

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "E" MUMBAI**

**BEFORE SHRI S. RIFAUH RAHMAN (ACCOUNTANT MEMBER) AND  
SHRI RAVISH SOOD (JUDICIAL MEMBER)  
ITA No.6326/MUM/2019  
(Assessment Year: 2015-16)**

DCIT, CC-8(1)  
Room No. 656,  
6<sup>th</sup> Floor, Aayakar Bhavan,  
M.K. Road,  
Mumbai – 400 020

Soex India Pvt. Ltd.,  
Vs. 21<sup>st</sup> Floor, Nirmal Building,  
Nariman Point,  
Mumbai - 400021

**PAN No. AAGCS0625Q**

**Appellant**

**Respondent**

Appellant by : Shri Vijay Kumar Menon, D.R  
Respondent by : Shri A.K. Ghosh, A.R

Date of Hearing : 31.03.2021  
Date of pronouncement : 31.05.2021

**ORDER**

**PER S. RIFAUH RAHMAN, AM:**

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-50, Mumbai, dated 15.07.2019, which in turn arises from the order passed by the A.O under Sec. 143(3) of the Income Tax Act, 1961, (for short 'Act'), dated 05.12.2017.

2. Brief facts of the case are that the assessee had filed its original return of income on 30.11.2015 declaring total income of Rs.15,22,18,550/-. The case was selected for scrutiny and assessment was completed under Sec. 143(3) of the Act on 05.12.2017. In this appeal, revenue has raised only issue of non sustaining of disallowance made by the assessing officer under Sec. 35(1)(ii) of the Act, and in this case, the assessing officer observed that the assessee had debited a sum of Rs.5 crores to profit and loss account on account of contribution under Sec. 35(1)(ii) under the head other expenses and claimed deduction under the above said section @ 175%. Assessing officer observed that the above donation in question was made to School of Human Genetics and Population Health (SHGPH), Kolkata. A survey action

under Sec. 133D of the Act was conducted at the office premises of SHGPH on 27.01.2015, from the survey action it was found that the above said institution is engaged in accepting bogus donation raised through various brokers in lieu of commission. Based on the above findings and subsequent withdrawal of the registration under Sec. 35(1)(ii) granted to SHGPH by the CBDT vide notification No. 4/2010 dated 20.01.2010. Considering the above development, assessing officer rejected the deduction claimed under Sec. 35(1)(ii) by the assessee and accordingly, it was disallowed.

3. Aggrieved with the above order assessee preferred the appeal before the CIT(A)-50, Mumbai, the assessee has filed detailed submission before him:-

*"1. The addition of Rs. 8,75,00,000/- u/s 35(1)(ii) being donation given to school of Human Genetics and Population Health(SHGPH) made by AO is unjust and also bad in law following reasons:*

- A. Addition of Rs 3.75,00,000/- u/s 35(1) cannot be made as Deration genuine and Assessee has discharged it's On Us Further in view of Explanation to Section 35(1)0 said addition cannot be made.*
- B. Addition of Rs 8,75,00,000/-u/s 35(1)) is made by relying on general statement.*
- C. Addition of Rs 8,75,00,000/ results in taxing the same income twice which is impermissible in Law.*

**2.Brief Facts of the case are as follows:**

- i) Assessee filed its Return of income for AY 2015-16 declaring total income of Rs. 15,22,18,550/ electronically on 30/11/2015. [Pg 49-84] of Paper Book*
- ii)The assessee company is engaged in the business of manufacturing of Molasses (Tobage and Herbal) and Beedi (Tobacco and Herbal).*
- iii)The assessee had debited sum of Rs. 5 crores to P&L account of contribution u/s 35(l)(ii) under the head other expenses and on which deduction has been claimed u/s. 35(l)(ii) of the Act @ 175% which amounts to a deduction of 8.75 crores. [Pg 91 & 103] of Paper Book*
- iv)The donation in question was made to an institute by the name School of Human Genetics and Population Health (SHGPH), Kolkata.*
- (v) Vide order dated 15/09/2016 the central Board of Direct Taxes (CBDT), a body of ministry of Finance withdrew the approval granted u/s 35(1)(ii) w.e.f. 20/01/2010 i.e. the date from which approval u/s. 35(l)(ii) had been accorder to SHGPH vide Notification No. 4/2010 dated 20/01/2010. [Pg48 ] of the Paper Book*
- vi) Vide Notice u/s. 142(1) of LT. Act, 1961, dated 17/11/2017, the assessee was issude show cause notice to explain why the deduction claimed of Rs. 8,75,00,000 /- u/s 35(1)(ii) of the I.T Act, 1961 in respect of donation made of donation made of Rs.*

5,00,00,000/- to school of Human Genetics and Population Health Kolkata should not be disallowed as the said entity was engaged in the illegitimate activity of providing entries for bogus donation u/s 35(1)(ii) of the Act through various brokers in lieu of mission.[Pg 27] of the paper Book

(vii) The assessee replied to the show cause vide letter vide order 24/11/2017 wherein it claimed the benefit of Explanation to sec. 35(I)(ii) which states that deduction shall not be denied merely on the ground that subsequent to the payment, the approval has been withdrawn. Assessee also claimed that donation given by it was genuine [Pg 25-47] of the Paper Book

(viii) Considering the facts and circumstances of the case disallowance of Rs 8,75,00,000/- was made and added to the total income of the assessee vide order dated 05.12.2017 [Pg 19-241 of Paper Book

(ix) Against the above order, assessee has filed an appeal before your honours Ld. CIT(A)- 50.

In view of the above factual matrix respectfully submitted that addition of Rs 8,75,00,000/- is not justified on following grounds which are without prejudice to one another:

**A. Addition of Rs 8,75,00,000/- u/s 35(1)(ii) cannot be made as Donation is genuine and Assessee has discharged it's Onus. Further in view of Explanation to Section 35(1)(ii) said addition cannot be made.**

A1 It is respectfully submitted that Assessee exercised reasonable due diligence before giving donation and has during the course of assessment proceedings discharged its onus to show that Donation was genuine.

A2 The assessee had donated the amount of Rs. 5.00 crores u/s 35(1) (ii) to the said organization on different dates (Rs. 2.50 Crores on dt 10/12/2014, and Rs 2.50 Crores on 11/12/2014) much before the withdrawal of notification 15 September, 2016. [Bank statement- Pg 46] of Paper Book

A3 Assessee has produced following evidences to prove that the donation was genuine:

i) Name and Address of party to whom payment made u/s 35(1)(ii) of IT. Act 1961 [Pg 35] of Paper Book

ii) Copy of receipts issued by the party. [Pg 36-37] of Paper Book

iii) Copy of Notification for approval u/s. 35(I)(ii) of the I.T. Act 1961 issued by Central Board of Direct Taxes, Department of Revenue, Ministry of Finance, Govt. of India to the party to whom payment made. [Pg 40-42] of Paper Book

iv) Copy of certificate issued by Department of Scientific and Industrial Research Technology, Ministry of Science and Technology, Govt. of India for renewal of recognition of Scientific and Industrial Research Organisations (SIROs) to the party [Pg 43] of Paper Book

v) List of parties from whom contributions received u/s. 35(1)(ii) of the I.T. Act, 1961 during AY. 2015-16 by the School of Human Genetics and Population Health where the assessee's name and amount is reflected [Pg 44] of Paper Book

vi) Copy of Pan Card of the party to whom payment made u/s: 35(1)(ii) of the IT. Act. 1961. [Pg 45] of Paper Book

vii) Copy of Bank Statement as a evidence of payment made through cheque and the payment is released by bank. [Pg 46] of Paper Book

viii) Copy of certificate dt. 31/12/2014 received from donee confirming the receiving of 5.00 crores from the assessee company towards contribution for Scientific Research Society. [Pg 47] of Paper Book

A4 Hence, Assessee at the time of giving donation had exercised reasonable due diligence that the trust is genuine and was not aware that the trust was also engaged in alleged legal activities Further, the trust had legal and valid approval u/s 35(1)(ii) when the donation was given Hence, subsequent withdrawal of approval will not affect the claim of assessee u/s 35(1)(ii) in view of the Explanation

A5 The Assessing Officer has not brought on record any material to suggest that Assessee has received back the money from the donee. The statement of third parties is general nature

A6 It is respectfully submitted that Reliance on various statements of third parties etc by the revenue do not constitute conclusive proof against the assessee as said statements are general in nature and not pertaining to the assessee

A7 In the Statement of Smt. Moumita Raghavan, Treasurer of SHGPH was recorded during survey it is clearly stated that not all donations were fraudulent. The relevant portion of her statement as extracted in order of withdrawal.

"As our organisation desperately needs money for its research and development activities we accepted their proposal

Q 18 Please explain in detail the usage of the said 25 crore, which you have stated as your actual amount of donation you have received since 2011.

Ans. Out of the above 25 crore, we have made fixed deposits of Rs. 12 crore Rs 4 crore have been spent on purchase of lands at Bolpur, Rs 4 crore have been spent on purchase of equipment of our laboratory and the residual amount paying at Bank.

A8 Further Statement of Smt Samadrita Mukherjee Sardar, Secretary of SHG&PH recorded during survey reiterated what was stated by Smt. Moumita Raghavan.

A9 Further, in response to the showcase notice in course of proceedings for withdrawal of approval M/s. 12A of the Act by jurisdictional field authorities. Smt. Samarita Mukherjee Sardar Secretary, SG&PH submitted a reply dated 24/8/2015. The relevant portion of the reply as extracted in the order of withdrawal is reproduced below:

"It is humbly submitted that registration 12A exemption u/s 80G granted to us has been a great and invaluable support and encouragement to our research

*and charitable and welfare projects and activities. However, during the AY 2012-13 to AY 2015-16, with view to meet the financial requirements for above explained research and welfare objectives and under certain circumstances at the time, we had arranged some income by way of accommodation entries for donations through certain mediators, which were refunded back as per their instructions after retaining our service charges. The said donations, as well as the refunds were mostly made through RTGS/proper banking channel It may be noted here that the RTGS cheques towards the refunds were made in favour of different parties as per the instruction of the middleman and by debiting the same in the books of accounts mainly under expense head. However, we would like to submit here again the we have been continuously involved in search social welfare and charitable activities, all along from inception of our society and we have never stopped these activities.*

*A10 Further relevant portion of the Order of Settlement Commission dated 22/07/2016 as extracted in the order of withdrawal is as under:*

*"2.2 It was further submitted in the SOF that as the society had inadequate financial resources, it was made to understand by certain persons acting as mediators about a way of caring some income as commission through the route of giving accommodation entries for donations. The applicant was enticed into accepting cheques towards 'donations and refunding almost similar amounts by debiting the payments under various heads in books of account after retaining a certain margin of 3% to 8% towards service charges for itself Owing to lack of financial flows and for the need for meeting their financial requirements the Secretary and Treasurer of the Society accepted such donations' during the FY 2011- 12, 2012-13 and 2013-14, which were accommodating entries for donations through mediators The refunds were made by debiting the payments many under the head Research and Development Expenditures and some other heads i.e SHG Advances etc. in the books of account and returned to the 'donors On consideration of facts of the case Hon'ble Settlement Commission in its order under section 245D(4) of the Act dated 22/07/2016, determined Rs. 24.19 crores as income (arising from providing accommodation entries to the donors) for the Assessment years 2012-2013 to 2014-2015 and also imposed a penalty of Rs. 1.95 crores under section 271(l)(c) of the Act"*

*A11 We respectfully state that it can be very well observed from the order of withdrawal which is the basis of addition there is no direct incriminating evidence against the assessee.*

*A12 Recently the Chennai tribunal in Smt. Deviyani Dilip Patel vs ITO [2017] 83 taxmann.com 278 (Chennai - Trib.)/[2Q17] 165 ITD 598 (Chennai - Trib.) was dealing with a similar fact situation. It was held that where Research Foundation institution was enjoying approval as per section 35(l)(ii) on date of receipt of donation, on retrospective cancellation of approval donor's claim of deduction could not be denied. In this case also, during survey under section 133A, the donee confirmed the receipt of voluntary donation through account payee cheque and returning back of the same to the donor assessee after deducting a commission at the rate of 5 per cent on the donation amount. The tribunal following the decision of Bombay high court in Seksaria Biswan Sugar Factory v. Inspecting Assistant Commissioner [1990] 184 ITR 123/52 Taxmann 257(Bom)HC) decided in favour of the Assessee. The relevant portion of the said decision is as under:*

"7. The Assessing Officer denied the claim of the assessee on the ground that the above approval of the Central Government has been withdrawn retrospectively vide 5.0. 2882(E) dated 6.9.2016 and the Id. CIT (A) confirmed the same. The Institution was enjoying the approval of the prescribed authority at that time and the assessee made donation was also not under dispute, the disallowance made by the Assessing Officer cannot be sustained under law. Our observation is duly fortified by the decision of Hon'ble Bombay High Court in the of Seksaria Biswan case Ltd. v. Inspection Sugar Factory Assistant Commissioner 1199011184 ITR 123/52 Taxman 257. The purport of the decision of Hon'ble Bombay High Court was that when the institution was enjoying the approval within the meaning of section 35(l)(ii) of the Act as on the date of receipt of donation and retrospective cancellation of approval of the concerned institution, the deduction claimed in respect of donation cannot be denied. Under the above facts and circumstances, denial of exemption claimed in respect of donation cannot be sustained.

8. With regard to the donation, M/s. Herbicure confirmed the voluntary donation of Rs. 15 lakhs from the assessee. A copy of the trust's Corporation Bank statement in which the donation received was also sent by the trust. Based on the sworn statement of the Founder Director Shri Swapan Ranjan Das Gupta of M/s. Herbicure, wherein, he has admitted that his organization accept the donation and giving back of the same to the donor after deducting a commission @ 5% on the donation amount. However, the Department has not made any effect to get any valid evidence that the organization has given back the donation to the donor after deducting a commission @ 5% on the donation amount Under the above facts and circumstances, the Assessing Officer is directed to ascertain the means as well as actual amount repaid by the donee to the assessee and decide the issue afresh after giving sufficient opportunities of hearing to the assessee. Thus, the ground raised by the assessee is partly allowed for statistical purposes."

A13 Thus, in view of the above submissions, it is respectfully submitted that Assessee is entitled to the benefit of Explanation to Section 35(1)(ii) and the issue is covered by the decision of the Bombay high court in National Leather Cloth Manufacturing Co. v Indian Council of Agricultural Research [200] 241 ITR 482 (Bom) (HC) which has held that

"Law is now well-settled that the assessee is entitled to rely upon the certificate granted by the prescribed authority under section 35(l)(ii) to the institution or association to which it had donated any sum of money for claiming deduction under that section if it was subsisting and valid at the time the donation was made. The retrospective withdrawal and/or cancellation of the certificate will have no effect upon the assessee who has acted upon it when it was valid and operative."

**B.Addition of Rs.75.00.000/- u/s 35(l)(ii) is made by relving on general statement and by violating the Principles of natural justice.**

B1 It is respectfully submitted that, the Assessing Officer has not brought on record any material to suggest that Assessee has received back the money from the donee. The statement of third parties are general in nature. It would not be out of place to mention that the notice u/s 142(1) in fact did not state that it was specifically relying upon the statement of third party but did so in the assessment order. In fact, copy of the statement of third parties has not been provided to the assessee.

**C.Addition of Rs 8,75,00,000/- results in taxing the same income twice which is impermissible in Law.**

C1 It is respectfully submitted that in the order of withdrawal of notification u/s 35(l)(ii) it is stated that SHGPH has offered entire income including income from accommodation entries for

*taxation before the Settlement Commission for AY 15-16. Thus, if donation received by SHGPH has been taxed in the hands of SHGPH, same cannot be taxed in the hands of the Assessee.*

*The Supreme Court in ITO v Bachu Lal Kapoor Kewal Ram [1966] 60 ITR 74 (SC) said that "the Act does not envisage taxation of the same income twice." This view was again reiterated by the Supreme Court in the case of Laxmipat Singhanian v. CIT [1969] 72 ITR 291(SC), where it has said that it is fundamental rule of the law of taxation that unless otherwise expressly provided, income cannot be taxed twice. In CIT v Prabha Debi Bagaria [1991] 192 ITR 416 (Cal)(HC) it was held as under:*

*"6. In this particular case, the ITO had assessed the trust in respect of the Income of half portion of the property in respect of which assessment was already made upon the assessee with regard to his half portion of the property. Thus, the ITO taxed twice in respect of the same income with regard to the same property in the hands of two different persons. The ITO had no jurisdiction to impose tax in respect of the same property and in respect of the same income twice."*

*In view of the above further written submissions, it is prayed that the appeal of the Assessee may be allowed."*

4. After considering the detailed submissions of the assessee and relying on the order passed in the group concern in the case of M/s Borsad Tobacco Co. Pvt. Ltd. Vs. DCIT Central Circle -8(1) for assessment year 2014-15 passed by the coordinate bench in ITA No. 2040/Mum/2018, Ld CIT(A) respectfully following the above decision, allowed the appeal filed by the assessee by observing that he has noted that in similar facts and circumstances, Ld CIT(A) himself, in the case of M/s Borsad Tobacco Co. Pvt Ltd, a group concern for the AY 2014-15, had disallowed the weighted deduction claimed u/s 35(1)(ii) of the Act, on donation made to SHGPH, Kolkatta by way of detailed speaking order. However, he observed that the matter was considered by Hon'ble ITAT, Mumbai in appeal and deleted the disallowance. Therefore, Ld CIT(A) respectfully followed the coordinate bench decision and allowed the appeal filed by the assessee in this case.

5. Aggrieved with the order of the revenue is in appeal before us raising following grounds of appeal:

- "1. On the facts and circumstances of the case and in law, Learned CIT(A) has erred in deleting the addition of Rs.8,75,00,000/- made by the AO in respect of disallowance of deduction u/s. 35(1)(ii) of the Income Tax Act, 1961 ignoring the findings during the survey action u/s 133A of Income Tax Act, 1961 which had conclusively proved that School of Human Genetic and Population Health (SHGPH), Kolkata had been engaged in misusing the provisions of section 35(1)(ii) of Income Tax Act, 1961.

2. On the facts and circumstances of the case and in law, Learned CIT(A) has erred in not appreciating the fact that M/s SGHPH in its application made u/s.245D(4) before the Hon'ble Settlement Commission, Kolkata has offered tax on account of income of Rs.24.19 crores earned from providing bogus donation entries and for which tax along with interest has also been paid by the School of Human Genetic and Population Health (SHGPH), Kolkata.
3. On the facts and circumstances of the case and in law, Learned CIT(A) has erred in not appreciating the fact that the approval granted u/s 35(l)(ii) to M/s. SGHPH ,Kolkata was withdrawn by the central government on finding the activities of the organization as not genuine".

The appellant craves leave to amend or alter any ground and/or add new grounds which may be necessary.”

6. At the time of hearing the Id. D.R brought to our notice the facts of the case in particular para 7 & 8 of the order and supported the findings of the assessing officer whereas Id. A.R brought our notice page 56 of the paper book and submitted that the facts are mutatis mutandis similar to the facts in the present case and submitted that the issue squarely covered in favour of the assessee.

7. Considered the rival submission and material on record. We notice that the facts in the case relied by Ld. AR, which was also respectfully followed by the Id. CIT(A), are similar to facts in the present appeal i.e., the donation was given by the assessee as well as the group concern M/s Borsad Tobacco Co. Pvt. Ltd. to the SHGPH, Kolkatta, for which the registration granted to the above said institution by the revenue and subsequently withdrawn by the CBDT. The issue is, the assessee made the donation before withdrawal of registration by the CBDT. We notice that the coordinate bench has already considered the above issue and held as below:

*“6. After having gone through the facts of the present case as well as considering the orders passed by revenue authorities and orders of the Coordinate Benches of ITAT as mentioned above, we find that as per the facts of the present case, admittedly, the assessee had given donation to SHGPH, which was after the date of recognition of SHGPH u/s 35(1)(ii) of the Act, but before the date of withdrawal of said approval by CBDT in the case of SHGPH. Now, the short point for consideration before us is as to whether the assessee /donor could be denied weighted deduction u/s 35(1)(ii) of the Act due to the subsequent withdrawal of recognition by CBDT with retrospective effect. We find that the issue under consideration has already been addressed /considered by the Coordinate Bench of Kolkata Tribunal in the case of DCIT vrs. Maco Corporation (I) Pvt. Ltd. in ITA No. 16/Kol/2017 dated 14.03.18 for AY 2013-14.*

*7. Apart from this, Ld. AR had also placed on the decisions of Hon'ble Supreme Court in the case of CIT vs Chotatingrai Tea reported in (2003) 126 Taxman 399 (SC) dated 29.10.2002 and State of Maharashtra vs Suresh Trading Company reported in (1998) 1998 taxmann.com 1747 (SC) dated 7.2.1996 which are squarely applicable to the facts of the instant case before us. The ratio decidendi of the said judgements are not being reproduced herein for the sake of brevity. In any case, we find that the provisions of section 35(1)(ii) of the Act vide its Explanation*

*reproduced hereinabove clearly proves that the donor (i.e assessee herein) cannot be affected due to subsequent withdrawal of recognition with retrospective effect. Therefore, respectfully following the provisions of the Act and the decisions of the Coordinate Benches of ITAT as mentioned above and in order to maintain judicial consistency and judicial discipline, we apply the same findings which are applicable mutatis mutandis in the present case. Therefore, we direct the AO to grant deduction u/s 35(1)(ii) of the Act to the assessee as claimed by him for the year under consideration.”*

8. Respectfully following the above decision of the coordinate bench, we do not see any reason to interfere with the findings of the Id. CIT(A). Accordingly, appeal filed by the revenue is dismissed.

Order pronounced in the open court 31.05.2021.

Sd/-

Ravish Sood  
(JUDICIAL MEMBER)

Mumbai, Date: 31.05.2021  
PS: Rohit

Sd/-

S.Rifaur Rahman  
(ACCOUNTANT MEMBER)

**Copy of the Order forwarded to :**

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR “E” Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar  
ITAT, Mumbai