

आयकर अपीलीय अधिकरण
दिल्ली पीठ "ए", दिल्ली
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री नवीन चंद्र, लेखाकार सदस्य के समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A", DELHI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER

आअसं . 2468/दिल्ली/2024 (नि. व. 2016-17)
ITA No.2468/DEL/2024 (A.Y.2016-17)

American Express (India) P. Ltd.,
Seventh Floor, Metroplaitan Saket,
Office Block, District Centre Saket,
South Delhi, Delhi 110017

PAN: AAACA-8163-F

बनाम Vs.

..... अपीलार्थी/ Appellant

Principal Commissioner of Income Tax,
C.R Building, I.T Office, I.P Estate,
Delhi

..... प्रतिवादी/ Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Nageshwar Rao, Advocate

प्रतिवादीद्वारा/ Respondent by : Ms. Ritu Sharma, CIT-DR

सुनवाई की तिथि/ Date of hearing : 12/08/2024

घोषणा की तिथि/ Date of pronouncement : 30/08/2024

आदेश/ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the order of Principal Commissioner of Income Tax, Delhi (1), dated 21.03.2024, for AY 2016-17.

2. Shri Nageshwar Rao appearing on behalf of the assessee submitted that the PCIT has erred in invoking revisional jurisdiction u/s. 263 of the Income tax Act, 1961(hereinafter referred to as 'the Act') without satisfying the two mandatory conditions laid down under the said section. The PCIT has erred in holding that the

assessment order dated 25.06.2021 passed u/s. 143(3) r.w.s 144C(3) r.w.s 144B of the Act is erroneous.

3. Narrating facts of the case, the Id. Counsel submitted that the assessee had incurred expenditure to the tune of Rs. 5,20,00,000/-under Corporate Social Responsibility (CSR). The assessee in its book disallowed the said expenditure. The aforesaid expenditure included some donations which were eligible for deduction u/s. 80G of the Act. The assessee claimed benefit of said deduction on the donations made under CSR. The Id. Counsel referred to page no. 19 of paper book, wherein the details of donations claimed under Chapter VIA of the Act are given along with the receipts of donation. He further pointed that during the course of assessment proceedings, the Assessing Officer (AO) had issued notice u/s. 142(1) of the Act. One of the points raise by him vide aforesaid notice was large deductions claimed under Chapter VIA. The assessee vide its reply dated 29.03.2021 *inter alia* gave details of deduction claimed u/s. 80G of the Act. Thus, the issue was examined by AO. He further submitted that there are catena of orders by the Tribunal wherein the expenditure incurred towards CSR was disallowed but if any part of the said expenditure was eligible for deduction u/s. 80G of the Act, the same was allowed. He referred to one such decisions rendered in the case of *JMS Mining P Ltd. Vs. PCIT 130 taxmann.com 118 (Kol. Trib.)*

4. Per contra, Shri Kanv Bali representing the department vehemently defending the order of PCIT, prayed for dismissing appeal of the assessee.

5. We have heard the submissions made by rival sides and have examined the impugned order and documents placed on record by the assessee in the form of

paper book. It is an undisputed fact that the assessee has incurred expenditure amounting to Rs. 5,20,00,000/- on account of CSR under the provisions of section 135 of the Companies Act 2013. The assessee disallowed the same in computation of income. However, the assessee has claimed benefit of deduction u/s. 80G of the Act amounting to Rs. 3,21,43,427/- out of the amount paid towards CSR. The AO in assessment proceedings examined assessee's claim of deduction u/s. 80G of the Act and accepted the same. According to the PCIT, claim of deduction u/s. 80G of the Act is not allowable to the assessee as the said claim has been made on expenditure incurred towards CSR.

6. We find that the Tribunal in past has considered this issue in various cases and has been consistently holding that CSR expenses which are mandatory u/s. 135 of the Companies Act are not allowable as deduction u/s. 37(1) of the Act. But if any part of CSR contribution that is otherwise eligible for deduction under Chapter VI-A there is no bar on the companies to claim the same as deduction u/s. 80G of the Act.

7. In the cases of JMS Mining P Ltd. vs. PCIT (supra) the coordinate bench has considered this issue. In the said case, the AO had accepted deduction claimed by the assessee u/s. 80G of the Act, in respect of donations made under CSR. The PCIT in exercise of revisional jurisdiction u/s. 263 of the Act held that allowing of such deduction u/s. 80G of the Act by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of Revenue. Hence, the PCIT initiated revisional proceedings. The PCIT in order passed u/s. 263 of the Act held the assessment

order erroneous and prejudicial to the interest of Revenue. On appeal to the Tribunal, the coordinate bench examined this issue and held as under:-

“15. Keeping the aforesaid judicial dictum in mind let us examine the legal issue raised by the assessee against the impugned action of the Ld. PCIT to exercise the revisional jurisdiction u/s 263 of the Act. So we have to see whether the Ld. PCIT was correct in finding fault with the order of the AO. For that we have to examine and find out whether the issue/fault on the basis of which the Ld. PCIT has interfered with the order of the A.O dated 03.12.2018 was erroneous or not i.e. whether the AO had erroneously allowed the claim of the assessee under Chapter VIA in respect of CSR expenditure amounting to Rs. 67,50,000/- i.e. [50% of Rs. 1,35,00,000/-] u/s 80G of the Act. This action of AO, according to Ld. PCIT, is erroneous since as per Section 37 of the Act, there is express prohibition to allow any amount of CSR expenditure by virtue of Explanation 2 to Section 37 of the Act and so irrespective of the fact that the assessee had made the CSR expenses as donation to any Fund or Institution (donee) which enjoys approval of PCIT/CIT u/s. 80G of the Act, still the AO could not have allowed the claim u/s. 80G of the Act. Therefore, the Ld. PCIT was of the view that the claim of the assessee for deduction of the CSR expenses to the tune of Rs. 67,50,000/- [50% of Rs. 1,35,00,000/-] should have been disallowed by the AO and added back to the total income of the assessee. Further according to Ld. PCIT the A.O has passed the assessment order without making enquiries or verification which should have been made in the facts of this case and thereby clause (a) of Explanation 2 to Section 263(1) is attracted in this case. Meaning that the order has been passed by the A.O. without making enquiries or verification and therefore he interfered with the assessment order and has set aside the same and directed AO to pass fresh assessment order taking note of the contents of show cause notice which he has reproduced in para 2 of his impugned order (supra).

16. We find in this regard that the assessee pursuant to show cause notice (SCN) (supra) had duly replied to the Ld. PCIT which fact has been acknowledged by the Ld. PCIT in para 3 of the impugned order, wherein he says that in response to the SCN the assessee has submitted reply dated 24.03.2021 which has been found placed at page 10 to 16 of the PB. From a perusal of the same, we note that the assessee specifically brought to the notice of the Ld. PCIT that the AO had specifically raised question about assessee's claim of deduction of CSR expenses under Chapter VIA of the Act vide his notice u/s 142(1) of the act dated 01.08.2018 by preferring question no (v) and the ibid notice of AO was attached as annexure along with reply given by assessee on this issue for the perusal of Ld. PCIT. The aforesaid query no (v) raised u/s 142(1) of the Act by the A.O and the reply given by the assessee to the Assessing Officer has been already reproduced (supra). From a perusal of the same it is clear that the A.O had enquired about this specific claim of the assessee i.e. deduction of CSR expenses amounting to Rs. 1.35 crores under Chapter VIA and from the perusal of the reply of the assessee it is clear that the assessee has given explanation as to how the assessee had claimed such a deduction along with case laws (supra). Thereafter considering the same only the A.O has allowed the deduction claim and thereby allowed the claim of 50% of the claim u/s. 80G of the Act. In such a scenario, the Ld. PCIT's findings/allegation that the A.O has not made any enquiry/verification on this issue is factually incorrect. And therefore, his assertion that clause (a) of Explanation 2 to Section 263 is attracted is clearly erroneous. From the query raised by the AO on this issue and the reply given by the assessee we are of the opinion that the

A.O. has discharged his dual role of an investigator as well as an adjudicator. The Ld. PCIT's action of brushing aside the reply given by the assessee and his finding that the A.O has not verified/enquired into the issue smacks of arbitrariness and non-application of mind making the impugned order bad in law.

17. Coming next to the legality/correctness of the deduction allowed by the AO in respect of CSR/donation u/s. 80G of the Act, first of all, we agree with the Ld. CITDR that CSR expenses which are required to be mandatorily incurred by the assessee Company as per Section 135 of the Companies Act are not entitled to deduction u/s 37(1) of the Act for A.Y 2015-16 by virtue of the fetter placed by Explanation 2 to Section 37(1) of the Act which was inserted by the Finance Act vide no. 2.2014. The relevant provisions of Explanation 2 to Section 37(1) of the Act read as follows:

"Explanation 2. -For the removal of doubts, it is hereby declared that for the purposes 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 be an expenditure incurred by the assessee for the purposes of the business or profession"

From a plain reading of the above provision shows that, any expenditure incurred towards CSR activities as referred to in Section 135 of the Companies Act, 2013 shall not be allowed as 'business expenditure' and shall be deemed to have not been incurred for purpose of business . The embargo created by this Explanation 2 inserted in Section 37 of the Act by the Finance (No.2) Act, 2014 was to deny deduction for CSR expenses incurred by companies, as and by way of regular business expenditure while computing "Income under the head Business".

18. So, it can be clearly seen that this Explanation 2 to Section 37(1) of the Act which denies deduction for CSR expenses by way of business expenditure is applicable only to the extent of computing 'Business Income' under Chapter IV-D of the Act. The said Explanation according to us cannot be extended or imported to CSR contributions which is otherwise eligible for deduction under any other provision or Chapter, to say donations made to charitable trusts registered u/s 80G of the Act for the reasons cited infra.

19. In the facts of the present case, it is an admitted position that the donation of Rs.1.35 crores was disallowed and suo-moto added back by the assessee in terms of Explanation 2 to Section 37(1) while computing "Income under the head Business". However, according to assessee, since the said CSR contribution comprised of donation made to registered charitable trust, it was legally entitled to claim deduction under Section 80G of the Act to arrive at the "Total Income" in terms of Chapter VI of the Act, and AO has allowed it, which action of AO has been found fault by Ld PCIT, which issue need to be examined. For examining the same let us look in to the relevant provisions which we need to be taken in to consideration.

20. The provisions of Section 135(5) of the Companies Act, 2013 read as under:

"The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent. of the average net profits of the company made during the three immediately preceding financial years or where the

company has not completed the period of three financial years since its incorporation, during such immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy."

21. Let us also look at section 80G of the Act (relevant portions) which reads as under:

Section 80G : Deduction in respect of donation to certain funds, charitable institution, etc.

(1) In computing the total income of an assessee, there shall be deducted in accordance with and subject to the provision of this section

(i)

(ii)

(2) The sum referred to in sub-section (i) should be the following namely –

(a) Any sums paid by the assessee in the previous year as donations to –

(i)

(ii)

“(iii)hk). The Swachh Bharat Kosh, set up by the Central Government, other than the sum spent by the assessee in pursuance of Corporate Social Responsibility under subsection (5) of Section 135 of the Companies Act, 2013 (18 of 2013); or

(iii)hl). The Clean Ganga Fund, set up by the Central Government, where such assessee is a resident and such sum is other than the sum spent by the assessee in pursuance of Corporate Social Responsibility under Sub-section (5) of Section 135 of the Companies Act, 2013 (18 of 2013).”

(iv). Any other fund or any institution to which section applies; or

(3)

(4)

(5) This Section applies to donations to any institution or fund referred to in Sub-clause (iv) of Clause (a) of Sub-section (2), only if it is established in India for a charitable purpose and if it fulfills the following condition namely:

(i)

(a)

(b)

(c)

(ii)

(vi) in relation to donations made after the 31st day of March, 1992, the institution or fund is for the time being approved by the PCIT or Commissioner in accordance with the rules 3 made in this behalf.

22. From a bare reading of the section 80G of the Act we note that deduction under this section has to be made in accordance with and subject to the provisions of this section i.e. section 80G of the Act. As per this section i.e. section 80G of the Act, an amount equal to fifty percent (50%) of the aggregate of the sums specified in sub-section 2 [refer sub-clause (iv) of Clause (a) of Sub-section 2 of section 80G of the Act read with section 80G (1) (ii)] which allows the donation given to any other Fund or any institution to which this section applies and if it satisfies the requirement of sub-section (5) of section 80G of the Act, then 50% of the donation is allowable expenditure [refer section 80G (1) (ii)] even if the assessee has included the expenditure as CSR Expenditure because there is no prohibition or restriction placed by the Parliament on such a donation even if shown as CSR expenditure. The reason for saying so is that in section 80G of the Act certain restrictions in respect of deduction in respect of two (2) donations are expressly seen in this Section. So the Parliament has expressed its intention clearly by bringing in restriction in respect of expenditure classified by an assessee company while claiming deduction u/s. 80G of the Act i.e. CSR expenditure related to Swachh Bharat Kosh and Clean Ganga Fund. So if an assessee makes some donation to these projects and include/classify it as CSR expenditure while claiming deduction u/s. 80G of the Act then it will be allowed only the amount that is other than the sums spent by the assessee in pursuance of CSR u/s. 135 of the Companies Act. In other words, if an assessee company spends only the mandatory expenditure of 2% of net profit for CSR activity, which includes the amount of donation to Swach Bharat Kosh & Clean Ganga Fund (iihk) and (iihi) of clause (a) of sub-section (2) of section 80G of the Act, then deduction u/s. 80G of the Act is not allowable, which can be illustrated by giving certain examples (infra). However, in a case scenario, wherein the assessee expends the mandatory expenditure and gives donation to these two projects i.e. over and above the mandatory CSR expenditure u/s. 135 of Companies Act, that sum donated to Swach Bharat Kosh & Clean Ganga Fund will be eligible for 100% deduction u/s. 80G of the Act [refer section 80G (1)(i) and subject to section 80G (4)]. However, such a restriction in respect of expenditure made by an assessee to any other fund or institution as referred to in sub clause (iv) of clause (a) of sub-section 2 of section 80G of the Act had not been placed by the Legislature. And if the Parliament desired, it could have been made such kind of restriction or any restriction like in the case of donation to Swach Bharat Kosh & Clean Ganga Fund. So the assertion of Ld. PCIT that AO could not have allowed deduction u/s 80G of the Act to an assessee on the CSR expenditure/donation to an institution u/s 80G(2)(a)(iv) which is enjoying certificate 80G(5)(vi) of the Act, is erroneous and therefore cannot be accepted. For this, we rely on the interpretation maxim "Expressio Unius Est Exclusio Alterius" which is a Latin phrase that means "express mention of one thing excludes all others. This is one of the rules used in interpretation of Statutes. The phrase indicates that items not on the list are assumed not to be covered by the Statute. When something is mentioned expressly in a Statute, it leads to the presumption that the things not mentioned are excluded. This is an aid to the construction of Statutes. Applying the legal maxim 'expressio unius est exclusio alterius', it can be safely inferred that when the Legislature in particular has provided for only the above referred two specific exceptions in Section 80G, then it is the implied intent of the Legislature to permit deduction u/s 80G in respect of CSR contributions made to funds/organizations referred to in all other sub-clauses of Section 80G [other than (iihk) and (iihl)] of the Act. The above analysis made by us, can be cumulatively illustrated by the

following examples for ease of understanding purpose only and should not be cited for making claim which should be made subject to the facts and law involved in each case and also subject to section 80G(4) of the Act:

Example: A company has reported eligible net profit u/s 135 of Companies Act, 2013 at Rs.100 crores. The minimum CSR contribution of 2% under Section 135(5) of the Act works out to be Rs. 2 crores.

Situation 1 : The company has been spent the required minimum CSR contribution of Rs 2 crores towards construction of roads & schools in the vicinity of the backward area where the factory is located.

Tax Treatment: The entire CSR expenditure of Rs.2 crores is to be disallowed and added back in terms of Explanation 2 to Section 37(1) of the Act.

Situation 2 : The company has contributed Rs.3 crores to Swachh Bharat Kosh.

Tax Treatment: The entire CSR expenditure of Rs.3 crores is to be disallowed and added back in terms of Explanation 2 to Section 37(1) of the Act. In terms of Section 135(5) of the Act read with Section 80G(iiihk) only the excess sum paid amounting to Rs. 1 crores [3 crores - 2% of 100 crores] can be availed as deduction u/s 80G of the Act.

Situation 3 : The company has contributed Rs.1 crore to Swachh Bharat Kosh and Rs.1 crore to any other charitable trust registered u/s 80G(5) of the Act.

Tax Treatment: The entire CSR expenditure of Rs.2 crores is to be disallowed and added back in terms of Explanation 2 to Section 37(1) of the Act. In terms of Section 135(5) of the Act read with Section 80G(iiihk) the donation of Rs.1 crores made to Swachh Bharat Kosh is not eligible for deduction u/s 80G of the Act. The company can claim deduction of fifty percent of the donation of Rs. 1 crores paid to any other registered charitable trust u/s 80G(2)(iv) read with Section 80G(1)(ii) of the Act.

Situation 4 : The company has contributed Rs.1 crore to Prime Minister's National Relief Fund and Rs. 1 crore to any other charitable trust registered u/s 80G(5) of the Act.

Tax Treatment: The entire CSR expenditure of Rs.2 crores is to be disallowed and added back in terms of Explanation 2 to Section 37(1) of the Act.

The company can claim deduction for hundred percent of the donation of Rs. 1 crores paid to Prime Minister's National Relief Fund u/s 80G(2)(iiia) read with Section 80G(1)(i) of the Act.

The company claim deduction to the extent of fifty percent of the donation of Rs. 1 crores paid to any other registered charitable trust u/s 80G(2)(iv) read with Section 80G(1)(ii) of the Act.

23. As discussed supra, we concur with the contention of the assessee that since Parliament intended certain restrictions to only CSR expenditure in respect of two donations included by an assessee as CSR expenditure i.e. [Swachh Bharat Kosh and Clean Ganga Fund] has impliedly not

made any prohibition/restriction in respect of claim of CSR expenses in other cases if it is otherwise eligible under Section 80G of the Act. In this context we find that the assessee has made donation of Rs. 1.25 crores on 20.01.2016 by RTGS dated 19.01.2016 through UCO Bank which is evident from page 18 of PB which is received by Shree Charity Trust which was 80G(5)(vi) certificate of the Department dated 15.01.2009 placed at page 17 of PB. The assessee has also made payment of Rs. 10 Lakhs to Pt. Jashraj Music Academy Trust which is found placed at page 22 & 23 and the approval u/s 80G (5)(vi) of the Act in respect of Pt. Jashraj Music Academy Trust is found placed at page 19 of PB dated 30.03.2012 given by Director of Income Tax (Exemption). Therefore, since the assessee satisfies the condition u/s. 80G of the Act of the donees, the assessee's claim for deduction of CSR expenses/contribution u/s 80G of the Act was allowed after enquiry by the AO. Thus we are of the opinion that the action of the AO allowing the claim u/s. 80G of the Act is a plausible view and is in line with the ratio of the decision of Tribunal cited (supra). Therefore we find that the Ld. PCIT has not been able to make out a case that on this issue raised by him, the AO's order is erroneous as well as prejudicial to the revenue. So the jurisdictional fact as well as law is absent for invoking revisional jurisdiction. Therefore, the usurpation of jurisdiction by Ld. PCIT u/s 263 of the Act is bad in law and therefore need to be quashed and we order accordingly."

[Emphasized by us]

8. We find that the facts in the instant case are similar to the aforesaid case. Thus, for parity of reasons, we hold that the PCIT has erred in exercising his jurisdiction u/s. 263 of the Act. Merely, for reason that the PCIT does not agree with the view taken by the AO, the assessment order does not become erroneous. In the present case a view taken by the AO in allowing deduction u/s.80G of the Act on donations which were part of the expenditure incurred on account of CSR is backed by various decisions of the Tribunal. Thus, the AO has taken a view which has been approved by the Tribunal. The satisfaction of twin conditions set out in section 263 of the Act i.e. the order is (i) erroneous; and (ii) prejudicial to the interest of Revenue are sine qua non for exercising revisional jurisdiction. If, any of the above said conditions are not satisfied, the revisional jurisdictional u/s. 263 of the Act cannot be invoked. In the instant case the PCIT has erred in holding that the assessment order is erroneous. Thus, the impugned order is without jurisdiction, hence, quashed.

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

Order pronounced in the open court on Friday the 30th day of August, 2024.

Sd/-

(NAVEEN CHANDRA)

लेखाकार सदस्य/ACCOUNTANT MEMBER

दिल्ली/Delhi, दिनांक/Dated 30/08/2024

NV/-

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. The PCIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि. , दिल्ली /DR, ITAT, दिल्ली
5. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar) ITAT, DELHI