

**IN THE INCOME TAX APPELLATE TRIBUNAL "K", BENCH  
MUMBAI**

**BEFORE SHRI M. BALAGANESH, AM  
&  
SHRI RAVISH SOOD, JM**

**ITA No.5651/Mum/2017  
(Assessment Year :2013-14)**

M/s. Glenmark Pharmaceuticals Ltd., Glenmark House, HDO Corporate Builng Wing A,B,D. Sawant Marg Chakala, Opp. Western Express Highway, Andheri (East), Mumbai – 400 099	Vs.	Asst. Commissioner of Income Tax – LTU-2, 29 <sup>th</sup> Floor, Centre-I World Trade Centre Cuffe Parade, Mumbai – 400 005
<b>PAN/GIR No. AAACG2207L</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

**ITA No.5841/Mum/2017  
(Assessment Year :2013-14)**

Asst. Commissioner of Income Tax – LTU-2, 29 <sup>th</sup> Floor, Centre-I World Trade Centre Cuffe Parade, Mumbai – 400 005	Vs.	M/s. Glenmark Pharmaceuticals Ltd., Glenmark House, HDO Corporate Builng Wing A,B,D. Sawant Marg Chakala, Opp. Western Express Highway, Andheri (East), Mumbai – 400 099
<b>PAN/GIR No. AAACG2207L</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	Shri Anuj Kisnadwala
Revenue by	Shri Anand Mohan
<b>Date of Hearing</b>	<b>11/07/2019</b>
<b>Date of Pronouncement</b>	<b>21/08/2019</b>

**आदेश / O R D E R**

**PER M. BALAGANESH (A.M):**

These cross appeals in ITA Nos.5651/Mum/2017 & 5841/Mum/2017 for A.Y.2013-14 arise out of the order by the Id. Commissioner of Income Tax (Appeals)-56, Mumbai in appeal No.CIT(A)-56/ACIT-LTU-2/2016-17/312-G dated 22/06/2017 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) r.w.s. 144C of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 18/01/2017 by the Id. Asst. Commissioner of Income Tax, LTU-2, Mumbai (hereinafter referred to as Id. AO).

**ITA No. 5651/Mum/2017 – Asst Year 2013-14 – Assessee Appeal**

2. The first issue to be decided in this appeal is as to whether, the Id CITA was justified in confirming the action of the Id AO in disallowing the weighted deduction u/s 35(2AB) in the sum of Rs 8,27,97,000/- on the ground that amount was not approved by DSIR, in the facts and circumstances of the case.

3. We have heard the rival submissions and perused the materials available on record including the judicial pronouncements that were referred to by both the parties at the time of hearing before us. We find at the outset, the Id AO had not doubted the genuineness of incurrance of this expenditure together with its purpose. This is evident from the fact that the Id AO had granted deduction to the assessee u/s 35 of the Act but had only denied the weighted deduction claimed by the assessee u/s 35(2AB) of the Act on the ground that DSIR is the only authority to approve the expenses made by the assessee company towards scientific research and accordingly the expenses thereon to the extent approved by DSIR shall be eligible for weighted deduction. Therefore, the Id AO observed that the amount which is not approved by DSIR in the sum of

Rs 827.97 lacs shall not be eligible for weighted deduction u/s 35(2AB) of the Act. The Id CITA upheld the action of the Id AO. We find that once the facility is approved by DSIR, the assessee is entitled for weighted deduction u/s 35(2AB) of the Act and there is no requirement as per the Act that the expenses need to be approved by DSIR. In this regard, the amendment has been brought in Rule 6(7A) of the IT Rules with effect from 1.7.2016 that even the expenses need to be approved by DSIR. Since this is applicable only from Asst Year 2017-18 onwards, the same cannot be made applicable for Asst Year 2013-14. We find that this issue is no longer res integra and is covered by the decision of this tribunal in the case of Inventia Health Care Pvt Ltd vs DCIT in ITA No. 5350/Mum/2014 for Asst Year 2010-11 dated 26.8.2016 wherein it was held as under:-

*“5.1. We have further considered the rival submissions of either side and perused the relevant materials on record, including the orders of the authorities below as regards the addition/disallowance made by the A.O u/s 35(2AB) of the “Act” and are unable to find ourselves to be in agreement with the observations of the lower authorities, to the extent the latter had concluded that the entitlement of the assessee company as regards weighted deduction u/s 35(2AB) of the “Act” is liable to be restricted to Rs.7,37,17,242/-, i.e on the basis of the amount approved by the „Ministry of Science & Technology”, as against the claim of Rs. 7,50,95,242/- raised by the assessee company as per its financial statements, for the reason as had weighed with them, the entitlement of the assessee company is statutorily required to be in parity and cannot exceed the amount computed on the basis of the figures which were approved by the 'Prescribed authority". We are of the considered view that the lower authorities had absolutely misconceived and misinterpreted the scope and gamut of the weighted deduction contemplated u/s 35(2AB) of the “Act”. That as per the mandate of Sec. 35(2AB) of the “Act”, an eligible assessee company which incurs any expenditure on in-house research and development facility (not being expenditure in the nature of cost of any land or building) as approved by the prescribed authority, is entitled for deduction contemplated therein, subject to the condition that it enters into an agreement with the prescribed authority for co-operation in such research & development facility and audit of the accounts maintained for that facility, and*

*submits with the "Prescribed authority" by 31<sup>st</sup> day of October of the relevant assessment year the details as regards the expenditure incurred by it on the in-house research and development facility, on the basis of which the „Prescribed authority" records its approval and submits the details of the expenditure approved to the "Director General (Exemptions)" in "Form 3CL". Thus a bare perusal of Sec. 35(2AB) reveals that what is required to be approved by the „Prescribed authority" is the "in-house R & D facility", and not the „amount of expenditure incurred by R&D approved unit". That for the sake of clarity the relevant extract of Sec. 35(2AB) is reproduced as under:-*

*"Sec. 35(2AB). Where a company engaged in the business of .....incurs any expenditure on scientific research.....on in-house research and development as approved by the prescribed authority then, there shall be allowed a deduction [of a sum equal to one and one-half times of the expenditure so incurred].*

*Thus in light of the aforesaid clearly worded statutory provision, it stands inescapably gathered beyond any scope of doubt that Sec. 35(2AB) though postulates approval by the prescribed authority of the "in-house R & D facility", however the same nowhere provides that the amount of deduction shall be regulated and restricted on the basis of the amount approved by the „Prescribed authority". That our aforesaid view is fortified by the order of the Hon'ble Ahmedabad bench of the Tribunal, in the case of :*

**ACIT Vs. Torrent Pharmaceuticals Ltd.**

**[28 CCH 783(2009)]**

*wherein the Tribunal observing that the amount of expenditure approved by the "Prescribed authority" in „Form 3CL" will not have any bearing as regards the allowability of the weighted deduction in the hands of the eligible assessee company, held as under:-*

*"Thus there was no justification in harping upon the figure contained in Form 3CL as is done by the Assessing Officer. The provisions of the Act does not contain any specific conditions for the allowance of expenditure to the effect that it will be restricted to that contained in Form 3CL"*

*We find ourselves to be in agreement with the aforesaid order of the co-ordinate bench of the Tribunal, and thus in light of our aforesaid observations set aside the findings of the lower authorities that the entitlement of the assessee company towards weighted deduction u/s 35(2AB) is liable to be restricted to the extent the in-house research and*

*development expenditure incurred by the assessee company is approved by the prescribed authority.*

*Now, adverting to the observations of the CIT(A) that the assessee company had failed to substantiate as to how the expenses pertaining to rent, repair expenditure and legal and professional charges had been incurred in the course of the scientific research activities of the assessee company, we are of the considered view that such a stray observation recorded for the first time by the CIT(A), without even confronting the same to the assessee, at the threshold on the said count itself is liable to be vacated. However, independent of the aforesaid factual position, the Ld. A.R submitted before us that as the rent and repair expenditure so claimed by the assessee company as forming part of the eligible amount entitled for claim of deduction u/s 35(2AB) of the „Act“, in itself pertained to the premises at which the research and development facility was located, as well as the legal and professional charges had been incurred in the course of and to facilitate the scientific research, therefore the said nature of the expenses read in light of the underlying purpose behind incurring of the same, ipso facto established beyond any scope of doubt the inextricable nexus of the said expenses and the scientific research activities of the assessee company, as regards which no infirmity had ever been pointed out by the A.O.*

*The Ld. A.R in support of his aforesaid contention placed reliance on the order of a coordinate bench of the Tribunal in the case of :-*

**USV Ltd. Vs. DCIT, Central Circle-32, Mumbai  
(2012) 24 taxmann.com 218 (Mum)**

*wherein it was held:*

*"The repairs, rent, etc., the expenditure incurred relating to R & D premises cannot form part of cost of land or building. In the absence of any fact that the said claim of the assessee aggregating to Rs. 62,00,689/- , is not the expenditure on rents, rates and taxes relating to R &D premises, we are of the considered view that the said expenditure has to form part of weighted deduction as per section 35(2AB) of the Act"*

*We thus in light of the aforesaid facts and settled position of law, find ourselves to be in agreement with the Ld. A.R and are of the considered view that as the aforesaid expenses had been incurred by the assessee company on the scientific research pertaining to its business of*

*manufacturing pharmaceutical formulations (not being expenditure in the nature of cost of any land or building) on in-house research and development facility approved by the prescribed authority, therefore the same in the absence of any fact which could go to prove that the said claim of expenditure by the assessee company on rent and repairs does not pertain to the R &D premises, or the professional and legal charges has no nexus with the scientific research of the assessee company, thus stands duly eligible for claim of weighted deduction u/s 35(2AB) of the "Act". Thus in light of our aforesaid observations, the disallowance of Rs. 13,78,000/- (supra) so made by the A.O is set aside, and the Ground of appeal No.3 & 4" so raised by the assessee company are allowed.*

3.1. We find that similar views were expressed by the co-ordinate bench of Pune Tribunal in the case of Cummins India Ltd vs DCIT reported in (2018) 96 taxmann.com 576 (Pune Trib) dated 15.5.2018 for Asst Year 2009-10 .

3.2. We also find that the Hon'ble Gujarat High Court in the case of CIT vs Claris Lifesciences Ltd reported in 326 ITR 251 (Guj) had also observed as under:-

*"8. 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 section 35(2AB) of the Act by the assessee.*

*9. We are, therefore, of the view that no substantial question of law arises out of the order of the Tribunal. This appeal is, therefore, dismissed."*

3.3. Respectfully following the aforesaid judicial precedents, we direct the Id AO to grant weighted deduction u/s 35(2AB) of the Act in the sum of Rs 8,27,97,000/- to the assessee. Accordingly, the Ground No. 1 raised by the assessee is allowed.

4. The last issue to be decided in this appeal is as to whether the Id CITA was justified in confirming the action of the Id AO in disallowing expenses amounting to Rs 25,73,08,067/- u/s 37(1) of the Act in the facts and circumstances of the case.

4.1. We have heard the rival submissions and perused the materials available on record including the judicial pronouncements that were referred to by both the parties at the time of hearing before us. We find that the Id AO had observed that these expenses were incurred by the assessee company for providing freebies to medical practitioners and their professional associations in violation of the regulations issued by the Medical Council of India (MCI) which is a regulatory body constituted under the Medical Council Act, 1956. The Id AO accordingly concluded that the said expenditure was incurred for a purpose which is either an offence or prohibited by law. He noted that the regulations issued by the MCI were made effective from 10.12.2009 and subsequently the CBDT had issued a Circular No. 5/2012 dated 1.8.2012 . We find that the Id AO had noted in his order that the assessee had furnished details vide letter dated 7.12.2016 in a tabular form together with the relevant supporting evidences in a separate Box File duly mentioning the page numbers thereon, which are reproduced in pages 23 to 26 vide para 7.7 of his order. It was also pointed out by the assessee before the Id AO that the MCI guidelines are applicable only to doctors / medical practitioners and their professional associations from inter alia, accepting gifts, travel facilities, hospitality , cash or monetary grants (freebies) from the pharmaceutical and allied health sector industries. It was pleaded that such restrictions imposed by the said MCI guidelines are not applicable to the pharma companies such as assessee. We find that the Id AO in para 7.9 of his order had observed that on perusal of the various

details of expenses given by the assessee with supporting documents, it could not be made out whether expenses were incurred in connection with medical practitioner or other entities as mentioned in MCI regulations. Therefore, the assessee was asked to furnish the details in this regard. The assessee vide letter dated 7.12.2016 stated that no expenses were incurred which are covered in MCI regulations and hence there are no further details to be submitted in that regard. The Id AO observed that the assessee had not furnished details of expenses in the nature of freebies and gifts etc incurred in relation to in-house medical practitioners. We find that the Id AO on perusal of various details submitted by the assessee came to the conclusion that there are certain expenses made to medical practitioners which are liable to be disallowed u/s 37(1) of the Act in view of MCI guidelines and CBDT circular no. 5/2012. He observed that in Asst Year 2011-12, the assessee had incurred sales promotion expenses of Rs 15.3 crores out of total turnover of Rs 1162.94 crores which worked out to 1.32% and accordingly he applied the same 1.32% on current year turnover and disallowed a sum of Rs 25,73,08,067/- as expenses incurred towards freebies and gifts to medical practitioners on an estimated basis and disallowed the same u/s 37(1) of the Act.

4.2. We find that the Id CITA observed that the CBDT Circular No. 5/2012 was dated 1.8.2012 and accordingly applicable for the Asst Year 2013-14 and hence upheld the action of the Id AO.

4.3. We find that the Id AR submitted that the MCI regulations are applicable only for medical practitioners and cannot be made applicable to pharma companies such as assessee and it was also submitted that receiving of gifts by doctors is prohibited by MCI guidelines, the giving of

such gifts by pharma companies is not prohibited by law. It was submitted that giving of small gifts bearing company logo to doctors does not tantamount to giving gifts to doctors but it is regarded as advertisement expenses. As regards sponsoring doctors for conferences and extending hospitality, pharmaceutical companies have been sponsoring practicing doctors to attend prestigious conferences so that they gather contemporary knowledge about management of certain illness / disease and learn about newer therapies. Reliance was placed by the Id AR on the decision of this tribunal in the case of Aristo Pharmaceuticals Pvt Ltd vs ACIT in ITA Nos. 6680/Mum/2012 ; 5553/Mum/2014 ; 5479/Mum/2015 ; 6129/Mum/2014 ; 5167/Mum/2015 & 5747/Mum/2015 for Asst Years 2005-06 , 2009-10 , 2011-12 and 2012-13 dated 26.7.2018 . We find that the co-ordinate bench of this tribunal in the case of DCIT vs PHL Pharma P Ltd reported in (2017) 49 CCH 124 (Mum Trib) had held that the validity of the circular in the backdrop of enlargement of scope of MCI regulations is not applicable to pharmaceutical companies and moreover there is no enabling provisions either under the Income Tax Act or under the Indian Medical Council Regulations . We find that MCI guidelines cannot decide the allowability or otherwise of an expenditure in the hands of drug manufacturing companies or individuals other than doctors under the Act. In any case, we find that the Id AO had only made an adhoc disallowance by applying 1.32% on turnover to have been incurred towards the freebies, gifts. This, in our considered opinion, cannot be sustained in the eyes of law, more particularly when the assessee had given complete details of expenses together with supporting evidences before the Id AO. We find that the Id AO had not identified the fact as to whether any expenses was incurred during the year towards freebies, gifts etc given to medical practitioners. Hence the disallowance of expenses u/s 37(1) of the Act

deserves to be deleted on that count also apart from various judicial precedents. We are also informed that MCI had filed an affidavit before the Hon'ble Delhi High Court that their guidelines are applicable only to doctors and not to others in Max Hospital case during their writ proceedings. In view of our aforesaid observations, we hold that no disallowance of expenses could be made in the instant case by applying the MCI guidelines which are applicable only to doctors and not to pharma companies such as assessee herein. Accordingly, the alternate ground raised by the assessee vide Ground No. 2(b) does not deserve any adjudication. Hence the Ground No. 2 raised by the assessee is allowed.

5. In the result, the appeal of the assessee is allowed.

**ITA No. 5841/Mum/2017 – Asst Year 2013-14 – Revenue Appeal**

6. The only issue to be decided in this appeal of the revenue is as to whether the Id CITA was justified in deleting the adjustment made on account of comfort guarantee by holding that these guarantee involve no cost and hardly any risk to the guarantor in the facts and circumstances of the case.

6.1. We have heard the rival submissions and perused the materials available on record including the judicial pronouncements relied upon by both the parties before us at the time of hearing. The assessee is engaged in the business of manufacturing and marketing pharmaceutical products and the related research and development activities. The assessee is the ultimate holding company of the Glenmark Group. During the financial year 2012-13, the assessee issued financial guarantees to its subsidiaries for the purpose of availing factoring facilities

from the banks in relation to sale of receivables. The receivables are sold by the said AEs to meet their working capital requirements and need for short term funds. The AEs sell the receivables upto the guaranteed amount to third party banks for which , it receives the adjusted value of the invoice minus margin minus the structuring fees. In the event of default by the third party customers, the bank will have full recourse to AEs to repurchase the receivables thereby making good the default. In the event that the AEs are not able to repurchase the same, the assessee shall be required to make good the default. The following are the list of factoring facilities guaranteed by assessee on behalf of its various AEs:-

- Glenmark Russia has taken a facility of USD 36million from Citibank N.A., Bahrain;
- GFL Brazil has taken a facility of USD 18.5 million from Citibank S.A., Brazil;
- Glenmark Pharmaceuticals S.R.L., Romania has taken a facility of USD 5 million from Citibank N. A., Bahrain;
- Glenmark Distributors SP z.o.o., Poland has taken a facility of USD 10.5 million from Citibank N. A., Bahrain;
- Glenmark SRO, Czech Republic has taken a facility of USD 6 million from Citibank N. A., Bahrain; and
- Glenmark Pharmaceuticals SK, s.r.o., Slovak Republic has taken a facility of USD 1 million from Citibank N.A., Bahrain.

6.2. It is not in dispute that the assessee had charged guarantee commission fee of 1% on the guarantees issued. The Id AR stated that the AE have the primary risk in respect of default by the third party

customers and accordingly undertake default risk and that the assessee would be liable for payment of receivables in the case of default by the third party customers and AEs to the extent the assets of the AEs are not sufficient to meet the outstanding liability. Accordingly, he stated that the assessee herein bears limited default risk. He also argued that as the AEs have access to fund, they are able to expand the size of the operations which in turn expands the reach of the Glenmark Group on those markets. In the event, the assessee did not issue such guarantee for factoring services and the AEs were not able to access the funds, then assessee would have to directly or through its holding company, infuse funds into the AEs for meeting their working capital requirements through equity or loans. In case if assessee had not issued the guarantees to the banks, then the bank would have to evaluate the creditworthiness of the underlying receivables. This process is a cumbersome and time consuming process which may delay the access to the funds. In order to simplify the process, the assessee issued a guarantee on behalf of the AEs. Actually this being a shareholder function, there is no need to even charge guarantee commission fee from the AEs. Whereas the assessee had actually charged 1% from its AEs and accordingly the same had to be accepted at ALP. We find that the Id TPO did not agree to these contentions of the assessee and determined the ALP of the said transaction to be at 1.5% on the total financial / comfort guarantees given by the assessee for availing factoring services and after reducing the guarantee fee charged by the assessee, he made an adjustment to ALP at Rs 1,41,16,043/-. We find that the Id CITA by placing reliance on the decision of Hon'ble High Court and Tribunal in various cases held that charging of guarantee fee at 0.5% should be accepted to be at ALP. Moreover, in Asst Years 2010-11 to 2012-13, the Id CITA had followed the tribunal order for Asst Year 2008-09 in assessee's own case and accepted

the rate charged by the assessee in earlier years and addition made by the Id TPO was deleted by the Id CITA. Accordingly, the Id CITA held that since the assessee had charged already guarantee fee at 1% from its AEs which is more than the rate approved by the tribunal in its own case for the Asst Years 2008-09 and 2009-10, no adjustment need to be made on account of guarantee fees.

6.3. We find that the decision of this tribunal in assessee's own case for the Asst Year 2008-09 was approved by the Hon'ble Jurisdictional High Court in the case of CIT vs Glenmark Pharmaceuticals Ltd reported in 398 ITR 439 (Bom) wherein the question raised before the Hon'ble Court and decision rendered thereon are as under:-

*Whether on the facts and in the circumstances of the case and in law the Tribunal is justified in deleting the addition of Rs.11,51,24,333/- to the income of the Assessee Company made by the Assessing Officer on account of guarantee commission chargeable to its Associate Enterprises?*

3. Regarding question no.(i):—

- (a) *We note that the impugned order of the Tribunal while allowing the assessee's appeal holding that the Arms Length Price of Corporate Guarantee cannot be determined on the basis of comparison with Bank Guarantee and relied upon the decision of its Co-ordinate bench in the case of Everest Kento Cylinder Ltd. v. Dy. CIT [2013] 34 taxmann.com 19 (Mum. - Trib.). Mr. Suresh Kumar, the learned counsel appearing for the Revenue very fairly states that being aggrieved with the above order in M/s. Everest Kento Cylinders Ltd., the Revenue had filed an appeal to this Court raising an identical issue viz. CIT v. Everest Kento Cylinders Ltd. [2015] 378 ITR 57/232 Taxman 307/58 taxmann.com 254 (Bom.). By an order dated May 8, 2015, the above appeal was not entertained.*
- (b) *As no distinction in facts and/or law has been shown to us in this appeal which would warrant taking a different view on this very issue from that taken by this Court in Everest Kento Cylinders Ltd. (supra), we follow the same.*
- (c) *Accordingly, question no.(i) as proposed does not give rise to any substantial question of law for the reasons indicated in our order dated 8th May, 2015 in Everest Kento Cylinders Ltd. (supra). Therefore not entertained.*

6.4. We find that this decision of Hon'ble Bombay High Court was approved and affirmed by the Honble Supreme Court in Civil Appeal No. 12632/2017 dated 11.12.2018 wherein it was held that *in so far as question no. (i) is concerned, we have perused the order of the learned Tribunal and the order of the High Court affirming the view taken by the learned Tribunal.*

*On such consideration, we find that question no. 1 has been rightly decided by the High Court in favour of the Assessee and against the Revenue. The same would, therefore, not require reopening in this appeal.*

6.5. Hence respectfully following the same, the guarantee fee charged by the assessee at 1% from its AEs should be considered at ALP and no adjustment thereon is warranted in the facts and circumstances of the case. Hence we hold that the Id CITA had rightly deleted the adjustment to ALP and rightly granted relief to the assessee, which does not require any interference. Accordingly, the Grounds raised by the revenue are dismissed.

**7. In the result, the appeal of the assessee is allowed and appeal of the revenue is dismissed.**

Order pronounced in the open court on this 21/08/2019

**Sd/-**  
**(RAVISH SOOD)**  
JUDICIAL MEMBER

**Sd/-**  
**(M.BALAGANESH)**  
ACCOUNTANT MEMBER

Mumbai; Dated 21/08/2019

KARUNA, *sr.ps*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)  
**ITAT, Mumbai**