आयकर अपीलीय अधिकरण न्यायपीठ रायपुर में।
IN THE INCOME TAX APPELLATE TRIBUNAL,
RAIPUR BENCH, RAIPUR

(Through Virtual Court)

BEFORE SHRI RAVISH SOOD, JUDICIAL MEMBER
AND
SHRI RATHOD KAMLESH JAYANTBHAI, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No. 188/RPR/2018

CO. No.18/RPR/2018

निर्धारण वर्ष /Assessment Year : 2014-15

The Assistant Commissioner of Income Tax,
Circle-1(1), Bhilai (C.G.)

.....अपीलार्थी / Appellant

बनाम / V/s.

Shri Praveen Sushil Kanda
MIG-6, Vaishali Nagar,
Bhilai-490 023.

PAN : AHJPK5723E

.....प्रत्यर्थी / Respondent

Assessee by : Shri NikhileshBegani, AR
Revenue by : Shri G.N Singh, DR

सुनवाई की तारीख / Date of Hearing :25.05.2022
घोषणा की तारीख / Date of Pronouncement :27.05.2022

आदेश / ORDER

PER RAVISH SOOD, JM:

The present appeal filed by the department is directed against the order passed by the CIT(Appeals)-II, Raipur, dated 09.07.2018, which in turn arises from the order passed by the A.O under Sec.143(3)of the Income-tax Act, 1961 (in short 'the Act') dated 16.12.2016 for assessment year 2014-15. Before us the Revenue has assailed the impugned order on the following grounds of appeal :

> "1. "Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was justified in deleting the addition made under section 35(1)(ii) of the IT Act, 1961 holding that during the relevant period when the said donation was made, i.e. in March, 2014, the society had the exemption from the prescribed authorities?
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> 2. "Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was justified in holding that the A.O. had not brought any material evidence on record against the donor and ignoring the fact that the credible information was on the basis of survey conducted by the Investigation Wing after due verification of material found during such action?
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> 3. "Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was justified in holding that if there were any allegations or reports against the assessee, the same ought to have been shared and provided to the assessee for his explanation, in spite of the fact that the A.O. had provided copy of notification vide which approval was withdrawn, to the assessee for his explanation?
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> 4. "Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was justified by not considering the CBDT's Notification dated 15-09-2016, which categorically specified that "....Shall be deemed that the said notification has not been issued for any tax benefits under the Income Tax Act, 1961 or any other law for the time being in force?"

5. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was justified in restricting the disallowance made u/s.40A(2)(b) on the basis of comparison of NP rate of previous year?

6. The Order of the Ld. CIT (A) is erroneous both in law and on fact.

7. Any other ground that may be adduced at the time of hearing."

Also, the assessee is before us as a cross-objector on the following grounds:

1. "On the facts and in the circumstances of the case as well as in law, the Learned Commissioner of Income Tax (Appeals) —II, Raipur ["the Ld. CIT(A)"] has grossly erred in not annulling the Assessment Order passed by the Learned Assessing Officer ["the Ld.AO"] under section 143(3) of the Income Tax Act, 1961 ["the Act"]. The Ld. CIT(A) has failed to appreciate that neither the contents of the purported adverse statements of persons recorded in the course of survey u/s.133A nor the contents/findings of the survey report of Investigation Wing of DDIT, Kolkata were provided to the respondent nor such persons were made available for cross-examination thereby rendering the Assessment Order as vitiated by the principles of natural justice.

   The Ld. CIT(A) ought to have held that the Assessment Order passed by the Ld.AO under section 143(3) of the Act is bad in law, highly illegal, vitiated by principles of natural justice and nullity in the eyes of law and hence, it is requested that the Assessment order may please be quashed and set aside.

2. On the facts and in the circumstances of the case as well as in law, the Ld. CIT(A) has grossly erred in confirming the disallowance of Rs.3,00,000/- {Disallowance made by Ld.AO to the extent of Rs.5,00,000/-} out of payment of salary made to persons specified under section 40A(2)(b) of the Act which is highly unjustified, unwarranted and not in accordance with the provisions of law hence, it is requested that disallowance of Rs.3,00,000/- confirmed by the Ld. CIT(A) may please be deleted.

3. That the cross objector craves leave to add, amend, alter or delete all or any of the grounds of cross objection at the time of hearing of the appeal."

2. Succinctly stated, the assessee had filed his return of income for the assessment year 2014-15 on 29.04.2014, declaring an income of Rs.61,69,750/-.Original assessment was, thereafter, framed by the A.O vide his order passed u/s.143(3), dated 16.12.2016 determining the income of the assessee at Rs.1,36,69,750/- after, inter alia, making the following additions/disallowances:

Sl. No.	Particulars	Amount
1.	Disallowance of the assesee's claim for deduction u/s.35(1)(ii) of the Act towards donation given to M/s. School of Genetics and Population Health (SHG & PH)	Rs. 70 lakhs
2.	Disallowance u/s.40A(2)(b)	Rs.5 lakhs

3. Aggrieved, the assessee carried the matter in appeal before the CIT(Appeals). Observing, that as on the date on which the assessee had given donation to a society, viz. School of Human Genetics and Pollution Health ("SHG&PH", for short) which as on the date of making of such donation by the assessee had the exemption from the prescribed authority; and no material/evidence had surfaced in the course of the survey proceedings conducted against the aforesaid society which would justify drawing of adverse inferences as regards the authenticity of the assessee's claim of having donated aforementioned amount, the CIT(Appeals) vacated

the disallowance by the AO of the assessee's claim for deduction of Rs. 70 lac u/s.35(1)(ii) of the Act. Apropos the assessee's claim of having paid a salary of Rs. 6 lac each to Smt. Parul Kanda and Smt. Shruti Kanda i.e., related parties, it was observed by the CIT(Appeals) that the AO had after making an aggregate disallowance of Rs. 5,00,000/- (i.e @ Rs. 2,50,000/- each per person) restricted the assessee's claim for deduction of salary to the aforementioned related parties to an amount of Rs. 3,50,000/- each. The CIT(Appeals) after deliberating at length on the contentions advanced by the assessee substituted the disallowance of Rs.5,00,000/- (i.e. @ Rs.2,50,000/- each per person) made by the A.O by an amount of Rs. 3,00,000/- (i.e. @ Rs.1,50,000/- each per person). Accordingly, the CIT(Appeals) though upheld principally concurred with the triggering of the disallowance by the A.O u/s. 40A(2)(a) of the Act, but restricted the same to an amount of Rs. 3,00,000/- (i.e. @ Rs. 1,50,000/- each per person).

4. The revenue being aggrieved with the order of the CIT(Appeals) has carried the matter in appeal before us. Also, as observed by us hereinabove, the assessee not accepting the part sustaining of the disallowance u/s 40A(2)(a) by the CIT(Appeals) is before us as a cross-objector.

5. We have heard the ld. authorized representatives of both the parties, perused the orders of the lower authorities and the material available on

record, as well as considered the judicial pronouncements that have been pressed into service by the ld. AR in order to drive home his contentions.

6. We shall first address the disallowance of the assessee's claim for deduction of Rs. 70,00,000/- u/s 35(1)(ii) of the Act by the AO, which thereafter had been vacated by the CIT(Appeals). Admittedly, the assessee during the year under consideration had donated an amount of Rs. 40 lac to School of Human Genetics and Pollution Health. On the basis of his aforesaid donation the assessee had in his return of income claimed a weighted deduction of Rs.70 lac i.e, an amount equal to one and three fourth times of the amount of donation of Rs.40 lac (supra) under Sec. 35(1)(ii) of the Act. As is discernible from the records, it is an admitted fact that at the time of making of such donation SHG&PH was having a valid approval granted under the Act by the CBDT. In the backdrop of the aforesaid fact, we have to examine as to whether or not the subsequent cancellation of registration to SHG&PH vide CBDT order dated 15.09.2016 with retrospective effect can invalidate the assessee's claim of deduction under Sec. 35(1)(ii) of the Act. For a fair appreciation of the issue under consideration we would herein cull out the 'Explanation' to Sec. 35(1)(ii) of the Act which will have a strong bearing on the adjudication of the issue under consideration, and reads as under:

> "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 (ii) or clause (iii) applies, shall not be denied merely on the ground that, subsequent to the payment of such sum by the assessee, the approval granted to the association, university, college or other institution referred to in clause (ii) or clause (iii) has been withdrawn;"

Now, in the case before us, we find that the aforesaid research institution i.e, SHG&PH as on the date of giving of donation by the assessee was having a valid approval granted under the Act. On a perusal of the aforesaid 'Explanation' to Sec. 35(1)(ii) of the Act, it can safely be gathered that a subsequent withdrawal of such approval cannot form a reason to deny deduction claimed by the donor. By way of an analogy, we may herein observe that the Hon'ble Supreme Court in the case of CIT Vs. Chotatingrai Tea (2003) 126 taxman 399 (SC) while dealing with Sec. 35CCA of the Act, had concluded, that a retrospective withdrawal of an approval granted by a prescribed authority would not lead to invalidation of the assessee's claim of deduction. On a similar footing the Hon'ble High Court of Bombay in the case of National Leather Cloth Mfg. Co. Vs. Indian Council of Agricultural Research (2000) 100 Taxman 511 (Bom), while dealing with an identical issue of denial of deduction under Sec.35(1)(ii) of the Act due to a subsequent withdrawal of approval with retrospective effect, had observed, that such retrospective cancellation of registration will have no effect upon the deduction claimed by the donor, since such donation was given acting upon the registration when it was valid and

operative. On a perusal of the aforesaid statutory provision i.e, Sec. 35(1)(ii) of the Act, as well as the ratio laid down in the aforesaid judicial pronouncements, it can safely be concluded that if an assessee acting upon a valid registration/approval granted to an institution had donated certain amount for which deduction is claimed, then, such deduction cannot be disallowed if at a later point of time the same is cancelled with retrospective effect. We have perused the aforesaid judicial pronouncements relied upon by the ld. A.R and are persuaded to accept his claim that the issue involved in the present appeal is squarely covered by the view taken by the co-ordinate benches of the Tribunal. Recently, a co-ordinate bench of Tribunal i.e ITAT Mumbai Bench "C", Mumbai in the case of M/s Pooja Hardware Pvt. Ltd. Vs. The Assistant Commissioner of Income Tax-13(1)(1), Mumbai [ITA No. 3712/Mum/2018 dated 28.10.2019] had after relying on the earlier orders of the co-ordinate benches of the Tribunal on the issue pertaining to the allowability of deduction under Sec. 35(1)(ii) of the Act in respect of a donation given to SHG&PH by the assessee's before them had vacated the disallowance of the assessee's claim for deduction under Sec.35(1)(ii) of the Act, observing as under:

> "6. We have heard the rival submissions of the parties and gone through the material on record including the cases relied upon by the parties. In the case of Mahesh C. Thakker vs. ACIT (supra), the

coordinate Bench has decided the identical issue in favour of the assesse holding as under:-

> "6. In view of the above submissions, it was claimed that exactly on identical issues the co-ordinate Bench of this Tribunal 'B' Bench Kolkata in the case of DCIT vs. Maco Corporation (India) Pvt. Ltd. in ITA No. 16/Kol/2017 vide order dated 14.03.2018 for AY 2013-14 has considered the issue in regard to very same trust i.e. SGHPH and holds that prior to the date of donation under cancellation of registration has happened and there is absolutely no provision of withdrawal of recognition under section 35(1)(ii) of the Act. Hence, allowed the claim of the assessee by observing in Para 8.1 and 8.5 as under: -
>
> "8.1. The brief fact pertaining to SGHPH are as under: - a) SGHPH was recognized vide Gazette Notification dated 28.1.2009 issued by the Central Board of Direct Taxes (CBDT in short), Ministry of Finance (Department of Revenue), Government of India, u/s 35(1)(ii) of the Act. b) SGHPH was also recognized as a scientific industrial research organization (SIRO) by Ministry of Science & Technology, Government of India. The renewal of recognition as SIRO by the Department of Scientific and Industrial Research under the Scheme on Recognition of Scientific and Industrial Research Organisation , 1988 was made for the period from 1.4.2010 to 31.3.2013 vide communication in F.No. 14/473/2007-TU-V dated 17.6.2010.
>
> 8.2. At the outset, we find that the Taxation Laws (Amendment) Act, 2006 with retrospective effect from 1.4.2006 had introduced an Explanation in Section 35 of the Act which reads as under:- Section 35(1)(ii) – 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 (ii) or clause (iii) applies, shall not be denied merely on the ground that, subsequent to the payment of such sum by the assessee, the approval granted to the association, university, college or other institution referred to in clause (ii) or clause (iii) has been withdrawn. Hence the aforesaid provisions of the Act are very clear that the payer (the assessee herein) would not get affected if the recognition granted to the payee had been withdrawn subsequent to the date of contribution by the assessee. Hence no disallowance u/s 35(1)(ii) of the Act could be made in the instant case."

> 7. Similarly, the another co-ordinate Bench of this Tribunal, Jaipur Bench, in the case of P.R. Rolling Mills Pvt. Ltd. vs. DCIT in ITA No. 529/JP/2019 vide order dated 05.07.2018 for AY 2014-15 has considered the same Trust/ institute i.e. SHG&PG and allowed the claim of the assessee. The facts and circumstances are exactly identical in the present case also, respectfully following the decision of co-ordinate Bench, we allow the claim of deduction under section 35(1)(ii) of the Act. 8. Similar, are the facts in AY 2014-15, hence taking a consistent view we allow the claim of assessee in this year also."

> 7. The issue involved in the present case is identical to the issue involved in the case of Mahesh C. Thakker vs. ACIT. Since, this issue has been decided by the coordinate Bench in favour of the assessee in the aforesaid case, we do not find any reason to take a different view from the view already taken by the coordinate Bench. Hence, respectfully following the decision of the coordinate Bench rendered in the case of Mahesh C. Thakker vs. ACIT (supra), we allow ground No 6 & 7 of the assessee's appeal and direct the AO to allow the claim of the assessee."

In the backdrop of our aforesaid deliberations and considering the fact that the issue involved in the present appeal is squarely covered by the aforesaid orders of the co-ordinate benches of the Tribunal, we, thus, finding no justifiable reason to take a different view respectfully follow the same. Accordingly, we uphold the order of the CIT(A) who had vacated the disallowance of the assessee's claim for deduction of Rs. 70 lac under Sec.35(1)(ii) of the Act. The **Grounds of appeal No(s). 1 to 4** raised by the revenue are dismissed.

7. We shall now deal with the claim of the revenue and also the grievance of the assessee, both of which hinges around the disallowance u/s 40A(2)(a) of Rs. 5 lac (i.e @ Rs. 2,50,000/- per person) out of the

assessee's claim for deduction of salary of Rs. 12 lac (i.e @ Rs. 6 lac each per person) that was claimed by the assessee to have been paid to Smt. Parul Kanda and Smt. Shruti Kanda, i.e related parties, which disallowance as observed by us hereinabove was restricted by the CIT(Appeals) to an amount of Rs. 3 lac (i.e @ Rs. 1,50,000/- each per person).

8. As observed by us hereinabove, the AO taking cognizance of the fact that the assesee had claimed to have paid a salary of Rs.6 lac each to Smt. Parul Kanda and Smt. Shruti Kanda, i.e. related parties, had after holding the aforesaid payments as excessive restricted the same to an amount of Rs.3.5 lac per person. Accordingly, the AO had disallowed u/s 40A(2)(a) an amount aggregating to Rs. 5 lac (out of the assessee's claim for deduction of Rs. 12 lac). On appeal, the CIT(Appeals) partly finding favor with the claim of the assessee had restricted the aforesaid disallowance u/s.40A(2)(a) to an amount aggregating to Rs.3 lac (out of Rs.5 lac made by the A.O), and therein allowed the assessee's claim for deduction of salary aggregating to Rs. 9 lac paid to the aforementioned persons (i.e @ Rs.4.5 lac each).

9. Both the assessee and the department being aggrieved with the aforesaid order of the CIT(Appeals) have carried the matter in appeal before us.

10. After giving a thoughtful consideration to the aforesaid issue in the backdrop of the contentions advanced by the Ld. Authorized Representatives of both the parties, we are unable to principally concur with the very basis on which the provisions of section 40A(2)(a) of the Act had been triggered by the lower authorities. On a perusal of Section 40A(2)(a) of the Act we find that the same reads as under (relevant extract):

> "(2)(a) Where the assessee incurs any expenditure in respect of which payment has been or to be made to any person referred to in clause (*b*) of this sub-sections and the Income-tax Officer is of opinion that **such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him there from, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction**……."
>
> (emphasis supplied by us)

As is discernible from the aforesaid statutory provision, the A.O after forming an opinion that the expenditure incurred by the assessee in respect of which payment has been or is to be made to any related party [as specified in clause (b) of Sec. 40A(2) of the Act], is found to be excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him there from, then, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction. However, in the case before us, we find that though the A.O

while working out the disallowance under the aforesaid statutory provision, had though observed that the payment of salary to the aforementioned two related parties in question was found to be excessive, but had fundamentally erred by not opining as to what as per him was the fair market value of the service which were being rendered by the aforementioned related persons, considering which the payments made to them by the assessee were to held as excessive. Before the CIT(Appeals) the state of affairs we find was no better, as he too without addressing the aforesaid fundamental and material requirement contemplated under Sec. 40A(2)(a) of the Act had though on an ad-hoc basis allowed some relief to the assessee, but had allowed the mistake of the AO to perpetuate. On the basis of our aforesaid observations, we are unable to concur with the view taken by either of lower authorities and holding a conviction that both of them had fundamentally erred in not appreciating the mandate of Section 40A(2)(a) of the Act in the right perspective, thus, set-aside the order of the CIT(Appeals) to the said extent and vacate the disallowance made by the A.O. Thus, the **Ground of appeal No.5** of the revenue's appeal is dismissed while for the ground of cross-objection raised by the assessee is allowed in terms of our aforesaid observations.

11. In the result, appeal of the revenue is dismissed and the cross-objection filed by the assessee is allowed in terms of our aforesaid observations.

Order pronounced in open court on 27th day of May, 2022.

Sd/-	Sd/-
RATHOD KAMLESH JAYANTBHAI	**RAVISH SOOD**
(ACCOUNTANT MEMBER)	**(JUDICIAL MEMBER)**

रायपुर/ RAIPUR ; दिनांक / Dated : 27th May, 2022
SB

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-II, Raipur (C.G)
4. The Pr. CIT-II, Raipur (C.G)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण,रायपुर बेंच, रायपुर / DR, ITAT, Raipur Bench, Raipur.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, रायपुर / ITAT, Raipur.

		Date	
1	Draft dictated on	25.05.2022	Sr.PS/PS
2	Draft placed before author	25.05.2022	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		