

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ "सी" अहमदाबाद।
IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND SHRI WASEEM AHMED, ACCOUNTANT MEMBER

ITA Nos. 3672/Ahd/2015 and 2925/Ahd/2016
Assessment Year : 2012-13 & 2013-14

Hitachi Hi-Rel Power Electronics Pvt. Ltd., B-52 & 62, 5 th Floor, "Corporate House", Near Judges Bungalow Cross-roads, Bodakdev, Ahmedabad-54 PAN : AAACH 3875 M	Vs	Deputy Commissioner of Income-tax, Circle 2 (1)(1), Ahmedabad
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
Assessee by :		Shri Dhinal Shah, AR
Revenue by :		Shri Dileep Kumar, Sr SR

सुनवाई की तारीख/Date of Hearing : 25/11/2019
घोषणा की तारीख /Date of Pronouncement: 27/11/2019

आदेश/ORDER

PER RAJPAL YADAV, JUDICIAL MEMBER :-

The present two appeals are directed at the instance of the assessee against the orders of learned CIT(A) dated 2nd November 2015 and 6th September 2016 passed for Assessment Years 2012-13 and 2013-14 respectively.

2. The assessee has taken three grounds of appeal; out of which in ground Nos. 2 & 3 in both the assessment years it has pleaded that the Revenue Authorities has erred in charging interest under Section 234B & 234C of the Act as well as they have erred in initiating penalty proceedings under Section 271(1)(c) in both the assessment years.

3. At the time of hearing, it was pleaded, as far as charging of interest is concerned, it is consequential in nature; therefore, there is no specific

finding is required to be recorded. Similarly, as far as initiation of penalty is concerned, we are of the view that it is a premature ground at this stage. The assessee will get an independent opportunity for disputing of levy of any penalty under Section 271(1)(c) of the Act; hence, this ground of the assessee is also rejected. In the result, ground Nos. 2 & 3 in both the assessment years are rejected.

4. In ground no.1, the grievance of the assessee is that learned CIT(A) has erred in confirming the disallowance of Rs.48,79,636/- and Rs.69.12 lakhs in Assessment Years 2012-13 and 2013-14 respectively.

5. The facts on all vital points are common; therefore, for facility of reference mainly we are taking up the facts from the Assessment Year 2012-13. The brief facts of the case are that the assessee at the relevant time was engaged in the business of manufacturing and providing solution for products like Uninterrupted Power Supply (UPS), Drives and Automation. It has filed its return of income for AY 2012-13 on 29.11.2012 declaring total income of Rs.6,22,90,348/-. The assessee had claimed a deduction of Rs.4,83,90,786/- under Section 35(2AB) of the Act being weighted deduction @ 200% of expenditure incurred for the purpose of Research and Development at Rs.2,41,95,393/-. Similarly, in Assessment Year 2013-14, it has claimed deduction of Rs.705.86 lakhs under Section 35(2AB) of the Act. The amount of Rs.2,41,95,393/- in Assessment Year 2012-13 includes capital expenditure of Rs.17,09,557/- in respect of Research and Development. The Learned Assessing Officer has analyzed the Annexures-5A and 5F enclosed by the assessee with the Audit Report wherein the details of these expenditures were shown. He observed that the auditor has put qualifying remarks against the claim made under Section 32(2AB) of the Act. Learned Assessing Officer has noticed the remarks made by the Auditor as well as

Department of Scientific and Industrial Research (DSIR). He disallowed a sum of Rs.48,79,636/- in Assessment Year 2012-13 and Rs.69.12 lakhs in Assessment Year 2013-14. The findings recorded by the Assessing Officer in Assessment Year 2012-13 read as under:-

"3.2 In this regard, Annexure 5A to 5F enclosed by foe assessee was also perused. Further, the audit report as submitted by the assessee as per Annexure 5G has also been perused. In this regard, relevant Para 2, 3 & 4 of the auditor's report is reproduced for the sake of clarity on the issue.

"2. We certify that

- a) The Company has maintained separate accounts for the R&D Centre recognized by DSIR u/s 35(2AB).*
- b) The accounts have been satisfactorily maintained. The expenditure certified is also in consonance with DSIR guidelines.*
- c) The firm-has extended full co-operation to us in carrying out the audit of the accounts of the R&D Centre.*

The expenditure of Rs. 24,195,393/- reported for the financial year 2011-12 relevant to the assessment year 2012-13 as detailed out in Appendix II to Annexure IV of DSIR guidelines at Para a'4' is correct to the best of our knowledge and belief as per the result of the audit of the recognized R&D Centre carried Out by us, on a test basis. Also Commercial Sale of products developed in R&D centre are reflected on page 35 (included in Note 19 – Revenue from operations), R&D capital expenditure is reflected on page 31 (included in Note 12A and 128 -Tangible and Intangible assets), revenue expenditures are reflected on page 36 (included in Note 21- Cost of Raw material arid components consumed), page 37 (included in Note 23 - Employee benefit expenses) and page 38 (Note 24 Other expenses) of 21st Annual report of the Company.

4. It is further certified that the expenditure claims do not include the following:

- i. Expenditure on outsourced R&D activities:*
- ii. Expenditure purely related to market research, sales promotions quality control, testing, commercial production, style changes, routine data collection or activities of a like nature except testing charges amounting to Rs.135,050/- (Refer Exhibit IV of Appendix II to Annexure 4) carried outside the approved premises.*
- iii. Lease rent paid for research farms or research labs.*

- iv. Expenditure on foundation seeds multiplication, demonstration crops and grow out test etc. beyond breeder seed development.
- v. Foreign patent filing expenditure.
- vi. Foreign consultancy expenditure.
- vii. Building maintenance, Municipal taxes and rental charges being paid.
- viii. Any interest component on loans for R&D.
- ix. Clinical trial activities carried out outside the recognized facilities.
- x. Contract research expenses duly certified by chartered accountant.
- xi. Expenditure on any payments made to members of the board of Directors or any other part time employees working for R&D except for remuneration to an Executive Director appointed in professional capacity amounting to Rs.4,879,636/-."

3.3 Considering the above audit report and the details submitted by the assessee, during the discussion held on 12/12/2014, the A.R. of the assessee was asked to furnish report in form 3CL issued by the department of Scientific and Industrial Research. In response, the assessee submitted a reply on 18/12/2014 and submitted the report in form 3CL dated 14/10/2014. From the perusal of Para 9 of the form 3d report of Department of Scientific and industrial Research (DSIR), New Delhi dated 14/10/2014, it is evident that in the assessment year 2012-13, the expenditure eligible for deduction on account of R & D expenditure u/s. 35(2A8) approved by the DSIR was Rs.19315757/- only comprising of capital expenditure of Rs.1709557/- and revenue expenditure of Rs.17606200/-. The DSIR has approved the full amount of capital expenditure of Rs. 1709557/- as R&D expenditure but restricted the revenue expenditure to Rs.17606200/- as against the claim of the revenue expenses made by the assessee at Rs.22485836/-. Since the assessee has claimed excess expenditure of Rs.4879636 (22485836-17606200) on account of revenue expenditure, the disallowance @ 200% u/s. 35(2AB) comes to Rs.9759272/-. However, the assessee itself has added back a sum of Rs.4879636/- which is included in the amount of Rs.22485836/-, the net disallowance comes to Rs.4879636 (Rs.9759272 - Rs.4879636). In view of the above, a sum of Rs.4879636/- is disallowed u/s. 35(2AB) of the IT Act and added back to the total income of the assessee. Penalty proceedings u/s. 271(1)(c) of the Act is being initiated separately for furnishing inaccurate particulars of income."

6. Appeal to the learned CIT(A) did not bring any relief to the assessee. On same analogy, the claim of the assessee to the extent of Rs.69.12 lakhs has been disallowed in Assessment Year 2013-14.

7. Learned Counsel for the assessee, while impugning the orders of the Revenue Authorities, contended that the salary paid to one of the Directors, which has been considered for disallowance, was not paid for the capacity of his directorship, rather it was paid on account of professional qualification possessed by him which authorizes him to undertake the research activity and helping the research team. He took us through the qualification remarks put by the Auditor at Sr. No. xi and pointed out that Auditors have pointed out that exclusion of expenditure incurred on any payments made to members of the Board of Directors or any other part time employees working for R&D, but exemption has been carved out wherein if remuneration is being paid to any Executive Director appointed in professional capacity, then that would not be disallowed. The DSIR failed to appreciate this aspect while restricting the allowance. He further contended that this aspect has been considered by the ITAT, Ahmedabad Bench as well as ITAT, Pune Bench. He drew our attention to the order of the ITAT, Ahmedabad Bench in the case of ACIT Vs. Torrent Pharmaceuticals Ltd, reported in [2012] 137 ITD 301 as well as ITAT, Pune Bench's order in the case of Cummins India Limited Vs. DCIT in ITA No. 309/Pun/2014. He placed on record copies of both these decisions. On the strength of above, he prayed that the disallowance be deleted.

8. On the other hand, learned Departmental Representative relied upon the orders of the authorities below and submitted that the Assessing Officer has no jurisdiction to disturb the certificate granted by DSIR for allowance of expenditure. This certificate has to be submitted on year to year basis.

9. We have duly considered the rival contentions and gone through the record carefully. As far as the existence of R&D facility at the business

premises of the assessee is concerned, it is not in dispute. It has also not been disputed that this facility has an approval from the competent authority, i.e. Department of Scientific and Industrial Research (DSIR). The dispute relates to quantification of revenue expenditure which can be allowed to the assessee. According to the Assessing Officer, the salary paid to Executive Director has not been approved by DSIR in the report submitted in Form No.3CL. Therefore, it is not admissible. This view point has been further fortified by the Assessing Officer with the help of the Auditor's remarks in Audit Report. It is pertinent to observe that exactly identical aspect has been considered by the ITAT, Pune Bench in the case of Cummins India Ltd (supra) and following findings are worth to note:-

"45. The issue which is raised in the present appeal is that whether where the facility has been recognized and necessary certification is issued by the prescribed authority, the assessee can avail the deduction in respect of expenditure incurred on in-house R&D facility, for which the adjudicating authority is the Assessing Officer and whether the prescribed authority is to approve expenditure in form No.3CL from year to year. Looking into the provisions of rules, it stipulates the filing of audit report before the prescribed authority by the persons availing the deduction under section 35(2AB) of the Act but the provisions of the Act do not prescribe any methodology of approval to be granted by the prescribed authority vis-à-vis expenditure from year to year. The amendment brought in by the IT (Tenth Amendment) Rules w.e.f. 01.07.2016, wherein separate part has been inserted for certifying the amount of expenditure from year to year and the amended form No.3CL thus, lays down the procedure to be followed by the prescribed authority. Prior to the aforesaid amendment in 2016, no such procedure / methodology was prescribed. In the absence of the same, there is no merit in the order of Assessing Officer in curtailing the expenditure and consequent weighted deduction claim under section 35(2AB) of the Act on the surmise that prescribed authority has only approved part of expenditure in form No.3CL. We find no merit in the said order of authorities below."

10. In the light of above findings, if we examine the facts of the present case, then it would reveal that the Auditors have carved out an exemption and observed that if Executive Director has been employed in his professional capacity, then the expenditure incurred on his salary will not be considered for

disallowance. The DSIR, without making an analysis of this expenditure, has restricted the allowance. In other words, an expenditure of Rs.48,79,636/- was not approved for grant of deduction in Assessment Year 2012-13 and Rs.69.12 lakhs in Assessment Year 2013-14. According to ITAT-Pune, prior to amendment made in the details required to be compiled in Form No.3CL with effect from 1st July 2016, there was no such power with DSIR to restrict such allowance. However, we have directed the learned Counsel for the assessee to point out the professional qualification of the Executive Director and what role he has played in the research activity so that he can be excluded from the remarks of the Auditors which has been accepted by the DSIR. We find that no such details have been placed in this connection either before the learned Assessing Officer or before the learned CIT(A). Before us, learned Counsel for the assessee sought to produce job description of Mr. Dhiran R. Shah who has been hired as Chief Technology Officer. He has been stated to be holding qualification of BE (Electrical Engineering), Gujarat University and MS (EE) - Modern Control Systems & Robotics, Purdue University, USA. To our mind, when the Assessing Officer has disallowed the claim of the assessee, then at the first available time before the First Appellate Authority the assessee ought to have produced all these details so that a report could be called for from the Assessing Officer and it could be ascertained his actual role in the research activity. However, we find that in earlier years, no such disallowance was made by the Assessing Officer - even in scrutiny assessment. The assessment order for Assessment Year 2011-12 has been placed on record. A perusal of this order would indicate that there is no discussion on the claim made under Section 13(2AB) of the Act. In other words, it is not ascertainable whether any claim was available in that year or not. Faced with above situation and in the interest of justice, we deem it appropriate to remit this issue to the file of the learned Assessing Officer for fresh adjudication. The assessee will be at liberty to submit any evidence exhibiting the role of Mr. Dhiran Shah as an Executive

Director-cum-Chief Technology Officer helping the research activity. In case it is established that he was hired in the research activity related work and he has played an active role in the research operations, then the expenditure incurred towards his salary will qualify for grant of deduction under Section 35(2AB) of the Act. The learned Assessing Officer shall re-adjudicate this issue after providing due opportunity of hearing to the assessee.

12. In the result, both appeals of the assessee are partly allowed for statistical purposes as indicated above.

Order pronounced in the Court on 27th November, 2019 at Ahmedabad.

Sd/-

Sd/-

(WASEEM AHMED)
ACCOUNTANT MEMBER

(RAJPAL YADAV)
JUDICIAL MEMBER

Ahmedabad, Dated 27/11/2019

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आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण , राजकोट/DR, ITAT, Ahmedabad,
6. गार्ड फाईल /Guard file.

आदेशानुसार/ BY ORDER,

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सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण
ITAT, Ahmedabad