IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C': NEW DELHI

BEFORE SHRIS.RIFAUR RAHMAN, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR US, JUDICIAL MEMBER

ITA No.2886/DEL/2024
(Assessment Year : 2012-13)

ITA No. 2887/DEL/2024
(Assessment Year : 2013-14)

Jubilant Foodworks Limited, Plot No. 1A, Sector-16A, Gautam Buddha Nagar–201 301 (Uttar Pradesh).	vs.	DCIT, Circle 5(1)(1), Noida.

(PAN : AABCD1821C)

(ASSESSEE) (RESPONDENT)

ASSESSEE BY : Shri K.M. Gupta, Advocate
Ms. Shruti Khimta, AR
REVENUE BY : Shri Dayainder Singh Sidhu, CIT(DR)

Date of Hearing : 23.10.2024
Date of Order : 10.01.2025

O R D E R

PER S.RIFAUR RAHMAN,AM:

1. These appeals have been filed by the assessee against the separate orders of Ld. Commissioner of Income Tax (Appeals)/National Faceless Appeal Centre, Delhi ["Ld. CIT(A)", for short] both dated 23.04.2024 for Assessment Years 2012-13 and 2013-14.

2. Since the issues are common and appeals are inter-connected in these appeals, the same are being disposed of by this common order. We are taking ITA No.2886/Del/2024 for Assessment Year 2012-13 as lead case.

3. Brief facts of the case are, that the assessee company filed its return of income for the year 2012-13 on 30.11.2012 declaring total income of Rs.129,48,84,549/- and the same was processed under section 143(1) of the Income-tax Act, 1961 (for short 'the Act') on 17.05.2013 at the total income of Rs.168,80,49,210/-. Subsequently, this case was selected for scrutiny and the assessment u/s. 143(3) of the Act was completed on 04.05.2016 and taxable income was determined at Rs.204,55,21,780/-. Against the order u/s. 143(3) of the Act, the assessee filed an appeal before the CIT(A) and ld. CIT(A) adjudicated the issues vide his order dated 28.11.2018. Accordingly, by giving effect to the order of the CIT(A), the AO passed a consequential order u/s. 143(3) r.w.s. 250 of the Act on 21.01.2019 determining the total income at Rs.129,48,84,650/-. The Revenue filed an appeal before the ITAT against the order of ld. CIT (A) order and the same was disposed of vide order dated 08.12.2021. The assessee filed its cross objection on the issue of ESOP and vide order dated 08.12.2021, the ITAT remitted this issue to the file of the AO to examine the same and decide their claim in accordance with law.

4. While giving effect to the order of the ITAT, the AO observed that the assessee had neither claimed this expenditure in the return of income filed nor during the course of assessment proceedings / appeal proceedings before the CIT(A). The assessee had claimed ESOP Expenditure as cross objection before the ITAT. Hence, the AO issued notice u/s. 142(1) of the Act. In response thereto, the assessee submitted its replies. AO noted that the replies given by the assessee were not satisfactory and observed that there is no specific provision for allowing such ESOP expenses from Section 30 to 36 of the Act. The residuary section 37 is also meant for revenue expenses incurred wholly and exclusively for business purposes. He further noted that in the instant case, the ESOP expenses are being claimed on account of issuance of shares at below market price, which will result in receipt of lesser amount towards share premium only. However, this will not result into incurring of any expenditure as short receipt of such share premium will only be a notional loss and not actual loss for which any liability is incurred. Therefore, the AO concluded that such notional losses are not allowable under the provisions of the Act and accordingly disallowed the claim.

5. Aggrieved with the aforesaid action of the AO, assessee preferred an appeal before the ld. CIT (A) and ld. CIT (A) concluded that Revenue is in appeal on the issue of allowability of ESOP expenditure before the

Hon'ble Supreme Court and in view of pendency of the same, the claim for deduction of ESOP expenditure is not allowable. He further observed that claiming Rs.38,90,90,948/- as ESOP expenditure after nine years of filing the return of income by filing a cross objection before the ITAT on Revenue's appeal on leasehold expenditure is not in accordance with law. A limited company's books of accounts and Annual Report published to the shareholders cannot be revisited in this manner. Accordingly, he upheld the action of the AO and dismissed the appeal of the assessee vide order dated 23.04.2024.

6. Aggrieved assessee is in appeal before us raising following grounds of appeal :-

> *"1. On the facts and circumstances of the case & in law, the action of the Ld. Commissioner of Income Tax (Appeals) confirming the assessment order under section 143(3) r.w.s. 254 of the Income Tax Act, 1961 ('the Act') dated March 14, 2023 passed by the Learned Deputy Commissioner of Income Tax, Circle 5(i)(i), Noida ('Ld. AO') is erroneous and bad in law as the same is not in conformity with directions of the Hon'ble Income Tax Appellate Tribunal (Hon'ble Tribunal).*
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> *2. On the facts and circumstances of the case & in law, the Ld. A.O. / Ld. CIT(A) grossly erred in not following the binding directions of the 'Hon'ble Tribunal issued vide order dated November 08, 2021 w.r.t. claim for deduction of ESOP expenditure of INR 38,90,90,948, thereby, violating the principles of judicial discipline.*
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> *2.1. In doing so, the Ld. CIT(A) exceeded its jurisdiction by questioning the power of the Hon'ble Tribunal to allow admission of a fresh claim of ESOP expenditure by filing of a cross objection in the original appellate proceedings, which is*

incorrect and leads to judicial impropriety and thus is liable to be struck down.

3. On the facts and circumstances of the case & in law, the Ld. A.O. / Ld. CIT(A) incorrectly held that the expenditure of short premium on the issue of ESOP, being a notional loss, is not allowable under the provisions of the Act without appreciating that the issue of allowability ESOP expenses is no more res-integra in view of decision of Special Bench of Tribunal in the case of Biocon Limited vs DCIT 35 Taxmann.com 335 (SB) and being approved by Hon'ble Karnataka High Court in the case of CIT vs Biocon Ltd [2020] 121 taxmann.com 351.

4. On facts and circumstances of the case & in law, the Ld. A.O./Ld. CIT(A) grossly erred in not appreciating the ratio in the case of Biocon Ltd Biocon Limited vs DCOT 35 Taxmann.com 335 (SB) which clearly spelt out the mechanics of allowability of ESOP expenses irrespective of how the ESOP Expenses are being recorded in the books of accounts.

4.1 In doing so, the Ld. AO/CIT(A) failed to appreciate that the Assessee had placed complete computation of allowance of ESOP expenses for the year under consideration before the Hon'ble Tribunal during the original appellate proceedings as well as during the course of remand proceedings before the AO and such calculations are in conformity with manner of computation as prescribed in the case of Biocon Limited vs. DCIT 35 Taxmann.com 335 (SB)."

7. At the time of hearing, ld. AR of the assessee, on the merits of the case on the grounds no. 3 & 4 relating to deductibility of ESOP expenditure, submitted that ITAT in principle accepted the allowability of ESOP as a business expenditure. The only reason for remanding the issue to the assessing authorities was to verify the amounts claimed and not to opine on the allowability thereof. He further submitted that the assessee had two

ESOP schemes i.e. ESOP 2007 and ESOP 2011 in force during the captioned AYs. The assessee, being a listed entity on the National Stock Exchange, had formulated such schemes in compliance with the SEBI guidelines and the applicable disclosures under the Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999. During the year, he submitted that the employees were allotted equity shares upon exercise of stock options and further, a detailed note on ESOP Scheme has also been provided in Note 29 of the Audited Financial Statements. He further submitted that AO however rejected this claim by holding that expenditure resulted as the issue of shares at a price lower than the market price does not result into incurring any expenditure and instead result in short receipt of share premium which is a notional loss. He submitted that it was held that given that said loss is not relatable to profits and gains arising from the business, ESOP expense are not an allowable deduction u/s 37 of the Act.

8. It is submitted that the assessee used “intrinsic value” method to account expenditure of ESOP in accordance with SEBI Guideline which resulted into no charge of the ESOP expenses in the P&L Account for the year under consideration as the Market Price prior to the date of the meeting of the Board of Directors in which options are granted/ shares are issued was

equivalent to grant price. However, the use of "fair value" Method computed strictly in accordance with SEBI Guideline resulted into charge of Rs.1,17,37,000 and t he complete disclosure of the same has been made in Audited Financial Statement.

9. It is further submitted that on account of the Nil expenditure charged to profit & loss account for the year under consideration for ESOP expenditure, no deduction was claimed by the Assessee in the return of income. However, he submitted that here it is pertinent to add that the allowance of the ESOP expenditure had been a subject matter of litigation not only with respect to its allowance as revenue expenditure but also with, respect to the quantum to be allowed in the respective years - grant, vesting and exercise year. He submitted that the aforesaid controversies on this issue had been settled by the decision in the case of Biocon Ltd. vs. DCIT (LTU) 35 taxmann.com 335 (2013) (SB) wherein it laid down the following principles for allowance of ESOP expenditure: -

> *"...11.3 We, therefore, sum up the position that the discount under ESOP is in the nature of employees cost and is hence deductible during the vesting period w.r.t. the market price of shares at the time of grant of options to the employees. The amount of discount claimed as' deduction during the vesting period is required to be reversed in relation to the unvesting / lapsing options at the appropriate time. However, an adjustment to the income is called for at the time of exercise of option by the amount of difference in the amount of discount calculated with reference the market price at the time of grant of option and the market price at the time of exercise of option. No accounting principle can be determinative in the matter of computation of total income under the Act. The*

question before the special bench is thus answered in affirmative by holding that discount on issue of Employee Stock Options is allowable as deduction in computing the income under the head 'Profits and gains of business or profession'."

10. He further submitted that the Hon'ble Karnataka High Court has affirmed the findings of the Special Bench of the Tribunal in the case of CIT vs Biocon Ltd. [2020] 121taxmann.com 351 (Karnataka). It was also submitted that assessee had duly deducted tax at source on perquisite value on exercise of such ESOPs in the hands of the employee on the amount of discount being the difference between market price on the date of exercise by the employee and exercise price at the time of grant in accordance with provisions of the Act. It is submitted that one of the issues before the Special Bench was also that since the amount in question is perquisite, which is taxable in the hands of the employee, therefore the amount of discount forgone by the Company is a deductible expenditure. It was further submitted that the detailed computation of ESOP expenses of Rs.38,90,90,948/- filed with the AO and CIT(A) during the course of remand proceedings which has been enclosed at Page No. 299 of the Paper Book. Further, in regard to the average market price considered by the assessee in computation, it was submitted that the Assessee had duly filed the screenshots of the website of the National Stock Exchange (NSE) representing the opening and closing price at the relevant dates before the CIT(A) vide submission dated March 27, 2024.

He submitted that the average market price is considered at simple average of i) opening price & ii) closing price for the respective days. To support this contention, he attached the screenshots of website at Page No. 334-357 of the paper book. In view of the above submissions, it was prayed that the disallowance by the lower authorities with regard to claim of ESOP expenditure may be reversed and it was further reiterated that the Hon'ble Tribunal has in principle accepted the same.

11. With regard to ground no. 1 & 2 relating to violating the principles of judicial discipline are concerned, it was reiterated by the Ld. AR that during the first round of appellate proceedings, the Tribunal after giving a thoughtful consideration to the facts and the position of law, allowed the additional claim of ESOP expenditure made. It was further submitted that the Tribunal concurred with the view of the Special Bench in the case of Biocon Ltd. Vs. DCIT (supra) that the discount on issue of Employees Stock Options is an allowable deduction while computing the income under the head "profit and gains of business". The Tribunal further held that since the instant issue was not adjudicated by the lower authorities, the issue needs to be remanded back to the AO and examined in accordance with law, hence the ground was allowed for statistical purposes.

12. It was further submitted that during the second round of assessment proceedings, the AO however rejected the additional claim of the Assessee on account of the ESOP expenditure being notional in nature. He submitted that being aggrieved by the assessment order, the assessee preferred an appeal before the ld. CIT(A). The assessee filed the submissions and information as required by the ld. CIT(A). The ld. CIT(A) passed an order dated April 23, 2024, wherein the ld. CIT(A) exceeded its jurisdiction in evaluating the scope of the aforementioned cross objection on additional claim of ESOP expenditure while the same was already decided in favour of the Assessee in principle by the Tribunal. It was further submitted that the aforesaid observations of the ld. CIT(A) / AO is contrary to the principle of judicial discipline. The ld. AR further submitted that the above observation should be expunged from its order. To support his contention, he relied upon the judgment of the Hon'ble Supreme Court in case of UOI Vs. Kamlakshi Finance Corporation Ltd [1992] 1992 taxmann.com 16 (SC) wherein it was held that :

> *"6....It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order, of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the*

orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department in itself an objectionable phrase and is the subject matter of an appeal can furnish no around for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws."

....

8. We have dealt with this aspect at some length, because it has been suggested by the learned Additional Solicitor General that the observations made by the High Court, have been harsh on the officers. It is clear that the observations of the High Court, seemingly vehement, and apparently unpalatable to the Revenue, are only intended to curb a tendency in revenue matter's which, if allowed to become widespread, could result in considerable harassment to the assesses- public without any benefit to the Revenue. We would like to say that the department should take these observations in the proper spirit. The observations of the High Court should be kept in mind in future and the utmost regard should be paid by the adjudicating authorities to the requirements of judicial discipline and the need for giving effect to the orders of the higher appellate authorities which are binding on them."

13. Ld. AR further submitted that the Hon'ble Supreme Court in the case of CCE v. Dunlop India Ltd. [1984] 1984 taxmann.com 492 (SC) observed that:

"We hope it will never be necessary for us to say so again that "in the hierarchical system of courts" which exists in our country, it is necessary for lower tier, including the High Court, to accept loyally the decisions of the higher tiers. It is inevitable in a hierarchical system of courts that there are decisions of the supreme appellate tribunal which do not attract the unanimous approval of all members of the judiciary.... But the judicial system only works if someone is allowed to have the last word and that last word, once spoken, is loyally accepted (See observations of Lord Hailsham and Lord Diplock in Broome v. Cassell). The better wisdom of the court below must yield to the higher wisdom of the

court above. This is the strength of the hierarchical judicial system."

14. Ld. AR further placed reliance on the following decisions where the Hon'ble Courts have echoed the view of the Hon'ble Supreme Court:

(a) Bank of Baroda Vs. N.G. Srivastava & Another (256 ITR 385),

(b) HDFC Bank Ltd. v. DCIT (2016) 383 ITR 529 (Bom.)(HC)

(c) Tejraj Chopada vs. Income-tax Officer [2008] 26 SOT 14 (Jodhpur) (URO)[22-07-2005]

(d) Bhartiya International Ltd. v. DCJT [2024] 158 taxmann.com 239 (Delhi - Trib.)

(e) Smt. Angoori Devi v. Chief Commissioner (Admn.) [2005] 145 Taxman 64 (Allahabad) [20-11- 2004]

15. Ld. AR further submitted that the Tribunal is final fact-finding authority, thus it is entrusted with duty to determine the correct total income of the taxpayer chargeable to tax under the provisions of the Act. In this regard, the ld. AR placed reliance on the decision of the Hon'ble Supreme Court in the case of National Thermal Power Corporation Ltd. v. CIT [(1998) 229 ITR 383 (SC)]. He further submitted that with respect to the fresh/additional claim in the Cross Objections, the same is also not res-integra in view of the interim decision in the case of DCIT vs Total Oil India (P) Ltd. [2021] 127 taxmann.com 774 (Mumbai - Trib.)[23.06.2021] wherein the refund of Dividend Distribution Tax was raised first time before the Hon'ble Tribunal in the Cross Objection

which was admitted after going through with the powers of the Tribunal under the permissions of the Act read with judicial precedents in the following words: -

> *"4 In our considered view, there is a legal parity in the appeal and the cross-objection inasmuch as the issues which can be raised in an appeal can also be raised in a cross-objection. Section 253(4) specifically provides when a party to the appeal is put to notice about the appeal having been filed by the other party, notwithstanding the fact that such a party may not have filed an appeal against related order or any part thereof, within thirty days of being so put to notice, "file a memorandum of cross-objections, verified in the prescribed manner, against any part of the order of the Commissioner (Appeals), and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3)". When this cross-objection is required to be treated as "an appeal presented", there cannot be any justification in restricting the scope of issues which can be raised in a cross-objection. Whatever issues, therefore, can be raised by way of an appeal are the issues that can be raised by way of a cross-objection. As learned counsel for the assessee aptly points out, as held by Hon'ble Gauhati High Court in the case of Purbanchal Paribartan Gosthi (supra), "it can safely be held on a point of law that there is absolutely no difference between an appeal and a cross-objection. The only difference if at all one can be pointed out is that an appeal can be preferred within 60 days from the date-of receipt of the order whereas a cross-objection can be filed within a period of 30 days of the date of service of appeal by the opposite party" We are not aware of any judicial precedent contrary to this judicial precedent. As regards the decisions cited by the learned Departmental Representative, all these decisions are in the context of powers of the Tribunal while dealing with an appeal, and, in any event, these decisions are rendered prior to Hon'ble Supreme Court's judgment in the case of National Thermal Power Corporation Ltd. v. CIT [(1998) 229 ITR 383 (SC)] which did categorically observe that "we fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not 'raised earlier" even though "undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised" Quite*

clearly, therefore, the powers of the Tribunal are not restricted to decide only the issues which have been considered by the authorities below. The narrower view of the powers of the Tribunal, as adopted in the judicial precedents cited by the learned Departmental Representative and particularly the full bench decision of Hon'ble Gujarat High Court in the case of Cellulose Products of India Ltd. (supra), has been specifically disapproved by Hon'ble Supreme Court in NTPC's case (supra).”

16. Ld. AR further placed reliance on the following case laws on allowance of the fresh claim for first time in the appeal before the Tribunal :-

a) Jute Corporation of India Ltd. vs. CIT [1991] 187 ITR 688 (SC)

b) ACIT vs Jubilant Enpro Ltd. ITA No. 348s/Del/20i4 dt. 16.06.2018

17. In view of the above, he submitted that the action of the ld. CIT(A) to question the scope of cross objection is unjustified specifically when the same has been allowed by the ITAT vide order dated December 08, 2021. Hence, he submitted that the ld. CIT(A)’s order is not in conformity with binding directions of the ITAT, thereby violating the principles of judicial discipline.

18. On the other hand, ld. DR for the Revenue relied upon the orders of the authorities below.

19. We have heard both the parties and perused the records. We find that as regards merits of the case i.e. on the ground no. 3 & 4 relating to deductibility of ESOP expenditure is concerned, the ITAT accepted the allowability of ESOP as a business expenditure based on the findings of

ITAT, Special Bench, Bangalore and subsequently upheld the abovesaid findings of Special Bench by the Hon'ble Karnataka High Court. In this case, it is fact on record that on account of Nil expenditure charged to profit & loss account for the year under consideration for ESOP expenditure, no deduction was claimed by the assessee in the return of income. Considering the fact that this issue was raised first time before ITAT, the same needs examination at the lower level, therefore, the coordinate Bench has remitted back the issue to the file of Assessing Officer. The Assessing Officer has rejected the claim of the assessee without considering the decision of the ITAT, Special Bench, Bangalore and Hon'ble Karnataka High Court. In our considered view, as far as the lower authorities are concerned, the abovesaid two decisions are binding on the authorities below as well as for us. After the decision of higher wisdom, still the authorities are not respecting the same. It is clearly disrespecting the principles of judicial precedents and judicial discipline.

20. With regard to ground no. 1 & 2 relating to violating the principles of judicial discipline are concerned, we note that during the first round of appellate proceedings, the Tribunal after consideration to the facts and the position of law, allowed the additional claim of ESOP expenditure. Since this issue was first time raised in the appellate forum and not claimed in the ROI, the coordinate Bench felt that this issue needs examination and remitted the issue to the file of Assessing Officer. However, Assessing

Officer has applied his lower wisdom and rejected the claim of the assessee without considering the higher wisdom of Hon'ble High Court and ITAT Special Bench. The coordinate Bench felt that this issue needs examination and gave one opportunity to the Revenue, but lower authorities does not care for the opportunity and in order to keep the issue alive since the ESOP issue was pending before Hon'ble Supreme Court, they have grossly rejected the claim of the assessee. Therefore, respectfully following the decision of Hon'ble High Court in Biocon Ltd. (supra), we direct the Assessing Officer to allow the claim of the assessee. Accordingly, the grounds raised by the assessee are allowed.

21. In the result, appeal filed by the assessee for assessment year 2012-13 is allowed.

22. With regard to appeal for AY 2013-14, since the facts are exactly similar to AY 2012-13 our above findings in AY 2012-13 are applicable *mutatis mutandis* in AY 2013-14. Accordingly, the appeal being ITA No.2887/Del/2024 for AY 2013-14 filed by the assessee is allowed.

23. To sum up : both the appeals filed by the assessee are allowed.

Order pronounced in the open court on this 10TH day of January, 2025.

SD/-	**SD/-**
(YOGESH KUMAR U.S.)	**(S.RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated : 10.01.2025
TS

Copy forwarded to:

1. Assessee
2. Respondent
3. CIT
4. CIT(Appeals)/NFAC, Delhi.
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI