IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHE (J),MUMBAI.

BEFORE SHRI BASKARAN BR, ACCOUNTANT MEMBER
AND SH. ANIKESH BANERJEE, JUDICIAL MEMBER

I.T.A. No. 1224/Mum/2021
Assessment Year: 2016-17

Omni Active Health Technologies Ltd.T-8b, 5th Floor, Phoenix House, A Wing, Phoenix Mill Compound, 462 Senapati Bapat Marg, Lower Parel, Mumbai. [PAN:AADCP2914Q] **(Appellant)**	**Vs.**	Addl. /Joint/Dy/Asstt. Commissioner of Income Tax, National E-Assessment Centre, Delhi **(Respondent)**

Appellant by	**Sh. Ketan Ved, AR**
Respondent by	**Sh.Rakesh Ranjan, CIT. DR.**

Date of Hearing	**28.07.2022**
Date of Pronouncement	**17.10.2022**

ORDER

Per:Anikesh Banerjee, JM:

The instant appeal filed by the Assessee is directed against the Order of the Disputes Resolution Panel-2, [In short

"DRP"] dated 26.02.2021 passed under section 144C(5) of the Income Tax Act, 1961 [In short "Act"] for the A.Y. 2016-17. The impugned order was raised from the draft assessment order passed by the Learned Income Tax Officer-7(3)(1), Mumbai [in short "A.O."], vide order dated 31.12.2019 passed under section 143(3) of the I.T. Act, 1961.

2. The assessee has raised the following grounds: -

"The Appellant objects to the order of the Additional / Joint / Deputy / Assistant Commissioner of Income-tax/ Income Tax Officer, National E-Assessment Centre, Delhi dated 22 April 2021 passed under section 143(3) read with section 144C(13) of the Income tax Act, 1961 ("the Act"), for the aforesaid assessment year on the following among other grounds.

1:0 Transfer Pricing Adjustment of INR 20.00.44.704/ - to the international transaction relating to export of goods

1 : 1 The learned Assessing Officer ("AO")/ Transfer Pricing Officer ("TPO")/ Dispute Resolution Panel ("DRP") has erred in making an upward adjustment of INR 20,00,44,7047 - to the total income of the Appellant by holding that the international transaction relating to the export of goods entered into by the

Appellant with its Associated Enterprise ("AE") was not at arm's length.

1:2 The learned AO/TPO/DRP erred in rejecting Transactional Net Margin Method ("TNMM") which was determined by the Appellant as the most appropriate method as per provisions of section 92C(1) of the Act.

1: 3 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject the international transaction relating to export of goods entered into by the Appellant with its AE was at arm's length and hence no adjustment in respect thereof was called for and the stand taken by the learned AO/TPO/DRP in this regard is misconceived, erroneous and incorrect.

1 : 4 The Appellant submits that the learned AO be directed to delete the upward adjustment of INR 20,00,44,704/- made by him to the Appellant's total income and to re-compute its total income and tax liability accordingly.

2 : 0 Addition of INR 41,500/- under section 69C of the Act

2 : 1 The learned AO/DRP has erred in law and on the facts in confirming additions of INR 41,500/- under section 69C of the Act.

2 : 2 The Appellant submits that once the confirmations of 18 out of 20 parties are submitted, it substantiates the genuineness of business conducted by the Appellant. Mere non-

compliance of one party by not responding to AO's notice ought not to make such transaction as non-genuine.

2 : 3 The Appellant submits that the learned AO be directed to delete the addition of INR 41,500/- made by him to the Appellant's total income.

3 : 0 Disallowance of weighted deduction of INR 1,87,96,989/- under section 35[2AB] of the Act

3 : 1 The learned AO/DRP has erred in law and on the facts of the case in disallowing weighted deduction of INR 1,87,96,989/-, out of the total weighted deduction of INR 21,20,74,9897- claimed by the Appellant under section 35(2AB) of the Act.

3 : 2 The learned AO/DRP has erred in law and on the facts of the case in disallowing weighted deduction under section 35(2AB) of the Act to the extent of INR 1,87,96,989/-, on the basis of the approval granted by Department of Scientific and Industrial Research CDSIR') to the Appellant's claim for R&D expenses.

3 : 3 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, the weighted deduction under section 35(2AB) of the Act of INR 21,20,74,9897- is rightly claimed by the Appellant and hence, no disallowance of INR 1,87,96,989/- in respect thereof was

called for. The stand taken by the learned AO/ DRP in this regard is misconceived, erroneous and incorrect.

3 : 4 The Appellant submits that the learned AO be directed to delete the disallowance of INR 1,87,96,989/- made by him to the Appellant's total income.

3 : 5 Without prejudice to the above and strictly in the alternative, the learned AO be directed to grant normal (i.e. 100%) deduction under section 37(1) for revenue expenses upon rejecting the Appellant's claim for weighted deduction under section 35(2AB) of the Act.

4 : 0 General

4 : 1 The Appellant craves leave to add, alter, amend and/or substitute and/or modify in any manner whatsoever modify all or any of the foregoing grounds of appeal at or before the hearing of the appeal."

3. Brief fact of the case is that Omni Active Health Technologies Limited assessee company is in the field of Natural APIs and Novel Delivery systems for nutrients and active ingredients. It is engaged in manufacturing of the patent protected Lutemax range Free Lutein and Lutein Esters for food fortification and dietary supplementation. During the assessment proceeding U/s 143(3)

reference was made u/s 92CA (1) of the Act determined the ALP of international transactions entered into between OHTL and its associated enterprises (AEs) as reported in Form 3CEB and reply of the notice of TPO dated 20th September, 2019, 5th October, 2019 and 15th October, 2019. The assessee filed its TP study and Hon'ble Bench marking approach adopted by the assessee. The assessee adopted of TNMM as MAM related to transaction of export of goods amounting to Rs. 20,00,44,704/- but the TPO rejected the method of TP study of the assessee and converted to CUP method as MAM. Accordingly, adjustment made amounting to Rs. 20,00,44,704/- in related to international transaction of export of goods. Also, the addition was made u/s 69C of bogus purchase amounting to Rs. 12,45,12,834/- and disallowance of R & D expenditure claimed u/s 35(2AB) of the Act amounting to Rs. 21,20,74,989/-. Aggrieved by the assessee filed objection before the ld. DRP. The ld. DRP passed order u/s 144C(5) of the Act related to TPO adjustment direction was made and upheld the order of the TPO. Related to addition u/s 69C the was restricted to Rs. 41,500/- for non-established the

genuineness of the purchase. Related to the addition of deduction u/s 35(2AB) of the Act the addition was reduced and restricted amounting to Rs. 1,87,96,989/-. Being aggrieved the assessee filed an appeal before us.

"Ground No. 1 -

1) Transfer pricing adjustment in respect of international transaction of export of goods amounting to INR 20,00,44,704/-

4. The learned counsel of the assessee pointed that the assessee made TP study on TNMM as MAM. The assessee had exported 1,43,286 Kgs of finished goods to its AE amounting to Rs. 179,82,61,814/-. In order to support the arm's length pricing for export of goods, the assessee had selected internal TNMM as MAM and compared margin earned from export to AE the details benchmarking analysis undertaking the assessee is as follows:-

Description	Segment-I (Transactions	Segment-II (Transactions with

	with 'AE') (Rupees in lakhs)	'Non-AE') (Rupees in lakhs)
Operating Revenues	18,060.43	2,826.57
Operating Cost	14,650.74	2,381.18
Operating Profit	3,409.69	445.38
Return on Total Cost (%)	23.27%	18.70%

4.1 Further, corroborative basis, the assessee has carried out benchmarking analysis using external TNMM as MAM method. The same has been documented in the TPSR. The summary of margin of comparable as calculated by the assessee is given below: -

Sr. No.	Name of the Comparable Company	PLI for FY 15-16 (%)
1.	Adi Finechem Ltd.	19.50%
2.	Mangalam Drugs & Organics Ltd.	8.83%

3.	Natco Pharma Ltd.	33.95%
4.	Nectar Life sciences Ltd.	13.47%
5.	Neuland Laboratories Ltd.	13.38%
6.	Roopa Industries Ltd.	-0.69%
7.	Spisys Ltd.	9.86%
8.	E I D-Parry (India) Ltd.	1.41%
9.	Eastern Condiments Pvt. Ltd.	3.58%
10.	Fredun Pharmaceuticals Ltd.	7.45%
11.	India Glycols Ltd.	2.93%
12.	Tyche Industries Ltd.	7.51%
	Mean	11.97%
	Median	8.83%
	35th percentile	7.45%
	65th Percentile	13.38%
	Omni Active's margin	22.63%s

4.2. We heard the rival submissions considered the documents available in the record, TNMM method selected by the appellant to benchmark transaction. The

method was adopted by the TPO to bench mark the transaction CUP. Margin of the appellant in respect of AE transactions @23.27% but the margin of the appellant in respect of non AE transaction was @18.70%. On the other hand the margin related to external TNMM called for by the TPO the margin of appellant 22.63% and margin of the comparable (selected in TPSR for external TNMM on a corroborative basis): @11.97%. The TPO has taken the CUP method as MAM. The findings of the DRP, a similar to the earlier Assessment Year i.e. Assessment Year 2012-13 to 2014-15 and that they do not find any infirmity in the draft order of the AO/TPO in keeping the issue alive.

4.3. The selection of the TNMM, the assessee is relied on his own case ITA No. **638 & 4643/Mum/2017, date of order 06.03.2018 and 7284/Mum/2018 date of order 26.05.2020**. The relevant para of the order in ITA 7284/Mum/2018, para 28 & 29 is extracted as below:

> *"28. From the above discussion, we find that the Transfer Pricing Officer has rejected the consistently applied TNMM method without bringing on record any cogent reason. It is the settled law that the consistent method followed can be changed only if there is a change of facts or law.*

There are various decisions of Hon'ble Apex Court in this regard including that from Radhasoami Satsang (supra). In the present case, there is no case that there is a change of law or there is a change in fact. It is also not the case that TNMM method which has been consistently applied in past was totally wrong method....

29. Thus from the above, it is evident that the arm's length price in relation to an international transaction is to be determined by one of the prescribed methods which is most appropriate method having regard to the nature of transaction, class of transaction, class of associated persons, functions to form by such person, or such other relevant factors. Section 92C(2) provides that it is only the appropriate method as referred to in section 92C(1) which can be appliedfor determining arm's length price in the prescribed manner. The choice of method on the basis of which arm's length price is determined has to be exercised on the touch stone of principles governing selection of most appropriate method set out in section 92C(1). The legislature does not provide for an order of preference of method of determining the arm's length price. Now once an appropriate method for determining the arms length price has been chosen and accepted by

the Revenue consistently over a number of years, there has to be some cc-gent reason to make it departure from the consistent method. We do not find that any case has been made out by the Transfer Pricing Officer or the DRP that there was an error committed earlier when the TNMM method was chosen and approved. The Transfer Pricing Officer while justifying the change stated that in T.P. report assessee has bench marked the transaction under TNMM, no verifiable data has been provided to substantiate the method used. Hence, from the above discussion, we find that no cogent reason has been pointed out by the authorities below that the TNMM method applied earlier was not accordance with the mandate of law as above."

It is settled law that the res judicata does not apply to taxation proceedings, but it has fairly often been held by the higher courts including by the Hon'ble Apex Court, **Radhasoami Satsang, 193 ITR 321 (SC)**

"13. *We are aware of the fact that strictly speaking res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assess ment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not*

challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."

As per the Apex court, the consistency should be maintained in the assessment proceedings. A consistently applied method can be changed only if there is a change in facts and law. In the present case, we find that there is no such case has been made out. Rather the Transfer Pricing Officer has proceeded to examine the issue on the basis of TNMM method. He has ordered for updated data of comparable. Thereafter, when even on the basis of updated data, the international transaction was found to be at arm's length, he laconically held that CUP method would be preferred. The DRP had summarily upheld the change from TNMM to CUP method without assigning any cogent reason whatsoever. By no means it is justified to keep on finding a method for addition by trial-and-error method. Accordingly, relying uponthe aforesaid order of coordinate bench, we hold that there was no justification in rejecting the TNMM method applied by the assessee as in the preceding year. Since as per the same computation the assessee's margin was found to be at arm's length.We set aside the order of authorities below and decide the issue in favour of the assessee. Since we have already allowed the assessee's appeal on this issue.For lack of justification inchanging the method of bench marking we are not dealing with the arguments on other aspects of merits of

application of CUP method computation of arm's length price by the Transfer Pricing Officer in this case. No new contrary judgment was produced by the ld. CIT-DR against the order of coordinate bench. We set aside the order of the ld. AO related to this ground of appeal.

4.4. **In the result ground-1 of the appeal is allowed**.

"Ground No. 2 -

2 :0 Addition of INR 41,500/- under section 69C of the Act"

5. We heard the rival submissions relied on the documents available in the record. The addition was made u/s 69C amount of Rs.41,500/-. The TPO was added back the amount of Rs.12,45,12,834/- for absence of genuineness and creditworthiness of the transaction. But the DRP accepted the assessee's submission and disallowed the addition made by the AO and amount was restricted only to Rs.41,500/- on which the assessee was not able to establish the purchases to this extent.

5.1. During the hearing the counsel of the assessee referred the judgment of Hon'ble Delhi High Court in the case of **PCIT vs. Param Dairy, (2022) 139 Taxmann.com 546** wherein it has been held that entire source of the purchases has

been duly recorded in the books of account, therefore, a source of purchased stand established and having been made out of funds shown in the books of account and the addition made u/s 69C of the IT Act 1961, was deleted. The reliance was also placed in the case of **Earth Moving Equipment Service Corporation vs. DCIT (2017) 84 taxmann.com 51** wherein it has been held that section 69C of the Act cannot be applied where payment were made to supplier through banking channels which were duly reflected in the books of account and the assessee was in possession of purchase invoice.

5.2. During hearing, ld. CIT. DR vehemently argued and not making any strong objection against this issue.

5.3. The assessee has possession of the purchased documents and the payment was made through banking channels. So, this addition cannot be sustained u/s 69C. The ld. Counsel has submitted the catena of judgments with corelated fact of the case. The identity was proved as payment was made by banking channel. Possession of invoice has never been challenged. We find no infirmity in the transaction of assessee. Accordingly, the addition made by the AO is liable to be quashed.

5.4. **In the result, the ground No. 2 of the appeal is allowed**.

"Ground No. 3 –

3 : 0 Disallowance of weighted deduction of INR 1,87,96,989/- under section 35[2AB] of the Act"

6. The issue is related to not granting the weighted deduction of Rs. Rs.1,87,96,989/- u/s 35 (2AB) of the Act. The ld. AO had sought granted the weighted deduction u/s 35(2B) of the Act by amounting to Rs.1,87,96,989/-, being the difference between the amount claimed in the return of income and has approved by the DSIR in Form No. 3CL. The assessee had placed its own case related to A.Y. 2014-15 where the same fact was duly considered by the ITAT Mumbai Bench in **ITA No. 7284/Mum/2018 date of order 26.05.2020.** Here, we are extracted para 5.4 of the said order:

> *"5.4 As rightly contended by the assessee before Ld. DRPthat theissueissquarely covered in assessee'sfavour by the decision of PuneTribunal inCummins India Ltd. V/s DCIT (96 Taxmann.com576 15/05/2018) whereinthe coordinate bench has observed as under: -*
>
> *38. We have heard the rival contentions and perused the record. The issue whicharisesin the present appeal is against the claim of deduction under section 35(2AB) of theActi.e. expenditure incurred on Research & Development activity. For*

computationofbusiness income under section 35 of the Act, expenditure on scientific researchistobeallowed on fulfilment of certain conditions which are enlisted in the said section. Undervarious sub-sections of section 35 of the Act, the conditions and the allowabilityofexpenditure vary. Sub-section (1) to section 35 of the Act deals with expenditureonscientific research, not being in the nature of capital expenditure, is to beallowedtoresearch association, university, college or other institution; for which an applicationinthe prescribed form and manner is to be made to the Central Government forthepurpose of grant of approval or continuation thereto. Before granting the approval, theprescribed authority has to satisfy itself about the genuineness of activitiesandmakeenquiries in this regard. Under sub-section (2B) to section 35 of the Act, accompany engaged in the specified business as laid there on, if it incurs expenditure onscientificresearch or in-house Research & Development facility also needs to be approvedbytheprescribed authority, is entitled to deduction, provided the same is approvedbytheprescribed authority.

39. Now, coming to sub-section (2AA) to section 35 of the Act, it talks about grantingofapproval by the prescribed authority but the approval to the expenditure beingincurredis missing under the said section. Similar is the position in sub-section (2A). Furtherinsub-section (2AB), it is provided that facility has

to be approved by theprescribedauthority, then there shall be allowed deduction of expenditure incurred whether 100%, 150% or 200% as prescribed from time to time. Clause (2) to section 35of theActprovides that no deduction shall be allowed in respect of expenditure mentionedinclause (1) under any provisions of the Act. Clause (3) further lays downthatnocompany shall be entitled for deduction under clause (1) unless it enters intoagreementwith prescribed authority for co-operation in such R & D facility. The FinanceAct, 2015w.e.f. 01.04.2016 has substituted and provided that facility has to fulfil suchconditionwith regard to maintenance of accounts and audit thereof and for audit of accountsmaintained for that facility.

40. Under Rule 6 of Income Tax Rules, 1962 (in short 'the Rules), theprescribedauthority for expenditure on scientific research under various sub-clauseshasbeenidentified. As per Rule 6(1B) of the Rules for the purpose of sub-section 2ABof section35 of the Act, the prescribed authority shall be the Secretary, Department of Scientificand Industrial Research i.e. DSIR. Under sub-rule (4), application for obtainingapprovalunder section 35(2AB) of the Act is to be made in form No.3CK. Under sub-rule(5A)ofrule 6 of the Rules, the prescribed authority shall, if satisfied that theconditionsprovided in the rule and in sub-section (2AB)

being fulfilled, pass an order inwritinginform No.3CM. The proviso however lays down that reasonable opportunityof beingheard is to be granted to the company before rejecting an application. So, theapplication has to be made under sub-rule (4) in form No.3CK and theprescribedauthority has to pass an order in writing in form No.3CM. Sub-rule (7A) providesthattheapproval of expenditure under sub-section (2AB) of section 35 of the Act, shall besubject to the conditions that the facilities do not relate purely to market research, salespromotion, etc. Clause (b) to sub-rule (7A) at the relevant time providedthat theprescribed authority shall submit its report in relation to the approval of inhouseR&Dfacility in form No.3CL to the DG (Income-tax Exemption) within sixty daysofitsgranting approval. Under clause (c), the company at the relevant time hadtomaintainseparate accounts for each approved facility, which had to be audited annually. Clause(b) to sub-rule (7A) has been substituted by IT (Tenth Amendment) Rules, 2016w.e.f.01.07.2016, under which the prescribed authority has to furnish electronicallyitsreport(i) in relation to approval of in-house R & D facility in part A of formNo.3CLand(ii)quantifying the expenditure incurred on in-house R & D facility by the companyduringthe previous year and eligible for weighted deduction under sub-section 2ABof section35 of the Act in part B of form No.3CL. In other words

the quantification of expenditurehas been prescribed vide IT (Tenth Amendment) Rules, 2016 w.e.f. 01.07.2016. Priortothis amendment, no such power was with DSIR i.e. after approval of facility.

41. Under the amended provisions, beside maintaining separate accountsof R&Dfacility, copy of audited accounts have to be submitted to the prescribedauthority.These amendments to rules 6 and 7a are w.e.f. 01.07.2016 i.e. under the amendedrules, the prescribed authority as in part A give approval of the facility and in part Bquantifythe expenditure eligible for deduction under section 35(2AB) of the Act.

42. The issue which is raised before us relates to pre-amended provisions andquestionis where the facility has been approved by the prescribed authority, can the deductionbedenied to the assessee under section 35(2AB) of the Act for non issue of formNo.3CLby the said prescribed authority or the power is with the Assessing Officer tolookintothe nature of expenditure to be allowed as weighted deduction under section35(2AB)ofthe Act. The first issue which arises is the recognition of facility by theprescribedauthority as provided in section 35(2AB) of the Act.

43. The Hon'ble High Court of Gujarat in CIT v. Claris Lifesciences Ltd. [2008] 174Taxman 113/[2010] 326 ITR 251 have held that weighted deduction is tobeallowedunder section

35(2AB) of the Act after the establishment of facility. However, sectiondoes not mention any cutoff date or particular date for eligibility to claimdeduction. TheHon'ble High Court held as under:—

"8. The Tribunal has considered the submissions made on behalf of the assesseeandtook 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 R&D facility is to be approvedfromaparticular date and, in other words, it is nowhere suggested that date of approval onlywill be cut-off date for eligibility of weighted deduction on the expenses incurredfromthat date onwards. A plain reading clearly manifests that the assessee hastodevelopfacility, which presupposes incurring expenditure in this behalf, applicationtotheprescribed authority, who after following proper procedure will approve thefacilityorotherwise and the assessee will be entitled to weighted deduction of anyandallexpenditure so incurred. The Tribunal has, therefore, come to the conclusionthatonplain reading of section itself, the

assessee is entitled to weighted deductiononexpenditure so incurred by the assessee for development of facility. The Tribunal hasalso considered r. 6(5A) and Form No. 3CM and come to the conclusion that aplainandharmonious reading of Rule and Form clearly suggests that once facility isapproved, the entire expenditure so incurred on development of R&D facility has to beallowedforweighted deduction as provided by s. 35(2AB). The Tribunal has also consideredthelegislative intention behind above enactment and observed that to boost upR&Dfacilityin India, the legislature has provided this provision to encourage the development ofthefacility by providing deduction of weighted expenditure. Since what is statedtobepromoted was development of facility, intention of the legislature by makingaboveamendment is very clear that the entire expenditure incurred by the assesseeondevelopment of facility, if approved, has to be allowed for the purpose of weighteddeduction. 10. We are in full agreement with the reasoning given by the Tribunal and weareoftheview that there is no scope for any other interpretation and since the approval isgrantedduring the previous year relevant to the assessment year in question, we areof theviewthat the assessee is entitled to claim weighted deduction in respect of the entireexpenditure incurred under s. 35(2AB) of the Act by the assessee."

44. The Hon'ble High Court of Delhi in CIT v. Sandan Vikas (India) Ltd. [2012] 22taxmann.com 19/207 Taxman 216/[2011] 335 ITR 117 (Del) on similar issue of weighteddeduction under section 35(2AB) of the Act held that the condition precedent wasthecertificate from DSIR, but the date of certificate was not important, where theobjectivewas to encourage research and development by the business enterprises inIndia. Inthefacts before the Hon'ble High Court of Delhi, the assessee had approachedDSIRvideapplication dated 10.01.2015. The DSIR vide letter dated 23.02.2006 grantedrecognitionto in-house research and development facility of assessee. Further, vide letter dated18.09.2006, DSIR granted approval for the expenses incurred by the company onin-houseresearch and development facility in the prescribed form No.3CM. The AssessingOfficerin that case refused to accord the benefit of aforesaid provision on the groundthatrecognition and approval was given by DSIR in the next assessment year. TheTribunalallowed the claim of assessee relying on the decision of the Hon'ble High Court of GujaratinClaris Lifesciences Ltd.'s case (supra). The Hon'ble High Court of Delhi takingnoteofthe decision of the Hon'ble High Court of Gujarat observed that it has been heldthat cutoffdate mentioned in the certificate issued by DSIR would be of no relevance whereoncertificate was issued by DSIR, then

that would be sufficient to hold that the assesseehadfulfilled the conditions laid down in the aforesaid provisions.

45. The issue which is raised in the present appeal is that whether where thefacilityhasbeen recognized and necessary certification is issued by the prescribed authority, theassessee can avail the deduction in respect of expenditure incurred on in-houseR&Dfacility, for which the adjudicating authority is the Assessing Officer andwhetherthepresscribed authority is to approve expenditure in form No.3CL fromyear toyear. Lookinginto the provisions of rules, it stipulates the filing of audit report before theprescribedauthority by the persons availing the deduction under section 35(2AB) of theAct but theprovisions of the Act do not prescribe any methodology of approval to be grantedbytheprescribed authority vis-à-vis expenditure from year to year. The amendment brought inbythe IT (Tenth Amendment) Rules w.e.f. 01.07.2016, wherein separate part hasbeeninserted for certifying the amount of expenditure from year to year and the amendedformNo.3CL thus, lays down the procedure to be followed by the prescribed authority. Priortothe aforesaid amendment in 2016, no such procedure / methodology was prescribed. Inthe absence of the same, there is no merit in the order of Assessing Officer incurtailingthe expenditure and consequent weighted deduction claim under section 35(2AB) oftheAct on the surmise that

prescribed authority has only approved part of expenditureinformNo.3CL. We find no merit in the said order of authorities below.

46. The Courts have held that for deduction under section 35(2AB) of the Act, first stepwas the recognition of facility by the prescribed authority and entering anagreementbetween the facility and the prescribed authority. Once such an agreement hasbeenexecuted, under which recognition has been given to the facility, then thereafter theroleofAssessing Officer is to look into and allow the expenditure incurred on in-houseR&Dfacility as weighted deduction under section 35(2AB) of the Act. Accordingly, weholdso.Thus, we reverse the order of Assessing Officer in curtailing the deduction claimedundersection 35(2AB) of the Act by Rs. 6,75,000/-. Thus, grounds of appeal No.10.1, 10.2and10.3 are allowed.

47. In the result, appeal of assessee is partly allowed. Respectfully following the same, we hold that Ld.AOwas not justifiedincurtailing the deduction u/s 35(2AB) in the pre-amended period. Therefore,by deleting the impugned additions, we allow ground no. 3 of theappeal."

6.1. We heard the rival submissions and considered the documents available in the record. In the terms of provision 35(2AB) needs to be approved by

DSIR.Research and Development Facility is approved and prescribed by the authority, DSIR in Form 3 CM then the expenses incurred by the assesseehave to be allowed u/s 35(2AB) and the same cannot be curtailed. To the quantum approved in Form No. 3CL in the pre amendment period.

6.2. The ld. CIT-DR vehemently argued but unable to produce any contrary judgment against the order of coordinate bench in this factual aspect.

6.3. We are fully relied on the order of the coordinate bench. The first step was recognition of facility by the prescribed authority and entering an agreement between the facility and the prescribed authority. The ld. AOcannot curtail the expenses which was contributed to R & D in pre amended period. Accordingly, the addition made by the ld. AO amount to Rs.1,87,96,989/- is liable to be quashed.

6.4. **In the result, the Ground No.3 of the appeal is allowed**.

7. In the result, the appeal of the assessee bearing **ITA No.1224/Mum/2021** is allowed.

Order pronounced in the open court on 17.10.2022

SD/-	**SD/-**
(B.R. BASKARAN) ACCOUNTANT MEMBER	(ANIKESH BANERJEE) JUDICIAL MEMBER

AKV/PS

Copy of the order forwarded to:

(1)The Appellant
(2) The Respondent
(3) The CIT
(4) The CIT (Appeals)
(5) The DR, I.T.A.T.

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By Order