

**आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर**

**IN THE INCOME TAX APPELLATE TRIBUNAL  
INDORE BENCH, INDORE**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER  
AND  
SHRI MANISH BORAD, ACCOUNTANT MEMBER**

**ITA No.373/Ind/2016  
Assessment Year: 2009-10**

ACIT 5(1), Indore	<b><u>बनाम/</u></b> Vs.	M/s. Symbiotic Pharmalab ltd. 385, Pigdamber, Rau, Indore
(Revenue)		(Respondent)
PAN: AAGCS9311		
Revenue by	Shri Ashima Gupta, CIT- DR	
Respondent by	Shri Ajay Tulsian & Kapil Shah, CAs	
<b>Date of Hearing:</b>	<b>29.11.2018</b>	
<b>Date of Pronouncement:</b>	<b>10.12.2018</b>	

**आदेश / O R D E R**

**PER MANISH BORAD, A.M:**

This appeal of Revenue pertaining to A.Y. 2009-10 is directed against the order of Ld. Commissioner of Income Tax(Appeals)-II, Indore, (in short 'CIT(A)'), dated 31.12.2015 which is arising out of the order u/s 143(3) of the Income Tax Act 1961(hereinafter called as the 'Act') framed on

05.12.2011 by ACIT, 5(1) Indore. The revenue has raised following grounds of appeal:

*“1. Whether the Ld. CIT(A) has erred in law and on facts in restricting the addition of Rs. 2,60,50,027/- to Rs.3,74,195/- and addition made by the AO 'after disallowing u/s 35(2AB) deleted to the extent of Rs. 2,56,75,832/- on account of R&D expenditure without appreciating the fact that the assessing officer had pointed out that DISR has not issue report in Form 3CL to DGIT exemption and even when no satisfactory clarification was given by the assessee to the AO.”*

*“2. Whether the LD. CIT(A) has erred in law and on facts in deleting the disallowance of Rs. 9,97,920/- made by the AO on account of foreign exchange loss without appreciating the fact that the assessing officer had pointed out that the loss claimed by the assessee in the year of fluctuation in the rate of exchange Or the same is allowable only in the year' of repayment of such loans.”*

2. Briefly stated facts as culled out from the records are that the assessee is a Limited Company engaged in the business of Manufacturing of Active pharmaceuticals, ingredients. E-return of income filed on 27.09.2009 declaring income of Rs.1,05,27,540/- which was subsequently revised on 24.02.2010 declaring nil income after claiming weighted average deduction u/s 35(2AB) for research & Development expenditure. Case selected for

scrutiny. Notices u/s 143(2) & 142(1) of the Act were duly served upon the assessee.

3. During the course of assessment proceedings Ld. Assessing Officer (in short 'Ld. AO') while examining the claim for deduction of Research & Development expenditure u/s 35(2AB) of the Act for Rs.2,60,50,027/- observed that the assessee has filed an application on form 3CL for approval of R&D Centre to the prescribed authority(DSIR) but the requisite report was not received from DSIR(Department of Science and Industrial Research) by the Director General of Income Tax (Exemptions) in Form 3CL and accordingly took a view that the alleged claim u/s 35(2AB) of the act was not admissible. Ld. AO also did not allow the notional loss claimed by the assessee on foreign exchange rate fluctuation at Rs.9,97,920/-. Various other disallowances/additions at Rs.9,30,343/- were also made by the assessing officer thereby assessing the income at Rs.2,55,97,610/- in the following manner:

Particulars		Amt (Rs.)
Net loss for the A.Y. 2009-10 as declared by the assessee		(23,80,677)
Add		
(1) Disallowance of sales commission as per para 1	3,39,924	
(2) disallowance u/s 35(2A) as per para 2	2,60,50,027	
(3) Disallowance u/s 14A as per para 6	40,773	
(4) Disallowance of Repairs & maintenance as per	65,817	

para 4		
(5) Disallowance of Legal & Professional expenses as per para 5	1,73,362	
(6) Addition of income not offered as per para 3	3,10,467	
(7) Disallowance of notional loss claimed on foreign exchange rate fluctuation as per par 7	9,97,920	2,79,78,290
Total Income		2,55,97,613
Round to		2,55,97,610

4. Aggrieved, assessee preferred an appeal before the Ld. CIT(A) against some of the additions and partly succeeded. Now Revenue is in appeal before the Tribunal raising two grounds aggrieved by the finding of the Ld. CIT(A) allowing the deduction for R&D expenditure u/s 35(2AB) of the Act at Rs.2,56,75,832/- as well as against the deletion of allowance of foreign exchange loss of Rs.9,97,920/-.

5. Ld. Departmental Representative(DR) vehemently argued supporting the orders of the assessing officer.

6. Per Contra Ld. Authorized Representative (AR) of the assessee supported the findings of Ld. CIT(A) and also submitted that the alleged disallowances by the Ld. Assessing Officer u/s 35 (2AB) of the Act was merely technical in nature as the necessary approval was duly received for granting the extension of approval from 01.04.2007 to 31.03.2010 and further extension of approval was also received from 01.04.2010 to 31.03.2012.

7. As regards the notional disallowance of foreign exchange loss, Ld. AR of the assessee submitted that the assessee has duly followed the judgment of Hon'ble Apex Court in the case of Oil & Natural Gas Corpn. Ltd. vs. CIT (2010) 322 ITR 180 wherein it has been held *“that assessee maintained accounts on mercantile system of accounting, loss claimed by the assessee on account of fluctuation in the rate of foreign exchange as on the date of balance sheet in respect of loans taken for revenue purposes is allowable as expenditure u/s 37(1), notwithstanding the fact that the liability has not been actually discharged in the year in which the fluctuation in the rate of foreign has occurred”*. Ld. AR also took us through the detailed paper book running from pages 1 to 313 and also placed reliance on the following judgments:

1. DCIT vs. Famy Care Ltd. in ITANo.1798/Mum/2013, I.T.A.T., Mumbai
2. CIT vs. Sandan Vikas (India) Ltd. (2011) 335 ITR 117 Hon'ble High Court of Delhi
3. CIT vs. Claris Lifesciences Ltd. (2010) 326 ITR 251, Hon'ble High Court of Gujarat

8. We have heard the rival contentions, perused the record placed before us and carefully gone through the judgments relied by the Ld. counsel for the assessee.

## **Ground No.1**

*“1. Whether the Ld. CIT(A) has erred in law and on facts in restricting the addition of Rs. 2,60,50,027/- to Rs.3,74,195/- and addition made by the AO 'after disallowing u/s 35(2AB) deleted to the extent of Rs. 2,56,75,832/- on account of R&D expenditure without appreciating the fact that the assessing officer had pointed out that DISR has not issue report in Form 3CL to DGIT exemption and even when no satisfactory clarification was given by the assessee to the AO.”*

9. We find that Ld. CIT(A) allowed the assessee's claim u/s 35(2AB) of the Act for Research and Development expenses to the extent of Rs.2,56,75,832/- by observing as follows:

*4. This ground of appeal has been raised against the disallowance of R&D expenditure amounting to Rs.2,60,50,027/- on technical ground of non-receipt of report in Form 3CL issued by DSIR. The appellant has claimed these expenses u/s 35(2AB) of the Income Tax Act, 1961. The AO has discussed the issue at para 2, page 2-3 of the assessment order.*

*4.1 The AO had observed that the approval was granted to the assessee under form 3CM by the prescribed authority as approved by R&D centre for the period of three years ending 31.03.2010. It has been further stated that the company has also filed the application for grant of form 3CL, along with the audited set of financial statements to the DISR on 16.09.2009 and the said application was still under process as on the date of assessment order. The correspondence in this regard between the assessee company and DISR was also presented during the assessment proceedings as noted by the AO in the assessment order. However, since the DISR has not issued report in Form 3CL to DGIT exemptions, the*

same has been disallowed under 35(2AB) on technical grounds of not having approval in Form 3CL.

4.2 In this case, the appellant has filed the return u/s 139(1) on 27.09.2009, which was revised on 24.02.2010 to claim weighted deduction u/s 35(2AB) of R&D expenses. The assessee appellant, in this computation has disallowed the revenue expenses debited to profit and loss account of Rs.1,37,51,463/- and separately claimed weighted deduction at the prescribed rate of 150% of the revenue expenses Of Rs.1,37,51,463/- amounting to Rs.2,06,27,195/-, @ 150% of the capital expenses other than building of Rs.1,20,64,974/amounting to Rs.1,80,97,461/- and @ 100% of capital expenditure on building of Rs.10,76,834/-. The total weighted deduction claimed by the appellant was at Rs.3,98,01,490/-.

4.3 The AO has tabulated the details of expenditure of Rs.2,60,50,027/- disallowed u/s 35(2AB) in this year, which IS abstracted hereunder: -

S. N	Particulars	Amount (In Rs.)	Expenditure Disallowable u/s 35(2AB)	
			%	Amount Rs.
1	Total revenue expenditure of R&D Unit (Excluding depreciation)	1375146	50%	6875732
2	Total Capital Expenditure of R&D Unit (Other than building)	12064974	150%	18097461
3	Total Capital Expenditure of R&D Unit (Building)	1076834	100%	1076834
		26893271		26050027

4.4 From the above Table it can be seen that in case of revenue expenditure of R&D unit as against weighted deduction claimed at 150%, the AO has disallowed only 50% and has allowed 100% of revenue expenses treating the same as regular revenue expenses. From the computation of income, it is found that the appellant has claimed the deduction u/s 35(2AB) at

*Rs.3,98.01,490/- and the AO has made the disallowance at Rs.2,60,50,027/-. The position is summarized here under: -*

S N o.	Particulars	Amount incurred	% of weighted deduction claimed	Claimed by assessee	Allowed by AO as revenue expenditure	Disallowed by AO
1	Total revenue expenditure of R&D	13751463	150%	20627195	13751463	6875732
2	Total Capital Expenditure of R&D (other than building	12064964	150%	18097461	0	18097461
3	Total Capital expenditure of R&D(building)	1076834	100%	1076834	0	1076834
		26893271		39801490	13751463	26050027

*4.5 The appellant has contended that this was merely a technical disallowance for want of approval in Form 3CL. The appellant had made detailed and elaborate submissions through various written ' submissions and stated that it had received a report in Form 3CL dated 04.04.2012 to be submitted by the prescribed authority to the Director General of Income Tax{ Exemptions) u/s 35(2AB) of the Income Tax Act, 1961. A copy of the same finds place at page 127 of the PB. The appellant claimed that an order of extension of approval of in-house research and development facility u/ s 35(2AB) of the Income Tax Act, 1961 in Form 3CM from the Department of Science and Technology has also been received by the assessee company clearly granting extension of approval for the purpose of section 35(2AB) from 01.04.2007 to 31.03.2010and further extension of approval from 01.04.2010 to 31.03.2012 has also been given to the assessee company. Copies of these approval letters have been placed before me at pages 124 and 126 of the PB.*

4.6 The appellant has further stated that as per Form 3CL, the amount of expenses for claiming deduction allowed u/ s 35(2AB) by the DSIR is Rs.255.67Iacs against Rs.258.16Iacs actually incurred by the assessee. It was contended that the DSIR authority is entitled to disallow certain expenses which they don't find appropriate. The appellant fairly admitted that during the relevant year, the DSIR had disallowed a sum of Rs.2.49 lacs out of revenue expenses. In other words, the appellant has claimed revenue expenses to the tune of Rs. 137.51 lacs and the DSIR restricted the same to Rs.135.02 lacs. He drew my attention to the chart stating that this would explain the position which is reproduced hereunder:

S N o.	Particulars	Amount incurred	% of weighted deduction allowable	Claimed by assessee	Held eligible by DSIR	Weighted deduction allowable
1	Total revenue expenditure of R&D	13751463	150%	20627195	13502000	20253000
2	Total Capital Expenditure of R&D (other than building	12064974	150%	18097461	12065000	18097461
3	Total Capital expenditure of R&D(building)	1076834	100%	1076834	1077000	1076834
		26893271		39801490	26644000	39427295
	Less: already allowed by the AO			13751463		13751463
	Disallowed by the AO			26050027		
	Now allowable as per the appellant					25675832

4.7 The appellant has further contended that the deduction ix] s 35(2AB) was claimed by the assessee as per the actual figures. Since the assessee has received Form 3CL and according to the said Form 3CL, the amount of disallowance works out to Rs.3,74,195/- So

*the appellant requested that considering the fact that the AO has already allowed deduction of Rs. 1,37,51,463/- as revenue expenses, further deduction u/s 35(2AB) may now be allowed at Rs.2,56,75,832/- as against Rs.2,60,50,027/- disallowed by the AO.*

*4.8 The then CIT (A), my predecessor verified the claim of this deduction claimed by the appellant is u/s 35(2AB) by making further queries. A detailed submission has been found filed by the appellant on 26.12.2012 which explains the entire procedure of claiming deduction u/ s 35(2AB). The entire reply is extracted above as a part of the order and hence not reproduced here again to avoid duplicity. The appellant was also asked to file Form 3CK for the year under consideration which was filed by the appellant vide its submission dated 31.12.2012. A questionnaire vide letter dated 02.01.2013 was also issued by my predecessor seeking further clarifications in respect of the claim of deduction u/ s 35(2AB).*

*4.9 The appellant has filed further written submissions in response to order sheet entries and also in response to the letter issued during appellate proceedings. These submissions have already been abstracted above. The appellant has categorically explained that it has claimed depreciation in respect of capital expenditure claimed as R&D expenditure. As required by my predecessor, the appellant has filed complete details and copies of bills and vouchers pertaining to capital as well as revenue expenditure incurred on R&D for A.Y. 2008-09 and A.Y. 2009-10.*

*4.10 I have gone through the assessment order, the queries raised and details called for during the course of appellate proceedings and the detailed and comprehensive submissions filed by the appellant in defense of the deduction claimed by it u/s 35(2AB). The claim of deduction u/s 35(2AB) was disallowed by the AO purely on technical ground i.e. for want of approval in Form 3CL and stating so clearly in the assessment order. The appellant has already furnished a report in Form 3CL dated 04.04.2012. So the technical flaw which was the*

*basis of making the disallowance of Rs.2,60,50,027/ - by the AO has since been prescribed form from the prescribed authority. It has been pointed out by the .appellant that deduction u/s 35(2AB) has been allowed to the appellant in all subsequent years also in the orders passed u/s 143(3).*

*4.11 Regarding, detailed and extensive queries raised by this office, I am of the view that the claim of deduction u/s 35(2AB) is governed by a separate and rigorous procedure as prescribed by Income Tax Rules., There has been no denial of the fact that the appellant is mainly engaged in the manufacturing -of pharmaceuticals ingredients (API) and intermediates. The appellant is into development of Steroids and Hormones to cure chronic and acute diseases of human beings. The grant of approval that the appellant has in fact a R&D unit, vouches for this fact. As far as the grant of approval i.e. 07.01.2010 is concerned, Form 3CM is the order of in-principle approval of in house Research & Development facility u/s 35(2AB) of the Income Tax Act, 1961. So far as approval for the impugned year is concerned, it was granted vide order dated 07.01.2010 in Form 3CM from 01.04.2007 to 31.03.2010. (copy at page 186 of PE) A copy of the same was also forwarded to the Director General (Income Tax Exemptions) on the same date. This is in principle approval of the R&D facility available with the assessee. Further extension of approval was also granted vide order dated 04.04.2012 from 01.04.2010 to 31.03.2012 in Form 3CM (copy at page 187 of PE). A copy of the same was forwarded to the Director General (Income Tax Exemptions) on the same date i.e. 04.04.2012. After having obtained in principle approval in Form 3CM from the DSIR, various details are called, filed and verified including audited accounts, obviously after the year end only for quantifying the amounts. Then the DSIR conducts its enquiries, seeks clarification, if felt necessary visits the facility and then approves the expenses in Form 3CL for weighted deduction. The appellant has undergone this process and finds due support from the fact that as per*

*Form 3CL the amount of expenses held eligible for claiming deduction allowed u/s 35(2AB) by the DSIR is Rs.255.67 Lacs against Rs.258.16 Lacs actually incurred by the assessee. So DSIR, who is the prescribed authority has verified the expenses incurred by the appellant and has categorically held expenses to the tune of Rs.255.67 Lacs as eligible for claiming deduction u/ s 35(2AB) and have held that a sum of RS.2.49 lacs is not eligible for weighted deduction u/s 35(2AB). The appellant has strongly placed reliance on the following decisions:*

*"CIT Vs. Claris Life Sciences Ltd. 326 ITR 251(Gujarat) where it was concluded that once facility is approved, entire expenditure incurred on development of R&D facility has to be allowed for weighted deduction; deduction cannot be restricted only to the expenditure incurred after the date of approval.*

*The Hon'ble Delhi High Court in the case of CIT Vs. SandanVikas (India) Ltd., (2011) 335 ITR 117 dated 24.02.2011 has endorsed the view taken by the Hon'ble Gujarat High Court in the case of Claris Life Sciences Ltd.*

*This case relates to AY 2005-06 and the in-principal recognition of the in house R&D facility was granted in February 2006 and the approval for expenses incurred was granted in the prescribed Form 3CM in September 2006. The AO citing these reasons did not allow the weighted deduction deduction u/s 35(2AB). The Honourable Delhi High court held that once the certificate is issued by DSIR, it would be sufficient to hold that the assessee fulfills the conditions laid down under the law. Endorsing the decision of the Honourable ITAT, the Honourable Delhi high Court held that the Tribunal was justified in allowing the benefit of weighted deduction u/e 35(2AB) for AY 2005-06 though the recognition and approval by the prescribed authority was given later on."*

*4.12 In view of the above discussion and facts and circumstances of the case, I am of the considered opinion that the appellant is entitled to claim deduction u/s 35(2AB) more so in view of the fact that the appellant has successfully removed the technical flaw forming the basis of disallowance of deduction u/ s 35(2AB) by furnishing the desired report in Form 3CL issued by the DSIR. So far as approval for AY 2009-10 is concerned it was granted vide order dated 07.01.2010 in Form 3CM from 01.04.2007 to 31.03.2010 which was also filed during the course of assessment proceedings. So far as quantification of eligible amounts is concerned, the same was done by DSIR vide Form no. 3CL for FY's 2008-09 to 2010-11 on 4<sup>th</sup> April 2012. I therefore find no reason to interfere with the approval of in House Research & Development facility u/s 35(2AB) of the Income Tax Act, 1961 granted to the appellant by the DSIR. The disallowance made u/s 35(2AB) of Rs.Ps.2,60,50,027/- is hereby directed to be restricted to Rs.3,74,195/-and the disallowance to the extent of -Rs.2,56,75,832/- is deleted. This ground of appeal is allowed.*

10. From perusal of the above detailed findings of fact by Ld. CIT(A) which remains uncontroverted by the Ld. Departmental Representative(DR), we find that the assessee made necessary application for approval to DSIR for in house research and development facility. However, the necessary approval was not received before the completion of the assessment proceedings. Subsequently, on 4<sup>th</sup> April, 2012 the necessary approval was granted by DSIR on form 3CL from financial years 2008-09 to 2010-11.

11. We find that the Ld. CIT(A) has rightly allowed the claim of assessee by following the judgment of Hon'ble Gujarat High Court in the case of CIT vs. Claris Lifesciences Ltd. (supra) as well as the judgment of Hon'ble Delhi High Court in the case of CIT vs. Sandan Vikas (India) Ltd.(supra).

12. We, therefore, in the given facts and circumstances of the case and respectfully following the above referred judgments, are of the considered opinion that no interference is called for in the finding of Ld. CIT(A) allowing the assessee's claim for research and development expenditure u/s 35(2AB) of the Act at Rs.2,56,78,832/-. We, accordingly uphold the same and dismissed ground no.1 raised by the Revenue.

**Ground No.2:**

*“2.Whether the LD. CIT(A) has erred in law and on facts in deleting the disallowance of Rs. 9,97,920/- made by the AO on account of foreign exchange loss without appreciating the fact that the assessing officer had pointed out that the loss claimed by the assessee in the year of fluctuation in the rate of exchange Or the same is allowable only in the year' of repayment of such loans.”*

13. We find that the Ld. CIT(A) deleted the impugned disallowance for notional loss claimed on foreign exchange fluctuation at Rs.9,97,920/- observing as follows:

*“8. The ground of appeal has been raised against disallowance of Rs.9,97,920/- on account of loss claimed on foreign exchange fluctuation. The AO has discussed the issue at Para-7 on page 5 of the assessment order, where the AO has observed that the appellant has booked expenditure of Rs.9,97,920/- on 31.03.2009 on account of revaluation of liability of FCNRB loan taken from SBI in US dollar on 24.08.2008 for one year i.e. the loan was payable on 24.08.2009. It has been further observed that the assessee has taken a term loan of 2.25 corers from State Bank of India in the year 2005-06, which was payable in quarterly installment from 2006-07 to 2010-11 and the rate of Rs.1,70,84,500/- on 24.08.2008, This Rupee term loan was converted to FCNRB loan (USD 390000 @Rs.43.71/-) on 25.08.2008 at the interest rate of 9.11 % p.a. for a period of 12 months repayable on 24.08.2009. The outstanding balance of the said loan on 31.03.2009 was USD 335500 out of which the appellant booked a Forward contract for part amount i.e. USD 213750 @Rs.50.61/- on 31.03.2009 and was Rs.14,74,875/- (50.61 less 43.71=6.90X 213750+14,74,875/-). The AO is stated that since the liability for incurring this loss was crystallized, it is an allowable loss. However, the remaining loan amount of USD 141750 (USD 355500 less USD 213750) which was to be paid on 24.08.2009 in Indian Rupees at the prevalent exchange rate was an open part. On this open part the assessee has booked a loss of Rs.9, 97,920/ - on 31.03.2009 being the difference of USD rate on 31.03.2009 i.e. Rs. 50.75 and the rate on 25.08.2008 of Rs. 43.71 (7.04 X 141750 = 9,97,920). The AO then observed that the liability to incur this loss will be crystallized on 24.08.2009 and therefore the loss booked on 31.03.2009 was only provisional in nature,*

*which cannot be allowed. The AO stated that this in the spirit of section 43A of the IT Act and thus disallowed the same.*

*8.1 The appellant has covered this issue in various written submission and contended that the said loss was in respect of the open part of the FCNRB outstanding loan as on 31.03.2009 and was recognized as per the Accounting standard 11 issued by the Institute of Chartered Accountants of India. The appellant further contended that the said item is not covered by section 43A as the said loan liability was not incurred in connection with acquisition of any asset from a country outside India. It was argued that provision of section 43A will come into play only and only in a case where the liability in foreign exchange is incurred for acquiring any asset from a country outside India which is not the case here at all. It has also been contended that the said FCNRB loan was availed to reduce the interest cost from 13.75% to 9.11% on the existing rupee term loan. The appellant stated that the initial rupee term loan was also not availed for acquiring any asset from a country outside India. It has been contended by the appellant that such entries are necessitated in order to ascertain the correct profit of any accounting period. The particular loan liability is repayable in Dollar terms and therefore, the conversion rate as applicable on the last day of any accounting year will have to be applied to the closing balance of outstanding loan for arriving at the actual profit or loss of that accounting year. The appellant has offered income of Rs.5,64,300/- on account of foreign exchange fluctuation in respect of FCNRB demand loan for the immediately preceding assessment year. Therefore, depending upon the conversion rate as the last day of the year, there may be a profit and at times there may be loss.*

*8.2 In response to further issues raised by my predecessor on this very issue the appellant has made another submission vide letter dated 24.12.2012, which has already been abstracted above, wherein the*

*appellant has reiterated its contention and further stated that it has offered income on account of foreign exchange fluctuation of Rs.23,96,632/- for AY 2007-08 and Rs.45,84,114/- for AY 2008-09, which incomes stand accepted by the department. It is also pointed out that the income of Rs.45,84,114/- offered for AY 2008-09 also include a gain of Rs.5,64,300/- of similar nature in respect of FCNRB demand loan which was adjusted with the closing conversion rate as on 31.03.2008. Thus it has been argued that when an income was booked, it has been accepted and assessed by the department but when a loss is claimed in respect of the same issue, the same is disallowed by the department. The appellant has placed reliance on CIT V/s Woodward Governor India Pvt. Ltd. 312 ITR 254 (Supreme Court) and ONGC V/s CIT 322 ITR 180 (Supreme Court) and has filed the copies of both the judgments. In the written submission dated 24.12.2012 the appellant has explained that it has satisfied all the parameters laid down by the Apex Court in this behalf of (i) following mercantile system of accounting, (ii) principle of consistency, (iii) similar treatment to the gains that may accrue, (iv) The method adopted is as per nationally accepted Accounting Standard and (v) the system adopted is fair and reasonable and is not adopted only to reduce the incidence of taxes.*

*8.3 I have considered the reasons brought out by the AO in the assessment order while making the disallowance and also the submissions filed by the appellant. I have also gone through the decisions cited by the appellant on this issue. The undisputed fact is that the appellant has booked the loss of Rs.9,97,920/- in respect of its FCNRB loan liability on the basis of the foreign exchange currency rate prevailing at the year end. Such loan liability in foreign currency was availed by the appellant to take benefit of lower rate of interest on such loans when compared with the rate of interest applicable in respect of the existing rupee term loan. The AO, though has mentioned that the disallowance is in the spirit of section 43A, but has not made out any case of*

*applicability of section 43A. As per the clear language of this statutory provision, it can be applied only in case where the liability in foreign currency was incurred only for the purpose of conversion of existing rupee term loan into FCNRB loan with the object of reducing the interest cost.*

*8.4 This FCNRB loan was repayable on 24.08.2009 and the appellant following the prudent accounting policy and the Accounting Standard prescribed by the ICAI in this behalf, has booked the impugned loss on the basis of the foreign currency conversion rate as on the last day of the previous year. It is seen that the decision of Hon'ble Apex Court in CIT Vs Woodward Governor India Pvt. Ltd. reported as (2009) 312 ITR 254 (copy at page 151 to 164 of the paper book) clearly supports the appellants case, wherein it has been held:-*

*"There is no dispute in the previous year whenever the dollar rate stood reduced, the department taxed the gains which accrued to the assessee on the basis of accrual and it is only in the year in question when the dollar rate stood increase, resulting in loss that the department has disallowed the deduction / debit. This fact is important it indicates the double standard adopted by the department."*

*It has been concluded by the Honourable Apex Court that loss suffered by the assessee in respect of a revenue liability on account of exchange difference as , on the date of the balance sheet is an item of expenditure allowable u/« 37(1) in the year of accrual."*

*8.5. Similarly in the case of ONGC V/s CIT reported as (2010) 322 ITR 180, the Hon'ble Supreme Court has held that the assessee having maintained accounts on mercantile system of accounting, loss claimed by it on account of fluctuation in the rate of foreign exchange as on the date of balance sheet in respect of loans taken for*

*revenue purposes is allowable as expenditure u/s 37(1), notwithstanding the fact that the liability has not been actually discharged in the year in which the fluctuation in the rate of foreign currency has occurred Thus considering the facts of the instant case, I am of the opinion that the loss of Rs. 9,97,920/- claimed by the appellant is allowable and the disallowance made by the AO was not justified. Accordingly this ground of appeal is allowed.”*

14. The above detailed findings on fact by the ld. CIT(A) has not been controverted by the Ld. DR. The alleged notional loss has been claimed by the assessee in respect of the open part of the FCNRB outstanding losses as on 31.03.2009 and was recognized as per the Accounting Standard II issue by the ICAI so to provide true and fair financial statement as on the closing date of balance sheet i.e. 31.03.2009 and the assessee is regularly following mercantile system of accounting. The alleged notional loss is revenue neutral. Therefore, we are of the considered view that the instant issue is squarely covered in favour of assessee by the judgment of Hon'ble Apex Court in case of Oil & Natural Gas Corpn. Ltd(supra) which has been followed by the Ld. CIT(A) allowing the assessee's claim for notional loss for fluctuation in the rate of foreign exchange. Therefore, no interference is called for in the finding of Ld.

CIT(A). We uphold the same and dismiss ground no.2 of revenue's stands.

15. In the result, the appeal of the Revenue stands dismissed.

*Order was pronounced in the open court on 10.12.2018.*

Sd/-  
(KUL BHARAT)  
JUDICIAL MEMBER

Sd/-  
(MANISH BORAD)  
ACCOUNTANT MEMBER

Indore; दिनांक Dated : 10 /12/2018

*Patel. P. S./नि.स.*

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order  
**Assistant Registrar**