

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ ITA. No. 346/JP/2018
निर्धारण वर्ष / Assessment Years : 2013-14

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| Nash Fashion (India) Ltd. G-169-170, EPIP, Sitapura, Tonk Road, Jaipur. | बनाम Vs. | The DCIT, Circle- II, Jaipur. |
| स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: AABCN 0909 K | | |
| अपीलार्थी / Appellant | | प्रत्यर्थी / Respondent |

निर्धारिती की ओर से / Assessee by : Shri M. L. Borad (Adv.)
राजस्व की ओर से / Revenue by : Shri Varinder Mehta (CIT)

सुनवाई की तारीख / Date of Hearing : 30/08/2018
उदघोषणा की तारीख / Date of Pronouncement : 01/10/2018

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. CIT(A)-I, Jaipur dated 05.01.2018 for the Assessment Year 2013-14 wherein the assessee has taken the following grounds of appeal:-

"1. That the learned Commissioner (Appeals) erred in sustaining disallowance of deduction claimed by the assessee U/s. 80G of the I.T. Act at Rs.1,27,67,676/- and thereby upholding addition of Rs.1,27,67,676/- made by the AO to the total income of assessee,

which sustaining of disallowance of deduction claimed by the assessee u/s. 80G and consequential upholding of addition of Rs.1,27,67,676/- made by the AO is most arbitrary, unjust, untenable and bad in fact and in law and in the alternative it is highly excessive w.r.t. facts and circumstances of the case.

2. That the learned Commissioner (Appeals) grossly erred in not following the judgment of Hon'ble Jurisdictional High Court passed on 11.08.2015 in assessee's own case for assessment year 2009-10 in DB Income Tax Appeal No.54/2015 wherein the Hon'ble Court dismissed the departmental appeal and maintained the order of Income tax Appellate Tribunal dated 05.11.2014 allowing deduction u/s. 80G of the I.T. Act to the assessee.

3. That sustaining by the learned Commissioner (Appeals) of disallowance of deduction claimed by the assessee u/s. 80G of the I.T. Act and consequential addition of Rs.1,27,67,676/- made by the AO to the returned total income and thereby sustaining levy of additional tax and charging of interest thereon under different sections consequent to such additions is unjust and in the alternative excessive.

4. That on the facts and circumstances of the case and under the law upholding by the learned Commissioner (Appeals) of the disallowance of Rs.36,00,008/- made by the AO u/s.40(a)(ia) of the I.T. Act and consequently adding the same in the total income of assessee is most arbitrary, unjust and in the alternative excessive.”

2. Ground Nos. 1 to 3 of assessee's appeal effectively relates to disallowance of deduction claimed by the assessee U/s 80G of the Act amounting to Rs. 1,27,67,676/-. Briefly, the facts of the case are that during the course of assessment proceedings, the Assessing Officer observed that on perusal of details, it is noticed that the donation has been made otherwise by way of money which is not allowable as per

provisions of Section 80G(5D) of the Act. The Assessing Officer thereafter referred to the Explanation 5 to Section 80G wherein it is stated that no deduction shall be allowed under this section in respect of any donation unless such donation is a sum of money. The AO thereafter referred to the decision of Hon'ble Rajasthan High Court and held that the department has not accepted the finding of the Hon'ble Rajasthan High Court and has filed an S.L.P. before the Hon'ble Supreme Court hence, the matter has not achieved finality. Accordingly, the deduction claimed U/s 80G of the Act amounting to Rs. 1,27,67,676/- was disallowed being the donation made in kind and not in cash as per Explanation 5 to Section 80G of the Act.

3. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A). The Id. CIT(A) referring to the decision of the Coordinate Bench and the decision of the Hon'ble Rajasthan High Court held that the issue before the Coordinate Bench was in the context of revision proceedings initiated by the Pr. CIT, Jaipur U/s 263 of the Act and against the said order, the department has gone in appeal before the Hon'ble Rajasthan High Court and the same was dismissed as no substantial question of law emerges in the said appeal. The Id. CIT(A) accordingly held that the impugned case is not covered by the decision of Hon'ble Rajasthan High Court as claimed by the assessee. The Id. CIT(A) thereafter referred to the Finance Bill, 1976 through which Explanation 5 was inserted in Section 80G and held that the said explanation is clearly applicable to the facts of the instant case. Regarding various decisions relied upon by the Id. AR, the Id. CIT(A) held that all these decisions are distinguishable and appears prior to the

judgment of the **Hon'ble Supreme Court in case of H.H. Sri Rama Verma vs. CIT 57 Taxman 149** wherein it was held that there has been a conflict of opinion between the various High Courts and some of the High Courts have taken the view that substance of the nature of the transaction should be taken into account and it was not necessary that the donation must be in cash. As against the said view, some other High Courts does not contemplate any donation in kind instead the expression 'sum' relates to the cash amount of money which may have been donated by the assessee. The Hon'ble Supreme Court after considering the conflicting views of the various High Courts held that "Section 80G(2)(a) contemplates only cash amount of money as donation, for claiming relief of deduction and it does not refer to any donation made in kind". It was further held by the Hon'ble Supreme Court that after insertion of the aforesaid explanation, there cannot be any doubt that for purposes of claiming deduction, only cash amounts which may have been donated would be taken into account. The Id. CIT(A) further referred to the decision of **Hon'ble Rajasthan High Court** in case of **CIT vs. Gaj Singh** reported in 211 ITR 785 which has followed the above decision of the Hon'ble Supreme Court. Further, the Id. CIT(A) referred to the decision of Hon'ble **Punjab and Haryana High Court** in case of **Nahar Spinning Mills vs. CIT** reported in 49 taxmann.com 565 wherein donation by way of clothes sent to Prime Minister relief fund for Gujarat earthquake relief was held not eligible for deduction U/s 80G r.w. Explanation-5 of the Act. Accordingly, the Id. CIT(A) upheld the deduction so made by the Assessing Officer. Now, the assessee is in appeal before us.

4. In his submission, the Id. AR heavily relied on the decision of the Co-ordinate Bench in assessee's own case for AY 2009-10 and submitted that the matter is squarely covered by the said decision of the Co-ordinate Bench which has been affirmed by the Hon'ble Rajasthan High Court, and which has been followed by the Coordinate Bench subsequently in AY 2012-13. Further, the Id. AR has referred to the written submissions which are reproduced as under:-

“ 1. That the observations of the learned CIT(A) that the donation given is otherwise than by way of money is not correct. The factual position is that on the request of M/s Rajasthan Medicare Relief Society, S.M.S. Hospital, Jaipur as well as SPMCHI, Jaipur, the cheques were issued in favour of supplier of medical equipments, who directly supplied and installed the equipments in both the hospitals. To support its claim that donation given by it is in money and not in kind, the assessee company submitted certificate issued by hospital authorities certifying that two donations, one of Rs. 31,23,590/- is made to Rajasthan Medicare Relief Society (PAN: AAATR5094F) SMS Hospital, Jaipur and other of Rs. 96,44,086/- is made to Rajasthan Medicare Relief Society (PAN: AAABR 0418D) S.P.M.C.H.I. Jaipur i.e. total donation of Rs. 1,27,67,676/-.

2. That firstly list of medical equipments required by hospital authorities was sent by Rajasthan Medicare Relief Society to the suppliers of medical equipments and simultaneously and separately the assessee company sent the payment by way of account payee cheques issued by it in favour of the suppliers of medical equipments.

3. In the above backdrop, if the facts of the assessee's case are analyzed, it can be noted that the assessee made payment by cheque to the various suppliers of the equipment and thereafter the suppliers supplied the equipment directly to the Medical Superintendent of both hospitals. At the time of placing of the order by the hospital authorities to the supplier, 10% payment is made in advance and the remaining 90% payment is made after installation of the equipment to the satisfaction of the Medical Superintendent of the Hospital. As such the fact remains is that medical equipments are directly sent to hospital authorities and installation is also made by the suppliers but the invoice is issued by supplier in the name of the company. This is evident from the various papers/documents filed by the AO. Therefore, only because invoices are raised by the supplier in the name of the assessee would not make any difference particularly when all other correspondences by the supplier is with Medical Superintendent of the hospitals. All these facts show that the transaction in substance is a money transaction and the donation is virtually a donation in cash.

4. That the learned AO failed to consider that the assessee donor is not the manufacturer of the medical equipments which were installed in the above mentioned government owned Hospitals in Jaipur. The factual position is that at the instance of Hospital authorities, the money for purchase of the equipments/items for both the hospitals was paid by the appellant assessee to the manufacturers of those machines by way of account payee cheques. Meaning thereby what the appellant assessee donated was money i.e. cash and not

donation in kind. Besides the medical equipments were directly sent by the manufacturers to the above mentioned Hospitals and the same were installed at the Hospitals with the prior consent of the Hospital authorities and the medical equipments and machineries were installed in the hospital to provide medical assistance to the poor people.

5. That the AO failed to note that in this case on the advice of the hospital authorities the money was sent directly by the assessee to the manufacturers of the medical equipments and machineries for and on behalf of both the Hospitals and there was a due confirmation by hospital authorities in regard to medical equipments and machineries being installed at the above mentioned Hospitals and amount having been paid by account payee cheque by the assessee to the manufacturers. It is further submitted that the AO should have appreciated that after installation of the machines in Hospitals there was a counter check by the government authorities i.e. medical superintendent etc.

6. That the AO failed to take into consideration the fact that so far as assessee is concerned, he has paid the amount of donation by way of account payee cheque issued to the manufacturers on the directions of Hospital authorities and soon after getting the cheque from the assessee, the manufacturers directly supplied machinery and equipments to the Hospitals and not to the assessee. To make the things clear, it is respectfully submitted that on the advise of the hospital authorities, the assessee issued a cheque in favour of the

manufacturers to directly supply the desired machinery and equipments to Hospitals. After getting the cheque from the assessee the manufacturers directly sent the machinery and equipments to the Hospitals. The machinery and equipments sent by manufacturers were directly delivered to the hospital authorities and also got installed in the hospital premises. The Hon'ble Bench will see that at no stage equipments are delivered to the assessee company. Moreover after having made the payments by way of cheques to the suppliers the assessee has no connection with the suppliers. As said above, all works including placing of order of medical equipments required by hospital authorities, taking of delivery of goods, checking of quality and quantity of the medical equipments and getting installed these medical equipments in the hospitals are under direct supervision of the medical superintendent and at no stage assessee comes into picture nor has he any say in the supply of the equipments and installation thereof. In other words it can be said that so far as assessee is concerned it has paid the donation in money i.e. by way of issuing cheque from his bank account in favour of suppliers of medical equipments and in such a situation by no canon of law, can it be said that donation is in kind or nor in cash.

7. That both the lower authorities failed to appreciate that Explanation-5 of Section 80G do not mandate that the payment should be made directly to the donee. The assessee had made payments by cheque to suppliers of equipments/items and goods were supplied/installed at SMS Hospital as well as Sir Padampat Matri Avam Shishu Swasthya Sansthan(S.P.M.C.H.I) JLN Marg,

Jaipur. The assessee filed two Certificates both dated 17.08.2013 of Medical Superintendent Sir Padampat Matri Avam Shishu Swasthya Sansthan(S.P.M.C.H.I) JLN Marg, Jaipur and Chief Accounts Officer, SMS Hospital Jaipur regarding receipt of the equipments/items. On similar facts, the ITAT Jaipur Bench in assessment year 2009-10, in assessee's own case, in ITA NO.298/JP/2014, relying on judgments in case of CIT Vs. Associated Cement Company Ltd., 68 ITR 478 (Bombay) and CIT Vs. Bangalore Woollen Cotton & Silk Mills, 91 ITR 166 (Mysore), held that the transaction in substance is a money transaction and the donation is virtually a donation of sum of money and assessee is entitled to deduction u/s.80G of the I.T. Act. As mentioned above appeal by the department against the ITAT order has been dismissed by the Rajasthan High Court. It is, therefore, prayed that the deduction u/s.80G may therefore be allowed to the assessee and disallowance made be deleted. The assessee had made payments by cheques to the suppliers of equipments on behalf of donee which tantamount to donations made in a sum of money.

8. That the humble appellant also craves leave to a recent judgment dated 15.11.2017 of **ITAT, Jaipur** in I.T.A.NO.1069/JP/2016 **for assessment year 2012-13** in **assessee's own case** wherein the Hon'ble Tribunal held as under:

"We also note that this issue is fully covered by the assessee's own case decided by the Jaipur ITAT Bench, in ITA NO.298/JP/2014 A.Y. 2009-10 wherein it was held that transaction in substance is money transaction and the donation is virtually the donation in cash.

Therefore, respectfully following the judgment of the Co-ordinate Bench on the same identical facts, we allow the appeal of the assessee."

9. The assessee very respectfully submits that the substance should be seen and not form of donation. That in relation to the issue as to whether a donation in substance is a money transaction or not, the appellant assessee craves leave to refer to and rely upon the decision of **Bombay High Court in CIT Vs. Associated Cement Co. Ltd. 68 ITR 478**. In this case, University of Bombay wrote to the Chairman of the assessee co. a letter saying that it is carrying out important laboratory experiments for which it require 'rottery experimental kiln'. Since the company was fabricating the kiln, its Board of Director passed a resolution sanctioning Rs.6,600/- which was paid by the assessee company as donation to the University, entitled for deduction u/s.15B of the Income Tax Act, 1922. Similarly, in **CIT Vs. Bangalore Woollen, Cotton & Silk Mills Co. 91 ITR 166** where cloths manufactured by it were donated to different institution of the value of Rs.6,834/- the Mysore High Court held that the substance of the transaction reveals that what is donated is a sum of money and therefore the rebate must be granted to the assessee. Again in case of **CIT Vs. Amonbolu Rajiah 102 ITR 403 (AP)** where the assessee agreed to donate necessary funds for construction of school building for Zila Parishad and advanced various amounts from time to time to the contractor for the purpose of construction of school building on a site belonging to Zila Parishad it was held that arrangement itself indicates that the intention was to donate the money earmarked for the purpose of

constructing a school building and therefore the Tribunal is right in reaching the conclusion that it was a donation of money and not in kind and once it is found that it was a donation of a sum of money the case would squarely fall u/s.88 of the Income Tax Act (now section 80G). In case of **Saurashtra Cement and Chemical Industries Ltd. Vs. CIT 123 ITR 669**, the assessee donated cement bags manufactured by it and it was held that transaction in substance was a money transaction and the donation was virtually a donation in cash.

10. One such issue came before the Hon'ble Gujarat High Court in the case of **CIT Vs. Smt. Dhirja Ben R. Amin 141 ITR 875** where the donation was of shares, the Hon'ble Court held that since donation is in kind deduction under section 80G is not available. However, in this decision, Hon'ble Gujarat High Court after referring to the decision of Bombay High Court in case CIT Vs. Associated Cement Co. Ltd. 68 ITR 478, Mysore High Court in case of CIT Vs. Bangalore Woollen, Cotton & Silk Mills Co. 91 ITR 166, Andhra Pradesh High Court in case of CIT Vs. Amonbolu Rajiah 102 ITR 403, Bombay High Court in case of CIT Vs. Khandelwal Laboratory Pvt. Ltd. 118 ITR 531 and Gujarat High Court in case of Saurashtra Cement and Chemical Industries Ltd. Vs. CIT 123 ITR 669 held in para 17 as under:

"The consensus of judicial opinion is that the substance of the donation should be looked into and if it is found that in substance it is a donation in cash, the benefit of section 80G should be extended to the assessee".

From reading of the entire judgment it can be seen that if the substance of a transaction is a money transaction, deduction u/s.80G is allowable. However, since in the case before the High Court, the donation was of shares and there was no finding of fact that the transaction of donation was in substance in cash, deduction was not allowed to the assessee.

In case of the decision of Supreme Court in 187 ITR 308 and Gujarat High Court in 115 CTR 120 relied by CIT, the donation was of shares and therefore it was held that deduction u/s.80G is not available. However, the Supreme Court in its decision approved the decision of Gujarat High Court in CIT Vs. Srnt. Dhiraj Ben R. Amin 141 ITR 875 (Supra). Thus the law is that if in substance the transaction is a money transaction, deduction u/s.80G is allowable.

11. That it is respectfully submitted that Explanation-5 of section 80G do not mandate that the payment should be made directly to the donee. The factual position as given above is that the assessee had made the payments by cheques to the suppliers of equipments on behalf of donee which tantamount to donation made in a sum of money. That the learned Commissioner (Appeals) should have taken into consideration the substance of the entire transaction and other facts and circumstances of the case.

12. Further the genuineness of this donation has not been doubted by the Revenue. The payments was made by the appellant on behalf of the donee to make available equipment without going to the technical formalities of the State Government for purchasing the

equipments, had made available these equipments directly. It has been certified by the Medical Superintendent of M/s. Rajasthan Medical Relief Society, S.M.S. Hospital, Jaipur, that the appellant had made payment on behalf of the society. The learned AR relied upon the decision in the case of Saurashtra Cement and Chemical Industries Ltd. Vs. CIT and CIT Vs. Smt. Dhirja Ben R. Amin (supra) are squarely applicable in this case of the assessee.

13. That the above mentioned issue of deduction u/s.80G of the I.T. Act also arose in assessee's case for assessment year 2009-10 i.e. for the previous year ended on 31.3.2009. In assessment year 2009-10 the appellant company filed its return of income for AY 2009-10 on 30.9.2009 declaring total income of Rs.68,77,320/-. The assessing officer after scrutinizing the case u/s.143(3) of the Income tax Act, 1961 and after examining the books of accounts of the assessee allowed the assessee's claim of deduction u/s.80G of the Income tax Act as claimed by the appellant company. Subsequently, Commissioner of Income tax by taking action u/s.263 of the Income tax Act took a contrary view and disallowed the assessee's claim of deduction u/s.80G. Against this disallowance of deduction u/s.80G by the learned CIT assessee preferred an appeal before the Income Tax Appellate Tribunal which by order dated 5th Nov., 2014 allowed the claim of the assessee u/s.80G of I.T. Act by holding that the order passed by Commissioner of Income tax u/s.263 is not valid in law. Against this judgment of Hon'ble ITAT, Income tax department filed appeal before the Hon'ble Rajasthan High Court. The appeal number was DB Income tax Appeal No.54/2015. The appeal of the department was dismissed by the Hon'ble High Court and the order

allowing the deduction u/s.80G by the learned ITAT was sustained by the Hon'ble High Court vide its judgment dated 11.8.2015.

14. Recently the assessee's case for assessment year 2013-14 i.e. year under appeal was selected for scrutiny under CASS and assessment proceedings were started. In the course of assessment proceedings the AO raised the issue of deduction u/s.80G of the I.T. Act in regard to donation made by appellant company otherwise by way of money. The assessee company supported its claim u/s.80G of the I.T. Act by way of filing with the AO copy of order dated 11.8.2015 of Hon'ble Rajasthan High Court in DB Income tax Appeal No.54/2015 for assessment year 2009-10 in assessee's own case whereby the Hon'ble High Court had dismissed the departmental appeal and the order allowing deduction u/s.80G passed by the learned Income tax Tribunal was sustained. However the learned AO by observing in 1st para of page 4 of the assessment order for 2013-14 that the department has not accepted the finding of the Hon'ble Rajasthan High Court in assessment year 2009-10 and has filed S.L.P. before the Hon'ble Supreme Court of India and accordingly the matter has not received finality disallowed deduction u/s.80G of the I.T. Act claimed by the assessee at Rs.1,27,67,676/- on the ground that the donation made is in kind and not in cash. It is very respectfully submitted that the mere filing of a special leave petition or grant of leave to appeal or pendency of appeal against the High Court's judgment does not denude that judgment of its binding effects.

15. In regard to binding force of a High Court judgment the humble appellant craves leave to submit that a decision of a High Court would have binding course in the state in which the court has jurisdiction, but not outside that state. Decisions of the High Court are binding on the subordinate courts, authorities and Tribunal situated within its jurisdictional territory.

16. That the disallowance of deduction u/s.80G of the I.T. Act at Rs.1,27,67,676/- made by the AO is highly unjustified and assessee craves leave to make following respectful submissions before your honour in above regard:

(a) That the learned AO failed to appreciate that the judgment passed by the Hon'ble Rajasthan High Court which is a jurisdictional High court with regard to the assessment year 2009-10 under similar facts and circumstances in assessee's own case would be squarely applicable as judicial precedent on the assessment for assessment year 2013-14 in assessee's own case.

(b) That the assessee craves leave to refer to 1st two lines of para 1 at page 4 of the impugned assessment order wherein the learned AO has clearly observed that the issue which was decided by the Hon'ble Rajasthan High Court in assessee's own case for the assessment year 2009-10 was similar to the issue involved in assessment for assessment year 2013-14. In this regard it is respectfully submitted that when the AO himself has confirmed that the issue of deduction u/s.80G of the I.T. Act involved in AY 2013-14 is similar to the issue of deduction u/s.80G of the I.T. Act involved in assessment year 2009-10 in assessee's own case, the

assessing officer i.e. the Dy. Commissioner of Income tax, Circle II, Jaipur as well as learned Commissioner (Appeals) were, in view of judicial discipline and doctrine of precedent, duty bound to follow in toto the judgment dated 11th August 2015 passed by the Hon'ble Rajasthan High Court.

(c) That it is respectfully submitted that it is a settled principle of law that mere filing of appeal against the judgment passed by the High Court and in this case the jurisdictional high court cannot reduce the precedential value of the judgment of the Hon'ble High Court.

(d) That the assessee understands that no stay order has been passed by the Hon'ble Supreme Court in regard to above said S.L.P. and it is submitted that in the absence of any stay order passed by Hon'ble Supreme Court, the judgment dated 11th August 2015 passed by the Hon'ble High Court of Judicature for Rajasthan is a binding precedent.

(e) That it is further submitted that when the similar issue has been decided by the jurisdictional high Court, simply on the ground of filing of S.L.P. by the department, the learned Commissioner (Appeals) cannot take contrary view while passing the impugned order.”

5. The Id. DR is heard who has vehemently argued the matter and has relied on the findings of the lower authorities. He submitted that the matter is squarely covered by the decision of the Hon'ble Supreme Court in case of H.H. Sri Rama Verma (supra) and it is clearly a case of donation in kind which is not eligible for deduction under section 80G of the Act.

6. We have heard the rival contentions and perused the material available on record. We find that the issue is no more *res integra* and has been decided by the Hon'ble Supreme Court in case of **H.H. Sri Rama Verma (supra)** wherein the Hon'ble Supreme Court after considering the conflicting decisions of the various High Courts, also referred by the Id AR in his contentions and submissions made before us, as well as the insertion by way of explanation to section 80G which has been relied upon by the Revenue, has held as under:

*"4. The language used in section 80G(2)(a) is clear and unambiguous. On a plain reading of the section, it is apparent that **an assessee is entitled to claim deduction from his income on the amount of money paid by him as donation to the authorities and for the causes specified therein.** The use of the expression 'any sums paid' contemplates payment of an amount of money. One of the dictionary meanings of the expression 'sum' means any indefinite amount of money. The context in which the expression 'sums paid by the assessee' has been used makes the legislative intent clear that it refers to the amount of money paid by the assessee as donation. The Act provides for assessment of tax on the income derived by an assessee during the assessment year; the income relates to the amount of money earned or received by an assessee. Therefore, **for purposes of claiming deduction from income-tax under section 80G(2)(a), the donation must be a sum of money paid by the assessee. The plain meaning of the words used in the section does not contemplate donations in kind. Donations may be made by supplying***

goods of various kinds including building, vehicle or any other tangible property but such donations, though convertible in terms of money, do not fall within the scope of section 80G(2)(a) entitling an assessee to deduction.

*Donation of shares of a company does not amount to payment of any sum or amount though the shares, on their sale, may be converted into money. But the donation so made does not fall within the ambit of the aforesaid section. Since the expression and language used in section 80G(2)(a) is plain and clear, **it is not open to the courts to enlarge the scope by its interpretative process founded on the basis of the object and purpose underlying the provisions for granting relief to an assessee.***

5. *There has been a conflict of opinion between the various High Courts on the interpretation of section 80G(2)(a). In CIT v. Associated Cement Co. Ltd. [\[1968\] 68 ITR 478 \(Bom.\)](#); Addl. CIT v. Abhai Maligai [\[1978\] 113 ITR 737 \(Mad.\)](#) and Cir v. Bangalore Woollen, Cotton & Silk Mills Co. Ltd. [\[1973\] 91 ITR 166 \(Mys.\)](#), courts have taken the view that while, interpreting section 80G(2)(a), the substance of the nature of the transaction should be taken into account and it is not necessary that the donation must be in cash. As against this view, other High Courts in CIT v. Amonbolu Rajiah [\[1976\] 102 ITR 403 \(AP\)](#); CIT v. Gopal Krishna Singhania [\[1980\] 121 ITR 260 \(All.\)](#) and CIT v. Smt. Dhirajben R. Amin [\[1983\] 141 ITR 875 \(Guj.\)](#), have held that section 80G(2)(a) does not contemplate any donation in kind; instead, the expression 'sums' relates to the cash amount of money which may have been donated by the assessee. On a careful scrutiny of the two opinions in the*

aforsaid judgments, we are in agreement with the view taken by the Andhra Pradesh, Allahabad and Gujarat High Courts in holding that section 80G(2)(a) contemplates only cash amount of money as donation, for claiming relief of deduction and it does not refer to any donation made in kind.

6. It appears that, in view of the conflicting opinions expressed by the various High Courts, Parliament intervened and added Explanation 5 to section 80G, 1976. Explanation 5 reads as under:

"For the removal of doubts, it is hereby declared that no deduction shall be allowed under this section in respect of any donation unless such donation is of a sum of money."

7. After the insertion of the aforesaid Explanation, there cannot be any doubt that, for purposes of claiming deduction, only cash amounts which may have been donated would be taken into account. No doubt this provision is not retrospective in nature; nonetheless it indicates the legislative intent behind section 80G(2)(a) even prior to its amendment.

8. We, therefore, agree with the view taken by the Kerala High Court. The appeal fails and is, accordingly, dismissed. There would be no order as to costs."

7. The *ratio decidendi* of the above judgement rendered by the Hon'ble Supreme Court will clearly applies to the case in hand. In the instant case, what is therefore relevant to determine is whether

the assessee has donated money to Rajasthan Medicare Relief Society, SMS Hospital, Jaipur amounting to Rs 31,23,590 and another donation of Rs 96,44,086 to Rajasthan Medicare Relief Society, Sir Padampath Mother and Child Health Institute (S.P.M.C.H.I), Jaipur, or the said donation has been made in kind in form of medical equipments.

8. The question for consideration is therefore the determination of the finer distinction between the cash donation and donation in kind. In both the cases, there is outflow of money from the assessee's hand. However, there could be various scenarios in particular facts and circumstances of each case. In one scenario, the money is going directly from the assessee to the donee which doesn't create any confusion and it will be clearly eligible for deduction. In another scenario, where the assessee has an existing asset/property/stock-in-trade in its possession/control and the same is thereafter transferred by way of donation, it will be a clear case of donation in kind and the same will not be eligible for deduction. There could be a third scenario where the assessee purchases any asset/property/equipments etc from a third party and thereafter, the same is donated. In this case, even though the money has been spent by the assessee in purchasing the asset/property/equipment, what has been actually donated is the asset/property/equipment. The act of donation is subsequent to purchase/acquisition by the assessee in its own right. Once the assessee has purchased/acquired the asset/property/equipment, the title/ownership in such asset/property/equipment has been

transferred by way of gift. The gift in such cases is thus gift in kind and the same won't be eligible for deduction. Another scenario is where there is a necessity/requirement of certain asset/property/equipment by the donee institution and it reaches out to the donor to fund such acquisition/purchase of asset/property/equipment. In this case, the donee institution places the order directly on the supplier of the asset/property/equipment, thereafter, the supplier supplies the equipment directly to the donee and the install the same at the premises of the donee institution. The limited role of the donor in such a scenario is to fund such acquisition/purchase and make the payment to the supplier on behalf of the donee institution.

9. If we look at the last two scenarios as discussed above, the finer distinction between these two scenarios is that in the first scenario, the assessee donor has purchased/acquired the asset/property/equipment in its own right and thereafter, the title/ownership in such asset/property/equipment has been transferred by way of gift to the donee institution. In the second scenario, the donee institution itself has purchased/acquired the asset/property/equipment in its own right and therefore, there is no question of transfer of the title/ownership in such asset/property/equipment by the donor to the donee institution and which has been spent/transferred by the donor is the sum of money equivalent to the purchase price of the equipments purchased directly by the donee institution. The first scenario will not qualify for deduction as what has been donated is property in kind, however

the second scenario will qualify for deduction as what has been spent and transferred is sum of money and not property in kind. In our view, the facts of the present scenario thus needs to be analysed in detail to determine which of the above scenarios it fits in and bases the same, whether the assessee is eligible for deduction under section 80G of the Act.

10. In the present case, the Id AR has contended that on the advise of the Hospital authorities, the assessee issued a cheque in favour of the manufacturers to directly supply the desired machinery and equipments to Hospitals. After getting the cheque from the assessee, the manufacturers directly sent the machinery and equipments to the Hospitals. The machinery and equipments sent by manufacturers were directly delivered to the hospital authorities and also got installed in the hospital premises. It was submitted that at no stage, equipments are delivered to the assessee company. Moreover after having made the payments by way of cheques to the suppliers, the assessee has no connection with the suppliers. It was submitted that all works including placing of order of medical equipments required by hospital authorities, taking of delivery of goods, checking of quality and quantity of the medical equipments and getting installed these medical equipments in the hospitals are under direct supervision of the medical superintendent and at no stage assessee comes into picture nor it has any say in the supply of the equipments and installation thereof. It was submitted that so far as assessee is concerned, it has paid the donation in money i.e. by way of issuing cheque from his bank account in favour of suppliers

of medical equipments and in such a situation by no canon of law, can it be said that donation is in kind or nor in cash. The above contentions of the Id AR need to be tested in terms of actual verifiable documentation right from placing the order by the Hospital authorities, raising of invoices by the supplier on the hospital authorities, delivery/supply/installation at the hospital premises and payment by cheque by the assessee equivalent to the invoice value directly to the suppliers. However, we find that there is nothing on record in terms of verifiable evidence/documentation in support of aforesaid contentions so raised by the Id AR. Further, we find that there is no finding recorded by the AO or the Id CIT(A) examining the aforesaid contentions so raised by the Id AR. In absence of the same, we are unable to take a view in the matter and the matter deserves to be set-aside.

11. Regarding reliance placed by the Id AR on the findings of the Coordinate Benches in earlier years which has been decided in favour of the assessee, we find that the decision of the Coordinate Bench in AY 2009-10 was rendered in the context of exercise of powers by the Id CIT u/s 263 where the AO has already examined the matter in the course of assessment proceedings u/s 143(3) and which has been followed subsequently by the Coordinate Bench in AY 2012-13. In our view, the act of donation whether cash or in kind being a factual matter needs to be examined for the each of the years under consideration. Even if we were to follow the orders passed by the Coordinate Benches in earlier years, the matter needs to be examined on facts prevailing in the impugned assessment year

to determine whether the findings of the earlier years can be applied to the facts of the impugned assessment year. As we have noted above, there has been no findings recorded by the lower authorities regarding actual transaction details and documentation of the donation made by the assessee, we are unable to accede to the contention of the Id AR to blindly follow the findings of the Coordinate Benches in the earlier years. Similarly, reliance placed by the Id AR on the decision of the Hon'ble Rajasthan High Court doesn't support the case of the assessee as the said decision has been rendered in the peculiar facts and circumstances of the case in the context of exercise of powers by the Id CIT u/s 263 of the Act and apparently, the decision of the Honb'le Supreme Court in case of H.H. Sri Rama Verma (supra) was not brought to the notice of Hon'ble High Court.

12. In the entirety of facts and circumstances of the case and in light of above discussions and in particular, the decision of the Hon'ble Supreme Court in case of H.H. Sri Rama Verma (supra) referred supra, we set-aside the matter to the file of the AO to examine the same afresh taking into consideration the above discussions, after providing reasonable opportunity to the assessee.

13. In the result, the ground is allowed for statistical purposes.

14. In ground No. 4 the assessee has submitted that this ground of appeal is in regard to sustenance by learned Commissioner (Appeals) of disallowance and consequential addition u/s.40(a)(ia) of the I.T. Act made by the AO on the ground that the certificate of

accountants furnished by the assessee have not been furnished in accordance with rule 31ACB as amended w.e.f. 19.02.2013 in relation to interest payment of Rs.36,00,008/- made by it to a Non-Banking Finance Company namely S.E. Investment Ltd at Rs. 36,00,008/- without deduction of tax at source.

15. It was submitted that the facts leading to above disallowances and consequential addition are that the assessee company is engaged in the business of manufacturing and export of readymade garments. It took unsecured loan from S.E. Investment Ltd., an NBFC. However TDS was not deducted on interest payment of Rs.36,00,008/- made by assessee to this NBFC and on account of this, the AO added this amount of Rs.36,00,008/- u/s.40(a)(ia) of the I.T. Act.

16. It was submitted that before the learned Commissioner (Appeals), the assessee's argument was that before making disallowance U/s. 40(a)(ia) the AO did not provide reasonable and sufficient opportunity of being heard. In as much as the AO did not issue and serve upon the assessee any specific show cause notice of his intention to make disallowances u/s.40(a)(ia) of the I.T. Act. It was further argued before the learned Commissioner that this omission of the AO in not issuing specific show cause notice to the assessee before making disallowances and additions deprived the assessee from his right of being heard and to put his defence before the AO against proposed disallowances and additions is against the principles of natural justice and accordingly the

impugned assessment order is not maintainable in law and liable to be vacated

17. That without prejudice to submissions made above, the assessee craves leave to mention the present legal position of the provisions of section 40(a)(ia) r.w.s.201(1) of the I.T. Act which is as under:

“Where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII on any such sum but is not deemed to be an assessee in default under the first proviso to section 201(1), then, for the purpose of section 40(a)(ia), it shall be deemed that the assessee has

(a) Deducted and

(b) paid the tax on such sum

On the date of furnishing of return of income by the resident payee referred to in the said proviso.

With effect from 1st day of July 2012 following proviso has been brought on statute book in sec. 201 of the I.T. Act which reads as under:

“Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident shall not deemed to be an assessee in default in respect of such tax if such resident:

- (i) has furnished his return of income under [section 139](#);
- (ii) has taken into account such sum for computing income in such return of income; and
- (iii) has paid the tax due on the income declared by him in such return of income and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed”

Therefore, if the resident payee satisfies all the above 3 conditions and the deductor furnishes a certificate to this effect from a chartered accountant in such form as may be prescribed, then the deductor will be allowed the deduction of the expenses mentioned in 40(a)(ia) by assuming that the deductor has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee aforesaid.

18. It was submitted that the learned AO ought to have appreciated that after the amendment in section 201 of the I.T. Act by way of insertion of proviso to section 201(1) of the I.T. Act, 1961 by Finance Act 2012 (w.e.f. 01.07.2012) payment of interest made to NBFCs without deduction of tax at source is an allowable expenditure [of course it is subject to some statutory compliances which included filing of certificate from Chartered Accountant] and not hit by the mischief of the provisions of section 40(a)(ia) of the I.T. Act.

19. It was submitted that the assessee understands that the NBFC, namely, S.E. Investment Ltd has furnished its return of income u/s.139

of the I.T. Act and has taken into consideration the interest received by it from the appellant assessee in their return of income and have paid the tax due on the income declared by it in such return of income. It was submitted that due to some misunderstanding which crept in the mind of above named NBFC, namely, S.E. Investment Ltd. in regard to assessee it is not providing to assessee the certificate in the form of annexure from a Chartered Accountant. The assessee is making strenuous effort to receive certificate from S.E. Investment Ltd. It is requested that the AO may very kindly be asked to provide an opportunity to assessee to submit the certificate from Chartered Accountant in the case of S.E. Investment Ltd.

20. The Id. DR is heard who has relied on the findings of the lower authorities.

21. We have heard the rival contentions and perused the material available on record. The assessee has contended that the addition has been made without providing reasonable opportunity and further, it is unlikely that the NBFC has not reported the payment in its return of income and paid taxes thereon and it shall be able to produce the necessary certificate in support thereof. As we have already set-aside the matter relation to deduction u/s 80G, in the interest of justice, this matter is also set-aside to the file of the AO to examine the same afresh after providing reasonable opportunity to the assessee. In the result, the ground is allowed for statistical purposes.

In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 01/10/2018.

Sd/-

(विजय पाल राव)
(Vijay Pal Rao)
न्यायिक सदस्य / Judicial Member

Sd/-

(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 01/10/2018.

*Santosh

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

1. अपीलार्थी / The Appellant- Nash Fashion (India) Ltd., Jaipur.
2. प्रत्यर्थी / The Respondent- DCIT, Circle-II, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File { ITA No. 346/JP/2018 }

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar