

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC", MUMBAI**

**BEFORE SHRI KULDIP SINGH, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA.NO. 4329/MUM/2019 (A.Y: 2014-15)

Kirit Gordhandas Shah B-1601 Lake Castle, Hiranandani Gardens, Powai Mumbai- 400076 PAN: AAIPS9216J	v.	Income Tax Officer-26(2)(1) Bandra- Kurla Complex Mumbai- 400051
(Appellant)		(Respondent)

Assessee Represented by	:	Shri Sanjay Thakkar
Department Represented by	:	Shri. Saurabh Kumar Rai
Date of Hearing	:	09.01.2023
Date of Pronouncement	:	03.04.2023

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of Learned Commissioner of Income Tax (Appeals)-38, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 17.01.2019 for the A.Y.2014-15.

2. Brief facts of the case are, assessee filed its return of income on 26.07.2014 declaring total income of ₹.18,45,270/-. Subsequently, assessee filed revised return of income on 04.09.2015 declaring total

income of ₹.19,20,270/-. Based on the information received from Pr. Director of Income-tax (Investigation), Kolkata that certain institutions vide a network of brokers are engaged in the bogus donation u/s.35(1)(iii) of the Income-tax Act, 1961 (in short "Act). Assessing Officer observed that as per the information, assessee is one of the beneficiary of such transactions and assessee has given bogus donation of ₹.1,00,000/- during the current Assessment Year to Scholl of Human Genetics & population Health, Kolkata (in short "SHGPH"), and accordingly, claimed benefit @175% of the donated amount. Accordingly, the assessment was reopened u/s. 147 of the Act after recording the reasons for reopening and notices u/s. 148 of the Act was issued on 30.09.2016 and duly served on the assessee. Vide letter dated 01.09.2017 assessee made request to provide the reasons for reopening and the same was provided vide letter dated 04.09.2017. Subsequently, notices u/s. 143(2) and 142(1) of the Act were issued and served on the assessee. In response authorised representative of the assessee attended and filed the relevant information as called for.

3. During the assessment proceedings notice u/s. 131 of the Act was issued to the assessee and during the course of statement recorded u/s.131 of the Act on 26.09.2016 assessee submitted and stated that the

donation given to the SHGPH was bonafide and in good faith. The Assessing Officer observed that, however, during the course of statement recorded no receipt/acknowledgement was produced from SHGPH for the donation made.

4. Further, Assessing Officer discussed the background and modus operandi of the activity of the above said trust in his order at Page No. 3 to 7 of the order. Further, Assessing Officer based on the statement recorded u/s. 131 of the Act of the assessee, came to the conclusion that the above donation is non-genuine and assessee has availed the benefit for higher deduction of tax for the purpose of tax evasion. Based on the investigation report and by applying preponderance of probabilities he has disallowed ₹.1,00,000/- claimed by the assessee u/s. 80GGA of the Act and he observed that assessee has withdrawn the benefit u/s. 35(1)(2) of the Act by filing revised return of income.

5. Aggrieved, assessee filed the appeal before the Ld.CIT(A) and filed detailed submissions, for the sake of clarity it is reproduced below: -

"6.1 The assessee filed his original return of income on 26.07.2014 declaring total income of Rs.18,45,180/-. Subsequently, assessee revised his return of income on 04/09/2014 with income of Rs. 19,20,270/-. The assessee had received notice u/s.142(1) and u/s.148, the assessee asked to provide reasons for reopening of the case and Ld. AO issued the same. The assessee had raised certain objections in connection with reopening of the case and in response

to same, the A.O has not passed the rejection order. Without prejudice to above, the assessee agreed to co-operate in the assessment. The assessee has made donation of Rs.1,00,000/- to School of Human Genetics and Population Health, Kolkata hereby known as SHG&PH. The Assessee has claimed weighted deduction in his Original return of income under 35(1)(ii) i.e Rs.1,75,000. However, later on when he realised that there is no business Income he filed revised return and wherein he claimed the deduction is claimed u/s. 80GGA and thereby reversed the original deduction and paid the necessary tax due on the same. The Ld. AO has called for various submissions which were submitted by the assessee on time to time basis. The Ld. AO has erred in passing the order therefore the assessee has filed the appeal. The grounds of appeal filed by the assessee are discussed in detail herewith.

6.2 With regard to the first ground of appeal it is submitted that the Ld. AO has passed the order under sec. 143(3) r.w.s 148 of the Income tax Act, 1961 without knowing all the facts, where the Ld. AO still had time to pass the order. The Ld. AO has merely relied upon the information received from DGIT, Kolkata. The AO did not consider the details submitted the assessee and passed the order under sec.143(3) r.w.s 148 of the Income Tax Act, 1961.

6.3 With regard to the second ground, it is contended that on the facts and circumstances of the case and in law the Ld. AO erred in determining the income at Rs. 20,20,270/- as against the returned income of Rs. 19,20,270/-. The addition made by the A.O. is purely on assumption basis without bringing any fresh evidence on record. The assessee had filed his original return declaring income of Rs. 18,45,180/- and claimed deduction of Rs.1,75,000/- u/s 35(1)(ii). But on realizing that there is no business income, the assessee reversed the deduction u/s 35(1)(ii) and claimed deduction u/s.80GGA of Rs. 1,00,000/- (which is the donation amount) by revising the return and declaring the income of Rs. 19,20,270/-. The AO did not consider the income of Rs. 19,20,270/- and made addition of Rs.1,00,000/- thereby disallowing the deduction of donation.

6.3.1 In today's world the donations are offered on line based on the face value of the trust and activities conducted by them. The appellant has given donation to said institution in good faith after reading about such institution on internet. The has entered into bonafide transaction and donation which was offered by the assessee was in good faith after ensuring that the institute is having all approvals in place at the time of making donation. The appellant had read about the said institution, the objects of the said Institution on internet. The assessee has made the donation on the basis of objects of the said institution which were in line with the nature of activity which encouraged and motivated the assessee to offer the

donation. It is bonafide belief that once approval is granted by CBDT, contribution can be safely made to such institution. The assessee has acted under bonafide belief that institution to which donation was made is engaged in research activity as per its objects, after checking the details about the organization on internet. In P.R. Rolling Mills Pvt. Ltd. Vs. Deputy Commissioner of Income tax, it is stated that where the appellant has made the donation, and the society is having a valid approval from the appropriate authorities then the claim of the appellant could not be denied based on any event having occurred subsequently ie. in next financial year. Therefore, donation made by the assessee is genuine.

6.3.2 The AO has failed to understand that assessee has given donation as charity and not to avail a higher deduction for the purpose of tax evasion. In original return of income the assessee had claimed higher deduction at a specified rate u/s 35(i)(ii) but on realizing of mistake assessee revised his return of income by claiming actual amount of donation under section 80GGA. The AO has formed an opinion that the donation claimed to have been made to School of Human Genetics and Population Health, Kolkata is non genuine and has been made with the sole motive to avail weighted deduction u/s.35(1) of the Income-tax Act, 1961 to lower the tax liability. Although the assessee has claimed deduction u/s 35(1)(ii) in original return but after realizing the facts the assessee has revised his return by offering tax on Rs.75,000/- Therefore, it is clear that the assessee did not have any motive to lower the tax liability. It should be noted that donation made by assessee is genuine and has not made for tax evasion or for tax benefit. Without bringing any corroborative evidence on record the AO formed opinion based on assumption that the assessee offered donation with the intention of tax evasion. The quantum of donation is quite reasonable in comparison of total income offered by the assessee.

6.3.3 The AO has not considered the details submitted during the course of hearing and passed the order. The Appellant has submitted all supporting documents which are sufficient to prove that donations given by assessee was genuine. The had submitted all the documents pertaining to the claim of deduction u/s 35(1)(ii) of the Act before the AO. But the AO has not considered the same and passed the order relying on the information received from DGIT, Kolkata. The assessee has submitted donation receipt, copy of cheque, copy of renewal letter and copy of gazette which are good enough to prove the genuineness of the transactions.

6.3.4 The AO has stated that assessee has received the refund of the said donation in cash without proving the same and whereas the assessee has not received any such cash or refund. The AO has no proof that donation amount is refunded back to the assessee in cash

or by any other mode and there is no such documentary evidence for the same. No cash trail or any evidence was found on the record by the AO except the information received from DGIT. Moreover AO passed the order disallowing the deduction of donation without giving any opportunity of cross examination. The Hon'ble Apex Court judgment in the case of Andaman Timber Industries (324) ELT 641 clearly stated that the requirement of allowing cross- examination of witnesses was held as in-dispensable for adjudication. In the case of CIT vs. D.M. Joshi & Others (1999) 239 ITR 0315, it is stated that the conclusions reached or inferences drawn upon incomplete examination tantamount to infringement of the fundamental right of equality of the Petitioner guaranteed under Article 14 of the Constitution of India. Therefore the assessee should be given the opportunity of cross examination to prove the genuineness of donation offered under bonafide belief.

6.4 As per Page No. 1 Para (iii), the Ld. AO has stated in its order that the assessee is one such person who has availed accommodation entries of bogus donations and benefit is 175% of donated amount. The Ld. AO has not considered the revised return wherein the 100% deduction has claimed by the assessee u/s. 80GGA. The provision of sec 80GGA permits deduction in respect of certain donations for scientific research or rural development in computing the total income of an assessee, any sum paid by the assessee in the previous year 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 institution is for the time being approved for the purposes of clause (ii) of sub-section (1) of section 35;

6.4.1 Thus it is clear from the above provision that the assessee has acted as per the provisions of the law. The donation made by the assessee is genuine. The Ld. AO failed to recognize the fact that assessee was under bonafide belief and made proper due diligence before granting donation to M/s. School of Human Genetics and Population Health which was duly recognized u/s. 35(1)(ii) of the Act at the time of giving donation. If subsequent notification cancelled registration u/s 35(1)(ii) of the Act, the same did not affect donation made by assessee when said notification was in force.

6.4.2 As per Page no. 3 Para 5.1 (it) the Ld. AO has stated that vide summons issued u/s. 131 of the IT Act, 21.09.2016 requested to attend personally and furnish details in support of assessee's claim of deduction u/s 35. The assessee has appeared personally and given all the explanations regarding donation made to SHG&PH. Further, appellant has made all the submissions which shows the genuineness

of the donation made. But the AO has not considered the same and has merely passed the order.

6.4.3 As per Page no. 3 Para 5.2 (ii) the Ld. AO has stated that Bogus donations are being taken vide cheque/RTGS and thereafter after taking commission, the same is routed back to the donor in the form of cash vide 3-layers. For this explanation, the assessee has relied upon the Judgment of Hon'ble Kolkata ITAT in the case of Rajda Polymers vs. DCIT in ITA No. 333/Kol/2017 (case law PB 96-102), wherein Hon'ble Bench has observed that "...Merely because the donee goes to Hon'ble Settlement commission and declares some additional income thereon, it does not automatically implead the assessee herein on the negative side and the express provisions of the Act cannot be ignored thereon. There cannot be any malafide that could be attributed on the assessee herein. It was submitted that the assessee was under the bonafide belief and had made proper due diligence before granting donation to HHBRF which was duly recognized u/s 35) of the Act at the time of giving donation. We hold that if the subsequent notification cancelled the registration u/s 35(1)) of the Act, the same does not attract the donation made by the assessee when the said notification was in force. The bonafide belief of assessee donor at the time of granting donation to an institute on the basis of recognition then available, cannot be disturbed by subsequent event. This is more clearly spelt out in the provisions of the Act itself by way of explanation to section 35(1) of the Act. Hence even as per the provisions of the Act, the denial of deduction u/s 35(1)(ii) of the Act is not in order..."

The assessee has not received the amounts back through cash or in kind from the said institutions and from any person whatsoever in lieu of the various amounts donated to these institution. The AO has no corroborative evidence that the assessee has received the amount in cash.

6.4.4 As per Page no.5 para no.5.3(ii) the AO has stated that assessee failed to clearly establish how this donation came to materialize in an unconnected city (Kolkata). It is the outlook of assessee as to which institution it wishes to donate and AO or other authority cannot ask to make the donation to any specified institute. It is also relevant to state that the institute to whom assessee has made the donation had a valid approval in force at the time of making donation. Various Hon'ble Courts have held that any retrospective changes or orders having retrospective effect have to be passed in rarest cases where it is very much warranted. Moreover the scope of retrospective order is limited to the person/entity concerned (here in this case the society i.e. SHGPH). This retrospective effect cannot in any way be extended to third parties and doing so would not only be against the settled position of law but would also be clearly doing in-

justice to third parties who acted in bonafide manner. Thus further adverse action in the hands of third parties (like that of assessee) on account of retrospective notification passed in the case of institute be held as unjust and unlawful.

6.5 *The assessee has relied on the following judgments where the facts and situation are similar to that of assessee and the copy of the same are enclosed herewith for your reference.*

> *Ramdas Maneklal Gandhi Vs. The Union of India (2000(1) BomCR 581, 2000 241 ITR 437 Bom, 2000(2) Mhlj 74)*

> *Vora Financial Services P. Ltd. Vs. Assistant Commissioner of Income Tax (Bombay Tribunal B.R. Baskaran, AM & Pawan Singh, JM. IT A No. 532/Mum/2018.*

> *P.R. Rolling Mills Pvt. Ltd. Vs. Deputy Commissioner of Income tax (Jaipur Tribunal Vijay Pal Rao, JM. & Bhagchand, AM. ITA No. 529/JP/2018) -*

> *Deputy Commissioner of Income Tax vs. MACO Corporation (India) Pvt. Ltd. (Kolkata Tribunal M. Balaganesh, AM S S.S. Vishwanethra Ravi, JM. ITA No. 16/Kol/2017*

> *Rajda Polymers vs. Deputy Commissioner of Income tax (Kolkata Tribunal M. Balaganesh, AM S S.S. Vishwanethra Ravi, JM. ITA No. 333/Kol/2017*

> *Santosh suresh kumar agarwal vs ACIT, Circle-36, Kolkata (ITA No. 1162/Kol/2018)*

6.6 *In the light of the above grounds, appellant prayed that the above disallowance be deleted as contrary to facts and law and income as per the return be restored as assessable u/s 143(3) r.w.s 147 of Income Tax Act, 1961. Kindly decide the case on the basis of provisions of the law."*

6. After considering the submissions of the assessee, Ld.CIT(A) dismissed the grounds raised by the assessee and sustained the addition made by the Assessing Officer.

7. Aggrieved assessee is in appeal before us raising following grounds in its appeal: -

"1. On the facts and in the circumstances of the case and in law the order passed by the Hon'ble CIT(A) is invalid and bad in law.

2. The Ld. AO as well as Hon'ble CIT(Appeal) failed to interpret and apply the explanation to Section 80GGA (2) which states that Explanation.-"The deduction, to which the assessee is entitled in respect of any sum paid to a research association, University, college or other institution to which clause (a) or clause (aa) applies shall not be denied merely on the ground that subsequent to the payment of such sum by the assessee, the approval to such association, University, college or other institution referred to in clause (a) or clause (aa). as the case may be, has been withdrawn."

Despite the provisions of the law is so clear, the Hon'ble CIT (Appeal) has confirmed the addition (i.e. addition of Rs.1,00,000/-) made by Ld. AO. The addition is made as well as confirmed without bringing any corroborative evidence on record.

3. The Hon'ble CIT(Appeal) has failed to understand the genuineness of the donation made by the assessee even though the assessee has provided all the details which were sufficient to prove that the donation made by the assessee is genuine. The Hon'ble CIT(Appeal) has not considered the details which were submitted by the assessee during the course of hearing and passed the order. The Hon'ble CIT(Appeal) has failed to understand that the donation was made by the assessee when the trust had valid approval in force. The Hon'ble CIT (Appeal) has passed the order without providing the opportunity of cross examination. The Hon'ble CIT(Appeal) has failed to understand that the assessee has given donation as charity and not to avail higher deduction for the purpose of tax evasion.

4. On the facts and in the circumstances of the case and in law, the charging of interest u/s.234B, 234C and 234D of the IT. Act, 1961 are invalid and bad in law and even initiated penalty proceedings u/s 271(1) (c) are invalid and bad in law."

8. At the time of hearing, Ld. AR of the assessee brought to our notice the relevant facts on record and submitted that originally assessee claimed deduction u/s. 35 of the Act, however, assessee himself withdrawn the claim by filing revised return of income and claimed only the donation paid of ₹.1,00,000/- u/s. 80GG of the Act. He submitted that assessee has made the donation in good faith and all the relevant information and details of remittance of donation was filed before the Assessing Officer. There is nothing on record to show that assessee has received back donation paid and Assessing Officer has merely applied the presumption and preponderance of probability to make the disallowance and declined the claim of the assessee.

9. On the other hand, Ld. DR relied on the orders of the lower authorities.

10. Considered the rival submissions and material placed on record, based on the facts on record, assessee has claimed donation of ₹.1,00,000/- paid to SHGPH and claimed the deduction u/s. 80GG of the Act. It is fact on record that assessee has originally claimed deduction u/s. 35 of the Act, however, assessee himself has withdrawn the same by filing revised return of income. No doubt the donation was paid to the

trust which was later found to be bogus trust entertaining and passing on the benefit to others. We observe from the record that Assessing Officer has merely relied on the orders and report from Investigation Wing, Kolkata and carried the investigation by recording statement u/s. 131 of the Act. We observe from the record that assessee has filed all the relevant information for payment of such donation and it is also fact on record there is no cogent material available on record of the Assessing Officer that assessee has received back the donation paid. Merely relying on the report of Investigation Wing and applying the preponderance of probabilities to make the above addition is not proper. Assessee has given donation to SHGPH on good faith and if the other entity misappropriates the fund the assessee cannot be penalized. In our view, without proper evidences on record the addition cannot be sustained in the hands of the assessee. Accordingly, ground raised by the assessee is allowed.

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

Order pronounced in the open court on 03rd April, 2023

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER
Mumbai / Dated 03/04/2023
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum