

आयकर अपीलीय अधीकरण, न्यायपीठ –“A” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA
[Before Shri P. M .Jagtap, Vice-President (KZ) and Shri A. T. Varkey, JM]

I.T.A. No. 146/Kol/2021
Assessment Year: 2016-17

M/s JMS Mining Pvt. Ltd. (PAN: AACCCJ 1575 C)	Vs.	PCIT, Kolkata-2, Kolkata
Appellant		Respondent

Date of Hearing (Virtual)	08.07.2021
Date of Pronouncement	22.07.2021
For the Appellant	Shri S. K. Tulsiyan, Advocate
For the Respondent	Shri Dinesh Aibor Jayal Sawkuie, CIT

ORDER

Per Shri A. T. Varkey, JM:

This is an appeal filed by the Assessee against the order of Ld. PCIT, Kolkata-2, Kolkata dated 30.03.2021 passed u/s 263 of Income Tax Act, 1961 (hereinafter referred to as the Act) for Assessment year 2016-17.

2. By preferring this appeal, the assessee has challenged the invocation of jurisdiction by the Ld. PCIT u/s 263 of the Act without satisfying the essential condition precedent as prescribed in Section 263 of the Act i.e. the AO's order has to be found by the Ld. PCIT to be erroneous as well as prejudicial to the revenue. According to Ld. AR. Shri S.K. Tulsiyan without this essential precedent being satisfied, the usurpation of revisional jurisdiction by Ld. PCIT is bad in law and therefore all consequent actions should be held as void in the eyes of law.

3. For buttressing this legal issue the Ld. A.R. drew our attention to the show cause notice (SCN) issued by the Ld. PCIT which is placed at page 1 and 2 of PB wherein the Ld. PCIT observes that the assessee has claimed deduction of CSR expenses u/s 80G of the Act which the AO has allowed which action of AO

according to Ld. PCIT was erroneous because CSR expenditure could not have been allowed as per express prohibition given by Explanation 2 of Sub-section (1) of Section 37 of the Act. For appreciating the factual and legal aspects deliberated by the Ld. PCIT in respect of this fault pointed out, it would be convenient to reproduce the show cause notice issued by him to assessee. The relevant portion of show cause notice is reproduced as under:

“Sub: Show cause notice u/s 263(1) of the I.T. Act in respect of assessment order for AY 2016-17- Matter regarding.

Whereas the undersigned had called for and examined the record of your case and it is considered that the impugned assessment order passed u/s 143(3) of the I T Act, 1961 by the DCIT, Circle - 12(1), Kolkata on 03/12/2018 for AY 2016-17 is prima facie, erroneous in so far as it is prejudicial to the interests of revenue for the following reasons:

As per Explanation 2 of sub-Section (1) of Section 37 of the IT Act, any expenditure incurred by an assessee on the activities relating to corporate social responsibility referred to in Section 135 of the Companies Act, 2013 shall not be deemed to be an expenditure incurred by the assessee for the purpose of the business or profession.

In the instant case it was observed from Note 27 to Profit & Loss Account that the assessee had debited an amount of Rs. 1,35,00,000/- towards Expenses on CSR Activities under the head Other Expenses and Rs. 10,20,000/- towards Donation under Miscellaneous Expenditure. It was further observed from the assessee's computation of total income for the A.Y. 2016-17 that the assessee had suo moto added back for both the said amounts and subsequently took further claim of benefit of deduction under Chapter-VIA amounting to Rs. 72,60,000/- on both Donation and GSR expenses also[50% of Rs. 1,45,20,000/- (Donation Rs. 10,20,000/- + Rs. Expenses on CSR activities Rs. 1,35,00,000/-)]. The Assessing Officer accepted and allowed the assessee's claim u/s. 80G of I.T. Act while completing assessment u/s 143(3).

As per the above provision of Section 37 of the Income Tax Act, any amount of GSR expenses whether it is made for donation or for other purposes is not an allowable expense. Therefore, the claim of deduction on CSR expenses amounting to Rs. 67,50,000/- (50% of Rs. 1,35,00,000/-) is required to be disallowed and added Back to the total income of the assessee. Therefore, the assessment completed appears to be erroneous in so far as it is prejudicial to the interest of revenue.

2. Having regard to the facts and circumstances of the case and in law and in accordance with the provisions of Section 263(1) of the I. T. Act, 1961 you are hereby given an opportunity of being heard to show cause as to why the impugned assessment order passed u/s 143(3) by the DCIT, Circle - 12(1), Kolkata on 03/12/2018 for AY 2016-17 should not be held as erroneous in so far as it is prejudicial to the interests of the revenue.”

4. The Ld. A.R. drawing our attention to the show cause notice (supra) contended that the assessee company is a mining service provider engaged in the

business of management and operation of mines. According to Ld. AR, the return of income for the relevant assessment year was filed on 17.10.2016 declaring total income of Rs. 56,04,96,630/- under the normal computation provision and Rs. 78,49,34,237/- under MAT provision. According to Ld. A.R, the assessee's case was selected for scrutiny through CASS and in response to the notice issued by the AO u/s 143(2) and 142(1) of the Act, the assessee had filed all the requisite details, information and documents as per requisitions/questionnaire which fact has been acknowledged by the AO at Para 2 of the assessment order dated 03.12.2018. Elaborately on the fault pointed out by the Ld. PCIT in the SCN (supra), the Ld. A.R. brought to our notice that in the return of income, the assessee company had claimed deduction of Rs. 67,50,000/- (50% of Rs. 1,35,00,000/-) under Chapter VI-A of the Act on account of CSR (Corporate Social Responsibility) expenses/donation made to eligible/approved Charitable Trusts u/s 80G(5)(vi) of the Act. According to Ld. A.R. during the course of scrutiny proceedings vide notice u/s 142(1) of the Act dated 01.08.2018 placed at pages 3 to 5 of PB wherein page 4 item No. (v) the assessee was asked to furnish the details of the information (fault) pointed out by the Ld. PCIT which is as reproduced as under:

“(v) Please explain why the alleged claim of deduction under Chapter-VIA on account of CSR activities amounting to Rs. 1.35 crore should not be disallowed.”

5. On this specific issue raised by the AO u/s 142(1) of the Act, the assessee replied by filing the pertinent note on allowance of deduction claimed under Section 80G of the Act which falls under Chapter-VIA which is found placed at page 7 of PB which is extracted as under:

NOTE ON ALLOWANCE OF DEDUCTION CLAIMED UNDER CHAPTER VIA:

We have made donations of Rs 1,35,00,000/- to certain Trusts, which qualifies as CSR Expenditure as per Section 135 read with Schedule VII of the Companies Act 2013 and the same has been added back in our computation of income in accordance with Explanation 2 to Section 37(1) which states that “For 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.”

However, Sub section- (1) of Section 80G of the Income Tax Act provides that “In computing the total income of the assessee, there shall be deducted, in accordance with and subject to the provisions of this section,-14. Further Sub section (5)(vi) of the section provides that “In computing to donations made after the 31st day of March, 1992,-the institution or fund is for the time being approved by the Commissioner in accordance with the rules— made in this behalf”.

In compliance with the above provisions, we have claimed the Donations amounting to Rs 1,35,00,000/-made to Charitable Trusts under Section 80G as the Trust were approved under section 80G(5)(vi) by the Commissioner of Income Tax, in this behalf. Neither there is any express provision nor any of the explanations present under Section 80G, prohibits the assessee to claim the amount made towards donation as deduction under Chapter VIA, even if the same has been classified as CSR expenditure for the purpose of Companies Act 2013.

In view of the above, the amount of Rs 1,35,00,000 is allowable under Chapter VIA of the Income Tax Act, 1961.”

6. According to Ld. A.R. the assessee brought to the notice of the AO that claim is allowable u/s 80G and for which he relied upon the decision of the Bangalore Tribunal (ITAT) in the case of Goldman Sachs Services Pvt. Ltd. vs. JCIT in IT(TP) A No. 2355/Bang/2019 wherein it was held as under :

16. The last ground of appeal argued by the learned Authorized Representative in respect of disallowance of deduction under Section 80G of the Act. In the financial year 2014-15, the assessee has incurred expenditure of Rs.4,72,00,024/- to meet the CSR (Corporate Social Responsibility) as per Policy formulated under Section 135 of the Companies Act, 2013. Out of the said amount, a sum of Rs.2,25,21,500 qualified for deduction under Section 80G of the Act and therefore the assessee claimed of 50% of amount being Rs.1,12,60,750/- as deduction under Section 80G of the Act. The TPO/A.O. has disallowed substantial portion of donation under Section 80G of the Act on the ground that donations were not in the nature of voluntary contribution as required under CSR Policy. Further the Assessing Officer has allowed the contribution to PM National Relief Fund under Section 80G of the Act as it was a direct contribution to the Government. No other inferences were raised by the TPO/A.O. in respect of other donations which are equally eligible for deduction under Section 80G of the Act. The learned Authorized Representative submitted that the donations or expenditure has been incurred wholly and exclusively for the purpose of business and eligible for deduction under Section 37 of the Act and alternatively under Section 80G of the IT(TP)A No.2355/Bang/2019 Act. We found the DRP has dealt at page 81 of the order and observed that, the claims are in the nature of CSR Policy expenditure and hence does not qualify for deduction under Section 80G of the Act. The learned Authorized Representative demonstrated in Paper Book Vol.II at pages 882 & 883 the list of deductions claimed under Section 80G of the Act with a statement of donees along with PAN and address and donation receipts. Further the donation receipts are self- explanatory and are eligible for deduction under Section 80G of the Act. We find that the CSR expenses are required to be incurred by companies as per Section 135 of the Companies Act and the deduction u/s. 37(1) of the Act, is not available from Assessment Year 2015-16 as per the Explanation 2 to Section 37(1) of the Act inserted by the Finance Act No.2. 2014. Whereas, the assessee company has made a claim for deduction of CSR expenses u/s. 80G of the Income Tax Act,1961. But the assessing officer has rejected the assessee's claim without verifying the nature of contributions and observed that it is not a donation, and was not spent voluntarily for the eligibility of claim u/s.80G of the Act but due to legal obligation

prescribed u/s. 135 r.w. Schedule VII of Companies Act, 2013. We find that the A.O. has allowed deduction u/s. 80G of the Act in respect of contribution made to PM Relief Fund which is not disputed. We are of the opinion that the A.O. has not made his observations clear that no CSR expenses are eligible for deduction u/s. 80G of the IT(TP)A No.2355/Bang/2019 Act. We consider it appropriate to refer to the Clauses (iihk) & (iihl) of sub-section 2 of Section 80G of the Act which are read as under :

"(iihk) 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 sub-section (5) of Section 135 of the Companies Act, 2013 (18 of 2013); or (iihl) 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)."

Where these two exceptions are provided in Section 80G of the Act, it can be inferred that the other contributions made u/s. 135(5) of the Companies Act are also eligible for deduction u/s. 80G of Income Tax Act subject to assessee satisfying the requisite conditions prescribed for deduction u/s. 80G of the Act. In the present case the A.O. has not dealt on these aspects, prima facie, considered the contributions as not voluntary but a legal obligation and has accepted the genuineness of the contributions. We are of the opinion, that the matter has to be considered for examination and verification of facts subject to the assessee satisfying the requirements of claim u/s. 80G of the Act. Accordingly, we restore the entire disputed issues to the file of A.O. for fresh examination and verification as discussed above and the assessee should be provided adequate opportunity of IT(TP)A No.2355/Bang/2019 hearing and shall co-operate in submitting the information and we allow the ground of appeal of the assessee for statistical purposes."

7. The Bangalore Tribunal in the case of Allegis Services (India) vs. CIT in ITA No. 1693/Bang/2019 pronounced on 29.04.2020 has held as under:

"In present facts of case, Ld.AR submitted that all payments forming part of CSR does not form part of profit and loss account for computing Income under the head, "Income from Business and Profession". It has been submitted that some payments forming part of CSR were claimed as deduction under section 80G of the Act, for computing "Total taxable income", which has been disallowed by authorities below. In our view, assessee cannot be denied the benefit of claim under Chapter VI A, which is considered for computing "Total Taxable Income". If assessee is denied this benefit, merely because such payment forms part of CSR, would lead to double disallowance, which is not the intention of Legislature.

19. On the basis of above discussion, in our view, authorities below have erred in denying claim of assessee under section 80G of the Act. We also note that authorities below have not verified nature of payments qualifying exemption under section 80G of the Act and quantum of eligibility as per section 80G(1) of the Act."

8. The Bangalore Tribunal in the case of FNF India Pvt. Ltd. vs. ACIT (ITA No. 1565/Bang/2019) reported in 2021-TIOL-319-ITAT-BANG pronounced on January,05,2021 held as under:

"Similar issue came up for consideration before this Tribunal in the case of Allegis Services (India) Pvt. Ltd. wherein it was held that "For claiming benefit under Section 80G,

deductions are considered at the stage of computing "Total Taxable income". Even if any payments under Section 80G forms part of CSR payments (keeping in mind ineligible deduction expressly provided u/s 80G), the same would already stand excluded while computing, income under the head "income from Business and Profession". The effect of such disallowance would lead to increase in Business income. Thereafter benefit accruing to assessee under Chapter VIA for computing "Total Taxable income" cannot be denied to assessee, subject to fulfillment of necessary conditions therein..... authorities below have erred in denying claim of assessee under section 80G of the Act....."

9. By taking note of the aforesaid orders/ *ratio-decidenti* of the Tribunal in similar case [CSR expenditure allowed u/s 80G of the Act] the assessee's claim of donation of a sum of Rs. 1,25,00,000/- which was given to Shree Charity Trust and a sum of Rs. 10,00,000/- which was given to Pt. Jasraj Music Academy Trust as contribution for CSR activities and since both these trusts are approved and are eligible for deduction u/s 80G(5)(vi) of the Act, the AO has allowed the claim of the assessee. This action of the AO is found fault by the AO, which according to Ld. A.R is erroneous both on fact as well as law because the AO's view on the issue is a plausible view and at any rate was in line with the decision of the Tribunal (supra).

10. Further the Ld. A.R. contended that CSR expenses are required to be mandatorily incurred by companies as per section 135 of Companies Act and accepted the fact that the assessee was aware that deduction u/s 37(1) of the Act, was not available from assessment year 2015-16 as per Explanation 2 to Section 37(1) of the Act which was inserted by the Finance Act No. 2. 2014 and, therefore, assessee has not made any claim for deduction under that Chapter IV-D. However according to Ld. A.R. the assessee company has made a claim of deduction for CSR expenses u/s 80G of the Act which is under Chapter VIA and there is no prohibition/ restriction for claiming the same. The Ld. A.R. further submitted that the legislative intent would be clear from the fact that under Section 80G, there are two specific donations which if classified as CSR expenses by an assessee can be allowed u/s. 80G of the Act only on satisfaction of certain condition precedent prescribed in that Section itself and for that he drew our attention to sub-Clause (iihk) & (iihl) of clause (a) of Sub-section (2) of Section 80G of the Act and explained the contours of

the provision viz, exceptions in respect of CSR expenses incurred in respect of two projects i.e. Swachh Bharat Kosh and Clean Ganga Fund,.

11. According to Ld. A.R. when the Parliament has expressly made ‘two’ exceptions in Section 80G of the Act in respect of donation classified as CSR expenses incurred by an assessee company u/s 135(5) of the Companies Act, the other donation which are classified as CSR expenses to any other Fund or Institution as provided in sub-clause (iv) of clause (a) to sub-section 2 of section 80G of the Act is eligible for deduction u/s 80G of the Act [*after the donee satisfies the requisite condition prescribed for deduction u/s 80G of the Act*]. It was pointed out by the Ld. A.R. that by enacting the aforesaid exceptions in respect of CSR expenses incurred for two projects i.e. Swachh Bharat Kosh and Clean Ganga Fund, the donation given by an assessee (like the assessee M/s JMS Mining Pvt. Ltd.) to other Funds or Institution enumerated u/s 80G(2)(a)(iv) of the Act are eligible for deduction u/s 80G of the Act. Thus, it was contended that there is no prohibition spelled out by the Parliament in respect of any other CSR expenditure when it otherwise qualifies/eligible for deduction u/s 80G of the Act.

12. Therefore, according to Ld. A.R. since the donations were made by the assessee company to the two trusts which were admittedly approved by Director of Income Tax, Kolkata [certificate for exemption u/s 80G(5)(vi) of the Act has been found placed at page 17 & 19 of the PB respectively], and after enquiring about it, the AO has rightly allowed the deduction which is in line with the Tribunal’s order cited (supra) and therefore it is a plausible view and since the AO has enquired about the issue on which the Ld. PCIT finds fault with has been enquired into and after going through the reply of the assessee has taken a plausible view the A.O’s order on this issue cannot be termed as erroneous as well as prejudicial to the revenue. And therefore according to Ld. A.R., the impugned action of the Ld. PCIT to have invoked jurisdiction u/s 263 of the Act without satisfying the condition precedent is an act without jurisdiction and therefore the impugned order passed by the Ld. PCIT is bad in law and should be quashed.

13. Per contra, Ld. CITDR Shri Dinesh Aibor Jayal Sawkuie vehemently opposing the submission of the Ld. A.R. contended that when there is an express prohibition u/s 37 of the Act against allowing CSR expenditure, the A.O could not have given deduction u/s 80G of the Act. Therefore the order of the A.O was erroneous and prejudicial to the revenue and therefore the Ld. PCIT has correctly invoked the jurisdiction. Therefore we should not interfere in the impugned order passed by the Ld. PCIT.

14. We have heard both the parties and perused the records. Before we advert to the facts and law involved in this lis before us, let us revise the law governing the issue before us. The assessee has challenged in the first place, the very usurpation of jurisdiction by Ld. Principal CIT to invoke his revisional powers enjoyed u/s 263 of the Act. Therefore, first we have to see whether the requisite jurisdiction necessary to assume revisional jurisdiction is existing in this case before the Pr. CIT rightfully exercises his revisional power. For that, we have to examine as to whether in the first place the order of the Assessing Officer found fault by the Principal CIT is erroneous as well as prejudicial to the interest of the Revenue. For that, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in *Malabar Industries Ltd. vs. CIT* [2000] 243 ITR 83(SC) wherein their Lordship have held that *twin* conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii) Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated the issue before him; [*because AO has to discharge dual role of an investigator as well as that of an adjudicator*] then in aforesaid any event the order passed by the Assessing Officer can be termed as erroneous order. Coming next to the second limb, which is required to be examined as to whether the actions of the AO can be termed as prejudicial to

the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (supra) held that this phrase i.e. "*prejudicial to the interest of the revenue*" has to be read in conjunction with an *erroneous order* passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue **"unless the view taken by the Assessing Officer is unsustainable in law"**.

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)27 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)

“(iihk).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 sub-section (5) of Section 135 of the Companies Act, 2013 (18 of 2013); or

(iiihl). 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 (iiihk) 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 (iiihk) and (iiihl)] 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 Swach 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 Swach 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 Swach 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.

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

Order is pronounced in the open court on 22nd July, 2021

Sd/-
(P. M. Jagtap)
Vice-President

Sd/-
(A. T. Varkey)
Judicial Member

Dated: 22.07.2021

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- M/s JMS Mining Pvt. Ltd, Dongfang Electric Building, 3rd Floor premises No. 16, Action Area-1A, Mar 1111, New Town, Rajarhat, Kolkata-700156.
2. Respondent – PCIT,Kolkata-2, Kolkata
3. The PCIT- 2, Kolkata
4. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Senior Private Secretary/DDO
ITAT, Kolkata Benches, Kolkata
