

आयकर अपीलीय अधिकरण, हैदराबाद पीठ में  
IN THE INCOME TAX APPELLATE TRIBUNAL  
HYDERABAD BENCHES "A", HYDERABAD

BEFORE  
SHRI RAMA KANTA PANDA, VICE PRESIDENT  
&  
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

आ.अपी.सं / ITA No. 470/Hyd/2022  
(निर्धारण वर्ष / Assessment Year: 2017-18)

Natco Pharma Limited, Hyderabad [PAN No. AAACN6927A]	Vs.	Dy.Commissioner of Income Tax, Circle-5(1), Hyderabad
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती द्वारा/Assessee by: Shri A.V. Raghuram, AR  
राजस्व द्वारा/Revenue by: Ms. L. Sunitha Rao, CIT-DR

सुनवाई की तारीख/Date of hearing: 25/07/2023  
घोषणा की तारीख/Pronouncement on: 31/07/2023

आदेश / ORDER

**PER K. NARASIMHA CHARY, JM:**

Aggrieved by the final assessment order passed consequent to the directions of Hon'ble Dispute Resolution Panel, Bengaluru ("DRP"), in the case of M/s. Natco Pharma Limited ("the assessee") for the assessment year 2017-18, under section 143(3) r.w.s. 144C(13) r.w.s. 144B of the Income Tax Act, 1961 (for short "the Act"), assessee filed this appeal.

2. Two questions were involved in this appeal. One is that whether the weighted deduction claimed under section 35(2AB) of the Act is available

in respect of the expenditure incurred on bio equivalence and clinical study outside the approved facility and the other is in respect of the Foreign Tax Credit (FTC), which was denied on the ground that Form 67 shall be furnished on or before the due date specified for furnishing of the return of income under section 139(1) of the Act and on furnishing the documents specified in Form 67.

3. Insofar as the first issue is concerned, contention of the assessee is that the bio equivalence and clinical study cannot be performed within the approved facility and, therefore, when once the expenditure relating to bio and clinical study expenses incurred outside approved facility are included in form 3CL and establish that such an expenditure is incurred in relation to the research in the approved facility, the same cannot be denied. Learned AR placed reliance on the decision of the Hon'ble High Court of Gujarat in the case of CIT vs. Cadila Healthcare Ltd. (2013) 214 Taxman 672 (Guj), against which, SLP was dismissed by the Hon'ble Apex Court in SLP No. 770/2015, dated 14/10/2015.

4. Per contra, according to learned DR, only such expenditure as incurred on scientific research on in-house research and development facility that too as approved by the prescribed authority is eligible for deduction under section 35(2AB) of the Act and any expenditure that was incurred by the assessee outside the research and development facility is not qualified for deduction under section 35(2AB) of the Act. He referred to provisions in section 35(2AB) of the Act to justify the orders of the authorities below.

5. We have gone through the record in the light of the submissions made on either side. So far as facts are concerned, there is no dispute. But the only dispute is whether the expenditure incurred on scientific research outside the research and development facility as approved by the prescribed authority is eligible for deduction under section 35(2AB) of the Act?

6. This question is no longer res integra and stood decided by the higher Fora in the case of CIT vs. Cadila Healthcare Ltd. (supra), the Hon'ble Gujarat High Court held the issue in favour of the assessee and for the sake of completeness, we extract the relevant observations here under,-

*"15. In our opinion, the Tribunal committed no error. Sec. 35(2AB) of the Act provides for deduction to a company engaged in business of bio-technology or in the business of manufacture or production of any article or thing notified by the Board towards expenditure of scientific research development facility approved by the prescribed authority. Such deduction at the relevant time was one and a half times expenditure which has now been increased to twice the eligible expenditure. We may notice that Explanation to s. 35(2AB)(1) which was introduced by the Finance Act, 2001 w.e.f. 1<sup>st</sup> April, 2002 reads as under:*

*"Explanation.-For the purposes of this clause, 'expenditure on scientific research in relation to drugs and pharmaceuticals', shall include expenditure incurred on clinical drug trial, obtaining approval from any regulatory authority under any Central, State or Provincial Act and filing an application for a patent under the Patents Act, 1970 (39 of 1970)."*

*Such Explanation thus provides that for the purpose of said clause, i.e., cl. (1) of s. 35(2AB), expenditure on scientific research in relation to drugs and pharmaceuticals shall include expenditure incurred on clinical drug trial, obtaining approval from any regulatory authority under the Central, State or Provincial Act and filing an application for a patent under the Patents Act, 1970.*

*The whole idea thus appears to be to give encouragement to scientific research. By the very nature of things, clinical trials may not always be possible to be conducted in closed laboratory or in similar in-house facility provided by the assessee and approved by the prescribed authority. Before a pharmaceutical drug could be put in the market, the regulatory authorities would insist on strict tests and research on all possible aspects, such as possible reactions, effect of the drug and so on. Extensive clinical trials, therefore, would be an intrinsic part of development of any such new pharmaceutical drug. It cannot be imagined that such clinical trial can be carried out only in the laboratory of the pharmaceutical company. If we give such restricted meaning to the term "expenditure incurred on in-house research and development facility", we, would on one hand*

*be completely diluting the deduction envisaged under sub-so (2AB) of s. 35 and on the other, making the Explanation noted above quite meaningless. We have noticed that for the purpose of the said clause in relation to drugs and pharmaceuticals, the expenditure on scientific research has to include the expenditure incurred on clinical trials, in obtaining approvals from any regulatory authority or in filing an application for grant of patent. The activities of obtaining approval of the authority and filing of an application for patent necessarily shall have to be outside the in-house research facility. Thus, the restricted meaning suggested by the Revenue would completely make the Explanation quite meaningless. For the scientific research in relation to drugs and pharmaceuticals made for its own peculiar requirements, the legislature appears to have added such an Explanation.*

*In the case of Dy. CIT vs. Mastek Ltd. in Tax Appeal No. 242 of 2000 and connected matters [reported at (2013) 263 CTR (Guj) 671 : (2013) 87 DTR (Gu) 41-Ed.], a Division Bench of this Court had touched on the aspect of what can be termed as scientific research. In the context, certain observations made by the Bench may be of some relevance :*

*"25. It can thus be seen that the term 'scientific research' in the context of the deduction allowable under S. 35(1) of the Act would include wide variety of activities. It can also be appreciated that every scientific research need not necessarily result into the ultimate goal with which it may have been undertaken. Often times in the field of research and invention, the efforts undertaken may not yield fruitful results. What is to be ascertained is whether any scientific research was undertaken and not whether such scientific research resulted into the ultimate aim for which such research was undertaken. It can be easily envisaged that the scientific research undertaken often times would completely fail to achieve desired results. That by itself does not mean that no scientific research was undertaken. What the legislature desired to encourage by granting deduction under S. 35(1) of the Act was a scientific research and not necessarily only the successful scientific research undertaken by an assessee."*

7. This decision has been followed by the Co-ordinate Benches of the Tribunal in a number of cases. This decision is applicable to the facts of the

case on all fours since the activities of bio equivalence and clinical study cannot be carried out only in the laboratory of the pharmaceutical company and they have to be necessarily carried out outside the research and development facility. However, the prescribed authority approved this expenditure by incorporating the same in form 3CL.

8. We, therefore, respectfully following the decision of the Hon'ble Gurajat High Court (supra) and followed by the Co-ordinate Benches of the Tribunal, consistently, hold the issue in favour of the assessee and direct the learned Assessing Officer to delete the addition made on this account.

9. Coming to the second issue, the case of the assessee is that rule 128 of the tax rules was introduced w.e.f. 01/04/2017 and since it is a new provision, and first year of implementation, by inadvertence, the assessee missed to file Form 67, but it complied with such a provision immediately. It is their further case that in the return of income, there was disclosure of this fact.

10. Learned AR submits that filing of Form 67 in accordance with rule 128 of the tax rules is only a procedural requirement to enable the tax authorities to verify the FTC available to the assessee, but it does not take away altogether the right of the assessee to claim the FTC.

11. Insofar as this issue is concerned, this is no longer res integra and we find that the Bangalore Bench of the Tribunal in the case of M/s.42 Hertz Software India Pvt.Ltd vide ITA No.29/ Bang/2021 order dated 07/03/2022 for the assessment year 2017-18, decided an identical issue and held that FTC cannot be denied to the assessee, where the assessee filed FTC in Form 67, although belatedly since filing of such Form 67 is not mandatory but directory in nature. Relevant observation of the Tribunal from para 6 onwards reads as under:-

*"6. There is no dispute that the Assessee is entitled to claim FTC. On perusal of provisions of Rule 128 (8) & (9), it is clear that, one of the requirements of Rule 128 for claiming FTC is that Form 67 is to be*

*submitted by assessee before filing of the returns. In our view, this requirement cannot be treated as mandatory, rather it is directory in nature. This is because, Rule 128(9) does not provide for disallowance of FTC in case of delay in filing Form No.67. This view is fortified by the decision of coordinate bench of this Tribunal in case of Ms.Brinda Kumar Krishna vs. ITO in ITA no.454/Bang/2021 by order dated 17/11/2021”.*

12. A Co-ordinate Bench of this Tribunal in the cases of Shridhar Madhav Diwan vs. DCIT in ITA No. 102/Hyd/2023, dated 24/05/2023 and Purushothama Reddy Vankireddy vs. ADIT in ITA No. 526/Hyd/2022, dated 05/12/2022, followed the same and held the issue in favour of the assessee. These decisions are applicable to the facts of the case and while respectfully following the said view, we hold the issue in favour of assessee.

13. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on this the 31<sup>st</sup> day of July, 2023.

Sd/-  
**(RAMA KANTA PANDA)**  
**VICE PRESIDENT**

Sd/-  
**(K. NARASIMHA CHARY)**  
**JUDICIAL MEMBER**

Hyderabad,  
Dated: 31/07/2023

TNMM

Copy forwarded to:

1. Natco Pharma Limited, Natco House, Road No. 2, Banjara Hills, Hyderabad.
2. Deputy Commissioner of Income Tax, Circle-5(1), Hyderabad.
3. The Dispute Resolution Panel (DRP), Bengaluru.
4. The Director of Income Tax (IT & TP), Hyderabad.
5. The Addl. Commissioner of Income Tax (Transfer Pricing), Hyderabad.
6. DR, ITAT, Hyderabad.
7. GUARD FILE

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