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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA No.75/2009

COMMISSIONER OF INCOME TAX ..... Appellant
Through: Mr. Ashok Manchanda, Sr. Standing Counsel.

versus

PANACEA BIOTEC LTD. ..... Respondent
Through: Mr. Salil Aggarwal, Adv. with Mr.Madhur Aggarwal, Adv.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

ORDER

% 10.01.2019

This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act', for short) in the case of Panacea Biotech Limited ('respondent-assessee', for short) relates to assessment year 2003-2004 and arises from the order passed by the Income Tax Appellate Tribunal ('Tribunal', for short) on 30.06.2008.

2. The appeal was admitted for hearing vide order dated 15.12.2009 on the following substantial question of law:

> *"Whether on a correct interpretation of the relevant statutory provisions, the Tribunal was justified in law in deleting the disallowance of Rs.7,72,25,725/- made by the Assessing Authority being the weighted deduction claimed by the assessee under Section 35(2AB) of the Act?"*

3. However, the substantial question of law was re-framed vide order dated 13.09.2018 for reasons recorded in paragraphs 2 to 10 of the said order

which reads as under:

> "2. *The respondent-assessee had filed the return of income for the Assessment Year 2003-04 on 28th November, 2003, declaring income of Rs.33,70,62,290/-. This return was revised on 31st March, 2005, declaring income of Rs.33,73,12,760/-.*
> 3. *In the original return and the revised return, the respondent-assessee had claimed deduction of Rs.7,72,25,723/- under Section 35 (2AB) of the Income Tax Act, 1961 being 150% of the expenditure incurred on in-house research and development of Rs.5,14,83,816/-.*
> 4. *The Assessing Officer disallowed the said claim as the respondent-assessee had not been able to furnish approval from the Secretary, Department of Scientific and Industrial Research (DSIR) on or before passing of the assessment order on 30th March, 2006.*
> 5. *The respondent-assessee had thereupon filed an appeal with an application for adducing additional evidence under Rule 46A of the Income Tax Rules, 1962 (Rules, for short) enclosing therewith report of the DSIR dated 20th July, 2006. For clarity, we may record that the respondent-assessee had applied for approval to the Secretary, DSIR on 9th January, 2006.*
> 6. *Commissioner of Income Tax (Appeals) for detailed reasons set out in paragraph 4.2 to 4.3.2 allowed the application under Rule 46A of the Rules for taking on record the approval granted by the DSIR dated 20th July, 2006. He has also held that the respondent-assessee was entitled to the said deduction.*
> 7. *Aggrieved, the Revenue preferred an appeal before the Tribunal on two grounds including deduction allowed under Section 35 (2AB) of the Act.*
> 8. *The Tribunal has rejected the appeal preferred by the Revenue in respect of deduction under Section 35 (2AB), inter alia, recording "From the grounds of appeal we find that the Revenue has not objected to admission of the additional evidence by CIT (A)."*
> 9. *Counsel for the Revenue has drawn our attention to the grounds of Revenue's appeal recorded by the Tribunal in paragraph 13 of the impugned order. It is submitted that the Revenue had filed an application dated 11th April, 2008 for*

amendment of the grounds of appeal along with authorization dated 2nd April, 2007, raising several grounds including the ground that the Commissioner of Income Tax (Appeals) had erred in law and in facts and circumstances of the case in admitting additional evidence under Rule 46A of the Rules. The aforesaid application under authorization has been enclosed as an annexure to the appeal paper book. This fact is also mentioned in ground No.10 of the grounds of appeal, which states that the Tribunal's order was vitiated by perversity on account of apparent non-application of mind to the specific grounds raised by the Revenue. The observations of the Tribunal, it is alleged, are totally contrary to the record. Specific challenge is made to the admission of additional evidence by Commissioner of Income Tax (Appeals) under Rule 46A.

10. We may note that the respondent-assessee has not file any affidavit controverting or denying that the Revenue has raised the said additional ground of appeal."

4. The substantial question of law as re-framed vide order dated 13.09.2018 reads as under:

"Whether the order of the Income Tax Appellate Tribunal dated 30th June, 2008, dismissing the appeal of the Revenue on the ground that they had not preferred an appeal against the direction allowing the application under Section 46A of the Income Tax Rules, 1962, is perverse and contrary to facts?"

5. The respondent-assessee was also given liberty to file an affidavit meeting the assertions made by the Revenue that they had filed and raised additional grounds of appeal challenging admission of additional documents by the Commissioner of Income Tax (Appeals) under Rule 46A of the Income Tax Rules, 1962.

6. The respondent-assessee has filed affidavit of the counsel who had appeared before the Tribunal in the appeal preferred by the Revenue. Another affidavit of Mr. Sunil Kapoor, Advocate, who had appeared for

respondent-assessee in the matter was also filed. As per the said affidavits, the Revenue has not filed alleged amended grounds of appeal before the Tribunal. Copy of the alleged memo of grounds of appeal was also not served on the counsel for the respondent-assessee. During the course of arguments also, the departmental representative for Revenue had neither raised the issue nor stated that they have filed additional grounds of appeal challenging the order of Commissioner of Income Tax (Appeals) admitting additional documents.

7. The affidavits filed by the respondent-assessee state that the relevant files of the Tribunal have been weeded out and are no longer available. This is accepted and admitted by the counsel for the Revenue.

8. In the given circumstances, we find it impossible to answer the substantial question of law as re-framed. Presumption in law would be that the facts relating to the file/grounds of appeal are correct. It would have been better and more convenient for the Revenue to have raised the issue by filing an application under Section 254(2) of the Act in view of the alleged error made in the impugned order, recording that the Revenue had not challenged admission of additional evidence *i.e.* the approval granted by the Department of Scientific and Industrial Research ('DSIR', for short) on 20.07.2006.

9. Revenue does not deny or dispute that DSIR had granted approval to the respondent-assessee on 20.07.2006. The issue and ground raised by the Revenue is that this approval was not available when the assessment order was passed, and the approval should not have been taken on record by the Commissioner of Income Tax (Appeals).

10. Learned counsel for the respondent-assessee has stated that they have

been allowed and granted benefit under Section 35(2AB) of the Act in earlier and subsequent years on the strength of approvals granted by DSIR.

11. Recording the aforesaid, we uphold the order passed by the Tribunal granting benefit under Section 35(2AB) of the Act to the respondent-assessee and thereby, answer the question of law raised by the Revenue as against them and in favour of the respondent-assessee. There would be no order as to costs.

SANJIV KHANNA, J.

ANUP JAIRAM BHAMBHANI, J.

JANUARY 10, 2019/*uj*