IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND
Ms. PADMAVATHY S, ACCOUNTANT MEMBER

ITA No.1141/Bang/2022
Assessment year : 2017-18

Flipkart India Private Limited, Alyssa, Begonia and Clover, Embassy Tech Village, Devarabeesanahalli, Outer Ring Road, Bangalore – 560 103. **PAN: AABCF 8078M**	Vs.	The Assistant Commissioner of Income Tax, AO AS SPECIAL RANGE-3, Bangalore.
APPELLANT		RESPONDENT

ITA No.1115/Bang/2022
Assessment year : 2017-18

The Deputy Commissioner of Income Tax, Central Circle 1(4), Bangalore.	Vs.	Flipkart India Private Limited, Bangalore – 560 103. **PAN: AABCF 8078M**
APPELLANT		RESPONDENT

Assessee by	:	S/Shri Ajay Vohra, Sr. Counsel, Kishore Kunal & Parth, Advocates
Revenue by	:	Ms. Neera Malhotra, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	02.03.2023
Date of Pronouncement	:	09.03.2023

O R D E R

Per Bench

These cross appeals by the assessee and revenue are against the order of the CIT(A)-11, Bangalore dated 19.10.2022 for the assessment year 2017-18.

2. The assessee is engaged in the business of wholesale distribution of books, mobile, media, computers, gaming console and other related accessories, apart from developing technology solutions, website solutions, supply chain management, financial solutions, logistic solutions, engineering & outsourcing solutions for e-commerce business. The assessee filed the return of income for AY 2017-18 on 30.11.2017 declaring a loss of Rs.139,61,48,741. The case was selected for scrutiny and statutory notices were duly served on the assessee. The AO completed the assessment by making following additions/disallowances:-

(i) Addition on account of valuation of marketing intangibles of assessee – Rs.1708,39,07,538.
(ii) Disallowance u/s. 37 towards ESOP expenses – Rs.15,80,70,000.

3. On further appeal, the CIT(A) deleted the addition made towards valuation of marketing intangible assets by relying on the decision of the coordinate Bench in assessee's own case. The CIT)(A) upheld the disallowance of ESOP expenses. The assessee and the revenue are in appeal against the order of the CIT(A).

4. The grounds raised by the assessee and by the revenue are as under:-

Grounds of Assessee's appeal

1. That on the facts and in the circumstances of the case and in law, the Learned Commissioner of Income Tax Appeals — 11, Bangalore ("Ld. CIT(A)") erred in upholding the action of the Learned Assessing Officer ("Ld. AO") in disallowing the ESOP expenditure amounting to INR 15,50,70,000/-for Assessment Year (AY") 2017 -18.

Disallowance of expenditure claimed towards Employee Stock Option Scheme (ESOP) under Section 37(1) of the Income-tax Act, 1961 ("Act") amounting to INR 15,50,70,000/-

2. The Ld. CIT(A) has erred in confirming the disallowance of the expenditure on ESOP of INR 15,50,70,000/- under Section 37 of the Act, both in facts and in law and by erroneously distinguishing binding precedents and by rendering perverse findings contrary to the record.

3. The Ld. CIT(A)'s finding on the issue of deductibility of ESOP expenditure is erroneous as:

3.1. the expenditure is not notional, fictious or contingent;

3.2. is in accordance with the books of accounts prepared according to recognized accounting standards;

3.3. is an actual cost incurred by the Appellant which is paid to the Holding company; and

3.4. the ESOP is not a service by Holding Company to Subsidiary Holding

Non-Applicability of Section 195 of the Act

4. The Ld. CIT (A) has erred in law and on facts by upholding the actions of the Ld. AO of disallowing the ESOP expenditure under section 40(a)(i) of the Act by holding that

Appellant is liable to deduct tax under Section 195 of the Act on reimbursement made to the Holding Company towards ESOP expenditure.

5. The Ld. CIT(A) has erred in law and on facts by ignoring that ESOP cross charge payments made to Holding Company are mere reimbursements having no mark-up or profit element attached to the same.

6. The Ld. CIT(A) has failed to appreciate that the ESOP cross charge payments received by Holding Company from its associated enterprises in India including the Appellant were scrutinized in AY 2015-16 and no adjustments were proposed by the Ld. Transfer Pricing Officer.

7. The Ld. CIT(A) has erred in law and on facts by contending that the Appellant is liable to deduct tax on ESOP cross charge payments under both Section 192 and Section 195 of the Act, against settled principles of law, without appreciating that the same would result in double taxation of same amount.

8. The Ld. CIT(A) has erred in law and on facts, in disregarding that the remittance towards recovery of ESOP charges is not taxable under India-Singapore Double Taxation Avoidance Agreement.

9. The Ld. CIT(A) has erred in law and on facts, in disregarding that the business profits, if any, of the Holding Company shall not be chargeable to tax in India in absence of a permanent establishment.

10. The Ld. CIT(A), against the principles of judicial discipline, has failed to follow the binding judgments and orders of Hon'ble Courts and this Hon'ble Tribunal, wherein it has been held that withholding obligations under Section 195 would not arise on reimbursement of expenses. Instead the Ld. CIT(A) has proceeded on extraneous considerations while relying on case laws decided in different context and not applicable to the facts of the Appellant.

11. The Ld. CIT(A), has erred in law and on facts, in failing to quash the penalty proceedings initiated under Section 270A of the Act by Ld. AO.

12. The Ld. CIT(A) has erred in law and on facts, in failing to delete interest levied under Section 234B of the Act.

The Appellant craves leave to add, alter, amend, substitute or withdraw all or any of the Grounds of Appeal herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing to enable the Hon'ble Tribunal members to decide these according to the law."

5. We will first consider the appeal of the assessee with regard to disallowance of ESOP expenses. The ld AR and ld. DR submitted a detailed written submissions with regard to the ESOP expenses which have been taken on record for the purpose of adjudication.

6. The summary of the submissions made by the ld. AR in the written submissions is that –

(i) ESOP expenses qualify the conditions prescribed u/s. 37 of the Act.

(ii) It is an unascertained liability and not a contingent liability.

(iii) ESOP expenses are recognized in accordance with the Accounting Principles i.e., INDAS 102.

(iv) ESOP expenses are recognized by following a consistent accounting method year on year.

(v) Based on various judicial pronouncements, it is well settled that there is no liability to withhold tax in the case of cost to cost reimbursement, as is in the assessee's case.

7. Through the written submissions, the ld DR brought to our attention the relevant parts of the CIT(A)'s order in order to distinguish

the assessee's case from *Biocon Ltd. (2013) 25 ITR (T) 602 (Bang. Trib.)* and submitted that the assessee has not submitted the relevant details in this regard.

8. We heard the rival submissions and perused the material on record. We notice that the coordinate bench of the Tribunal in the case of *Novo Nordisk India P. Ltd. v. DCIT, [2014] 42 taxmann.com 168 (Bang. ITAT)* has considered the similar issue and held that –

> "18. We have considered the rival submissions. It is clear from the facts on record that there was an actual issue of shares of the parent company by the assessee to its employees. 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 those shares were issued by the assessee to its employees, was reimbursed by the assessee to its parent company. This sum so reimbursed was claimed as expenditure in the profit & loss account of the assessee as an employee cost. The law by now is well settled by the decision of the Special Bench of the ITAT Bangalore in the case of Biocon Ltd. v. Dy. CIT [2013] 35 taxmann.com 335 and other connected appeals, by order dated 16.07.2013, wherein it was held that expenditure on account of ESOP is a revenue expenditure and had to be allowed as deduction while computing income. The Special Bench held that the sole object of issuing shares to employees at a discounted premium is to compensate them for the continuity of their services to the company. By no stretch of imagination, we can describe such discount as either a short capital receipt or a capital expenditure. It is nothing but the employees cost incurred by the company. The substance of this transaction is disbursing compensation to the employees for their services, for which the form of issuing shares at a discounted premium is adopted.
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> 19. In the present case, there is no dispute that the liability has accrued to the assessee during the previous year. The only question to be decided is as to whether it is the expenditure of the assessee or that of the parent company. We are of the view that

the observations of the CIT(A) in para 5.6 of his order that these expenses are the expenses of the foreign parent company is without any basis and lie in the realm of surmises. The foreign parent company has a policy of offering ESOP to its employees to attract the best talent as its work force. In pursuance of this policy of the foreign parent company, allowed its subsidiaries/affiliates across the world to issue its shares to the employees. As far as the assessee in the present case which is an affiliate of the foreign parent company is concerned, the shares were in fact acquired by the assessee from the parent company and there was an actual outflow of cash from the assessee to the foreign parent company. The price at which shares were issued to the employees was paid by the employee to the Assessee who in turn paid it to the parent company. The difference between the fair market value of the shares of the price at which shares were issued to the employees was met by the Assessee. This factual position is not disputed at any stage by the revenue. In such circumstances, we do not see any basis on which it could be said that the expenditure in question was a capital expenditure of the foreign parent company. As far as the assessee is concerned, the difference between the fair market value of the shares of the parent company and the price at which those shares were issued to its employees in India was paid to the employee and was an employee cost which is a revenue expenditure incurred for the purpose of the business of the company and had to be allowed as deduction. There is no reason why this expenditure should not be considered as expenditure wholly and exclusively incurred for the purpose of business of the assessee.

20. We fail to see any basis for the observation of the CIT(A) that the obligation to issue shares at a discounted price to the employees of the Assessee was that of the foreign parent company and not that of the Assessee. Admittedly, the shares were issued to employees of the Assessee and it is the Assessee who has to bear the difference in cost of the shares. The expenditure is necessary for the Assessee to retain a health work force. Business expediency required that the Assessee incur such costs. The parent company will be benefitted indirectly by such a motivated work force. This will be no ground to deny the deduction of a legitimate business expenditure to the Assessee as

laid down by the Hon'ble Supreme Court in the case of Sassoon J. David& Co. (P.) Ltd. (supra).

21. The reference by the CIT(A) to the provisions of Sec.40A(2)(b) of the Act is again without any basis. The price of the shares of NNAS is arrived at by applying the average market price for the period 3rd October, - 17the October, 2005 in the Copenhagen Stock Exchange. The price so arrived at and the price at which shares are issued to the employees of the Assessee is the benefit which the employees get under the ESOP. The Assessee or its parent company can never influence the stock market prices on a particular date. There is no evidence or even a suggestion made by the CIT(A) in his order. There is no basis to apply the provisions of Sec.40A(2)(b) of the Act.

22. With regard to the decision of the ITAT in the case of AccentureServices (P.) Ltd. (supra), we find that the facts of the case of Accenture Services (P.) Ltd. (supra)are identical. In the case of Accenture Services (P.) Ltd. (supra), the facts were that the assessee company incurred certain expenses on account of payments made by it for the shares allotted to its employees in connection with the ESPP. The AO had disallowed Rs. 9,06,788/- incurred by the assessee on the ground that this expenditure is not the expenditure of assessee company but that expenditure is of parent company and the benefit of such expenditure accrues to the parent company and not assessee. The CIT(A) deleted the addition made by the AO. The CIT(A) found that the common shares of Accenture Ltd. the parent company, have been allotted to the employees of ASPL, the Indian affiliate/Assessee and not to the employees of the parent company. The CIT(A) also found that though the shares of the parent company have been allotted, the same have been given to the employees of the Assessee at the behest of the SUNIL Assessee. The CIT(A) thus held that it was an expense incurred by the assessee to retain, motive and award its employees for their hard work and is akin to the salary costs of the assessee. The same was therefore business expenditure and should be allowable in computing the taxable income of the assessee. The tribunal upheld the view of the CIT(A). It can be seen from the decision in the case of Accenture Services (P.) Ltd. (supra) that the shares of the foreign company were allotted and given to the employees of affiliate in India at the behest of the

affiliate in India. The CIT(Appeals), however, presumed that the facts in the instant case of the assessee was that the shares were allotted to the employees of the affiliate in India at the behest of the foreign company. This is not the factual position in the assessee's case, as the assessee had on its own framed the NNIPL ESOP Scheme, 2005, to benefit its employees. NNAS may have a global policy of rewarding employees of affiliates with its shares being given at a discount and that policy might be the basis for the Assessee to frame ESOP. That by itself will not mean that the ESOP was at the behest of the parent company. In any event the immediate beneficiary is the Assessee though the parent company may also be indirect beneficiary of a motivated work force of a subsidiary. We are of the view that the factual basis on which the CIT(Appeals) distinguished the decision of the Mumbai Bench of ITAT in the case of Accenture Services (P.) Ltd. (supra) is erroneous.

23. With regard to the observations of the CIT(Appeals) that the ESOP actually benefits only the parent company, we are of the view that the expenditure in question is wholly and exclusively for the purpose of the business of the assessee and the fact that the parent company is also benefited by reason of a motivated work force would be no ground to deny the claim of the assessee for deduction, which otherwise satisfies all the conditions referred to in section 37(1) of the Act. The decision of the Hon'ble Supreme Court in the case of Sassoon J. David & Co. (P)Ltd. (supra) and the Hon'ble Karnataka High Court decision in the case of Mysore Kirloskar Ltd. (supra) clearly support the plea of the assessee in this regard.

24. We are of the view that in the facts and circumstances of the present case, the expenditure in question was wholly and exclusively for the purpose of the business of the assessee and had to be allowed as deduction as a revenue expenditure.

25. For the reasons given above, we direct the expenditure be allowed as deduction."

9. We also notice that the issue of whether ESOP cross charge expenses are allowable u/s. 37 of the Act has already been decided by

this Tribunal in favour of the assessee in the case of *Biocon Ltd. (supra)* which has also been affirmed by the Hon'ble Karnataka High Court in [2021] 430 ITR 151 (Karnataka) by categorically holding that *"the expression 'expenditure' will also include a loss and therefore, issuance of shares at a discount where the assessee absorbs the difference between the price at which it is issued and the market value of the shares would also be expenditure incurred for the purposes of Section 37(1) of the Act."*

10. The assessee's case being identical, respectfully following the above decision of the coordinate Bench, we hold that the expenditure towards ESOP is eligible for deduction u/s 37 of the Act.

Revenue's appeal

11. The assessee is a wholesale dealer in various items. It purchases goods from various persons and sells the same immediately to retail seller like M/s. WS Retail Services P. Ltd. and M/s. Flipkart Online Services P. Ltd. During the assessment proceedings, the AO noticed that the assessee has been selling the goods purchased to the resellers/retailers at a price less than the cost price of the assessee. The AO further noticed that during the year under consideration, the assessee has made a sale of Rs.15,264.42 crores to the retailers and against this, the cost of goods was Rs.15,425.35 crores and accordingly a cash loss of Rs.160.93 crores. The AO considered this as a basis for marketing intangibles and accordingly made an addition towards the same.

12. The CIT(A) deleted the addition by relying on the decision of the coordinate Bench in *assessee's own case for AY 2015-16 [2018] 92 taxmann.com 387 (Bang. Trib)* where the Tribunal has held that the profit margin forgone by the assessee cannot be held to be expenditure in creating intangible or goodwill. Aggrieved, the revenue is in appeal before the Tribunal.

13. In the written submissions, the ld. DR highlighted the relevant paragraphs from the order of the CIT(A) to support the contention that the CIT(A) ought not to have merely relied on the decision of the ITAT in assessee's own case for AY 2015-16 to delete the addition without considering the evidence furnished by the AO.

14. The ld. AR relied on the order of the coordinate Bench and submitted that since there is no change in the facts in the current year it is covered by that decision.

15. We heard the parties and perused the material on record. We noticed that the issue is covered by the coordinate bench of the Tribunal in assessee's own case for AY 2015-16 (supra) where the Tribunal has held that –

> "49. As far as the appeal by the revenue is concerned, the issue involved is with regard to quantification of the profit margin of comparable companies chosen by the AO. On the revenue's appeal, the learned DR relied on the order of the AO and pleaded that the computation of expenses on creating intangibles as done by the AO should be restored.

50. We have given a very careful consideration to the rival submissions. As far as the Assessee's appeal is concerned, the issue that arises for consideration is as to whether the determination of total income as done by the AO was justified in the facts and circumstances of the case. The Assessee as we have seen is a wholesale trader. He purchases goods for the purpose of trading at say Rs. 100/- from unrelated parties. He sells it to retailers at Rs. 80/-. The retailers are also unrelated parties. The retailers sell the goods through the Assessee's web portal "flipkar.com". The trading by the retailers to the end user is through E-Commerce. The customers browse the website and see the various products and place orders electronically. The products are delivered physically to the customers at their desired place. The payment is also made electronically or by cash at the point of deliver to the customers. As far as the Assessee is concerned it deals only with retailers. On sale to the retailers the Assessee incurs loss. The case of the AO is that a wholesale trader normally sells his products at cost + his mark-up (margin) + indirect costs incurred in the business of wholesale trading. The plea of the Assessee is that E-commerce was at a nascent stage and therefore to attract customers to purchase goods through E-Commerce, the only way was to offer goods at a lesser price than what the retailers in physical market in show room offer (referred to as retailers in brick and mortar). The further plea of the Assessee was that by offering goods at a lesser price, the Assessee in the long run will capture a huge market and generate profits in the long run. According to the AO the strategy of selling goods at lower than cost price was to establish customer goodwill and brand value in the long run and reap benefits in the later years. Therefore the profits foregone in the earlier years by selling goods at less than cost price was to be regarded as expenditure incurred in creating intangibles/brand value or goodwill. Since such expenditure create asset in the form of intangible/brand or goodwill, the expenditure has to be construed as capital expenditure and would go to reduce the loss declared by the Assessee in the return of income. Therefore the loss declared by the Assessee in the return of income filed was converted into positive income by disallowing expenditure. The quantification of expenditure was done by adding to the cost price, profit margin which Assessees engaged in similar business would earn and reducing there from the actual sale value realised

by the Assessee. The question is whether the course of action adopted by the AO was permissible under the Act.

51. The relevant statutory provisions of the Act are Section 4 of the Act which creates a charge on the total income of an Assessee and it lays down in Section 4(1) of the Act that where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of the Act in respect of the total income of the previous year of every person. Section 5 of the Act lays down the scope of total income under the Act and it lays down that total income of any previous year of a person who is a resident includes all income from whatever source derived which(a) is received or is deemed to be received in India in such year by or on behalf of such person; or(b) accrues or arises or is deemed to accrue or arise to him in India during such year; or(c) accrues or arises to him outside India during such year. Sec. 2(24) of the Act defines income by laying down that income includes and lists out several categories of receipts which can be characterised as income. The definition is inclusive definition and therefore what can be regarded by ordinary connotation of the said term as income can be regarded as income even though they do not fall within any of the categories of income set out in various sub-clauses of Sec. 2(24) of the Act. The aspect to be noted is that there should be income and its receipt or accrual because it is only income which accrues or arises that can be subject matter of total income u/s.5 of the Act. Sec.14 lays down that income for the purpose of computation of total income has to be classified under the following heads of income viz., Salaries, Income from house property, Profits and gains of business or profession, Capital gains and Income from other sources. Sec.28 of the Act lays down various categories of income that shall be chargeable to income-tax under the head "Profits and gains of business or profession". The income of the Assessee in the present case would fall within Sec.28(i) of the Act viz., "the profits and gains of any business or profession which was carried on by the assessee at any time during the previous year". Section 145 of the Act provides how income chargeable under the head "Profits and gains of business or profession" or "Income from other sources" has to be computed and it lays down that such income shall,

subject to the provisions of sub-section (2), be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. Sub-section (2) of Section 145 provides that the Central Government may notify in the Official Gazette from time to time income computation and disclosure standards to be followed by any class of assessees or in respect of any class of income. Sub-Section (3) of Section 145 provides that Where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub-section (1) has not been regularly followed by the assessee, or income has not been computed in accordance with the standards notified under sub-section (2), the Assessing Officer may make an assessment in the manner provided in section 144. It is thus clear from the statutory provisions that the starting point of computing of income from business is the profit or loss as per the profit and loss account of the Assessee. The AO cannot disregard the profit or loss as disclosed in the profit and loss account, unless he invokes the provisions of Sec. 145(3) of the Act. In the present case it is not the case of the AO that the provisions of Sec. 145(3) of the Act are applicable. In such circumstances, the question is as to whether the AO had power to go beyond the book results. In our view, the AO was not empowered under the Act to do so.

52. As laid down by the Hon'ble Supreme Court in the case of Calcutta Discount Co. (supra), when one trader transfers his goods to another trader at a price less than the market price, the taxing authority cannot take into consideration the market price of those goods, ignoring the real price fetched. As laid down by the Hon'ble Supreme Court in the case of A. Raman & Co. (supra), income which has accrued or arisen can only be subject matter of total income and not income which could have been earned but not earned. The decision of the Hon'ble Karnataka High Court in the case of A. Khader Basha (supra) is squarely applicable to the facts of the present case. The facts of the Assessee's case and the facts of the case decided by the Hon'ble Karnataka High Court were identical. The Hon'ble Karnataka High Court held following Hon'ble Supreme Court decision in the case of Calcutta Discount Co. Ltd. (supra), that where a trader transfers his goods to another trader at a price less than the market price and the transaction is a bona fide one, the taxing

authority cannot take into account the market price of those goods, ignoring the real price fetched to ascertain the profit from the transaction. The Hon'ble Court explained that the only exception was if Section 40(A)(2)(a) of the Act applies viz., where the parties to the transaction are related. Following the aforesaid decisions, we hold that the AO was not right in proceeding to ignore the books results of the Assessee and resorting to a process of estimating total income of the Assessee in the manner in which he did. We find force in the submission of the learned counsel for the Assessee that what can be taxes is only income that accrues or arises as laid down in Sec.5 of the Act. Nothing beyond Sec.5 of the Act can be brought to tax. As contended by him there was nothing to show accrual of income so as to disregard the loss declared by the Assessee in the return of income filed. As we have already seen there is no provision in the Act by which the AO can ignore the sale price declared by an Assessee and proceed to enhance the sale price without material before him to show that the Assessee has in fact realized higher sale price. As contended by the learned counsel for the Assessee, wherever the legislature wanted to tax income not earned, it had made specific provisions in the Act by way of deeming fiction like provisions of Sec.43CA(1, Sec.45(4) and Sec.50C(1) of the Act.

53. In view of the above conclusion, there may not be any necessity to deal further with the manner in which the AO has proceeded to compute total income of the Assessee and we can conclude by holding that the loss returned by the Assessee has to be accepted and the manner of determination of total income as done by the AO is not in accordance with law. Nevertheless, we shall also address the issue as to whether the conclusions of the AO that the Assessee incurred expenses in creating intangibles/brand or goodwill and also the question whether the conclusion of the AO that to the extent the Assessee has foregone his profit margin, he can be said to have incurred expenditure in creating intangibles/brand or goodwill.

54. Did the Assessee incur any expenditure as held by the AO in creating intangibles/brand or goodwill? To say that an expenditure has been incurred by an Assessee there should be either accrual of liability or actual outflow in the form of

payment. There was no such accrual of liability or actual outflow in the present case. This fact is also acknowledged by the AO. The AO has however proceeded to draw hold that because the Assessee was purchase at Rs. 100 and selling the goods to retailers at Rs. 80/- the rationale for incurring loss by a wholesale trader at the gross level was very peculiar. Since such a pricing was done keeping in mind the long run profits of the Assessee which will grow because of the intangible/brand or goodwill which will be generated in the long run. Therefore to the extent profits are foregone by the Assessee, the Assessee can be deemed to have incurred expenditure on creating intangibles/brand or goodwill and such expenditure has to be regarded as capital expenditure and added to the total income of the Assessee.

55. We find no basis for the above conclusions of the AO. The first presumption of the AO is that the Assessee had incurred expenditure. As rightly contended by the learned counsel for the Assessee there was no accrual of any liability on account of any expenditure or actual outflow of funds towards expenditure. One cannot proceed on the basis of presumption that the profit foregone is expenditure incurred and further that expenditure so incurred was for acquiring intangible assets like brand, goodwill etc. As pointed by the Hon'ble Supreme Court and the Hon'ble Bombay High Court in the case of B.C. Srinivasa Setty (supra) and Evans Frazer (supra), for creation of intangibles like say goodwill it is not possible to ascertain in terms of money the cost of acquisition of goodwill; it is equally impossible to ascertain in terms of money the cost of addition or alteration to the quality of goodwill which led to the increase in its value. It is therefore not possible to say that profits foregone created goodwill or any other intangibles or brand to the Assessee. The argument of the learned DR on the existence of intangibles/brands or goodwill was on the basis of purchase of Assessee's shares at a premium by investors. Despite making losses, the Assessee's shares were purchased by investors at a high premium. In this regard two instances of purchase by venture capitalists of the shares of the Assessee of Re.1/- in the previous years relevant to AY 15-16 and 14-15 at a premium of Rs. 1899/- and Rs. 595/- respectively was cited by him. According to him such high share premium was justified only because of the asset base created by the Assessee in the form of brand value. This again is an argument without bringing on

record any material to substantial that valuation of shares were done only because of value being ascribed to brand or goodwill or any intangibles. The valuation of shares as per the AO was on DCF method and there is no mention in the order of assessment regarding values being ascribed to goodwill/brand or intangibles. We therefore hold that there was no expenditure incurred by the Assessee except those that are set out in the profit and loss account. The question of incurring expenditure on creating intangibles does not arise for consideration at all.

56. In view of our conclusions that the action of the AO in disregarding the books results cannot be sustained and the further conclusion that the action of the AO in presuming that the Assessee had incurred expenditure for creating intangible assets/brand or goodwill is without any basis, we do not think it necessary to deal with the arguments that even assuming that expenditure was incurred by the Assessee the expenditure for building brand or creating intangible or goodwill is revenue expenditure and allowable as deduction. It is also not necessary for us to go into the question of estimation of quantum of expenditure on creating intangibles, in view of the above conclusions.

57. For the reasons given above, we hold that the loss as declared by the Assessee in the return of income should be accepted by the AO and his action in disallowing expenses and arriving at a positive total income by assuming that there was an expenditure of a capital nature incurred by the Assessee in arriving at a loss as declared in the return of income and further disallowing such expenditure and consequently arriving at a positive total income chargeable to tax is without any basis and not in accordance with law and the said manner of determination of total income is hereby deleted."

16. Respectfully following the above decision of the Tribunal, we find no reason to interfere with the order of the CIT(Appeals) and uphold the same. The grounds taken by the revenue are dismissed.

17. In the result, appeal of the assessee is allowed and appeal of revenue is dismissed.

Pronounced in the open court on this 9th day of March, 2023.

Sd/-	Sd/-
(GEORGE GEORGE K.)	(PADMAVATHY S.)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Bangalore,
Dated, the 9th March, 2023.

/*Desai S Murthy /*

Copy to:

1. Assessee 2. Revenue 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.