IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH : KOLKATA

[Before Hon'ble Shri M.Balaganesh, AM & Hon'ble Shri S.S.Viswanethra Ravi, JM]

I.T.A No. 378/Kol/2017

Assessment Year : 2014-15

DCIT, Circle-12(1), Kolkata	-vs-	M/s Maco Corporation India (P) Ltd. [PAN: AACCM 8740 L]
(Appellant)		(Respondent)

For the Appellant : Shri S. Dasgupta, Addl. CIT(DR)

For the Respondent : Shri Miraj D Shah, AR

Date of Hearing : 10.04.2018

Date of Pronouncement : 13.04.2018

ORDER

Per M.Balaganesh, AM

1. This appeal by the Revenue arises out of the order of the Learned Commissioner of Income Tax(Appeals)-4, Kolkata [in short the ld CIT(A)] in Appeal No.11123/CIT(A)-4/Circle-12(1)/16-17 dated 27.12.2016 against the order passed by the DCIT, Circle-12(1), Kolkata [in short the ld AO] under section 143(3) of the Income Tax Act, 1961 (in short "the Act") dated 22.09.2016 for the Assessment Year 2014-15.

2. The only effective issue to be decided in this appeal is as to whether the ld CITA was justified in deleting the disallowance made u/s 35(1)(ii) of the Act in the sum of Rs 4,37,50,000/- in the facts and circumstances of the case.

3. The brief facts of this issue is that the assessee is a private limited company engaged in the business of import and export of machinery spares, equipment & component and project execution work. The return of income for the Asst Year 2014-15 was filed by the assessee on 30.9.2014 disclosing total income of Rs 35,46,93,990/-. The ld AO observed that the assessee claimed donation of Rs 4,37,50,000/- (being 175% of Rs 2,50,00,000/-) u/s 35(1)(ii) of the Act for the scientific research organization donation made as under:-

Herbicure Healthcare Bio-Herbal Research Foundation (HHBHRF in short)	7.3.2014	1,00,00,000
HHBHRF	11.3.2014	1,00,00,000
HHBHRF	29.3.2014	50,00,000
		2,50,00,000

Survey Operations u/s 133A of the Act were conducted on 27.1.2015 in the premises of HHBHRF by the Directorate of Investigation, Kolkata. In such survey, it was found that the aforesaid concern was engaged in collecting bogus donations u/s 35(1)(ii) of the Act from beneficiaries to enable them to claim weighted deduction of 175% of the amounts actually paid by such beneficiaries. The ld AO issued a show cause notice asserting the following :-

- As per Tax audit report column 15(a), the amounts debited and deduction allowable u/s 35 is being shown as “NA”.
- These institutions are engaged in the bogus donation u/s 35(1)(ii) of the Act through various brokers in lieu of commission. Bogus donations are received through cheques/RTGS and thereafter cash is returned to the donors after deducting commission.

- Statements of key persons like secretary/Treasures/President and other persons recorded during the survey has confirmed the above bogus activity by these institutions.
- Statements of auditors recorded during the course of survey clearly shows lacunas in the audit done by them.
- Statements of number of brokers/entry operators recorded in course of survey proceedings have confirmed the bogus billing or accommodation entries from these institutions.
- Pre survey & post survey enquiries have found that most of the expense side parties are paper & bogus concerns.
- The Bank statements of these institutions show clear pattern of donation coming and going vide the above modus operandi.
- SHG&PH have gone in settlement commission admitting that in lieu of service charge they have provided accommodation entries of donation to the donors.
- The books of accounts were not there at the registered offices. In case of SHG&PH there are broker wise ledgers of commission. No purchase bills were found for financial year 2014-15. Documents related to commission were found and impounded.
- These institutions have few persons with good CV who are associated only in honorary position and they are not involved in the day to day activities.
- The research work shown is just reproduction of published material. Details in respect of research work could not be furnished by these institutions.
- These institutions have miniscule presence and their contribution to scientific research is too negligible for the kind of donation they received. The research facilities are near about missing in these institutes.

- These institutes have blatantly violated Rule 5C, 5D & 5E of Income Tax Rules which are required to be complied by the institutes approved u/s 35(1)(ii) of the Act.

In the light of above points the AO wanted the appellant to explain its claim of deduction amounting to Rs. 4,37,50,000/- u/s 35(1)(ii) of the Act.

4. The assessee in response to show cause notice replied as under:-

- These institutions are duly registered with the registrar of companies, Income Tax Department, SIRO and other authorities and are engaged in the research activities. These institutions enjoy registrations u/s 35(1)(ii) of the Act.
- These are not bogus donations as alleged. The donations are genuine and no commission whatsoever was paid to any person with respect to these donations. At the time of making these donations no such discrepancy came to the knowledge of the assessee company.
- The assessee company is subjected to regular assessment every year and it can be seen from the accounts that for several years the assessee group has been supporting several institutions by giving donations. This is the philosophy of the group.
- The deduction claimed is correct and should be allowed in full. In support of its claim the assessee company furnished following:-
  a) Registration & renewal certificate of Department of Science & Technology, Government of India.
  b) Request letter of HHBHRF.
  c) Income Tax Exemption of Certificate.
  d) Receipts of Rs 2,50,00,000/- issued by HHBHRF
- Assessee requested the ld AO to provide all materials proposed to be used against the assessee company in respect of transactions with foundation. The

assessee also requested to cross examine the parties who have given adverse statements.

- It was also mentioned that in view of the judicial cases, where any donation is made by an assessee to an approved institution and claimed deduction, the subsequent withdrawal of the approval of such institution would not entitle the department to disallow the deduction to the assessee.
- It was also submitted by the assessee that merely on submission made by the donee trust during the course of their income tax proceedings, the assessee company should not be denied the benefit of deduction as on the date of the donation the donee trust was carrying on activities based on which recognition was given by the Income Tax authorities.
- It further stated that assessee company should be given an opportunity to cross examine the donee trust before making any disallowance on the presumption that the donation is bogus.

5. The ld AO observed that the donations made through banking channel reflected the urgency in making the arrangement and donation being made towards the fag end of the financial year wherein the actual profit earned during the financial year 2013-14 had become crystal clear. The ld AO further relied on the survey report and observed that the assessee company's name appear at serial number 272 of the survey report amongst the list of names furnished by the DDIT (Inv.) Unit 4(1), Kolkata in the case of HHBHRF reflecting bogus donation transaction of the assessee company. The ld AO extracted the statements recorded by the DDIT, Investigation Wing, Kolkata from various persons belonging to HHBHRF. The ld AO finally stated that on perusal of extracts of survey reports and statements of Sri Manoj Kumar Kothary, Sri Swapan Ranjan Dasgupta, Sri Anand Krishna Maitin, Sri Kalipada Bhattacharya, Smt Sujata Ghosh Dastidar , Sri Sanker Kumar Khetan, Sri Kishan Bhawsinghka, Sri Kailash Kumar Rungta, it is clear that the assessee company had paid bogus donation. The ld

AO also issued summons u/s 131 of the Act to Shri Nagesh M Patel, Managing Director of the assessee company and recorded statement from him. He concluded that the assessee company had not verified the concerns properly. The MD of the assessee company does not know any person of these concerns and does not remember the name of the broker who had brought the details of these concerns. Accordingly, the ld AO disallowed the weighted deduction claimed in the sum of Rs 4,37,50,000/- u/s 35(1)(ii) of the Act in the assessment.

6. The assessee filed a detailed written submissions before the ld CITA meeting out each and every point of the order of the the ld AO which are reproduced in pages 7 to 24 of the order of the ld CITA which are not reiterated herein for the sake of brevity. The ld CITA deleted the disallowance by observing as under:-

> *"5.1. I have gone through the assessment order, written submissions filed by the AR of the appellant company as well as the paper book containing all the supporting documents in the matter. I find that the identical issue has already been decided in favour of the appellant by me in the appellant's own case for* ***AY 2013-14 vide ITA No. 10687/CIT(A)-4/Circle-12(1)/16-17 dated 24.10.2016****.In such circumstance and following the principles of Consistency, the addition made by the AO on this count for the year under consideration is alos hereby directed to be deleted. The AO is directed accordingly in the matter. These grounds are allowed."*

7. Aggrieved, the revenue is in appeal before us on the following grounds:-

> *1. That on the facts & circumstances of the case and in law, the Ld. CIT(A) has erred by deleting the disallowance of deduction u/s. 35(1)(ii) of the Act of Rs. 4,37,50,000/-.*
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> *2. That on the facts & circumstances of the case and in law, the Ld. CIT(A) has erred by not appreciating the facts that the A.O. had made enquiries and established the same in the assessment order before making disallowance of deduction u/s. 35(1)(ii) of the Act.*

3. That on the facts & circumstances of the case and in law, the Ld. CIT(A) has erred by not appreciating the facts that against the said concern i.e. Herbicure Healthcare Bio-Herbal Research Foundation, a survey operation was conducted by the Investigation Wing of the Department, Kolkata on 27.01.2015 in the premises of aforementioned concern in which it had been found that the said concern is engaged in providing bogus donation u/s. 35(1)(ii) in the name of various parties so as to enable them to avail 175% deduction u/s. 35(1)(ii) of the IT. Act.

4. That on the facts & circumstances of the case and in law, the Ld. CIT(A) has erred by not appreciating the facts that the name of the assessee company was appearing in Serial No. 272 & 301 of the survey report amongst the names of list furnished by the DDIT(Investigation), Unit-4(1) Kolkata in the case of Herbicure Healthcare Bio Herbal Research Foundation & School of Human Genetics & Population Health reflecting wherein bogus donation had been availed.

5. That on the facts & circumstances of the case and in law, the Ld. CIT(A) has erred by not appreciating the facts that CBDT, vide Notification No. 79/2016/F. No. 203/ 135/2007/ITA.II dated 06.09 2016 & 82/2016/F.No. 203/642009/ITA.II dated 15.09.2016 has withdrawn the approval Notification of donees concern namely Herbicure Healthcare Bio-Herbal Research Foundation, Kolkata and School of Human Genetics & Population Health, Kolkata with effect from 1st April, 2007.

6. That on the facts & circumstances of the case and in law, the Ld. CIT(A) has erred by no appreciating the facts that on the basis of enquiry made on Survey & post survey operations by the Investigation Wing of the Department in the case of the donee concerns, the Hon'ble CBDT has withdrawn the approval Notification of the donee concern w.e.f. 1st April, 2007.

8. We have heard the rival submissions and perused the materials available on record. We find that this issue is squarely covered in favour of the assessee by the order of this tribunal in assessee's own case for the Asst Year 2013-14 in ITA No. 16/Kol/2017 dated 14.3.2018 wherein it was held as under:-

8. We have heard the rival submissions and perused the materials available on record. The brief facts pertaining to HHBHRF are as under:-

a) HHBHRF was registered u/s 12AA of the Act by the ld DIT(Exemptions), Kolkata with effect from 26.12.2003.

b) HHBHRF was also recognized in the year 2006-07 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 1.4.2012 to 31.3.2015 vide communication in F.No. 14/444/2006-TU-V dated 13.8.2012.

c) HHBHRF was recognized vide Gazette Notification No 35/2008 dated 14.3.2008 issued by the Central Board of Direct Taxes (CBDT in short) Ministry of Finance, Government of India, u/s 35(1)(ii) of the Act.

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:-

> *<u>Section 35(1)(ii) – Explanation</u>*
> *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.

8.3. We find that there is no provision in section 35(1)(ii) of the Act to withdraw the recognition granted to the assessee therein. When there is no provision for withdrawal of recognition in the Act, the action of the revenue in withdrawing the recognition with retrospective effect from 1.4.2007 is unwarranted. In this regard, the recent decision of the Hon'ble Supreme Court in the case of Industrial Infrastructure Development Corporation (Gwalior) M.P. Ltd vs CIT Gwalior reported in (2018) 90 taxmann.com 281 (SC) wherein it was held that :-

> ***21.*** *In our considered opinion, the CIT had no express power of cancellation of the registration certificate once granted by him to the assessee under Section 12A till 01.10.2004. It is for the reasons that, first, there was no express provision in the Act vesting the CIT with the power to cancel the registration certificate granted under Section 12A of the Act. Second, the order passed under Section 12A by the CIT is a quasi judicial order and being quasi judicial in nature, it could be withdrawn/recalled by the CIT only when there was express power vested in him under the Act to do so. In this case there was no such express power.*
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> ***22.*** *Indeed, the functions exercisable by the CIT under Section 12A are neither legislative and nor executive but as mentioned above they are essentially quasi judicial in nature.*
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> ***23.*** *Third, an order of the CIT passed under Section 12A does not fall in the category of "orders" mentioned in Section 21 of the General Clauses Act. The expression "order" employed in Section 21 would show that such "order" must be in the nature of a "notification", "rules" and "bye laws" etc. (see - Indian National Congress(I) v. Institute of Social Welfare [2002] 5 SCC 685.*
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> ***24.*** *In other words, the order, which can be modified or rescinded by applying Section 21, has to be either executive or legislative in nature whereas the order, which the CIT is required to pass under Section 12A of the Act, is neither legislative nor an executive order but it is a "quasi judicial order". It is for this reason, Section 21 has no application in this case.*
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> ***25.*** *The general power, under Section 21 of the General Clauses Act, to rescind a notification or order has to be understood in the light of the subject matter, context and the effect of the relevant provisions of the statute under which the notification or order is issued and the power is not available after an enforceable right has accrued under the notification or order. Moreover, Section 21 has no application to vary or amend or review a quasi judicial order. A quasi judicial order can be generally varied or reviewed when obtained by fraud or when such power is conferred by the Act or Rules under which it is made. (See Interpretation of Statutes, Ninth Edition by G.P. Singh page 893).*
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> ***26.*** ……

27. *It is not in dispute that an express power was conferred on the CIT to cancel the registration for the first time by enacting sub-Section (3) in Section 12AA only with effect from 01.10.2004 by the Finance (No.2) Act 2004 (23 of 2004) and hence such power could be exercised by the CIT only on and after 01.10.2004, i.e., (assessment year 2004-2005) because the amendment in question was not retrospective but was prospective in nature.*

28. *The issue involved in this appeal had also come up for consideration before three High Courts, namely, Delhi High Court in the case of DIT (Exemptions) v. Mool Chand Khairati Ram Trust [2011] 11 taxmann.com 42/199 Taxman 1/339 ITR 622, Uttaranchal High Court in the case of Welham Boys' School Society v. CBDT [2006] 285 ITR 74/[2007] 158 Taxman 199 and Allahabad High Court in the case of Oxford Academy for Career Development v. Chief CIT [2009] 315 ITR 382.*

29. *All the three High Courts after examining the issue, in the light of the object of Section 12A of the Act and Section 21 of the General Clauses Act held that the order of the CIT passed under Section 12A is quasi judicial in nature. Second, there was no express provision in the Act vesting the CIT with power of cancellation of registration till 01.10 2004; and lastly, Section 21of the General Clauses Act has no application to the order passed by the CIT under Section 12A because the order is quasi judicial in nature and it is for all these reasons the CIT had no jurisdiction to cancel the registration certificate once granted by him under Section 12A till the power was expressly conferred on the CIT by Section 12AA(3) of the Act w.e.f. 01.10.2004.*

We hold that the ratio decidendi of the aforesaid judgement of the Hon'ble Apex Court would squarely be applicable to the facts of the instant case. Infact the assessee's case herein falls on a much better footing than the facts before the Hon'ble Apex Court. In the case before Hon'ble Apex Court, the power of cancellation of registration us 12A of the Act was conferred by the Act on the ld CIT w.e.f. 1.10.2004 and the Hon'ble Apex Court held that prior to that date , no cancellation of registration could happen. But in the instant case, there is absolutely no provision for withdrawal of recognition u/s 35(1)(ii) of the Act . Hence we hold that the withdrawal of recognition u/s 35(1)(ii) of the Act in the hands of the payee organizations would not affect the rights and interests of the assessee herein for claim of weighted deduction u/s 35(1)(ii) of the Act.

8.4. We also find that the co-ordinate bench of this tribunal in exactly similar facts had decided the issue in favour of the assessee in the following cases:-

a) Rajda Polymers vs DCIT in ITA No. 333/Kol/2017 for Asst Year 2013-14 dated 8.11.2017.

b) Saimed Innovation vs ITO in ITA No. 2231/Kol/2016 for Asst Year 2013-14 dated 13.9.2017.

The findings of those decisions are not reiterated herein for the sake of brevity.

8.5. In view of the aforesaid findings in the facts and circumstances of the case and respectfully following the various judicial precedents relied upon hereinabove, we hold that the ld CITA had rightly deleted the disallowance u/s 35(1)(ii) of the Act in the sum of Rs 3,06,25,000/- made by the ld AO. Accordingly, the Grounds raised by the revenue are dismissed.

8.1. In view of the aforesaid findings in the facts and circumstances of the case and respectfully following the various judicial precedents rel ed upon hereinabove, we hold that the ld CITA had rightly deleted the disallowance u/s 35(1)(ii) of the Act in the sum of Rs 4,37,50,000/- made by the ld AO. Accordingly, the Ground Nos. 1 to 6 raised by the revenue are dismissed.

9. The next issue to be decided in this appeal is as to whether the ld CITA was justified in directing the ld AO to consider only dividend bearing investments for the purpose of computing disallowance u/s 14A of the Act read with Rule 8D(2)(iii) of the Rules under the normal provisions of the Act, in the facts and circumstances of the case.

9.1. We find that the issue is squarely covered in favour of the assessee by the decision of this tribunal in the case of REI Agro Ltd reported in 144 ITD 141 (Kol Trib) wherein it was held that only dividend bearing investments is to be considered for computing disallowance under Rule 8D(2)(ii) and 8D(2)(iii) of the Rules. We hold that the ld CITA had rightly granted relief to the assessee in this regard by placing reliance on the said decision. Hence we hold that only dividend bearing investments are to be considered for the purpose of computing disallowance u/s 14A

of the Act read with Rule 8D of the Rules. Accordingly, the Grounds raised by the revenue in this regard are dismissed.

10. The next issue to be decided is as to whether the disallowance u/s 14A of the Act read with Rule 8D of the Rules could be made while computing book profits u/s 115JB of the Act, in the facts and circumstances of the case.

10.1. We find that this issue is squarely covered in favour of the assessee by the decision of this tribunal in the case of M/s .CD Equifinance Pvt Ltd vs DCIT in ITA No. 577/Kol/2016 dated 9.2.2018 reported in 2018(2) TMI 868-ITAT Kolkata , wherein it was held that :-

> *"9. We have heard the arguments of both the sides and also perused the relevant material available on record. It is observed that a similar issue relating to addition on account of expenditure disallowed under section 14A while computing book profit under section 115JB of the Act has been decided by the Special Bench of this Tribunal at Delhi in the case of ACIT vs Vireet Investment Pvt. Ltd. (I.T.A. No. 502/Kol/2012 dated 16.06.2017) wherein it was held, after taking into consideration the decision of Delhi High Court in the case of Goetze (India) Ltd. (supra), that the expenditure incurred to earn exempt income computed under section 14A of the Act could not be added while computing book profit under section 115JB of the Act. In the case of CIT vs. Jayshree Tea Industries Ltd. (ITAT No. 47 of 2014 dated 19.11.2014), Hon'ble Kolkata High Court has also expressed a similar view by holding that the provision of section 115JB in the matter of computation is a complete code in itself and resort need not and cannot be made to section 14A of the Act. Hon'ble Kolkata High Court has further held that the computation of the amount of expenditure relatable to exempt income of the Act where the assessee has not claimed such expenditure to be nil. Respectfully following the said decision of the Hon'ble Jurisdictional High Court in the case of Jayshree Tea Industries Ltd. (supra), we set aside the impugned order of the Ld. CIT(A) on this issue and restore the matter to the file of the AO for computing the amount of expenditure relatable to the exempted income of the assessee independently by applying clause (f) of Explanation (1) under section 115JB of the Act without resorting to section 14A or Rule 8D. Ground No. 9 of the assessee's appeal is thus partly allowed."*

Respectfully following the aforesaid decision, we set aside the impugned order of the ld CITA on this issue and restore the matter to the file of the ld AO for computing the amount of expenditure relatable to the exempted income of the assessee independently by applying clause (f) of Explanation (1) u/s 115JB of the Act without resorting to section 14A or Rule 8D. Accordingly, the Grounds raised by the revenue in this regard are allowed for statistical purposes.

11. In the result, the appeal of the revenue is partly allowed for statistical purposes.

Order pronounced in the Court on 13.04 2018

Sd/-	Sd/-
[S.S. Viswanethra Ravi]	[M.Balaganesh]
Judicial Member	Accountant Member

Dated : 13.04.2018

SB, Sr. PS

Copy of the order forwarded to:
1. DCIT, Circle-12(1), Kolkata, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-700069.
2. M/s Maco Corporation (India) Pvt. Ltd., 7A, Sukhsagar Appt., 2/5, Sarat Bose Road, Bhowanipore, Kolkata-700020.
3..C.I.T.- 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

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By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches