

## No denial of sec. 35(2AB) relief just because co. didn't submit approval of exp. incurred on R & D facility

**Summary – The Pune ITAT in a recent case of Minilec India (P.) Ltd., (the Assessee) held that If recognition to facility given by prescribed authority which is mandate of section 35(2AB) is maintained, assessee has to be accorded deduction under section 35(2AB); non-receipt of Form No. 3CM is at best a procedural lapse and is not fatal for denial of claim of deduction under section 35(2AB)**

### Facts

- The assessee in the return of income had claimed weighted deduction under section 35(2AB) for R & D activity duly approved by DSIR (Department of Scientific and Industrial Research).
- However, the Assessing Officer observed that the assessee had not submitted approval for expenses incurred by it on in-house R & D facility in prescribed Form No. 3CM from DSIR and as such the deduction claimed under section 35(2AB) could not be granted. Thus, the deduction claimed was added to the assessee's total income as unexplained expenses under section 69C.
- The Commissioner (Appeals) further held that the assessee did not have requisite certificate in Form No. 3CM from DSIR approving the expenses incurred by it on in-house R & D facility as per provisions of the Act. Hence, he upheld the order of Assessing Officer in denying weighted deduction under section 35(2AB).
- On appeal:

### Held

- Sub-section (2AA) to section 35, 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 per cent, 150 per cent or 200 per cent as prescribed from time to time. Clause (2) to section 35(AB) provides that no deduction shall be allowed in respect of expenditure mentioned in clause (1) under any provisions of the Act. Clause (3) further lays down that no company shall be entitled for deduction under clause (1) unless it enters into agreement with prescribed authority for co-operation in such R & D facility. The Finance Act, 2015 with effect from 1-4-2016 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.
- Under rule 6 of Income-tax Rules, 1962, 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, 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) is to be made in form No. 3CK. Under sub-rule (5A) of rule 6, the prescribed authority shall, if he is satisfied that the conditions provided in the rule and in sub-section (2AB) is 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, 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 with effect from 1-7-2016, 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 in part B of form No. 3CL. In other words the quantification of expenditure has been prescribed vide IT (Tenth Amendment) Rules, 2016 with effect from 1-7-2016. Prior to this amendment, no such power was with DSIR, i.e., after approval of facility.

- Under the amended provisions besides maintaining separate accounts of R & D facility, copy of audited accounts have to be submitted to the prescribed authority. These amendments to rule 6 are with effect from 1-7-2016, i.e., under the amended rules, the prescribed authority give approval of the facility and quantify the expenditure eligible for deduction under section 35(2AB).
- The issue which is raised relates to pre-amended provisions and question is where facility has been approved by prescribed authority, but no Form No. 3CM issued, can the assessee be denied deduction under section 35(2AB).
- Now, for adjudication, the events date-wise, *i.e.*, correspondence between the assessee and DSIR for three different phases of recognition of in-house R & D facility have to be considered. The first set of correspondence between the assessee and DSIR relates for the first phase year 2006-09. The second set of correspondence between the assessee and DSIR relates for second phase year 2010-12 and the third set of correspondence between the assessee and DSIR relates to the third phase year 2013-15. The perusal of said details would reflect that the assessee had made an application for recognition of in-house R & D unit as early as on 10-2-2006. The recognition was granted by DSIR on 1-6-2006 upto 31-3-2009. Thereafter, an agreement was entered into with DSIR, which is referred in the application filed by the assessee for approval of R&D centre under section 35(2AB). The said agreement was enclosed with Form No. 3CK. The assessee received Form No. 3CM from DSIR for the period 1-4-2006 to 31-3-2009 vide certificate dated 18-3-2008. A reminder was sent by DSIR to

renew the recognition of R&D unit beyond 31-3-2009 *vide* communication dated 5-12-2008. The assessee duly filed the application for renewal of recognition on 6-2-2009 and the facility was recognized by the prescribed authority *vide* letter dated 16-6-2009 upto 31-3-2012. In this regard, certificate of registration was granted by DSIR dated 24-6-2009 for recognition of R&D facility upto 31-3-2012.

- Further, next reminder was sent by DSIR to renew recognition of R&D unit beyond 31-3-2012 *vide* letter dated 2-1-2012. The assessee did file online application for renewal of R & D facility before DSIR on 6-5-2012. The renewal of recognition was granted by DSIR upto 31-3-2015 *vide* letter dated 25-6-2012. Form No. 3CM was granted on 5-11-2013 by DSIR for the period from 1-4-2012 to 31-3-2015. The perusal of above said documents reflect that the assessee was for the first time given recognition by DSIR on 1-6-2006. The said recognition was granted upto 31-3-2009. The assessee and DSIR entered into an agreement recognizing in-house R & D facility of the assessee, which entitles the facility to be eligible for grant of deduction under section 35(2AB). The assessee also filed Form No. 3CK along with copy of agreement and received Form No. 3CM granted by DSIR for the period 1-4-2006 to 31-3-2009. The recognition of facility was further granted for the period upto 31-3-2012 *vide* certificate of registration dated 24-6-2009. However, the assessee did not receive Form No. 3CM for the period 1-4-2009 to 31-3-2012 as the application in Form No. 3CK was filed along with application filed for the next period of three years ending 31-3-2015. The assessee received Form No. 3CM from DSIR for the period 1-4-2012 to 31-3-2015 but no such Form No. 3CM was granted for the period 1-4-2009 to 31-3-2012.
- The issue which arises is whether the assessee can be denied deduction under section 35(2AB) for non-receipt of Form No. 3CM. The assessee admittedly, had received recognition in the initial period and thereafter, it is case of renewal of recognition of in-house R&D facility, which was also granted by the prescribed authority for the period ending 31-3-2012 and also for the period ending 31-3-2015. The correspondence between the assessee and DSIR for the third phase reflects a reminder being sent by DSIR to renew the recognition of in-house R&D facility beyond 31-3-2012. In other words, DSIR has not de-recognized the facility for the years 2009-12. The recognition to the facility has been granted from start till date and has not been withdrawn. In other words, once the recognition given by the prescribed authority which is mandate of section 35(2AB) is maintained, the assessee has to be accorded deduction under section 35(2AB). The non-receipt of Form No. 3CM is at best a procedural lapse and is not fatal for denial of claim of deduction under section 35(2AB). The prescribed authority in any case under the pre-amended provisions had no authority to look into the nature and quantum of expenditure except in the first year to see investment in land and building. After recognition of facility and approval by DSIR, the Assessing Officer is to allow the claim of assessee after verifying the same. Thus, the Assessing Officer to allow deduction claimed under section 35(2AB) to the facility for the year under appeal.