आयकर अपीलीय अधिकरण, मुंबई " के" खंडपीठ

Income-tax Appellate Tribunal -"K"Bench Mumbai

सर्वश्री राजेन्द्र,लेखा सदस्य एवं, राम लाल नेगी, न्यायिक सदस्य

Before S/Shri Rajendra,Accountant Member and Ram Lal Negi,Judicial Member

आयकर अपील सं./I.T.A./4156/Mum/2012,निर्धारण वर्ष /Assessment Year: 2007-08

आयकर अपील सं./I.T.A./5557/Mum/2012,निर्धारण वर्ष /Assessment Year: 2007-08

ACIT-10(1), 455, Aayakar Bhavan, 4th Floor, M.K. Marg,Mumbai-400 020.	Vs.	M/s. Wockhardt Ltd. Wockhardt ToWEr, BKC Bandra (E),Mumbai-400 051. **PAN:AAACW 2472 M**

(अपीलार्थी **/Appellant**) (प्रत्यर्थी **/ Respondent**)

Revenue by: Shri Jayant Kumar -DR

Assessee by: Shri Yogesh A. Thar

सुनवाई की तारीख **/ Date of Hearing: 17/10/2017**

घोषणा की तारीख **/ Date of Pronouncement: 05/01/2018**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य ,राजेन्द्र के अनुसार/ PER RAJENDRA, AM-

Challenging the orders of the CIT(A)-15 and CIT(A)-21, Mumbai dated 21/06/2012 and 01/ 03/2012 respectively,the Assessing Officers(AO.s)have filed the above appeals.Assessee-company,engaged in the business of manufacturing and trading of pharmaceutical products, filed its return on 1/11/2007 declaring total income of Rs.5 crores.the AO completed the assessment u/s.143(3),on 31/3/2010,determining the income of the assessee at Rs.117,07,19, 060/-.

Later on,the AO passed an order u/s.154 of the Act on 24/08/2011.The First Appellate Authority(FAA)allowed the appeal,filed by the assessee,against the revisionary order.The AO has challenged the order of the FAA cancelling the order passed u/s.154 of the Act.Thus, there are two appeals for the same AY.

ITA/5557/Mum/2012:

2.First Ground of appeal is about deleting the addition of Rs.2.17 crores made by the AO,on account of guarantee fee income.During the assessment proceedings the AO found that the assessee had entered into International Transactions(IT.s)with its Associated Enterprises (AE) for the year under consideration.He made a reference to the Transfer Pricing Officer (TPO) to determine the Arm's length Price (ALP) of the IT.s.

During the TP proceedings,the TPO found that the AE of the assessee ,namely CP Pharma (CPP),had acquired loans from HSBC,Bank,UK of 14 million pounds (£), that the assessee

had guaranteed payment of HSBC bank for agreed guarantee fee charged of 0.75% of the loan amount to its AE, that the assessee had adopted CUP method for bench-marking the guarantee fee, that it was claimed that fee at the rate of 0.75% was at arm's-length, that the assessee had claimed that it had obtained quotation from HSBC Mumbai, for guarantee fee charged.The TPO asked the assessee to show cause,vide order sheet entry dt. 09/10/2010,as to why adjustment to the rates of guarantee fee should not be made in pursuance of the order of the earlier assessment year(A.Y).After considering the submission of the assessee, the TPO observed that no party would provide guarantee without adequate consideration, that charge of guarantee fee could not be generalized, that there could not be a standard parameters for charging guarantee fee, that guarantee fee rate depended on several factors like loan transactions, tenure of loan, conditions of repayment and creditworthiness of the borrower,that quotation produced by the assessee from HSBC bank-Mumbai (@0.75% as bench mark) was not acceptable.Referring to his predecessor's order for AY.2006-07 he used the following comparables:

Name of Bank	Name of the party	Average guarantee fee charged
SCB India	As per Rates Card (Copy enclosed at Annexure-I)	300 bppa
HSBC India	AE.s are WEll as non AE.s	75 bppa#
FMO(Netherlands Financierings Maatchappji Voor Ontwikkelingslanden N.V.)	Rabo India (Finance) Ltd.	250 bppa
Average		208.33 bppa

Taking the guarantee fee @ 208.33 bppa, he calculated the arm's length as under

Guarantee fee received @ 0.75%	Rs.1,22,89,350/-
Guarantee fee @ 2.08%	Rs.3,40,82,464/-
95% of the above	Rs.3,23,78,340/-
Difference to be adjusted	Rs.2,17,93,114/-

After receiving the order of the TPO, the AO made upward adjustment of Rs.2.17 crores to the income of the assessee .

2.1. Aggrieved by the order of the AO, the assessee preferred an appeal before the FAA and made elaborate submissions.It also relied upon certain case laws.After considering available material,he held that the TPO had rejected the letter of HSBC holding it to be cryptic,that TPO could have , if desired, sought further details from the assessee or from the branches to know the terms and conditions of the transactions, that the consideration of the rates by the TPO to arrive at the average rate of guarantee suffered from same weakness as alleged by him with regard to the method adopted by the assessee, that the TPO had not provided details regarding terms and conditions of loan agreement, that he had not evaluated the credit quality

of the AE,that parameters such as geographical reasons,amount of loan underlying security and credit worthiness of the borrower were relevant factors to determine the rate of guarantee fee, that the assessee had adopted an appropriate method,that it had obtained quotation from HSBC India to prove he genuineness of the claim made with regard to rate of financial guarantee,that the HSBC bank after carrying out the diligence of the assessee's account arrived at quotation of 0.75% for financial guarantee, that the quotation of HSBC was in nature of external CUP. He referred to the order of the FAA of the AY.2006-07 and deleted the adjustment made by TPO/AO.

2.2. Before us,the Departmental Representative (DR) argued that the TPO had considered fresh benchmark,that guarantee commission was an IT,that the calculation made by the TPO was more comprehensive.The Authorised representative (AR) had stated that assessee had charged GC@ 0.75%, that the TPO had considered to general rate card, that GC was not an IT,that amendment to sec.92(2) was prospective in nature and was not applicable to the yr under consideration, that GC should be restricted to 0.75%. He referred to the case of Everest Kento Cylinder Ltd.(378ITR57);Marico Industries Ltd.(70taxmann.com 214), Rushabh Diamonds (178TTJ425) and M/s. Asian Paints (India) Ltd. (243taxmann348).

2.3. We have heard the rival submissions and perused the material before us. We find that during the year under consideration the assessee had received guarantee fee of Rs.1.22 crores from CPP in lieu of financial guarantee given by it for a loan taken by AE in UK, that it obtained quotation from HSBC ,India for providing financial guarantee for the loan availed by the AE,that the HSBC Bank,Mumbai provided quotation of 0.75% as guarantee fee, that the assessee had adopted comparable uncontrolled price as the most appropriate method to benchmark the ALP of its IT, that the quotation from HSBC,Mumbai was considered as valid comparable, that the TPO considered average guarantee fee charged by Standard Chartered Bank (3%) and FMO Netherlands (2.5%) in addition to the quotation obtained by the, that accordingly he computed guarantee fee at the rate of 2.0833%, that he computed ALP of financial guarantee at Rs.3.40 crores,that after considering fee received by assessee,he recom -mended adjustment of Rs.2.17 crores, that the FAA deleted the addition made by TPO/AO.

2.3.1. We find that in the case of Everest Kento Cylinder Ltd. (supra) the Hon'ble Bombay High Court has dealt the identical issue and had decided it against the rev.We are reproducing the question framed by the Hon'ble Court and relevant portion of the judgment, which reads as under :-

> "*….the considerations which applied for issuance of a corporate guarantee are distinct and separate from those in a case of bank guarantee and, accordingly, the commission charged could not be called in question, in the manner the Transfer Pricing Officer had done. The comparison was not between like transactions but between guarantees issued by commercial banks as against a corporate guarantee issued by holding company for the benefit of its associated enterprise, a subsidiary company. Therefore, no transfer pricing adjustment could be made in respect of the commission charged…..*"

Respectfully following thejudgments/order,relied upon by the assessee including the that of Everest Kento,we dismiss the first Ground of appeal raised by the AO.

3.Ground No.2 deals with deletion of notional interest of Rs.72.13 lakhs. During the asst proceedings,the AO found that Wockhardt Europe Ltd. (WEL) had brought back 80.22 lakhs ordinary shares from the assessee at the book value of British Pound of 64.57 lakhs,that WEL was incorporated in 1999-2000 in British Virgin Islands,that it was a wholly owned subsidiary of the assessee, that the in the year under consideration WEL had bought back the shares from assessee company at NAV of the company, that the investment was made @ 1 British pound per share, that after investment the net-worth of WEL had gone down ,that the shares were bought back at the rate of British Pound 0.80 per share,the AO directed the assessee to furnish further details in that regard and asked it to show cause as to why transaction should not be treated as financial facility and why interest should not be charged on the fund invested in the shares.After considering the submission of assessee,the AO held that apparent was not real,that the design and device of any planning had to be judged on the reality aspect of the assessee,that no document in respect of the decision and assessment of future profitability was filed,that assessee wanted to provide financial support to its AE without any financial consideration, that assessee had not earned any profit,that it had sold shares at lesser value, that loss had occurred to Wockhardt Ltd.,that the whole transaction was a colourable device used by the assessee to support WEL, that the foreign entity required funds for establishing its business in Europe.Finally,the TPO held that the transact - tion in question was a loan transaction in the garb of share investment,that the amount in respect of bought back shares was remitted to 10th July, that the number of days involved was 101,that the rate of interest had to be applied at 5.07 per annum from Espharma – Germany.The same rate of in the took as benchmark in view of geographical location. Accordingly he calculated rate of interest as under :-

The investment made in wockhardt Europe for 80,22,217 shares	*Rs.51,41,84,190/-*
Number of days (Amt. remitted on 10th July)	*101*
Interest rate	*5.07%*
Interest for the whole year	*Rs.2,60,69,138/-*
Interest for 101 days	*Rs.72,13,652/-*

After receiving the order of TPO,the AO made upward adjustment of Rs.72.13 lakhs under the head buy-back shares by WEL.

3.1. Aggrieved by the order of the AO,the assessee preferred an appeal before the FAA and made elaborate submissions.After considering the available material,he held that the TPO held that buy back of shares was a sham transaction,that he considered the same to be a loan transaction,that the TPO further held that interest rate of 5.07% was reasonable rate for charging interest for the transaction,that the TPO had not disputed the valuation of shares either at the time of acquisition of sales by the assessee or at the time of the sale of shares,that the shares were valued by professionals as per the exchange control legislation, that restructuring of business investment in subsidiaries or disinvest -ment from subsidiaries was a common business activity of multinational entities,that the disputed transaction was related to buy back of shares by the AE from the assessee,that the TPO had not disputed the valuation of shares, that he had been guided by the fact that the acquisition price was higher as compared to the buyback price per share,that the valuation done of shares and submitted during TP proceedings had neither been commented upon nor has been disputed as accept -able,that TPO was not justified in treating the transaction as interest free loan to the subsidiary.

3.2. Before us,the DR relied upon the order of the AO.The AR stated that there was no basis of charging interest,that the TPO had not disputed the valuation of shares,that the valuation was in conformity with the exchange control regulations,that it was appropriate for the purpose of benchmarking,following CUP method.

3.3. We have heard the rival submissions.We find that WEL was incorporated in the AY. 2000-01,that the assessee had invested into WEL,that investment , consequent to bring WEL into existence,was for the purpose of further exploration of business,that investment by the assessee was @1 pound per share of WEL,that during the year under consideration WEL bought back the shares from the assessee@ 0.8 pound per share, .that the TPO had presumed that buy back of shares was not a normal business transaction, that he treated it as advancing of interest free loan by the assessee to the AE,that he charged notional interest not only for the year under consideration but upto the date of remittance, that the assessee had furnished the report of the professionals i.e. CA.s who had valued the shares in dispute,that the TPO had not stated that as to what were the defects in the calculation of the professionals in valuing the shares

Purchasing the share @ 1pound per share and selling at @0.8 pound per share cannot be the basis for presuming that the transaction was not a genuine transaction-especially when the valuation was as per the exchange regulations.Buying back of share at par or at higher or lower rate than the purchase price is one of the very common practice of the business world.Until and unless it is proved that such a transaction was not based on scientific basis or was against the provisions of exchange manual/regulation,it should be accepted.We find that the FAA has given a categorical finding that the TPO had not doubted the valuation.In these circumstances,we hold that there was no justification for the TPO to charge notional interest. As the order of the FAA does not suffer from any legal or factual infirmity,so,confirming the same,we decide ground no.2 against the AO.

4.Ground No.3 deals with allocation of R&D expense to the 80-IB and 80-IC qualifying units.It was brought to our notice that identical issue was decided by the Tribunal against the AO while adjudicating the appeal for the AY.2005-06(ITA/7383/M/2010 dated 13/04/2012). We are reproducing the relevant portion of the order and it reads as under:

> *"10. Ground No.1: regarding allocation of R&D expenses and interest expenses to units eligible for deduction U/s. 80 IB, is covered in favour of the assessee by the order of the Tribunal in the assessee's own case for the assessment year 2001-02, 2002-03 and 2003-04 of IT 3991/M/2005 the Tribunal has at para No.14 of this order held as follows:*
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> "After considering the submissions and perusing other material on record, WE found that the assessee deserves to succeed in this ground. WE have noted that the assessee is claiming deduction on account of R&D for last so many years and they were not disturbed neither any disallowance was made. WE further note that the deduction in respect of R&D expenditure has been claimed by the Head Office and a statutory deduction has been claimed U/s. 35. Therefore, for this reason alone, WE are of the considered view that there was no justification to allocate proportionate expenses incurred on R&D and on interest for the purpose of computing deduction U/s. 801B. The expenditure on R&D is for a specific purpose and there is no dispute in incurring of expenses for the specific purpose i.e., in the field of medical science etc., The expenditure incurred on R&D were not related to business of any existing units of the company or to the products manufactured by any of its unit in which the assessee has claimed deduction U/s. 801B. The Research and Development Institute is a statutory institute of the assessee company which is situated at Aurangabad which deals with global research. There is no doubt that assessee's units got benefit from the research work done by the research at Aurangabad. Further the contention of the Assessing Officer that some part of the expenditure are liable to be considered in the units in which the deduction U/s. 801B has been claimed, in our considered view, is not tenable. The details of Research Institute has been prepared separately and they have shown separately and thus expenditure are nothing to do with the activity of the unit on which the deduction U/s. 801B has been claimed. Similarly, the interest which was paid was claimed in the Head Office A/c. as the interest borrowed by the assessee were borrowed by the Head Office for running its overall business units. Therefore, allocation of some part of interest again is not justified as assessee has taken into account the interest amount on account of Head Office. Nothing has been brought on record that borrowed funds by the Head Office were transferred to the units on which the deduction U/s. 6 801B has been claimed by the assessee. The onus lay upon the Assessing Officer to

discharge it by bringing some positive evidence to establish that some part of the expenditure on account of R&D and on account of interest has been incurred on these units because Assessing Officer, who is alleging that some part of expenditure incurred on R&D and interest are related to the units on which deduction U/s. 801B has been claimed. This onus has not been discharged, therefore, allocation of the proportionate expenses at the end of the Assessing Officer, in our considered view were not justified. The CIT(A) was also not justified in confirming the action of the Assessing Officer. In case of Ponds India Ltd., decided in the Tribunal vide its order dt. 28-05-2002 has held as under:

"The next issue is with reference to the claim of deduction Under Sections 80HH and 80-I by considering part of the head-office expenses in working out the profit of the industrial unit. The head office of any industry, which has units spread over at various places, monitors the requirements of finances and such other actions that are necessary in running of the unit as such. These are administrative expenses though related and relatable to the various units and also be said to be expenditure incurred in the general management of the business as such. From this stand point of view,We are of the opinion that the assessee was justified in making the claim that the head office expenses should not be treated as incurred on any unit on any proportion, namely turnover or any other basis. WE accordingly uphold the claim of the assessee".

In the case of Vanaz Engineers Ltd., decided on 15-07-1994 in ITA Nos. 34 and 35/PN/1989, the Pune Bench held as under:

"The assessee had claimed deductions U/s. 80HH and U/s. 801 in respect of its newly set up industrial unit. The Assessing Officer was of the view that even the head office expenses of the assessee should be proportionately deducted from the profit of the new unit. The assessing officer accordingly, proportionately reduced the allowance U/s. 80HH and U/s. 801. The CIT(A)also agreed with the Assessing Officer. Before the Tribunal, it was submitted that the new unit was functioning as an independent unit, and all the expenses relating to the said unit were debited to the separate profit and loss account prepared for that unit. It was submitted that the said unit was separately managed as it had a separate managerial staff and other officers were employed for the management of the unit and separate administrative expenses were incurred for that unit. The Assessing Officer was not justified in reducing from the profit of the new unit proportionate administrative expenses. It was also submitted that a provision in a statute granting incentive for promoting growth and development should be construed liberally. It was accordingly held that the debtor-company Hind Cycles Ltd., became a unit and was therefore taken over by the government. The assessee could not recover any amount from that company till 1994. The debts were also legally time-barred. Whether the debt has become bad or not is a decision which the businessman has to take keeping in mind all the relevant facts. Since the assess was not able to recover the debt till the year of account and there were no prospects of recover, the assessee was justified in writing it off as bad debt. Neither the Assessing Officer nor the CIT (A) has brought any material on record to show that there was still some hope for recovery of the amount. The bad debt is directed to be allowed".

The ratio of both of these decisions of the tribunal are surely applicable on the facts of the present case. Therefore, in view of the ratio of these decisions and in view of the facts and circumstances discussed by us above, we hold that the CIT (A) was not justified in confirming the action of the Assessing officer in regard to allocation of expenses on account of R&D and interest for the purpose of computing deduction U/s. 801B. Accordingly, we set aside the order of lower authorities on this issue and the Assessing Officer is directed to re-compute the deduction accordingly".

Respectfully following the same we uphold the order of the CIT (A) on the issue and dismiss this ground of appeal."

Considering the above,ground no.3 is decided against the AO.

5.Next ground of appeal is about allowing the claim of weighted deduction,made by the assessee u/s.35(2AB)of the Act.In order to examine the correctness of the claim necessary details of expenses,incurred by the assessee for in-house scientific research,were obtained by the AO.He observed that the deduction u/s. 35was already available to the assessee in respect of expenditure on scientific research,that deduction u/s. 35 (2AB) was introduced with a very specific purposei.e., to promote in-house research and development, that if deduction @150% was to be allowed on expenditure outside the assessee's unit the whole purpose of giving incentive would be defeated,that the assessee had not carried out any clinical trials/bio-studies,that it had not created any infrastructure/facility, that all trials/studies were conducted through third parties.Finally, he held that assessee was not entitled to deduction u/s. 35 (2AB) of the Act.He made a disallowance of Rs.6.25 crores (foreign consultancy expenses-Rs.13.08 lakhs(+)foreign legal exepenses-Rs.87.83 lakhs(+)analysis charges-Rs.3.89 crores(+)clinical trial expenses-Rs.1.31crores(+)bio-study-Rs.4.12lakhs).The AO further mentioned that weighted deduction of Rs.6.25 crores would not be allowed on the above expenditure of Rs.3.12 crores.

5.1. During the appellate proceedings before the FAA the assessee made detailed submissions. It also placed reliance on the orders of the FAA for the earlier years,wherein the FAA had directed the AO to delete the disallowance where Form 3CL was issued by the Deptt.of Science and Industrial Research (DSIR)was received by the assessee after completion of the assessment order.Following the orders of earlier years,the FAA deleted the disallowance made in respect of weighted deduction for clinical trial.

5.2. Before us,the DR stated that the Tribunal had decided the issue against the assessee in the earlier year holding that deduction was available for in house trials and RD research only.The AR contended that while deciding the issue in favour of the department,the Tribunal had followed decision of Concept Pharma,that the said decision stands over-ruled by a series of orders of the Tribunal and judgment of the Hon'ble Gujarat High Court in the case Cadilla Healthcare (214taxmann 672).He relied upon the cases of Cadilla (67SOT 110);Cadilla (56SOT89);Tejas Network Ltd. (60taxmann.com 309); Mastek Ltd. (210 Taxman 432) and Electronics Corporation of India Ltd. (140ITD221).

5.3. We have heard the rival submissions and perused the material available before us.We are of the opinion that mater needs further verification. Therefore, we are remitting back the issue to the file of AO for deciding the issue afresh,.He is directed to afford reasonable opportunity of hearing to the assessee and after considering the case laws relied upon by the assessee before us.Ground No.4 is partly allowed.

6.Fifth Ground also deals with disallowance of weighted deduction u/s. 35(2AB) of the Act on the ground that Form 3CL was not submitted by the assessee.The AO had denied the deduction,claimed by assessee u/s.35(2AB)of the Act,as the approval of appropriate authority i.e.DSIR was not submitted by the assessee .It was stated that assessee had made the application to the prescribe authority in time.

6.1. It was brought to our notice that other appeal filed by the AO is about the same issue. Therefore,we would deal with the issue of Form No.3CL in later part of our order.

7.Ground No.6 deals with deleting the addition of Rs.5.55crores, made by AO u/s.40(a)(i) of the Act.During the assessment proceedings,the AO found that the assessee was making payment to non residents on account of pilot-bio study and clinical research,that it had not deducted tax at source before making payment. He directed assessee to file details in that regard and asked it as to why the expenditure should not be disallowed u/s. 40(a)(i) of the Act. After considering the submission of the assessee ,he held that issue of deducting tax at source had to be decided by the international taxation division, that in the AY.s 2005-06 and 2006-07,the AO of international taxation had passed order u/s.201 of the Act and 201(1A), that the assessee was treated as an assessee in default. Referring to those orders,he made a disallowance of Rs.5,55,47,000/- u/s. 40(a) of the Act.

7.1. Before the FAA,during the appellate proceedings,the assessee made detailed submissions. After considering available material,he held that the issue of deducting tax at source for the payments made to non- resident entity was decided in favour of the assessee by the Tribunal, while deciding the appeal for AY 2007-08. Referring to the said order of the Tribunal and order of the FAA for the earlier years,he deleted the addition made by the AO.

7.2. Before us,the DR stated that matter could be decided on merits and the AR supported the order of the FAA.

7.3. We find that the Tribunal vide its order dated 30/06/2012 (ITA/4757/Mum /2009 and order dated 13/4/2012 (ITA/7383/Mum/2010) has dealt the issue and decide it in favour of

the assessee.We are reproducing the relevant portion i.e. para -13 of the order of Tribunal (ITA/7383/Mum/10) and it reads as under:-

> *"13. The Hon'ble Bombay High Court in the case of CAT Vs. Kotak Securities ltd., 62 DTR (BOM) 339 held that transaction charges paid by the assessee to the stock exchange constituted fee for technical services covered U/s. 194 (J). It further held that from the year 1995 to the year 2005, the assessee as well as the revenue, proceeded on the footing that the assessee is not liable to deduct tax at source and hence no fault can be found with the assessee for not deducting tax at source, as it was under a bonafide belief that no tax need be deducted at source on this payment. In the case on hand, the assessee paid charges for testing at laboratories of CRO which used their own skills and equipments etc., to prepare the report. The Tribunal came to conclusion that there is no parting of skills or know-how by CRO and hence the service is not technical in nature, but was only a commercial service. Consisting with the view taken therein, we up-hold the finding of the first appellate authority and dismissed this ground of revenue. In the result the appeal of the revenue is allowed in part."*

Respectfully following the above,we decide the last Ground of appeal against the AO.

ITA/4156/Mum/2012 :

8.As stated earlier(Paragraph-6.1),the AO had rejected the application filed by the assessee u/s. 154 of the Act.The assessee had filed return of income,claiming deduction u/s. 35(2AB) @150% of the capital expenditure of Rs.22.50 crores and revenue-expenditure of Rs.175 crores for in-house R&D units.As per the provisions of section 35(2AB) in-house R&D facility has to be approved by the prescribed authority i.e. govt. of India Ministry of Science and Technology,DSIR.At the time of assessment the assessee had not received approval from DSIR,so,the AO asked the assessee to explain as to why deduction claimed by it should not be disallowed.After considering the submission of the assessee, dtd. 16/11/2009,the AO disallowed claim made by the assessee u/s.35(2AB).Vide its letter dt. 15/12/2012 the assessee filed an application for rectification u/s. 154 of the Act and requested him to allow the deduc -tion.However,the AO rejecting the application and held that no mistake was apparent from record.

8.1. Aggrieved by the order of the AO,the assessee filed appeal before the FAA and made elaborate submissions.After considering the available material,the FAA held that for claiming deduction the approval of the prescribed authority, in the Form No.3CL was required to be enclosed with the return of income, that the assessee had applied for such approval, that till date of assessment order it did not receive the approval from prescribed authority, that AO had disallowed the claim made by the assessee,that in the assessment order he himself had stated that claim made by the assessee would be accepted as soon as it would received approval in Form No.3CL,that AO had also stated that demand arising on that issue would not be collected arising out of the addition made regarding 35(2AB),that after passing of the assessment order the assessee had received approval from DSRI,that approval in Form 3CL

was submitted to AO, that obtaining approval from DSRI was not in the hands of the assessee,that it could only apply well in time to prescribed authority , that the assessee could not be penalised for the delay attributable to Govt. Deptt. in issuing the approval,that the AO himself had admitted the fact of pendency of approval,that it was a mistake apparent from record,that he was not justified in rejecting the rectification application of the assessee. He further held that the direction of carrying out necessary rectification was limited to issue of non submission of Form 3CL only,that AO should allow claim of the assessee of deduction of section 35(2AB) of the Act so far as it related to submission /non submission of approval of prescribed authority , that disallowance of the claim u/s. 35(2AB) by the AO on any other ground was not covered by the order.

8.2. Before us,the DR stated that Form 3CL was not filed before the AO in time. The AR supported the order of the FAA and relied upon the cases of Sun Pharmaceuticals Ltd. (85taxmann.com 80);Shrikar Hotels Pvt.Ltd. (79taxmann.com63);Famy Care Ltd.(67 SOT 85);Ferment Biotech Ltd.(64SOT246) and Sri Biotech laboratories India Ltd.(69 taxmann. com 361)

8.3. We have heard the rival submissions.We find that DSRI had not issued the Form 3CLin time,that the assessee could not file the same before the AO during the assessment proceed - ings, that the Form was submitted before the AO after DSRI issued the same,that AO himself had mentioned in the order deduction would be allowable on production of Form 3CL.In these circumstances,we are of the opinion that he was not justified in rejecting the application filed by assessee u/s. 154 of the Act.We would like to reproduce the relevant portion of the order of the Tribunal in case of Famy Care Ltd (supra)and it reads as under:

> "*2.1. We have considered the rival submissions and perused the material available on record. …… During the year under consideration, the assessee claimed research and development expenditure u/s 35(2AB) of the Act, relating to its in-house division, amounting to Rs.16,41,80,309/-.The assessee claimed weighted deduction u/s 35(2AB) of the Act @ 150% of the capital expenses of Rs.3,76,48,919/- and revenue expenses of Rs.7,18,04,620/-.The ld. Assessing Officer disallowed the claimed deduction on the plea that the assessee did not submit the approval from the prescribed authority. On appeal, before the ld. Commissioner of Income tax (Appeals), the issue was decided in favour of the assessee. The relevant finding/conclusion is reproduced hereunder for ready reference from the impugned order.*
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> > "I have considered the facts of the case and submission of the assessee. It was beyond the control of the assessee to file Form No.3CL, because it is issued by the Secretary, DSIR, Government of India and it was not issued till the time of assessment order i.e. 30/12/2011 because Form No.3CL is dated 30/03/2012, a copy of which has been filed as per Form No.3CL and Form No.3CM, assessee is eligible for weighted deduction u/s 35(2AB). Therefore, A.O. is directed to verify Form No.3CM and Form No.3CL and accordingly allow weighted deduction to the assessee u/s 35(2AB) on revenue expenditure as well as capital expenditure claimed by the assessee. Assessee is directed to file a copy of Form No.3CL and Form No.3CM before the A.O. for giving necessary effect to this order. In result, the ground of appeal is treated as allowed.

2.2. We note that for granting approval u/s 35(2AB) of the Act, the assessee made application, with the prescribed authority, in accordance with section 35(2AB)(3) r.w. Rule 6(4) of the Income-tax Rules, 1962 (hereinafter the Rules), on 11/12/2007. The prescribed authority approved/granted in-house research and development facility u/s 35(2AB) of the Act on 04/03/2009 for a period from October 19, 2007 to 31st March 2010 in Form no. 3CM, in accordance with Rule 6(5A) of the Rules. This approval was produced before the Assessing Officer during assessment proceedings i.e. before framing the assessment on 30/12/2011.The prescribed authority sent Form no. 3CL to the Income-tax Department on 22nd November 2010 (A.Y. 2008-09) in accordance with section 35(2AB)(4) read with Rule 6(7A)(b) of the Rules. As the approval of the entire period was given once i.e. by way of Form no. 3M, thus, in our view, the assessee complied with the conditions for claim of deduction as required u/s 35(2AB) of the Act. We are reproducing hereunder the relevant provision of section 35(2AB) of the Act for ready reference.

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3. If the aforesaid section is analyzed then the deduction shall be allowed of a sum equal to two times of the expenditure so incurred and the prescribed authority is to submit its report of such approval/facility to the Director General on a prescribed form within specified time, meaning thereby, the authority concerned has to submit the report to the Director General. However, if the totality of facts are analyzed, as mentioned earlier, the assessee made application for such approval on 11/12/2007 with the prescribed authority and such approval was granted on 04/03/2009, therefore, the assessee cannot be denied the claimed deduction u/s 35(2AB) of the Act merely on the ground that the prescribed authority did not submit form no. 3CL in time to the Income-tax Department. The assessee cannot be penalized for the fault, if any, of the Department. The Assessing Officer cannot be expected to be too technical rather is to take practical approach under the facts narrated hereinabove, because, it was beyond the control of the assessee to direct the authority to submit the prescribed form on Form no.3CL to the Department. Section 35(2AB) of the Act, nowhere suggest that the date of approval of research and development facility will be cut off date for eligibility of weighted deduction under this section on expenses incurred from that date onwards; Once facility is approved, entire expenditure so incurred on development of research and development facility has to be allowed for such weighted deduction u/s 35(2AB) of the Act and thus it would be sufficient to hold that assessee has fulfilled the conditions as laid down in the section. Even otherwise, the ld. Commissioner of Income tax (Appeals) directed the Assessing Officer to verify the Form No.3CM and 3CL and then allowed weighted deduction, as claimed by the assessee. We find no infirmity in the conclusion and the direction in the impugned order. It is affirmed."

Considering the above,we decide Effective Ground of appeal against the AO.

As a result,ITA/5557/Mum/2012 is partly allowed and ITA/4156/Mum/2012 stands dismissed.
फलतःआ.अ. /5557/मुंबई/2012 अंशतःमंजूर की जाती है और आ.अ. /4156//मुंबई/2012 नामंजूर की जाती है.

Order pronounced in the open court on 05th January, 2018.
आदेश की घोषणा खुले न्यायालय में दिनांक 05 जनवरी ,2018 को की गई।

Sd/-	**Sd/-**
(**राम लाल नेगी / Ram Lal Negi**)	(राजेन्द्र / **Rajendra**)
न्यायिक सदस्य / **JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक/Dated : 05. 01.2018.
Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त
5.DR "K " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, के खंडपीठ,आ.अ.न्याया.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai.**