



ITA No.7284/Mum/2018
M/s. Omni Active Health Technologies Ltd.
Assessment Year-2014-15

आयकर अपीलीय अधिकरण "जे" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"J" BENCH, MUMBAI

श्री शक्तिजीत दे, न्यायिक सदस्य एवं
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE SHRI SAKTIJIT DEY, JM AND
SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ I.T.A. No.7284/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2014-15)

Omni Active Health Technologies Ltd T-8B, 5 th Floor, Phoenix House, A-Wing Phoenix Mill Compound 462 Senapati Bapat Marg, Lower Parel Mumbai-400 013.	बनाम/ Vs.	ACIT-7(3)(1) Room No.142 G Aaykar Bhavan, M.K. Road Mumbai-400 020
स्थायी लेखा सं./ जी आइ आर सं./ PAN/GIR No. AADCP-2914-Q		
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से/ Appellant by	:	Ms. Urvi A. Mehta-Ld.AR
प्रत्यर्थी की ओर से/Respondent by	:	Shri Rajeev Harit -Ld. CIT-DR

सुनवाई की तारीख/ Date of Hearing	:	07/02/2020
घोषणा की तारीख / Date of Pronouncement	:	26/05/2020

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member): -

1.1 Aforesaid appeal by assessee for Assessment Year [in short referred to as 'AY'] 2014-15 contest certain additions / adjustment made in final assessment order dated 17/10/2018 passed by Ld. Assistant Commissioner of Income Tax-7(3)(1), Mumbai [AO] u/s. 143(3) r.w.s. 144C(13), pursuant to the directions of Dispute Resolution Panel-2, Mumbai,



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[in short referred to as DRP], u/s 144C(5) dated 24/09/2018. The grounds raised read as under: -

1 : 0 Transfer Pricing Adjustment of INR 11,20,79,641/- 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 11,20,79,641/- 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 11,20,79,641/- made by him to the Appellant's total income and to re-compute its total income and tax liability accordingly.

2 : 0 Transfer Pricing Adjustment of INR 1,20,969/- to the international transaction relating to Corporate Guarantee

2:1 The learned AO/TPO/DRP has erred in making an upward adjustment of INR 1,20,969/- to the total income of the Appellant by holding that the transaction relating to corporate guarantee entered into by the Appellant with its AE was not arm's length.

2:2 The Appellant submits that the learned AO/TPO/DRP has erred in applying the rate of guarantee commission on the entire amount of guarantee of Rs.15,19,00,000 instead of restricting the adjustment only on the actual amount of loan utilized by the AE from the overseas bank during the year.

2:3 Considering the facts and circumstances of its case and the law prevailing on the subject the international transaction relating to corporate guarantee 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.

2:4 The Appellant submits that the learned AO be directed to delete the upward adjustment of INR 1,20,969/- made by him to the Appellant's total income and to re-compute its total income and tax liability accordingly.

3 : 0 Not granting deduction of INR 10,54,524/- being the weighted deduction allowable u/s. 35(2AB) of the Act

3:1 The AO/ DRP has erred in not granting deduction of INR 10,54,524/- incurred towards research and development expenditure, claimed u/s. 35(2AB) of the Act.

3:2 The Appellant submits that considering the facts and circumstances of its case and the



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law prevailing on the subject, the AO ought to have granted weighted deduction under section 35(2AB) of the Act as the R&D "facility" has been approved by the DSIR and hence the stand taken by the AO/DRP in this connection is misconceived, erroneous and incorrect.

3:3 The Appellant submits that the AO be directed to grant entire deduction of the expenses incurred by the Appellant u/s. 35(2AB) of the Act and to re-compute its total income and tax thereon accordingly.

1.2 The income of the assessee has been determined at Rs.1425.98 Lacs after certain Transfer Pricing (TP) Adjustments of Rs.1122 Lacs as against returned income of Rs.293.43 Lacs filed by the assessee on 30/11/2014. The weighted deduction of Rs.10.54 Lacs claimed by the assessee u/s 35(2AB) has also been denied to the assessee. Aggrieved, the assessee is under further appeal before us. The assessee is stated to be engaged in the field of Natural APIs and Novel delivery systems for nutrients and active ingredients. The assessee has established an international reputation for its range of active natural ingredients for healthcare, food and personal care applications.

1.3 The perusal of material on record would reveal that a draft assessment order was passed by Ld. AO on 28/12/2017 pursuant to the order of Ld. Transfer Pricing Officer-3(1)(1), Mumbai (TPO) dated 27/10/2017. The assessee preferred objections against the same before Ld. DRP which were disposed-off vide directions dated 24/09/2018. Pursuant to the said directions, final assessment order was passed on 17/10/2018 incorporating the proposed adjustments / disallowances. Against this order, the assessee is under appeal before us.

1.4 We have carefully heard the arguments advanced by both the



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representatives and perused relevant material on record. The Ld. Authorized Representative for Assessee (AR), placed on record ground-wise chart to submit that substantial issues are covered by the earlier order of the Tribunal in assessee's own case. The copy of Tribunal order ITA Nos. 638 & 4643/Mum/2017 for AYs 2012-13 & 2013-14 common order dated 06/03/2018 has been placed on record.

In the above background, our adjudication to the subject matter of appeal would be as given in succeeding paragraphs.

Transfer Pricing Adjustments

2. The perusal of the order of Ld. TPO passed u/s 92CA(3) on 27/10/2017 would reveal that following Transfer Pricing adjustments (TP) has been proposed therein: -

No.	TP Adjustment	Amount (Rs. in Lacs)
1.	Export of finished goods	1120.80 Lacs
2.	Corporate Guarantee	1.20 Lacs
	Total	1122.00 Lacs

Export of finished goods

3.1 One of the international transactions which was referred to Ld. TPO for determination of Arm's Length price (ALP) was sale of goods by the assessee to one of its AE namely Omni-active Health Technologies Inc., USA (OHTI) for Rs.11920.16 Lacs. The assessee benchmarked the same using Transactional Net Margin Method (TNMM), the assessee being the tested party, Profit Level indicator (PLI) being operating profit /operating expenses & operating profit / operating revenue which were computed to



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be 19.02% & 15.98% respectively. The assessee is stated to have sold natural ingredients products to its US AE. The assessee sourced certain raw material from third parties based in USA which is done via AE and AE had charged the assessee for the same on cost-to-cost basis. Such purchase of raw material amounted to Rs.218.35 Lacs which was stated to be miniscule in comparison to overall volume of assessee's business. Both the transactions were aggregated for the purpose of benchmarking. The assessee also furnished segmental profitability wherein the return to total cost was reflected to be 22.05% on transactions with AE vis-à-vis return of 8.4% on transactions with non-AEs. Accordingly, no TP adjustment was proposed by the assessee. However, the assessee, as per the observations of Ld. TPO, did not take material cost on actual but took the same on sale ratio and therefore the benchmarking was rejected. Consequently, the average product wise price charged from AE as well as Non-AEs was called for, which has been tabulated in the order of Ld. TPO. It was noted that average rate of goods sold to AEs was lower in certain cases as compare to average rate at which it was sold to non-AEs. These products were separately tabulated and confronted to the assessee. The amount less charged from AE segment was quantified at Rs.1120.79 Lacs.

3.2 Although the assessee defended the benchmarking and relied upon various judicial pronouncements in support of the same. However, it could not find favor with Ld. TPO who proposed an adjustment of Rs.1120.79 Lacs on these transactions. The assessee, in its reply, also submitted corroborative benchmarking considering OHTI as tested party and



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submitted that the margin of its AE was merely 1.40% as against assessee's margin of 22.05% in AE segment. In the alternative, the assessee submitted that as per CUP, the correct computations would work out to be Rs.835.43 Lacs. However, rejecting TNMM and adopting CUP as Most appropriate method (MAM), Ld. TPO proposed an adjustment of Rs.1120.79 Lacs. It was noted by Ld. TPO that similar methodology of benchmarking was adopted in AYs 2012-13 & 2013-14 which was upheld by Ld. DRP.

3.3 Before Ld. DRP, the attention was drawn to the favorable order of Tribunal for AYs 2012-13 & 2013-14 wherein it was held that there was no justification in rejecting TNMM method. However, Ld. DRP, to keep the issue alive, chose to confirm the stand of Ld. AO in draft assessment order as done in AYs 2012-13 & 2013-14 since the proceedings before DRP were in continuation of assessment proceedings.

3.4 We find that, as rightly noted by Ld. DRP, the issue stood covered in assessee's favor 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 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 bench mark 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 arm's 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.



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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 bench mark 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. Vs ACIT. 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:

"i. 92C Computation of arm's length price

2) The arm's length price in relation to an international transaction shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe namely :—

- (a) comparable uncontrolled price method;
- (b) resale price method;
- (c) cost plus method;
- (d) profit split method;
- (e) transactional net margin method;
- (f) such other method as may be prescribed by the Board.

3) The most appropriate method referred to in sub-section (1) shall be applied, for determination of arm's length price, in the manner as may be prescribed; Provided that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices.

ii. Rule 10C of the Income-tax Rules, 1962 ("Rules") states that:

(1) For the purposes of sub-section (1) of section 92C, the most appropriate method shall be the method which is best suited to the facts and circumstances of each particular international transaction provides the most reliable measure of



an arm's length price in relation to the international transaction.

(2) In selecting the most appropriate method as specified in sub-rule (1), the following factors shall be taken into account, namely:—

- (a) the nature and class of the international transaction;
- (b) the class or classes of associated enterprises entering into the transaction and the functions performed by them taking into account assets employed or to be employed and risks assumed by such enterprises;
- (c) the availability, coverage and reliability of data necessary for application of the method;
- (d) the degree of comparability existing between the international transaction and the uncontrolled transaction and between the enterprises entering into such transactions;
- (e) the extent to which reliable and accurate adjustments can be made to account for differences, if any, between the international transaction and the comparable uncontrolled transaction or between the enterprises entering into such transactions;
- (f) the nature, extent and reliability of assumptions required to be made in application of a method.

iii. Rule 10B of the Income-Tax Rules, 1962 ("Rules") states that: (1) For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely :—

- (e) transactional net margin method, by which,—
 - (i) the net profit margin realised by the enterprise from an international transaction entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base;
 - (ii) the net profit margin realised by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base;
 - (iii) the net profit margin referred to in sub-clause (ii) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market;
 - (iv) the net profit margin realised by the enterprise and referred to in subclause (i) is established to be the same as the net profit margin referred to in sub-clause (iii);
 - (v) the net profit margin thus established is then taken into account to arrive at an arm's length price in relation to the international transaction

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



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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 arms 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 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 in accordance with the mandate of law as above.

It is settled law that resjudicata 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 bench marking we are not dealing with the arguments on other aspects of merits of application of CUP method computation of arms 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.

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



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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.

Corporate Guarantee

4.1 The assessee provided corporate guarantee (CG) of 4 Million US dollars to Sun National Bank, New Jersey, USA to extend credit facilities to one of its 100% subsidiary. The initial guarantee was for 2.5 Million US dollars which was increased to 4 Million US dollars vide loan modification agreement dated 28/03/2014. In its TP study report, the assessee benchmarked the transactions and arrived at spread of 1.25% on these transactions. Applying the same to loan amount outstanding at the month end, the assessee worked out TP adjustment of Rs.18.74 Lacs. However, during proceedings before Ld. TPO, it pleaded that the transactions would not constitute international transactions. The said plea was rejected in the light of decision of Hon'ble Bombay High Court in Everest Kanto Cylinders Ltd. & Mumbai Tribunal in **Glenmark Pharmaceuticals (ITA No. 5031/Mum/2012 dated 13/11/2013)**. Finally, the rate of 1.25% adopted by the assessee was accepted as ALP rate. However, the same would apply to



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gross amount of guarantee and not on the actual loan availed by AE as held in Mumbai Tribunal in **Laqshya Media Pvt. Ltd. (ITA No.500/Mum/2015 04/01/2017)**. Therefore, applying the rate on gross basis, Ld. TPO worked out additional adjustment of Rs.1.20 Lacs which is tabulated in para 6.2.14 of Ld. TPO's order.

4.2 The Ld. DRP, relying upon directions in AYs 2012-13 & 2013-14 confirmed the same against which the assessee is in further appeal before us.

4.3 In the meantime, the assessee, vide rectification letter dated 02/11/2018 raised a plea that the ground of objection that adjustment was to be made only with respect of the amount of actual loan availed by the AE during the year, was not disposed-off by Ld. DRP. However, Ld. DRP, vide order dated 29/03/2019, rejected the said plea since the same could not be termed as matter of rectification under Rule 13 of Income Tax (Dispute Resolution Panel) Rules, 2009.

Aggrieved as aforesaid, the assessee is under further appeal before us.

4.4 Upon, perusal of cited order of Tribunal for AYs 2012-13 & 2013-14, we find that the stand of Ld. DRP *qua* Corporate Guarantee has been confirmed vide para 35 of the order. Similar facts exist in this year. Therefore, no infirmity could be found in the order of lower authorities, on this issue. The rate of 1.25% would apply to gross amount of guarantee given by the assessee and not on the actual loan availed by AE as held in Mumbai Tribunal in **Laqshya Media Pvt. Ltd. (ITA No.500/Mum/2015 04/01/2017)**. Accordingly, this ground stand dismissed.



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Corporate Adjustment

5.1 The assessee claimed deduction u/s 35(2AB) being 200% of amount incurred towards scientific research. The perusal of approvals from DSIR in Form No.3CM and working of deduction u/s 35(2AB) as per return of income and as per Form No. 3CL reflected difference of Rs.10.54 Lacs. Accordingly, the same was disallowed and added to the income of the assessee.

5.2 Before Ld. DRP, the assessee submitted that in terms of provisions of Sec.35(2AB) what needs to be approved is the research and development facility and not the expenditure. Once the facility is approved by the prescribed authority i.e. DSIR then expenditure incurred by the assessee has to be allowed u/s 35(2AB). Reliance was placed on the decision of Ahmedabad Tribunal in **Sun Pharmaceuticals Industries Ltd. V/s PCIT (162 ITD 484)** as approved by Hon'ble Gujarat High Court reported at 250 Taxman 270. Reliance was also placed on the decision Pune Tribunal in **Cummins India Ltd. V/s DCIT (ITA No. 309/Pun/2014)** for the said submissions. However, Ld. DRP, relying upon DRP's direction for AY 2013-14, confirmed the same. Aggrieved, the assessee is under further appeal before us.

5.3 Upon perusal of cited order of Tribunal in assessee's own case for AY 2013-14, we find that deduction was denied in that year since the assessee had not filed the necessary certificate issued by the prescribed authority in Form 3CL. The assessee sought to file the same during proceedings before Tribunal and therefore, the matter was remitted back to the file of Ld. AO



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for verification. However, the facts are different in this year since the assessee has furnished requisite certificates. The deduction has been denied to the extent of Rs.10.54 Lacs, being the difference in amount claimed in Return of income vis-à-vis amount mentioned in the Form issued by prescribed authority. Therefore, the decision of earlier year is not applicable to this year.

5.4 As rightly contended by the assessee before Ld. DRP that the issue is squarely covered in assessee's favor by the decision of Pune Tribunal in **Cummins India Ltd. V/s DCIT (96 Taxmann.com 576 15/05/2018)** wherein the coordinate bench has observed 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



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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



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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. The Hon'ble High Court of Gujarat in *CIT v. Claris Lifesciences Ltd.* [2008] 174 Taxman 113/[2010] 326 ITR 251 have held that weighted deduction is to be allowed under section 35(2AB) of the Act after the establishment of facility. However, section does not mention any cutoff date or particular date for eligibility to claim deduction. The Hon'ble High Court held as under:—

"8. The Tribunal has considered the submissions made on behalf of the assessee and took 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 approved from a particular date and, in other words, it is nowhere suggested that date of approval only will be cut-off date for eligibility of weighted deduction on the expenses incurred from that date onwards. A plain reading clearly manifests that the assessee has to develop facility, which presupposes incurring expenditure in this behalf, application to the prescribed authority, who after following proper procedure will approve the facility or otherwise and the assessee will be entitled to weighted deduction of any and all expenditure so incurred. The Tribunal has, therefore, come to the conclusion that on plain reading of section itself, the assessee is entitled to weighted deduction on expenditure so incurred by the assessee for development of facility. The Tribunal has also considered r. 6(5A) and Form No. 3CM and come to the conclusion that a plain and harmonious reading of Rule and Form clearly suggests that once facility is approved, the entire expenditure so incurred on development of R&D facility has to be allowed for weighted deduction as provided by s. 35(2AB). The Tribunal has also considered the legislative intention behind above enactment and observed that to boost up R&D facility in India, the legislature has provided this provision to encourage the development of the facility by providing deduction of weighted expenditure. Since what is stated to be promoted was development of facility, intention of the legislature by making above amendment is very clear that the entire expenditure incurred by the assessee on development of facility, if approved, has to be allowed for the purpose of weighted deduction.

10. We are in full agreement with the reasoning given by the Tribunal and we are of the view that there is no scope for any other interpretation and since the approval is granted during the previous year relevant to the assessment year in question, we are of the view that the assessee is entitled to claim weighted deduction in respect of the entire expenditure 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] 22



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taxmann.com 19/207 Taxman 216/[2011] 335 ITR 117 (Del) on similar issue of weighted deduction under section 35(2AB) of the Act held that the condition precedent was the certificate from DSIR, but the date of certificate was not important, where the objective was to encourage research and development by the business enterprises in India. In the facts before the Hon'ble High Court of Delhi, the assessee had approached DSIR vide application dated 10.01.2015. The DSIR vide letter dated 23.02.2006 granted recognition to in-house research and development facility of assessee. Further, vide letter dated 18.09.2006, DSIR granted approval for the expenses incurred by the company on in-house research and development facility in the prescribed form No.3CM. The Assessing Officer in that case refused to accord the benefit of aforesaid provision on the ground that recognition and approval was given by DSIR in the next assessment year. The Tribunal allowed the claim of assessee relying on the decision of the Hon'ble High Court of Gujarat in *Claris Lifesciences Ltd.'s* case (*supra*). The Hon'ble High Court of Delhi taking note of the decision of the Hon'ble High Court of Gujarat observed that it has been held that cutoff date mentioned in the certificate issued by DSIR would be of no relevance where once the certificate was issued by DSIR, then that would be sufficient to hold that the assessee had fulfilled the conditions laid down in the aforesaid provisions.

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.

46. The Courts have held that for deduction under section 35(2AB) of the Act, first step was the recognition of facility by the prescribed authority and entering an agreement between the facility and the prescribed authority. Once such an agreement has been executed, under which recognition has been given to the facility, then thereafter the role of Assessing Officer is to look into and allow the expenditure incurred on in-house R&D facility as weighted deduction under section 35(2AB) of the Act. Accordingly, we hold so. Thus, we reverse the order of Assessing Officer in curtailing the deduction claimed under section 35(2AB) of the Act by Rs. 6,75,000/-. Thus, grounds of appeal No.10.1, 10.2 and 10.3 are allowed.



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47. In the result, appeal of assessee is partly allowed.

Respectfully following the same, we hold that Ld.AO was not justified in curtailing the deduction u/s 35(2AB) in the pre-amended period. Therefore, by deleting the impugned additions, we allow ground no. 3 of the appeal.

Reasons for delay in pronouncement of order

6.1 Before parting, we would like to enumerate the circumstances which have led to delay in pronouncement of this order. The hearing of the matter was concluded on 07/02/2020 and in terms of Rule 34(5) of Income Tax (Appellate Tribunal) Rules, 1963, the matter was required to be pronounced within a total period of 90 days. As per sub-clause (c) of Rule 34(5), every endeavor was to be made to pronounce the order within 60 days after conclusion of hearing. However, where it is not practicable to do so on the ground of exceptional and extraordinary circumstances, the bench could fix a future date of pronouncement of the order which shall not ordinarily be a day beyond a further period of 30 days. Thus, a period of 60 days has been provided under the extant rule for pronouncement of the order. This period could be extended by the bench on the ground of exceptional and extraordinary circumstances. However, the extended period shall not ordinarily exceed a period of 30 days.

6.2 Although the order was well drafted as well as approved before the expiry of 90 days, however, unfortunately, on 24/03/2020, a nationwide lockdown was imposed by the Government of India in view of adverse circumstances created by pandemic covid-19 in the country. The lockdown was extended from time to time which crippled the functioning of most of



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the government departments including Income Tax Appellate Tribunal (ITAT). The situation led to unprecedented disruption of judicial work all over the country and the order could not be pronounced despite lapse of considerable period of time. The situation created by pandemic covid-19 could be termed as unprecedented and beyond the control of any human being. The situation, thus created by this pandemic, could never be termed as ordinary circumstances and would warrant exclusion of lockdown period for the purpose of aforesaid rule governing the pronouncement of the order. Accordingly, the order is being pronounced now after the re-opening of the offices.

6.3 Faced with similar facts and circumstances, the co-ordinate bench of this Tribunal comprising-off of Hon'ble President and Hon'ble Vice President, in its recent decision titled as **DCIT V/s JSW Limited (ITA Nos. 6264 & 6103/Mum/2018)** order dated 14/05/2020 held as under: -

7. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 7th January 2020, this order thereon is being pronounced today on 14th day of May, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders, provides as follows:

(5) The pronouncement may be in any of the following manners: —

(a) The Bench may pronounce the order immediately upon the conclusion of the hearing.
(b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement.

(c) In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ordinarily (emphasis supplied by us now) be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board.

8. Quite clearly, "ordinarily" the order on an appeal should be pronounced by the



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bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression “ordinarily” has been used in the said rule itself. This rule was inserted as a result of directions of Hon’ble jurisdictional High Court in the case of **Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)]** wherein Their Lordships had, inter alia, directed that **“We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile (emphasis, by underlining, supplied by us now), all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment”.** In the ruled so framed, as a result of these directions, the expression “ordinarily” has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any “extraordinary” circumstances.

9. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon’ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial wok all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon’ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that **“In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown”.** Hon’ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, **“It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly”,** and also observed that **“arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020”.** It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus “should be considered a case of natural calamity and FMC (i.e. force majeure clause) maybe



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invoked, wherever considered appropriate, following the due procedure...". The term '**force majeure**' has been defined in Black's Law Dictionary, as '**an event or effect that can be neither anticipated nor controlled**'. When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary" period.

10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to be interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of **Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)]**, Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that **"while calculating the time for disposal of matters made timebound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly"**. The extraordinary steps taken suo motu by Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily", in the light of the above analysis of the legal position, the period during which lockdown was in force is to be excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to re-fix the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalized, but then, in our considered view, no such exercise was required to be carried out on the facts of this case.

Driving strength from the ratio of aforesaid decision, we exclude the period of lockdown while computing the limitation provided under Rule 34(5) and



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proceed with pronouncement of the order.

Conclusion

7. The appeal stands partly allowed in terms of our above order. This order is pronounced under Rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details of the same on the notice board.

Sd/-

(Saktijit Dey)

न्यायिक सदस्य / Judicial Member

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 26/05/2020

Sr.PS:-Jaisy Varghese

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT
– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai