

Discount on shares issued under ESOP was allowable deduction under section 37(1): ITAT

Summary – The Mumbai ITAT in a recent case of Kotak Mahindra Bank Ltd., (the Assessee) held that Discount on shares allotted by assessee to its employees under ESOP scheme out of its share capital is an allowable deduction under section 37(1)

Facts

- The assessee company was engaged in the business of banking and financial services had e-filed its return of income. A reassessment notice was issued upon assessee on the grounds that discount on shares allotted by the assessee to its employees under the ESOP scheme out of its share capital claimed as an expenditure in the return of income was not allowable, therefore, the income of the assessee was under assessed.
- On appeal, the Commissioner (Appeals) concluded that the expenditure incurred by the assessee on ESOP scheme was allowable in the hands of the assessee. He directed the Assessing Officer to grant deduction of certain amount being expenditure incurred on ESOP, in accordance with the principle laid down by the Special Bench of the Tribunal in the case of *Biocon Ltd. v. Dy. CIT (LTU)* [2013] 144 ITD 21/35 taxmann.com 335 (Bang.)
- On instant appeal, the revenue submitted that as the order of the 'Special Bench' of the Tribunal in the case of *Biocon Ltd. (supra)* had not been accepted by the Department and a further appeal had been filed before the High Court of Karnataka, therefore, the Commissioner (Appeal) had erred in allowing the discount on issue of ESOP's to the assessee company in accordance with the principle laid down by the 'Special Bench' of the Tribunal.

Held

- The 'Special Bench' of the Tribunal in the case of *Biocon Ltd. v. Dy. CIT (LTU)* [2013] 144 ITD 21/35 taxmann.com 335 (Bang.) after deliberating at length on the issue as to whether the assessee was entitled to claim the discount on ESOP's as an expenditure under section 37(1), or not, had therein answered the said issue in affirmative and concluded that the same was allowable as an expenditure under section 37(1) in the hands of the assessee.
- The Assessing Officer while framing the assessment had specifically observed that the claim of the assessee towards entitlement of discounted premium on ESOP's as an expenditure under section 37(1) was though found to be in accordance with the principle laid down by the 'Special Bench' of the Tribunal in the case of *Biocon Ltd. (supra)*, however, as the order of the 'Special Bench' of the Tribunal had not been accepted by the department and had been assailed before the High Court of Karnataka, therefore, the claim of the assessee as regards allowability of discounts on ESOP's could not be accepted. One is unable to persuade to subscribe to the aforesaid view of the Assessing Officer that the order of the 'Special Bench' of the Tribunal was not to be followed for the reason

that an appeal had been filed by the department against the said order before the High Court. It is not the case of the department that either the order of the 'Special Bench' of the Tribunal in the case of *Biocon Ltd. (supra)* had been set aside or the operation of the same had been stayed by the High Court. One is unable to comprehend that as to how the Assessing Officer despite conceding that the claim of the assessee as regards allowability of the discount of ESOP's was in accordance with the principle laid down by the 'Special Bench' of the Tribunal in the case of *Biocon Ltd. (supra)*, could still decline to adjudicate the issue under consideration in terms with the order of the 'Special Bench'. As on the date on which the assessment was framed, the order of the 'Special Bench' of the Tribunal did hold the ground, therefore, he remained under a statutory obligation to have passed his order in conformity with the view taken by the 'Special Bench', which had also been followed by the jurisdictional Tribunal, viz. Tribunal, Mumbai in the case of *Mahindra & Mahindra Ltd. v. Addl. CIT [2013] 40 taxmann.com 522*. The conduct of the Assessing Officer in declining to follow the order of the 'Special Bench' of the Tribunal in the case of *Biocon Ltd. (supra)*, which had neither been set aside or stayed by the High Court has to be deprecated. The Commissioner (Appeals) duly appreciating the serious infirmity in the order of the Assessing Officer, therein going by the principle of judicial discipline had set aside the order of the Assessing Officer by observing that the issue under consideration was covered by the order of the 'Special Bench' of the Tribunal in the case of *Biocon Ltd. (supra)*. The department had assailed the order of the Commissioner (Appeals) for the reason that the latter had erred in directing the Assessing Officer to follow the order of the 'Special Bench' of the Tribunal in the case of *Biocon Ltd. (supra)*. It is absolutely beyond comprehension that how the department could be aggrieved with the order of the Commissioner (Appeals) who had set aside the observations of the Assessing Officer which were palpably found to be in serious contradiction of the order of the 'Special Bench' of the Tribunal in the case of *Biocon Ltd. (supra)*. Neither anything has been placed on record nor averred which could persuade one to conclude that the order of the 'Special Bench' of the Tribunal in the case of *Biocon Ltd. (supra)* had either been stayed or set aside by the High Court of Karnataka, or a view taken by the 'Special Bench' no more holds the ground on account of a contrary view taken by any other High Court. Thus in the backdrop of aforesaid observations one is unable to persuade to accept the ground of appeal raised by the revenue, therefore, there is no infirmity in the well reasoned order of the Commissioner (Appeals) and same is upheld.