

आयकर अपीलिय अधीकरण, न्यायपीठ –“C” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA
[Before Shri J. Sudhakar Reddy, AM and Shri A. T. Varkey, JM]

I.T.A. No. 1761/Kol/2019
Assessment Year: 2013-14

DCIT, Circle-10(2), Kolkata	Vs.	M/s STP Ltd. (PAN:AAECS 6339 M)
Appellant		Respondent

Date of Hearing (Virtual)	07.01.2021
Date of Pronouncement	13.01.2021
For the Appellant	Shri Supriyo Paul, Addl. CIT
For the Respondent	Shri Rajaram Chowdhury, Advocate

ORDER

Per Shri A.T. Varkey, JM:

This is an appeal preferred by the Revenue against the order of Ld. CIT(A)-4, Kolkata dated 29/03/2019 for 2013-14.

2. The grounds of appeal raised by the Revenue are as under:

- Whether in the facts and the circumstances of the case, the Ld. CIT(A) was correct in allowing the deduction to the tune of Rs. 2,55,25,677/- u/s 35(2AB) of the Income Tax Act, 1961 in respect of the in-housing Scientific Research and development expenditure of the Sipaigachhi Unit, where the DSIR does not approve of such expenditure in the Form 3CL?*
- Whether the Ld. CIT(A) was correct in holding that in order to avail up the deduction u/s 35(2AB) irrespective of the date of recognition and the cut off date mentioned in the certificate of the prescribed authority the existence of recognition is required?*
- That the appellant craves to add, delete or modify any of the grounds of appeal before or at the time of hearing.*

3. Brief facts of the case as noted by the AO is that the assessee company is engaged in the business of manufacturing and trading of waterproofing felts, bitumals coal tar products and construction additives etc. The AO observes from a perusal of ITR of the assessee and the computation of income of the assessee for the year under consideration that the assessee had claimed deduction of Rs. 2,79,56,896/- u/s 35(2AB) of the Income Tax Act, 1961 (hereinafter referred to as the “Act”). The AO notes that the assessee had filed the details of expenses incurred on Research & Development (R&D) during the relevant year under consideration. However, according to AO the assessee has not filed the copy of Form No. 3CL which according to him, has to be submitted by the Secretary of Department of Scientific and Industrial Technology Bhawan, New Delhi (hereinafter referred to as DSIR) to DGIT(Exemption) of Income Tax Department u/s 35(2AB) of the Act. According to AO, he gave notice to the assessee to explain why the deduction should not be allowed as claim u/s 35(2AB) of the Act. The AO acknowledges that pursuant to the said notice, the assessee filed reply dated 24.02.2016 along with the copy of Form No. 3CL in respect of this assessment year (AY 2013-14) issued by Secretary DSIR. However, according to AO, in the Form 3CL the breakup of total cost of in-house research was given as under:

- | | | | |
|----|---|---|---|
| a) | Capital Expenditure
(other than land & building) | : | Rs. 1.40 Lakh |
| b) | Recurring Expenditure | : | <u>Rs. 21.50 Lakh</u>
Rs. 22.90 Lakh |

4. The AO notes that even though the DSIR Form 3CL approves only Rs. 22.90 Lakhs, the assessee along with the return had filed the computation of income wherein it has availed deduction u/s 35(2AB) the following: (i) Recurring Expenditure to the tune of Rs. 67,96,974/- and (ii) Capital Expenditure of Rs. 1,05,79,961/-. Thus, according to AO, the deduction availed by the assessee u/s 35(2AB) of the Act is therefore, not in conformity with the Report in Form 3CL given by Secretary DSIR. The AO therefore asked the assessee to reconcile the difference and he reproduces the reply of assessee dated 24.02.2016 wherein the assessee explained the discrepancy as under:

“This is to inform that our R&D division at M6-9, Cuncolim Industrial Estate, Cuncolim, Selectee, Goa and Village-Sipaigachi, Post Office : Charpur, District: Hooghly, P.S.. Haripal, West Bengal is approved by Department of Scientific and Industrial Research (DSIR) vide their recognition certificate no. TU/IV-RD/3247/2011 dated 24.08.2011 and further by TU/IV-RD/3247/2013 dated 26.03.2013 valid up to 31.03.2016.

During the financial year 2012-13, A.Y. 2013-14 the company has incurred Rs. 105.80 lac towards Capital Expenditure and Rs.67.97 towards Revenue Expenditure. In this regard a certificate by the Statutory Auditor dated 09.01.2014 is already submitted to your department.

A deduction of Rs.2,79,56,896/- (Rs.6796974/- towards revenue and Rs.21159922/- towards Capital) was provided in the computation of income for I. T. Return. Details of the same are annexed below:

Sl No	R&D Goa		R&D Sipaigachi		Total		Weig hted Dedu ction	Total as per I.T. Return	
	Recurring	Capital	Recurring	Capital	Recurring	Capital		Recurring	Capital
1	2150431	140394	4646543	10439567	6796974	10579961	200%	6796974	21159922

Further we have received form 3CL from DSIR wherein they have allowed Rs.22.90 lacs which is for our Goa R&D only. Accordingly to DSIR the deduction for our Sipaigachi R&D unit could not be allowed due to its recognition date which is 26.03.2013. (Copy of Form 3CL is enclosed for your perusal)

But as per I.T. Act the deduction is allowed for full year in which the recognition of R&D unit is provided by the DSIR (Refer section 35). The matter was upheld by various Hon'ble High Courts and Tribunals, a few are submitted in earlier hearing.”

5. The AO thereafter rejects the assessee's claim u/s 35(2AB) by holding as under:

“3.5. The submission filed by the assessee has been duly considered. The Department of Scientific & Industrial Research has granted Registration to the Sipaigachi unit only on 26.03.2013. This fact has been accepted by the assessee in its submission also. The assessee can claim deduction u/s 35(2AB) only on those expenses which are approved by the Department of Scientific & Industrial Research and the said expenses are duly reflected in Form 3CL issued by Secretary, DSIR, which is a statutory requirement. The DSIR in its Report in Form 3CL has not certified / approved the expenses claimed to be incurred by the assessee in respect of its R&D unit at Sipaigachi. The ratio of the judgments relied upon by the assessee is not applicable in the case of the assessee. In this case, not only the registration was granted to R&D unit of the assessee company at Sipaigachi on 26.03.2013, but also the Secretary, DSIR in its report in Form 3CL has not approved / certified recurring as well capital expenditure incurred at Sipaigachi R&D unit in F.Y. 2012-13.

3.6 Hence as discussed above, the submission of the assessee is found unacceptable. No weighted deduction u/s 35(2AB) of the I.T. Act, 1961 is allowed to the assessee in respect of recurring and capital expenditure incurred at R&D unit Sipaigachi. The recurring and capital expenditure incurred at R&D unit at Sipaigachi are as follows:-

Recurring Expenditure	:	Rs. 46,46,543/-
Capital Expenditure	:	Rs. 1,04,39,567/-
Weighted deduction claimed u/s 35(2AB) in respect of R&D unit at Sipaigachi	:	Rs.2,55,25,677/-

6. Aggrieved the assessee preferred an appeal before the Ld. CIT(A) who was pleased to allow the claim of the assessee.

7. Aggrieved the revenue is before us.

8. We have heard both the parties and perused the records. We note that the assessee company is engaged in the business of manufacturing and trading of waterproofing felts, bitumals coal tar products and construction additives etc. The AO observes from a perusal of ITR and TAR of the assessee that it had claimed deduction of Rs. 2,79,56,896/- u/s 35(2AB) of the Act. However, the AO notes that in the Form No. 3CL given by Secretary DSIR, it has not certified/approved the recurring expenditure of Rs. 46,46,543/- and capital expenditure of Rs. 1,04,39,567/- in respect of R & D division at Sipaigachi and since the Secretary DSIR has issued the recognition u/s 35(2AB) of the Act only on 26.03.2013 in respect of R&D division at Sipaigachi, the assessee's claim of expenditure to the tune of Rs. 2,55,25,677/- cannot be allowed. On appeal the Ld. CIT(A) has taken note of the decision of Hon'ble Gujrat High Court in the case of Banco Products (India) Ltd. vs. DCIT (2018) 405 ITR 318 / 258 Taxman 244(Guj)(HC) and given relief to the assessee. We note that in order to adjudicate this issue the relevant provision of Section 35(2AB) of the Act and the relevant Rules applicable need to be understood are reproduced as under:

Expenditure on scientific research.

35. (1) In respect of expenditure on scientific research, the following deductions shall be allowed—

(2AB)(1) Where a company engaged in the business of bio-technology or in any business of manufacture or production of any article or thing, not being an article or thing specified in the list of the Eleventh Schedule incurs any expenditure on scientific research (not being expenditure in the nature of cost of any land or building) on in-house research and development facility 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:

.....

(2) No deduction shall be allowed in respect of the expenditure mentioned in clause (1) under any other provision of this Act.

(3) No company shall be entitled for deduction under clause (1) unless it enters into an agreement with the prescribed authority for co-operation in such research and development facility and for audit of the accounts maintained for that facility.

(4) The prescribed authority shall submit its report in relation to the approval of the said facility to the Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General in such form and within such time as may be prescribed.

.....”

Rule 6 of the Income Tax Rules, 1962 (Rules) prescribes procedure to be followed by the prescribed Authority for grant of approval under Section 35(2AB) of the Act. The relevant part of **Rule 6**, insofar as it relates to this appeal, reads thus:-

[(1B) For the purposes of sub-section (2AB) of section 35, the prescribed authority shall be the Secretary, Department of Scientific and Industrial Research.]

[(4) The application required to be furnished by a company under sub-section (2AB) of section 35 shall be in Form No. 3CK.]

[(5A) The prescribed authority shall, if he is satisfied that the conditions provided in this rule and in sub-section (2AB) of section 35 of the Act are fulfilled, pass an order in writing in Form No. 3CM :

Provided that a reasonable opportunity of being heard shall be granted to the company before rejecting an application.]

9. From a plain reading of the aforesaid provision it is taken note that under section 35(1)(i) an assessee is entitled to deduction in respect of expenditure on scientific research not being in the nature of capital expenditure laid out or expended on scientific research related to the business. Under section 35(2AB) of the Act deduction is allowed at a sum equal to two times of the expenditure incurred on scientific research if the assessee is engaged in the business of bio-technology or in any business of manufacture or production of any article or thing, not being an article or thing specified in the list of the Eleventh Schedule incurs any expenditure on scientific research (not being expenditure in the nature of cost of any land or building) on in-house research and development facility as approved by the prescribed authority. Deduction under section 35(1)(i) and section 35(2AB) of the Act are similar except that the deduction under section 35(2AB) is allowed as weighted deduction at 200% of the expenditure, while deduction under section 35(1)(i) is allowed only at 100%. The conditions for allowing deduction under section 35(1)(i) of the Act and under section 35(2AB) of the Act are identical with the only difference being that the assessee claiming deduction under section 35(2AB) of the Act should be engaged in manufacture of certain articles or things.

10. It is not in dispute that the assessee is engaged in business to which section 35(2AB) of the Act applied. The other condition required to be fulfilled for claiming deduction under section 35(2AB) of the Act is that the research and development facility situated at Sipaigachi should be approved by the prescribed authority. The prescribed

authority is the Secretary, Department of Scientific Industrial Research, Govt, of India (DSIR). It is not in dispute that the assessee in the present case obtained approval on 26.03.2013 in respect of R&D unit at Sipaigachi (refer page 73 of paper book) . As per the procedure for claiming deduction under section 35(2AB) of the Act as per Department of Scientific and Industrial Research (DSIR) subsequent to the approval by the DSIR, the assessee should submit audited accounts for each year for each approved scientific research centre by 31st October of the succeeding year along with certain information. Thereafter the DSIR will issue a form called Form 3CL. The claim of the assessee for weighted deduction at 200% of the expenditure incurred on scientific research was refused by the assessing officer for the only reason that the expenditure incurred at assessee's R&D unit at Sipaigachi did not get approval in Form 3CL from DSIR to the claim of assessee to the tune of Rs.2,55,25,697/-.

11. It has to be taken note that Rule 6(7A)(b) of the Income Tax Rules, 1962 (hereinafter referred to as the "Rules") specifying the prescribed authority and conditions for claiming deduction under Section 35(2AB) of the Act has been amended by the Income Tax (10th Amendment) Rules, 2016) with effect from 01.07.2016, whereby it has been laid down that the prescribed authority, i.e. DSIR shall quantify the quantum of deduction to be allowed to an assessee under section 35(2AB) of the Act. Prior to such substitution, the above provisions merely provided that the prescribed authority shall submit its report in relation to the approval of in-house R&D facility in Form No. 3CL to the DGIT(Exemption) within 60 days of granting approval. Therefore, prior to 01.07.2016 there was no legal sanctity for Form No. 3CL in the context of allowing deduction under Section 35(2AB) of the Act. *The courts have held that for deduction under Section 35(2AB) of the Act, first step was the recognition of facility by the prescribed authority and entering an agreement between the facility and the prescribed authority. Once such an agreement has been executed, under which recognition has been given to the facility, then thereafter the role of AO is to look into and allow the expenditure incurred on in-house R&D facility as weighted deduction under Section 35(2AB) of the Act.*

12. The Hon'ble Delhi High Court quoted the following observations of the Hon'ble Gujarat High Court and agreed with the said view:-

"7. The lower authorities are reading more than what is provided by law. A plain and simple reading of the Act provides that on approval of the research and development facility, expenditure so incurred is eligible for weighted deduction.

8. The Tribunal has considered the submissions made on behalf of the assessee and took the view that section speaks of:-

- (i) development of facility;
- (ii) incurring of expenditure by the assessee for development of such facility;
- (iii) approval of the facility by the prescribed authority, which is DSIR; and
- (iv) allowance of weighted deduction on the expenditure so incurred by the assessee.

9. The provisions nowhere suggest or imply that research and development facility is to be approved from a particular date and, in other words, it is nowhere suggested that date of approval only will be cut-off date for eligibility of weighted deduction on the expenses incurred from that date onwards. A plain reading clearly manifests that the assessee has to develop facility, which presupposes incurring expenditure in this behalf, application to the prescribed authority, who after following proper procedure will approve the facility or otherwise and the assessee will be entitled to weighted deduction of any and all expenditure so incurred. The Tribunal has, therefore, come to the conclusion that on plain reading of s. itself, the assessee is entitled to weighted deduction on expenditure so incurred by the assessee for development of facility. The Tribunal has also considered rule 6(5A) and Form No. 3CM and come to the conclusion that a plain and harmonious reading of rule and Form clearly suggests that once facility is approved, the entire expenditure so incurred on development of R&D facility has to be allowed for weighted deduction as provided by section 35(2AB). The Tribunal has also considered the legislative intention behind above enactment and observed that to boost up research and development facility in India, the legislature has provided this provision to encourage the development of the facility by providing deduction of weighted expenditure. Since what is stated to be promoted was development of facility, intention of the legislature by making above amendment is very clear that the entire expenditure incurred by the assessee on development of facility, if approved, has to be allowed for the purpose of weighted deduction."

From the above discussion it is clear that prior to 1-7-2016 Form 3CL had no legal sanctity and it is only with effect from 1-7-2016 with the amendment to rule 6(7A)(b) of the Rules, that the quantification of the weighted deduction under section 35(2AB) of the Act has significance.

13. Coming back to the facts of the case as discernible from records is that the assessee in this case had filed the the Tax Audit Report along with Return of income, and the auditors have certified deduction u/s 35(2AB) of the Act at Rs. 2,79,56,856/- as per details given below:

Sl. No.	R&D Goa		R&D Sipaigachi		Total		Weighted deduction	Total as per IT Return		Grand Total
	Recurring	Capital	Recurring	Capital	Recurring	Capital		Recurring	Capital	
1	2150431	140394	4646543	10439567	6796974	10579961	200%	6796974	21159922	27956856

It is taken note that the AO allowed deduction only in respect of the R&D unit at Goa which was approved by DSIR on 24.08.2011 and allowed Rs. 24,31,179/-. The AO allowed the same by taking note that the Secretary DSIR in Form no. 3CL for AY 2013-14 has given the breakup of the total cost of in-house research to the tune of Rs. 22.90 Lakhs and has not approved the expenditure incurred as claimed in respect of R&D unit at Sipaigachi.

14. The assessee's claim for deduction u/s 35(2AB) for its R&D, Sipaigachi Unit (recurring expenditure of Rs. 46,46,543/- and capital expenditure of Rs. 1,04,39,567/-) was thus disallowed by the AO on the grounds that the assessee's R&D unit at Sipaigachi unit was granted recognition by Secretary DSIR only on 26.03.2013 and in the Form 3CL issued for the year under consideration, the DSIR has not approved the expenses claimed to have been incurred by the assessee in respect of its R&D Unit at Sipaigachi therefore, an amount of Rs. 2,55,25,677/- was disallowed. On appeal, the Ld. CIT(A) has allowed the claim of the assessee by relying on the decision of Hon'ble Gujrat High Court in the case of Banco Products (India) Ltd. (supra). And we note that similar issue came up before the Hon'ble Gujrat High Court in the case of CIT vs. Sun Pharmaceutical Industries Ltd. reported in (2017) 250 TAXMAN 0270 wherein the Hon'ble high held as under:

"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 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."

15. We note that the AO has accepted the fact that the assessee's R&D unit at Sipaigachi was given recognition by Secretary, DSIR vide letter dated 26.03.2013 which

is placed at page 73 of PB and various certificates of registration which is placed at page 74 to 80 of PB. Therefore, since the prescribed authority as per Section 35(2AB) i.e. Secretary DSIR has approved the research and development facility set up by the assessee and necessary approval has been granted, the action of AO not giving weighted deduction u/s 35(2AB) for absence of Form 3CL cannot be countenanced. And the other objection of AO in respect of the date of approval given by DSIR being on 26.03.2013, the deduction for AY 2013-14 cannot be given also has no legal sanction. The provision we note nowhere suggests or implies that R&D facility should be approved from a particular date and in other words, it is nowhere suggested that date of approval only will be cut off date for eligibility of weighted deduction on the expenses incurred from that date onwards. The statute does not say that and therefore, AO erred in prescribing something which is not in the statute and thus not allowing the claim on this reason also is erroneous.

16. As we have discussed (supra) prior to 01.07.2016, Form 3CL had no legal sanctity and it is only w.e.f 01.07.2016 with the amendment to Rule 6(7a)(b) of the Rules that the quantification of the weighted deduction u/s 35(2AB) of the Act has significance. We note that for claiming deduction u/s 35(2AB) of the Act, the assessee should be engaged in manufacture of certain articles or things as stipulated in that provision. It is not in dispute that the assessee is engaged in the business to which Section 35(2AB) of the Act applied. The other condition required to be fulfilled for claiming deduction u/s 35(2AB) of the Act is that the research and development facility should be approved by the prescribed authority i.e, Secretary, Department of Scientific Industrial Research, Govt. of India (DSIR). It is not in dispute that the assessee in this case received recognition of its R&D unit at Sipaigachi vide letter dated 26.03.2013 vide page 73 of PB. In the aforesaid facts and circumstances we are of the view that the deduction u/s 35(2AB) of the Act ought to have been allowed as weighted deduction at 200% of the expenditure as claimed by the assessee. However, we note that neither the prescribed authority (Refer page 82 & 83 of PB) nor the AO has applied the mind as to the expenditure, actually incurred for the R&D facility at Sipaigachi. Merely because the prescribed authority (DSIR) failed to send intimation in Form 3CL in respect of expenditure incurred by R&D unit at Sipaigachi would not be reason enough to deprive the assessee's claim of deduction u/s

35(2AB) of the Act. Since the verification has not been done by the prescribed authority (DSIR) or the AO, we set aside the impugned order of the Ld. CIT(A) and remand this issue for the limited purpose to the file of AO to verify the actual expenditure incurred by the assessee in respect of its R&D establishment at Sipaigachi. For this we rely on the Hon'ble Gujrat High Court in the case of CIT vs. Sun Pharmaceutical Industries Ltd. (supra) against which the revenue preferred an SLP [Civil Diary No. 18273 of 2018] before the Hon'ble Supreme Court which has been dismissed on 28.07.2018 and reported in 2018 Tax Pub (DT) 5079 (SC).

17. In the result, appeal of the revenue is partly allowed. .

Order is pronounced in the open court on 13.01.2021.

Sd/-

(J.S. Reddy)
Accountant Member

Sd/-

(A. T. Varkey)
Judicial Member

Dated: 13.01.2021

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- DCIT, Circle-10(2), Kolkata
2. Respondent- M/s STP Ltd., 6, Lyons Range, (1st Floor), Kolkata-700001
3. The CIT(A)- , Kolkata (sent through e-mail)
4. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata