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IN THE HIGH COURT OF DELHI AT NEW DELHI

DECIDED ON: 25.07.2012

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W.P.(C) 4180/2012

Shriram Scientific & Industrial Research Foundation Petitioner

Through: Mr.M.S.Sayali, Sr.Advocate with
Mr.Satyen Sethi, Mr.Arta Trana Panda,
Mr.Mayank Naga, Mr.Rahul Sateerja &
Mr.Husnal Sayali, Advocates.

versus

Central Board of Direct Taxes Respondent

Through: Mr.Kiran Babu, Sr.Standing Counsel

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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Issue notice. Mr.Kiran Babu, Sr.Standing Counsel for the revenue, accepts notice and submits that since the matter may be heard finally.

1. The petitioner is aggrieved by order dated 20th March, 2012, whereby it was refused to grant of approval in terms of Section 35(1)(ii) of the Income Tax Act, 1961.

2. The petitioner, Shriram Scientific & Industrial Research Foundation, which was established in the year 1940, was notified as "Scientific & Industrial Association on 23rd November, 1946. Its position as Scientific & Industrial Association remained unbroken till 1996. W.e.f. 1st April, 1997, the Central Government notified its status as Scientific Research Institution. Since the

petitioner was not adversely affected in the sense that the tax concession benefit admissible to it was not withdrawn up to 1996, the petitioner's position as Scientific Research Institution continued. It was sought to be treated as Scientific Research Association. This was, however, contested and the Appellate Tribunal ultimately ruled in favour of the petitioner which became conclusive.

3. The petitioner's representation for grant of approval in terms of Section 35(1)(ii), made on 22nd August, 2008 remained pending; in the meanwhile an amendment was made to its object clause. On 24th September, 2010, first respondent rejected the application holding that the approval could not be given since the conditions prescribed under the provision were not satisfied. The petitioner felt aggrieved and approached this Court by filing W.P.(C) 7518/2010 impugning the said rejection order dated 24th September, 2010.

4. This Court by order dated 9th August, 2011 allowed the writ petition. The Division Bench observed and directed as follows:

"4. To appreciate the aforesaid rivalised submissions at the Bar, we have carefully scrutinized the order dated 24th September, 2010, which has been impugned in the writ petition. On a perusal of the said order, it is clear as crystal that there has been no discussion and, in fact, it is extremely cryptic. The stand put forth by the Revenue in the counter affidavit nowhere finds place in the impugned order. Such a laconic order cannot stand the nuanced scrutiny. It is obligatory on the part of the authorities to ascribe cogent reasons while dealing with the said applications as reason is heart and soul of an order.

5. In view of the aforesaid, we have no other option and are compelled to quash the order dated 24th September, 2010 contained in Annexure P-1 and accordingly we so do. We direct the competent authority of the Central Board of Direct Taxes to afford an opportunity of hearing to the petitioner and pass afresh order within a period of three months from the date of receipt of the order passed today. It needs no special emphasis to state that the competent authority shall issue a notice to the petitioner, fix a date and thereafter deal with the stand urged and pass an order by ascribing reasons which would be germane to the issue raised.

6. Consequently, the writ petition is allowed to the extent indicated above, leaving the parties to bear their respective costs."

5. The petitioner, consequent upon quashing of the earlier order, denying the approval, again approached the authorities and made representation. In the detailed representation dated 17th February, 2012, it was contended, inter-alia, as follows:-

“4. That it is further placed on records that the Hon’ble Bombay High Court, in the matter of *Indian Planetary Society v. CBDT* (2009) 318 ITR 102 (Bom.) has held as under:-

“On a perusal of the provision of Section 35(1)(ii) and the proviso it would be clear that the authority to grant permission is the Government of India. Where the permission for approval had been rejected by the Central Board of Direct Taxes and nothing had been shown to indicate that the Central Board of Direct, under the Business Rules of the Government of India, had been allowed to discharge functions of the Government under Section 35(1)(ii), rejection of the application for approval by the CBDT was not valid and the order liable to be set aside and the matter remanded to the Government of India for reconsideration according to law”

5. That it is pertinent to submit and place on records that the Assessee Foundation is recognized as Scientific and Industrial Research Organisation by the Government of India, Ministry of Science and Technology, Department of Scientific and Industrial Research, New Delhi. The letter issued by the Ministry of Science and Technology, Government of India is attached herewith for your kind reference and record. Annexure-1

6. That in the case of *Indian Planetary Society v. CBDT* (2009) 318 ITR 102 (Bom.) the Hon’ble High Court, while considering the aspect of the matter regarding application under Section 35(1)(ii), held as under:-

“CBDT by its very nature is composed of the officers from Income Tax Department. By their very nature though they may read and consider some aspects, will really not be in the position to arrive at the finding as to whether the activities carried on by bodies like the petitioner amount to research as may be required. In our opinion therefore, the Central Government which has the authority, before considering the application of a body like the petitioner, ought to bear this in mind.”

6. By the impugned order, the Central Board of Direct Taxes denied the approval. Learned Sr.Counsel, Mr.M.S.Sayali, appeared on behalf of the petitioner and contended that the Central Board of Direct Taxes could not have decided the

matter; he relied on Section 35(3) of the Act. It was submitted that the directions of this Court on or dated 9th August, 2011 have to be understood in the context of existing law i.e. CBDT, if not satisfied with the claims of the petitioner, it has to make a reference in terms of Section 35(1)(iii) to the concerned authority i.e. Central Government. Since it did not do so and chose to determine the matter itself, counsel urged that this assumption by the authority of jurisdiction not conferred upon it vitiated the entire order.

7. Learned counsel for the respondent, Mr.Kiran Babu, submitted that CBDT did follow the directions of this Court and afforded opportunity to the petitioner and decided the claim. In the circumstances, the petitioner cannot question the jurisdiction of the CBDT.

8. To properly understand the contentions of the writ petitioner, it would be necessary to extract Sections 35(1), (2), (3).

“35(1) *In respect of expenditure on scientific research, the following deductions shall be allowed - (i) Any expenditure (not being in the nature of capital expenditure) laid out or expended on scientific research related to the business.*

Explanation : Where any such expenditure has been laid out or expended before the commencement of the business (not being expenditure laid out or expended before the 1st day of April, 1973) on payment of any salary [as defined in Explanation 2 below sub-section (5) of section 40A] to an employee engaged in such scientific research or on the purchase of materials used in such scientific research, the aggregate of the expenditure so laid out or expended within the three years immediately preceding the commencement of the business shall, to the extent it is certified by the prescribed authority 535 to have been laid out or expended on such scientific research, be deemed to have been laid out or expended in the previous year in which the business is commenced;

(ii) Any sum paid to a scientific research association which has as its object the undertaking of scientific research or to a university, college or other institution to be used for scientific research :

Provided that such association, university, college or institution is for the time being approved for the purposes of this clause by the prescribed authority by notification in the Official Gazette;

(iii) Any sum paid to a university, college or other institution to be used for research in social science or statistical research :

Provided that such university, college or institution is for the time being approved for the purposes of this clause by the prescribed authority by notification in the Official Gazette;

(iv) In respect of any expenditure of a capital nature on scientific research related to the business carried on by the assessee, such deduction as may be admissible under the provisions of sub-section (2) :

Provided that the scientific research association, university, college or other institution referred to in clause (ii) or clause (iii) shall make an application in the prescribed form and manner to the prescribed authority for the purpose of grant of approval, or continuance thereof, under clause (ii) or, as the case may be, clause (iii) :

Provided further that the prescribed authority may, before granting approval under clause (ii) or clause (iii), call for such documents (including audited annual accounts) or information from the scientific research association, university, college or other institution as it thinks necessary in order to satisfy itself about the genuineness of the activities of the scientific research association, university, college or other institution and that authority may also make such inquiries as it may deem necessary in this behalf :

Provided also that any notification issued by the prescribed authority under clause (ii) or clause (iii) shall, at any one time, have effect for such assessment year or years, not exceeding three assessment years (including an assessment year or years commencing before the date on which such notification is issued) as may be specified in the notification.

(2) For the purposes of clause (iv) of sub-section (1), - (i) In a case where such capital expenditure is incurred before the 1st day of April, 1967, one-fifth of the capital expenditure incurred in any previous year shall be deducted for that previous year; and the balance of the expenditure shall be deducted in equal installments for each of the four immediately succeeding previous years;

(ia) In a case where such capital expenditure is incurred after the 31st day of March, 1967, the whole of such capital expenditure incurred in any previous year shall be deducted for that previous year :

Provided that no deduction shall be admissible under this clause in respect of any expenditure incurred on the acquisition of any land, whether the land is acquired as such or as part of any property, after the 29th day of February, 1984.

Explanation 1 : Where any capital expenditure has been incurred before the commencement of the business, the aggregate of the expenditure so incurred within the three years immediately preceding the commencement of the business shall be deemed to have been incurred in the previous year in which the business is commenced;

Explanation 2 : For the purposes of this clause, - (a) "Land" includes any interest in land; and (b) the acquisition of any land shall be deemed to have been made by the assessee on the date on which the instrument of transfer of such land to him has been registered under the Registration Act, 1908 (16 of 1908), or where he has taken or retained the possession of such land or any part thereof in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882), the date on which he has so taken or retained possession of such land or part;

(ii) Notwithstanding anything contained in clause (i), where an asset representing expenditure of a capital nature incurred before the 1st day of April, 1967, ceases to be used in a previous year for scientific research related to the business and the value of the asset at the time of the cessation, together with the aggregate of deductions already allowed under clause (i) falls short of the said expenditure, then - (a) There shall be

allowed a deduction for that previous year of an amount equal to such deficiency, and (b) no deduction shall be allowed under that clause for that previous year or for any subsequent previous year;

(iii) If the asset mentioned in clause (ii) is sold, without having been used for other purposes, in the year of cessation, the sale price shall be taken to be the value of the asset at the time of the cessation; and if the asset is sold, without having been used for other purposes, in a previous year subsequent to the year of cessation, and the sale price falls short of the value of the asset taken into account at the time of cessation, an amount equal to the deficiency shall be allowed as a deduction for the previous year in which the sale took place;

(iv) Where a deduction is allowed for any previous year under this section in respect of expenditure represented wholly or partly by an asset, no deduction shall be allowed under clause (ii) of sub-section (1) of section 32 for the same or any other previous year in respect of that asset;

(v) Where the asset mentioned in clause (ii) is used in the business after it ceases to be used for scientific research related to that business, depreciation shall be admissible under clause (ii) of sub-section (1) of section 32.

(2A) Where, before the 1st day of March, 1984, the assessee pays any sum (being any sum paid with a specified direction that the sum shall not be used for the acquisition of any land or building or construction of any building) to a scientific research association or university or college or other institution referred to in clause (ii) of sub-section (1) or to a public sector company to be used for scientific research undertaken under a programme approved in this behalf by the prescribed authority having regard to the social, economic and industrial needs of India, then, - (a) There shall be allowed a deduction of a sum equal to one and one-third times the sum so paid; and

(b) No deduction in respect of such sum shall be allowed under clause (ii) of sub-section (1) for the same or any other assessment year.

Explanation : For the purposes of this sub-section, "public sector company" shall have the same meaning as in clause (b) of the Explanation below sub-section (2B) of section 32A.

(2AA) Where the assessee pays any sum to a National Laboratory or a University or an Indian Institute of Technology with a specific direction that the said sum shall be used for scientific research undertaken under a programme approved in this behalf by the prescribed authority, then - (a) There shall be allowed a deduction of a sum equal to one and one-fourth times the sum so paid; and

(b) No deduction in respect of such sum shall be allowed under any other provision of the Income-tax Act :

Provided that the prescribed authority shall, before granting approval, satisfy itself about the feasibility of carrying out the scientific research and shall submit its report to the Director General in such form as may be prescribed.

Explanation : For the purposes of this section, - (a) "National Laboratory" means a scientific laboratory functioning at the national level under the aegis of the Indian Council of Agricultural Research, the Indian Council of Medical Research, the Council of Scientific and Industrial Research, the Defence Research and Development Organisation, the Department of Electronics, the Department of Bio-Technology or the Department of

Atomic Energy and which is approved as a National Laboratory by the prescribed authority in such manner as may be prescribed;

(b) "University" shall have the same meaning as in Explanation to clause (ix) of section 47;

(c) "Indian Institute of Technology" shall have the same meaning as that of "Institute" in clause (g) of section 3 of the Institutes of Technology Act, 1961 (59 of 1961).

(2AB)(1) Where a company engaged in the business of manufacture or production of any drugs, pharmaceuticals, electronic equipment, computers, telecommunication equipment, chemicals or any other article or thing notified by the Board incurs 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, then, there shall be allowed a deduction of a sum equal to one and one-fourth times of the expenditure so incurred.

(2) No deduction shall be allowed in respect of the expenditure mentioned in clause (1) under any other provision of this Act.

(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 for audit of the accounts maintained for that facility.

(4) The prescribed authority shall submit its report in relation to the approval of the said facility to the Director-General in such form and within such time as may be prescribed.

(5) No deduction shall be allowed in respect of expenditure referred to in clause (1) which is incurred after the 31st day of March, 2000

(2B)(a) Where, before the 1st day of March, 1984, an assessee has incurred any expenditure (not being in the nature of capital expenditure incurred on the acquisition of any land or building or construction of any building) on scientific research undertaken under a programme approved in this behalf by the prescribed authority having regard to the social, economic and industrial needs of India, he shall, subject to the provisions of this sub-section, be allowed a deduction of a sum equal to one and one-fourth times the amount of the expenditure certified by the prescribed authority to have been so incurred during the previous year.

(b) Where a deduction has been allowed under clause (a) for any previous year in respect of any expenditure, no deduction in respect of such expenditure shall be allowed under clause (i) of sub-section (1) or clause (ia) of sub-section (2) for the same or any other previous year.

(c) Where a deduction is allowed for any previous year under this sub-section in respect of expenditure represented wholly or partly by an asset, no deduction shall be allowed in respect of that asset under clause (ii) of sub-section (1) of section 32 for the same or any subsequent previous year.

(d) Any deduction made under this sub-section in respect of any expenditure on scientific research in excess of the expenditure actually incurred shall be deemed to have been wrongly made for the purposes of this Act if the assessee fails to furnish within one year of the period allowed by the prescribed authority for completion of the programme, a

certificate of its completion obtained from that authority and the provisions of sub-section (5B) of section 155 shall apply accordingly.

***(3)** If any question arises under this section as to whether, and if so, to what extent, any activity constitutes or constituted, or any asset is or was being used for, scientific research, the Board shall refer the question to the prescribed authority, whose decision shall be final."*

9. The writ petitioner relied upon the decision of the Bombay High Court in the case of *Indian Planetary Society v. CBDT* (2009) 318 ITR 102. It had relied upon the decision in the representation made to the CBDT, after the order dated 9th August, 2011 in the earlier writ petition. The ruling of the Bombay High Court Division Bench is categorical as it says that the CBDT has the power to make a reference to the Central Govt. which alone has the jurisdiction to decide the question in terms of Section 35(3) of the Income Tax Act and the governing Rules. The CBDT could not be unaware of the legal position having regard to the mandate of Section 35; this Court is of the opinion that the assumption of jurisdiction by CBDT to decide the matter itself is without authority of law. The direction of the Court had to be construed within the frame work of law and the CBDT could only refer the matter to the Central Govt., but not to decide the matter itself.

10. In this view of the matter, the impugned order dated 20th March, 2012 cannot be sustained. It is hereby quashed. The matter is sent to CBDT which shall make appropriate order referring the matter for consideration by the Central Government, which in such eventuality shall determine the matter and will give its decision within two months from today.

11. The writ petition is allowed in the above terms.

12. Dasti.

S. RAVINDRA BHAT, J

R.V.EASWAR, J

JULY 25, 2012

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