

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI B R BASKARAN, ACCOUNTANT MEMBER**

ITA No.1352/BANG/2015
Assessment year : 2011-12

M/s Shilpa Medicare Ltd., 10/80, 1 st Floor, Rajendra Gung, Raichur – 584 102 PAN: AADCS 8788 F	Vs.	The Additional Commissioner of Income Tax, Raichur.
APPELLANT		RESPONDENT

Revenue by	:	Shri. Pradeep Kumar, CIT(DR), ITAT, Bengaluru.
Assessee by	:	Shri. S. Annamalai, Advocate

Date of hearing	:	08.03.2021
Date of Pronouncement	:	09.03.2021

ORDER

Per N.V. Vasudevan, Vice President

This is an appeal by the Assessee against the order dated 9.9.2015 of CIT(A) Kalaburagi, relating to AY 2011-12.

2. One of the issues that arose for consideration in the appeal by the assessee for AY 2011-12 was with regard to the allowability of the assessee for weighted deduction u/s 35(2AB) of the Income Tax Act 1961 (the Act). Similar issue arose for consideration in the Assessee’s appeal for AY 2010-11 also in ITA No.1351/Bang/2015. The appeals for AY 2010-11 and 2011-12 were heard together and a common order was passed by the Tribunal. On the issue of allowing deduction u/s.35(2AB) of the Act, the Tribunal came to the following conclusion in its order dated 6.2.2020:-

“7. Grounds 6 to 10 raised by assessee are with regard to rejection of the claim of assessee for grant of weighted deduction u/s. 35(2AB) of the Act. The admitted position u/s. 35(2AB) of the Act is that approval of

prescribed authority on the scientific research on in house R&D facility is required to be obtained. It is also the admitted position that the assessee obtained the approval from the prescribed authority w.e.f. 1.4.2011. The assessee had made application to the prescribed authority for grant of approval on 12.5.2011 and the date of approval of the scientific research by the prescribed authority was 7.12.2011. It was the case of AO that since in the previous year relevant to AY 2010-11, the assessee had not even made application for grant of approval to the prescribed authority and since the approval of the prescribed authority is only w.e.f. 1.4.2011, the deduction cannot be allowed for AY 2010-11. The assessee, however, had placed reliance on the decision of Hon'ble Gujarat High Court in the case of Claris Lifesciences Ltd. [326 ITR 251 (Guj)] wherein the Hon'ble High Court held that the provisions of section 35(2AB) nowhere suggests or implies that the R&D facility is to be approved from a particular date or that the date of approval only will be the cut-off date for allowability of weighted deduction. The CIT(Appeals) on this aspect held as follows:-

“ The contents of the Assessment order and the submissions of the Assessee are perused and considered. The Hon'ble High Court of Gujarat has approved in-principle that cut-off date for claiming deduction under section 35(2AB) is not the date of approval by the Government. In the instant case, the Approval has been received during the FY 2011-12, which is after 2 years of the current AY. The Assessee is into the business of manufacturing of bulk drugs and intermediaries, which go into production of pharmaceutical products. In this kind of industry, research and development is part and parcel of the production and without which survival becomes difficult. The Appellant's eligibility to claim the deduction is also not in dispute, however, what is unacceptable is that the Assessee has claimed the deduction in respect of the current AY. without receiving approval during the year. As discussed elsewhere, Approval has been received by the Assessee-company during the period relevant to subsequent AY 2012-13. Of course, a deduction is allowed in Assessment in AY 2012-13. The decision in the case of Claris Life Sciences, is distinguishable for the reason that Approval in that case was received during the year itself. Whereas in the case on hand, as said above, the Approval is received not during the current year. In the circumstances, I take the view that the Appellant is not eligible to take a deduction in the current AY. Accordingly, I uphold the stand of the AO in disallowing the deduction.”

8. *Aggrieved by the order of CIT(Appeals), the assessee is in appeal before the Tribunal.*

9. *The ld. counsel for the assessee apart from relying on the decision of the Hon'ble Gujarat High Court in the case of Claris Life Science (supra) further placed reliance on the decision of Hon'ble Delhi High*

Court in the case of CIT v. Sandan Vikas (India) Pvt. Ltd., 335 ITR 117 (Del) laying down identical proposition and also on the decision of the Hon'ble Gujarat High Court in the case of Banco Products (I) Ltd., 405 ITR 318 (Guj).

10. We have perused the aforesaid decisions and we find that in the case of *Claris Lifesciences (supra)*, weighted deduction was claimed by the assessee in AY 2001-02 and the approval was received in that year itself. Similarly in the case of *Sandan Vikas (India) Pvt. Ltd. (supra)*, weighted deduction was claimed in AY 2005-06 and the application was filed by the assessee company on 10.1.2005 i.e., during the relevant previous year. In the case of *Banco Products (I) Ltd. (supra)*, weighted deduction was claimed for AY 2008-09 and application to the prescribed authority was made on 22.12.2006, much prior to the previous year relevant to AY 2008-09. It was in those circumstances that that the High Court took the view that the date of recognition or date of approval is irrelevant, but the existence of recognition or approval is sufficient to grant deduction u/s. 35(2AB). In our view, the ratio laid down in the aforesaid decision cannot be applied to the case of assessee. As we have already mentioned that the approval for grant of recognition to the prescribed authority was made by the assessee only on 12.5.2011 and not at any time during the relevant previous year. In the given facts and circumstances, we are of the view that the order of CIT(Appeals) should be upheld on this basis. We may also mention a similar claim has been made by the assessee in AY 2011-12 which is also being decided in this common order and in that year the assessee would be entitled to the benefit of deduction u/s. 35(2AB) as the approval was received on 12.5.2011 during the previous year relevant to AY 2011-12. We will discuss this issue while deciding the relevant ground of appeal for AY 2011-12. As far as AY 2010-11 is concerned, we are of the view that there is no merit in grounds No.6 to 10 and consequently they are dismissed.”

3. The above paras of the Tribunal's order decides the issue for AY 2010-11. As far as the issue for AY 2011-12 is concerned, the Tribunal allowed the deduction for that AY observing as follows:-

“33. Ground Nos.2 to 6 are with regard to grant of weighted deduction to the assessee u/s. 35(2AB) of the Act. We have already seen while deciding identical ground of assessee for AY 2010-11 that the claim of assessee was rejected only because of the approval of the prescribed authority u/s. 35(2AB) of the Act was effective only from 1.4.2011. In AY 2011-12 also, the revenue took the same stand that the approval was obtained only on 7.12.2011 and it was valid only from 1.4.2011 to 31.3.2012 relevant to AY 2012-13.

34. *We have already held while deciding identical ground for AY 2010-11 that the deduction has to be allowed for AY 2011-12 because the application for grant of approval to the prescribed authority was made by the assessee on 12.5.2011 i.e., during the relevant previous year. In the circumstances, the decision of the Hon'ble Gujarat High Court in the case of Claris Lifesciences Ltd. (supra) as well as the decision of the Hon'ble Delhi High Court in the case of Sandan Vikas (I) Ltd. (supra) will be applicable. Following the aforesaid decisions, we hold that the assessee should be allowed weighted deduction u/s. 35(2AB) of the Act for AY 2011-12. Thus, the relevant grounds of appeal are allowed."*

4. The revenue filed MP No.119/Bang/2020 against the order of the Tribunal dated 6.2.2020. In the MP the revenue has pointed out that the conclusions of the Tribunal for AY 2010-11 was that if the application for grant of approval is made to the prescribed authority during the previous year, then the deduction has to be allowed even though the approval is obtained at a later date. If this analogy is applied to AY 2011-12, the application for approval was made on 12.05.2011 which is after the end of previous year relevant assessment year 2011-12. The revenue prayed that deduction u/s.35(2AB) of the Act for AY 2011-12 also ought not to have been granted by the Tribunal.

5. By an order dated 5.11.2020, the Tribunal decided MP 119/Bang/20 filed by the revenue by holding as follows:

"We have carefully considered the rival submissions and are of the view that date of approval is very crucial and in view of the facts brought to our notice in the MP and in view of the facts brought to our notice by the ld. counsel for the assessee regarding the correct date of approval of the prescribed authority which is stated to be 19.01.2011, the question with regard to the allowability of the assessee to claim deduction u/s 35(2AB) for AY 2011-12 needs to be re-adjudicated as there is a mistake apparent on the face of the record in terms of noticing the correct date of approval of the prescribed authority u/s 35(2AB). Accordingly we recall the order of the Tribunal in ITA No. 1352/B/15 dated 06.02.2020 for the limited purpose of re-adjudicating the grounds 2 to 6 raised by the assessee in that appeal which is with regard to the grant of deduction u/s

35(2AB) of the Act. Accordingly, the Registry is directed to fix the appeal for hearing in due course.”

6. Pursuant to the aforesaid order, the appeal was fixed for the limited purpose of hearing the parties on the issue raised by the Assessee in Gr.No.2 to 6 viz., the claim for weighted deduction u/s.35(2AB) of the Act for AY 2011-12. The learned counsel for the Assessee drew our attention to page-36 of the paper book which is a copy of the recognition of Assessee's in house R & D unit granted by the Government of India, Ministry of Science and Technology. It was pointed out by him that this approval was granted on 19th January, 2011 and therefore for AY 2011-12, the Assessee was rightly allowed deduction u/s.35(2AB) of the Act. He also pointed out that the date of application as 12.5.2011 as mentioned in the approval in Form No.3CM was the date on which application for issue of Form No.3CM was made. He drew our attention to the approval in Form No.3CM which approval is valid w.e.f. 01.40.2011 upto 31.03.2012. This is available in page 33 of Paper Book No.2 filed by the assessee for the appeal for Assessment Year 2010-11 in ITA No.1352/Bang/2015. In this approval, there is reference to application dated 12.05.2011. He pointed out that the application for issue of Form No.3CM is not relevant for allowing deduction under section 35(2AB) of the Act. In this regard, the learned Counsel drew our attention to the decision of Hon'ble Gujarat High Court in the case of Banco Products India Ltd., Vs. DCIT 405 ITR 318 (Guj) wherein the Hon'ble Gujarat High Court dealing with the case for Assessment Year 2008-09 held as follows:

“In view of above referred two decisions and by applying the same to the facts on hand, one has rr hesitation in allowing the assessee's claim for deduction under section 35(2AB). Shorn of ans.) controversy, documents on record would suggest that at any rate, the assessee had applied for approval of research and development facility to the prescribed authority on 22-12-2006 and such approval was granted on 22-10-2008. The Assessing Officer and Commissioner (Appeals) restricted the assessee's claim for deduction in relation to such expenditure which was incurred prior to 1-4-2008 on the ground that the approval was granted for two years between 1-4-2008 to 31-3-2010. Combined reading, of the judgment of this Court in case of Claris Life sciences Ltd. (supra) and judgment of Delhi High Court in case of Maruti Suzuki India Ltd. (supra), would show that period during which the approval is granted is not relevant as long as such approval has been granted and expenditure has been incurred for the specified purpose. As noted, the provision is aimed at promoting development of in house research and

development facility which necessarily would require substantial expenditure which immediately may not yield desired results or could be correlated to generation of additional revenue. By the very nature of things, research and development is a hit and miss exercise. Much of the efforts, capital as well as human investment may go waste if the research is not successful. The legislature therefore, having granted special deduction for such expenditure, the same should be seen in light of the purpose for which it has been recognised. Research and development facility can be set up only after incurring substantial expenditure. The application for approval of such facility can be made only after setting up of the facility. Once an application is filed by the assessee to the prescribed authority, the assessee would have no control over when such application is processed and decided. Even if therefore, the application is complete in all respects and the assessee is otherwise eligible for grant of such approval, approval may take sometime to come by. The claim for deduction cannot be defeated on the ground that such approval was granted in the year subsequent to the financial year in which the expenditure was incurred. No such indication was given by this Court in case of Claris Life sciences Ltd. (supra), n9ne appears from the judgment of the Delhi High Court in case of Maruti Suzuki India Ltd. (supra).”

8. Learned DR relied on the order of the CIT(A).

9. We have carefully considered the rival submissions. The provisions of Sec. 35(2AB) of the Act, deals with a cases where a company engaged in the business of manufacture or production of any article or thing incurs any expenditure on scientific research on in-house research and development facility as approved by the prescribed authority, then there shall be allowed a deduction of some equal to 150% of such expenses incurred by the assessee for in-house research and development facilities. For this purpose, prescribed authority is Secretary, DSIR, Ministry of Science and Technology, Govt of India. Further, Rule 6 and 7A of Income Tax Rules, 1962 provides for procedure of approval of R&D facility. As per Rule 6 of the Income Tax Rules, 1962, the prescribed authority for expenditure on scientific research and development for the purpose of 35(2AB) of the Act, shall be the Secretary, DSIR. Sub Rule (4) requires the assessee to furnish the application in form 3CK. As per Sub Rule 5A, if the prescribed authority is satisfied the conditions provided in this Rule and in Sub Sec. 2AB of Sec. 35 of the Act, are fulfilled, then the prescribed authority shall pass an order in writing in from No. 3CM. In this case, there is no dispute with regard to fact that the R&D facility set up by the assessee was recognised by the competent authority on 19.1.2011. In order to claim the benefit of weighted deduction u/s 35(2AB) of the Act, the assessee should fulfil two conditions. First condition is there

should be an in-house research and development facility and such facility should be recognized / approved by the competent authority. The competent authority for this purpose has been defined as the secretary, DSIR, Ministry of Science and Technology, Govt. of India, who has approved the facility by his recognition dated 19.1.2011.

10. The Hon'ble Gujarat High Court in the case of CIT Vs. Claris Lifesciences Ltd., (supra) has considered an identical issue in light of provisions of Sec. 35(2AB) of the Act, and held that the provisions nowhere suggest simply that R& D facility is approved from particular date and in other words, it is no where suggested that date of approval only will be cut off date for eligibility. The court further held that once facility is approved, the entire expenditure so incurred on development of R&D facility has to be allowed for weighted denudation. The Hon'ble Delhi High Court in the case of Maruthi Suzuki India Pvt Ltd., Vs Union of India (2017) 397 ITR 728 (Delhi), had considered an identical issue and held that for availing the benefit u/s 35(2AB) of the Act, what is relevant is not the date of recognition or the cut off date mentioned in the certificate of the DSIR or even the date of approval, but the existence of recognition. The Hon'bel Gujarat High Court in the case of Banco Product India Ltd., Vs. DCIT (supra) had once again reiterated its earlier position in the case of claris lifescience ltd. (supra) and held that once an application is filed by the assessee to the prescribed authority, the assessee would have no control over when such application is processed and decided. The Hon'ble court further held that period during which the approval is granted is not relevant as long as such approval is granted and expenditure has been incurred for this specified purpose.

11. In the present case, the Assessee was granted recognition of Assessee's in house R & D unit granted by the Government of India, Ministry of Science and Technology on on 19th January, 2011 and therefore for AY 2011-12, the Assessee was entitled to deduction u/s.35(2AB) of the Act. The date of application as 12.5.2011 as mentioned in the approval in Form No.3CM was the date on which application for issue of Form No.3CM was made. The application for issue of Form No.3CM is not relevant for allowing deduction under section 35(2AB) of the Act. Form 3CM quantifies the expenditure incurred for carrying out scientific research. The assessee has to make an

application for approval in prescribed form 3CK for issue of Form No.3CM and also filed necessary evidence including details of expenditure. Therefore the date of application for approval does not assume any significance as admittedly, the Assessee has obtained approval u/s.35(2AB) of the Act and in any case for AY 2011-12, there was in fact an approval dated 19.1.2011. The Assessee is therefore entitled to deduction u/s.35(2AB) of the Act. We hold and direct accordingly.

12. In the result, the appeal on Gr.No.2 to 6 is allowed for the reasons given above.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

(B. R. BASKARAN)
ACCOUNTANT MEMBER

Sd/-

(N. V. VASUDEVAN)
VICE PRESIDENT

Bangalore,

Dated: 09.03.2021.

/NS/*

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.