

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'F' BENCH, MUMBAI**

BEFORE

SRI SANJAY GARG, JUDICIAL MEMBER

&

SRI OM PRAKASH KANT, ACCOUNTANT MEMBER

I.T.A. No. 241/Mum/2022

Assessment Year: 2018-19

M/s JSW Cement Ltd.....Appellant
[PAN: AABCJ 6731 B]

Vs.

Addl.CIT/Dy. ACIT, Mumbai.....Respondent

Appearances by:

Sh. Rakesh Joshi, appeared on behalf of the Assessee.

Sh. S N Kabra, appeared on behalf of the Revenue.

Date of concluding the hearing : May17th, 2022

Date of pronouncing the order : August 12, 2022

ORDER

Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 23.12.2021 of the National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as 'CIT(A)'] passed under Section 250 of the Income Tax Act (hereinafter referred to as the 'Act').

2. The assessee in this appeal has taken the following grounds of appeal:

"1.On the facts and circumstances of the case as well as in law, the Learned CIT(A) has erred in restricting the action of Learned Assessing Officer in making a disallowance of Employees

Contribution to PF of Rs.30,49,649/- under Section 36(1)(va) of the Income Tax Act, 1961.

2. On the facts and circumstances of the case as well as in law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in making a disallowance of corporate social responsibility (CSR) expenses of Rs.3,01,00,000/- under Section 37 of the Income Tax Act, 1961.

3. The appellant craves leave to add, amend, alter or delete the said ground of appeal.”

Ground No. 1:

3. At the outset, the ld. Counsel for the assessee has submitted that there was a delay in depositing employee's as well as employer's contribution to the Employee's Provident Fund/ESI fund. However, the amount was deposited before the due date of the filing of the return. The ld. Counsel has submitted that this issue is squarely covered by the decision of the Hon'ble Jurisdictional Calcutta High Court in the case of *CIT, Kolkata vs. M/s Vijay Shree Limited* 43 taxman.com 396(Cal) which has been, further, followed by the Coordinate Calcutta Bench of this Tribunal in the case of *Harendra Nath Biswas vs. DCIT* in ITA No.186/Kol/2021 by the order dated 16.07.2021. The ld. D/R could not show any decision contrary to the case law cited by the ld. Counsel for the assessee.

3.1. We find that the issue is covered in favour of the assessee as the assessment year involved is AY 2017-18 and the Explanation-5 inserted by Finance Act, 2021 to Section 43B w.e.f. 01.04.2021 is not applicable to the assessment year under consideration. The relevant portion of the Coordinate Bench decision of the Tribunal in the case of *Harendra Nath Biswas vs. DCIT (supra)* for the sake of reference is reproduced as under:

“2.The sole grounds of appeal raised by the assessee is against the Ld. CIT(A) in confirming the action of AO who disallowed/added back a sum of Rs. 1,10,62,263/- on account of delayed deposit of employees contribution to PF and ESI under Section 36(1)(va) read with Section 2(24)(x) of the Income Tax Act, 1961 (hereinafter referred to as the Act) despite the assessee contributing/ depositing the same before the due date of filing of return of income under Section 139(1) of the Act.

3.Brief facts of the case is that the CPC while processing the return disallowed/added Rs. 1,10,62,263/- on the ground that employees contribution to employees provident fund (EPF) and ESI fund has been deposited beyond the due date applicable under the provision of ESI Act, 1948 and EPF Act by invoking the provision of Section 36(1)(va) of the Act. Aggrieved by this disallowance, the assessee filed the appeal before the national Faceless Appeal Centre (NFAC), Delhi where the Ld. CIT(A) has taken note of the assessee’s submission that no disallowance was warranted in respect of delayed deposit of employees contribution to EPF /ESI fund since the assessee has deposited the employees contribution in respect of both these Acts (EPF & ESI Act) before filing the return of income and relied on the various judicial decision including that of the jurisdictional Hon’ble High Court of Calcutta in the case of CIT vs. Vijayshree Ltd. in [2014] 43 taxman.com 396(Cal). However, the Ld. CIT(A) did not accept the contentions of the assessee in this regard and by relying on the Explanation-5 below Section 43B which was brought in by Finance Act, 2021 to deny the claim of assessee. Therefore, the assessee is before us by preferring this appeal.

4.We have heard both the parties and perused the record. First of all, we do not countenance this action of the Ld. CIT(A) for the simple reason that the Explanation 5 was inserted by the Finance Act, 2021, with effect from 01.04.2021 and relevant assessment year before us is AY 2019-20. Therefore, the law laid down by the Jurisdictional Hon’ble High Court will apply and since this Explanation-5 has not been made retrospectively. So we are inclined to follow the same and we reproduce the order of Hon’ble Calcutta High Court in the case of Vijayshree Ltd. supra wherein the Hon’ble Calcutta High Court has taken note of the Hon’ble Supreme Court decision in CIT vs. Alom Extrusion Ltd. reported in 390 ITR 306. The Hon’ble Calcutta High Court’s decision in Vijayshree Ltd. supra is reproduced as under:

“This appeal is at the instance of the Revenue and is directed against an order dated 28th April, 2011 passed by the Income Tax Appellate Tribunal, “A” Bench, Kolkata in ITA No. 1091/Kol/2010 relating to assessment year 2006-07 by which the Tribunal dismissed the appeal preferred by the Revenue against the order of CIT(A).

The only issue involved in this appeal is as to whether the deletion of the addition by the AO on account of Employees ‘Contribution to ESI and PF by invoking the provision of Section 36(1)(va) read with Section 2(24)(x) of the Act was correct or not.

It appears that the Tribunal below, in view of the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., reported in 2009 Vol.390 ITR 306, held that the deletion was justified.

Being dissatisfied, the Revenue has come up with the present appeal.

After hearing Mr. Sinha, learned advocate, appearing on behalf of the appellant and after going through the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., we find that the Supreme Court in the aforesaid case has held that the amendment to the second proviso to the Sec 43(B) of the Income Tax Act, as introduced by Finance Act, 2003, was curative in nature and is required to be applied retrospectively with effect from 1st April, 1988.

Such being the position, the deletion of the amount paid by the Employees’ Contribution beyond due date was deductible by invoking the aforesaid amended provisions of Section 43(B) of the Act.

We, therefore, find that no substantial question of law is involved in this appeal and consequently, we dismiss this appeal.

Urgent xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.”

In the light of the aforesaid discussion we do not accept the Ld. CIT(A)’s stand denying the claim of assessee since assessee delayed the employees contribution of EPF & ESI fund and as per

the binding decision of the Hon'ble High Court in Vijayshree Ltd. (supra) under Section 36(1)(va) of the Act since assessee had deposited the employees contribution before filing of Return of Income. Therefore, the assessee succeeds and we allow the appeal of the assessee."

3.2. In view of the above proposition of law and the issue being squarely covered in favour of the assessee, the impugned addition made in respect of the above issue by the lower authorities is ordered to be deleted.

Ground No. 2:

4. Vide ground no. 2 the assessee has agitated the action of Ld. CIT(A) in confirming the disallowance made by Ld. Assessing Officer (in short "AO") in respect of Corporate Social Responsibility (CSR) expenses of Rs. 3,01,00,000/- under Section 37 of the Act.

4.1. During the assessment proceedings the ld. AO noted from the profit and loss account that during the year under consideration the assessee had incurred expenditure of Rs. 3,01,00,000/- on account of Corporate Social Responsibility. The ld. AO taking note of the provisions of Section 135 of Companies Act, held that it was the statutory obligation of the assessee company to take care of the environment, society at large and contribute to the wealth of the nation. He further observed that as per the Explanation 2 to Section 37 of the Income Tax Act as amended by Finance Act, 2014, any expenditure incurred by an assessee on the activities relating to Corporate Social Responsibility as referred to in Section 135 of the Companies Act shall not be deemed to be an expenditure incurred by the assessee for the purpose of the business or profession. The ld. AO

accordingly disallowed to the aforesaid expenditure being not admissible under the relevant provisions of Section 37 of the Income Tax Act.

In appeal, the ld. CIT(A) confirmed the disallowance so made by the AO. The assessee has, thus, come in appeal before us.

4.2. At the outset, ld. Counsel for the assessee has submitted that the aforesaid expenditure was incurred by the assessee company for the purpose of business. He, in this respect has invited our attention to the submissions made before the ld. CIT(A), which read as under:

“Further it is submitted that the assessee company has to maintain adequate and cordial relationship with the local community, land owners and authorities in order to get their acceptability for the growth and sustenance of an organization. Most of assessee company’s employees belong to local place where business facilities are situated. It becomes necessary to uplift their living standards, educate them and develop their skills so that company should not face any issues to get the required skilled manpower even in the future. Further, in order to attract, retain, motivate employees, increase employee morale and give a sense of belonging to the organization, the assessee company took initiatives to indulge itself in social activities for its benefit. The assessee was of an opinion that good employee and community relations can lower its employee turnover rate and improve employee motivation. Additionally, it will help firms in attracting new staff members. Hence in order to achieve aforesaid objectives, the company had extended its arm to provide Medical and other facilities to the employee, land owners and villagers so that the employee and their relatives can live healthy and educated life which will in turn facilitate the business to grow and reoccurring problems like lock-outs, strikes, union issues and local authority clearance could be avoided. The expenses have been essentially incurred in location and in issues that will help the company grow alongside with the said activity. The said expenses incurred are thus incurred wholly and exclusively for the purpose of the business of the assessee company and hence we contend that the same are duly allowable. Under Income Tax Act, what is to be

seen is that the sum claimed as expenses should have been incurred wholly and exclusively for the purpose of the business of the entity and should not be in the nature of being capital or personal. It would be pertinent to note that these expenses are also imperative to incur so as to win the trusts of the locals so that there is no resistance from them which is done so in rural area and to ensure that the operations are conducted in an amicable manner without any roadblocks or obstruction by them. Hence it is humbly submitted that the same are revenue expense, duly allowable.”

4.3. Ld. Counsel for the assessee has, further, submitted that the Explanation 2 to Section 37 of the Act was not applicable in this case as the aforesaid expenditure was incurred by the assessee as over and above its statutory Corporate Social Responsibility as required under Section 135 of the Companies Act. He, in this respect, has relied upon the notes to financial statement of the company for the year ended on 31.03.2018 wherein, under column “O”, the details of Corporate Social Responsibility expenditure have been mentioned as under:

<i>Particulars</i>	<i>Rs. Crores</i>	
	<i>As at 31st March, 2018</i>	<i>As at 31st March, 2017</i>
<i>Amount required to be spent as per Section 135 of the Act</i>	-	-
<i>Amount spend during the year on:</i>		
<i>(i) Construction/ acquisition of an asset</i>	-	-
<i>(ii) On purpose other than (i) above</i>	3.01	2.52
<i>Total</i>	3.01	2.52

4.4. The Ld. Counsel for the assessee inviting our attention to the above chart has submitted that the assessee was not required to spend Corporate Social Responsibility expenditure under Section 135 of the Companies Act. The aforesaid expenditure was incurred by the assessee in addition to any statutory liability to incur the same. He has, further, referring to above submissions,

submitted that the aforesaid expenditure was incurred for the upliftment of living standards, education and development of skills of the locals for peaceful existence with the neighbouring locality to attract, retain and motivate employees and to create a healthy working atmosphere. He, in this respect, has relied upon the decision of the Hon'ble Gujarat High Court in the case of *PCIT vs. Narmada Valley Fertilizer and Chemicals Ltd.* reported in [2020] 121 taxmann.com 82 (Gujarat) wherein the Hon'ble Court, in similar circumstances, held that in respect of such expenditure where the disabling provision of Explanation 2 to Section 37(1) of the Act is not attracted, then such expenditure in respect of discharge of Corporate Social Responsibility on a voluntary basis and for the purpose of promotion of business and peaceful existence and incurred for the welfare of the society to fulfil its social obligations considering the nature of business carried out by the assessee is to be held as expenditure incurred for business purposes and will be allowable deduction under Section 37 of the Act.

4.5. The ld. D/R, on the other hand, has submitted that the assessee has never taken this plea before the lower authorities that the aforesaid expenditure incurred by the assessee was over and above its a statutory Corporate Social Responsibility as provided under Section 135 of the Companies Act. He, therefore, has submitted that the lower authorities have rightly disallowed the aforesaid expenditure as per the provisions of Section 37 of the Act.

4.6. We have considered the rival contentions of the ld. Representatives of the parties. Before proceeding further, it will

be relevant to reproduce here the relevant provisions of Section 135 of the Companies Act.

“Section 135 of Company Act, 2013:

(1) Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.

(5) The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two percent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy: Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities: Provided further that if the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub-section (3) of section 134, specify the reasons for not spending the amount. Explanation. —For the purposes of this section

—average net profit shall be calculated in accordance with the provisions of Section 198.”

4.7. As per the aforesaid provisions of Section 135 of the Companies Act, a company, having net worth of Rs. 500 Cr. or more, or turnover of Rs. 1000 Cr. or more, or net profit of Rs. 5 Cr. or more during any financial year, is obliged to spend at least 2% of the average net profits of the company made during the three immediate preceding financial years on Corporate Social Responsibility.

4.8. At this stage, it will also be relevant to reproduce Section 37(1) of the Act as amended vide Finance Act, 2014 with effect from 01.04.2015.

“Section 37(1) of the Income Tax Act:

Any expenditure (not being expenditure of the nature described in section 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head “Profits and gains of business or profession”.

[Explanation 1- For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance or allowance shall be made in respect of such expenditure]

[Explanation 2.- For the removal of doubts, it is hereby declared that for the purpose of sub-section (1), any expenditure incurred by an assessee on the activities relating to corporate social responsibility referred to in section 135 of the Companies Act, 2013 (18 of 2013) shall not be deemed to an expenditure incurred by the assessee for the purposes of the business or profession]”

4.9. As per the aforesaid explanation 2 to Section 37(1) of the Act, any expenditure incurred on Corporate Social Responsibility as referred to in Section 135 of the Companies Act shall not be deemed to be an expenditure incurred by the assessee for the purpose of business or profession and the same as such will not be allowed as an expenditure for computing the net profits for the purpose of Income Tax Act.

4.10. Now, coming to the chart as reproduced in para 4.3 above, the assessee has mentioned the amount required to be spent as Corporate Social Responsibility under Section 35 of the Act as “ - ” which as per the Ld. AR means ‘Nil’. However, a perusal of the statement of profit and loss account for the year under consideration reveals that the assessee has shown a profit of Rs. 106.18 Cr. in accordance with the provisions of the

Companies Act. Since the assessee is having the net profit of more than Rs. 5 Cr. during the financial year under consideration, the assessee, as per the provisions of Section 135 of the Companies Act, was supposed to incur at least 2% of the average net profits of the company as calculated under companies Act of three immediately preceding financial years on Corporate Social Responsibility. The Id. Counsel for the assessee has not demonstrated as to how the assessee was exempted from incurring such expenditure on Corporate Social Responsibility.

4.11. A perusal of the chart also shows that for the year ended on 31.03.2017 the assessee has again shown its liability under Section 135 of the Companies Act on Corporate Social Responsibility as 'NIL'. Further, the assessee has also relied upon the assessment order for the AYs 2015-16, 2016-17 & 2017-18 to submit that such expenditure incurred by the assessee on Corporate Social Responsibility has been allowed by the Id. AO in earlier years.

However, there is no pleading that the company has spent more than the amount as it was required to spend as per the provisions of Section 135 of the Companies Act in an earlier years which, as per the provisions of sub-Section 5 to Section 135 of the Companies Act, can be set off against the requirement of Corporate Social Responsibility in succeeding three financial years. Hence, there is nothing on the file to show that the assessee had incurred more than the required expenditure on CSR in earlier years which could have been set-off against the liability on CSR of the current year.

Even otherwise, there is nothing on record to show that the assessee company was exempt from spending any amount on Corporate Social Responsibility as required under Section 135 of the Companies Act.

4.12. In view of this, the matter is restored to the file of the ld. AO to verify the aforesaid contention of the assessee that the assessee was not required to spend any amount under Section 135 of the Companies Act on Corporate Social Responsibility and, further, that whether the amount spent by the assessee on Corporate Social Responsibility during the year was over and above its statutory liability under Section 135 of the Companies Act. If the above contention of the ld. Counsel for the assessee is found correct then the ld. AO will allow the aforesaid expenditure on Corporate Social Responsibility as business expenditure of the assessee. However, if it is found that the aforesaid plea of the assessee that the Corporate Social Responsibility expenditure was over and above its statutory obligation under Section 135 of the Companies Act is wrong and false then the finding of the ld. AO disallowing the aforesaid expenditure being hit by the provisions of Explanation 2 to Section 37 of the Act will stand affirmed. Apart from that, the ld. AO shall re-open the assessment of the assessee for AYs 2015-16, 2016-17 & 2017-18 wherein the assessee allegedly has claimed the aforesaid Corporate Social Responsibility expenditure as allowable business expenditure on the plea that the same was over and above its statutory liability. The ld. AO then will frame re-assessment in the aforesaid cases in accordance with law.

5. Ground no. 3 is general in nature and does not require any adjudication.

6. In the result, subject to the observations made/ directions given above, the appeal of the assessee is treated as allowed for statistical purposes.

Order is pronounced in the open court on 12.08.2022.

Sd/-
[Om Prakash Kant]
Accountant Member

Sd/-
[Sanjay Garg]
Judicial Member

Dated:12.08.2022

Bidhan (P.S.)

Copy of the order forwarded to:

- 1. M/s JSW Cement Ltd., 5th Floor, JSW Centre, Bandra Kurla Complex, Bandra (East), Mumbai, Maharashtra-400051.**
- 2. Addl. CIT/Dy. ACIT, Mumbai.**
3. CIT(A)-National Faceless Appeal Centre (NFAC), Delhi.
4. CIT-
5. CIT(DR), Mumbai Benches, Mumbai.

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches,
Kolkata