

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I': NEW DELHI**

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

ITA No.2661/Del/2017
(ASSESSMENT YEAR 2011-12)

Make My Trip (India) Private Limited, 243, Ground Floor, Tower A, SP Infocity, UdyogVihar, Phase-1, Gurgaon, Haryana-122016 PAN:AADCM5146R	Vs.	DCIT (International Taxation), Circle-16(1), New Delhi.
(Appellant)		(Respondent)

Assessee by	Dr. Rakesh Gupta, Advocate Shri Somil Agarwal, Advocate Shri Saksham Agrawal, CA & Shri Deepesh Garg, Advocate
Department by	Shri S.K.Jadhav, CIT-DR

Date of Hearing	20/01/2025
Date of Pronouncement	22/01/2025

ORDER

PER MAHAVIR SINGH, VP:

This appeal by assessee is arising out of the revision order passed by Principal Commissioner of Income Tax-06, New Delhi (PCIT for short) for the Assessment Year 2011-12 u/s 263 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his

order dated 30/03/2017. The assessment was framed by Deputy Commissioner of Income Tax, Circle-61, New Delhi u/s 143(3) r.w.s 92CA(3) of the Act, vide his order dated 30/03/2015.

2. The only issue in this appeal of assessee is as regards to the revision order passed by PCIT u/s 263 of the Act revising the assessment order passed by AO u/s 143(3) r.w.s 93CA(3) of the Act as erroneous as well as prejudicial to the interest of Revenue for the reason that there is failure on the part of the Assessing Officer to enquire and verify before allowing Employees Stock Option Plan ('ESOP') expenses claimed by assessee. For this, the assessee has raised following three grounds:

"1. That having regard to facts & circumstances of the case, Ld. Pr. CIT has erred in law and in facts in assuming jurisdiction u/s 263 of Income Tax Act, 1961 and passing the impugned order u/s 263 by holding the assessment order passed u/s 143(3)/92CA(3) dated 30.03.2015 as erroneous and prejudicial to the interest of revenue and that too by holding that there was failure on the part of the Assessing Officer by allowing Employee Stock Option Plan ('ESOP') cost paid by the Appellant to MakeMyTrip, Mauritius as deduction.

2. In any view of the matter and in any case, impugned order passed by. Ld. Pr. CIT u/s 263 is bad in law, against the facts and circumstances of the case and is in violation of principles of natural justice and has been passed by recording incorrect facts and findings and without appreciating/considering the submissions of Appellant during the course of proceedings before Ld. Pr. CIT and during the course of assessment & the case laws relied upon.

3. That having regard to facts & circumstances of the case, Ld. Pr. CIT has erred in law and on facts in setting aside the assessment order for fresh examination and enquiry on the issue of deduction of expenditure amounting to Rs.11,35,61,564/- on account of ESOP cost and that too by giving his conclusions."

3. The brief facts are that the assessee is a private limited company and is a travel agent and tour operator. The assessee company is wholly owned subsidiary of Make My Trip Limited

(Formerly, International Web Travel Pvt. Limited), Mauritius. The Assessing Officer completed assessment u/s 143(3) r.w.s 92CA(3) of the Act for relevant Assessment Year 2011-12 vide his order dated 30/03/2015. The PCIT, on perusal of assessment record noted that the assessee has claimed deduction of ESOP costs, as deduction paid to its parent company amounting to Rs.11,35,61,564/-. The PCIT first of all issued show cause notice u/s 263 of the Act dated 23.03.2017 stating that the Assessing Officer while framing assessment has allowed the claim of deduction on ESOP made by assessee in computation of income on account of "ESOP cost on shares exercised", whereas the same was not allowable in the hands of the assessee being expenditure pertaining to the parent company on allotment of shares of the parent company to the employees of the assessee without making inquiries or verification on this issue. According to him, this resulted in incorrect allowance of expenditure and this has become prejudicial to the interest of Revenue. The assessee before PCIT replied that the complete details were filed before the Assessing Officer in regard to this claim, which was duly examined by him and the assessee has claimed this deduction to the extent of actual payment to its holding company. He explained that these shares were issued by the parent company under the ESOP scheme at the behest of the assessee company and reimbursement of expenditure is under a contractual obligation, and hence, this being a business expenditure is allowable claim.

4. The PCIT noted from the scrutiny of the assessment records that the assessment order passed by the AO for the relevant assessment year allowing relief on account of deduction of reimbursement of expenditure pertaining to ESOP expenses of the holding company of the assessee without making any enquiry or verification is erroneous as well as prejudicial to the interest of Revenue. He noted that the claim of the assessee that the AO has formed an opinion on this claim is not on facts and actual ESOP scheme as launched by Make My Trip Limited Mauritius namely, Make My Trip.com 2001 Equity Option Plan, MakeMy Trip.com 2010 Shares Incentive Plan and Share Based Compensation Cost-Recharge Agreement in Support of the claim of allowability of reimbursement expenditure of Rs.11,3,61,564/- on account of ESOP cost of another company in the computation of income of the assessee is incorrect claim. The PCIT finally rejected the assessee's claim on merits by observing as under:

“A careful reading of the above extracted part of the self-serving agreement between two related parties namely assessee and its parent company proves beyond doubt that holding company of the assessee admittedly introduced and adopted ESOP scheme for its employees and employees of the subsidiary companies but the expenditure incurred on ESOP scheme launched by holding company was recovered by from the assessee way of this related party agreement. It is pertinent to mention here that under the unrelated party scenario no numeration or reimbursement is charged by the holding company from the subsidiary company for the shareholder's activities carried on by the holding company to protect the interest of the holding company.

It is evident from the above referred to documents that in this case the holding company had adopted and launched ESOP scheme for Its employees and employees of the subsidiary companies since year 2000 as a part of shareholder's activity in order to protect its business interests.

Since the ESOP schemes were launched by Make My Trip Limited Mauritius, holding company of the assessee, all the expenditure incurred on ESOP plans was the expenditure of the Mauritius company and the assessee company had never subsidized the cost of holding company and no reimbursement of expenditure incurred by holding company on ESOP scheme was paid by the assessee till AY 2010-11. It is a matter of record that the assessee had never claimed deduction on account of ESOP expenditure. However, subsequently, with effect from the year under consideration, when nothing had changed and even when the assessee had neither planned nor launched any ESOP scheme itself it had made a claim of ESOP expenditure for the first time by making reimbursement of the holding company on ESOP scheme. Since, the ESOP expenditure was incurred by holding company the assessee company is not entitled to subsidize the expenditure of the holding company by way of an agreement for the reason that under the Income Tax Act, expenditure of a company that too, a foreign company cannot be allowed as deduction in the P&L A/c or computation of income of another company i.e. assessee company. In view of the above, the contention of the assessee that the expenditure of its holding company, a foreign company was transferred to the expenditure of the assessee company by way of a self-serving agreement between the related parties and the same was allowable under the Income Tax Act is found unacceptable and the same is rejected.”

The PCIT also referred to CBDT Notification issued u/s 119 of the Act wherein the CBDT clause 6 of Notification No.S.O.1021(E) dated 11/10/2001 is clearly barred the assessees from claiming such deduction. Finally, the PCIT set aside the assessment order passed by AO u/s 143(3) r.w.s 92CA(3) of the Act and directed the AO to conduct fresh enquiry in regard to the claim of deduction of reimbursement of expenditure on account of ESOP costs incurred by the holding company amounting to Rs.11,35,61,564/-. Aggrieved, assessee is in appeal before Tribunal.

5. We have heard the rival contentions and gone through the facts and circumstances of the case. We noted that the assessee

has filed information in regard to ESOP charges claimed as deduction while furnishing information before TPO i.e., copy of information and documents maintained in TP report u/s 92D(1) of the Act including Executive Summary of ESOP cross charges. Relevant details are enclosed in assessee's paper book at page 159. The assessee in its TP report has disclosed the ESOP cross charges which is part of assessment record and TP report and the relevant part read as under:-

"During the year ended March 31, 2011, ESOP cross-charge amounting to INR 24,151,868 was recorded by the Company on account of share options granted and vested upon its employees by the holding company under the latter's Equity Option Plan (namely, MMT ESOP Plan). The cross-charge represents the value determined and certified by an independent evaluator. The benefits under the share options accrue exclusively to and applies equitably and consistently across the beneficiary employees of MMT India granted options under the scheme.

The abovementioned grants are exclusively issued in consideration of fulfillment of contractual obligations defined under the employment contracts of beneficiary employees of MMT India. Further the options vest with the employees of MMT India upon completion of market and internal performance conditions and completion of a requisite service period, at stated annual intervals."

The Assessing Officer/TPO issued notice u/s 92CA(2) and 92D(3) of the Act dated 01/12/2014 wherein he made enquiry from the assessee vide questionnaire dated 19/01/2015 and the relevant question No.1 reads as under:-

"1) It is observed that there is a cross charge by MMT Mauritius for issue of ESOPs. Further it is also observed that the shares of the MMT are not listed and in the absence of the same the valuation submitted as per the Black sholes formula models suffers from various limitations. In an independent situation no one company would allow any other company to cross charge it in such a manner especially when all the functions are carried out at its end. However before arriving at any decision regarding the ALP of the above transaction please furnish the following information:-

The AO required the assessee to file following details (i) to (xv).

(i) Please tell whether the shares of the company offering ESOPs are listed or not.

(ii) Please tell whether assessee offering any services to the entity offering ESOPS.

(iii) As per the financial position of Make my trip Mauritius available with this office it is observed that against an equity of USD 19671540 there are loans and payables at USD 40883668. Thus for every USD 1 there is a debt of USD 2. In view of this what is valuation arrived at of these shares and what effect has been given to the debt outstanding of the company.

(iv) Whether the employee remuneration policy includes provision of ESOP's.

(v) What is the Accounting treatment of ESOPS.

(vi) Whether there were actual purchases or phantom rights.

(vii) What is the Proof of ESOPs any mails or documents).

(viii) Whether the options were exercised by the employee or not.

ix) List of employee who subscribed to these shares and their current employment status.

(x) Whether the transfer of shares happened through MMT India or directly MMT Mauritius.

(xi) If the employees are getting ESOPs as a matter of achieving a particular target, then is the subsidiary Company getting any benefit from the same.

(xii) Please furnish a valuation report for issuing such ESOP.

(xiii) Whether the employees are serving the US entity also, if so then please tell whether the cost charges are divided?

(xiv) What benefits you seem to derive from paying these cross charges. In any case benefit if any shall be derived by the employee. Why should you be paying cross charges and why not the ALP of these cross charges be treated as nil

(xv) Whether the amount outstanding against the legal charges to be claimed from MMT Mauritius also regarding these expenses only.

The assessee reply this question vide reply dated 23.01.2015, which is enclosed at assessee's paper book 259 to 263 detailing out the entire ESOP Scheme and the expenses claimed. The assessee also provide benefits derived from paying this cross charges and the benefit derived by the employees and consequent benefit derived by the assessee company is narrated vide Answer of Question No.(xiii) and the relevant part read as read under:

“(xiii) What benefits you seem to derive from paying these cross charges. In any case benefit if any shall be derived by the employee. Why should you be paying cross charges and why not the ALP of these cross charges be treated as nil.

Kindly refer to our responses above. ESOP forms integral part of employee incentive/ compensation structure. The Company derives exclusive benefits from the services of an enthused and motivated employee, whose eligibility to realize/ accumulate earnings under the ESOP is directly linked to her/his on-the-job performance. In return, the Company has to bear the cost of ESOP by funding the purchase of MMYT shares that are traded in the open market.

In other words, the cross-charge represents the consideration paid by the Company to discharge its obligations towards the employee in terms of the employment contract. It can be likened to the Company making rental payments to a landlord to fulfill its contractual obligation on account of providing rent-free-accommodation to an employee. Or, it is similar to

funding the cost of utilities, personal insurance, personal travel, etc., availed by an employee.

In every way, the nature of ESOP cost is no different than cost of providing amenities or perquisites to serving employees or making monthly payroll disbursements. All items are recorded under the head "Salary & Compensation" in the Profit & Loss statement. Your query "why should you be paying cross charges?" is no different than "why should you be paying monthly salary?"

Also, in connection with the above, it is pertinent to note that being the principal operating entity of MMT Group, the Company records worldwide sales as operating revenue in its profit & loss statement. This itself bears testimony to the fact that the Company is benefitting from incurring ESOP costs which form an integral part of employee compensation.

Accordingly, in view of the above, the expenditure on account of ESOP cannot be treated as 'Nil' by any stretch of imagination."

6. The assessee before us contended that in order to discharge this obligation under the employee's contracts, the assessee company has offered the eligible stock options of the parent company formerly MakeMy Trip, Mauritius. Further, the assessee has also recognized the expenditure to the tune of Rs.2,41,51,868/- in order to reflect the contribution required to fund the acquisition of share, which is evident from clause-13 of the scheme. The relevant Appendix-C (ii) of Form No.3CEB is enclosed at assessee's paper book page 328 to 333. It was explained that the above sum was added by the assessee suo motu under the head in admissible within the purview of the Act and, therefore, the same is not taxable in the hands of the assessee company. Learned Counsel for the assessee also rebutted the argument of PCIT regarding Notification No.323/2001/F.No.142/48/2001-TPL dated 11/10/2001 and argued that this relates to prerequisite to be claimed by assessee

u/s 17 of the Act and not for the present assessee for claiming of expenses on ESOP. The assessee also replied to the AO vide letter dated 22/12/2014 that the entire amount pertains to compensation being awarded to be claimed by the eligible employees of the assessee company is in accordance with ESOP scheme. The said expenditure appears as a part of personnel expenses in the Profit and Loss Account and the assessee company has computed this stock price by using "Black Sholes" formula as per ESOP in the profit and loss account and the same was claimed as deduction in view of certificate issued by the Auditor of the assessee. These details were filed by assessee in response to the queries raised by the Assessing Officer clearly reveals that the AO was conscious of the claim of assessee in regard to ESOP scheme at the time of original assessment and he has verified the claim duly. He has raised pertinent queries and after receiving replies on the same and satisfying himself allowed the claim of deduction. It means that the AO has rightly allowed after due verification and satisfaction.

7. From the above facts and circumstances, we are of also of the view that the assessee has filed entire details and Assessing Officer has carried out enquiry into the details and after verifying the details he has allowed the claim of the assessee, and hence, it is not a case that the Assessing Officer has not carried out verification or has not made in enquires in regard to this claim. Before us Ld. Counsel for the assessee filed a copy of the Tribunal order in the case of M/s Ambuja Cements Ltd., (Formerly known as Gujrat

Ambuja Cements Limited) vs. CIT-LTU in ITA No. 3477/Mum/2019 & ITA No.3478/Mum/2019 dated 19/01/2022 wherein the Tribunal has considered the issue of verification and inquiry in regard to revision order vide para 3.6 as under:

“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.”

8. In regard to merits of the case, we noted that the shares of MakeMy Trip, Mauritius got listed on NASDAQ Stock Exchange w.e.f., 17/08/2010 and since that date the market price of MakeMy Trip, Mauritius are readily available on the stock exchange. We noted that that the assessee has accounted for all the entries related to ESOP in term of guidelines note provided by ICAI on accounting of employees shares based payments and assessee has carried out the accounting treatment skill in compliance with the same. Further the assessee has undertaken ESOP costs as part of the salary and compensation under personnel expenses in the profit and loss account. The assessee has provided complete list of employees, as subscribed to these shares and their current employment status and benefit provided to them and consequent

benefit to the assessee company. The assessee also explained before the AO and now before us that the earning under ESOP accrues to eligible employees by virtue of their employment with the assessee company. The company benefits from the services of an enthused and motivated work force, who remain committed and loyal to the company in anticipation of potential benefits under ESOP. The assessee has also provided valuation report for issuing such ESOP scheme and as per schedule reflected in Annexure-5 of the scheme the grant price of ESOPs during the year sum up to US\$ 5,27,28 as per graded vesting schedule and corresponding amount of Rs.2,41,51,868 has been booked in the audited financial statements and duly reflected in F. No.3CBE of assessee company for the Financial Year 2010-11 relevant to AY 2011-12. We noted from the above reproduced reply of the assessee vide letter dated 23/01/2015 vide question No.1 (xvi) and reply (xiii) read in above para No.5. The complete benefit, if any, share shall be derived by employee and consequent benefit to the company is described is entity. Hence, on merits also the PCIT could not find fault with the scheme. He has simply directed revision on the assessment order that no verification or enquiry was carried out by the AO. This was also considered on merits by Co-ordinate Bench of ITAT, Mumbai Benches, Mumbai, in the case of M/s Ambuja Cements Ltd., (Formerly known as Gujrat Ambuja Cements Limited) vs. CIT-LTU (supra) wherein identical facts in paras 3.5 held as under:

“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.

9. In view of the above facts, discussion carried and judicial precedents available, we quashed the revision order and allowed the appeal of the assessee.

Order pronounced on 22nd January, 2025.

Sd/-

(M. BALAGANESH)
ACCOUNTANT MEMBER

Dated: 22/01/2025

Pk/sps

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT

Sd/-

(MAHAVIR SINGH)
VICE PRESIDENT

4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI