

आयकरअपीलीयअधिकरण, अहमदाबादन्यायपीठ 'D'- अहमदाबाद।

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD – BENCH 'D'

BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER
&SMT. MADHUMITA ROY, JUDICIAL MEMBER

आयकरअपीलसं.ITA No. 1458/Ahd/2017

निर्धारणवर्ष/Asstt. Year: 2014-15

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| Lincoln Pharmaceuticals Ltd. Lincoln House, B/h Satyam Complex, Science City Road, Sola Ahmedabad- 380060 PAN:AAA CL2 711 N | Vs. | DCIT Cir-2(1)(2), Ahmedabad |
| अपीलार्थी/ (Appellant) | | प्रत्यर्थी/ (Respondent) |

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|---------------|-----------------------------------|
| Assessee by : | Shri Vinod Tanwani, Sr. DR |
| Revenue by : | Shri Tushar Hemani, AR |

सुनवाईकीतारीख/Date of Hearing : 20/03/2019

घोषणाकीतारीख/Date of Pronouncement: 27/03/2019

आदेश/ORDER

PER MADHUMITA ROY- JM:

The instant appeal filed by the assessee is directed against the order dated 08.05.2017 passed by the CIT(A)-2 Ahmedabad arising out of the order dated 13.10.2016 passed by the DCIT Cir.-2(1)(2) Ahmedabad u/s. 143(3) of the Income Tax Act 1961 (hereinafter refer to as 'the Act') for assessment year 2014-15.

2. The assessee company engaged in manufacturing of drugs and pharmaceutical products filed its return of income on 29.11.2014 declaring total income of Rs. 11,14,65,960/- which was processed u/s. 143(3) of the Act. Upon scrutiny notice u/s. 143(2) dated. 28.08.2015 was issued followed by a further notice u/s. 143(2) r.w.s. 129 of the Act dated 14.06.2016 due to change of

incumbent. A further notice u/s. 142(1) of the Act dated 16.06.2016 followed by questionnaire dated 08.08.2016 was served upon the assessee.

3. The first ground relates to confirming of disallowance of Rs. 42,59,157/- u/s. 35(2AB) on research and development expenditure. The details as asked for was duly submitted by the assessee during the course of the assessment proceedings along with the supporting evidences including the certificate issued by the DSIR substantiating the claim of deduction of Rs. 3,30,87,157. According to the Ld. AO in terms of the DSIR certificate the assessee was eligible for deduction to the tune of Rs. 288.28 lakhs only and the excess claim of R & D expenses of Rs. 42,59,157 was directed to be explained by the assessee by the Ld. AO as to why the same would not be added to the income of the assessee. Ultimately such excess R & D expenses of Rs. 42,59,157/- was added to the total income of the assessee with the following observation :-

“In response, the assessee could not furnish any explanation in this regard. The deduction for the purpose of R&D u/s. 35(2AB) of the Income Tax Act is to be given only if the assessee is in receipt of 3CL and 3CM report certified by the DSIR. The DSIR in its certificate furnished has categorically specified the claim of deduction at Rs. 288.28 lacs for Research and Decelopment. It is pertinent to mention here that the deduction specified in Form No. 3CL and 3CM issued by the DSIR to be taken into consideration and binding on the department. In view of the above the excess claim of deduction u/s. 35(2AB) of the Income Tax Act as worked out above claimed by the assessee in its return of income amounting to Rs. 42,59,157/- (Rs. 3,30,87,157/- - Rs. 2,88,28,000) is disallowed and added to the total income of the assessee. Penalty proceedings u/s. 271(1)(c) of the Income Tax Act is hereby initiated separately for furnishing inaccurate particulars of income and thereby concealing particulars of income by the assessee.”

4. In appeal the Ld. CIT(A) confirmed the same considering the decision taken by his predecessor in assessee's own case for assessment year 2014-15 with the following observation:

“ Decision:
3.3. I have carefully considered the facts of the case, assessment order and submission of the appellant. The AO has made the disallowance of the weighted deduction claimed by the appellant u/s. 35(2AB) of the I. T. Act, 1961 amounting to Rs, 42,59,157/-. As per the AO, the DSIR Certificate for deduction was at Rs.288.28 lacs, while in the computation of income, the

appellant has claimed the weighted deduction of Rs.3,30,87,157/-. Thus, there was short approval of the DSIR Certificate, and therefore, the excess claim of deduction made by the appellant was disallowed.

3.4 On going through the facts of the case, it is noticed that identical issue on similar facts has been decided by this office in appellant's own case for immediately preceding year i.e. A. Y. 2013-14 vide Appellate Order No. CIT(A)-2/329/AC. Cir. 2(1) (2)/2015-16 dated 14/06/2016, whereby the ground has been decided against the appellant. The relevant findings given are reproduced hereunder:-

“3-3. Decision:

I have carefully considered the facts of the case, the assessment order and the written submission of the appellant. The AO has made the disallowance of the weighted deduction claimed by the appellant u/s. 35(2AB) of the I. T. Act, 1961 amounting to Rs.19,62,0007-. The disallowance was made for the reason that the certificate issued, by DSIR in the form of 3CL and 3CM, it has categorically been specified the deduction at Rs.368.93 lacs for research and development, while the claim of the appellant was at Rs.388.55 lacs towards revenue and capital expenditure. In other words, the excess claim made by the appellant at Rs. 19.62 lacs was disallowed as the same was less certified by the. DSIR in the certificate issued in this regard.

3.4. On the other side, the appellant has claimed that there was no dispute with regard to the amount of expenditure or the nature of expenditure. The appellant further submitted that the AO has failed to appreciate the fact that expenditure on clinical trial and expenditure on professional fee for registration under the Patent Act be incurred in an in-house facility and therefore needs to be incurred outside. The expenditure on repairs of R & D Building is also very much allowable as the same is for the purpose of maintaining the in-house R & D facility. It has also relied upon the various judgments.

*3.5. Having considered the facts and submission, it has been noticed that the appellant has claimed the R & D Expenditures at Rs.388.55 lacs, but after examination of the details and submissions, the competent authority i.e. DSIR has only certified the expenditure for R & D at Rs.368.93 lacs in the certificate issued by it. It means on examination, the expenditure to the tune of Rs.19.62 lacs was found to be not relating to the R & D Expenditure, as envisaged u/s. 35(2AB) of the I. T. Act. Thus, the approval of the DSIR in respect of the expenditure at Rs.368.93 lacs is only allowable expenditure u/s. 35(2AB) of the I. T. Act as has been communicated by the DSIR to the DG / DI (Exemption). Thus, the qualification of the amount in the DSIR certificate has the sanctity and would be relevant for granting the deduction u/s. 35(2AB) of the I. T. Act, 1961 as has been held by **Hon'ble ITAT, B Bench, Hyderabad in the case of Electronics Corporation of India Ltd. Vs. ACIT in ITA No. 1106/Hyd/2011 dated 25/09/2012.** The relevant findings of the decision is reproduced as under:-*

"17. As per the provisions of section 35(2AB) of the Act as applicable to the relevant Assessment Year, the expenditure incurred by the assessee in any approved in-house research facility, to the extent of approved by the prescribed authority, is entitled to weighted deduction of 150% of such approved expenditure. Therefore; the expenditure as approved by the DSIR in the certificate given by them in Form 3CL alone is to be granted weighted deduction. The DSIR in their certificate has certified expenditure eligible for weighted deduction as Rs.3,126.02 lakhs. Therefore, it is not for either the assessing authority or the appellate authority to decide on the expenditure which will be entitled to weighted deduction u/s. 35(2AB). In fact, u/s. 35[2BA)(3J, if any question arises u/s. 35 as to whether and if so, what extent any activities constitutes or constituted or any asset was used for scientific research, the matter should be referred to the appropriate authority whose decision will be final. In this case the appropriate authority is the DSIR. Therefore once the DSIR has certified the quantum of eligible R & D expenditure for the purposes of weighted deduction u/s. 35(2AB) the figure cannot be tampered by ITAT. Even if the assessee is right in that there is a mistake in the certificate issued by the DSIR, which we don't know, the same can only be rectified by DSIR and not the ITAT in appellate proceedings. We, therefore, uphold the decision of lower authorities in restricting the weighted deduction u/s. 35(2AB) to Rs.46,89,03 lakhs and disallowing sum of Rs.1,69,73,987/- out of the claim made by the assessee. We, however, direct that in case DSIR corrects the amount of research and development expenditure on which the assessee is entitled weighted deduction for the assessment year under appeal, corresponding weighted deduction u/s. 35(2AB) shall be granted on receipt of the clarification from DSIR. Consequently if the assessee is able to prove that any amount of expenditure in their in-house research and development facilities was omitted to be considered by the DSIR for weighted deduction the same may be allowed as a deduction u/s. 37 of the Act. With this observation we dismiss the appeal of the assessee on this issue."

3.6 It has been noticed that the case laws relied upon by the appellant are not applicable over the facts of the case. In view of the aforesaid discussion, the disallowance of the excess claim of the expenditure made by the AO is found correct and justified, and hence, the same is confirmed. The ground of appeal is dismissed."

5. At the time of hearing of the instant appeal the Ld. Counsel appearing for the assessee submitted before us that in ITA Nos. 2114/Ahd/2016 and 2294/Ahd/2016 the Hon'ble Tribunal was pleased to set aside the identical issue for assessment year 2013-14 as relied upon by the Ld. CIT(A) to the file of the Ld. AO to decide the same afresh in accordance with law. A copy of the said order

was also filed before us. In that view of the matter the order passed by the Ld. CIT(A) is of no consequence and thus the matter be sent to the Ld. CIT(A) with the same observation as made by the Coordinate Bench in ITA No. 2294/Ahd/2016 as also submitted by the Ld. AR.

On the contrary the Ld. DR failed to rebut the contentions made by the Ld. AR.

6. We have heard the Ld. Counsel appearing for the parties, we have also perused the relevant materials available on record. We have also carefully considered the order passed by the Hon'ble Tribunal in ITA No. 2114/Ahd/2017 and ITA No. 2294/Ahd/2016. While disposing of the matter the Hon'ble Tribunal observed as follows:

“6. When this issue came up for hearing before us, without prejudice to learned counsel's arguments on merits of original claim, it was submitted that the expenses being in bonafide furtherance of its legitimate business interests is not in doubt, and, therefore, the Assessing Officer should at best restrict the disallowance to capital expenditure but allow depreciation thereon nevertheless. It was also submitted that so far as revenue expenditure is concerned, the Assessing Officer should consider its deducibility under section 37(1). Learned Departmental Representative submitted that he has not objection to the claim of the assessee being re-examined in this light but prayed that the matter should be restored to the file of the Assessing Officer for fresh adjudication so that the matter may be properly examined. Learned counsel for the assessee does not oppose this submission. In the light of these discussions, and bearing in mind entirety of the case, we deem it fit and proper to remit the matter to the file of the Assessing Officer for fresh adjudication in accordance with the law, by way of a speaking order, in the light of the above observations and after giving yet another opportunity of hearing to the assessee. Ordered accordingly.”

7. Respectfully following the judgment passed by the Ld. Tribunal we set aside the issue to the file of the Ld. AO for fresh adjudication of the same as directed by the Coordinate Bench mentioned herein above.

8. Hence, assessee's appeal is allowed for statistical purposes.

9. The second grounds of appeal relates to confirmation of disallowance of Rs. 7,12,464/- being 12.5% out of total disallowance of Rs. 56,99,710/- of the sales promotion expenses. During the course of assessment proceeding the assessee was asked submit evidences in respect of his claims of sales promotion and marketing expenses; the expenses towards gift articles to chemist, stockists and retailers etc. The details including the names, address and the gift items though directed to be furnished by the Ld. AO the complete address of the parties and the details of the schemes under which those gifts were distributed during the year including the details of targets and the achievements of the stockists, retailers and chemists were failed to be furnished by the assessee. Ultimately the Ld. AO relied upon a circular being No. 5 of 2012 issued by the CBDT disallowed Rs. 56,99,710/- u/s. 37 (1) of the Act towards gift articles claimed to have been distributed by the assessee to the stockists, retailers and distributors treating the same as a gifts to the doctors. In appeal the Ld. CIT(A) relying upon the order passed by his predecessor for A.Y. 2013-14 restricted such disallowance of sales promotion expenses to the tune of Rs. 7,12,464/- being 12.5% of the total sales promotion expenses of Rs. 56,99,710/-. Hence, the appeal before us.

10. At the time of hearing of the instant appeal the Ld. Representative of the assessee submitted before us that the order passed by the Ld. CIT(A) in assessee's own case for A.Y. 2013-14 was also deleted by the Hon'ble Tribunal in appeal preferred by the assessee in ITA Nos. 2114/Ahd/2016 and 2294/Ahd/2016 for A.Y. 2013-14. He, therefore, prayed for same relief before us.

On the contrary the Ld. DR relied upon the order passed by the authorities below.

11. We have heard the rival contentions made by the respective parties, we have also perused the relevant materials available on record. We have further carefully considered the judgment passed in ITA Nos. 2114/Ahd/2016 and 2294/Ahd/2016

for A.Y. 2013-14. While disposing of the identical issue the Coordinate Bench observed as follows:-

“7. *The only other issue in this appeal, i.e. first additional ground of appeal by the assessee, is as follows:*

The learned CIT(A) has erred, both in law and on facts, in partly confirming the disallowance of the sales promotion expenses to the tune of Rs 10,57,363 being 12.5% of total sales promotion expenses of Rs 84,58,904. In the facts and circumstances of the case, entire disallowance ought to have been deleted.

8. *In a connected grievance raised in the appeal filed by the Assessing Officer, which we must take up alongwith the above ground of appeal, grievance raised is as follows:*

The learned CIT(A) has erred in law and on facts in restricting the disallowance of made under section 37(1) of the Act to Rs 10,57,363 as against Rs 85,58,904, without properly appreciating the facts of the case and the material on record.

9. *The relevant material facts are as follows. During the course of assessment proceedings, the Assessing Officer noticed that the assessee has, as put by the Assessing Officer himself in the assessment order, "the assessee has shown Rs 84,58,904 as gift items to chemists, retailers and retailers". As the Assessing Officer himself puts it, "the assessee was asked, vide order sheet entry dated 27.01.2016, to submit the names, addresses and details of the gift items to chemists, stockists and retailers as claimed by the assessee and the various schemes under which the same have been given and the description of gifts that have been given". It was noted that some of these gifts were things like gold rings and gold chains and that "despite several opportunities, the assessee has not submitted complete names and addresses of various stockists, retailers and chemists to whom the gifts have been given during the year". The Assessing Officer thus proceeded on the presumption that these gifts were actually given to the doctors and were inadmissible as deduction under section 37(1) being in violation of the Medical Council of India guidelines. The disallowance of Rs 84,58,904 was accordingly made. In appeal, learned CIT(A) noted that complete details of recipients were placed on record by the assessee, no were discrepancies found therein and the disallowance was made on the basis of a presumption rather than factual finding. On a rather contradictory note, however, he also observed that "for want of verification due to improper maintenance of accounts in supply of gift articles, it would be fair and reasonable to confirm the disallowance @ 1 2.5% of the purchase and the same is confirmed, which comes to Rs 1 0,57,363". None of the parties is satisfied. While Assessing Officer is aggrieved of the disallowance being restricted to Rs 10,57,363, the assessee is aggrieved of the disallowance of Rs 10,57,363. Both the parties are in appeal before us.*

10. *Having heard the rival contentions and having perused the material on record, we are unable to find any justification, save and except for the*

suspicion that these gifts may have found their way to the doctors, for the impugned disallowance. The scheme under which the gifts were given were placed on record even before the Assessing Officer and no defects were pointed out therein. We have also noted that complete details of the recipients were on record before the CIT(A) and no perversity is even alleged in these factual findings of the CIT(A). In these circumstances, we are of the considered view that the disallowance of Rs. 64,58,904 ought to have been deleted in entirety. We, therefore, reject the grievance of the Assessing Officer and accept that of the assessee. The disallowance stands deleted in entirety and the assessee will get further relief, by way of deduction of Rs. 10,57,363 accordingly.

11. In the result, the appeal of the assessee is partly allowed, as above, and the appeal of the Assessing Officer is dismissed. Pronounced in the open court today on the 4th day of March, 2019.”

12. We have also gone through the order passed by the Ld. CIT(A) wherein we find that the entire details including the scheme were placed before the Ld. CIT(A). Particulars of the expenses in question were submitted before the authorities below along with the copies of relevant invoices; the list and confirmation of stockists to whom such gifts were given was also on record which has not been controverted by the Ld. CIT(A). In that view of the matter respectfully following the judgment passed by the Coordinate Bench in ITA Nos. 2114/Ahd/2016 and 2294/Ahd/2016 for A.Y. 2013-14 we delete the disallowance in entirety.

13. In the result, assessee's this ground of appeal is allowed.

[Order pronounced in the Court on 27-03-2019.]

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER

Ahmedabad; Dated 27/03/2019

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आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. संबंधितआयकरआयुक्त/ Concerned CIT
4. आयकरआयुक्त(अपील) / The CIT(A)

5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण/ DR, ITAT,
6. गार्डफाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, अहमदाबाद / ITAT, Ahmedabad