IN THE INCOME TAX APPELLATE TRIBUNAL

"C" BENCH : BANGALORE

BEFORE SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER AND

SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No.1140/Bang/2018
Assessment Year :2013-14

M/s. QlikTech India Private Limited, The Millennia, No. 1 & 2, 4th Floor, A Wing, Murphy Road, Ulsoor, Bangalore – 560 008. **PAN: AAACQ2405N**	Vs.	The Deputy Commissioner of Income Tax, Circle – 5 (1) (1), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri S.K. Agarwal CA
Revenue by	:	Shri C. Sundar Rao, CIT (DR)
Date of hearing	:	10.04 2019
Date of Pronouncement	:	10.05.2019

O R D E R

Per Shri A.K. Garodia, Accountant Member

This appeal is filed by the assessee and the same is directed against the order of ld. CIT (A)-5, Bangalore dated 18.01.2018 for Assessment Year 2013-14.

2. The grounds raised by the assessee are as under.

> "*1. That the order passed by the Ld. CIT(A) under section 250 of the Act is based on incorrect interpretation of law and facts of the case and therefore bad in law.*
>
> *2. That on the facts and in circumstances of the case and in law, the Ld. CIT(A) has erred in disallowing the Employee Stock Options (ESOPs) expenditure amounting to Rs. 15,864,756 incurred by the Appellant during the AY 2013-14.*
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> *3. That on the facts and in circumstances of the case and in law, the Ld. CIT(A) has erred in holding that ESOPs expenditure are capital in nature and accordingly not allowable under section 37 of the Act, ignoring the fact that said expense is a part of remuneration of employees and incurred with the purpose of securing the consistent and concentrated efforts of the employees and was thus, incurred wholly and exclusively for the purpose of the business of the Appellant.*

4. That the Ld. CIT(A) has erred in not appreciating the principles laid down by the Hon'ble Bangalore ITAT in the case of Novo Nordisk India (P.) Ltd. [2014] 63 SOT 242 and Biocon Ltd. [20131 25 ITR (T) 602 (SB) which are squarely applicable to the case of the Appellant.

5. That the Ld. CIT(A) has erred in concluding that the case laws relied upon by the Appellant are not relevant to the Appellant's case without providing for any specific reason for the same.

6. That on the facts and in circumstances of the case and in law, the Ld. CIT(A) has erred in not accepting the claim of the Appellant that the ESOPs expenditure amounting to Rs. 3,125,700 (included in Rs. 15,864,756 above) was not a prior period expenditure, since such expense crystallized only during the Financial Year 2012-13 relevant to the AY 2013-14.

7. Without prejudice to the above, on the facts and in circumstances of the case and in law, the Ld. CIT(A) has erred in not accepting that the aforesaid prior period expenses shall be allowed as expenditure in the previous financial year i.e. FY 2011-12.

8. The Ld. CIT(A) has erred in law and in facts, by levying interest under section 2348 of the Act.

9. The Ld. CIT(A) has erred in initiating penalty proceedings under section 271(1)(c) of the Act.

The above grounds of appeal are independent and without prejudice to one another.

That the Appellan craves leave to add, alter, amend and/ or modify any ground of appeal before or during the hearing of this appeal."

3. It was submitted by ld. AR of assessee regarding ground nos. 1 to 5 that the issue involved in these grounds is covered in favour of the assessee by the Tribunal order rendered in the case of Novo Nordisk India Pvt. Ltd. Vs. DCIT as reported in (2014) 63 SOT 242 in which the Tribunal has followed the decision of special bench of the Tribunal rendered in the case of Biocon Limited Vs. DCIT as reported in (2013) 25 ITR (T) 602. He submitted that copy of the Tribunal rendered in the case of Novo Nordisk India Pvt. Ltd. Vs. DCIT (supra) is available on pages 155 to 164 of the paper book and the order of the special bench rendered in the case of Biocon Limited Vs. DCIT (supra) is available on pages 132 to 154 of paper book. He submitted that ld. CIT(A) has held that these judgments are not applicable without giving

any valid reason for holding so and hence, this issue should be decided in favour of the assessee by following these two Tribunal orders.

4. Regarding ground no. 6 of assessee's appeal regarding disallowance of Rs. 31,25,700/- on this basis that this is prior period expenditure, it was submitted that the amount has crystallized in the present year and therefore, it should be allowed in the present year and in this regard, our attention was drawn to paper book pages 91 and 92. Regarding the objection of the AO in this regard, he submitted that in bottom para on page no. 7 of the assessment order, it is stated by AO that this amount of Rs. 31,25,700/- included in the total amount of Rs. 1,58,64,756/- is disallowable for this reason also that it is prior period expenditure as qualified by the auditor in the financial statements. In this regard, our attention was drawn to page no. 51 of the paper book where it is stated that this amount of Employee stock option scheme of Rs. 1,58,64,756/- includes prior period expenditure of Rs. 31,25,700/-. He submitted that this issue was decided by CIT(A) as per Para 6 of his order on this basis hat the main grounds are decided in favour of the revenue and following the same principle, all these grounds are rejected. Therefore, it is clear that this aspect has not been examined and decided by CIT (A) as to whether the expenses has crystallized in the present year or not.

5. As against this, the ld. DR of revenue supported the orders of authorities below. Our a tention was drawn to note no. 22 in the audited accounts of the assessee company available on page no. 54 of the paper book and it was pointed out that in this note, it is stated that the parent company Qlik Technologies Inc., USA has issued employee stock options (ESOP) to certain employees of the Company and has been cross charged for the year ended March 31, 2013 Rs. 1,58,64,756/- (March 31, 2012: Rs. Nil) towards the administrative charges and this has been charged in the statement of profit and loss under the head employee benefit expenses. It was submitted that these are administrative charges of that company and then how, the same can be allowed as expenses in the present case. The ld. DR of revenue submitted that 2010 Omnibus Equity Incentive Plan was not available before the AO/CIT(A). The copy of this plan was brought on

record and it was submitted that various terms are defined in this plan such as “Exercise Price” as per clause no. 16.14 and Fair Market Value as per clause no. 16.15, Exercise Price as per col no. 5.3 and Stock Option Agreement as per clause no. 5.1 of this incentive plan. It was submitted that even if it is held that assessee is eligible for deduction then also, the matter should be restored back to the file of AO to examine the eligibility of the assessee for deduction in the light of this incentive plan. He also submitted that the shares were issued by the parent company and not by the assessee and therefore, the judgments cited by ld. AR of assessee are not applicable in the present case. He also submitted that RBI permission was taken or not is not clear. Our attention was drawn to para 4.6 of the assessment order and it was pointed out that in this Para, it is noted by the AO that the expenditure that is debited is only a notional loss to the holding company and this is recharged to the present assessee and are booked by the assessee company and reimbursed to the holding company. He submitted that therefore, it is a colourable device for shifting of profits outside the country. The ld. DR of revenue also filed written submissions which is taken on record.

6. We have considered the rival submissions. We find that the issue in dispute was decided by ld CIT (A) as per para nos. 5 and 6 of his order and therefore, for the sake of ready reference, these paras are reproduced from the order of CIT(A). The same are as under.

> “*5. I have considered the above grounds of appeal, statement of facts and written submissions filed by the appellant and also perused the assessment order. The appellant has raised as many as eleven grounds and the ground nos.1 and 11 are general in nature, no separate adjudication is needed. Ground nos. 2 to 5 are related to allowability of expenditure in connection with Employee Stock Options ("ESOPSs") offered to employees of the Company. The Assessing Officer has disallowed the amount of Rs.1,58,64,756 paid by QIPL during the year under consideration holding that the ESOP expenditure incurred by the Appellant is only fictitious or national cost and it cannot be said to have been actually incurred by QIPL. The ultimate parent company of QIPL i.e. Qlik Technologies Inc (“Qlik US") has established an incentive scheme as part of which stock options ("ESOPs") are issued to certain key employees of the QlikTech group. The scheme was conceptualized with a view to encourage stock ownership among employees to motivate and*

encourage employees and to compensate them for their dedication, hard work and commitment. Qlik US has cross-charged to QIPL, ESOP cost pertaining to QIPL's employees, that is borne by QIPL. Accordingly, Rs. 1,58,64,756 was cross- charged by Qlik US during the subject AY and has actually been paid QIOL. Copy of debit notes raised by the parent company on the Appellant along with copy of bank instructions and Chartered Accountant's certificate in Form 15CB evidencing payment of Rs.1,58,64,756/- has been submitted submission dated 6 December 2017. The amount of Rs.1,58,64,756/- has actually been paid by QIPL pursuant to debit notes raised on the company, and there has been an actual outflow of such funds from the Company. Accordingly, by no stretch of imagination can such expenditure be held as imaginary or fictitious in nature. The decision of the Hon'ble Supreme Court in the case of Indian Molasses Co. (P) Ltd. v. CIT [1959] 37 ITR 66. The Hon'ble Apex court in the aforementioned case, while dealing with the allowability of expenditure u/s.10(2)(xv) of the Indian Income Tax Act, 1922. The Hon'ble Supreme Court held that whatever be the nature of the expenditure, the primary basis for deductibility of the same should be setting aside or "paying out" of such amount towards an actual liability, which is a clear feature in the Appellant's case.

5.1 The appellant further submitted that such benefit of ESOP received in the handsof the employees of QIPL has been offered to tax by the respective employee under thehead "Salaries" at the time of exercise of the ESOP Further, QIPL has also deductedappropriate tax at source on such perquisite amount. Recognition of ESOP expenditureas a form .of employee compensation expense has also been upheld by the Hon'blejurisdictional Income Tax Appellate Tribunal ("ITAT") in the case of Biocon Limited v.DCIT [2013] 25 ITR (Trib SB) 0602 and Novo Nordisk India Pvt. Ltd. v. DCIT [2014] 63SOT 242. Further submitted that while in the case of Biocon Ltd (supra), theexpenditure was only incurred but there was no actual cash outflow (as pointed by the Ld DR). However, in the instant case, QIPL has a better fact pattern, as the Company has actually paid to Qlik US. The appellant company relied on the decision of theSpecial Bench of the Hon'ble Bangalore Tribunal in the case of Biocon Limited v. DCIT (2013) 25 ITR (Trib SB) 0602, wherein it was held that ESOP discount is a deductiblebusinessexpenditure since it represents consideration/ compensation for servicesrendered by employees. Further submitted that judicial precedents have held that ESOP expenses cross charged to the appellant is deductible business expenditure. Followingthe principle of judicial discipline I have perused the judgement copies filed before meincluding of the Special Bench of the Hon'ble Bangalore Tribunal in the case of Biocon Limited v. DCIT and also Novo Nordisk Pvt. Ltd. Vs. DCIT, of Jurisdictional ITAT. Allother case laws relied on are not relevant to the appellant's case except the above twocase laws. In the special bench case the appellant company itself offered the shares

atdiscounted price to its employees which was held to be notional expenses whereas inthe appellant the shares of the parent company of US were offered to the appellant'semployees at discounted price and such discount has been cross charged to theappellant company, therefore those case laws are distinguishable and the appellantrelying on those case laws and submitting they are squarely applicable is not accepted.The doctrine of Res judicata is not applicable to Income Tax proceedings as eachassessment year is independent of other and identical controversies can arise in twodifferent assessment years. The appellant during the appellate proceedings has fileddebit notes substantiate its claim for having remitted the amount therefore submittedthat the Assessing Officer's stand that it was notional in nature is not correct. Having notfollowed the above case laws relied on by the appellant I would analyze the nature and the character of the discounted price borne by the appellant in order to facilitate itsemployee to acquire the shares of its parent company and ul imately the treatment inthe books of its parent company for having allotted shares. The allotment of sharesgoes to increasing the capital base of the holding company and if it all there is gain orloss on account of the issue of shares to employees it should be reflected in the holdingcompany. Even if it is looked in employee/individual point of view the investment madein acquiring the shares would not be claimed as revenue expenditure. Though, theappellant company has compensated the discounted price by way of making paymentsto its parent company and the employee would be showing it as compensation receivedfrom its employer but ultimately the nature of payment is going to acquire a capital asset'n the form of shares. Therefore, the character of payment is changed and suchexpenditure incurred on accoun of discounted price of the shares of the appellant'parent company offered to its employees is not allowable expenditure u/s.37 of the Income Tax Act 1961. The grounds of appeal are hereby dismissed.

6 Ground No.6 is on disallowing the claim made towards discount on ESOPgranted amounting to Rs.31,25,700/- as a prior period expenditure, without appreciating that such discount on ESOP offered crystallized only during the financial year 2012-13.Ground No.7 is on the nomenclature used in the books of account is not a decisive factor to determine claim of expense under the Act. In ground no. 8 the appellant raisedthat without prejudice to the above, the Assessing Officer erred in law and facts infailing to Mention that the claim of expense if treated as pertaining to the prior periodshould be allowed as expenditure in the previous AY's computation of Income. As themain grounds are decided in favour of the revenue, following the same principle, allthese ground also are hereby dismissed."

7. From the above paras reproduced from the order of CIT(A), it is seen that before ld. CIT(A) also, reliance has been placed on same two Tribunal orders having been rendered in the cases of Novo Nordisk India Pvt. Ltd.

vs. DCIT (supra) and Biocon Limited vs. DCIT (supra). It is observed by CIT(A) in Para 5.1 of his order that except these two Tribunal orders, other case laws relied on are not relevant to assessee's case. Hence this is admitted position that as per CIT(A) also, these two Tribunal orders are relevant in the case. After observing this, the ld. CIT(A) has held that the Tribunal order rendered in the case of Biocon Limited Vs. DCIT (supra) is not applicable in the present case for this reason that in that case, the assessee company itself offered shares at discounted price to its employees. Whereas in the present case, the shares of parent company of USA have been offered and such discount is cross charged to the assessee company. In our considered opinion, this objection of the ld. CIT(A) has no merit because in our considered opinion, if a benefit is granted to the employees, then the expenses incurred by the assessee company on granting such benefit to employees is allowable as deduction in the hands of the employer company and what is the manner in which the benefit is granted to the employees is not material. If the benefit or an asset is given to the employees at a price lesser than the fair market value and such loss on account of granting the asset to the employees at a price lesser than fair market value is borne by the assessee company then deduction is allowable on that account and this is not material as to whether the asset is in the form of equity shares of the assessee company or of the parent company of the assessee company or some outsider company. The relevant aspect is this that benefit is received by the employees of the assessee company and cost of benefit given to the employees is borne by the assessee company. If these two conditions are satisfied then the manner of giving such benefit to the employees is not material. This is not in dispute in the present case that for shares of the parent company of the assessee company, right was given to the employees of the assessee company to acquire shares of the parent company of the assessee company at a price lesser than fair market value of such shares and cost of giving this benefit to the employees was in fact borne by the assessee company. Hence these two conditions are very much satisfied in the present case. Hence this objection of CIT(A) has no merit. Thereafter in

the later portion of Para 5.1 of his order, it is stated by CIT(A) that having not followed these two case laws relied upon by the assessee, he analyses the nature and character of discounted price borne by the assessee in order to facilitate its employees to acquire the shares of its parent company and ultimately, the treatment in the books of its parent company for having allotted shares. Thereafter it is stated by CIT(A) that the allotment of shares goes to increasing the capital base of the holding company and if it all, there is gain or loss on account of the issue of shares to employees, it should be reflected by the holding company. We find no basis of this observation of CIT(A) because if the parent holding company is issuing shares to the employees of the assessee company or to an outsider, it will expect to realise fair market value of the shares so issued and if because of the incentive scheme, lesser price is realized on issue of shares and such discount is realized by the parent company from the assessee company, then the total amount to be credited in the books of the parent holding company will be the fair market value of the shares issued by the parent holding company and this cannot be a basis to reject the assessee's claim because when the benefit is given to the employees of the assessee company in India, why the loss will be borne by the parent holding company particularly when as per the incentive scheme, such loss is realizable by the parent holding company from the assessee company. There is no basis of saying that gain or loss on account of issue of shares to the employees of the present assessee company in India should be reflected in the books of the holding company situated abroad.

8. Thereafter it is also observed by CIT (A) that even if it is looked in employee /individual point of view, the investment made in acquiring the shares would not be claimed as revenue expenditure. The basis of such statement by ld. CIT(A) is this that the assessee company has compensated the discounted price by way of making payments to its parent company and the employee would be showing it as compensation received from its employer but ultimately the nature of payment is going to acquire a capital asset in the form of shares and therefore, the character of payment is changed and such expenditure incurred on account of discounted price of the shares of the

assessee's parent company offered to its employees is not allowable expenditure u/s. 37 of the IT Act, 1961. We fail to understand the logic of ld. CIT(A) because even if we pay salary to employees in cash, employee can acquire any asset out of such cash and if the logic of CIT(A) is accepted then no salary payment should be allowed as revenue expenditure if an asset is acquired by the employee.

9. We have seen that the reasons given by ld. CIT (A) for not following these two Tribunal orders have no merit. We also find that before AO also, reliance has been placed on the same Tribunal order rendered in the case of Novo Nordisk India Pvt. Ltd. vs. DCIT (supra). In para 4.1 of the assessment order on page no. 4 of the assessment order it is noted by the AO that the assessee has relied on this Tribunal order rendered in the case of Novo Nordisk India Pvt. Ltd. Vs. DCIT (supra) as well as other decisions of the Tribunal in its support. The AO has not given any valid basis for not following the Tribunal orders cited before him. He has simply stated that revenue is in appeal against this tribunal order and revenue has not accepted the same. Even if appeal is filed by the revenue against the Tribunal order, the order is valid and is to be followed if operation is not stayed by the High Court. This is not the case of the revenue that operation of these Tribunal orders is stayed by the High Court and hence, the AO and CIT(A) and even the Tribunal are duty bound to follow these Tribunal orders. Regarding various objections of ld. DR of revenue, we find that these objections are not arising out of the objections of the AO in the assessment order and in the assessment order this is not the case of the AO that the 2010 Omnibus Equity Incentive Plan was not available before the AO and for this reason, he is not allowing the claim of the assessee. This is also not the objection of the AO that the assessee has not obtained the permission from the RBI for payment and this is the reason for making disallowance of the assessee's claim. This is also not objection of the AO in the assessment order that assessee's claim is colourable device for shifting profits outside the country. The facts in the present case and in the case of Novo Nordisk India Pvt. Ltd. Vs. DCIT (supra) are similar because in the case of Novo Nordisk India Pvt. Ltd. Vs. DCIT (supra) also, employees of its

foreign affiliates of Novo Nordisk A/S, Denmark ("NNAS") were entitled to purchase shares of NNAS at a price less than the market price. In that case also, 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 these shares were issued by assessee to its employees was reimbursed by the assessee to its parent company and this sum reimbursed was claimed as expenditure in the profit and loss account of the assessee company as employees cost. Hence there is no difference in facts. Hence we find no reason for not following these two binding Tribunal orders rendered in the case of Novo Nordisk India Pvt. Ltd. vs. DCIT (supra) and Biocon Limited vs. DCIT (supra). Respectfully following these two Tribunal orders, we decide the main issue in favour of the assessee.

10. Regarding ground no. 6 in respect of an amoun of Rs. 31,25,700/- for which it is held by the AO that disallowance to this extent is to be made for this reason also that the expenses in question is prior period expenditure, we find that this issue was not decided by CIT(A) and hence, on this issue, we restore this matter back to the file of CIT(A) for decision on this aspect. Ground no. 6 is allowed for statistical purposes.

11. In the result, the appeal fi ed by the assessee stands allowed in the terms indicated above.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(PAVAN KUMAR GADALE)	(ARUN KUMAR GARODIA)
Judicial Member	Accountant Member

Bangalore,
Dated, the 10th May, 2019.
/MS/

Copy to:

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

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Bangalore.