

IN THE INCOME TAX APPELLATE TRIBUNAL, 'A' MUMBAI

**BEFORE: SHRI MAHAVIR SINGH, VICE PRESIDENT
&
SHRI M.BALAGANESH, ACCOUNTANT MEMBER**

**ITA No.3477/Mum/2019
(Assessment Year :2012-13)**

&

**ITA No.3478/Mum/2019
(Assessment Year :2013-14)**

M/s. Ambuja Cements Ltd., (Formerly known as Gujarat Ambuja Cements Limited) Elegant Business Park MIDC Cross Road B, Andheri East Mumbai – 400 059	Vs.	Commissioner of Income Tax-LTU 29 th Floor, Centre-1 World Trade Centre Cuffe Parade Mumbai – 400 005
PAN/GIR No. AAACG0569P		
(Appellant)	..	(Respondent)

Assessee by	Shri Chaitanya D Joshi
Revenue by	Shri C.T. Mathews
Date of Hearing	22/10/2021
Date of Pronouncement	19/01/2022

आदेश / O R D E R

PER M.BALAGANESH (AM):

ITA No.3477/Mum/2019 (A.Y.2012-13)

This appeal in ITA No.3477/Mum/2019 for A.Y.2012-13 arises out of an independent order preferred by the assessee against the revision order of the Commissioner of Income Tax (LTU) in appeal dated 27/03/2019 u/s.263 of the Act.

ITA No.3478/Mum/2019 (A.Y.2013-14)

This appeal in ITA No.3478/Mum/2019 for A.Y.2013-14 arises out of an independent order preferred by the assessee against the revision order of the Commissioner of Income Tax (LTU) in appeal dated 27/03/2019 u/s.263 of the Act.

As identical issues are involved in both the appeals they are taken up together and disposed of by this common order for the sake of convenience.

2. The first issue to be decided in this appeal is as to whether the Id. PCIT was justified in invoking revisionary jurisdiction u/s.263 of the Act in the facts and circumstances of the instant case for both the years under consideration.

2.1. With the consent of both the parties, the facts of A.Y.2012-13 are taken up for consideration and the decision rendered thereon would apply with equal force for A.Y.2013-14 also in view of identical facts except with variance in figures.

3. We have heard rival submissions and perused the materials available on record. We find that the return of income for the A.Y.2012-13 was filed by the assessee company on 28/11/2012 declaring total income of Rs.441,90,99,841/- under normal provisions of the Act and book profit of Rs.1069,80,92,443/- u/s.115JB of the Act. The assessment for the A.Y.2012-13 was completed u/s.143(3) of the Act on 17/05/2016 determining total income of Rs.1365,04,60,560/- under normal provisions of the Act and Rs.1590,54,94,584/- u/s.115JB of the Act. Since the tax payable under normal provisions of the Act was higher than the

prescribed percentage of the tax payable u/s. 115JB of the Act, the income was assessed under normal provisions of the Act and demand raised thereon. Later, this assessment was sought to be revised by the Id. PCIT by invoking revision jurisdiction u/s.263 of the Act on the ground that the order passed by the Id. AO is erroneous in as much as it is prejudicial to the interest of the Revenue. Accordingly, a show-cause notice was issued by the Id. PCIT dated 15/03/2019. In the said show-cause notice, one of the issues primarily dealt was with regard to allowability of employee compensation expenses under Employee Stock Option Scheme (ESOP) amounting to Rs.32.55 Crores u/s.37(1) of the Act. The Id. PCIT placed reliance on the decision of Delhi Tribunal in the case of Ranbaxy Laboratories Ltd., vs. Addl. CIT reported in 124 TTJ 771 which held that discount on ESOP is a short receipt of share premium and as no money goes out from the assessee, the same cannot qualify for deduction u/s.37 of the Act. The Id. PCIT by referring to Schedule 'P' of notes to accounts of audited financial statements, observed that the assessee company had with retrospective effect changed its method of compensation cost relating to ESOP from intrinsic value method to fair value method for all outstanding stock options at the beginning of the year. Accordingly, the assessee company had recognised the additional expenses of Rs.33.20 Crores which included amount relating to earlier years of Rs.32.55 Crores. The Id. PCIT observed that this expenditure of Rs.32.55 Crores pertains to ESOP granted in years 2007, 2008, 2009 and 2010 wherein the vesting period is one year from the grant and exercise period is four years from the date of vesting. The Id. PCIT also relied on the Special Bench decision of Bangalore Tribunal in the case of Biocon Ltd., reported in 144 ITD 21 wherein it was held that the total amount of discounting premium should be claimed evenly over the vesting period of four years and should be determined on straight line basis with suitable

upward and downward adjustment. The Id. PCIT observed that the claim made by the assessee is not in accordance with the said Special Bench decision. We find that assessee had filed detailed submissions before the Id. PCIT both on invalid assumption of jurisdiction by the Id. PCIT u/s.263 of the Act on incorrect assumption of fact and also made submissions on merits of the issue. We find that the assessee had specifically pointed out before the Id. PCIT that very same expenditure of Rs.32.55 Crores debited to profit and loss account was indeed subject matter of examination by the Id. AO during the course of assessment proceedings. This fact is also reflected in page 8 of the order of the Id. PCIT. We find that assessee had made the following disclosure of expenditure of Rs.32.55 Crores debited to P & L account under the head 'exceptional items'. We find that assessee had duly explained before the Id. PCIT that during the year under consideration, the assessee had accounted for ESOP expenditure on account of change in method of ESOP valuation, which fact is also reported in Schedule 'P' and Schedule 'O' of the audited financial statements. The assessee pointed out that a letter dated 11/03/2016 was specifically filed before the Id. AO in response to the queries raised by the Id. AO in the course of assessment proceedings wherein it was specifically mentioned that assessee is following intrinsic value method for accounting for ESOP and as per accounting standards assessee was required to give disclosure as per fair value method and accordingly, the management of the company decided to change the method of measurement of compensation cost relating to ESOP and accordingly, the company had charged the same to profit and loss account and disclosed the same under 'exceptional items'. It was specifically pointed out that the accounting for ESOP is governed by SEBI guidelines and guidance note of accounting for employee share based payments issued by the Institute of Chartered Accountants of India

(ICAI). The guidance note prescribes two methods for valuation of ESOP expenses i.e. intrinsic value method and fair value method. During the year, the assessee has changed method of accounting from intrinsic value method to fair value method. The impact due to the change in the method of accounting has resulted in the debit of expenditure of Rs.32.55 Crores during the current year and assessee had to incorporate this change right from the inception of the scheme and the method once changed should be followed thereafter regularly. The assessee also placed reliance on the decision of the Hon'ble Jurisdictional High Court in the support of its contentions in the case of Mol Mould Corporation vs. CIT reported in 202 ITR 789; Bajaj Auto Ltd., vs. CIT reported in 389 ITR 259 (Bom); decision of Hon'ble Calcutta High Court in the case of CIT vs. Kesoram Industries and Cotton Mills Ltd., reported in 204 ITR 154 (Cal), among others. The assessee also pointed out that the expenditure claimed on account of ESOP was also in accordance with the Special Bench decision of Bangalore Tribunal in Biocon Ltd referred to supra as the entire expenditure had been absorbed in the year of vesting, since vesting period is one year. We find that the Id. PCIT however disregarded all the contentions of the assessee and proceeded to treat the order passed by the Id. AO as erroneous in as much as it is prejudicial to the interest of the Revenue. It is pertinent to note that the Id. PCIT having held that the Id. AO had not made any enquiries with regard to the letter dated 11/03/2016 filed by the assessee before him during the course of assessment proceedings. strangely directs the Id. AO to directly disallow the ESOP expenses of Rs.32.55 Crores and revise the assessment accordingly. In this regard, we find that when the Id. PCIT had initially alleged that the Id. AO had not made any enquiries with regard to submissions made by the assessee on the allowability of ESOP expenses, ought not to have directed the Id. AO to make disallowance directly.

When the grievance of the Id. PCIT seems to be that the Id. AO had not made any enquiry and the policy adopted by the assessee is not in accordance with the Special Bench decision of Biocon Ltd., referred to supra, then it would be fair that the Id. PCIT could have at best only set aside the assessment to the Id. AO with a direction to make proper enquiries and decide the matter in accordance with law. In the instant case, the Id. PCIT, as stated earlier, had directed the Id. AO to make disallowance and hence, the assessee is bound to argue the issue on merits also before us.

3.1. Let us primarily examine whether the allowability of ESOP expenditure was subject matter of examination by the Id. AO in the course of assessment proceedings or not? We find from pages 23-24 of the factual paper book filed before us that assessee has filed a letter dated 11/03/2016 in Tapal which has been duly acknowledged by the Income Tax department. This letter dated 11/03/2016 has been filed before the Id. AO during the course of assessment proceedings. In the said letter, we find that the Id. AO had specifically raised a query during the course of hearing conducted on 09/02/2016 directing the assessee to provide details of 'exceptional items' debited to P & L Account. As stated earlier, the assessee had indeed debited Rs.32.55 Crores on account of ESOP expenditure under the head 'exceptional items' in its profit and loss account. We find that the assessee vide letter dated 11/03/2016 filed before the Id. AO had provided complete details of exceptional items as under:-

1.0 Provide details of exceptional items (Query raised during the course of hearing on 09-02-2016)

1.1 In this regard it is submitted that the assessee has debited employee compensation expenses of Rs. 32.55 Crs. in the Profit & Loss A/c. The same is shown under Schedule O - 'Exceptional Items' of the Audited accounts. Relevant extracts of the audited account is enclosed as Annexure - 1.

1.2 During the previous year relevant for the assessment year under consideration, the assessee has changed its method of measurement of compensation cost relating to employee stock options from intrinsic value method to fair value method for all outstanding unvested employee stock options at the beginning of the year. The same has resulted in restatement of employee compensation cost by Rs. 32.55 Crs. which is disclosed as exceptional item. The said fact is also evident from the Notes to Accounts, relevant extract of which is already enclosed as Annexure-1.

1.3 In this regard, it is pertinent to note that accounting for employee stock options is governed by the Guidance Note on Accounting for Employee Share-based Payments issued by the ICAI. The said Guidance notice prescribes two methods for valuation of ESOP expense (a) Fair Value Method & (b) Intrinsic Value Method. Vide Paragraph 41 of the aforesaid Guidance Note, the ICAI has recommended that accounting for employee share-based payment plans should be based on fair value approach. Further, as per paragraph 48 the Guidance Note if entity follows intrinsic Value Method, it has to give disclosure of valuation as per Fair Value Method. Since, even after following Intrinsic Value method for accounting ESOP, the assessee was required to give disclosures as per Fair Value Method, the management of the assessee company decided to change its method of measurement of compensation cost relating to employee stock options from intrinsic value method to fair value method. Relevant extracts of the guidance note issued by the ICAI is enclosed as Annexure - 2.

1.4 In view of the aforesaid, the assessee has accounted for employee compensation expenses as exceptional item in the audited accounts.

3.2. We also find from the audited financial statements that complete disclosure with detailed explanation has been made by the assessee company with regard to this ESOP compensation vide pages 113,132,133, 136 & 149 of the factual paper book containing the schedules of profit and loss account and notes to accounts thereon. We find that assessee in page 133 of the paper book in the notes to accounts in Schedule 'P' para 1(B) under heading 'change in accounting policy' has disclosed as under:-

“During the year, the Company has with retrospective effect changed its method of measurement of compensation cost relating to employee stock options from intrinsic value method to fair value method for all outstanding unvested employee stock options as the beginning of the year. Accordingly, the company has recognized an additional expense of Rs.33.20 Crores. Amount relating to earlier years of Rs.32.55 crores has been disclosed as exceptional items.

Had the Company continued to use the earlier method of measurement, the Profit after taxation for the current year would have been higher by Rs.33.20 Crores and the Employee's remuneration and benefits and exceptional expenses would have been lower by Rs.0.68 crores and Rs.32.55 Crores respectively.”

3.3. We also find that assessee in page 136 of the factual paper book in Schedule 'P' of notes to accounts had disclosed as under with regard to ESOP cost:-

“(i) Employee Stock Compensation Cost:

The company measures compensation cost relating to employee stock option using the intrinsic value method. Discount on Equity Shares as compensation expenses under the Employee Stock Option Scheme, is amortised in Securities and Exchange Board of India (SEBI) and the Guidance Note on Accounting for Employee Share-based Payments, issued by the Institute of Chartered Accountants of India.”

3.4. We find that assessee vide page 149 of the factual paper book under Schedule 'P' notes to accounts had also made the following disclosure under ESOP plans:-

AMBUJA CEMENTS LIMITED
SCHEDULE 'P' - NOTES TO ACCOUNTS (contd.)

10 Employee Stock Option Plans :

a) The Company has provided various share based payments to its employees. During the year ended 31st March, 2012, the following schemes were in operation :

Particulars	2007 *	2008 \$	2009	2010
a) Date of grant	07.06.2007	01.07.2008	19.06.2009	22.04.2010
b) Date of Board Approval	11.01.2007	01.07.2008	06.02.2009	04.02.2010
c) Date of Shareholders Approval	26.03.2007	22.04.2008	06.04.2009	05.04.2010
d) Number of options granted	7,497,900	7,498,150	7,499,600	9,998,900
e) Method of Settlement (Cash/Equity)	Equity	Equity	Equity	Equity
f) Vesting period from the date of Grant	1 year	1 year	1 year	1 year
g) Exercise Period from the date of Vesting	4 years	4 years	4 years	4 years

* Includes 1,11,150 options in Tranche 2 granted on 1st July 2008 @ Rs.82/- per option.

\$ Includes 1,13,850 options in Tranche 2 granted on 19th June 2009 @ Rs.96/- per option.

b) The details of activity under the Employee Stock Option Plans schemes have been summarised below :

Particulars	2011-2012		2010-2011	
	Number of Shares	Weighted Average Exercise price (Rs.)	Number of Shares	Weighted Average Exercise price (Rs.)
a) Outstanding at the beginning of the year	24,506,800	106.61	21,913,425	95.68
b) Granted during the year	-	-	9,998,900	119.00
c) Forfeited during the year	1,755,150	107.57	881,350	114.67
d) Exercised during the year	4,876,775	103.99	6,463,806	87.96
e) Expired during the year	-	-	60,369	69.60
f) Outstanding at the end of the year	17,874,875	107.23	24,506,800	106.61
g) Exercisable at the end of the year	17,874,875	107.23	24,506,800	106.61
h) Weighted average remaining contractual life (in years)	2.09		2.90	

The weighted average share price at the date of exercise for stock options was Rs. 149.99 (31.03.2011-Rs. 131.27)

The weighted average share price for the period over which stock option were exercised was Rs. 158.97 (31.03.2011-Rs. 135.65)



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SCHEDULE 'P' - NOTES TO ACCOUNTS (contd.)

10 Employee Stock Option Plans (contd..)

c) The details of exercise price for stock options outstanding at the year ended 31st March, 2012

ESOP Plans	2011-2012			2010-2011		
	Number of options outstanding	Weighted average remaining contractual life of options (in years)	Weighted average exercise price (Nominal value of Rs. 2 per share)	Number of options outstanding	Weighted average remaining contractual life of options (in years)	Weighted average exercise price (Nominal value of Rs. 2 per share)
2007						
Tranche 1	3,182,350	0.18	113.00	5,906,650	1.19	113.00
Tranche 2	31,250	1.25	82.00	50,650	2.25	82.00
2008						
Tranche 1	2,636,950	1.25	82.00	3,801,650	2.25	82.00
Tranche 2	71,775	2.22	96.00	91,350	3.22	96.00
2009	3,952,700	2.22	96.00	5,373,100	3.22	96.00
2010	7,999,850	3.06	119.00	9,283,400	4.06	119.00



AMBUJA CEMENTS LIMITED

SCHEDULE 'P' - NOTES TO ACCOUNTS (contd.)

10 Employee Stock Option Plans (contd..)

c) The details of exercise price for stock options outstanding at the year ended 31st March, 2012

ESOP Plans	2011-2012			2010-2011		
	Number of options outstanding	Weighted average remaining contractual life of options (in years)	Weighted average exercise price (Nominal value of Rs. 2 per share)	Number of options outstanding	Weighted average remaining contractual life of options (in years)	Weighted average exercise price (Nominal value of Rs. 2 per share)
2007						
Tranche 1	3,182,350	0.18	113.00	5,906,650	1.19	113.00
Tranche 2	31,250	1.25	82.00	50,650	2.25	82.00
2008						
Tranche 1	2,636,950	1.25	82.00	3,801,650	2.25	82.00
Tranche 2	71,775	2.22	96.00	91,350	3.22	96.00
2009	3,952,700	2.22	96.00	5,373,100	3.22	96.00
2010	7,999,850	3.06	119.00	9,283,400	4.06	119.00



3.5. From the above tabulation, it could be seen that vesting period from the date of grant of each ESOP scheme is only one year and only the exercise period is four years from the date of vesting. We find that the decision of the Hon'ble Special Bench of Bangalore Tribunal in the case of Biocon Ltd., reported in 144 ITD 21 says that the discount premium should be claimed evenly over the vesting period. In the instant case, from the aforesaid disclosures made in the audited financial statements, it is very much evident that the vesting period is only one year. Hence, the entire discount premium had to be claimed as expenditure in the year of vesting. From the above tabulation reproduced in page 149 of the factual paper book, it could be seen that the date of grant is 22/04/2010 and the one year period gets over on 22/04/2011 which falls in A.Y.2012-13. Hence, the vesting period falls during A.Y.2012-13. We find that no ESOP expenses are debited by the assessee in A.Y.2013-14 which is accepted by the Id. PCIT itself and which fact is also staring from the audited financial statements of the assessee. Hence, the additional compensation cost of Rs.32.55 Crores on account of ESOP has been debited as 'expenditure' by the assessee in the year of vesting i.e. A.Y.2012-13 rightly, which is also in consonance with the decision of the Hon'ble Special Bench of Bangalore Tribunal in the case of Biocon Ltd., We find that the Id. PCIT had erroneously proceeded based on incorrect assumption of fact that the vesting period of the claim is four years. As stated earlier the vesting period is only one year and the same falls in A.Y.2012-13.

3.6. In view of the above observations, we have no hesitation in holding that assessee had rightly debited the ESOP compensation cost of Rs.32.55 Crores in the year of vesting as an expenditure which is in

accordance with Special Bench decision of Biocon Ltd., and that the Id. PCIT had invoked revisionary jurisdiction based on incorrect assumption of fact. Apart from this, we also hold that adequate enquiries were indeed made by the Id. AO in the course of assessment proceedings. The law is now very well settled that the revision jurisdiction u/s.263 of the Act could be invoked only for 'lack of enquiry' and not for 'inadequate enquiry'. Hence, we have no hesitation in quashing the revision order passed by the Id. PCIT in this regard. Accordingly, the grounds raised by the assessee on account of ESOP expenditure are allowed.

4. Yet another ground for which the Id. PCIT had assumed revisionary jurisdiction u/s.263 of the Act was on account of allowability of provision of interest u/s.234D of the Act, while computing the demand payable u/s.115JB of the Act. Since this was also not done by the Id. AO in the assessment proceedings, the order of the Id. AO was treated as erroneous and prejudicial to the interest of the Revenue by the Id. PCIT.

4.1. We have heard rival submissions and perused the materials available on record. From the initial paragraph of this order, it could be seen that the scrutiny assessment was ultimately completed by the Id. AO u/s.143(3) of the Act dated 17/05/2016 and ultimately the income was determined under normal provisions of the Act. We also find from the said order, that the tax payable under normal provisions of the Act was much more than the prescribed percentage of tax payable u/s.115JB of the Act. Hence, the income was finally determined only under normal provisions of the Act by the Id. AO. The Id. AR argued that even there is some error in the computation of book profits and

consequently in the computation of tax and interest thereon, when the income is ultimately computed under normal provisions of the Act, the mistake in computation of book profits u/s.115JB of the Act would not cause any prejudice to the interest of the Revenue. We are unable to accede to this argument advanced by the Id. AO, in view of the fact that the interest u/s.234D of the Act indeed partakes the character of income tax and the income tax demand is supposed to be added back while computing book profits u/s.115JB of the Act under Explanation 1(a) to Section 115JB(2) of the Act while computing the book profits. Hence, the action of the Id. PCIT in invoking revision jurisdiction is upheld in this regard.

5. In the result, the appeal of the assessee for A.Y.2012-13 in ITA No.3477/Mum/2019 is partly allowed.

ITA No.3478/Mum/2019 (A.Y.2013-14)

6. The ground No.1&2 raised by the assessee for A.Y.2013-14 are identical for A.Y.2012-13 and the decision hereinabove would apply with equal force for A.Y.2013-14 also.

7. The ground No.3 raised by the assessee has challenged the direction of the Id. PCIT to initiate penalty u/s.271(1)(c) of the Act. This, in our considered opinion, would be premature for adjudication at this stage.

8. The ground No.4 raised by the assessee is general in nature and does not require any specific adjudication.

9. In the result both the appeals of the assessee are partly allowed.

Order pronounced on 19/01/2022 by way of proper mentioning in the notice board.

Sd/-
(MAHAVIR SINGH)
VICE PRESIDENT

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 19/01/2022
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai