in the name of "Food bazar", which became a great hit with the consumers. Considering the vast experience in the trading, procurement, business development and managing qualities of Mr. Narendra Baheti, he was made the Managing Director of the assessee company. Another employee Shri Rajendra Baheti is a Chartered Accountant and he had joined hands with Mr. Narendra Baheti in developing Food Bazaars and was in-charge of procurement of staples. Hence he was appointed as Zonal Head –North.

11.From the valuation report furnished by the consultant cited above, we notice that the issuing of sweat equity shares was authorized with the stipulation that they will be entitled for the same after the completion of one year from the date of commencement of business subject to the condition that he will develop the supply chain to meet PRIL (holding company) requirement for their food & grocery outlets and frame the organization structure in such a way that PFPIL (Old name of the assessee herein) develop its system with the development of PRIL's business. The sweat equity shares shall be issued within first five years

and if developments are not achieved satisfactorily in the first year, aforesaid option of sweat equity will lapse. From the report given under the heading "Business activities of the Company", it is seen that the assessee company was formed originally in the name of Pantaloon Food Product India Ltd (PFPIL) as a wholly owned subsidiary of Pantaloon Retail (India) Ltd (PRIL) on 13.04.2005. The turnover target was fixed at Rs.50 crores for the first year of operations and the same was achieved. Hence both the persons cited above were allotted Sweat Equity Shares during the year under consideration.

12.The foregoing discussions would show that the Sweat Equity shares were issued to the above said two persons for "Value Addition" as given in the definition of the expression "Sweat Equity Shares". As discussed earlier, the value addition was given by the above said persons to the assessee company in the form of their vast experience in new business concepts and professional experience. Under these set of facts, in our view, the Value addition would partake the character of an intangible asset in the hands of the assessee company. Since the Sweat Equity shares were issued for acquiring the Value addition, in our view, the tax authorities are justified in holding the same as "Capital expenditure" in the hands of the assessee company. Accordingly, we uphold the order of Ld. CIT(A) on this issue.

13.In the result, the appeal filed by the assessee is dismissed.

Keeping in view the above facts and circumstances of the case, the disallowance made by the AO is upheld. In the result, this ground of appeal is dismissed.

Aggrieved, the assessee is in further appeal before us.

4.1 The Ld. Senior Counsel, *Dr K.Shivram*, submitted that the assessee's employees participated in the *ESOP Scheme* formulated by the parent company of the assessee and assessee reimbursed the differential amount of market price [Rs.31.50 per share] vs. issue price [Re. 1/- per share] aggregating to Rs.1.32 Crores for the aforesaid participation and the said sum was paid for retention of employees and merely a method of remunerating them. The Ld. Counsel submitted that lower authorities failed to appreciate that the expenditure was not a capital expenditure in the

hands of the assessee since no advantage in the capital field accrued to the assessee and the impugned expenditure neither gave rise to any capital asset-tangible or intangible in the hands of the assessee nor did it affect the capital of the assessee. The shares were allotted by the holding company to the employees of the Assessee and the assessee company merely made good the difference. Since there was no advantage in the capital filed, the expenditure was revenue expenditure in terms of decision of Hon'ble Apex Court rendered in *Empire Jute Company Ltd Vs. CIT [124 ITR 1].* The Ld. Counsel further submitted that the said expenditure was in the nature of incentive for the employees as a means of retaining / rewarding the employees and therefore allowable u/s 37(1). It is further submitted that the assessee made the actual payment to the holding company and neither the parent company nor the assessee company had to forego any premium. The parent company received the full price for its share and the assessee had actually paid the same through its Bank Account as *employees benefit expenditure.* Reliance has been placed on number of judicial pronouncements rendered by this Tribunal at different point of time.

4.2 At the same time, Ld. Counsel distinguish the case laws relied upon by lower authorities by submitting that the decision rendered in *Ranbaxy Laboratories Ltd. & VIP Industries Ltd.* has already been considered in the favorable decision rendered by the Special Bench of Bangalore Tribunal in the case of *Biocon Limited Vs. DCIT [*144 ITD 21]. The case of *Punjab State Industrial Development Corporation Limited* dealt with the issue of

fees paid to Registrar of Companies for increase in Share Capital and hence not applicable. It is further submitted that the case of Future Agrovet Ltd. Vs. ACIT [155 ITD 786] dealt with the issue of *Sweat Equity Shares* which is not the case here.

4.3 Per *Contra,* Ld. Departmental Representative, *Ms. Pooja Swaroop* supported the stand of lower authorities by submitting that the impugned expenditure was related with increase in share capital and was in the nature of compensation of *Share premium* and therefore, capital in nature which could not be allowed to the assessee.

5.1 We have carefully heard the rival contentions and perused relevant material on record including judicial pronouncements as cited before us. Some undisputed facts that emerge out of the facts as narrated by us here-in-above are that there is no increase in the *Share Capital* of the assessee rather the shares have been issued by its holding company to the assessee's employees and the assessee has funded the differential amount i.e. difference between issue price and the market price of the shares. The Ld. CIT(A), in our opinion, has clearly flawed in equating the same with *Sweat Equity Shares* which is not the case here and therefore, reliance paid on the decision of *Future Agrovet Limited* was erroneous.

5.2 The lower authorities, in our opinion, were misled by the fact that the impugned payments were made to make up for the shortfall in the *share premium account* and therefore, the same was on capital account. However, in our opinion, the nature of receipts in the hands of holding

company was not relevant factor to determine the true nature of payment in the hands of the assessee payer. The same is akin to a situation where the assessee acquires certain moveable properties for the benefit of its employees as a means of retaining them or rewarding them, which is clearly allowable to the assessee as business expenditure u/s 37(1). The moveable property, in the instant case, happens to be *Equity Shares* of the assessee's holding company which has led the lower authorities to treat the same as expenditure in the capital field. However, the same, in our opinion was an erroneous approach and therefore, could not be sustained.

5.3 The facts of the above case, as correctly pointed out by Ld. Sr. Counsel are covered in assessee's favor by the number of judgments rendered by this Tribunal. For ease of reference, we would like to extract relevant portion of the judgment rendered by *Bangalore* Tribunal in *Novo Nordisk India (P.) Ltd. Vs. DCIT [42 Taxmann.com 168]* which is as follows:-

> ***18.*** *We have considered the rival submissions. It is clear from the facts on record that there was an actual issue of shares of the parent company by the assessee to its employees. The difference, between the fair market value of the shares 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 & 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. v. Dy. CIT [2013] 35 taxmann.com 335 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 services to the company. By no stretch of imagination, we can describe such discount as either a short capital receipt or a capital expenditure. It is nothing but the employees cost 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 adopted.

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& Co. (P.) Ltd. (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, - 17the 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 Services (P.) Ltd. (supra), we find that the facts of the case of Accenture Services (P.) Ltd. (supra) are identical. In the case of Accenture Services (P.) Ltd. (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, motive 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 Services (P.) Ltd. (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 Services (P.) Ltd. (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.*
25. *For the reasons given above, we direct the expenditure be allowed as deduction.*

In view of the above stated position, the sole ground raised in assessee's appeal stand allowed.

5.4 So far as the quantification of the expenditure is concerned, the working of the same has been provided on *Page number-54* of the *paper-book.* The Ld. AO is directed to verify the same and allow the claim of the assessee keeping in view the fact that the deduction would be available to the assessee only to the extent of shares which are ultimately allotted by the issuer to the assessee's employees and no deduction would be available against cancelled / un-allotted shares since the amount paid by assessee in respect of those shares would accrue to the assessee as refund from holding company.

Revenue's Appeal, ITA No. 6479/Mum/2016

6. The revenue, in its appeal, is aggrieved by certain relief of Rs.53.30 Lacs provided by Ld. first appellate authority to the assessee on account of disallowance u/s 14A. At the outset, it is pointed out that tax effect of the quantum additions as contested by the revenue is less than prescribed limit of Rs.20 Lacs and the same is covered by recently issued *low tax effect* Circular No.03/2018 dated 11/07/2018 issued by *Central Board of Direct Taxes [CBDT].* The Ld. DR has controverted the same by submitting that

necessary instructions / certificate, in this regard, would be required from higher authorities.

7. We have gone through the circular and find that the tax effect of quantum in dispute is below prescribed limit of Rs.20 Lacs and the assessee stood benefitted by the above circular issued by CBDT wherein the minimum monetary limit for filing the appeals before various appellate authorities have been fixed as under:-

S. No.	***Appeals/ SLPs in Income-tax matters***	***Monetary Limit (Rs.)***
1	*Before Appellate Tribunal*	*20.00,000*
2	*Before High Court*	*50.00,000*
3	*Before Supreme Court*	*1,00.00,000*

The aforesaid limits, as per *para 13* of the circular applies to pending appeals also. In view of the admitted position, we dismiss the revenue's appeal.

8. So far as the contentions raised by Ld. DR is concerned, we find that aforesaid circular does not envisage obtaining of any certificate from any authorities, in any manner. Nevertheless, the revenue is free to move appropriate application to recall this order, if at a later stage, it is found that the matter is covered by any exceptions provided in the aforesaid circular or in case the tax effect of the quantum additions as agitated by revenue exceeds the prescribed monetary limit.

9. The revenue's appeal stand dismissed.

Conclusion

10. The assessee's appeal ITA No. 6891/Mum/2016 stand allowed whereas the revenue's appeal ITA No. 6479/Mum/2016 stand dismissed.

Order pronounced in the open court on 03rd October, 2018.

Sd/-	Sd/-
(Saktijit Dey)	**(Manoj Kumar Aggarwal)**
न्यायिकसदस्य / **Judicial Member**	लेखासदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 03.10.2018
Sr.PS:-Thirumalesh

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त (अपील)/ The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधिमुंबई ,आयकरअपीलीयअधिकरण ,/ DR, ITAT, Mumbai
6. गार्डफाईल /Guard File

आदेशानुसार/ BY ORDER,

उपसहायकपंजीकार/ (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण ,मुंबई **/ ITAT, Mumbai**