

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

BEFORE SHRI D. KARUNAKARA RAO, AM AND
SHRI LALIET KUMAR, JM

आयकर अपील सं. / ITA Nos.883 & 884/PUN/2018

निर्धारण वर्ष / Assessment Years : 2013-14 & 2014-15

Nath Bio-Genes (India) Ltd.,
Nath House, Nath Road,
Aurangabad - 431005

PAN : AABCN7978E

.....अपीलार्थी / Appellant

बनाम / V/s.

The Pr.CIT-1,
Aurangabad

.....प्रत्यर्थी / Respondent

Assessee by : S/Shri N.R. Agrawal and Vijay Saboo
Revenue by : Shri Deepak Garg

सुनवाई की तारीख / Date of Hearing : 13.02.2020

घोषणा की तारीख / Date of Pronouncement : 13.02.2020

आदेश / ORDER

PER D. KARUNAKARA RAO, AM:

There are two appeals under consideration filed by the assessee against respective revision orders passed by Pr.CIT-1, Aurangabad, both dated 16.03.2018 for the Assessment Years 2013-14 and 2014-15.

A.Y. 2013-14

2. Briefly stated, relevant facts include that the assessee is engaged in the business of production, processing and marketing of various types of hybrid seeds. The assessee has filed its return of income on 28.09.2013 declaring total income at Rs.27,25,780/- and agricultural income at Rs.12,02,30,945/-. For the year under consideration, assessment was completed by the

Assessing Officer (AO) determining the assessed income. Accordingly, the AO computed the revised tax liability and the same is extracted as under:-

	Rs.	
<i>Net Income (as per computation)</i>		27,25,782/-
<i>Add: As per Para 4</i>	12,02,30,945/-	
<i>As per Para 5</i>	7,71,422/-	
<i>Claim of deduction u/s 35(2AB)</i>	2,07,29,524/-	
<i>Research exp. Not added earlier</i>	8,03,29,115/-	22,20,61,006/-
<i>Total Income</i>		22,47,86,788/-
<i>Less: Deduction u/s 35(2AB)</i>	18,13,87,754/-	
<i>Total Income</i>		4,33,99,034/-

3. During the course of assessment proceedings, the AO issued a questionnaire asking for details of 20 items. Referring to item No.16 relates to *“Please furnish details of deductions claimed u/s 35, 35(2AA) and 35(2AB) along with the relevant documents of ministry of scientific and research.”* In response to the same, the assessee communicated the reply informing about the details of R&D facilities, details of expenditure incurred at page 53 in para 16. The same is extracted as under:-

“16. Our company is an In-house Research and Development Company duly approved by the Department of Science & Industrial Research (DSIR), Govt. of India, New Delhi. Copy of the approval issued by the Department of Scientific & Industrial Research (DSIR), Govt. of India, New Delhi is enclosed herewith for your kind perusal. Hence, various types of R&D activities had conducted by the Company during the previous year. The R&D activities are basically targeting creation of new hybrid seeds for the farming community, at large. The activities include, Large Scale Trials (LST) and Multi Location Trials (MLT) expenses, Field Day and Crop Seminars, Farmer Advisory expenses, Salaries and other expenses of the R&D staff, etc. These expenses are duly debited to the R&D expenditure after proper identification. Hence company has claimed 200% of its expenditure incurred on Research & Development activities during the year under assessment. Copies of the relevant supporting enclosed herewith.”

4. After considering the reply of assessee, the AO allowed the claim of deduction u/s 35(2AB) of the Income-tax Act, 1961 (hereinafter referred to as ‘the Act’). There is no evidence on record to decipher that the AO examined the contents of page 51 i.e. expenditure incurred on R&D as claimed u/s

35(2AB) of the Act. Subsequently, Pr.CIT invoked the provisions of section 263 of the Act and examined the above issue of allowability of deduction claimed u/s 35(2AB) of the Act when Form No.3CL is absent on record and issued show cause notice proposing to revise the said order of AO. It is case of Pr.CIT that although the assessee had obtained the requisite approvals from the Secretary, DSIR for the purpose of in-house R&D facility, the assessee could not demonstrate the issuance of Form No.3CL by the Secretary, DSIR to the DG(Exemption). There is no dispute about the facts of issuance of order of approval in Form No.3CM. Form No.3CM is issued by the Secretary, DSIR informing the order of approval of in-house R&D facility as required u/s 35(2AB) of the Act. As mentioned, Form No.3CL is an intimation between the Secretary, DSIR and DG(Exemption). Without going into the bonafides of the said expenditure (referred in page 51), merely for want of said Form No.3CL and assessee's failure to furnish the audit records to DSIR, Pr.CIT gave a direction to the AO and the same is extracted as under:-

“7.6 Therefore, in view of the above facts, I have no doubt in holding that the AO has not properly examined the above issue. Accordingly, the AO is directed that the assessment order should be reframed as per the provisions of law, after considering proper facts and submissions of the assessee and also for necessary verification in the light of the observations made above, after affording proper opportunity to the assessee.”

5. Aggrieved with the above adverse revision order of Pr.CIT, the assessee is in appeal before us for both assessment years 2013-14 and 2014-15. The grounds for A.Y. 2013-14 are extracted as under and the same are taken as lead case:

Ground No.1 *The learned Pr. CIT erred in passing the order u/s 263 of the Income tax Act & also erred in treating the AO's order as both erroneous & prejudicial to the interest of revenue.*

Ground No.2 *The learned Pr.CIT erred in disallowing weighted deduction u/s 35(2AB).*

Proceedings before the Tribunal:

6. Before us, Id. Counsel Shri N.R. Agrawal accompanied by Shri Vijay Saboo submitted the background facts relating to Form Nos.3CM and 3CL tracing the evolution and the developments over the period from A.Y. 2008-09 to 2010-11. The Id. Counsel mentioned the assessee never filed requisite Form Nos.3CM and 3CL to the Department. However, the assessee got the relief from the Tribunal despite absence of Form No.3CM. Referring to the developments in A.Y. 2011-12, Id. Counsel submitted there is no dispute about non furnishing of these both forms to the Department. Therefore, there is no litigation and when it comes to A.Y. 2012-13, Form No.3CM is available and Form No.3CL is not available. The assessee did not submit the audit accounts to the DSIR. Coming to the current year under consideration, Id. Counsel brought our attention to page 1 of the Paper Book and submitted that Form No.3CM is very much available on record and Form No.3CL could not be furnished as the assessee failed to furnish the financial statements to DSIR. Notwithstanding the same, Id. Counsel mentioned the said statements are now furnished (on 12.02.2020) to DSIR and the assessee tried to rectify the same defect for A.Y. 2014-15 also. It is argued by the Id. Counsel that the Tribunal and the Hon'ble High Courts are consistently granting deduction u/s 35(2AB) of the Act to the assessee despite absence of Form No.3CL. In this regard, Id. Counsel brought our attention to the Co-ordinate Bench decisions in the cases of (i) Cummins India Ltd. Vs. DCIT in ITA No.309/PUN/2014 for A.Y. 2009-10, order dated 15.05.2018 (ii) Minilec India

(P) Ltd. Vs. ACIT (2018) 171 ITD 124 (Pune) and assessee's own case in ITA No.367/PN/2012 & 417/PN/2012, for A.Y. 2008-09, order dated 27.01.2014. Further, ld. Counsel brought our attention to the decision of Hon'ble High Court of Gujarat at Ahmedabad in the case of CIT Vs. Sun Pharmaceutical Industries Ltd. in Tax Appeal No.541 of 2017, judgment dated 14.08.2017 and mentioned that the absence of Form No.3CL is no ground to deny the claim of deduction u/s 35(2AB) of the Act. However, the Hon'ble High Court observed that the bonafides of expenditure claimed is required to be examined from the perspective of said provisions. The said observations are in para 5 of the said judgment. This is a case where Pr.CIT invoked the provisions of section 263 of the Act and the matter was decided in favour of assessee conditionally. Further, ld. Counsel fairly submitted that so long as the claim of deduction u/s 35(2AB) of the Act is allowed, Bench may modify the directions of Pr.CIT for verifying the allowability of claim of expenditure claimed u/s 35(2AB) of the Act.

7. Per contra, ld. DR heavily relied on the order of Pr.CIT. Bringing our attention to various provisions of the Act, ld. DR submitted that it is clear case of AO's failure to examine the correctness of expenditure, genuineness and bonafide in allowability of the deduction claimed u/s 35(2AB) of the Act. He also mentioned it is clear case where Form No.3CL is not in existence at all and therefore, rules are not honoured by the assessee. The assessee failed to file audited statements to the DSIR, which is required under the provisions of Rule 6 of Income-tax Rules, 1962.

Decision of the Tribunal:

8. We heard both the parties and perused revised order of Pr.CIT and fresh assessment order made by AO u/s 263 r.w.s. 143(3) of the Act, Tribunal's orders placed before us (supra), judgment of Hon'ble High Court of Gujarat in the case of CIT Vs. Sun Pharmaceutical Industries Ltd. (supra). On perusal of the said orders of the Tribunal not only in assessee's own case and others, we find the failure to file Form No.3CL to the authority does not make orders erroneous. The claim is very much allowable provided the expenditure portion is examined and found allowable under the said provisions. In any case, such expenditure can also be allowable u/s 37 of the Act, provided the conditions are met. Further, we also examined the judgment of Hon'ble High Court of Gujarat in the case of CIT Vs. Sun Pharmaceutical Industries Ltd. (supra). We find it relevant to extract the same as under:-

"3. The Commissioner of Income tax was of the opinion that the Assessing Officer had not made proper inquiries before accepting the claim. After giving notice to the assessee, he passed an order dated 28.3.2016 under section 263 of the Act and held that the order of assessment was passed without proper verifications, investigation and examination. The same was therefore, erroneous and prejudicial to the interest of the Revenue. He therefore, directed the Assessing Officer to examine the issues discussed in the order and pass a fresh order of assessment in view of such discussion. In the process the Assessing Officer would also "consider correct amount of disallowable expenditure after considering the financial documents and other relevant details/submissions filed by the assessee and as available on record with a view to ensure that there is no discrepancy in the facts and figures on record." One of the main grounds which appealed to the Commissioner was that the prescribed authority had not sent the intimation in Form 3CL to the Revenue, in absence of which, according to the Commissioner, claim could not have been accepted.

4. The assessee approached the Tribunal. The Tribunal by the impugned judgment allowed the appeal inter-alia holding HC-NIC Page 2 of 4 Created On Tue Aug 22 03:39:27 IST 2017 O/TAXAP/541/2017 ORDER that the prescribed authority shall submit its report in relation to the approval of the in-house research and development in Form 3CL to

the Director General of Income Tax (Exemption) within 60 days of its granting approval. In the opinion of the Tribunal, same was merely in form of intimation to be sent by the prescribed authority to the department. In case of the assessee, the research and development activity having already been approved in Form 3CM, the assessee thereafter, had no further role to play in the inter-departmental correspondence. The Tribunal therefore, held that the assessee was entitled to deduction on the capital and revenue expenses incurred on in-house research and development amounting to Rs.237,77,05,310/-.

5. Having heard learned counsel for the parties and having perused the orders on record, we are broadly in agreement with the view of the Tribunal. Undisputedly, the research and development facility set up by the assessee was approved by the prescribed authority and necessary approval was granted in the prescribed format. The communication in Form 3CM was thereafter, between the prescribed authority and the department. If the same was not so, surely, the assessee cannot be made to suffer. To this extent, the Tribunal was perfectly correct and the Commissioner was not, in observing that in absence of such certification, claim of deduction under section 35(2AB) was not allowable. However, neither the prescribed authority nor the Assessing Officer has applied the mind as to the expenditure, be it revenue or or capital in nature, actually incurred in developing the in-house research and development facility. To the limited extent, the Commissioner desired the Assessing Officer to verify such figures, we would allow the Assessing Officer to do so. In other words, in principle, we accept the Tribunal's reasons and conclusions. Merely because the prescribed authority failed to send intimation in Form 3CL, would not be reason enough to deprive the assessee's claim of deduction under section 35(2AB) of the Act. However, in facts of the present case, it would be open for the Assessing Officer to verify the actual expenditure incurred by the assessee.

9. From the above, it is inescapable conclusion that the claim of deduction u/s 35(2AB) of the Act cannot be denied merely for want of Form No.3CL subject to fulfilment of other conditions under Rule 7 of IT Rules. It is merely a procedural lapse. Further, it is also a decided issue that the expenditure which is claimed under the said section is allowable after due process of verification by the concerned authorities. Therefore, the Hon'ble High Court directed the AO to verify the actual expenditure incurred by the assessee in that case. Neither the AO nor Pr.CIT gave finding of fact on the R&D nature of expenditure under consideration. The contents are available in page 51 of

the Paper Book. There, we cannot examine them and give a finding of fact. Ld. AR also requested for remand for verification.

10. Considering the above settled nature of the issue, we are of the opinion that the deduction u/s 35(2AB) of the Act cannot be denied merely for the procedural lapses. Therefore, the order of the PCIT needs modification. Modification include (1) the judgment of Hon'ble High Court of Gujarat in the case of CIT Vs. Sun Pharmaceutical Industries Ltd. (supra) and other judgments, if any, on the subject, are required to be following by the PCIT; and (2) Due verification of the expenditure and the allowability of expenditure u/s 35(2AB) of the Act has to be examined by the PCIT too. We modify the orders of Pr.CIT accordingly, for both assessment years. PCIT is directed to pass consequential order after hearing the assessee. The assessee is directed to demonstrate the allowability of the said expenditure.

11. In the result, both the appeals of the assessee is partly allowed as above.

Order pronounced on this 13th day of February, 2020.

Sd/-
(LALIET KUMAR)
न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-
(D. KARUNAKARA RAO)
लेखा सदस्य/ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 13th February, 2020.
GCVSR

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) /
The Pr.CIT-1, Aurangabad
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "बी" /
DR 'B', ITAT, Pune;
5. गार्ड फाईल / Guard file.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.