

**IN THE INCOME TAX APPELLATE TRIBUNAL  
"J" BENCH, MUMBAI**

**SHRI B.R. BASKARAN, ACCOUNTANT MEMBER  
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 748/MUM/2022  
(Assessment Year: 2017-18)**

**Omni Active Health Technologies  
Limited,**

T-8b, 5<sup>th</sup> Floor, Phoenix House, A Wing,  
Phoenix Mill Compound, 462,  
Senapati Bapat Marg, Lower Parel,  
Mumbai - 400013  
[PAN: AADCP2914Q]

..... **Appellant**

**Additional/Joint/Deputy/Assistant  
Commissioner of Income-  
tax/Income Tax Officer, National E-  
Assessment Centre, Delhi**

Vs

..... **Respondent**

**Appearance**

For the Appellant/Assessee : Shri Ketan Ved  
Ms Shraddha Jain

For the Respondent/Department : Shri Manoj Kumar  
Shri Samuel Pitta

**Date**

Conclusion of hearing : 23.01.2023  
Pronouncement of order : 19.04.2023

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**ORDER**

**Per Rahul Chaudhary, Judicial Member:**

1. The present appeal is directed against the Assessment Order dated, 24/02/2022, passed under Section 143(3) read with Section 144C(13) read with Section 144B of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'], as per directions, dated 28/01/2022, issued by the CIT (Dispute Resolution Panel-2), Mumbai-2 (hereinafter referred to as 'the DRP') under Section

144C(5) of the Act pertaining to the Assessment Year 2017-18.

2. The Appellant has raised grounds of appeal in relation to the following issues:
  - (a) Transfer Pricing Adjustment of INR 16,59,51,699/- to the international transaction relating to export of goods. [Ground No. 1 to 1.4]
  - (b) Disallowance of weighted deduction of INR 98,93,734/- under Section 35(2AB) of the Act. [Ground No. 2 to 2.5]
  - (c) Disallowance of INR 2,00,201/- under section 14A of the Act. [Ground No. 3 to 3.3]
  - (d) Addition to Book Profit under Section 115JB of the Act of the Act on account of disallowance under Section 14A of the Act amounting to INR 2,00,201/-. [Ground No. 4 to 4.3]
  - (e) Addition to Book Profits under Section 115JB of the Act on account of disallowance of weighted deduction under Section 35(2AB) of the Act amounting to INR 98,93,734/-. [Ground No. 5]
3. Brief facts of the case are that the Appellant is a company engaged, inter alia, in manufacturing in the field of natural APIs and novel delivery systems for nutrients and active ingredients. The Appellant filed its return of income for the Assessment Year 2017-18 declaring total loss of INR 31,42,58,126/- under the normal provisions and Book Loss of INR 1,49,20,651/- under Section 115JB of the Act. Thereafter, the Appellant filed a revised return on 29/03/2019 declaring loss of INR 25,15,97,422/-.
4. The case of the Appellant was selected for scrutiny and notice

under Section 142(1)/143(2) were issued to the Appellant. During the assessment proceedings, the Assessing Officer noted that the Appellant had entered into international transactions with Associated Enterprises (AEs) and therefore, a reference was made to the Transfer Pricing Officer (TPO) for computation of Arm's Length Price (ALP) under Section 92CA(1) of the Act.

5. The TPO, vide order, dated 12/02/2020, passed under Section 92CA of the Act, proposed upwards transfer pricing adjustment of INR 16,59,51,699/- which incorporated in the Draft Assessment Order dated 22/04/2021, passed under Section 143(3) read with Section 144B and 144C(1) of the Act. The Assessing Officer also proposed disallowance of deduction of INR 98,93,743/- claimed by the Appellant under Section 35(2AB) of the Act and disallowance of INR 2,00,201/- under Section 14A of the Act read with Rule 8D of the Income Tax Rules, 1962 (hereinafter referred to as 'the Rules') for the purpose of computing taxable income under normal provisions of the Act, as well as for the purpose of computing Book Profits under Section 115JB of the Act.
6. Against the Draft Assessment Order, the Appellant filed objections which were disposed off by the DRP on 28/01/2022 (as having been partly allowed), and pursuant to the same Final Assessment Order, dated 24/02/2022, was passed under Section 143(3) read with Section 144C(13) and 144B of the Act.
7. Being aggrieved, the Appellant has preferred the present appeal.
8. **Ground No. 1 to 1.4** raised by the Appellant are directed against the transfer pricing addition of INR 16,59,51,699/-. During the relevant previous year, the Appellant had exported finished goods

to its AE (i.e. OmniActive Health Technologies Inc., USA) and had determined ALP for the same at INR 2,20,14,86,661/- by adopting internal Transaction Net Margin Method (TNMM) with Operating Profit (OP)/Operating Cost (OC) as the Profit Level Indicator (PLI). Before the TPO, the Appellant filed audited segmental profitability statement for two segments – First Segment which was related to transactions with independent uncontrolled non-AE parties had OP/OC of 9.88% and the Second Segment which was related to transaction with AEs had OP/OC of 16.50%. Therefore, it was contended by the Appellant that transaction of sale/export of goods by the Appellant to its AE should be treated as being on arm's length basis. Further, on a corroborative basis, based upon earlier years the Appellant had also carried out benchmarking analysis considering external TNMM as the most appropriate method. The margin of comparables as selected in transfer pricing study report of the Appellant for external TNMM on corroborative basis came to 13.54% as against margin of the Appellant which stood at 15.18%. Therefore, it was contended by the Appellant that even by adopting external TNMM the transaction of sale/export of goods by the Appellant to its AE was on arm's length basis. However, the TPO, rejected TNMM method and applied Comparable Uncontrolled Price (CUP) Method as the most appropriate method and taking the price at which products were sold by the Appellant to non-AEs the TPO applied internal CUP to determine ALP in respect of 12 products and arrived at aggregate transfer pricing adjustment of INR 16,59,51,699/-. The Appellant, in the objection filed before DRP, justified rejection of CUP method in the transfer pricing study report on the ground that the transaction between the AE and non-AE were not comparable on

account of difference such as, difference in geographical location, volume of sales, currency of transaction, commission and sales promotion incurred. For the Assessment Year 2010-11 and 2011-12, the Assessing Officer/TPO had accepted internal TNMM benchmarking analysis conducted by the Appellant while for the Assessment Year 2017-18, the TPO has not provided any reasoning for rejection of TNMM as the most appropriate method. However, the DRP referring to the earlier orders passed by the DRP in the case of the Appellant for the Assessment Years 2012-13 to 2014-15 rejected the objections raised by the Appellant.

9. We have considered the rival submissions on the transfer pricing adjustment and perused the material on record. We find that for the Assessment Year 2010-11 and 2011-12, Assessing Officer/TPO had accepted internal TNMM benchmarking analysis conducted by the Appellant. For Assessment Years 2012-13 and 2013-14, the Tribunal has, vide order, dated 06/03/2018, passed in ITA Nos. 638 & 4643/Mum/2017), allowed the appeal of the Appellant and accepted TNMM method, as applied by the Appellant as the most appropriate method holding as under:

*"24. Against the above order, the assessee is in appeal before us.*

*25. We have heard both the counsels and perused the records. The Id. Counsel of the assessee submitted that since the last three years the assessee has been following TNMM method which has been duly accepted by the Revenue. He submitted that no cogent reason has been given for rejecting the TNMM method in the present year. He placed reliance on several decisions from the Hon'ble Apex Court including Radhasoami Satsang v. CIT [1992] 193 ITR 321/60 Taxman 248 for the proposition that there should be a consistency in the income tax proceedings unless mandated by change in law and the facts.*

26. *Per contra, the Id. Departmental Representative relied upon the orders of the Transfer Pricing Officer. Justifying the change from TNMM to CUP method, the Id. Departmental Representative submitted the case law for the proposition that error should not be perpetuated. He further referred to ITAT decision in the case of Serdia Pharmaceuticals (India) (P.) Ltd. v Asstt. CIT [2011] 44 SOT 391/9 taxmann.com 13 (Mum.) that CUP method was to be preferred.*

27. *We have carefully considered the submissions and all the relevant records have been perused. We find that the first objection of the Id. Counsel of the assessee is that in the preceding years, for three years transactional net margin method was used to benchmark the international transaction. In the present assessment year, the Transfer Pricing Officer noted that the assessee has adopted transactional net margin method for determining the arms length price for export of finalised goods to the Associate Enterprises. During the course of assessment proceedings, the Transfer Pricing Officer proceeded with the same and also asked the assessee to provide an updated margin of the comparable selected. The updated margin was given to the Transfer Pricing Officer. From the computation of updated margin also, the PLI of the assessee come to 15.21% which was higher than the PLI of the two comparable companies. Hence, from this analysis of updated comparables also, the transaction was found to be at arm's length. At this juncture, the Transfer Pricing Officer changed his tracks. He observed that no verifiable data has been provided to substantiate the method used. He further held that CUP would be a more appropriate method to benchmark the sale transaction. The assessee objected to the same. In the objections, the assessee also relied upon the OECD Guidelines and the ITAT decision in the case of Welspun Zucchi Textiles Ltd. v Asstt. CIT [2014] 151 ITD 353/43 taxmann.com 314 (Mum. - Trib.). However, the Transfer Pricing Officer summarily rejected and held that the application of TNMM is the method of last resort when the comparable price method cannot be applied. However, he noted that in the assessee's case since the comparable price for the same or similar products to the third parties has been provided by the assessee, the same has to be*

*considered for bench-marking this transaction. Accordingly, Transfer Pricing Officer proceeded to apply the CUP method for bench-marking. The assessee's objection in this regard was also dismissed by the DRP when it held that it was of the opinion that when internal CUP is easily available, the TNMM is to be treated as method of last resort.*

*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. In this regard, we may gainfully refer to the relevant provisions contended by the Transfer Pricing Officer as under*

*"92C Computation of Arm's Length Price  
xx xx....."*

*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 applied for 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 of arm's length price. Now once an appropriate method for determining the arm's length price has been chosen and accepted by the Revenue consistently over a number of years, there has to be some cogent 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 benchmarked 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 in accordance with the mandate of law as above.*

*It is settled law that 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 that 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, on the anvil of aforesaid Hon'ble Apex Court's decision as discussed hereinabove, 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 in changing the method of benchmarking 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. The case law referred by the Id. Departmental Representative are distinguishable on the facts of this case."*

10. The above decision of the Tribunal was followed by the Tribunal in appeal preferred by the Appellant for the Assessment Year 2014-15. The relevant extract of the decision of the Tribunal dated 26/05/2020, passed in ITA No. 7284/Mum/2018 read as under:

*"3.4 We find that, as rightly noted by Ld. DRP, the issue stood covered in assessee's favour by the order of Tribunal for AYs 2012-13 & 2013-14 wherein the coordinate bench held as under:-*

*'27. We have carefully considered the submissions .....*

*Upon perusal of the same, we find that TNMM method as adopted by the assessee in earlier years has constantly been accepted to be the Most Appropriate Method as against the observation of Ld. TPO that it was to be applied as a last resort. We find that similar facts exist in this year. Applying TNMM method, the assessee's margins in AE segment are much higher than margin in non-AE segment and therefore, it could be stated that the transactions were at Arm's Length. No infirmity has been pointed out by any of lower authorities in assessee's methodology. Therefore, respectfully following the earlier order of Tribunal in assessee's own case, we hold that TNMM method as adopted by the assessee was appropriate methodology and therefore, no TP adjustment would be warranted on these transactions. By deleting the same, we allow ground no.1 of the appeal."* (Emphasis Supplied)

11. As noted by the DRP, the facts and circumstances in which transfer pricing addition was made during the Assessment Year 2017-18 before us are identical to those prevailing in Assessment Year 2012-13 to 2014-15. Therefore, respectfully following the above decision in the case of the Assessee, we hold that TNMM method as adopted by the Assessee was the most appropriate method for benchmarking the international transaction of sale/exports of goods. Accordingly, transfer pricing adjustment of INR 16,59,51,699/- made by the Assessing Officer is set aside, and the

issue is remanded back to the file of Assessing Officer for determination of ALP of the transaction of export of finished goods by the Appellant to its AE (i.e. OmniActive Health Technologies Inc., USA) as per TNMM method as adopted by the Appellant. It is clarified that no transfer pricing addition would be made in case the submission of the Appellant that the Appellant's margins in AE Segment are higher than the margins in non-AE Segment is found to be correct. In terms of the aforesaid, Ground No. 1 to 1.4 are allowed for statistical purposes.

12. **Ground No. 2 to 2.5** raised by the Appellant are directed against the disallowance of the weighted deduction of INR 98,93,734/- claimed by the Appellant under Section 35(2AB) of the Act.
13. In the return of income the Appellant had claimed weighted deduction at the rate of 200% under Section 35(2AB) of the Act in respect of the Research & Development Expenses. Accordingly to the Appellant, the Appellant was entitled to claim weighted deduction of INR 30,23,16,734 [i.e., @ 200% of INR 15,11,58,367/-]. However, in the Draft Assessment Order, dated 22/04/2021, the Assessing Officer allowed weighted deduction of INR 28,49,72,000 [i.e., @ 200% of INR 14,24,86,000/-]. Thus, the Assessing Officer proposed disallowance of deduction of INR 1,73,44,734/- [i.e. 200% of INR 86,72,367/-] claimed by the Appellant under Section 35(2AB) of the Act on the ground that the Research & Development Expenditure of INR 86,72,367/- was not approved by the Prescribed Authority.
14. The DRP also rejected the objection raised by the Appellant on this issue, and declined to grant any relief. However, the DRP directed

Assessing Officer to allow deduction under Section 37 of the Act @ 100% of the revenue expenditure forming part after Research & Development Expenditure of INR 86,72,367/- after verification. Accordingly, the Assessing Officer passed Final Assessment Order, dated 24/02/2022, and allowed deduction for INR 74,51,000/- under Section 37(1) of the Act, and thus, disallowing deduction of INR 98,93,734/- claimed by the Assessee under Section 35(2AB) of the Act holding the same to be excess deduction.

15. Being aggrieved, the Appellant has carried the issue in appeal before us.
16. The Ld. Authorised Representative for the Appellant relied upon the orders passed by the Tribunal for the Assessment Years 2012-13 & 2013-14, 2014-15 and 2016-17, and contended that as per the provisions of Section 35(2AB) of the Act, only the research & development facility is required to be approved by the Prescribed Authority. Once the Research & Development Facility is approved by the Prescribed Authority, then the weighted deduction for the expenditure incurred by the Assessee has to be allowed under Section 35(2AB) of the Act. The Assessing Officer, therefore, erred in concluding that weighted deduction for Research & Development Expenditure could be allowed only when the research & development facility as well as the Research & Development Expenditure incurred by an assessee is approved by the Prescribed Authority. In this regard, he relied upon the language used in proviso to Section 35(2AB) of the Act and drew our attention to the language used in Section 35(1)(i), 35(1)(iia), 35(2A), 35(2AA) & 35(2B) of the Act.

17. Per Contra, the Ld. Departmental Representative relied upon the findings of the DRP and Assessing Officer. He submitted that the Prescribed Authority need not approve the entire expenditure claimed by the Assessee, and may, in its discretion, specify lesser amount of expenditure to be claimed by an assessee while issuing certificate in Form 3CL. Weighted deduction under Section 35(2AB) of the Act is allowable only in respect of Research & Development Expenditure approved by the Prescribed Authority. In this regard, the Ld. Departmental Representative relied upon Rule 6 of the Income Tax Rules, 1962 and submitted that quantification of expenditure has been specifically provided for w.e.f. 01/07/2016 by the Income Tax (10<sup>th</sup> Amendment Rules, 2016) by way of amendment to Rule 6.
18. In rejoinder the Learned Authorised Representative for the Appellant submitted that the amendment made to Rule 6 cannot override the provisions of the Act which have not been amended and continue to provide for weighted deduction for any expenditure on scientific research (not being expenditure in the nature of cost of any land or building) on in-house research and development facility as approved by the prescribed authority. In this regard, he relied upon the following judicial precedents – CIT vs. S. Chenniappa Mudaliar: [1969] 74 ITR 41 (SC) and Anuj Bhagwati vs. Deputy Commissioner of Income Tax: ITA NO.1844 & 1845/MUM/2022, dated 20/09/2022.
19. We have considered the rival submissions and perused the material on record. We find that the Tribunal has in the case of the Appellant, while deciding identical issue in favour of the Appellant in appeals preferred by the Appellant for the Assessment Years

2012-13 & 2013-14, 2014-15 and 2016-17, relied upon the decision of the Pune Bench of the Tribunal in the case of Cummins India Ltd. vs. DCIT : 96 Taxmann.com 576 (ITA No. 7284/Mum/2018) The relevant extract of the aforesaid decision of the Tribunal read as under:

*"38. We have heard the rival contentions and perused the record. The issue which arises in the present appeal is against the claim of deduction under section 35(2AB) of the Act i.e. expenditure incurred on Research & Development activity. For computation of business income under section 35 of the Act, expenditure on scientific research is to be allowed on fulfillment of certain conditions which are enlisted in the said section. Under various sub-sections of section 35 of the Act, the conditions and the allowability of expenditure vary. Sub-section (1) to section 35 of the Act deals with expenditure on scientific research, not being in the nature of capital expenditure, is to be allowed to research association, university, college or other institution; for which an application in the prescribed form and manner is to be made to the Central Government for the purpose of grant of approval or continuation thereto. Before granting the approval, the prescribed authority has to satisfy itself about the genuineness of activities and make enquiries in this regard. Under sub-section (2B) to section 35 of the Act, a company engaged in the specified business as laid there on, if it incurs expenditure on scientific research or in-house Research & Development facility also needs to be approved by the prescribed authority, is entitled to deduction, provided the same is approved by the prescribed authority.*

*39. Now, coming to sub-section (2AA) to section 35 of the Act, it talks about granting of approval by the prescribed authority but the approval to the expenditure being incurred is missing under the said section. Similar is the position in sub-section (2A). Further in sub-section (2AB), it is provided that facility has to be approved by the prescribed authority, then there shall be allowed deduction of expenditure incurred whether 100%, 150% or 200% as prescribed from time to time. Clause (2) to section 35 of the Act provides that no deduction shall be allowed in respect of expenditure mentioned in clause (1) under any provisions of the Act. Clause (3) further lays down that no company shall be*

entitled for deduction under clause (1) unless it enters into agreement with prescribed authority for co-operation in such R & D facility. The Finance Act, 2015 w.e.f. 01.04.2016 has substituted and provided that facility has to fulfill such condition with regard to maintenance of accounts and audit thereof and for audit of accounts maintained for that facility.

40. Under Rule 6 of Income Tax Rules, 1962 (in short 'the Rules'), the prescribed authority for expenditure on scientific research under various sub-clauses has been identified. As per Rule 6(1B) of the Rules for the purpose of sub-section 2AB of section 35 of the Act, the prescribed authority shall be the Secretary, Department of Scientific and Industrial Research i.e. DSIR. Under sub-rule (4), application for obtaining approval under section 35(2AB) of the Act is to be made in form No.3CK. Under sub-rule (5A) of rule 6 of the Rules, the prescribed authority shall, if satisfied that the conditions provided in the rule and in sub-section (2AB) being fulfilled, pass an order in writing in form No.3CM. The proviso however lays down that reasonable opportunity of being heard is to be granted to the company before rejecting an application. So, the application has to be made under sub-rule (4) in form No.3CK and the prescribed authority has to pass an order in writing in form No.3CM. Sub-rule (7A) provides that the approval of expenditure under sub-section (2AB) of section 35 of the Act, shall be subject to the conditions that the facilities do not relate purely to market research, sales promotion, etc. Clause (b) to sub-rule (7A) at the relevant time provided that the prescribed authority shall submit its report in relation to the approval of in-house R & D facility in form No.3CL to the DG (Income-tax Exemption) within sixty days of its granting approval. Under clause (c), the company at the relevant time had to maintain separate 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, 2016 w.e.f. 01.07.2016, under which the prescribed authority has to furnish electronically its report (i) in relation to approval of in-house R & D facility in part A of form No.3CL and (ii) quantifying the expenditure incurred on in-house R & D facility by the company during the previous year and eligible for weighted deduction under sub-section 2AB of section 35 of the Act in part B of form No.3CL. In other words the quantification of expenditure has been prescribed vide IT (Tenth Amendment)

Rules, 2016 w.e.f. 01.07.2016. Prior to this amendment, no such power was with DSIR i.e. after approval of facility.

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

42. The issue which is raised before us relates to pre-amended provisions and question is where the facility has been approved by the prescribed authority, can the deduction be denied to the assessee under section 35(2AB) of the Act for non issue of form No.3CL by the said prescribed authority or the power is with the Assessing Officer to look into the nature of expenditure to be allowed as weighted deduction under section 35(2AB) of the Act. The first issue which arises is the recognition of facility by the prescribed authority as provided in section 35(2AB) of the Act.

43. xx xx

44. xx xx

45. The issue which is raised in the present appeal is that whether where the facility has been recognized and necessary certification is issued by the prescribed authority, the assessee can avail the deduction in respect of expenditure incurred on in-house R&D facility, for which the adjudicating authority is the Assessing Officer and whether the prescribed authority is to approve expenditure in form No.3CL from year to year. Looking into the provisions of rules, it stipulates the filing of audit report before the prescribed authority by the persons availing the deduction under section 35(2AB) of the Act but the provisions of the Act do not prescribe any methodology of approval to be granted by the prescribed authority vis-à-vis expenditure from year to year. The amendment brought in by the IT (Tenth Amendment) Rules w.e.f. 01.07.2016, wherein separate part has been inserted for certifying the amount of expenditure from year to year and the amended form No.3CL thus, lays down the procedure to be followed by the prescribed authority. Prior to the aforesaid amendment in 2016, no such procedure/methodology was prescribed. In the absence of the same, there is no merit in

*the order of Assessing Officer in curtailing the expenditure and consequent weighted deduction claim under section 35(2AB) of the Act on the surmise that prescribed authority has only approved part of expenditure in form No.3CL. We find no merit in the said order of authorities below."*

20. On perusal of above, it is clear that the Tribunal has concluded that the amendments brought by the Income Tax (Tenth Amendment) Rules effective from 01.07.2016, had laid down the procedure/methodology to be followed by the Prescribed Authority for quantification of the Research & Development Expenses, which was not specified prior to the aforesaid amendment. Since, the issue before the Pune Bench of the Tribunal pertain to pre-amended provisions, the Tribunal decided the issue in favour of the Assessee holding that in absence of the procedures/methodology prescribed for quantification of expenditure, the Assessing Officer was not justifying in denying weighted deduction for research and development expenses under Section 35(2AB) of the Act on the surmise that Prescribed Authority has only approved part of expenditure in Form No. 3CL. The appeal before us pertains to Assessment Year 2017-18. Therefore, as per the above decision of the Tribunal, for the assessment year before us the weighted deduction of Research & Development Expenditure would be allowed subject to, both, the facility as well as the quantum of expenditure having been approved by the Prescribed Authority since the procedure/methodology for the quantification of expenditure had been prescribed by way of amendment brought by the Income Tax (Tenth Amendment) Rules w.e.f. 01.07.2016.
21. In this regard, it would be pertinent to refer to the provisions contained in amended Rule 6, as applicable to the assessment

year before us. Rule 6(4) provides that an application for obtaining approval under Section 35(2AB) of the Act is required to be filed in Form 3CK. Rule 6(5A) provides that in case the Prescribed Authority is satisfied that the conditions specified Section 35(2AB) of the Act and Rule 6 are satisfied, the Prescribed Authority shall pass in order in writing in Form 3CM. One of the conditions prescribed in Rule 6(7A) for grant to approval for expenditure under Section 35(2AB) is electronically furnishing of report in Form 3CL by the Prescribed Authority to the specified income tax authority (*i.e. Principal Chief Commissioner, Chief Commissioner, Principal Director General or Director General*). We note that Clause 4 of Section 35(2AB) of the Act, as inserted by the Finance Act-1997, provided for furnishing of report by the Prescribed Authority in the prescribed form and manner. The prescribed form for the report (*i.e. Form 3CL*) was also substituted in place of the earlier Form 3CL by the Income Tax (Tenth Amendment) Rules and the Central Board of Direct Taxes (CBDT) had issued Notification No. SO 1580(E) [NO.29/2016 (F.NO.142/19/2015-TPL)], dated 28/4/2016, to this effect. Thus, on a co-joint reading of Clause 4 of Section 35(2AB) with Rule 6(7A) it can be seen that the approval for expenditure on in-house research & development facility under Section 35(2AB) of the Act shall be, *inter alia*, subject to the condition that the Prescribed Authority should furnish to the specified Income Tax Authority a report (a) in relation to approval of in-house research and development facility in Form 3CL – Part A, and (b) quantifying the expenditure incurred on in-house research and development facility by the Appellant during the previous year that is eligible for weighted deduction under Section 35(2AB) of the Act in Form 3CL – Part B. A perusal

of Part B of the aforesaid Form 3CL shows that the Prescribed Authority is required to certify the details of expenditure on (A) land and building, (B) capital expenditure – equipments and others, (C) Revenue expenditure – directly related to research & development. At this juncture, it would also be pertinent to consider the amendment made by the Finance Act, 2016 [with effect from 01/04/2016] to Clause (3) of Section 35(2AB) which, post-amendment, reads as under:

*"(3) No company shall be entitled for deduction under clause (1) unless it enters into an agreement with the prescribed authority for co-operation in such research and development facility and fulfils such conditions with regard to maintenance of accounts and audit thereof and furnishing of reports in such manner as may be prescribed." (Emphasis Supplied)*

By way of the above said amendment, in place of phrase 'for audit of accounts maintained for that facility', the phrase 'fulfils such conditions with regard to maintenance of accounts and audit thereof and furnishing of reports in such manner as may be prescribed' was substituted. The aforesaid amendment to Clause 3 of Section 35(2AB) of the Act, thus, mandated the assessee to furnish the relevant information in the form of a report in prescribed Form No. 3CLA as a pre-condition to claiming deduction under Clause (1) of Section 35(2AB) of the Act.

22. On examining the various Clauses of Section 35(2AB) of the Act, both, prior to, and post amendments, we find that the amendments were made in the provisions contained in Section 35(2AB) of the Act, as well as amendments in the corresponding

Rule 6 and the change in the requirement to file/furnish the prescribed forms, it becomes clear that amendments/changes were made to put in place a framework for approval of the in-house research and development expenditure in addition to the approval for the in-house research and development facility as has been concluded by the Tribunal in the case of Cummins India Ltd. (supra). In our view, the amendments made to the provisions of Section 35(2AB) and Rule 6 clearly being out the legislative intent to allow deduction for expenditure approved by the Prescribed Authority. Therefore, we reject the contention advanced on behalf of the Appellant that only Rule 6 was amended without making any amendment to the provisions contained in Section 35(2AB) of the Act. The conflict as perceived by the Appellant in the provisions contained in Section 35(2AB) of the Act and Rule 6, which in our view is non-existent, can, in any case, be resolved by way of harmonious interpretation of the provisions contained therein instead of adopting the interpretation as proposed by the Appellant which would render otiose the provisions contained in Rule 6 and Section 35(2AB) of the Act which were brought in effect by way of specific amendments. In view of the aforesaid reasoning/conclusion, the judicial precedents relied upon by the Appellant also do not advance the case of the Appellant as the same are not applicable to the facts of the present case. In the judicial precedents cited by the Appellant there was repugnancy between the provisions of statute and the rules made thereunder, whereas in the case before us there is no such conflict. Absent any irreconcilable conflict between the applicable provisions contained in Section 35(2AB) and Rule 6, the judicial precedents cited by the Appellant have no application to the facts of the present case.

23. In view of the above, we do not find any merit with the submissions advanced on behalf of the Appellant in this regard. Further, we find that the directions issued by the DRP are in line with the provisions of Section 144C(8) of the Act which provide that DRP may confirm, or enhance the variations proposed in the Draft Assessment Order. Accordingly, Ground No. 2 to 2.5 raised in the appeal are dismissed.
24. **Ground No. 3 to 3.3** are directed against disallowance of INR 2,00,201/- made by the Assessing Officer under section 14A of the Act. The relevant facts in brief are that the Appellant had made suo-moto disallowance of INR 1,90,992/- under Section 14A of the Act. During the assessment proceedings, the Assessing Officer re-computed the amount of disallowance by applying provisions of Section 14A read with Rule 8D of the Rules to arrive at total disallowance of INR 3,91,193/-. Thus, the Assessing Officer made additional disallowance of INR 2,00,201/- under Section 14A of the Act.
25. The DRP rejected the objections raised by the Appellant on the ground that following the decision of DRP for the Assessment Year 2012-13, and therefore, disallowance of INR 2,00,201/- was made by the Assessing Officer in the Final Assessment Order.
26. Being aggrieved, the Appellant has preferred appeal on this issue before us.
27. We have considered the rival submissions and perused the material on record. The DRP had rejected the objections of the Appellant by following the order of DRP for the Assessment Year 2012-13. We find that the Tribunal has, while deciding identical

issue in the appeal for the Assessment Year 2012-13 (ITA No. 1844 & 1845/Mum2022), held as under:

*"36. On this issue, the Assessing Officer noted that the assessee company has invested in shares to the tune of Rs.2,42,85,000/-. He noted that no disallowance u/s. 14A has been done. He rejected the assessee's submission that the assessee has not earned any exempt dividend income by placing reliance upon the ITAT decision in the case of Cheminvest Ltd. v. ITO [2009] 121 ITD 318 (Delhi) (SB). The Assessing Officer proceeded to apply Rule 8D and made the disallowance of Rs.7,41,654/-.*

*37. Against the above order, the assessee filed objection before the TRP and the DRP granted part relief directing as under:*

*8.8 In view of the above detailed discussion, the action of the A.O. in applying Rule 8D is upheld. However, the DRP has noted that while marking the disallowance u/s.14A, credit has not been given for the income already offered to tax of Rs.4,86,322/- in the computation of income. During the course of the DRP proceedings, a copy of computation of income was filed in support of the claim made by the assessee company. Thus, DRP has taken note of the fact that this has led to double addition. Accordingly, the A.O. is directed to again verify the facts from the original record and given credit of Rs.4,86,322/- for the suo moto disallowance made in the computation of income and further, addition should be made only for the balance amount.*

*38. Upon careful consideration we find that it is now decided by various high courts including the Hon'ble Jurisdictional High Court that no disallowance u/s.14A is required when no exempt income has been earned.*

*39. In the present case, the assessee's contention is that it has not earned any dividend income from its subsidiary company in India. As regards the income from foreign subsidiary it has been submitted that the same is subject to tax u/s. 115BBD of the Act. We find that principally we are in agreement with the above said submissions of the Id. Counsel of the assessee. However, since the above requires factual examination of the contention that no dividend income has been received from the subsidiary companies in India and dividend income from foreign subsidiary are already subject to tax, the issue is remitted to the file of the Assessing*

*Officer. The Assessing Officer shall examine the veracity of the above submissions and thereafter grant the assessee necessary relief, as per law.” (Emphasis Supplied)*

28. For the Assessment Year under consideration also, the Appellant has not earned any exempt income and therefore, the addition made by the Assessing Officer under Section 14A of the Act read with Rule 8D of the Rules was not warranted as per the above decision of the Tribunal in the case of the Assessee. To same effect is the decision of the Hon'ble Bombay High Court in the case of Principal Commissioner of Income Tax-6 vs. Kohinoor Project Pvt. Ltd. : 425 ITR 700 (Bombay). Accordingly, disallowance of INR 2,00,201/- under Section 14A of the Act made by the Assessing Officer is deleted. Ground No. 3 to 3.3 raised by the Appellant are allowed.
29. **Ground No. 4 to 4.3** are directed against the addition to Book Profit under Section 115JB of the Act on account of disallowance under Section 14A of the Act amounting to INR 2,00,201/-. Since we have deleted the disallowance of INR 2,00,201/- made under Section 14A of the Act while computing income under the normal provisions of the Act, the question of making addition of the same while computing book profits under Section 115JB of the Act does not arise. Accordingly, addition of INR 2,00,201/- made by the Assessing Officer while computing the Book Profits under Section 115JB of the Act is deleted. Assessing Officer directed to compute the amount of disallowance under Section 14A of the Act to be added to the Book Profits in terms of Section 115JB of the Act read with Explanation 1(f) thereto as per the decision of the Special Bench of the Tribunal in the case of Assistant Commissioner of Income Tax, Circle 17(1), Delhi vs. Vireet Investments Ltd.:

[2017] 58 ITR(T) 313 (Delhi - Trib.) (SB)/[2017] on the basis of audited financial statements of the Appellant. In terms of the aforesaid, Ground No. 4 to 4.3 raised by the Appellant are allowed for statistical purposes.

30. **Ground No. 5 to 5.3** are directed against the addition to Book Profits under Section 115JB of the Act on account of disallowance of weighted deduction under Section 35(2AB) of the Act amounting to INR 98,93,734/-.
31. We have considered the rival submissions and perused the material on record. While disposing off Ground No. 2 to 2.5 above we have rejected the claim of weighted deduction under Section 35(2AB) of the Act in respect of Research & Development Expenditure of INR 86,72,367/-. Since, the Assessing Officer allowed deduction under Section 37 of the Act in respect of Research & Development Expenditure of INR 74,51,000/-, the amount of addition/disallowance was restricted to INR 98,93,734/- computed as under:

Particulars	Amount (INR)
A. Weighted deduction (@ 200%), in respect of Research & Development Expenditure of INR 86,72,367/-, claimed under Section 35(2AB) of the Act but disallowed by the Assessing Officer	1,73,44,734/-
B. Relief granted as per the Directions of the DRP by allowed deduction for revenue expenditure (@100%) for under Section 37 of the Act	74,51,000/-
C. Amount of disallowance/additions made in Final Assessment Order [A. – B.]	98,93,734/-

32. The Assessing Officer has increased Book Profits as computed by the Appellant under Section 115JB of the Act by the aforesaid amount of INR 98,93,734/-. We note that while the Appellant has claimed weighted deduction of INR 1,73,44,734/-, being 200% of Research & Development Expenditure of INR 86,72,367/-, under Section 35(2AB) of the Act while computing income under normal provisions of the Act, the amount of Research & Development Expenditure debited to the Profit & Loss Account was only INR 86,72,367/- out of which deduction for revenue expenditure of INR 74,51,000/- has been allowed under Section 37 of the Act by the Assessing Officer as per directions of DRP. Therefore, out of expenditure of INR 86,72,367/- debited to the Profit & Loss Account, only INR 12,21,367/- [INR 86,72,367/- Less INR 74,51,000/-] has been disallowed as being capital in nature. Part-II and Part-III of Schedule-6 of the Companies Act, 1956 does not permit any capital expenditure to get debited in the Profit & Loss Account. It is not the case of the Revenue that the aforesaid capital expenditure of INR 12,21,367/- were debited to Profit & Loss Account in contravention of the aforesaid provisions of the Companies Act and have, in effect, been claimed as deduction while computing Book Profits under Section 115JB of the Act. Further, disallowance under Section 35(2AB) of the Act does not fall under any of the permissible addition specified in Explanation 1 to Section 115JB of the Act. Therefore, the Assessing Officer would not be entitled to tinker with the approved audited accounts as per the judgment of the Hon'ble Apex Court in the case of Apollo Tyres Limited reported in 255 ITR 273. Accordingly, the addition of INR 86,72,367/- made by the Assessing Officer to Book Profits (as computed by the Appellant) under Section 115JB of the Act is

deleted. Thus, Ground No. 5 to 5.3 raised by the Appellant are allowed.

33. In result, the appeal preferred by the Assessee is partly allowed  
Order pronounced on 19.04.2023.

**Sd/-**  
**(B.R. Baskaran)**  
**Accountant Member**

**Sd/-**  
**(Rahul Chaudhary)**  
**Judicial Member**

मुंबई Mumbai; दिनांक Dated : 19.04.2023  
Alindra, PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT,  
Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai