IN THE INCOME TAX APPELLATE TRIBUNAL
"C'' BENCH: BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT AND SHRI B.R. BASKARAN, ACCOUNTANT MEMBER

ITA No.2215/Bang/2019
Assessment Year: 2015-16

M/s. Provimi Animal Nutrition India Pvt. Ltd. IS 40, KHB Industrial Area Yelahanka New Town Bangalore-560 058 **PAN NO : AAACT4909N**	**Vs.**	Principal CIT-5 Bangalore
APPELLANT		**RESPONDENT**

Appellant by	**:**	Shri Chavali Narayan, A.R.
Respondent by	**:**	Shri Pradeep Kumar, D.R.

Date of Hearing	**:**	02.12.2020
Date of Pronouncement	**:**	03.12.2020

O R D E R

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

The assessee has filed this appeal challenging the revision order dated 14.08.2019 passed by Ld Pr. CIT-5, Bangalore u/s 263 of the Income-tax Act,1961 ['the Act' for short] for the assessment year 2015-16.

2. The assessee is engaged in the business of manufacture and sale of animal feed supplements and veterinary drugs. The AO completed the assessment of the year under consideration u/s 143(3) of the Act on 27.12.2017. The Ld Pr. CIT, upon examination of assessment records, noticed that the assessee has claimed deduction

of Rs.2,65,43,330/- u/s 35(2AB) of the Act (being weighted deduction @ 200% of expenditure incurred by it) and it has been allowed by the AO. The Ld Pr. CIT noticed that the assessee has specifically stated before the AO that it has filed requisite documents for approval and certification of the expenditure by the Department of Scientific & Industrial Research (DSIR) in Form 3CL and is awaiting approval and certification. The Ld Pr. CIT noticed that the assessee did not furnish approval granted by DSIR in Form 3CL before the AO in support of its claim made u/s 35(2AB) of the Act till the date of completion of assessment. The Ld Pr. CIT noticed that the AO has allowed the deduction without ascertaining factual aspects relating to approval of expenditure. Accordingly, the Ld Pr. CIT took the view that the assessment order is erroneous in so far as it is prejudicial to the interests of revenue. Accordingly, he initiated revision proceedings u/s 263 of the Act.

3. The assessee contended before the Ld Pr. CIT that the DSIR is required to submit Form 3CL to the Director General of Income tax within 120 days of granting approval. It was contended that the is merely in the form of intimation to be sent by DSIR to the Income tax department. Accordingly, it was submitted that the furnishing of Form 3CL is not the obligation of the company. The assessee also made certain alternative prayers before Ld Pr. CIT.

4. The Ld Pr. CIT did not accept the contentions of the assessee. He took the view that the AO has failed to make necessary enquiries in respect of the claim made u/s 35(2AB) of the Act. The Ld Pr. CIT also took support of the decision rendered by Hon'ble Karnataka High Court in the case of Tejas Network Limited (2015)(233 Taxmann 426), wherein the Hon'ble High Court held that the AO is bound to allow the deduction on the basis of expenditure approved by DSIR in Form 3CL. Accordingly, the Ld Pr. CIT set aside the assessment order and

restored the matter of claim of deduction u/s 35(2AB) of the Act to the file of the assessing officer for examining it afresh. He also held that the assessee is bound to produce certified copies of Form 3CL before the AO. The assessee is aggrieved by the order passed by Ld Pr. CIT.

5. The Ld A.R submitted that the AO has taken up the return of income of the assessee under "limited scrutiny", inter alia, to examine the claim for deduction u/s 35(2AB) of the Act. He submitted that the assessee has furnished all the relevant details before the AO and also stated before the AO that the approval from DSIR in Form 3CL is awaited. The AO accepted the submissions of the assessee and accordingly allowed the claim. He submitted that the question as to whether the approval in Form 3CL is mandatory to allow the claim is a debatable issue. He submitted that the co-ordinate bench of Tribunal has allowed similar claim made by the assessee in AY 2013-14 and 2014- 15 in ITA No. 26 & 27/Bang/2018, vide its order dated 12th September, 2019 holding that furnishing of Form 3CL has become mandatory with effect from 1.4.2016 only (sic. 1.7.2016) and the authorities are not justified in insisting on production of Form 3CL for allowing deduction u/s 35(2AB) of the Act prior to that. Accordingly, he submitted that the AO has taken a possible view in this matter and hence the Ld Pr. CIT is not justified in revising the assessment order.

6. On the contrary, the Ld D.R supported the order passed by Ld Pr. CIT.

7. We heard the parties and perused the record. Before proceeding further, we may refer to the celebrated decision of Hon'ble Supreme Court rendered in the case of Malabar Industrial Co. Ltd vs. CIT (2000) (109 Taxman 66)(SC), wherein the scope of revision

proceedings u/s 263 has been explained succinctly by Hon'ble Supreme Court as under:-

> *"5. To consider the first contention, it will be apt to quote Section 263(1) which is relevant for our purpose:-*
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> > *263. Revision of orders prejudicial to revenue - (1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous insofar as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.*
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> *6. A bare reading of this provision makes it clear that the prerequisite to exercise of jurisdiction by the Commissioner suo moto under it, is that the order of the Income-tax Officer is erroneous insofar as it is prejudicial to the interests of the revenue. The Commissioner has to be satisfied of twin conditions, namely, (i). the order of the Assessing Officer sought to be revised is erroneous; and(ii) it is prejudicial to the interests of the revenue. If one of them is absent -- if the order of the Income-tax Officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the revenue-- recourse cannot be had to Section 263(1) of the Act.*
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> *7. There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind. The phrase prejudicial to the interests of the revenue is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The High Court of Calcutta in Dawjee Dadabhoy & Co. Vs. S.P. Jain and Another [31 ITR 872], the*

> *High Court of Karnataka in Commissioner of Income- tax, Mysore Vs. T. Narayana Pai [98 ITR 422], the High Court of Bombay in Commissioner of Income-tax Vs. Gabriel India Ltd. [203 ITR 108] and the High Court of Gujarat in Commissioner of Income-tax Vs. Smt. Minalben S. Parikh [215 ITR 81] treated loss of tax as prejudicial to the interests of the revenue.*
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> …….
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> *9. The phrase prejudicial to the interests of the revenue has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Income-tax Officer is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the revenue. Rampyari Devi Saraogi Vs. Commissioner of Income-tax [67 ITR 84] and in Smt. Tara Devi Aggarwal Vs. Commissioner of Income-tax, West Bengal [88 ITR 323].”*

8. The Hon'ble Supreme Court has held that both the conditions, viz., the assessment order is erroneous and further it is prejudicial to the interests of revenue are required to be satisfied. It was further held that *“Every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated*

as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Income-tax Officer is unsustainable in law."

9. Now adverting to the facts of the present case, we notice that the co-ordinate bench of Tribunal in the case of M/s Mahindra Electric Mobility Ltd vs. ACIT (ITA No.641/Bang/2017 dated 14-09-2018) has expressed the view that prior to 1.7.2016, Form 3CL had no legal sanctity and it is only w.e.f. 1.7.2016 with the amendment to Rule 6(7A)(b) of the Rules that the quantification of weighted deduction u/s 35(2AB) of the Act has significance. For the sake of convenience, we extract below the operative portion of the order passed by the Tribunal in the above said case:-

> "13. We have heard the rival submissions. The learned DR relied on the order of the AO/CIT(A). The learned counsel for the Assessee reiterated submissions as were made before the revenue authorities and placed reliance on some judicial precedents on identical issue rendered by various benches of ITAT and Hon'ble High Courts.
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> 14. For AY 2012-13, the previous year is FY 2011-12 i.e., the period from 1.4.2011 to 31.3.2012. The facts on record go to show that the Assessee's in-house R & D facilities was approved by the DSIR, Govt. of India, Ministry of Science and Technology for AY 2012-13 vide their letter dated 20.5.2009, a copy of which is placed at Page-30 of the Assessee's ITA No. 641/Bang/2017 Page 10 of 17 paper book. The approval is for the period 1.4.2009 upto to 31.3.2012. Therefore, the condition for allowing deduction u/s.35(2AB) of the Act has been fulfilled by the Assessee. The claim of the revenue, however, is that the approval by the prescribed authority in form No.3CM is not final and conclusive

and the quantum of expenditure on which deduction is to be allowed is to be certified by DSIR in form No.3CL. There is no statutory provision in the Act which lays down such a condition. We shall therefore examine what is Form No.3CL.

15. DSIR has framed guidelines for approval u/s.35(2AB) of the Act. The guidelines as on May, 2010 which is relevant for AY 2012-13, in so far as it is relevant for the present appeal, was as given below.

(i) As per guideline 5 (iv) of the guidelines so framed, every company which has obtained an approval from the prescribed authority should also submit an undertaking as per Part C of Form No. 3CK to maintain separate accounts for each R&D centre approved under Section 35(2AB) by the Prescribed Authority, and to get the accounts duly audited every year by an Auditor as defined in sub- section (2) of section 288 of the IT Act 1961. (The statutory auditors of the Company should audit the R&D accounts. To facilitate this audit separate books of accounts for R&D should be maintained. Also, the statutory auditors should sign the auditors' certificate in the details required to be submitted as per annexure- IV of the guidelines to facilitate submission of Report in Form 3CL).

(ii) As per guideline 5(vi) of the guidelines, the audited accounts for each year maintained separately for each approved centre shall be furnished to the Secretary, Department of Scientific & Industrial Research by 31st day of October of the succeeding year, along with information as per Annexure-IV of the Guidelines.

(iii) As per guideline 5(ix) Expenditures, which are directly identifiable with approved R&D facility only, shall be eligible for

the weighted tax deduction. However, expenditure in R&D on utilities which are supplied from a common source which also services areas of the plant other than R&D may be admissible, provided they are metered/measured and subject to certification by a Chartered Accountant.

(iv) As per guideline 5 (x) Expenditure on manpower from departments, other than R&D centre, such as manufacturing, quality control, tool room etc. incurred on such functions as attending meetings providing advice / directions, ascertaining customer choice/response to new products under development and other liaison work shall not qualify for deduction under section 35(2AB) of I.T. Act 1961.

(v) As per guideline 10 Documents required to be submitted by 31 st October of each succeeding year of approved period to facilitate submission of Report in Form 3CL (2 sets) are Complete details as per annexure-IV of DSIR guidelines.

16. The Assessee applied for issue of Form No.3CL to the appropriate authority on 24.3.2017, after the order of the CIT(A). The application so made by the Assessee is at page 43 to 65 of the Assessee's paper book. According to the Assessee, it has complied with all the requirements of the guidelines for issue of Form No.3CL, but the DSIR has issued Form No.3CL dated 5.4.2018 for AY 2014 & 15 & 2015-16 but no Form No.3CL was issued for AY 2012-13. Though there has been no communication to the Assessee in this regard, the learned counsel for the Assessee submitted that since the audited accounts were not submitted by 31 st October of the succeeding AY, as is required under

Guideline 5 (vi), the Assessee's application would not have been considered by the DSIR.

17. Rule-6(7A)(b) of the Rules specifying the prescribed authority and conditions for claiming deduction u/s.35(2AB) of the Act has been amended by the Income Tax (10 th Amendment) Rules, 2016 w.e.f. 1.7.2016, whereby it has been laid down that the prescribed authority, i.e., DSIR shall quantify the quantum of deduction to be allowed to an Assessee u/s.35(2AB) of the Act. Prior to such substitution, the above provisions merely 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 DGIT (Exemption) within 60 ITA No. 641/Bang/2017 Page 12 of 17 days of granting approval. Therefore prior to 1.7.2016 there was legal sanctity for Form No.3CL in the context of allowing deduction u/s.35(2AB) of the Act.

18. The issue as to whether deduction u/s.35(2AB) of the Act can be denied for absence of Form No.3CL by the DSIR was subject matter of several judicial decisions rendered by various Benches of ITAT.

(i) The Pune ITAT in the case of Cummins India Ltd. Vs. DCIT in ITA No.309/Pun/2014 for AY 2009-10 order dated 15.5.2018 had an occasion to consider a case where part of the claim for deduction u/s.35(2AB) of the Act was claimed supported by Form No.3CL but part of it was not supported by Form No.3CL. The Pune ITAT held as follows:-

> "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 ITA No. 641/Bang/2017 Page 13 of 17 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 ? 6,75,000/-. Thus, grounds of appeal No.10.1, 10.2 and 10.3 are allowed."

(ii) The Hyderabad ITAT in the case of M/S. Sri Biotech Laboratories India Ltd. Vs. ACIT ITA No.385/Hyd/2014 for AY 2009-10 order dated 24.9.2014 took the view (vide Paragraph-13 of the order) that when the Assessee's R & D facility is approved the deduction u/s.35(2AB) of the Act cannot be denied merely on the ground that prescribed authority has not submitted report in Form 3CL.

19. The question of allowing deduction u/s.35(2AB) of the Act was considered by the Hon'ble Delhi High Court in the case of CIT vs. Sadan Vikas (India) Ltd. (2011) 335 ITR 117 (Del) where AO refused to accord the benefit of the weighted deduction to the assessee under s. 35(2AB) on the ground that recognition and approval was given by the DSIR in February/September, 2006, i.e., in the next assessment year and, therefore, the weighted deduction cannot be allowed. The CIT(A) confirmed the order of the AO. The Tribunal held that the assessee would be entitled to weighted deductions of the aforesaid expenditure incurred by ITA No. 641/Bang/2017 Page 14 of 17 the assessee in terms of the s. 35(2AB) of the Act and in coming to this conclusion, the Tribunal

relied upon the judgment of Gujarat High Court in CIT vs. Claris Lifesciences Ltd. 326 ITR 251 (Guj). In its decision the Hon'ble Gujarat High Court held that the cut-off date mentioned in the certificate issued by the DSIR would be of no relevance. What is to be seen is that the assessee was in indulging in R&D activity and had incurred the expenditure thereupon. Once a certificate by DSIR is issued, that would be sufficient to hold that the assessee fulfils the conditions laid down in the aforesaid provisions. The Hon'ble Delhi High Court followed the decision of the Hon'ble Gujarat High Court and upheld the decision of the Tribunal. The Hon'ble Delhi High Court quoted the following observations of the Hon'ble Gujarat High Court and agreed with the said view:

> "7. ... The lower authorities are reading more than what is provided by law. A plain and simple reading of the Act provides that on approval of the research and development facility, expenditure so incurred is eligible for weighted deduction.
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> 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.
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> 9. The provisions nowhere suggest or imply that research and development 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 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 s. 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 research and development 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."

20. From the above discussion it is clear that prior to 1.7.2016 Form 3CL had no legal sanctity and it is only w.e.f 1.7.2016 with the amendment to Rule 6(7A)(b) of the Rules, that the quantification of the weighted deduction u/s.35(2AB) of the Act has significance. In the present case there is no difficulty about the quantum of deduction u/s.35(2AB) of the Act, because the AO allowed 100% of the expenditure as deduction u/s.35(2AB)(1)(i) of the Act, as expenditure on scientific research. Deduction u/s.35(1)(i) and Sec.35(2AB) of the Act are similar except that the deduction u/s.35(2AB) is allowed as weighted deduction at 200% of the expenditure while deduction u/s.35(1)(i) is allowed only at 100%. The conditions for allowing deduction u/s.35(1)(i) of the Act and under Sec.35(2AB) of the Act are identical with the only difference being that the Assessee claiming deduction u/s.35(2AB) of the Act should be engaged in manufacture of certain articles or things. It is not in dispute that the Assessee is engaged in business to which Sec.35(2AB) of the Act applied. The other condition required to be fulfilled for claiming deduction u/s.35(2AB) of the Act is that the research and development facility should be approved by the prescribed authority. The prescribed authority is the Secretary, Department of Scientific Industrial Research, Govt. Of India (DSIR). It is not in dispute that the Assessee in the present case obtained approval in Form No.3CM as required by Rule 6 (5A) of the Rules. In these facts and circumstances and in the light of the judicial precedents on the issue, we are of the view that the deduction u/s.35(2AB) of the

Act ought to have been allowed as weighted deduction at 200% of the expenditure as claimed by the Assessee and ought not to have been restricted to 100% of the expenditure incurred on scientific research. We hold and direct accordingly and allow the appeal of the Assessee.

10. We notice that the above said decision of Tribunal was available when the impugned revision order was passed u/s 263 of the Act, meaning thereby, there was two possible views with regard to the question as to whether furnishing of Form 3CL is mandatory or not for claiming deduction u/s 35(2AB) of the Act. Hence, it has to be held that the AO has followed one of the possible views in which case, the impugned assessment order cannot be termed as prejudicial to the interests of the revenue. In that view of the matter, one of the two conditions would fail and hence the impugned revision order cannot be sustained. We have noticed earlier that the co-ordinate bench has also decided this issue in favour of the assessee in AY 2013-14 and 2015-16.

11. Accordingly, we set aside the revision order passed by Pr. CIT for AY 2015-16.

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

Order pronounced in the open court on 3rd Dec, 2020.

Sd/- **(N.V. Vasudevan)** **Vice President**	**Sd/-** **(B.R. Baskaran)** **Accountant Member**

Bangalore,
Dated 3rd Dec, 2020.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.