| आयकर अपीलीय अधिकरण न्यायपीठ, कोलकाता |
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, KOLKATA

BEFORE DR. MANISH BORAD, HON'BLE ACCOUNTANT MEMBER
&
SHRI SONJOY SARMA, HON'BLE JUDICIAL MEMBER

I.T.A. No. 461/Kol/2023
Assessment Year: 2018-19

Britannia Industries Ltd. 5/1A, Hungerford Street Shakespeare Sarani Kolkata - 700017 **[PAN: AABCB2066P]**	Vs	**Dy. CIT, Circle-7(1), Kolkata**

अपीलार्थी/ (Appellant)		**प्रत्यर्थी**/ (Respondent)

Assessee by :	Shri Kush Kanodia, A/R
Revenue by :	Shri Subhendu Datta, CIT, D/R

सुनवाई की तारीख/**Date of Hearing : 19/10/2023**
घोषणा की तारीख /**Date of Pronouncement: 14/12/2023**

आदेश/O R D E R

PER DR. MANISH BORAD, ACCOUNTANT MEMBER :

The above captioned appeal is directed at the instance of the assessee against the order of the National Faceless Appeal Centre, Delhi (hereinafter the "ld. CIT(A)") dt. 24/03/2023, passed u/s 250 of the Income Tax Act, 1961 ("the Act") for the Assessment Year 2018-19.

2. The assessee has raised the following grounds of appeal :-

"1. For that on the facts and in the circumstances of the case and in law, the Ld. CIT(A) failed to appreciate that the appellant had suo moto computed and disallowed sum of Rs.14,10,610/- which inter alia included sum of Rs.14,19,009/- computed in terms of Rule 8D(2)(ii) being 1% of the value of tax free investments and therefore the AO had factually erred in holding that the aforesaid voluntary disallowance represented disallowance offered by way of direct expenditure u/s 14A read with Rule 8D(2)(i) and thereby wrongly computed further disallowance of Rs.13,32,000/- in terms of Rule 8D(2)(ii).

2. For that on the facts and in the circumstances of the case and in law, the Ld. CIT(A) grossly erred in restricting the disallowance u/s 14A of the Act to Rs.8,93,606/- and instead he ought to have directed the AO to delete the entire disallowance of Rs.23,12,615/- made u/s 14A of the Act by the NFAC.

3. For that on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was unjustified on facts and in law in confirming the disallowance of weighted component of deduction claimed u/s 35(2AB) of the Act to the extent of Rs.8,90,72,303/-.

4. For that on the facts and in the circumstances of the case and in law, the appellant having furnished the requisite Form 3CM and 3CLA in support of the expenditure incurred at the in-house R& D facility, Ld. CIT(A) ought to have directed the AO/NFAC to also allow the weighted component of the deduction claimed u/s 35(2AB) of the Act i.e. Rs.8,90,72,303/-.

5. For that on the facts and in the circumstances of the case and in law and without prejudice to the above, the AO/NFAC ought to be directed to allow the weighted component of the deduction claimed u/s 35(2AB) of the Act being Rs.8,90,72,303/- in terms of the Form 3CL as and when issued by the DSIR.

6. For that on the facts and in the circumstances of the case and in law, the lower authorities erred in not computing the short term capital gain by taking the value of the cost of investments sold in accordance with FIFO Method, as mandated by Section 45(2A) of the Act.

7. For that on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was wholly unjustified on facts and in law in denying the deduction of Rs.11.07 crores claimed u/s 80G of the Act on the alleged premise that the donation of Rs.22.14 crores made by the appellant was allegedly involuntary and made to a related entity in violation of the conditions precedent in Section 80G of the Act.

8. For that on the facts and in the circumstances of the case and in law, the reasoning given by the Ld. CIT(A) to uphold the denial of the deduction claimed u/s 80G of the Act was frivolous and did not emanate from the extant provisions of the law and in that view of the matter the disallowance of Rs.11.07 crores claimed u/s 80G of the Act may kindly be directed to be deleted.

9. For that on the facts and in the circumstances of the case and in law, the Ld. CIT(A) failed to direct the NFAC to correctly quantify the gross dividend declared and distributed during the year at Rs.264 crores instead of Rs.300.14 crores and thereby re-assess the gross DDT payable thereon at Rs.53,77,06,787/- as against Rs.61,69,62,775/- as assessed in ITBA Computation Sheet annexed to the assessment order dated 22.03.2021.

10. For that on the facts and in the circumstances of the case and in law, the NFAC/JAO be directed to delete the demand along with interest raised u/s 115-O/115-P of the Act and instead re-compute and allow the refund of excess DDT of Rs.13,11,69,254/- paid by the appellant on the dividend distributed to non-resident shareholders, as directed by the Ld. CIT(A).

11. For that on the facts and in the circumstances of the case and in law, the appellant having furnished the return of income within the time limit prescribed u/s 139(1) of the Act, the Ld. CIT(A) ought to have directed the NFAC/AO to delete the interest of Rs.23,20,642/- levied u/s 234A of the Act.

12. For that the appellant craves leave to submit additional grounds and/or amend or alter the grounds already taken either at the time of hearing of the appeal or before."

3. Ground Nos. 1 & 2 of the appeal are against the disallowance of Rs.8,93,606/- confirmed by the Ld. CIT(A). Brief facts of the case, as noted, are that, the appellant had originally disallowed sum of Rs.14,19,009/- under Section 14A of the Act in the return of income. The AO however had mistakenly inferred the suo moto disallowance made by the appellant to be Rs.9,80,615/- instead of Rs.14,19,009/-, which it held to be in the nature of 'Direct Expenses' disallowed under Rule 8D(2)(i) of the Income tax Rules, 1962 ('the Rules'). The AO also computed further disallowance in terms of Rule 8D(2)(ii) at Rs.13,32,000/-. Accordingly, it is noted that the AO disallowed further sum of Rs. 13,32,000/- [9,80,615 +

13,32,000 – 9,80,615]. Aggrieved by this action of the AO, the appellant preferred an appeal before the Ld. CIT(A).

4. Before the Ld. CIT(A), the appellant explained that it had originally disallowed sum of Rs.14,19,009/- and not Rs.9,80,615/-. It was further brought to the notice of the Ld. CIT(A) that, the suo moto disallowance comprised of (i) direct expenses i.e. demat charges of Rs.8,399/- and (ii) disallowance as per Rule 8D(2)(ii) being 1% value of tax-free investments being Rs.14,10,610/-. It was accordingly claimed that the suo moto disallowance u/s 14A was in accordance with both Rule 8D(2)(i) & (ii) and did not solely constitute 'direct expenses'. According to the appellant, therefore, no further disallowance was warranted u/s 14A of the Act in this regard. It is noted that, the Ld. CIT(A) agreed that the appellant had suo moto offered disallowance of Rs.14,19,009/- under Section 14A of the Act but continued to hold it to be in the nature of 'direct expenses' under Rule 8D(2)(i). The Ld. CIT(A) accordingly restricted the disallowance to Rs.8,93,606/- [9,80,615 + 13,32,000 – 14,19,009]. Being aggrieved, the appellant is now in appeal before us.

5. Heard both the parties. It is noted that, the appellant had computed and offered disallowance of Rs.14,19,009/- under Section 14A in terms of Rule 8D, whose details have been placed at Pages 30 to 39 of the Paper Book-I. Perusal of the same reveals that the disallowance comprised of following :-

(i)	Direct Expenses [Demat Charges]	– Rs. 8,399/-
(ii)	1% of tax free investments	- Rs.14,10,610/-
		Rs.14,19,009/-

6. The above calculation is noted to have been furnished before the AO vide letter dated 07.10.2019. The Ld. AR brought to our notice that, inadvertently in one of their reply dated 27.01.2021, the figure of suo moto disallowance u/s 14A was erroneously mentioned at Rs.9,80,615/- which was apparently considered by AO to be the purported disallowance offered by the appellant u/s 14A of the Act. However, from the facts placed before us, it is noted that the disallowance offered u/s 14A as per Rule 8D in the return of income for AY 2018-19 was Rs.14,19,009/-. Having regard to the above calculation, it is thus held that direct expenses disallowable under Rule 8D(2)(i) was Rs.8,369/- and the AO had wrongly computed the same at Rs.9,80,615/-. Coming to the disallowance as per Rule 8D(2)(ii), it is noted that the disallowance suo moto computed by the appellant at Rs.14,10,610/- exceeded the sum of Rs.13,32,000/- worked out by the AO. The Ld. AR fairly stated that the correct sum disallowable under Rule 8D(2)(ii) was Rs.14,10,610/-. We thus hold that the aggregate sum disallowable u/s 14A read with Rule 8D for the relevant year was Rs.14,19,009/- [8,399 + 14,10,610] which is noted to have already been offered by the appellant in the return of income. Hence, the plea of the assessee that no further disallowance u/s 14A is warranted on these given facts, is accepted. Accordingly, the excess disallowance of Rs.8,93,606/-

retained by Ld. CIT(A) is directed to be deleted. Ground Nos. 1 & 2 of the appeal are therefore allowed.

7. Now we take up Ground Nos. 3 to 5 which relate to the disallowance of the deduction claimed u/s 35(2AB) of the Act. The facts as discernible from the records are that the appellant had incurred scientific research expenditure, both revenue and capital, at their approved in-house R&D facility at Bengaluru, aggregating to Rs.17,81,44,605/-. The appellant is noted to have claimed weighted deduction @ 150% of the aforesaid expenditure being Rs.26,72,16,908/- (Rs.17,81,44,605 x 150%) u/s 35(2AB) of the Act. In the course of the assessment, the AO had required the appellant to furnish copy of Form 3CL, issued by the DSIR in terms of Rule 6(7A) of the Income Tax Rules, 1962, in support of the weighted deduction claimed u/s 35 of the Act. Although the appellant submitted the initial approval issued by the DSIR in Form 3CM and the audit report in Form 3CLA filed before DSIR seeking weighted deduction in relation to the expenditure of Rs.17,81,44,605/-, but it expressed its inability to furnish Form 3CL as the same was pending to be issued by the DSIR. The AO, in the absence of Form 3CL, disallowed the deduction claimed u/s 35(2AB) with the following rider:

> *"However, this claim is disallowed with a rider that in due course of time even after the passing of this Assessment Order when assessee received Form No. 3CL from DSIR for AY 2018-19, assessee can move in a request for Rectification under Section 154 of the Income Tax Act, 1961 and due consideration should*

be given to the Rectification plea of the assessee. Allowance of expenditure under Section 35(2AB) for AY 2018-19 should be allowed to the assessee based on Form 3CL once the assessee is in receipt of the same."

8. Aggrieved by the above order, the appellant preferred an appeal before the Ld. CIT(A). The Ld. CIT(A) is noted to have upheld the finding of the AO that in the absence of Form 3CL, the claim for weighted deduction u/s 35(2AB) of the Act cannot be allowed. The Ld. CIT(A), however, acceded to the appellant's alternate plea that the normal deduction for the aggregate expenditure of Rs.17,81,44,605/- has to be allowed. With these observations, the Ld. CIT(A) is noted to have restricted the disallowance to the extent of Rs.8,90,72,303/- (Rs.26,72,16,908 – Rs.17,81,44,605). Being aggrieved by the order of the Ld. CIT(A), the appellant is now in appeal before us.

9. At the time of hearing, the Ld. AR for the appellant placed before us the copy of Form 3CL dated 31.08.2023 which has been issued by the DSIR, in which out of the total expenditure of Rs.17,81,44,605/-, expenses to the tune of Rs.17,26,44,000/- has been approved for weighted deduction u/s 35(2AB) of the Act. The Ld. AR thus pleaded that, in line with the above rider given by the AO, the consequent weighted deduction claimed u/s 35(2AB) of the Act ought to be allowed. To this, the Ld. DR appearing for the Revenue, did not oppose the plea of the assessee.

10. Heard both the parties. It is noted that the DSIR has issued Form 3CL dated 31.08.2023, in terms of which, the appellant is entitled to

weighted deduction of Rs.25,89,66,000/- [17,26,44,000 X 150%] u/s 35(2AB) of the Act. The balance sum of Rs.55,00,605/- [17,81,44,605 – 17,26,44,000] however is only eligible for normal deduction, as rightly held by the Ld. CIT(A). Accordingly, the total deduction allowable u/s 35(2AB) and 35(1)(i)/(iv) of the Act works out to Rs.26,44,66,605/- [25,89,66,000 + 55,00,605] as opposed to the deduction of Rs.26,72,16,908/- claimed by the appellant in the return of income. Accordingly, the disallowance of Rs.8,90,72,303/- confirmed by the Ld. CIT(A) stands restricted to Rs.27,50,303/- [26,72,16,908 - 26,44,66,605]. These grounds are therefore partly allowed.

11. Ground No. 6 of the appeal relates to computation of short term capital on sale of listed investments following FIFO Method. Briefly stated, the facts of the case are that, the appellant had computed and offered short term capital gain on sale of listed investments held in demat form following the weighted average cost method. Before the AO, the appellant is noted to have submitted that the calculation methodology followed by it was incorrect, as the provisions of Section 45(2A) of the Act mandated that the profit/gain arising on sale of listed investments shall be determined on the basis of First-In First-Out (FIFO) Method. The appellant accordingly furnished a revised working statement in which the short term capital gain which was originally computed at Rs.20,32,04,468/- stood revised to Rs.20,31,33,803/-. The AO is however noted to have rejected the claim since it was not raised in the original return of income. Aggrieved by this action of Ld. AO, the appellant went

in appeal before the Ld. CIT(A) who also did not interfere with the order of AO. Now the appellant is in appeal before us.

12. Heard both the parties. The first issue which arises for our consideration is, whether the claim made by the appellant regarding re-computation of STCG on sale of investments on FIFO basis in the course of assessment, is admissible in absence of such claim being raised in the return of income. For this, we gainfully refer to the decision rendered by the Hon'ble jurisdictional Calcutta High Court in the appellant's own case which is reported in 396 ITR 677. In the decided case the Hon'ble Court after considering the decision of Hon'ble Supreme Court in the case Goetze (India) Ltd (284 ITR 323) and Addl. CIT v. Gurjargravures (P.) Ltd. (111 ITR 1) has held that the appellate authority has the power to entertain new claim if the grounds raised are bonafide. Thus, in principle, we agree that the appellant is legally entitled to raise this claim before us.

13. Now coming to the merits of this claim, we note that the provisions of Section 45(2A) of the Act is abundantly clear that where the person has transferred securities held in dematerialized form, then for the purposes of Section 48 as well as Section 2(42A) of the Act, the cost of acquisition and the period of holding of any securities shall be determined on the basis of the first-in-first-out method. This position is noted to have been explained by the CBDT as well in their Circular No. 768 dated 24.06.1998. Accordingly, the contention of the appellant that the short term capital gain is to be worked out on FIFO Method and not weighted average cost

method is held to be tenable. According to the appellant, the short term capital gain which was originally computed at Rs.20,32,04,468/- by following weighted average cost method shall stand rectified to Rs.20,31,33,803/- under the FIFO Method. The lower authorities have, however, observed that the appellant did not furnish any document / calculation in support of its claim. To this, the Ld. AR showed us that the complete statement giving scrip-wise break-up was furnished before the AO vide letter dated 05.02.2021, copy of which was placed at Page 43 to 57 of the Paperbook-I. Having regard to the same, we set aside this issue to the file of the AO to verify the calculation/computation submitted by the assessee and accordingly re-compute/quantify the correct taxable short term capital gain in terms of Section 45(2A) of the Act. This ground is therefore allowed for statistical purposes.

14. Now we take up Ground Nos. 7 & 8 of the appeal, which are against the Ld. CIT(A)'s action confirming the disallowance of deduction claimed u/s 80G of the Act. The facts of the case as noted by us are that, during the year the appellant had contributed sum of Rs.22.13 crores towards its CSR obligations to Nowrosjee Wadia Maternity Hospital and Sir Ness Wadia Foundation. It is not in dispute that, the appellant had disallowed and added back the aforesaid expenditure in terms of Explanation 2 to Section 37(1) of the Act, while computing the taxable business income. However, as the sum contributed qualified for specific deduction u/s 80G of the Act, the appellant is noted to have claimed the same in the manner as prescribed therein, i.e. 50% of the donation being Rs.11,06,85,217/-.

Before the AO, complete details in support of the deduction claimed u/s 80G of the Act was provided. It is however noted that, the AO denied the deduction so claimed by observing that the donation was not made voluntarily, and that the appellant had chosen to make the same to related concerns covered u/s 80G of the Act. On appeal, the Ld. CIT(A) is noted to have confirmed the order of the AO, aggrieved by which, the appellant is now in appeal before us.

15. Assailing the action of Ld. CIT(A), the appellant submitted that the reasoning given by the lower authorities for making the impugned disallowance was extraneous and did not emanate from the extant provisions of Section 80G of the Act. The Ld. AR pointed out that, nowhere did the provisions of Section 80G of the Act provide that, the pre-condition to claim deduction is that, the sums paid to charitable trusts is required to be demonstrated to have been paid voluntarily. Also, there is no prohibition or restriction that sums paid to related charitable trusts would not qualify for deduction u/s 80G of the Act. The Ld. AR further explained that, the appellant had not contributed to the concerned registered charitable trust under any specific mandate or compulsion. Instead, it was the appellant's voluntary decision as to how it wished to spend on CSR activities and it was solely the appellant's decision to contribute the sum to this particular registered charitable trust/s. The Ld. AR submitted that, the appellant had the right to exercise its own free will to determine the nature and organization to which it wants to make contributions in relation to its corporate social responsibility and merely

because the appellant has made donation to registered charitable organizations, in which their promoters were actively involved, was completely irrelevant to deny the otherwise eligible deduction claimed u/s 80G of the Act. The Ld. AR further relied on several judicial precedents to support the appellant's claim for deduction u/s 80G of the Act. He thus urged that the impugned disallowance be deleted. Per contra, the Ld. DR supported the order of lower authorities.

16. We have heard both the parties and perused the relevant provisions of the Act. It is noted that the provisions of Section 37 of the Act, which deals with allowability of expenses incurred in the course of and for the purposes of business, is applicable only to the extent of computation of 'Business Income' under Chapter IV-C of the Act. In our view, therefore, the Explanation (2) to Section 37 of the Act which denies deduction for the expenses incurred on CSR initiative by way of deduction from computation of 'Business Income' cannot be read into Chapter VI of the Act, which is applicable for arriving at taxable income from the Gross Total Income. It is also noted that wherever the Legislature intended that CSR contributions to any specific charitable trusts should be denied deduction, necessary provisions were incorporated in the specified sub-clauses, viz. sub-clauses (iiihk) and (iiihi). It is noted that no such debar has been set out by the Legislature in any other sub-clauses of Section 80G of the Act. As far as the reasoning given by the AO to deny the deduction is concerned, we find the same to be of no relevance as the same is not borne out from the provisions contained in Section 80G of the Act. Rather,

we find the reliance placed by the Ld. AR of the appellant on the decision of this Tribunal at Kolkata in the case of JMS Mining Pvt. Ltd. vs PCIT in ITA No. 146/Kol/2021 dated 1st July 2021 to be relevant. In the instant case also, the Tribunal after considering the provisions of Explanation (2) to Section 37 of the Act and Section 80G of the Act, observed that the Parliament intended restrictions to CSR expenditure spent by way of donations to only two funds/trusts i.e. Swachh Bharat Kosh and Clean Ganga Fund. The Tribunal thus held that, the fact that specific prohibition/restriction has been made for CSR contributions only to two eligible charitable organizations, then it automatically implies that there is no prohibition/restriction in respect of claim of CSR expenses, in any other cases, which are otherwise eligible under Section 80G of the Act. Following the same, this Tribunal in the case of Acme Chem Ltd Vs ACIT in ITA No. 650/Kol/2022 dated 31.03.2023 has deleted similar disallowance made by the AO u/s 80G of the Act in relation to the CSR donations made to registered charitable trusts, by observing as follows :-

> *"60. We fail to find any merit in this action of ld. AO which has been subsequently confirmed by ld. CIT(A) for the reason that CSR expenses incurred by the assessee already stands disallowed in the computation of income. Now, Section 80G of the Act comes into play if any of the donations is eligible for deduction u/s 80G of the Act. It is not in dispute before us that the organizations to which the alleged donation has been given are registered u/s 12A of the Act holds the approval of Section 80G of the Act. This Tribunal in the case of M/s. JMS Mining Pvt. Ltd. vs PCIT in ITA No. 146/KOL/2021 order dated 22.07.2021 has allowed the deduction u/s 80G of the Act on CSR expenses. The relevant finding of this Tribunal is reproduced below:*

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."

61. We, therefore, respectfully following the decision referred herein above, are inclined to hold that the assessee is eligible for deduction u/s 80G of the Act at Rs. 17.50 lakh and thus, set aside the finding of ld. CIT(A) and allow ground nos. 8 & 9 raised by the assessee for AY 2017-18."

17. Respectfully following the above decisions (supra), we are inclined to hold that the assessee is eligible for deduction of Rs.11,06,85,217/- claimed u/s 80G of the Act. We accordingly set aside the order of the lower authorities in this regard and allow Ground Nos. 7 & 8 raised by the appellant.

18. Ground Nos. 9 & 10 relate to non-granting of credit for dividend distribution tax paid u/s 115-O and levy of interest u/s 115P of the Act. At the time of hearing, the Ld. AR brought to our notice that the JAO had rectified this error by passing rectification order dated 19.05.2023 u/s 154 of the Act, copy of which was placed before us. Having regard to the same, both the parties agreed that this ground has now been rendered infructuous and is therefore dismissed.

19. Ground No. 11 is general in nature, which needs no adjudication.

20. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the Court on 14th December, 2023 at Kolkata.

Sd/-	*Sd/-*
(SONJOY SARMA)	**(DR. MANISH BORAD)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Kolkata, Dated 14/12/2023
SC Sr.PS

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

1. अपीलार्थी / The Assessee
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-
5. विभागीय प्रतिनिधि ,**आयकर अपीलीय अधिकरण,** कोलकाता/DR,ITAT, Kolkata,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ **BY ORDER**
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Kolkata