

IN THE INCOME TAX APPELLATE TRIBUNAL 'B' BENCH, KOLKATA

Before Sri J. Sudhakar Reddy, Accountant Member & Sri S.S. Godara, Judicial Member

I.T.A. No.341 & 342/Kol/2019
(Assessment Year: 2013-14 & 2014-15)

M/s. Shyam Sunder Co. Jewellers.....Appellant
[PAN :AAMCS 5240 F]

Vs.

ACIT, Circle-2(2), Kolkata.....Respondent

Appearances by:

Shri S. M. Surana, Advocate, appearing on behalf of the appellant.

Shri Robin Choudhury, Sr. DR, Addl.CIT, appearing on behalf of the Respondent.

Date of concluding the hearing : April 8th, 2019

Date of pronouncing the order : April 26th, 2019

O R D E R

Per J. Sudhakar Reddy :-

These two appeals by the assessee are directed against the separate and identical orders of the Id. Commissioner of Income Tax (Appeals), Kolkata (hereinafter the 'Id. CIT (A)'), passed u/s 250 of the Income Tax Act, 1961 (the 'Act'), dated 04.01.2019 for Assessment Year 2013-14 & 25.01.2019 for Assessment Year 2014-15.

2. The issues arising in these two appeals are common and hence both the appeals are heard together and disposed off, for the sake of convenience, by way of this common order.

3. The assessee, M/s. Shyam Sunder Co. Jewellers (P) Ltd., is a company and is engaged in the manufacturing and trade of jewellery. The issues that arise for our adjudication for the Assessment Year 2013-14 is (a) the claim of deduction of PF and ESI dues which are paid before the filing of return of income and (b) the claim of

deduction u/s 35(1)(ii) of the Act, of donation given to M/s School of Genetics and Population Health, Kolkata. For the Assessment Year 2014-15, the only issue is disallowance of deduction claimed u/s 35(1)(ii) of the Act for a donation given to School of Genetics and Population Health, Kolkata ('SHG &PH')

4. We have heard Mr. S.M. Surana, the Id. Counsel for the assessee and Mr. Robin Choudhury, the Id. Departmental Representative for the revenue. On a careful consideration on the facts and circumstances of the case, perusing the papers on record and orders of the authorities below as well as case laws cited, we hold as follows.

5. We first take up Ground No.1 for the Assessment Year 2013-14 regarding the issue of claim of deduction of PF & ESI dues. The undisputed fact is that these dues have been paid before the specified due date of filing return of income u/s 139(1) of the Act. The Assessing Officer denied the deduction on the ground that the payment was made beyond the due date of payments specified in the relevant enactment. This issue is covered in favour of the assessee. As the payments are made prior to the due date of filing the return of income u/s 139(1) of the Act, the same should be allowed. Hence, we allow this ground of the assessee.

6. Ground No.2 to 4 for the Assessment Year 2013-14 and Ground No.2 to 4 for the Assessment Year 2014-15 are on the issue of disallowance of claim of deduction u/s 35(1)(ii) of the Act of donations given to SHG &PH. The Assessing Officer disallowed the claim on the ground that survey was conducted on SHG &PH and it came to light that the donations received by cheque/RTGS were returned in cash to the donors.

7. Similar issues on identical facts and arguments were considered by different Benches of the Tribunal which are as under.

7.1 The Hon'ble Kolkata ITAT, B Bench in the case of Tushar Chawda, in ITA No.2362/Kol/2017 dated 21.03.2018 has held as follows:

This is an appeal by the assessee directed against the order of the Commissioner of Income Tax-(A)-9, Kolkata relating to A.Y. 2014-15.

2. In this case the assessee had paid an amount of Rs.15,00,000/- as deduction u/s 35(1)(ii) of the I.T.Act, 1961 (Act) to School of Human Genetics and Population Health and claimed weighted deduction u/s 35 of the Act [175% of 1500000] amounting to Rs.26,25,000/- from income under the head business.

3. The AO rejected this claim by observing as follows :-

"From the submissions of the assessee, it is clear that the assessee made the donation with a motive to get a huge deduction from business income only to reduce the total income for avoiding the payment of tax. Further, the assessee has failed to substantiate the payment of donation satisfactorily. It is clear that the donation, made by the assessee, was a bogus payment and to get some benefit for which the assessee chose this particular organization and particular FY. The assessee must have got some benefit in lieu of donation payment of Rs.15,00,000/-. Hence, the weighted deduction claimed u/s.35 amounting to Rs. Rs.26,25,000/- from income under the head business is disallowed and added to the total income of the assessee for the AY 2014-15." 4. The Id. CIT(A) had rejected the contentions of the assessee by observing as follows :-

4.1. 1 have considered the submission of the appellant and perused the relevant assessment records. The M/S School of Genetics and Population Health, Kolkata had been granted approval u/s 35(1)(ii) of the I.TAct, 1961 vide Notification No. 4/2010/F. o. 203/64/2009/ITAT dated 28.01.2010 in the Official Gazetted by the Central Government. Any expenditure to such Notified .Institution which has as its object the undertaking of scientific research is eligible for weighted deduction equal one and three fourth times of any sum paid.

However, the Ministry of Finance (Department of Revenue) (Central Board of Direct Taxes) Vide Notification No. 82/2016/F.No. 203/64/2009/IT A.11 dated 15.09.2016 in The Gazette of India: Extra Ordinary had rescinded the Notification granting approval by the Central Government to the appellant for the purpose of clause (ii) of sub section (1) of section 35 of the I.T. Act, 1961, read with Rule 5C and 5E of the Income tax Rule, 1962. The Notification reads as follows:

"Ministry of Finance, (Department of Revenue) (Central Board of Direct Taxes) Notification New Delhi, the 15th September, 2016, S.O. 2961(E)-In exercise of the powers conferred under clause (ii) of sub-section (1) of section 35 of the Income-tax Act, 1961 read with Rule 5c and 5E of the Income-tax Rules, 1962, the Central Government hereby rescinds the notification of the Government of India, Ministry of Finance, Department of Revenue number 4/2010 dated 28.01.2010 published in Gazette of India , Part 11, Section 3, Sub-section (ii) dated 28.01.2010 vide S.O. 348 with effect from 1st April, 2017 and shall be deemed that the said notification has not been issued for any tax benefits under the Income-tax Act, 1961 or any other law of the time being in force [Notification No. 82/2016/F.No.203/64/2009/ITA-II] Deepshikha Sharma, Director."

The above notification makes clear that the earlier notification.No. 4/2010 dated 28.01.2010 shall be deemed not to have been issued for any income- tax benefits under the Income-tax Act. Therefore, the payment of Rs.15,00,000/- for the purpose of availing weighted deduction of 175% u/s 35(1)(ii) of the Act made to M/s School of Human Genetics and Population Health, Kolkata is denied. It may be clarified here that explanation to section 35(1)(iii) of the Income-tax Act shall not come to the rescue of the appellant as it relates, only to approvals which have been withdrawn subsequent to the payment made to Institutions to which clause

(ii) or cause (iii) applies. In the case of M/s School of Human Genetics and Population Health, Kolkata, the notifications had been deemed not to have been issued for any tax benefits under the Income-tax Act, 1961 or any other law of the time being in force.

Though the appellant made a donation of only Rs.15,00,000/-, however, he has claimed u/s 35(1)(i) and (ii) weighted deduction amounting to Rs.26,25,000/- from his return income. The disallowance is, therefore, restricted to the deduction claimed at Rs.26,25,000/-."

5. After hearing rival contentions, I am of the view that the assessee cannot suffer on account of withdrawal of notification given to M/s. School of Human Genetics and Population Health, Kolkata granting approval u/s 35 (1) (ii) of the Act. This recognition was originally granted on 28th January, 2010 and renewed on 17th June, 2010 by Government of India . Ministry of Science and Technology. In response to letter dated 03.02.2014 given by M/s. School of Human Genetics and Population Health, to the assessee, donation of Rs.15,00,000/- was made on 31.03.2014 by the assessee. The said amount was given to the donee on 31.03.2014 and withdrawal was on 15.09.2016. i.e. after 17 months from the date of donation made in March, 2014. Such withdrawal in my view cannot take away the vested right of the assessee for claiming deduction under Section 35 (1) of the Act.

7.2 The Tribunal in the case of Rajda Polymers vide ITA No.333/Kol/2017 order dated 08.11.2017 at page 7 has held as follows :-

"5.6. We find that the Id CITA had made an observation which has been heavily relied upon by the Id DR that the assessee's line of business has got nothing to do even remotely with the healthcare or herbal healthcare industry much less in the area of research thereon and accordingly there was no need for the assessee to give donation of Rs 14,00,000/- to HHBRF . We find that this aspect has been duly addressed by the assessee by stating that one Cardiologist Doctor had introduced the assessee to HHBRF and donations were given after due satisfaction of the assessee based on personal visits to the two research centres of HHBRF and activities carried on by them. Moreover, it is well settled that it is always the prerogative of the assessee to give or not to give any donation to a particular institution, which wisdom cannot be questioned by the revenue. The question of business expediency of an expenditure had to be viewed from the point of view of the businessman and not from the view point of the revenue. The businessman knows his interest best. However, it cannot be denied that this donation paid to HHBRF is free from any suspicion. It definitely leads to further probe by the revenue, which has been carried out by the revenue by summoning the Director of HHBRF . The said Director Shri Swapan Ranjan Dasgupta, though could not appear in person before the Id AO for cross-examination (which was sought by the assessee) but had confirmed in writing that the donations given by the assessee to HHBRF were genuine in nature and had further confirmed that HHBRF had not paid any cash back to assessee in lieu of cheque donations paid to them. The revenue had left the matter at this stage itself and did not further probe into it to check the veracity of the confirmation made by Shri Swapan Ranjan Dasgupta. Therefore, the Id AO proceeded to make the addition only based on the statement recorded from Swapan Ranjan Dasgupta at the time of survey. It may be true that in the said statement, Swapan Ranjan Dasgupta may have deposed to the fact that HHBRF were in receipt of various donations from various persons in cheques and the same were routed back to the donors in cash after retaining certain portion as their commission and intermediaries' commission. This is only a general statement given by Swapan Ranjan Dasgupta about the modus operandi carried out by HHBRF. But nowhere in the said statement or in the subsequent enquires / investigation , it came to light that the assessee herein had indeed received back the cash in lieu of cheque donations given to HHBRF. This serves as a clinching missing evidence in the entire gamut of this case.

7. Respectfully applying the proposition of law laid down in this case law to the facts of case on hand and as the donation to " School of Human Genetics and Population Health" was made while it was holding the approval in question, we direct the AO to grant the said deduction as claimed. In the result this issue is decided in favour of the assessee.

8. In the result the appeal of the assessee is allowed.

7.3 The Kolkata ITAT in the case of Zenith Credit Corporation in ITA No.718/Kol/2018 pronounced on 20th July, 2018 held as follows:-

This is an appeal filed by the assessee directed against the order of the Commissioner of Income Tax (Appeals)-10, Kolkata, (hereinafter the 'Ld. CIT(A)'), dt. 23/02/2017, passed u/s 250 of the Income Tax Act, 1961 (hereinafter the 'Act'), relating to Assessment Year 2014-15, on the following grounds:-

"1. For that the Ld. CIT(Appeals) was wrong and unjustified in confirming the disallowance of deduction u/s 35(1)(ii) of Rs.3,50,000/- on the donation of Rs.2,00,000/- made to School of Human Genetics & Pollution Health without properly appreciating the submission of the appellant. The court decisions cited by the Ld. CIT(Appeals) are not applicable in the facts of the appellant's case.

2.For that the appellant craves leave to alter, amend, modify any of the grounds and/or take additional ground before or at the time of hearing of this appeal."

2.Heard both the parties.

The ld. Counsel for the assessee submits that from the statement recorded and relied upon by the Assessing Officer of Shri Avijit Sinha Roy, it is clear that he stated that after February, 2011, he left this activity of providing bogus donations for commission. He drew the attention of the Bench to page 3 para 6.6. of the assessment order and submitted that the donation in question was made on 03/06/2014. Thus, he submits that reliance placed on this statement of Shri Avijit Sinhar Roy, for making this addition, is wrong. He further submits that no opportunity was provided to the assessee for cross-examination of the persons on whose statements the revenue relied upon to make this addition. He submitted that under similar circumstances the Kolkata 'SMC' Bench of the Tribunal in the case of Tushar Chawda vs ITO in ITA No. 2362/Kol/2017, order dt. 21/03/2018, and the Kolkata 'B' Bench of the Tribunal in the case of DCIT vs. M/s. Maco Corporation India (P) Ltd. in ITA No. 378/Kol/2017, order dt.13/04/2018, adjudicated the issue in favour of the assessee.

2.1. The ld. D/R, on the other hand submitted that statements were recorded from key persons of the Trust and in these statements, these persons have admitted that such accommodation entries were provided for donations. He specifically referred to question no. 12 at page 7 of the assessment order, wherein, Smt. Samadrita Mukherjee Sardar, secretary of the School of Human Genetics and Population Health, had admitted to such bogus entries. He further referred to pages 11 of the assessment order and submitted that Shri Avijit Sinha Roy had specifically stated that this amount of Rs.2 Lakhs from M/s. Zenith Credit Corporation was a bogus transaction. In his rejoinder, the ld. Counsel for the assessee submitted that, when Shri Avijit Sinha Roy has in his sworn statement stated that he has left his work of providing bogus donations far back in the year 2011 and hence, the question of his arranging these donations in the year 2014, does not arise. He further pointed out from the statement at page 11 of the assessment order, it is clear that the list was prepared by the revenue authorities and that Shri Avijit Sinha Roy has simply signed the list by noting that he has seen the list. He submitted that the list cannot be taken as evidence. He submitted that opportunity of cross-examination has not been provided in this case and hence no reliance can be placed on the statements, based on which the revenue authorities to make this addition.

3.After hearing rival contentions, perusing the papers on record, orders of the authorities below as well as case-law cited, I hold as follows:-

I find that in the statement recorded from Shri Avijit Sinha Roy u/s 131 of the Act, on 13/04/2015 he states that after the month of February, 2011, he left this bogus donation work. On the other hand, he has signed a declaration on 30/07.2015. The list prepared by the revenue was signed with a remark that he has seen the list. There is a contradiction in these two. In such circumstances, it has to be seen as

to which is correct. No opportunity of cross-examining Shri Avijit Sinha Roy has been provided to the assessee. Hence the declaration as well as the statement cannot be the basis of addition. Similarly, the statement of the key persons of the trust cannot be the basis of addition as no cross-examination of witness was provided. No proof of money being returned is available with the revenue.

3.2. Similar view was taken by the 'B' Bench of the Tribunal in the case of DCIT vs. M/s. Maco Corporation (India) Pvt. Ltd. in ITA No. 16/Kol/2017; Assessment Year 2013-14, order dt. 14/03/2018.

4. Consistent with the view taken therein, we allow this appeal of the assessee and direct the Assessing Officer to grant the necessary deductions.

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

7.3 We also find that similar issue came up before the co-ordinate bench of this tribunal in the case of *Saimed Innovation vs ITO* in ITA No. 2231/Kol/2016 for Asst Year 2013-14 dated 13.9.2017, wherein it was held as under:-

"9. We note that the sole basis for making the addition is on the basis of the statement recorded on oath during survey at M/s. Herbicare of Shri Swapan Ranjan Dasgupta, other than the said statement there is no other evidence to show that the assessee has received back the donation as suggested in his general statement about providing accommodation entry by Shri Swapan Ranjan Dasgupta. We also note that the said Shri Swapan Ranjan Dasgupta has not stated anywhere that the assessee indulged in bogus donation or that the amount donated to it (M/s. Herbicare) was given back to the assessee after deducting the commission. We note that the statement recorded on oath during survey cannot be the sole basis for making the disallowance as decided by the Hon'ble Supreme Court in CIT Vs. S. Kader Khan Son (2013) 352 ITR 480 (SC). In any case, if the AO was of the opinion that the statement of Shri Swapan Ranjan Dasgupta, the founder Director of M/s. Herbicare has adversely affected the veracity of the donation made by the assessee then he was duty bound to summon Shri Swapan Ranjan Dasgupta and allowed the assessee to have cross examined him, failing which the statement of Shri Swapan Ranjan Dasgupta could not be used against the assessee trust as held by the Hon'ble Supreme Court in Andaman Timbers Ltd. Vs. Commissioner of Central Excise 62 Taxman 3. We note that the AO had in fact, recorded the fact that the partners of the assessee firm desired to cross examine the founder Director of M/s. Herbicare Shri Swapan Ranjan Dasgupta regarding the purported deposition made at the time of survey. However, AO did not grant him that opportunity to cross examine Shri Swapan Ranjan Dasgupta. We also note that the AO issued notice u/s. 131 of the Act to the partners of the assessee firm and has recorded their statement on oath on 28.12.2015. We note for question no. 14 as to how the partner knew about M/s. Herbicare, the partner of the assessee firm has answered that Dr. Bhuban Chakraborty, a Cardiologist friend introduced them to M/s. Herbicare and to question no. 15 as whether the partners have visited the office of M/s. Herbicare to which the partners answered that they had visited the premises of M/s. Herbicare on two occasions and for question no. 16 as to whether the partners were satisfied with the work of scientific research carried on by the said M/s. Herbicare, the partners of the assessee firm had replied that during their visit at Pailan and Baral they were satisfied with the scientific research work and for question no. 17 the partners replied that they had seen the certificate issued by Govt. of India and also have gone through the research paper of the people working there. For question no. 20 they have given the name of the doctor who was a Cardiologist who introduced them to M/s. Herbicare. We note that the AO enquired about Dr. Bhuban Chakraborty's address for which the partner replied that the doctor resides at Kshudiram Sarani, Rathtala, Kolkata. For question no. 21 as to whether they knew about the Directorate of Investigation, Kolkata carried out survey u/s. 133A and that its investigation is found that the activities were not genuine, the partners replied that they were not aware of the survey, however, they added that after their visit of the two centers

they were on a bonafide belief that M/s. Herbicare was a competent institute and based on the recommendation of the Cardiologist Dr. Bhuban Chakrabrty they made donation to the said concern. We also note that the AO issued summons to Shri Swapan Ranjan Dasgupta who did not appear for cross examination due to ill health but the said Shri Dasgupta confirmed the donations made by the assessee firm to M/s. Herbicare in writing to the AO and clearly stated that no money was refunded back to assessee firm, which fact has been reproduced by the AO at page 7 of his order as under:

"Shri Swapan Ranjan Dasgupta, Director of M/s Herbicare Healthcare Bio-Herbal Research Foundation had filed a letter on 28/01/2016 stating "Referring to the above and your comments on my reply dated 22.01.2016, I would further request your good office to elaborate the financial years in question to enable our Accounts Deptt for verification and submission.

However, we apparently observe from our records that following donations were received by us from M/s. Saimed Innovation, the assessee in the financial years mentioned against each:

F.Ys	Amount	Mode of transaction	Date	Receipt No.
2012-13	7,51,000/-	RTGS:UTR No. BARBH13074606758	15.03.2013	HHBHRF/15-03-13/004
2012-13	7,51,000/-	RTGS:UTR No BARBH 13085899500	26.03.2013	HHBHRF/26-03-13/004

Further, it is submitted for your kind record that no money was refunded to the above named assessee against donations given by them.

Meantime, I may submit that I am critically indisposed due to acute lumber scoliosis and am not able to move. I am under strict medical supervision. As such, my personal appearance may kindly be waived on compassionate ground. I am attaching the current medical prescription/advice along with MRI reports for your kind record.

However, the information as submitted above may please recorded as my witness."

10. Thus we note from the entire facts and circumstances, that the AO got swayed away with the statement recorded on oath of Mr. Swapan Ranjan Dasgupta during survey conducted at the premises of M/s. Herbicare. We have reproduced Question no. 22 and 23 and answers given by Shri Swapan Ranjan Dasgupta, wherein he admits to provide accommodation entries in lieu of cash. This information we should say can be the tool to start an investigation when the assessee made the claim for weighted deduction. The general statement of Shri Swapan Ranjan Dasgupta against donation made the claim of assessee for deduction suspicious. However, when the AO investigated, Shri Swapan Ranjan Dasgupta has confirmed that M/s. Herbicare was in receipt of the donation and it has not given any refund in cash, then the sole basis of disallowance of claim as a matter of fact disappeared. It should be remembered suspicion howsoever strong cannot take the place of evidence. The confirmation from Shri Swapan Ranjan Dasgupta fortifies the claim of the assessee for weighted deduction u/s. 35(1)(ii) of the Act. The sole basis of the addition/disallowance based on statement recorded on oath during survey cannot be allowed as held by Hon'ble Supreme Court in Kader Khan & sons (supra). Moreover, we note that if the AO was hell bent determined to disallow the claim of the assessee, then he should have granted an opportunity to cross examine Shri Swapan Ranjan Das Gupta and Shri Kishan Bhawasingka as held by Hon'ble Supreme Court in Andaman Timber (supra).

11. In the light of the aforesaid facts and circumstances, we cannot sustain the order of the authorities below. Therefore, we set aside the impugned order and direct the AO to allow the deduction of Rs.26,28,500/- u/s. 35(1)(ii) of the Act.

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

8. The facts of this case as identical with the facts of this case decided by the ITAT cited above. Copy of the statements was not confronted to the assessee. No evidence of the money being returned in cash is brought on record. The certificate is valid as on the date of donation. Hence, respectfully following of the judgment of Co-ordinate Bench of the Tribunal, we allow these grounds no.2 to 4 for Assessment Year 2013-14 & 2014-15.

9. In the result, the appeals of the assessee are allowed.

Kolkata, the 26th April, 2019.

Sd/-
[S.S. Godara]
Judicial Member

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Dated : 26.04.2019
(RS, Sr. PS)

Copy of the order forwarded to:

1. M/s. Shyam Sunder Co. Jewellers, 8, Ganesh Chandra Avenue, Saha Court, 6th Floor, Kolkata – 700 013.

2. ACIT, Circle-2(2), Kolkata.

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches