आयकर अपीलीय अधिकरण पुणे न्यायपीठ "ए" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.690/PUN/2015
निर्धारण वर्ष / Assessment Year : 2010-11

Minilec India Pvt. Ltd.,
1073/1-2-3,
At & Post Pirangut,
Pune – 412111 …. अपीलार्थी/Appellant

PAN:AABCM2682E

Vs.

The Asst. Commissioner of Income Tax,
Circle 11(2), Pune …. प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Shri Kishore Phadke

प्रत्यर्थी की ओर से / Respondent by : Shri Mukesh Jha, JCIT

सुनवाई की तारीख / **Date of Hearing : 10.01.2018**		घोषणा की तारीख / **Date of Pronouncement: 09.04.2018**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The appeal filed by the assessee is against order of CIT(A)-7, Pune, dated 27.02.2015 relating to assessment year 2010-11 against order passed under section 143(3) of the Income Tax Act 1961 (in short the 'Act').

2. The assessee has raised the following grounds of appeal:-

> 1. *The learned CIT(A)-7, Pune erred in law and on facts in confirming the disallowance of weighted deduction u/s 35(2AB) of the ITA, 1961 amounting to Rs.93,45,333 without appreciating the fact that the in-house R & D facility was approved by DSIR on an in-principle basis and mere lapse in subsequent paperwork does not affect the deductibility of the said weighted deduction amounting to Rs.93,45,333.*

2. *Alternate (without prejudice) to Ground No.1 above, the learned CIT(A)-7, Pune erred in law and on facts in not allowing deduction of Rs.57,64,322 u/s 35(1)(i) being revenue expenditure incurred for R & D activity and deduction of Rs.4,65,900/- u/s 35(1)(iv) being capital expenditure incurred for R & D activity.*

3. *The learned CIT(A)-7, Pune erred in law and on facts in confirming the disallowance of Rs.96,311 u/s 43B of the ITA, 1961 on account of delayed payment of leave encashment without appreciating the fact that leave encashment is a trade liability and not a statutory liability.*

3. The first issue raised in the present appeal is against disallowance of weighted deduction under section 35(2AB) of the Act amounting to ₹ 93,45,333/-.

4. Briefly, in the facts of the case, the assessee for the year under consideration had furnished return of income declaring total income of ₹ 51,09,560/-. The assessee had undertaken two activities under Research & Development i.e. D & D (or electronics activity) and Bio-Diesel activity. The assessee in the return of income had claimed weighted deduction under section 35(2AB) of the Act only for D & D activity; whereas in the case of Bio-Diesel activity, deduction was claimed under section 35(1) of the Act and no weighted deduction was claimed. The assessee further explained that DSIR had approved for the D & D activity and Research & Development expenses incurred for the year under appeal were submitted. The Assessing Officer asked the assessee to justify its claim of deduction under section 35(2AB) of the Act debited to Profit and Loss Account of ₹ 41,89,369/- and ₹ 57,64,322/-. The Assessing Officer also asked the assessee to furnish copy of approval from the prescribed authority. In reply thereto, the assessee pointed out that under section 35(2AB) of the Act, in order to claim weighted deduction, the same had to be certified by the Competent Authority, that the assessee had undertaken Research & Development activity. The Competent Authority in this behalf was the Department of Scientific and Industrial Research (DSIR). The assessee

explained that it was carrying on R & D activity during the year and had incurred expenditure thereupon. The assessee had approached DSIR vide application dated 25.06.2012 for renewal of recognition of R & D unit which was granted by it and it also granted approval for the expenses incurred by the assessee on in-house R & D facility in prescribed Form No.3CM. The assessee thus, held that it had claimed the deduction according to the conditions mentioned in the said section. The Assessing Officer noted that Research & Development expenses incurred for Bio-Diesel activity were ₹ 41,89,369/- which was claimed as deduction under section 35(1) of the Act and Research & Development expenses incurred for D & D activity was ₹ 57,64,322/-, for which weighted deduction under section 35(2AB) of the Act was claimed at ₹ 93,45,333/-. The Assessing Officer observed that where the assessee had not submitted approval for expenses of ₹ 57,64,322/- incurred by it on in-house R & D facility in prescribed form No.3CM from DSIR, as such the deduction claimed under section 35(2AB) of the Act could not be granted. Thus, the deduction claimed at ₹ 93,45,333/- was added to the assessee's total income as unexplained expenses under section 69C of the Act.

5. The CIT(A) noted that the DSIR had not granted form No.3CM for earlier period including the period under consideration. The CIT(A) the referred to the provisions of section 35(2AB) of the Act and pointed out that application for approval has to be filed in form No.3CK to the Secretary, DSIR and if he was satisfied that the conditions provided in Rule 6(7A) and in section 35(2AB) of the Act were fulfilled, he had to pass an order in writing in form No.3CM. The CIT(A) further holds that the assessee in the present case does not have requisite certificate in form No.3CM from DSIR approving the expenses incurred by it on in-house Research & Development facility as per provisions of the Act. Hence,

he upheld the order of Assessing Officer in denying weighted deduction under section 35(2AB) of the Act. Reliance was placed on different decisions was found to be misplaced since in all those cases the respective persons had received approval letter from the prescribed authority. The CIT(A) also observed that the Tribunal had held that once the facility was approved, the entire expenditure incurred had to be allowed and the Hon'ble High Court had upheld the said view in CIT Vs. Claris Lifesciences Ltd. (2010) 326 ITR 251 (Guj). However, since in the present case the approval was not granted by the DSIR, the CIT(A) held the assessee not eligible to claim the said deduction.

6. The assessee is in appeal against the order of CIT(A).

7. The learned Authorized Representative for the assessee referred to the chart, under which overall position of in-house R & D expenditure claimed was filed. The first block period related to assessment years 2007-08 to 2009-10, under which the assessee had received recognition of in-house R & D unit established by the assessee from DSIR. The recognition was granted on 01.06.2006 for in-house R & D facility upto 31.03.2009. Form No.3CK was filed on 16.03.2007 and form No.3CM was granted by DSIR on 18.03.2008 for the period 01.04.2006 to 31.03.2009. The learned Authorized Representative for the assessee pointed out that for identical facility, renewal application was submitted by the assessee on 06.02.2009. Vide letter dated 16.06.2009, recognition to the R & D facility was extended upto 31.03.2012 and the certificate of registration was granted by DSIR on 24.06.2009. The assessee claims that it did not receive any certificate in form No.3CM. He further pointed out that on 06.05.2012 an online application was submitted for renewal of R & D facility before the DSIR which was granted by DSIR on 25.06.2012 for the period 01.04.2012 to

31.03.2015. The assessee also pointed out that form No.3CM was granted by DSIR for the aforesaid period vide letter dated 05.11.2013. In respect of in between period, the assessee pointed out that on 03.06.2013, application was submitted along with form No.3CK for grant of form No.3CM, which was denied by DSIR vide letter dated 30.07.2013 on the ground that want of compliance regarding form No.3CK. The learned Authorized Representative for the assessee further pointed out that R & D facility was approved for the period 01.04.2006 to 31.03.2009 and deduction under section 35(2AB) of the Act was granted from 01.04.2006 by the Tribunal. He further pointed out that once the facility has been recognized by DSIR, then the approval in form No.3CM had to be granted. However, in the facts of present case, form No.3CM was not granted by DSIR for the second block. However, for the third block, recognition and form No.3CM were granted and even weighted deduction was given. Our attention was drawn to the DSIR guidelines in this regard, which are placed at pages 166 to 186 of Paper Book and it was pointed out that under the said guidelines, only application can be processed during the period. Referring to the grounds of appeal, the learned Authorized Representative for the assessee pointed out that vide ground of appeal No.1, the assessee has claimed deduction under section 35(2AB) of the Act @ 150%, vide ground of appeal No.2, an alternate plea has been raised to allow the deduction under section 35(2AB) of the Act at 100% and vide ground of appeal No.3, the issue to be decided is whether the payment of leave encashment was covered under section 43B of the Act or not. Our attention was drawn to the provisions of said section and it was pointed out that the assessee had submitted letter of renewal but no approval letter was received in form No.3CK. However, the same facility continues, wherein for the earlier period, there was recognition and even for the consequent period, there was recognition. So, the question which arises is whether the assessee is entitled to

the aforesaid recognition in the intervening period. In this regard, reliance was placed on the decision of Pune Bench of Tribunal in list of case laws including the decision in the case of ACIT Vs. Nath Biogenes India Ltd. in ITA No.417/PN/2012, order dated 27.01.2014 and the Hon'ble High Court of Gujarat in CIT Vs. Claris Lifesciences Ltd. (2008) 174 TAXMAN 113 (Guj). The learned Authorized Representative for the assessee fairly pointed out that the Hon'ble High Court of Delhi in Apollo Tyres Ltd. Vs. Union of India in WP (C) 13338/2009, judgment dated 20.04.2010 had dismissed writ petition of assessee therein to grant approval from earlier years i.e. prior to making application for renewal of recognition.

8. The learned Departmental Representative for the Revenue pointed out that the Assessing Officer had disallowed the claim. He further placed reliance on the ratio laid down by the Hon'ble High Court of Karnataka in Tejas Networks Ltd. Vs. DCIT (2015) 60 taxmann.com 309 (Kar).

9. The learned Authorized Representative for the assessee further pointed out that the issue now stands covered by the decision of the Hon'ble High Court of Delhi in Maruti Suzuki India Ltd. Vs. Union of India (2017) 84 taxmann.com 45 (Del), wherein reference was made to the decision of Hon'ble High Court of Gujarat in CIT Vs. Claris Lifesciences Ltd. (2010) 326 ITR 251 (Guj) and the CIT Vs. Sandan Vikas (India) Ltd. (2011) 335 ITR 117 (Del).

10. We have heard the rival contentions and perused the record. The issue which arises in the present appeal is against the claim of deduction under section 35(2AB) of the Act i.e. expenditure incurred on Research & Development activity. For computation of business income under section 35 of the Act, expenditure on

scientific research is to be allowed on fulfillment of certain conditions which are enlisted in the said section. Under various sub-sections of section 35 of the Act, the conditions and the allowability of expenditure vary. Sub-section (1) to section 35 of the Act deals with expenditure on scientific research, not being in the nature of capital expenditure, is to be allowed to research association, university, college or other institution; for which an application in the prescribed form and manner is to be made to the Central Government for the purpose of grant of approval or continuous thereto. Before granting the approval, the prescribed authority has to satisfy itself about the genuineness of activities and make enquiries in this regard. Under sub-section (2B) to section 35 of the Act, a company engaged in the specified business as laid there on, if it incurs expenditure on scientific research or in-house Research & Development facility also needs to be approved by the prescribed authority, is entitled to deduction, provided the same is approved by the prescribed authority.

11. Now, coming to sub-section (2AA) to section 35 of the Act, it talks about granting of approval by the prescribed authority but the approval to the expenditure being incurred is missing under the said section. Similar is the position in sub-section (2A). Further in sub-section (2AB), it is provided that facility has to be approved by the prescribed authority, then there shall be allowed deduction of expenditure incurred whether 100%, 150% or 200% as prescribed from time to time. Clause (2) to section 35(AB) of the Act provides that no deduction shall be allowed in respect of expenditure mentioned in clause (1) under any provisions of the Act. Clause (3) further lays down that no company shall be entitled for deduction under clause (1) unless it enters into agreement with prescribed authority for co-operation in such R & D facility. The Finance Act, 2015 w.e.f. 01.04.2016 has substituted and provided that facility has

to fulfill such condition with regard to maintenance of accounts and audit thereof and for audit of accounts maintained for that facility.

12. Under Rule 6 of Income Tax Rules, 1962 (in short 'the Rules), the prescribed authority for expenditure on scientific research under various sub-clauses has been identified. As per Rule 6(1B) of the Rules for the purpose of sub-section 2AB of section 35 of the Act, the prescribed authority shall be the Secretary, Department of Scientific and Industrial Research i.e. DSIR. Under sub-rule (4), application for obtaining approval under section 35(2AB) of the Act is to be made in form No.3CK. Under sub-rule (5A) of rule 6 of the Rules, the prescribed authority shall, if he satisfied that the conditions provided in the rule and in sub-section (2AB) being fulfilled, pass an order in writing in form No.3CM. The proviso however lays down that reasonable opportunity of being heard is to be granted to the company before rejecting an application. So, the application has to be made under sub-rule (4) in form No.3CK and the prescribed authority has to pass an order in writing in form No.3CM. Sub-rule (7A) provides that the approval of expenditure under sub-section (2AB) of section 35 of the Act, shall be subject to the conditions that the facilities do not relate purely to market research, sales promotion, etc. Clause (b) to sub-rule (7A) at the relevant time provided that the prescribed authority shall submit its report in relation to the approval of in-house R & D facility in form No.3CL to the DG (Income-tax Exemption) within sixty days of its granting approval. Under clause (c), the company at the relevant time had to maintain separate accounts for each approved facility, which had to be audited annually. Clause (b) to sub-rule (7A) has been substituted by IT (Tenth Amendment) Rules, 2016 w.e.f. 01.07.2016, under which the prescribed authority has to furnish electronically its report (i) in relation to approval of in-house R & D facility in part A of form No.3CL and (ii) quantifying the expenditure

incurred on in-house R & D facility by the company during the previous year and eligible for weighted deduction under sub-section 2AB of section 35 of the Act in part B of form No.3CL. In other words the quantification of expenditure has been prescribed vide IT (Tenth Amendment) Rules, 2016 w.e.f. 01.07.2016. Prior to this amendment, no such power was with DSIR i.e. after approval of facility.

13. Under the amended provisions, beside maintaining separate accounts of R & D facility, copy of audited accounts have to be submitted to the prescribed authority. These amendments to rules 6 and 7a are w.e.f. 01.07.2016 i.e. under the amended rules, the prescribed authority as in part A give approval of the facility and in part B quantify the expenditure eligible for deduction under section 35(2AB) of the Act.

14. The issue which is raised before us relates to pre-amended provisions and question is where facility has been approved by prescribed authority, but no form No.3CM issued, can the assessee be denied deduction under section 35(2AB) of the Act.

15. The Hon'ble High Court of Gujarat in CIT Vs. Claris Lifesciences Ltd. (supra) have held that weighted deduction is to be allowed under section 35(2AB) of the Act after the establishment of facility. However, section does not mention any cutoff date or particular date for eligibility to claim deduction. The Hon'ble High Court held as under:-

> *"8. The Tribunal has considered the submissions made on behalf of the assessee and took the view that section speaks of:*
>
> *(i) development of facility;*

(ii) incurring of expenditure by the assessee for development of such facility;

(iii) approval of the facility by the prescribed authority, which is DSIR; and

(iv) allowance of weighted deduction on the expenditure so incurred by the assessee.

9. The provisions nowhere suggest or imply that R&D facility is to be approved from a particular date and, in other words, it is nowhere suggested that date of approval only will be cut-off date for eligibility of weighted deduction on the expenses incurred from that date onwards. A plain reading clearly manifests that the assessee has to develop facility, which presupposes incurring expenditure in this behalf, application to the prescribed authority, who after following proper procedure will approve the facility or otherwise and the assessee will be entitled to weighted deduction of any and all expenditure so incurred. The Tribunal has, therefore, come to the conclusion that on plain reading of section itself, the assessee is entitled to weighted deduction on expenditure so incurred by the assessee for development of facility. The Tribunal has also considered r. 6(5A) and Form No. 3CM and come to the conclusion that a plain and harmonious reading of Rule and Form clearly suggests that once facility is approved, the entire expenditure so incurred on development of R&D facility has to be allowed for weighted deduction as provided by s. 35(2AB). The Tribunal has also considered the legislative intention behind above enactment and observed that to boost up R&D facility in India, the legislature has provided this provision to encourage the development of the facility by providing deduction of weighted expenditure. Since what is stated to be promoted was development of facility, intention of the legislature by making above amendment is very clear that the entire expenditure incurred by the assessee on development of facility, if approved, has to be allowed for the purpose of weighted deduction.

***10.** We are in full agreement with the reasoning given by the Tribunal and we are of the view that there is no scope for any other interpretation and since the approval is granted during the previous year relevant to the assessment year in question, we are of the view that the assessee is entitled to claim weighted deduction in respect of the entire expenditure incurred under s. 35(2AB) of the Act by the assessee."*

16. The Hon'ble High Court of Gujarat held that the intent of the Legislature was to encourage development of facility by providing deduction of weighted expenditure. It was further held that since what was stated to be promoted was development of facility, then the entire expenditure incurred on development of facility, if facility is approved, had to be allowed for the purpose of weighted deduction.

17. The Hon'ble High Court of Delhi in CIT Vs. Sandan Vikas (India) Ltd. (supra) on similar issue of weighted deduction under section 35(2AB) of the Act held that the condition precedent was the certificate from DSIR, but the date of certificate was not important, where the objective was to encourage research and development by the business enterprises in India. In the facts before the Hon'ble High Court of Delhi, the assessee had approached DSIR vide application dated 10.01.2015. The DSIR vide letter dated 23.02.2006 granted recognition to in-house research and development facility of assessee. Further, vide letter dated 18.09.2006, DSIR granted approval for the expenses incurred by the company on in-house research and development facility in the prescribed form No.3CM. The Assessing Officer in that case refused to accord the benefit of aforesaid provision on the ground that recognition and approval was given by DSIR in the next assessment year. The Tribunal allowed the claim of assessee relying on the decision of the Hon'ble High Court of Gujarat in CIT Vs. Claris Lifesciences Ltd. (supra). The Hon'ble High Court of Delhi taking note of the decision of the Hon'ble High Court of Gujarat observed that it has been held that cutoff date mentioned in the certificate issued by DSIR would be of no relevance where once the certificate was issued by DSIR, then that would be sufficient to hold that the assessee had fulfilled the conditions laid down in the aforesaid provisions.

18. The Hon'ble High Court of Madras in CIT Vs. Wheels India Ltd. (2011) 336 ITR 513 (Mad) had also held that the assessee was entitled to weighted deduction for whole year and not merely from the date of notification. It was held by the Hon'ble High Court that *Once the prescribed authority approves the existence of a research and development facility and the expenditure incurred on such scientific research, the assessee would be entitled to the expenditure*

incurred for the whole of the assessment year and it cannot be granted in a truncated manner.

19. The Pune Bench of Tribunal in Nath Biogenes India Ltd. Vs. ACIT in ITA No.367/PN/2012, relating to assessment year 2008-09, order dated 27.01.2014 held that where the prescribed authority i.e. DSIR had given recognition, then such a facility is recognized for claiming deduction under section 35(2AB) of the Act. The Tribunal further held that if the approval was not in prescribed form No.3CM was not a serious discrepancy, which would result in disallowance of deduction to the assessee under section 35(2AB) of the Act. Where the Competent Authority had granted approval / recognition after verification of all the details, then the claim of assessee for deduction under section 35(2AB) of the Act cannot be ruled out only on the ground that the approval in the prescribed form No.3CM was not received by the assessee.

20. The Pune Bench of Tribunal in the case of same assessee in ITA No.1115/PN/2013, relating to assessment year 2009-10, vide order dated 28.05.2014 had on similar ground allowed the claim of assessee in succeeding year also.

21. The Mumbai Bench of Tribunal in ACIT Vs. Meco Instruments (P.) Ltd. (2010) 7 taxmann.com 24 (Mum) vide order dated 20.08.2010 had also decided the issue of approval of facility and consequent claim of deduction under section 35(2AB) of the Act. In the facts of said case also, the assessee had the approval of prescribed authority but did not have the approval in the prescribed form as the same was never brought to his notice. When the assessment proceedings

for assessment year 2005-06 were taken up, an objection was raised and the assessee filed application giving particulars of approval and also expenditure for the financial years 2002-03 to 2004-05. It was pointed out that the prescribed authority vide order dated 28.08.2008 granted approval in form No.3CM w.e.f. 01.04.2007 to 31.03.2011. The plea of assessee in that case was that since no time limit was prescribed for complying with the prescribed procedure for grant of approval, hence the approval which was subsequently granted in the prescribed form should not result in denial of deduction to the assessee for earlier period. The Tribunal after considering provisions of the Act and rules therein held as under:-

> *"6.2…. A close reading of the section r.w. Rule 6 would reveal that nowhere any time has been prescribed within which the application is required to be filed by the assessee company. Further, nowhere, any condition has been prescribed regarding cut off date from which the approval could be made effective. Therefore, once the assessee company is granted approval it will apply till it is revoked with reference to all the assessment years, which come within the ambit of that period. Therefore, mere mentioning of 1.4.2007 in the order dated 28.8.2008 was of no consequence and the approval granted in Form 3CM was also applicable for A.Y. 2005-06. In this regard, it is further noticeable that while granting of approval on 28.8.2008, the prescribed authority has, inter alia, observed in para 5 as under:-*
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> > *'Ref.No. and Date of the application : Ref NBil dated 16.8.2007*
> > *The above Research & Development facility is further approved for the purpose of section 35(2AB) from 1.4.2007 to 31.3.2011 subject to the conditions underlined therein."*
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> *The term 'further' makes it clear that the approval was not limited to 1.4.2007 to 31.3.2011 but was in addition to periods already approved. It is further noticeable that information obtained under RTI clearly showed that the assessee's applications were processed for earlier years also but no orders have been passed with reference to earlier assessment years. At the same time, the assessee has not been given any opportunity of being heard as required under proviso to Rule 6 (5A) before rejecting the said application. Therefore, impliedly, the application for the entire period, for which it was made, has to be deemed to have been granted. On the basis of above discussion, we are of the opinion that the assessee was entitled for weighted deduction u/s. 35(2AB)."*

22. The Tribunal concluded by holding that at best it was only a procedural defect and merely on the ground of technicalities of the procedure, the benefit bestowed by the Legislature could not be denied. It was also held that *When it*

comes to follow the prescribed procedure, the exemption provisions have to be liberally construed and if in substance, the assessee has fulfilled the basic requirements then the exemption cannot be denied. Reliance was placed on the decision of the Hon'ble High Court of Gujarat in CIT Vs. Claris Lifesciences Ltd. (supra).

23. The Hon'ble High Court of Delhi in Maruti Suzuki India Ltd. Vs. Union of India in Writ Petition dated 04.08.2017 had analyzed the provisions of section 35(2AB) of the Act and had also applied the ratio laid down by the Hon'ble High Court of Delhi in CIT Vs. Sandan Vikas (India) Ltd. (supra) and the Hon'ble High Court of Gujarat in CIT Vs. Claris Lifesciences Ltd. (supra) and held that for availing the benefit under section 35(2AB) of the Act, what was relevant was not the date of recognition or cutoff date mentioned in the certificate of DSIR or even the date of approval, but the existence of recognition. It was further held that if R&D centre is not recognized, it is not entitled to deduction; but if it is recognized, it is entitled to the benefit. It was further observed that the Hon'ble High Court of Gujarat in CIT Vs. Claris Lifesciences Ltd. (supra) had rightly observed that the date of approval of R&D centre, not being part of provision, extending benefit only from the date of recognition "amounts to reading more in the law which is not expressly provided". Distinguishing the ratio laid down by the Hon'ble High Court of Delhi itself in Apollo Tyres Ltd. Vs. Union of India (supra), it was observed as under:-

> *"42. Insofar as the Apollo Tyres (supra) is concerned, in the said case, the Petitioner had omitted to apply for approval under Form 3CK, though recognition was granted to its R&D Centre. The said Form 3CK consists of the Agreement to be entered into with the DSIR, in Part B. The omission by the Petitioner was held against it and this Court held that since the Petitioner had omitted to obtain the approval under Form 3CK, it is not entitled to the benefit of Section 35(2AB) since 2004. The facts of the present case are different and there has been no omission by the Petitioner herein to obtain approvals. The stage for approval arises after the recognition is granted by the DSIR, for which the*

> *application was filed right at inception by the Petitioner. Upon obtaining recognition, which was granted on 26th March 2014, the Form 3CK was filed on 31st March 2014. There has been no lapse of time, unlike in Apollo Tyres (supra) wherein the recognition was granted on 31st March, 2004 and the Form 3CK application was made only on 21st August, 2008. Thus the present case is clearly distinguishable from the facts in Apollo Tyres (supra)."*

24. The assessee was held to be entitled to the claim of deduction under section 35(2AB) of the Act in the said case by the Hon'ble High Court of Delhi.

25. The learned Departmental Representative for the Revenue has placed reliance on the ratio laid down by the Hon'ble High Court of Karnataka in Tejas Networks Ltd. Vs. DCIT (supra), wherein it was first held that under section 35(2AB) of the Act, the prescribed authority was the Secretary, DSIR. Further, under sub-section (3) of section 35(2AB) of the Act provides that no company would be entitled for deduction under clause (1) unless and until it enters into agreement with the prescribed authority. The Hon'ble High Court of Karnataka further goes on to hold that if the prescribed authority is satisfied that the conditions provided under section 35(2AB) of the Act are satisfied, then it would pass an order in writing in form No.3CM. In the facts of the said case, order of approval was granted in form No.3CM. Thereafter, the question was whether the Assessing Officer can look into the allowability of expenditure and as to what expenditure. The Hon'ble High Court held that where he does not accept the contention of assessee made under section 35(2AB) of the Act, he has to refer the matter to the Board, which in turn, would refer the matter to the prescribed authority. The Hon'ble High Court thus, has approved the procedure for recognition of facility. Further, the issue before the Hon'ble High Court was in respect of provisions of section 35 r.w.s. 43 of the Act. The Hon'ble High Court of Karnataka in view of section 43(4) of the Act observed that the said sub-section defines as to what activities would constitute scientific research and it

was held that the said issue requires examination by the prescribed authority itself. The Hon'ble High Court categorically held that the Assessing Officer could not sit in judgment over the report submitted by the prescribed authority in form No.3CL. So, the issue before the Hon'ble High Court of Karnataka was whether any expenditure incurred in the acquisition of rights in or arising out of scientific research as indicated in clause (2) of sub-section (4) of section 43 of the Act was allowable or not, which is not the issue before us. The issue before us is in respect of provisions of section 35(2AB) of the Act.

26. The Hon'ble High Court of Gujarat in CIT Vs. Claris Lifesciences Ltd. (supra), the Hon'ble High Court of Delhi in CIT Vs. Sandan Vikas (India) Ltd. (supra) and the Hon'ble High Court of Madras in CIT Vs. Wheels India Ltd. (supra) have clearly held that for accord of deduction under section 35(2AB) of the Act, first step is the recognition of facility by the prescribed authority and the entering of agreement between the facility and the prescribed authority. Once such an agreement has been executed, under which recognition has been given to the facility, then merely because the approval in the prescribed form has been granted or not granted would not de-recognize recognition granted by the prescribed authority and would not disentitle the assessee from claiming the deduction under section 35(2AB) of the Act.

27. We may also refer to the decision of the Pune Bench of Tribunal in Advik Hi tech (P.) Ltd. Vs. Addl. CIT (2014) 51 taxmann.com 245 (Pune – Trib.), wherein the issue was decided following the ratio laid down by the Hon'ble High Court of Delhi in Apollo Tyres Ltd. Vs. Union of India (supra). However, we have already referred to the decision of the Hon'ble High Court of Delhi in Maruti

Suzuki India Ltd. Vs. Union of India (supra), which in turn, has distinguished the facts of Apollo Tyres Ltd. and held that the said decision is not applicable.

28. Now, for adjudication, we may have to look at the events date-wise i.e. correspondence between the assessee and DSIR for three different phases of recognition of in-house R&D facility. The assessee has filed the relevant documents in Paper Book. However, we are making reference to the date-wise events in this regard, which are placed in Paper Book at pages 43 to 166. The first set of correspondence between the assessee and DSIR relates for the first phase year 2006-09. The second set of correspondence between the assessee and DSIR relates for second phase year 2010-2012 and the third set of correspondence between the assessee and DSIR relates to the third phase year 2013-15. The perusal of said details would reflect that the assessee had made an application for recognition of in-house R&D unit as early as 10.02.2006. The recognition was granted by DSIR on 01.06.2006 upto 31.03.2009. The copy of said document is placed at page 47 of Paper Book. Thereafter, an agreement was entered into with DSIR, which is referred in the application filed by the assessee for approval of R&D centre under section 35(2AB) of the Act. The said agreement was enclosed with form No.3CK. The assessee received form No.3CM from DSIR for the period 01.04.2006 to 31.03.2009 vide certificate dated 18.03.2008. A reminder was sent by DSIR to renew the recognition of R&D unit beyond 31.03.2009 vide communication dated 05.12.2008. The assessee duly filed the application for renewal of recognition on 06.02.2009 and the facility was recognized by the prescribed authority vide letter dated 16.06.2009 upto 31.03.2012. In this regard, certificate of registration was granted by DSIR dated 24.06.2009 for recognition of R&D facility upto 31.03.2012.

29. Further, next reminder was sent by DSIR to renew recognition of R&D unit beyond 31.03.2012 vide letter dated 02.01.2012. The assessee did file online application for renewal of R&D facility before DSIR on 06.05.2012. The renewal of recognition was granted by DSIR upto 31.03.2015 vide letter dated 25.06.2012. Form No.3CM was granted on 05.11.2013 by DSIR for the period from 01.04.2012 to 31.03.2015. The perusal of above said documents reflect that the assessee was for the first time given recognition by DSIR on 01.06.2006. The said recognition was granted upto 31.03.2009. The assessee and DSIR entered into an agreement recognizing in-house R&D facility of the assessee, which entitles the facility to be eligible for grant of deduction under section 35(2AB) of the Act. The assessee also filed form No.3CK along with copy of agreement and received form No.3CM granted by DSIR for the period 01.04.2006 to 31.03.2009. The recognition of facility was further granted for the period upto 31.03.2012 vide certificate of registration dated 24.06.2009. However, the assessee did not receive form No.3CM for the period 01.04.2009 to 31.03.2012 as the application in form No.3CK was filed along with application filed for the next period of three years ending 31.03.2015. The assessee received form No.3CM from DSIR for the period 01.04.2012 to 31.03.2015 but no such form No.3CM was granted for the period 01.04.2009 to 31.03.2012.

30. The issue which arises is whether the assessee can be denied deduction under section 35(2AB) of the Act for non receipt of form No.3CM. The assessee admittedly, had received recognition in the initial period and thereafter, it is case of renewal of recognition of in-house R&D facility, which was also granted by the prescribed authority for the period ending 31.03.2012 and also for the period ending 31.03.2015. The correspondence between the assessee and DSIR for the third phase reflects a reminder being sent by DSIR to renew the recognition

of in-house R&D facility beyond 31.03.2012. In other words, DSIR had not de-recognized the facility for the years 2009-12. The recognition to the facility has been granted from start till date and has not been withdrawn. In other words, recognition given by the prescribed authority which is mandate of section 35(2AB) of the Act is maintained and once the recognition is so maintained, the assessee has to be accorded deduction under section 35(2AB) of the Act. The non receipt of form No.3CM for the intervening three years is at best a procedural lapse and is not fatal for denial of claim of deduction under section 35(2AB) of the Act. Accordingly, we hold so. The prescribed authority in any case under the pre-amended provisions had no authority to look into the nature and quantum of expenditure except in the first year to see investment in land and building. After recognition of facility and approval by DSIR, the Assessing Officer is to allow the claim of assessee after verifying the same. Thus, we direct the Assessing Officer to allow deduction claimed under section 35(2AB) of the Act to the facility for the year under appeal. The ground of appeal No.1 raised by the assessee is thus, allowed.

31. The alternate plea of assessee becomes academic in nature, in view of our allowing ground of appeal No.1.

32. The issue in ground of appeal No.3 raised by the assessee is against disallowance of ₹ 96,311/- under section 43B of the Act on account of delayed payment of leave encashment.

33. Clause (f) to section 43B of the Act was inserted by the Finance Act w.e.f. 01.04.2002. However, the Hon'ble High Court of Calcutta in Exide Industries Ltd. Vs. Union of India (2007) 292 ITR 470 (CAL.) had struck down the said

amendment being arbitrary and unconstitutional, applying the ratio laid down by the Hon'ble Apex Court in the case of Bharat Earth Movers Vs. CIT (2000) 245 ITR 428 (SC). Once the said clause has been struck down, then the payment of leave encashment is a trade liability and not statutory liability, hence, the provisions of section 43B of the Act are not attracted. Accordingly, we direct the Assessing Officer to allow the aforesaid deduction to the assessee. The ground of appeal No.3 raised by the assessee is thus, allowed. The grounds of appeal raised by the assessee are partly allowed.

34. In the result, appeal of assessee is partly allowed.

Order pronounced on this 9th day of April, 2018.

Sd/-	**Sd/-**
(ANIL CHATURVEDI)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 9th April, 2018.

GCVSR

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to</u> :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-7, Pune;
4. The Pr.CIT-6, Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे ""ए"" / DR 'A', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune