

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'SMC-1', NEW DELHI**

Before Sh. Bhavnesh Saini, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

(Through Video Conferencing)

ITA No. 1231/Del/2019 : Asstt. Year : 2014-15

Bharat Rasayan Ltd., 1501, Vikram Tower, Rajendra Place, New Delhi-110008	Vs	ACIT, Circle-4(2), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAACB4127A		

**Assessee by : Sh. Sandeep S. Nagar, CA
Revenue by : Sh. Prakash Dubey, Sr. DR**

Date of Hearing: 21.12.2020	Date of Pronouncement: 02.02.2021
------------------------------------	--

ORDER

Per Dr. B.R.R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order of the Id. CIT(A)-2, New Delhi, dated 21.12.2018.

2. Following grounds have been raised by the assessee:

"1.1 That on the facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeals) [hereinafter referred to as the Id. CIT(Appeals)] was not justified and grossly erred in confirming the addition made by the learned AO of weighted average deduction u/s 35(2AB) of the Act.

1.2 That on the facts and in the circumstances of the case, the Id. CIT(Appeals) was not justified and grossly erred in not considering the fact that the Research and development center of the appellant is duly recognized and all the documents necessary for compliance with the Act have been submitted with the DSIR.

2.0 That on the facts and in the circumstances of the case, the Id. CIT(Appeals) was not justified in admitting the additional ground raised in appellant proceedings without considering the judicial pronouncements and provision of the Act.

3.0 That on the facts and in the circumstances of the case, the Id. CIT(Appeals) is unjustified in not allowing the claim of education cess of Rs.24,43,508/- as an allowable business expenditure.

4.0 That on the facts and in the circumstances of the case, the Id. CIT(Appeals) is unjustified in not treating Focus Product Script Rs.14,81,465/- incentive received under Foreign Trade Policy as capital receipt not chargeable to tax by considering the purpose test."

Deduction u/s 35(2AB):

3. Straight to the issue, the assessee claimed weighted deduction u/s 35(2AB) amounting to Rs.1.21 Cr. The Assessing Officer held that in the absence of Form 3CL, such deduction is not allowable.

4. The Id. CIT (A) supported the contention of the Assessing Officer reiterating that in the absence of Form 3CL, the claim of the assessee cannot be quantified and verified. While denying the deduction, the Id. CIT (A) held that since Section 35(2AB) allows two times deduction of actual expenditure, it is necessary to have the quantification available before the AO and verify the quantum of claim.

5. Before us, the Id. AR submitted that the assessee M/s Bharat Rasayan Ltd. is a recognized in house research & development (RD) center approved by Department of Scientific Research Govt. of India, New Delhi since assessment year 2007-08 and the recognition is continuing till date without any interruption and regularly submitting requisite information to DSIR in form 3CK year after year. He has produced the copy of

the renewals issued by DSIR dated 19.05.2015 granting renewal of recognition upto 31.03.2021 which are as under:

Dated: 19th May, 2015

*To,
M/s Bharat Rasayan Ltd.,
1501, Vikram Tower,
Rajendra Place,
New Delhi-110008*

*Subject: Renewal of Recognition of in-house R&D
Units(s)*

Dear Sirs,

This has reference to your application for renewal of recognition of your In-House R&D unit(s) beyond 31.03.2015 by the Department of Scientific and Industrial Research.

2. This is to inform you that it has been decided to accord renewal of recognition to the In-House R&D unit(s) of your firm at 2 K.M. Stone Madina Mokhra Road, Village Mokhra, Tehsil Meham, Distt. Rohtak (Haryana) upto 31.03.2018. Terms and conditions pertaining to this recognition are given overleaf.

3. Kindly acknowledge the receipt of this letter.

*Yours faithfully,
Sd/-
(K.V.S.P. Rao)
Scientist - 'G'*

Dated: 24th April 2018

*To,
M/s Bharat Rasayan Ltd.,
1501, Vikram Tower,
Rajendra Place,
New Delhi-110008*

*Subject: Renewal of Recognition of In-House R&D
Units(s)*

Dear Sirs,

This has reference to your application for renewal of recognition of your In-House R&D unit(s) beyond 31.03.2018 by the Department of Scientific and Industrial Research.

2. This is to inform you that it has been decided to accord renewal of recognition to the In-House R&D unit(s) of your firm at C-1424, 2nd Floor, M.I.E. Part B, Bahadurgarh, Distt. Jhajjar (Haryana) upto 31.03.2021. Terms and conditions pertaining to this recognition are given overleaf.

3. Kindly acknowledge the receipt of this letter.

*Yours faithfully,
Sd/-
(Dr. S. K. Deshpande)
Scientist - 'G'*

6. The expenditure incurred on R&D centre for the assessment year 2014-15 is as under:

Appendix-I to Annexure-IV

Details of expenditure incurred on R&D centre/facility
Approved by Secretary, DSIR u/s 35(2AB)

1. Assessment Year: 2014-15 2. Financial Year: 2013-14


3. Location of the R&D facility: Bharat Rasayan Ltd. C-1424, II Floor, M.I.E. Part – B, Bahadurgarh, Distt. Jhajjar (Haryana), Pin-124507 and 2 K.M. Stone Madina Mokhra Road, Village: Mokhra, Tehsil: Meham, Distt. Rohtak, Haryana

4. Details of expenditure: (In Rs. Lakhs)

A.	(i)	Land	Nil
	(ii)	Buildings	Nil
B.	(i)	Capital Equipment (attach a separate sheet giving item-wise break-up of items costing more than Rs.1 Lakh). Rs. 4.12 Lacs, Part – A of Annexure - I	
	(ii)	Salaries/wages (including perquisites/other benefits; attach a list of persons along with designation, whose salary has been charged to R&D account along with salaries and other benefits paid.). Rs. 35.77 Lacs Part – B of Annexure - I & Annexure - II Contains of R&D Persons	
	(iii)	Material/Consumables/spares (Give item-wise details of items costing more than Rs. 50,000/-each in separate sheet). Rs. 4.06 Lacs Part --C of Annexure-I	
	(iv)	Utilities*	Nil
		• Steam	
		• compressed air	
		• water	
		• electricity	
		• Any others (specify)	
	(v)	Any other expenditure directly related to R&D. Rs. 9.33 Lacs Part – D of Annexure - I (Give item-wise break-up of expenditure more than Rs. 1 lakh in separate sheet) Total expenditure B(i)to(v)eligible U/S 35(2AB)	
C.	Total expenditure on the approved R&D centre. (A + B).Rs. 53.29 Lacs		
D.	Details of amounts received by the R&D Centre in cash and kind for: Nil		
i)	Commercial sale of prototypes		
ii)	Donations/payments for sponsored research programmes.		
iii)	Others (specify)		
E.	Net amount chargeable to R&D expenditure (C – D)		Rs. 53.29 Lacs

I certify that above expenditure claimed are as per the guidelines issued by DSIR and correct to the best of my knowledge and belief



Date : 28.10.2014
Place: New Delhi



Signature of the Managing Director
S.N. Gupta
S.N. GUPTA
(Managing Director)

* The expenditure on each utility should be given separately. The expenditure shall be claimed only if the utility is exclusively meant for the R&D centre or the consumption of the utility by R&D is metered and recorded.*

8. It was argued that the above expenditure for the assessment year 2014-15 and assessment year 2016-17 proves that the assessee is continuously engaged in the Research activity and the same has been renewed and approved by the DSIR as can be seen from the above approval letters. It was argued that the Form 3CL could not be submitted due to the fact that the CFO of the company has left the service and the document could not be traced. It was also submitted that Form 3CL has been submitted by the assessee on 26.12.2018 and 95% of the expenditure was allowed by the DGIT as allowed the expenses of 95%. The report submitted by the prescribed authority to the DGIT is as under:

 <p>सूचना का अधिकार RIGHT TO INFORMATION</p>	<p>दूरभाष/TEL : 26962819, 26567373 (EPABX) : 26565694, 26562133 : 26566887, 26562144 : 26562134, 26562122 फैक्स/FAX : 26960629, 26529745 Website : http://www.dair.gov.in</p>	 <p>सत्यमेव जयते</p>	<p>भारत सरकार विज्ञान और प्रौद्योगिकी मंत्रालय वैज्ञानिक और औद्योगिक अनुसंधान विभाग टेक्नोलॉजी भवन, नया महेरौली मार्ग, नई दिल्ली - 110016 GOVERNMENT OF INDIA MINISTRY OF SCIENCE AND TECHNOLOGY Department of Scientific and Industrial Research Technology Bhavan, New Mehrauli Road, New Delhi - 110016</p>
---	---	---	--

(आईएसओ 9001:2008 प्रमाणित विभाग)
(AN ISO 9001:2008 CERTIFIED DEPARTMENT) **FORM No. 3C**

Report to be submitted by the prescribed authority to the Director General (Income tax Exemption) under section 35(2AB) of the income tax Act, 1961.

1. Name and Address of the registered office of the company including phone/fax:

M/s Bharat Rasayan Limited,
1501, Vikram Tower, Rajendra Place,
New Delhi - 110008.
Tel. nos. - 011-43661111

2. Permanent Account Number (PAN) of the company: AAACB4127A

3. Name and designation of the Principal Officer of the company:

Shri S.N.Gupta, Managing Director

4. Nature of Business/activity of the company:

Manufacture of Agrochemicals

5. Annual production of the eligible products of the company during past three years.

S. No.	Product	Unit	Yearly Production		
			2013-14	2014-15	2015-16
1.	Cypermethrin Technical	MT	594.03	334.42	255.60
2.	Ethion Technical	MT	409.75	630.75	629.25
3.	Fenvalerate Technical	MT	331.60	241.40	230.26
4.	Imidacloprid Technical	MT	180.58	231.04	172.34
5.	Meta Phenoxy Benzaldehyde	MT	1224.53	1425.96	2338.59
6.	Phenthoate Technical	MT	321.02	339.74	263.00

6. Proposed objectives of scientific research contemplated by the company:

i) Process development of new agrochemicals products
ii) Quality assurance and quality improvement of existing products

7. Whether the nature of business is related to the proposed objectives of the scientific research contemplated by the company. Yes

8. Details of the nature of existing in-house Research and Development facility specifying whether the in house Research & Development facility is adequate for carrying out scientific research:

Yes, adequate R&D facilities for carrying out research as per proposed objectives contemplated are available.

9. Whether recognition granted to the in-house Research and Development centre of the company by Department of Scientific and Industrial research:

Yes, valid up to 31.03.2017

10. Total cost of in-house research facility, giving break-up of expenditure on land and building:

Description	(Rs. In Lakhs)
	AY 2016-17
Capital Expenditure (other than land & Building)	9.79
Revenue Expenditure	66.49
Total R&D expenditure	76.28

11. Whether agreement for co-operation and Research and Development facility and for audit of the accounts maintained for that facility entered into. Yes

Certified that the above information is true to the best of our knowledge and belief.

(Indu Bhaskar)
Scientist 'G'

(For and on behalf of Secretary, DSIR)

Place: New Delhi

Date: 19th December, 2017

DSIR Ref. File No. TU/IV-15 (1455)/2016

Order in Form 3CM No. TU/IV-15 (1455)/35(2AB)/3CM/1178/2016

3CL No. TU/IV-15(1455)/35(2AB)/3CL/2916/2017

To:

1. The Chief Commissioner of Income Tax (Exemptions), Pratyaksh Kar Bhawan, Block E-2, 25th Floor, Civic Centre, J.L. Nehru Marg, New Delhi 110002.
2. The Chief Commissioner of Income Tax-2, Room No. 353, Central Revenue Building, I.P. Estate, New Delhi
3. M/s Bharat Rasayan Limited, 1501, Vikram Tower, Rajendra Place, N. Delhi - 110008.

9. The statement of expenditure claimed and allowed by the department in the Form 3CL is as under:

BRL _ R&D EXPS. FY 2015-16 (AY16-17)

*Note: R&D Expenses: The Company is registered as Research & Development Unit (R&D) with Ministry of Science & Technology, Govt. of India, Department of Scientific & Industrial Research, New Delhi, hence eligible for weighted deduction U/S 35(2AB) of the Income Tax Act on expenditure incurred for the purpose. Total expenditure of Rs. 80,38,972/- (Revenue Expense of Rs. 70,60,332 (net of depreciation) and Capital Expenditure of Rs. 9,78,640/-) are eligible for weighted deduction U/S 35(2AB) of the Income Tax Act, 1961.

Exp claim by Us		
R & D Expenses*		79,45,039.00
Less :	Depreciation	8,84,707.00
Net Revenue		70,60,332.00
Add :	Capital Expenditure	9,78,640.00
Net Claim by us		80,38,972.00

Exp Approved by DSIR		
R & D Expenses*		75,34,546.00
Less :	Depreciation	8,84,707.00
Net Revenue		66,49,839.00
Add :	Capital Expenditure	9,78,640.00
Net Claim Approved		76,28,479.00

Diff		4,10,493.00
Details		
Rent	1,17,000.00	
Bank charges	1,727.00	
Business Promotion	5,724.00	
Gratuity prov.	1,84,602.00	
Car R/M exps	62,838.00	
Vehicle Exps	38,602.00	4,10,493.00

Bharat Rasayan Limited

ANNEXURE - 3

Statement showing comparison of expenditure claimed by appellant and allowed by the department in Form-3CL vis-à-vis AY 2014-15

Nature of expenditure	A.Y. 2016-17		A.Y. 2014-15	
	Amount claimed as per Form 3CK	Amount allowed as per Form 3CL	Amount claimed as per Form 3CK	Amount that would be allowed as per subsequent year
Bonus(Indirect)	2,488	2,488	36,698	36,698
Employer Contribution Of LWF	2,080	2,080	1,400	1,400
Employer Contribution To ESIC	-	-	12,399	12,399
Employer Contribution To PF	1,50,122	1,50,122	52,511	52,511
Group Gratuity Premium	1,84,602		1,03,235	
Salary & Wages	49,48,013	49,48,013	32,93,562	32,93,562
Leave Encashment	81,914	81,914	59,526	59,526
Staff Welfare	21,584	21,584	18,152	18,152
Anal Ytical/Product Registration Expenses	-	-	9,663	9,663
Book Periodicals & Subscription	3,67,456	3,67,456	2,84,669	2,84,669
Car Repair & Maintenance	62,838		1,43,581	
Bank Charges & Commission Total	1,727		7,197	
Computer Expenses	2,614	2,614	250	250
Conveyance Expenses	25,761	25,761	43,486	43,486
Depreciation	8,84,707	8,84,707	7,49,535	7,49,535
Laboratory Expenses	60,140	60,140	80,077	80,077
Postage & Courier Expenses	900	900	360	360
Machinery & Plant Repair & Maintenance	28,038	28,038	1,69,866	1,69,866
Miscellaneous & General Expenses	78,036	78,036	47,741	47,741
Office Exepenses	42,213	42,213	4,145	4,145
Printing & Stationery Exps	11,098	11,098	2,825	2,825
Rent	1,17,000		87,750	
Telephone & Communication Expenses	26,417	26,417	25,185	25,185
Tour & Travelling Expenses	37,648	37,648	26,588	26,588
Vehicle Expenses	38,206		-	
Rebate & Short Excess	530	530	-	-
Business Promotion/Hospitality	5,724	-	-	-
Purchase - Consumables & Utility	7,63,183	7,63,183	4,06,280	4,06,280
Total Revenue Expenses	79,45,039	75,34,942	56,66,681	53,24,918
Add: Addition To Fixed Assets	93,933	93,933	4,11,713	4,11,713
Total Revenue & Capital Exps	80,38,972	76,28,875	60,78,394	57,36,631

10. The Id. AR argued that having submitted all the details, the communication in Form 3CL was as per the rules is between the prescribed authority and the Income Tax Department.

11. The Id. AR submitted that it is the responsibility of the Assessing Officer to obtain the Form 3CL from the prescribed authority as the assessee is not privy to the communication between the Government authorities. He argued that once the expenditure has been incurred on R&D and the expenditure *per se* is not doubted, the revenue department cannot deny the benefit to the assessee.

12. On the other hand, the Id. DR argued that any expenditure which is to be allowed and given benefit to, the assessee has onerous responsibility to prove that such expenditure is allowable. It was argued that the assessee failed to submit Form 3CL which is a prerequisite for claiming of deduction u/s 35(2AB). It was also argued that allowing of such expenditure in the earlier year and the subsequent year doesn't give any right to allow the deduction during the current year.

13. Heard the arguments of both the parties and perused the material available on record.

14. The moot issue to be decided by us is whether the claim for deduction u/s 35(2AB) in the absence of submission of Form 3CL by the assessee is allowable or not.

15. We are guided by the overall facts and circumstances of the assessee on this issue, we find that the assessee has submitted all the documents necessary to prove the claim of

deduction u/s 35(2AB). The assessee has submitted Form 3CK for entering into an agreement with DSIR for R&D facility along with audit statement and DSIR issued letter stating recognition of In-House R&D units from 31.03.2012 to 31.03.2015 and thereafter till 31.03.2018 and upto 31.03.2021. From the perusal of said certificates, it can be seen that the year under consideration is covered under the certificates issued by the DSIR wherein approval has been duly granted. We have also gone through the provisions pertaining to Form 3CL and find that the Form 3CL is issued by the Scientists for and on behalf of Secretary, DSIR and the report is to be submitted to the Director General (Income Tax Exemption) u/s 35(2AB) of the Income Tax Act, 1961. The said format of communication of Form 3CL is as under:

FORM NO. 3CL
Report to be submitted by the prescribed authority to the Director General (Income-tax Exemptions) under section 35(2AB) of the Income-tax Act, 1961

1. Name and Address of the registered office of the company including Telex/Fax/Phone numbers	
2. Permanent Account Number (PAN) of the company	
Name and designation of the Principal Officer of the company	
3. Nature and Business/activity of the company	
Manufacture/production of -	
Drugs	
Pharmaceuticals	
Electronic Equipments	
Computers	
Telecommunication Equipments	
Chemicals	
Any other article or thing notified under sub-section (2AB) of section 35 (please specify)	
4. Annual production of the eligible products of the company during the past three years.	
5. Proposed objectives of scientific research contemplated by the company.	
6. Whether the nature of the business is related to the proposed objectives of the scientific research contemplated by the company.	
7. Details of the nature of existing in-house Research and Development facilities specifying whether the in-house Research and Development facility is adequate for carrying out scientific research.	
8. Whether recognition granted to the in-house Research and	

Development centre of the company by Department of Scientific and Industrial Research.	
9. Total cost of in-house research facility, giving break-up of expenditure on land and buildings. (ASSESSMENT YEAR)	
10. Whether agreement for co-operation and Research and Development facility and for audit of the accounts maintained for that facility entered into.	
Certified that the above information is true to the best of our knowledge and belief.	
Place _____ Date _____	_____ Signature of Secretary, DSIR

16. From the above, we find that it is the responsibility of the AO to obtain the copy from the DSIR. We also find that the DSIR has also submits copy to the Jurisdictional Chief Commissioner of Income Tax too. There was no dispute regarding the expenditure incurred by the assessee.

17. with regard to the issue before hand, we have also gone through the judgment of Hon'ble High Court of Gujarat in the case of CIT Vs Sun Pharmaceutical Industries Ltd. where in it was held that "having heard learned counsel for the parties and having pursued 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 3CL 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 available”.

18. Similarly, the Tribunal in the case of Century Seeds Pvt. Ltd. Vs DCIT in ITA No. 942/Hyd./2017 dated 20.07.2018 held that AO has correctly allowed the deduction and there is no error in the order passed by AO u/s 143(3). Once a research facility is approved entire expenditure incurred on department of R&D has to be allowed weighted deduction as provided u/s 35(2AB).

19. Further, relying on the case of DCIT Vs Famy Care Ltd. on the same facts, the Tribunal in the case of Efftronics Systems Pvt. Ltd. Vs ACIT in ITA No. 216/Viza/2015 laid down the proposition that in case Form 3CL is not available, the appellant should not be penalized and weighted deduction cannot be denied.

20. Similarly, the ITAT Mumbai Bench in the case Mahindra & Mahindra Ltd. Vs DCIT in ITA No. 8597/Mum/2010 order dated 06.06.2012 wherein it was held that while deciding the issue related with benevolent provisions like 35(2AB), liberal and practical approach should be followed.

21. Hence, keeping in view the entirety of the facts and peculiar circumstances of the instant case, we hold that the assessee should not be shorned of the legal right bestowed upon by the provisions of the Income Tax Act. The revenue may disallow the claim of the assessee if it can prove that the claim of the assessee is wrong after obtaining the report in Form 3CL

from the concerned authority. The matter is being sent back to the file of the Assessing Officer.

Education Cess:

22. The assessee has taken up additional grounds pertaining to deduction of Education Cess before the Id. CIT (A). The Id. CIT (A) did not allow the grounds holding that it doesn't emanate from the assessment order.

23. Before us, it was argued that a legal ground can be taken up any time before the higher authorities. The Id. AR relied on the judgment of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. Vs CIT (1998) 229 ITR 383. Admission of the additional ground has been opposed in principle by the Id. DR.

24. Keeping in view, the judgment of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. Vs CIT (1998) 229 ITR 383, the additional ground filed by the assessee is accepted. The relevant portion of the judgment is as under:

"5. Under Section 254 of the Income-tax Act, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise

from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.

6. In the case of Jute Corporation of India Ltd. v. C.I.T. . this Court, while dealing with the powers of the Appellate Assistant Commissioner observed that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer. This Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also.

7. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) takes too narrow a view of the powers of the Appellate Tribunal [vide, e.g., C.I.T, v. Anand Prasad (Delhi), C.I.T. v. KaramchandPremchand P. Ltd. and C.I.T. v. Cellulose Products of India Ltd. . Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is

necessary to consider that question in order to correctly assess the tax liability of an assessee.

8. The reframed question, therefore, is answered in the affirmative, i.e., the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee. We remand the proceedings to the Tribunal for consideration of the new grounds raised by the assessee on the merits."

25. Respectfully following the above judgment of the Hon'ble Apex Court, the additional grounds taken up by the assessee are hereby admitted.

26. Reading the provisions of Section 40(a)(ii), the assessee argued that education cess paid on Income Tax doesn't come under the purview of the definition as it is levied on the amount of Income Tax but not on profits of business. The Id. AR relied on the Circular No. 91/58/66-ITJ(19) by CBDT dated 18.05.1967, which states the effect of the omission of the words 'cess' from Section 40(a)(ii) is that only taxes paid are to be disallowed in the assessment for the assessment years 1962-63 onwards.

27. The Id. AR also relied on the judgment of Hon'ble Rajasthan High Court in the case of Chambal Fertilisers and Chemicals Ltd. Vs JCIT in ITA No. 52/2018 dated 31.07.2018 wherein the same issue has been decided in favour of the assessee and particularly held that education cess is an allowable expenditure.

28. Further, he argued that in the case of ITC Vs ACIT in ITA No. 685/Kol/2014 dated 27.11.2018 wherein it was held that the education cess is an allowable expenditure.

29. The Id. AR has also relied in the case of Peerless General Finance & Investment Co. Ltd. Vs DCIT in ITA No.937 & 938/Kol/2018 dated 24.03.2019 wherein it was held that education cess is not tax and is an allowable expenditure.

30. The Id. DR argued that it is not the appropriate forum to raise the issue at this juncture. Since, there is no dispute between the assessee and the Assessing Authorities, a non-dispute cannot be adjudicated. He argued that the education cess is a part of the Income Tax and is a charge on the assessee. Hence, it cannot be treated as expense eligible for deduction.

31. Heard the arguments of both the parties and perused the material available on record.

32. Regarding the claim of education cess as an allowable expenditure, we find that the CBDT vide Circular No. 91/58/66 – ITJ(19) clarified as under:

"Interpretation of provisions of Section 40(a)(ii) of the I.T Act – clarification regarding.

Section 40(a)(ii) – Recently a case has come to the notice of the Board where the ITO has disallowed the 'cess' paid by the assessee on the ground that there has been no material change in the provisions of Section 10(4) of the old Act and Section 40(a)(ii) of the new Act.

2. The view of the ITO is not correct. Clause 40(a)(ii) of the IT Bill, 1961 as introduced in the Parliament stood as under:

"(a) any sum paid on account of any cess, rate or tax levied on the profits or gains of any business or profession or

assessed at a proportion of, or otherwise on the basis of, any such profits or gains."

When the matter came up before the Select Committee, it was decided to omit the word 'cess' from the clause. The effect of the omission of the word 'cess' is that only taxes paid are to be disallowed in the assessments for the years 1962-63 and onwards.

3. The Board desire that the changed position may please be brought to the notice of all the ITOs so that further litigation on this account may be avoided."

33. The similar issue of allowability of cess u/s 37 has been examined by the Co-ordinate Bench of ITAT in ITA No. 685/Cal./2014 wherein the amount of the cess paid has been held to be an allowable deduction.

34. Further, we find that the Hon'ble High Court of Judicature for Rajasthan at Jaipur in ITA No. 52/2018 in the case of Chambal Fertilizers and Chemicals Ltd. held that in view of the Circular of CBDT where the word 'cess' is deleted, the claim of the assessee for deduction is acceptable. In that case, the Hon'ble High Court held that there is difference between the cess and tax and cess cannot be equated with the cess.

35. We have also gone through the provisions of Sec. 115 of the Income Tax act 1961 which are as under:

"Explanation 2 to section 115JB (2) of the Act defines the term 'Income-tax' in an inclusive manner, which includes cess. Provision of the explanation 2 to section 115JB is as given below:-

For the purposes of clause (a) of Explanation 1, the amount of income-tax shall include—

(i) any tax on distributed profits under [section 115-Q](#) or on distributed income under [section 115R](#);

- (ii) any interest charged under this Act;*
- (iii) surcharge, if any, as levied by the Central Acts from time to time;*
- (iv) Education Cess on income-tax, if any, as levied by the Central Acts from time to time; and*
- (v) Secondary and Higher Education Cess on income-tax, if any, as levied by the Central Acts from time to time.*

36. Thus, wherever the legislature wanted to include this term specifically in the statute it has done so under the Act. The term 'tax' has been defined in section 2(43) of the Act to include only Income-tax, Super Tax and Fringe Benefit Tax (FBT). Provision of the section 2(43) is as given below:

"tax" in relation to the assessment year commencing on the 1st day of April, 1965, and any subsequent assessment year means income-tax chargeable under the provisions of this Act, and in relation to any other assessment year income-tax and super-tax chargeable under the provisions of this Act prior to the aforesaid date and in relation to the assessment year commencing on the 1st day of April, 2006, and any subsequent assessment year includes the fringe benefit tax payable under [section 115WA](#)."

37. Surcharge on income-tax finds place in the First Schedule, but that is not the case so far as Education Cess is concerned. Therefore, the education cess on this reasoning cannot be equated as tax or surcharge. Based on this, it can be said that since the word 'Cess' is not specifically included in the definition, it cannot be considered a part of tax, and accordingly, it should not be disallowed in u/s 40(a)(ii) of the Act.

38. Further, we are guided by the judgment of the Constitutional bench which was also referred in the case of

Dewan Chand Builders & Contractors Vs Union of India & Others
in Civil Appeal No. 1830 of 2008 dated 18.11.2011.

39. The Constitution Bench of this Court in Hingir Rampur Coal Co. Ltd. Vs. State of Orissa² was faced with the challenge to the constitutional validity of the Orissa Mining Areas Development Fund Act, 1952, levying Cess on the petitioner's colliery. The Bench explained different features of a 'tax', a 'fee' and 'cess' in the following passage:

"The neat and terse definition of Tax which has been given by Latham, C.J., in Matthews v. Chicory Marketing Board (1938) 60 C.L.R. 263 is often cited as a classic on this subject. "A Tax", said Latham, C.J., "is a compulsory exaction of money by public authority for public purposes enforceable by law, and is not payment for services rendered". In bringing out the essential features of a tax this definition also assists in distinguishing a tax from a Fee. It is true that between a tax and a fee there is no generic difference. Both are compulsory exactions of money by public authorities; but whereas a tax is imposed for public purposes and is not, and need not, be supported by any consideration of service rendered in return, a fee 1 AIR 1954 SC 282 2 1961 (2) SCR 537 is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it. If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee. Tax recovered by public authority invariably goes into the consolidated fund which ultimately is utilised for all public purposes, whereas a cess levied by way of Fee is not intended to be, and does not become, a part of the consolidated fund. It is earmarked and set apart for the purpose of services for which it is levied."

40. We also find that the proceeds from collection of "Education Cess" are not credited to Consolidated Fund but to a non-lapsable Fund for elementary education-"**Prarambhik Shiksha Kosh**". Since the proceeds from collection of Education Cess are kept separate for a specified purpose, applying the principles in the aforesaid decision of Apex Court in the case of **M/s Dewan Chand Builders (supra)**, it can be said that the same is not in the nature of tax. Hence, it is allowable as deduction.

41. Further, Provisions of Section 37 are perused which are as under:

"37. (1) Any expenditure (not being expenditure of the nature described in [sections 30 to 36](#) and not being in the nature of **capital expenditure** or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".

*Explanation 1.—For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an **offence** or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.*

*Explanation 2.—For the removal of doubts, it is hereby declared that for the purposes of sub-section (1), any expenditure incurred by an assessee on the activities relating to **corporate social responsibility** referred to in section 135 of the Companies Act, 2013 (18 of 2013) shall not be deemed to be an expenditure incurred by the assessee for the purposes of the business or profession."*

42. From the above, we find that Education Cess is not of the nature described in sections 30 to 36, Education Cess is not in the nature of capital expenditure, Education Cess is not personal expense of the Assessee, it is mandatory for it to pay Education Cess and for the purpose of computation of Education Cess, the Income 'Tax' is taken as the criteria for computational purpose. Thus, the expense of Education Cess is mandatory expenses to be paid but does not fall under capital expense and personal expenditure and hence may be allowed as deduction.

43. We have also gone through the various judgments of judicial authorities pan India wherein the fresh claim of the assessee is considered and the deduction u/s 37 of Education Cess has been allowed. The Hon'ble High Court of Bombay held that the appellate authorities may confirm, reduce, enhance or annul the assessment or remand the case to the AO, because the basic purpose of a tax appeal was to ascertain the correct tax liability in accordance with the law. To mention a few,

- *DCIT Vs M/s. Agrawal Coal Corporation Pvt. Ltd ITA Nos. 801 to 803/Indore/2018.*
- *Atlas Copco India Ltd. Vs ACIT in ITA No. 736/Pune/2011*
- *Tata Autocomp Hendrickson Vs DCIT in ITA No. 2486/Pune/2017*
- *Symantec Software India Pvt. Ltd. Vs DCIT in ITA No. 1824/Pune/2018*
- *Sicpa India Pvt. Ltd. Vs ACIT in ITA No. 704/Kol/2015*
- *Philips India Ltd. Vs ACIT in ITA No. 2612/Kol/2019*
- *ITC Limited Vs ACIT in ITA No. 685/Kol/2014*
- *DCIT Vs The Peerless General Finance & Investment & Co. Ltd. in ITA No. 1469/Kol/2019.*
- *ACIT Vs ITC Infotech in ITA No. 220/Kol/2017*
- *Reckitt Benckiser India Pvt. Ltd. Vs DCIT (2020) 117 taxmann.com 519 (Kol.)*

- *Crystal Crop. Protection Pvt. Ltd. Vs JCIT in ITA No. 1539/Del/2016*
- *Midland Credit Management India Vs ACIT in ITA No. 3892/Del/2017*
- *Voltas Ltd. Vs ACIT in ITA No. 6612/Mum/2018*
- *Sesa Goa Ltd. Vs JCIT (2020) 117 taxmann.com 96 (Bom.)*
- *Chambal Fertilisers and Chemicals Vs JCIT in ITA No. 52 of 2018 (Raj. HC)*

44. Hence, keeping in view the provisions of the Act pertaining to Section 40(a)(ii) and Section 115JB, Circular of the CBDT No. 91/58/66-ITJ(19), the orders of Co-ordinate Benches of ITAT and judicial pronouncements of the Hon'ble High Court of Bombay and Hon'ble High Court of Rajasthan, we hereby hold that the assessee is eligible to claim the deduction of the 'Education Cess' as per the provisions of Section 37 of the Income Tax Act.

Incentive under Foreign Trade Policy:

45. The assessee has received incentive under "Focus Product Scheme" (FPS) from Government of India for exports of goods. It was submitted that the objective of the FPS is to promote export of products which have high intensity/employment potential so as to offset infrastructural inefficiencies and other associated cost involved in marketing of these products. That said incentive was given @ 2% of the FOB value for export to potential new markets and not for all the markets. This is an incentive given for exploring new market on a long term perspective. The potential markets will be identified by the Government and the samples will be sent for exploring the markets. From the perusal of the Scheme, it can be seen that, incentive has been given with an objective to intensify and

accelerate the process of dispersal of Industries. The Id. AR produced the copy of the said scheme to buttress its arguments.

46. On the other hand, the Id. DR argued that the incentives are in the nature of revenue as it is linked to the percentage of the FOB value for exports. Since, the FOB value is a trading implication any income arising out of such transaction has to be treated as revenue in nature.

47. Heard the arguments of both the parties and perused the material available on record.

48. We have gone through the scheme of the legal framework of the scheme of Foreign Trade Policy and Chapter-1B pertaining to special focus initiatives which reads as under:

"With a view to continuously increasing our percentage share of global trade and expanding employment opportunities, certain special focus initiatives have been identified/continued for Market Diversification, Technological Upgradation, Support to status holders, Agriculture Handlooms, Handicraft, Gems & Jewellery, Leather, Marine, Electronics and IT Hardware manufacturing Industries, Green products, Exports of products from North-East, Sports Goods and Toys sectors. Government of India shall make concerted efforts to promote exports in these sectors by specific sectoral strategies that shall be notified from time to time.

Export of Products/Sectors of high export intensity/employment potential (which are not covered under present FPS List) would be incentivized at 2% of FOB value of exports (in free foreign exchange) under FPS when exported to the Linked Markets (countries), which are not covered in the present FMS list, as notified in Appendix 37D of HBPV, for exports made from 27.08.2009 onwards."

49. We have also examined the para no. 3.15.3 of the scheme document of the Foreign Trade Policy of Government of India, Ministry of Commerce and Industry wherein it was specified that market linked focus products scripts (MLFPS) is meant for export of products of high export intensity employment potential would be incentivized at 2% of FOB value of exports in free Foreign Exchange under FPS when exported to the linked market countries.

50. Thus, there is no dispute that this incentive is an export incentive. The matter has been well considered by the order of the Co-ordinate of ITAT Chennai in the case of Eastman Exports Global Clothing Pvt. Ltd. in ITA No. 47/MDS./2016 dated 17.05.2016. The order dealt with the similar issue of market linked focus products scheme scripts has been deliberated and the same has been treated as a capital receipt in view of the decision of the Hon'ble Apex Court in the case of Ponni Sugars and Chemicals Ltd. 306 ITR 392. The relevant part of the order is as under: (Factual matrix)

"2. the assessee submitted that the assessee received Market Linked Focus Product Scheme scrips on export of knitted garments. The Market Linked Focus Product Scheme was given @ 2% of the FOB value for export to potential new markets and not for all the markets. According to the Id. Representative, this is an incentive given for exploring new market on a long term perspective. The potential markets will be identified by the Government and the samples will be sent for exploring the markets. The assessee is engaged in the manufacturing of hosiery garments, therefore, exported hosiery garments to South American countries.

(Operative part of the decision)

9. We have considered the rival submissions on either side and also perused the material available on record. The Market Linked Focus Product Scheme is a scheme promoted by the Director General of Foreign Trade wherein incentive @ 2% on the FOB value of the total export was allowed. As per the Scheme, the incentive was given to export products in a specified market. The export of products which are covered under FPS list would be given incentive of 2% on FOB value of the export. In other words, it is an incentive given by the Government for exploring the new markets across the globe. The question arises for consideration is when the assessee was given incentive for exploring the new markets across the globe, whether such incentive would be a capital receipt or revenue receipt? The Apex Court in the case of Ponnai Sugars & Chemicals Ltd (supra) had an occasion to examine an identical situation and observed that if the object of the subsidy was to enable the assessee to carry on the business more profitably, then the receipt is on the revenue account. On the other hand, if the object of assistance was to enable the assessee to set up a new unit or expand the existing unit, then the receipt is on the capital account. In the case before us, the Government of India provided the incentive for exploring the new markets across the globe. Exploring a new market for a specified area would naturally expand the market area of the assessee. The incentive given to the assessee is not for running the business profitably but for expanding the market area. Therefore, this Tribunal is of the considered opinion that the incentive given by the Government to the assessee for exploring the new market is a capital receipt, hence it cannot be treated as income either u/s 2(24) or 28 of the Act. In view of the above, we are unable to uphold the order of the lower authority. Accordingly, the orders of the lower authorities are set aside and the addition made by the Assessing Officer is deleted."

51. We have gone through the entire facts and preposition of the law and find that the issue is squarely covered by the said order of the Tribunal which was based on the judgment of the Hon'ble Apex Court. The MLFPS received by the assessed is to be treated as capital receipt only. Hence, we hereby allow the plea of the assessee on this ground.

52. In the result, the appeal of the assessee is allowed.
Order Pronounced in the Open Court on 02/02/2021.

Sd/-

(Bhavnes Saini)
JUDICIAL MEMBER

Dated: 02/02/2020

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(Dr. B. R. R. Kumar)
ACCOUNTANT MEMBER

ASSISTANT REGISTRAR