

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 20.04.2010

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WP (C) 13338/2009

APOLLO TYRES LTD, KOCHI

... Petitioner

- versus -

UNION OF INDIA

... Respondent

Advocates who appeared in this case:-

For the Appellant : Mr T.N. Chopra with Mr Shivendra Kumar

For the Respondent : Mr A.S. Chandhiok, ASG with Mr Atul Batra

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE MANMOHAN SINGH

1. Whether Reporters of local papers may be allowed to see the judgment ? Yes
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in Digest ? Yes

BADAR DURREZ AHMED, J (ORAL)

1. By way of this writ petition, the petitioner has sought the quashing of the impugned order dated 15.06.2009, wherein the approval under Section 35(2AB) of the Income-tax Act, 1961 (hereinafter referred to as 'the said Act') is indicated to have been given with effect from 01.04.2007 as against from 01.04.2004 which the petitioner was seeking.

2. As aforesaid, the impugned order dated 15.06.2009 has been passed in the context of the provisions of Section 35(2AB) of the said Act. The said Section 35(2AB), as was applicable during the relevant period, reads as under:-

“35. Expenditure on scientific research.—

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(2AB) – (1) Where a company engaged in the business of [bio-technology or in] “any business of manufacture or production of any article or thing, not being an article or thing specified in the list of the Eleventh Schedule” 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-half times of the expenditure so incurred.

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

(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 the expenditure referred to in clause (1) which is incurred after the 31st day of March, 2012.”

3. The facts of the case are that by a letter dated 17.09.2001, upon an application for renewal of recognition of the petitioner’s in-house Research and Development units at Perambra, Distt-Trichur beyond 31.03.2001 as also recognition of the Research and Development Centre at

Limda village, Distt-Baroda (Gujarat), the Government of India through the Ministry of Science and Technology informed the petitioner that it had been decided to accord renewal of the recognition of the in-house Research and Development unit at Perambra as also to grant recognition of the in-house Research and Development unit at village Limda upto 31.03.2004. Thereafter, upon a similar renewal of the recognition of the in-house Research and Development units being sought, the Government of India, Ministry of Science and Technology, by its letter dated 15.04.2004 conveyed its decision of according renewal of recognition to the in-house Research and Development units of the petitioner at Perambra as well as at village Limda upto 31.03.2007. A similar renewal was also granted to the petitioner by virtue of the letter dated 31.05.2007 issued by the Government of India, Ministry of Science and Technology upto the period 31.03.2010. On 21.08.2008, the petitioner sought an amendment of the recognition granted to the in-house Research and Development units under Section 35 (2AB) of the said Act. In the said letter, the petitioner stated that, while it had complied with all the requirements and conditions laid down in the earlier approval and renewals granted, it had inadvertently omitted to make an application for approval of the in-house Research and Development units by filing the prescribed form No. 3CK as provided under Rule 6(4) of the Income-tax Rules, 1962 (hereinafter referred to as 'the said Rules'). Consequently, alongwith the said letter dated 21.08.2008, the petitioner attached an application in Form 3CK alongwith the latest annual report for the purposes of grant of approval under Section 35 (2AB) of the said Act in

respect of the in-house Research and Development units for which approval had earlier been granted. It may be pointed out that Form 3CK is the prescribed form in terms of Rule 6(4), which stipulates that the application required to be furnished by a company under sub-Section (2AB) of the said Section 35 shall be in Form No. 3CK.

4. Form 3 CK is entitled:-

“Application form for entering into an agreement with the Department of Scientific and Industrial Research for cooperation in In-house Research and Development facility and for audit of accounts maintained for that facility.”

The said form comprises of two parts. Part ‘A’ contains the particulars of the applicant, such as, name and address, permanent account number, business activities, the annual production, annual expenditure on scientific research, etc. Part ‘B’ comprises of the agreement which is to be entered into between the petitioner and the Department of Scientific and Industrial Research. We may point out that the agreement that is comprised in part ‘B’ is the very agreement which has been stipulated in Section 35(2AB)(3) of the said Act which has already been set out hereinabove. The said provision stipulates that 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 have audited the accounts maintained for that facility. We may also point out that Rule 6(5A) of the said Rules stipulates that the prescribed authority shall, if he is satisfied that the conditions provided in the said rule and in sub-section (2AB) of Section 35 of the said Act are fulfilled, pass an order in writing in

Form 3CM. Consequent upon the application made by the petitioner on 21.08.2008, alongwith the application in Form 3CK and the agreement, which is comprised in Part 'B' thereof, the prescribed authority passed the impugned order dated 15.06.2009 in Form 3CM. The operative portion of the order reads as under:-

“The above Research & Development facility is approved for the purpose of section 35(2AB) from 01.04.2007 to 31.03.2010, subject to the conditions underlined therein (approval for the financial year 2007-08 is recommended only for the purpose of claiming weighted tax deduction on capital expenditure on R&D equipment).”

5. A plain reading of the operative portion of the impugned order indicates that the research and development facility at Limda has been approved for the purposes of Section 35(2AB) from 01.04.2007 to 31.03.2010. However, such approval is subject to the condition underlined therein as also to the condition that approval for the financial year 2007-08 is recommended only for the purposes of claiming weighted tax deduction on capital expenditure on R&D equipment.

6. The learned counsel for the petitioner submitted that when approval of the in-house Research and Development facilities had been granted right upto 31.03.2010, there was no occasion for the respondent and, in particular, the prescribed authority, being the Secretary, Department of Scientific and Industrial Research, to limit the approval to one which would operate only with effect from 01.04.2007. The petitioner seeks the extension of the approval to operate from the date of 01.04.2004. The learned counsel for the petitioner also submitted that the said weighted tax

deduction could be claimed on all expenditure on the in-house Research and Development facility and should not have been limited only to the capital expenditure on the research and development equipment for the financial year 2007-08.

7. Mr A.S. Chandhiok, the learned Additional Solicitor General, appearing on behalf of the respondent, pointed out that the Department of Scientific and Industrial Research, Ministry of Science and Technology, New Delhi had brought out guidelines for approval of in-house Research and Development centres and reporting of expenditure under Section 35(2AB) of the said Act. He drew our attention to the guidelines, which were upto date as on May 2009. Para 6 of the said guidelines outlines the ‘policy for approval’. Clause (i) of the said para 6 reads as under:-

“(i) Approval to the in-house R&D centres having valid recognition by DSIR are considered from 1st April of the year in which application is made in Form 3CK.”

Clause (vi) of the said para 6, which is also relevant for our purposes, is as under:-

“(vi) In case of firms, having R&D centres already recognized by DSIR and who have applied for approval of an in-house R&D centre u/s 35(2AB) and who have made capital investment on R&D of more than Rs. one crore, excluding capital expenditure on land and buildings, on such centre in the financial year preceding the year in which the firm applied to prescribed authority for the approval – such capital expenditure incurred in the said preceding year provided the company had claimed such capital expenditure in their I.T. returns for concerned assessment year.”

8. From the aforesaid two provisions of the said guidelines, it was pointed out by Mr Chandhiok that, in the first instance, the approval to in-house research and development centres having valid recognition by the Department of Scientific and Industrial Research, would, as a normal rule, be considered from the first of April of the year in which the application is made in Form 3CK. He submitted that in the present case, the application in Form 3CK was made on 21.08.2008 and, therefore, in terms of these guidelines, the approval would normally have been granted from 01.04.2008. However, in view of the guideline prescribed in clause (vi) of para 6, a beneficial provision has been made so as to extend the approval of an in-house research and development centre to the previous year, but limited only to capital expenditure (excluding any capital expenditure on land and buildings). It is for this reason, according to Mr Chandhiok, that the approval in Form 3CM granted on 15.06.2009 has been given with effect from 01.04.2007. It was also pointed out that it is because of these provisions, which are beneficial to the petitioner, that the benefit of weighted tax deduction for the year 2007-08, which is the year prior to the year of application, has been limited to capital expenditure (excluding expenditure on land and building). However, for the period subsequent to 01.04.2008, the petitioner would be entitled to the entire benefit as stipulated under Section 35(2AB), both on the capital expenditure as well as on revenue expenditure, excluding, of course, the capital expenditure on land and building.

9. After having considered the arguments advanced by the counsel for the parties, we are inclined to accept the submissions made by Mr Chandhiok on behalf of the respondent. While it may be true that, initially, the petitioner had obtained approval right upto 31.03.2010, but that approval would be relatable only to Section 35(2AB)(1). Before a company is entitled for deduction under the said sub-section (1), it must also enter into an agreement with the prescribed authority for co-operation in such research and development facility and for audit of accounts maintained for that facility. This is specifically stipulated in clause (3) of Section 35(2AB) of the said Act. We find that the agreement was entered into only on 21.08.2008 when the petitioner made the application in Form 3CK. We have already mentioned that part 'B' of the said form comprises of the said agreement. Such an agreement is a condition precedent to the kind of approval, for the purposes of deduction, which the petitioner is seeking. This condition was only met on 21.08.2008. Therefore, the petitioner's plea that it ought to have been granted approval with effect from 01.04.2004 and not with effect from 01.04.2007 is not acceptable.

10. Insofar as the plea that the approval has been granted for the financial year 2007-2008 only for capital expenditure and not revenue expenditure, is concerned, we agree with the submissions made by Mr Chandhiok that the benefit would not have normally accrued to the petitioner for the financial year 2007-2008 because the approval would normally have been granted only in the year in which the application in form 3CK is made. If that were to be the case, then the petitioner could

have got approval only with effect from 01.04.2008. It is only because of the beneficial provisions indicated in the guidelines that the benefit has been extended to the earlier year, being the financial year 2007-08, subject to the condition that such benefit would be limited only to the capital expenditure (excluding the capital expenditure on land and building). Thus, on this ground also, we feel that the petitioner has no case.

11. The learned counsel for the petitioner had also made a submission that before the impugned order was made, no reasonable opportunity of hearing was granted to the petitioner, although the proviso to Rule 6(5A) specifically provided for such an opportunity being given. This plea of the petitioner is also not tenable because the proviso only stipulates that a reasonable opportunity of being heard ought to be granted to the petitioner before rejecting its application in Form 3CK. This is not a case where the petitioner's application has been rejected. In fact, the petitioner's application has been allowed after following the prescribed procedure. Therefore, the plea taken by the learned counsel for the petitioner cannot be accepted.

12. For the reasons indicated above, we are not inclined to interfere with the impugned order. The writ petition is dismissed. The parties are left to bear their own costs.

BADAR DURREZ AHMED, J

APRIL 20, 2010

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MANMOHAN SINGH, J