IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD 'B' BENCH, AHMEDABAD

[Coram: Pramod Kumar AM and Mahavir Prasad JM]

ITA Nos.2446 & 2907/Ahd/2013
Assessment Years: 2010-11

Matrix Comsec Pvt. Ltd. ....***Appellant***
C-1/394, G.I.D.C.,
Makarpura, Baroda.
[PAN : AABCM 5892 Q]

Vs.

Asstt. Commissioner of Income Tax,
Range-4, Baroda. ....***Respondent***

Appearances by

S.N. Soparkar and Parin shah *for the applicant*
Mudit Nagpal *for the respondent*

Hearing concluded on: 14.02.2018
Order pronounced on : 24.04.2018

O R D E R

Per Pramod Kumar, AM:

This appeal i.e. ITA No.2446/Ahd/2013, filed by the assessee, is directed against the order dated 22nd August 2013 passed by the learned CIT(A), in the matter of assessment under section 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter), for the assessment year 2010-11.

2. When this appeal was taken up for hearing, learned Senior counsel for the assessee fairly submitted that ground no.3 is not required to be adjudicated on merits in this appeal. It is so for the reason that in the impugned order, learned CIT(A) had not adjudicated on the related ground of appeal before him, but when it was pointed out to the learned CIT(A), he disposed of the same, by a subsequent order dated 3rd October, 2013, which is separately in appeal before us. He submits that, in view of this subsequent development, ground no.3 is not required to be adjudicated in this appeal. Learned Departmental Representative does not oppose the submissions so made by the learned Counsel. We, therefore, dismiss ground no.3 as infructuous.

3. Ground no.3 is, therefore, dismissed as infructuous.

4. In ground nos.1 & 2, which are interconnected, the grievances raised are as follows :-

> *"1. The Learned CIT(A) has erred in law and on facts of the appellant's case in confirming the action of Learned A.O. of disallowing the claim of weighted deduction of Rs.1,12,84,050/- u/s.35(2AB) of the Act 1961 on various erroneous pleas.*
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> *2. Both the lower authorities have erred in law and on facts of the appellant's case in not appreciating the fact that the appellant's R&D Centre is duly approved and has fulfilled all the requirements for claiming the deduction u/s.35(2AB) of the Act."*

5. Briefly stated, the relevant material facts, as culled out from material on record, are as follows. The assessee before us is a company engaged in the business of manufacturing and trading of telecommunication and security equipment etc. During the course of scrutiny assessment proceedings, the Assessing Officer noted that the assessee has claimed a weighted deduction, under section 35(2AB) of the Act, of Rs.1,12,84,050/- on account of expenditure on scientific reason on In-house research and development facility. The appellant had established this facility on 15th October, 2009 and the recognition by the Department of Scientific and Industrial Research was received on 31.03.2010. The expenditure of Rs.1,12,84,050/- represents expenditure incurred during this period of 15.10.2009 to 31.10.2010. After obtaining the recognition of DSIR, the assessee filed an application, on 18.05.2010, seeking approval of the prescribed authority. This approval was granted, on 5th July 2011, with effect from 1st April 2010. It was submitted by the assessee that in order to be eligible for deduction under section 35(2AB), all that is needed is that R&D unit should be approved by the prescribed authority, and that the statutory provisions do not require the approval with effect from a date prior to incurring of expenditure. The Assessing Officer, however, did not approve this plea. He declined the deduction under section 35(2AB) and justified the same by observing as follows :-

> *"4.4 The reply of the assessee is considered however it is not acceptable. The explanation below sec.35(2AB) of the Act refers as,*
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> > *(3) No company shall be entitled for deduction under clause (1) unless it enters into an agreement with the prescribed authority for co-operation*

in such research and development facility and for audit of the accounts maintained for that facility.

(4) The prescribed authority shall submit its report in relation to the approval of the said facility to the Director-General in such form and within such time as may be prescribed.

……………..”

The company who is availing facility of claiming R&D expenses @150% has to submit its yearly report to Ministry of Science and Technology, Department of Scientific and Industrial Research, New Delhi in Form 3CL, however for AY 2010-11 assessee has not submitted such report. In reply submitted on 28.12.2012, the assessee itself submits at point no.3 that the company has filed application for approval with the prescribed authority u/s.35(2AB) of the Act on 18.5.2010 and the same was approved vide Form No.3CM dated 5.7.2011 w.e.f. 1.4.2010 i.e. w.e.f. F.Y. 2010-11 relevant to A.Y. 2011-12. However in reply at point no.10, the assessee submits that the facilities were ready on 15.10.2009, the company made application based on the situation as on 15.10.2009, the same was approved, this therefore means that the facility was approved w.e.f. 15.10.2009, in view thereof all expenditure incurred by the company after 15.10.2009 should be allowed as weighted deduction. With the reply the assessee has also submitted a copy of Form No.3CM dated 5.7.2011. On verification it is observed that the Ministry of Science and Technology, Department of Scientific and Industrial Research, New Delhi has in form No.3CM dated 5.7.2011 granted approval of in-house R&D facility u/s.35(2AB) of the IT Act to the assessee by noting that "......... the above Research & Development facilities are approved for the purpose of sec.35(2AB) from 1.4.2010 to 31.3.2012............". It means that the assessee is eligible for weighted deduction u/s.35(2AB) @150% .w..ef F.Y. 2010-11 to F.Y. 2011-12 only relevant to A.Y. 2011-12 to A.Y. 2012-13.

Furthermore it may be mentioned that, Department of Scientific and Industrial Research, New Delhi had issued a letter dated 7.7.2011 enclosing the approval in Form No.SCM dated 5.7.2011, inter alia, directing the assessee company to furnish/comply to the various details, like :-

i. Form No.3CL duly filled up for the relevant assessment year(s).

ii. Additional information as per Annexure-IV of DSIR guidelines along with Appendix-I and auditor's certificate.

iii. Copy of Annual Report and IT Returns for the relevant assessment year(s).

iv. The details of expenditure in Appendix-I should be reconciled with the expenditure published in the Annual Report and also the IT Returns for the relevant year(s).

v. A write up on the basis of allocation of expenditure, for each of the items in the details furnished in the Appendix-I to Annexure-IV indicating clearly whether it is apportioned/directly booked/metered (in the case of utilities and common services).

vi. List of R&D manpower associated with each of the R&D projects/programmes taken up during the year along with the brief note on the progress of each of the Projects to be furnished as per Annexure-IV.

vii. Documents required as per DSIR guidelines.

The assessee has not clarified nor submitted any evidence to substantiate, whether it has complied to the above details to be entitled for such weighted deduction. It is worthwhile to mention that vide order sheet dated 8.11.2012 the assessee was specifically requested to furnish the evidence of filing of Form No.SCL with the prescribed authority, but assessee could not furnish and the same was recorded in order sheet dated 20.12.2012.

The case law relied upon by the assessee is also not applicable in the case of assessee, because the facts in assessee's case are different. In assessee's case the assessee has failed to comply to the details required under this provision. Further more in assessee's case the period for approval of its R&D unit is clearly stated from 1.4.2010 to 31.3.2012. Therefore, the assessee is not entitled for claiming R&D expenses @150% in the year under consideration. Since, 100% R&D expenses has already been claimed in P & I a/c., assessee is not entitled for further claim of 50% amounting to Rs.1,12,84,050/- as weighted deduction u/s.35(2AB) of the Act. Therefore, Rs.1,12,84,050/- is disallowed and added back to the total income of the assessee. Penalty proceedings u/s. 271(1)(c) of the I.T. Act, 1961 are separately initiated for furnishing inaccurate particulars of income.

[Addition: Rs.1,12,84,050/-]"

6. Aggrieved, assessee carried the matter in appeal before the learned CIT(A) but without any success. While confirming the action of the Assessing Officer, learned CIT(A) observed as follows :-

"6.3.5. When the facts of the appellant's claims are analyzed in view of the provisions of the Act, the relevant rules and guideline for approval of in-house R&D centers and reporting of expenditure u/s 35(2AB) of the IT Act 1961 as updated on 26/05/2009 and published by department of Scientific and Industries Research, Ministry of Science and Technology, New Delhi, following conclusions Emerges:

I. The appellant made application for approval for the deduction u/s 35(2AB) on 18.05.2010, As on that date, the appellant was already having R&D centre which had already been duly approved by DSIR on 31.03.2010.

II. Under these circumstances as per Clause (i) of policy for approval of DSIR, the approval could have been given only from the 1st April of the

year in which application was made in Form 3CK. Accordingly the order of the DSIR clearly mentions that the approval granted to the appellant is with effect from 01.04.2010.

III. *So far as allowability of any weighted deduction u/s 35(2AB) in the year preceding to the year of making application to DSIR is concerned, the appellant's case is covered by Clause (vi) of the policy for approval. This is so because as on the date of making the application in form 3CK, the appellant was already having R&D facility approved by the DSIR. Now as per this clause, the appellant could have deduction u/s 35(2AB) for the financial year 2009-10 only if it had made a capital Investment on R&D of more than Rs.1 crore excluding the capital expenditure on land and building in this financial year. As already stated above, the capital investment made by the appellant during financial year 2009-10 was Rs.20.37 lakhs excluding the expenditure on land and building. Hence the appellant was not eligible for any deduction u/s 35(2AB) for A.Y. 2010-11. Besides as per this policy, the revenue expenditure made by the appellant during financial year 2009-10 was not at all eligible for weighted deduction u/s 35(2AB).*

IV. *As already stated, the appellant has not fulfilled any of the conditions imposed by the provisions of the rules 6(7A) of the IT Rules 1962 while claiming deduction u/s 35(2AB) for A.Y. 2010-11. It has also not fulfilled the conditions imposed by the guidelines of the DSIR so far as no separate audit of separate books of accounts for such R&D facility for the Year 2009-10 has been carried out.*

6.4. *The appellant has relied upon the decision of Honorable Gujarat High Court in the case of Claris Life Sciences Ltd. (Supra), The perusal of this decision shows that in this case the approval by DSIR was granted on 27.02.2001. The assessee claimed deduction u/s 35(2AB) for the entire year i.e. F.Y. 2000-01. The AO granted this only from 27.02.2001. The Honorable High Court held that since the approval was granted during the previous year relevant to the assessment year in question, the assessee is entitled to claim weighted deduction in respect of the entire expenditure incurred under section 35(2AB) of the Act by the assessee. Thus the facts of this case are different from the present appeal. In the present appeal the approval has been granted by DSIR on 15.07.2011 w.e.f, 01.04.2010 on the basis of application made on 18.05.2010. Thus the appellant has been already granted deduction w.e.f. 1st April of the financial year in which the application was made and thus the ratio of decision in the case of Claris Life Science Ltd. (supra) has already been followed.*

6.4.1. *Besides in the decision before the Honorable High Court, the guidelines of the DSIR were not there. These guidelines, as applicable to the current year, have already been discussed above and on the basis of these guidelines, the appellant is not eligible for deduction u/s 35(2AB) for the current year as it has not fulfilled the conditions listed in these guidelines. The appellant has also relied upon the decision of Honorable Delhi High Court in the case of Sandan Vikas (India) Ltd. (Supra). This decision also pertains to A.Y. 2005-06 to which the current guidelines of DSIR were not applicable. Hence these decisions cannot be applied to the appellant's appeal for A.Y. 2010-11.*

> ***6.5.*** *On the basis of these discussions, it is held that the AO has rightly denied deduction u/s 35(2AB) to the appellant. Hence this ground of appeal is dismissed."*

7. Aggrieved, the assessee is in further appeal before us.

8. We have heard the rival submissions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

9. We find that the question whether an approval under section 35(2AB) can relate back to an earlier assessment year was decided, in favour of the assessee, by Hon'ble Delhi High Court in the case of CIT vs. Sandan Vikas India Limited [(2012) 335 ITR 117 (Del)], but , in the impugned order, earned CIT(A) has distinguished the said ore on the ground it pefrtained to the assessment year 2005-06 in which the DSIR guidelines in force during the assessment year 2010-11 were not applicable. This plea, however, can no longer be accepted. It is so for the reason that Hon'ble Delhi High Court in the case of Maruti Susuki India Limited vs. Union of India [(2017) 84 taxmann.com 45 (Del)], has applied the same principle for the assessment years 2011-12, 2012-13 and 2013-14 as well. Their Lordships of Hon'ble Delhi High Court has followed their own judgement in the case of Sandan Vikas India Limited (Supra) and observed as follows:-

> *"**40.** The settled position in law is that, for availing the benefit under Section 35 (2AB) of the Act what is relevant is not the date of recognition or the cut off date mentioned in the certificate of the DSIR or even the date of approval but the existence of the recognition. If a R&D Centre is not recognised it is not entitled to deduction but if it is recognised, it is entitled to the benefit. The Gujarat High Court in **Claris Lifesciences (supra)** has rightly observed that the date of approval of the R&D Centre, not being a part of the provision, extending benefit only from the date of recognition "amounts to reading more in the law which is not expressly provided".*
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> ***41.*** *Section 35 (2AB) clearly provides that any expenditure incurred by a party on its R&D facility except, insofar as it relates to land and building is liable to be allowed to be claimed as deduction (twice the amount of expenditure). A perusal of the scheme of the Act especially Sections 35 (2AB), 35A and 35AB reveals in no uncertain terms, that the purpose behind these provisions is to provide impetus for research, development of new technologies, obtaining patent rights, copyrights and know-how.*
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> ***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).

43. *In the present case, it could be true that there are some errors in the Petitioner's application dated 31st October, 2011, however, one cannot ignore that since 2011, the Petitioner has been candid with the DSIR about its expenses for the Gurgaon and Rohtak R&D Centres and has given the break-up of the expenditure incurred thereupon; has submitted the Auditor's certificate required for the same; has entered into an agreement with the DSIR as required for sharing of technologies; and has also repeatedly requested for certification of the expenditure incurred by it. Under such circumstances, an isolated error in an application cannot result in the entire benefit itself being refused to the Petitioner resulting in it being deprived of the deduction as permissible under Section 35 (2AB).*

44. *In the facts and circumstances of the present case, this Court holds that the Petitioner is entitled to deduction under Section 35 (2AB) of the Act for the expenditure in respect of its Rohtak R&D Centre as per the provisions of Section 35 (2AB) for AYs 2011-12, 2012-13 and 2013-14. Accordingly, the Corrigendum dated 7th May, 2015 is set aside and the Respondent No.1 DSIR is directed to issue a fresh certification in Form 3CL in respect of the expenditure on scientific research on the Rohtak R&D Centre of the Petitioner for AYs 2011-12, 2012-13 and 2013-14. Since the DSIR has already issued the certification for the Gurgaon R&D centres, for AYs 2012-13 and 2013-14, no orders are called for in that respect. The Respondent No.2 is further directed to give consequential deductions as per Section 35 (2AB) to the Petitioner”*

10. Clearly, therefore, the stand of the CIT(A) is not sustainable in law. We vacate the same and direct the Assessing Officer to grant deduction under section 35(2AB), as, beyond any dispute or controversy, the R&D Unit is approved by the prescribed authority, and as the date of approval, in the light of the above discussions, is not really material for the present purposes. The disallowance thus stands deleted.

11. In the result, the appeal No.2446/Ahd/2013 is partly allowed in the terms indicated above.

12. We now take up ITA No.2907/Ahd/2013. This appeal is directed against the order dated 03.10.2013 passed by the ld. CIT(A) under section 154 r.w.s. 250/143(3) of the Income-tax Act, 1961, for the assessment year 2010-11.

13. Grievance raised by the assessee-appellant is as follows:-

> *"The learned CIT(A) has erred in law and on facts of the appellant's case in confirming the action of the Learned AO of disallowing reimbursement of advertisement expense of Rs.19,32,177/- u/s.40(a)(ia) of the Act on the erroneous plea that TDS was deductible on the same and the appellant has not deducted the same."*

14. Briefly stated, the relevant material facts are like this. During the course of scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has incurred certain advertisement and exhibition expenses, through an intermeditary – namely Ashish Mistry, but not deducted tax at source. The assessee did point out that these expenses represent only credit notes for reimbursement of expenses to the extent of 35% and 50% as per respective agreements and the expenses were not actually incurred by the assessee. However, the Assessing Officer did not accept the explanation of the assessee and held that the assessee ought to have deducted tax at source from these payments but the assessee has not done so. As a corollary to this finding, the Assessing Officer proceeded to disallow the said expenses which aggregated to Rs.19,32,177/-. Aggrieved, assessee carried the matter in appeal before the ld. CIT(A) but without any success. The CIT(A) initially did not even deal with this grievance of the assessee. When assessee pointed it out by way of a rectification petition, learned CIT(A) dealt with the matter on merits but rejected the grievances anyway – this time on merits. The assessee is not satisfied and is in further appeal before us.

15. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

16. We find that there is no dispute that what is paid by the assessee is a reimbursement, a partial reimbursement in fact, of the advertisement and exhibition expenses. It is not in the nature of income at this stage but is only a reimbursement of expenses to the person who has actually incurred the advertisement expenses and

exhibition charges. The character of payment, so far as the assessee is concerned, is simply of reimbursement of expenses. On materially similar facts, Hon'ble jurisdictional High Court, in the case of CIT Vs. Gujarat Narmada Valley Fertilizers Co. Ltd, [(2014) 361 ITR 192 (Guj)], has decided the issue in favour of the assessee, and observed, inter alia, as follows:-

> *"**2.** It appears that the assessee claimed deduction under Section 40(a)(ia) of Rs. 6,93,372/- towards reimbursement of CHA charges paid to C & F agent and Rs. 76,00,509/- towards reimbursement of expenses towards consignment agents. The aforesaid expenses were disallowed by the Assessing Officer solely on the ground that the assessee has not deducted the TDS on the aforesaid accounts.*
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> ***3.** In an appeal by the assessee the Commissioner (Appeals) allowed such deductions observing that so far as the amount of Rs. 6,93,372/- is concerned as such the agent had already deducted the TDS and deposited in the Government and, therefore, there was no further liability of the assessee to deduct the TDS. With respect to Rs. 76,00,509/-, the CIT(A) observed that the said amount was towards the reimbursement of the expenses to the consignment agent, which was in fact incurred on behalf of the assessee and there was no profit element. The CIT(A) held that the assessee was not required to deduct the TDS on such reimbursement and, therefore, the Assessing Officer was not justified in making the above disallowance and accordingly directed to delete the same. Being aggrieved and dissatisfied with the order passed by the CIT(A) in holding the above the appellant-revenue preferred appeal before the Income Tax Appellate Tribunal and by the impugned order the Income Tax Appellate Tribunal has confirmed the order passed by the CIT(A). It is required to be noted that while confirming the order passed by the CIT(A) and deleting the disallowance, it has been specifically observed by the tribunal that in fact the expenses were incurred by the agent on behalf of the assessee for transportation and other charges, which has been spelt out in the bill itself including the commission to the agent. The learned tribunal also observed that the relation between the assessee and the agent is principal and an agent. The learned tribunal also observed that so far as the obligation to deduct tax at source from the payment of transport charges and other charges is concerned, the same was complied with by the agent, who had made payment on its behalf. On the aforesaid facts the learned tribunal also observed that the circular relied upon by the revenue that it is the liability of the assessee as principal agent to deduct the TDS will not be applicable and the said circular would be applicable for payment made to principal to principal. Considering the aforesaid facts and circumstances of the case, when the learned tribunal has confirmed the order passed by the CIT(A) quashing and setting aside the order passed by the Assessing Officer in deleting the disallowance of Rs. 6,93,372/-and Rs. 76,00,509/- claimed by the assessee under Section 40(a)(ia) of the Income Tax Act, we see no reason to interfere with the same. No error has been committed by the learned tribunal in confirming the order passed by the CIT(A). No question of law, much less substantial question of law, arises in the present appeal. Hence, the present appeal deserves to be dismissed and is accordingly dismissed."*

17. Quite clearly, reimbursements of expenses do not require tax deduction at source. The tax deduction liability arises only at the point of time when payment is "*for carrying out any work in pursuance of a contract*" for the specified purposes. The payment, in the present case, is not for carrying out any work of the specified nature but only a partial reimbursement of such a payment of specified nature. The distinction is subtle and significant. The lower authorities clearly lost sight of the above aspect of the matter, and proceeded to treat reimbursement of expenses as incurring of expenses.

18. Learned CIT(A) has also stated that there is no evidence of the fact that the tax deduction at source was made by the person actually making payment of expenditure. In our considered view, this is wholly irrelevant. All that we are concerned at this stage is whether the assessee has failed to discharge his tax withholding obligation, and when the assessee has not committed any such failure, there is no question of his being visited with the consequences of such a non-existent failure.

19. In the light of the above discussions, as also bearing in mind entirety of the case, we uphold the plea of the assessee and direct the Assessing Officer to delete the impugned disallowance of Rs.19,32,177/-. The assessee gets the relief accordingly.

20. In the result, ITA No.2907/Ahd/2013 is allowed.

21. To sum up, ITA No.2446/Ahd/2013 is partly allowed and ITA No.2907/Ahd/2013 is allowed. Pronounced in the open court on this 24th day of April, 2018.

Sd/-	*Sd/-*
Mahavir Prasad	**Pramod Kumar**
Judicial Member)	(Accountant Member)

Dated: 24th April, 2018.
*PBN/**

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad