

THE INCOME TAX APPELLATE TRIBUNAL
“G” Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Pavankumar Gadale (JM)

I.T.A. No. 2039/Mum/2018 (Assessment Year 2014-15)

Sopariwala Exports Pvt. Ltd. 21 st Floor, Nirmal Building Nariman Point Mumbai-400 021. PAN : AACCS1620D (Appellant)	Vs.	DCIT, CC-8(1) Room No. 656 Aayakar Bhavan M.K. Road Mumbai-400 020. (Respondent)
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Assessee by	Shri Sandeep Bhalla
Department by	Shri Prabhat Kumar Gupta
Date of Hearing	22.03.2021
Date of Pronouncement	17.06.2021

ORDER

Per Shamim Yahya (AM) :-

This is an appeal by the assessee directed against the order of learned CIT(A) dated 30.1.2018 pertains to A.Y. 2014-15.

2. The issue raised in that learned CIT(A) erred in sustaining the disallowance of item of expenditure under section 35(1)(ii) of the I.T. Act with reference to payment of Rupees Ten crores.

3. Brief facts are that the assessee company is engaged in the business as buyers, purchasers, sellers, distributors, importers, exporters, traders or otherwise dealers of tobacco, tobacco leaves, beedies, cigars, cigarettes, pan masala, tobacco masala, tobacco powder, tobacco pastern agro-based products, flowers, etc.

4. In the course of assessment the Assessing Officer examined the claim of expenditure under section 35(1)(ii) of the Act. He noted that the assessee debited a sum of Rs. 10 crores to P&L account on account of contribution u/s 35(1)(ii) and clubbed it as part of figure of contribution u/s 35 AC (total of Rs. 23 crores) under the head Administrative, Selling, Distribution & Other

expenses and on which deduction has been claimed u/s. 35(l)(ii) of the Act @ 175%. He noted that the payment was made to an institute by the name School of Human Genetics and Population Health (SHGPH), Kolkata. That a Survey action u/s. 133A of the Act, was conducted at the office premises of SHGPH on 27.01.2015. That during the course of survey, it emerged that School of Human Genetics and Population Health is engaged in accepting bogus donation u/s 35(l)(ii) of the Act through various brokers in lieu of commission. That bogus donations were accepted vide cheque/RTGS and thereafter after taking commission, the same was routed back to the donor in the form of cash vide 3-4 layers after bogus billing or other accommodation entries in the books of institute. That the commission rate charged was 12 to 18 per cent. Whereas share of the exempted organization is 8-10 % of total amount and remaining 2 to 8 per cent of total amount was charged by the broker. That as the benefit is 175% of donated amount, a large number of assessee were lured by these brokers. During the course of survey u/s. 133A of the IT Act, the Smt. Moumita Raghavan, treasurer of School of Human Genetics and Population Health since 2002 stated that *".....the source of income for this organization is mainly out of donation from corporate bodies as well as from individuals. In facts, we received donations through cheque, RTGS and simultaneously we issue cheques in the name of some companies and in the process our organization originally received to 8% of donation amount. That the total process has been maintained by brokers....."*. That she also accepted that through brokers they get donation clients and donation money is returned back to the donors by bogus billing after deducting commission of 8%. That subsequently, vide order dated 15th September, 2016 the Central Board of Direct Taxes (CBDT), a body of the Ministry of Finance withdrew the approval granted u/s 35(l)(ii) w.e.f 20.01.2010 i.e the date from which approval u/s. 35(1)(ii) had been accorded to SHGPH vide Notification No. 4/2010 dated 20.01.2010. Para 7 of the order dated 15.09.2016 expressly states that, *"SHGPH has grossly misused provision of sec 35(l)(ii) of the Act by indulging in money laundering through bogus research contributions and repaying them in*

cash. It is found to be involved in illegal activity of proving accommodation entries to the donors in the name of research activities which has enabled the donors to claim false income tax deduction"

5. That hence, vide order sheet entry dated 15.11.2016, the assessee was show-caused to explain why the deduction claimed u/s 35(l)(ii) be not disallowed as SHGPH was found to be indulging in illegal activities, blatantly fraudulent in nature. The assessee replied to the show-cause vide letter dated 16.11.2016 wherein it claimed the benefit of Explanation to Sec 35(l)(ii) which states that deduction shall not be denied merely on the ground that subsequent to the payment, the approval has been withdrawn.

6. The Assessing Officer observed that while the assessee's contention of Explanation to Sec 35(l)(ii), deserves merit, it covers situations in which the approval granted to institutions are subsequently withdrawn for failing to fulfill the requirements as envisaged to be eligible for approval u/s 35(1)(ii). That the situation obtaining in the case of SHGPH is based on pure illegality and misuse of the beneficent provisions of the Act which are meant to promote Scientific research. That hence assessee's contention is rejected. Hence Assessing Officer made disallowance of Rs. 17,50,00,000

7. Upon assessee's appeal learned CIT(A) confirmed the Assessing Officer's action. He inter alia relied upon the same search proceedings as that by the Assessing Officer. He further referred that he had taken into consideration the CBDT notification of withdrawal dated 15.9.2016 wherein it is noted that M/s. SHGPH has not taken any scientific research action.

8. Against the above order assessee is in appeal before us.

9. We have heard both the parties and perused the records. At the outset learned Counsel of the assessee submitted that the issue is covered in favour of the assessee by several decisions of the ITAT on identical facts. He referred to the following decisions :

- Motilal Dahyabhai Jhaveri & sons Vs. ACIT (ITA No. 3453/Mum/2018 dt. 24.4.2019)
- Borsad Tobacco Co. Pvt. Ltd. Vs. DCIT (ITA No. 2040/Mum/2018 dt. 17.6.2019)
- Kitchen Essentials Vs. ACIT (ITA No. 6672&6673/Mum/2013 dt. 15.1.2019)

10. Per contra, learned Departmental Representative relied upon the orders of the authorities below.

11. Upon careful consideration we note that identical issue was decided in favour of the assessee in the aforesaid decisions of the ITAT. We may refer to the decision in the case of Kitchen Essentials (supra) as under :-

“We have heard the rival submissions and perused the material on record including the decisions cited by the Id. AR. The undisputed facts are that the assessee has made donations of Rs.50 lakhs to the "The School of Human Genetics and Population Health" and claimed deduction u/s.35(1)(ii) of the Act equal to Rs.87,50,000/- being 175% of the amount paid. A survey was conducted at the office premises of the school namely, "The School of Human Genetics and Population Health" u/s.133A of the Act on 27.01.2015 and it was observed by the survey team that this institute in connivance with donors, brokers and accommodation entry providers has indulged in a dubious scheme of tax evasion, under which bogus donations were received from donors and money used to be returned back to the donors in lieu of commission, even while the donor availed of deductions u/s.35(1)(ii) of the Act. The registration of the institution was cancelled by the Government of India with retrospective effect and it was held that the institution has misused the exemption. However, under similar facts and circumstances, various coordinate benches have taken the view that mere admission on the part of the office bearers of the body/trust, the assessee cannot be penalized and the amount of donations claimed by the assessee on account of payment to the said school cannot be denied. In the case of Narbheram Vishram Qua, ITA No.42&43/Kol/2018, order dated 27.07.2018, the Kolkata Bench of the Tribunal under similar circumstances and facts has held as under :-

"13 we have given a careful consideration to the rival submissions and perused the materials available on record, we note that the assessee has challenged disallowance of weighted deduction of Rs.4,81,25,000/- for A.Y. 2013-14 and disallowance of weighted deduction of Rs.10,50,00,000/-, for A.Y. 2014-15, claimed by him under section 35(l)(ii) of the Act in respect of the amounts of donations made to two Institutions viz. 'Mativani Institute Experimental Research & Education' (hereinafter referred to as 'Mativani') and 'The School of Human Genetics and Population Health' (hereinafter referred to as 'SHG'). The Assessee Firm in A.Y. 2014-15, made donation of Rs,2,00,00,000/ to Mativani and Rs,4,00,00,000/ to SHG and claimed weighted deduction

of Rs.10,50,00,000 under section 35(l)(ii) of the Income Tax Act, 1961, being 175% of the aggregate sum of Rs.6,00,00,000/- (Rs.2,00,00,000 + Rs.4,00,00,000) donated to these two institutes which were approved by the Central Government for the purposes of section 35(1) (ii) of the Act read with Rule 5C and SE of the Income Tax Rules, 1962. In the assessment year 2013-14, the assessee claimed weighted deduction of Rs.4,81,25,000/- under section 35(1) (ii) of the Act, which is 175% of the amount of donation being the sum of Rs.2,75,00,000/- in respect of the donation given to 'The School of Human Genetics and Population Health'. We note that the Notifications to this effect, that these two institutions viz. 'Matrivani' and 'SHG', were approved by the Central Government for the purpose of section 35(1)(ii) of the Act, was published in the Gazette of India. However, the deduction claimed by the assessee was denied by the Assessing Officer on the basis of the allegations contained in the report of the Investigation Wing of Kolkata that the said donations were bogus. The reasons stated therein, in short, were that statements of some key persons of these two donee institutions were recorded by the Investigation authority in course of survey proceedings in their cases. The said key person, in their statements, accepted to have received donations from various entities in lieu of cash returned to them after deducting commission there from.

14. We note that, during the course of hearing, before us, the Id Counsel for the assessee submitted that, the sums paid to "Matrivani and "SHG, were genuine donations and both of the Institutions were admittedly registered under section 12A of the Income Tax Act, 1961. We note that both of the said two Institutions viz, "Matrivani" and "SHG", are Scientific Research Association approved as such by Central Government under section 35(l)(ii) of the Income Tax Act, 1961 vide Notification, bearing No. 229/2007 (F.NO.203/135/2007/ITA-II) dated 21.08.2007 and Notification No. 4/2010 (F. No. 2B/A/2009,/ITA-II dated 28.01.2010 respectively, published in Official Gazette of India. The assessee categorically denied that it ever received back the amounts of donations in cash or in kind from the said Institutions and from any person whatsoever in lieu of the various amounts donated to these two institutions, we note that in the statements, of key persons and alleged brokers recorded by the Investigation Wing in course of survey proceedings, in their cases and the extracts of which was provided to the assesses in the show cause notice, the name of the assessee firm does not appear anywhere. It is to be noted that none of those persons implicate the assessee to have made bogus donations and that cash was paid to the donors assessee in lieu of the alleged bogus donation after deducting their commission.

We note that the statements of the various parties and persons were recorded behind the back of the assessee and the Assessing Officer did not allow opportunity of cross examination. We note that in absence of opportunity of cross-examination no reliance could be made on such statements to draw any adverse inference against the assessee firm. The assessee firm denied its knowledge of the statements made by these institutes which were relied on by the Investigation Wing and the

Assessing Officer. We note that not providing the opportunity of cross-examination is against the principle of natural justice and for that we rely of-the judgment of Hon'ble Delhi High Court in the case of CIT vs. Dharam Pal Prern Chand Ltd. [2007] 295 ITR 105, 108 (del). We note that on identical facts, the similar proposition was upheld by the Coordinate Bench of Kolkata in the case of Rajda Polymers, ITA No.333/Kol/2017,for Assessment Year 2013-14 wherein it was held as follows:

"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. Herb/cure. 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. Herb/cure 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(l)(ii) of the Act.

15. Now, we deal with the arguments of Id DR for the Revenue. We note that the solitary grievance of the Id DR for the Revenue is that since the registration had been cancelled by the CBDT, with retrospective effect that is, with effect from 1st April 2007, by issuing notification dated 06.09.2016, for both the institutions viz: 'Matrivani' and 'The School of Human Genetics and Population Health', therefore these institutions are not entitled to claim benefit under section 35 (1) (ii) of the Act.

We note that the withdrawal of recognition u/s 35(l)(ii) of the Act in the hands of the payee organizations would not affect the rights and interests of the assesses herein for claim of weighted deduction u/s

35(1)(ii) of the Act, for that we rely on the judgment of the Coordinate Bench, Kolkata, in the case of M/s Maco Corporation India (P) Ltd, ITA No.16/Kol/2017, for Assessment Year 2013-14, wherein it was held as follows:

"29. All the three High Courts after examining the issue, in the light of the object of Section 12A of the Act and Section 21 of the General Clauses Act held that the order of the CIT passed under Section 12A is quasi judicial in nature. Second, there was no express provision in the Act vesting the CIT with power of cancellation of registration fill 01.10.2004; and lastly, Section 21 of the General Clauses Act has no application to the order passed by the CIT under Section 12A because the order is quasi judicial in nature and it is for all these reasons the CIT had no jurisdiction to cancel the registration certificate once granted by him under Section 12A till the power was expressly conferred on the CIT by Section 12AAC3 of the Act w.e.f. 01.10.2004.

We hold that the ratio decidendi of the aforesaid judgement of the Hon'ble Apex Court would squarely be applicable to the facts of the instant case. In fact the assessee's case herein falls on a much better footing than the facts before the Hon'ble Apex Court. In the case before Hon'ble Apex Court, the power of cancellation of registration us 12A of the Act was conferred by the Act on the Id CIT w.e.f. 1.10.2004 and the Hon'ble Apex Court held that prior to that date , no cancellation of registration could happen. But in the instant case, there is absolutely no provision for withdrawal of recognition u/s 35(l)(ii) of the Act. Hence we hold that the withdrawal of recognition u/s 35(l)(ii) of the Act in the hands of the payee organizations would not affect the rights and interests of the assessee herein for claim of weighted deduction u/s 35(1)(H) of the Act."

16. In view of the aforesaid findings in the facts and circumstances of the case and respectfully following the various judicial precedents relied upon hereinabove, we direct the Id AO to grant deduction u/s 35(1)(ii) of the Act, in the sum of Rs. 4,81,25,000/- for A. Y, 2013-14 and in the sum of Rs. 10,50,00,000/-, for A. Y. 2014-15, as claimed by him under section 35(l)(ii) of the Act in respect of the amounts of donations made to two Institutions viz. 'Matrivani Institute Experimental Research & Education' and The School of Human Genetics and Population Health'. Accordingly, the Grounds 1 to 4 raised by the assessee for A.Y. 2013-14 and the Grounds 1 to 5 raised by the assessee for A. Y. 2014-15 are allowed."

9. Similarly in various other decisions the issue has been decided by the Tribunal in favour of the assessee by disregarding the revenue's contentions that the registration of the school has been cancelled by the CBDT with retrospective effect by issuing Notification and, therefore, the assessee is not entitled to benefit u/s.35(1)(ii) of the Act. The facts before us being materially same involving the same school, namely, "The School of Human Genetics and

Population Health", we, therefore, respectfully following the decisions of the coordinate benches of the Tribunal, hold that the deduction u/s.35(1)(ii) of the Act cannot be denied to the assessee. Accordingly, we direct the AO to grant deduction u/s.35(1)(ii) of the Act. Appeal of the assessee for the assessment year 2013-2014 (ITA No.6672/Mum/2017) is hereby allowed."

12. We note that facts in the present case are identical. The withdrawal of the approval to the payee has taken place subsequent to the payment by the assessee. The assessee's case duly follows under section 35(1)(ii) of the Act which read as under :-

Section 35(1)(ii) : an amount equal to one and one half times of any sum paid to a research association which has as its object the undertaking of scientific research or to a university, college or other institution to be used for scientific research :

Provided that such association, university, college or other institution for the purposes of this clause—

(A) is for the time being approved, in accordance with the guidelines, in the manner and subject to such conditions as may be prescribed; and

(B) such association, university, college or other institution is specified as such, by notification in the Official Gazette, by the Central Government :

Provided further that where any sum is paid to such association, university, college or other institution in a previous year relevant to the assessment year beginning on or after the 1st day of April, 2021, the deduction under this clause shall be equal to the sum so paid;

13. Hence the payee was duly approved when the payment was done. By no stretch of imagination it can be said that the assessee could have done the impossible and known that subsequently the approval will be withdrawn. Accordingly, following the above said precedent and noting that it is not the case that Hon'ble Bombay High Court has reversed the decision, we set aside the order of authorities below. The assessee is therefore held to be eligible for deduction under section 35(1)(ii) of the Act.

15. In the result, appeal filed by the assessee is allowed.

Pronounced in the open court on 17.6.2021.

Sd/-
(PAVANKUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 17/06/2021

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

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