

आयकर अपील अाधिकरण, अहमदाबाद ँयायपीठ  
IN THE INCOME TAX APPELLATE TRIBUNAL,  
"B" BENCH, AHMEDABAD

BEFORE, SHRI WASEEM AHMED, ACCOUNTANT MEMBER  
And

Ms. MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./ITA No.2633/AHD/2015

अाधायण वष/Asstt. Year: 2012-2013

M/s. Rotofilt Engineers Ltd., Plot No.102, Phase-GIDC Industrial Estate, Opp. Torrent Power Station, Vatva Ahmedabad.  PAN: AABCR3882K	Vs.	D.C.I.T., Circle-3(1)(2), Ahmedabad.
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आयकर अपील सं./ITA No.3205/AHD/2016

अाधायण वष/Asstt. Year: 2012-2013

D.C.I.T., Circle-3(1)(2), Ahmedabad.	Vs	M/s. Rotofilt Engineers Ltd., Plot No.102, Phase-GIDC Industrial Estate, Opp. Torrent Power Station, Vatva, Ahmedabad.  PAN: AABCR3882K
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(Applicant)		(Respondent)
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Assessee by :	Ms. Arti Shah, A.R
Revenue by :	Shri Mudit Nagpal, Sr.DR

सुनवाई का ताराख/Date of Hearing : 11/07/2019

घोषणा का ताराख /Date of Pronouncement: 31/07/2019

**आदेश/O R D E R**

**PER WASEEM AHMED, ACCOUNTANT MEMBER:**

The captioned cross-appeals have been filed at the instance of the Assessee and Revenue against the orders of the Learned Commissioner of

Income Tax (Appeals)-9, Ahmedabad [Ld.CIT(A) in short], dated 24/07/2015 02/09/2019 arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dated 17/02/2015 relevant to Assessment Year (A.Ys) 2012-13.

First, we take ITA No. 2633/Ahd/2015 for A.Y. 2012-13. The assessee has raised the following grounds of appeal:

- 1. The Learned Commissioner of Income Tax, (Appeals)-9 Ahmedabad has erred in law and on facts of the case in not allowing depreciation of Rs.26,26,717/- u/s. 32 of the I.T. Act, 1961.*
- 2. Your Applicant prays to reserve the right to add, alter, amend and/or withdraw any of the above grounds of appeal.*

The assessee vide letter dated 14<sup>th</sup> September 2018 has also filed the additional ground of appeal as reproduced under:

- 1. The learned A.R. has erred in law and facts of the case in not allowing the claim of deduction u/s 35(2AB) of Rs.4,27,06,806/- in respect of in-house R & D work carried out by the assessee.*
- 2. Your appellant prays to reserve the right to add, alter, amend and/or withdraw any of the above grounds of appeal.*

The issue raised by the assessee in the ground of appeal and the additional ground of appeal is interconnected. Therefore, we have clubbed both the grounds for the sake of convenience and the adjudication.

2. The brief facts of the case are that the assessee claimed the deduction under section 35 of the Act for the cost of machinery utilized in the scientific research activity. Accordingly, the assessee in the statement of income disallowed the depreciation at its own and claimed the deduction under section 35 of the Act. However, the assessee during the year withdrew its claim under section 35 of the Act and accordingly it sought to claim the benefit of depreciation on such machinery. However, now the assessee in the

appeal before us wishes to claim the deduction under section 35 of the Act. Thus, both the issues are interconnected. In this backdrop of the facts of the case, the submission of the assessee goes as under:

3. The learned AR at the outset regarding the additional ground of appeal submitted that all the facts relating to the claim of the deduction under section 35 of the Act are available on record.

3.1 The learned AR also claimed that the deduction claimed under section 35(2AB) of the Act was withdrawn during the assessment proceedings on the misunderstanding of the approval granted by the Department of Scientific Research Institute wherein it was mentioned that the sanction is valid from 1<sup>st</sup> April 2012 to 31<sup>st</sup> March 2016. Whereas, the assessee is entitled to the deduction even before the date of the approval as held in the judgment of Honøble Jurisdictional High Court in the case of Banco products India Ltd versus the CIT reported in 95 taxmann.com 132.

In view of the above, the learned AR before us prayed for the admission of the additional ground of appeal and set aside the same to the AO for fresh adjudication.

4. On the other hand, the learned DR submitted that the issue raised by the assessee in the additional ground of appeal is factual in nature. Therefore the same cannot be admitted at the stage of Honøble ITAT. Moreover, the assessee itself has withdrawn its claim during the assessment proceedings. Accordingly, the learned DR vehemently objected on the admission of the additional ground of appeal raised by the assessee.

5. The learned AR in her rejoinder submitted that the assessee is entitled to raise the factual ground of appeal if the related facts to the issue are available on record. Accordingly, the learned AR also drew our attention to the assessment order, where the discussion regarding the impugned issue was recorded/ discussed in detail. The learned AR in support of her contention relied on the order of this tribunal in the case of Adani power Ltd versus CIT reported in 61taxmann.com 355.

5.1 The learned AR also claimed that the assessee is also entitled to raising the issue before the higher forum despite the fact the same was withdrawn before the authorities below.

6. We have heard the rival contentions of both the parties and perused the materials available on record. The assessee in the instant case has claimed the deduction for Rs.4,27,06,806/- under section 35(2AB) of the Act. But the same was withdrawn during the assessment proceedings on the reason that it was not entitled to the deduction under section 35(2AB) of the Act for the year under consideration as the approval granted by the Department of scientific research Institute was effective from the year 1<sup>st</sup> April 2012 to 31<sup>st</sup> March 2016 whereas the impugned deduction relates to the PY 2011-12.

6.1 Admittedly, the issue raised by the assessee in the additional ground of appeal relates to the factual dispute which was discussed in the assessment order. As such the assessee claimed the deduction under the provisions of section 35 2 AB of the Act in its return of income which was disputed by the AO in the assessment proceedings. But the same was withdrawn by the assessee on the misunderstanding of the period of approval granted by the Department of scientific research Institute as claimed by the learned counsel

for the assessee. This fact can be verified from the submission of the assessee made before the AO during the assessment proceedings as detailed below:

*2. The company is withdrawing the deduction u/s.35(2AB) only on its sanction date in From NO.3CM being from 1<sup>st</sup> April, 2012 too 31<sup>st</sup> March, 2016 and not otherwise. However, company urges the tax authorities to look into the matter and allow deduction if available on the basis of company's activity and submission of application to DSIR before F.Y. 2012-13, which will boost the morale of SMES and research oriented companies."*

From the above, it is evident that the order of the AO aggrieved the assessee for not availing the deduction under section 35(2AB) of the Act for the reasons discussed above. However, the assessee at the stage of pendency of the appeal before the ITAT on some other ground came to know that it is entitled to the deduction under section 35(2AB) of the Act. Accordingly, the assessee filed the additional ground of appeal before us. Thus it is clear that the issue on the deduction under section 35(2AB) has already been disputed before the AO and the relevant facts were available before him AO. As such, the assertion of the assessee is not a fresh claim which was not made in the income tax return. Therefore we are of the view that the assessee being aggrieved is entitled to raise the ground in the instant case.

6.2 Before parting, we find pertinent to mention that the assessee is also entitled to raising the ground of appeal before the higher forum despite the fact it was withdrawn before the authorities below in the given facts and circumstances. It is because the impugned issue was subject matter of the dispute before the AO. In view of the above, we are inclined to admit the ground of appeal raised by the assessee.

6.3 However, we note that the assessee had not raised its points of contention before the AO as the same was withdrawn. Therefore, in the interest of justice and fair play, we are inclined to refer the matter to the file of the AO for fresh adjudication as per the provisions of law.

6.4 It is also pertinent to note that the other issue raised by the assessee in the memo of appeal for claiming the depreciation amounting to 26,26,717.00 under section 32 of the Act is dependent and connected with the additional ground of appeal raised by the assessee as discussed above. Therefore, we are of the view that this issue also needs to be set aside to the AO for fresh adjudication as per the provisions of law.

6.5 Hence, the issue raised by the assessee in the ground of appeal and additional ground of appeal is allowed for the statistical purposes.

**Now coming to the penalty appeal filed by the Revenue bearing ITA 3205/AHD/2016**

7. At the outset, we note that the quantum appeal filed by the assessee bearing ITA No. 2633/AHD/2015 has been restored to the file of the AO for fresh adjudication in the preceding paragraph bearing number 6 of this order. For the detailed discussion, please refer to the relevant paragraph.

7.1 As the impugned penalty appeal is arising out of the quantum appeal bearing ITA No. 2633/AHD/2015 which has been restored to the file of AO for fresh adjudication as discussed above, then in our considered view, the penalty appeal filed by the Revenue becomes infructuous. Accordingly, we dismiss the same.

8. In the result, the appeal of the assessee is allowed for statistical purposes, and the appeal filed by the Revenue is dismissed.

**Order pronounced in the Court on 31/07/2019 at Ahmedabad.**

**-Sd-  
(Ms. MADHUMITA ROY)  
JUDICIAL MEMBER**

**-Sd-  
(WASEEM AHMED)  
ACCOUNTANT MEMBER**

(True copy)  
Ahmedabad; Dated 31/07/2019  
*Manish*