

THE INCOME TAX APPELLATE TRIBUNAL
“A” Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. No. 935/Mum/2021 (Assessment Year 2016-17)

M/s. Aditya Birla Insurance Brokers Ltd. Tower 1, 7th, One World Centre (formerly known as One India Bulls Centre) Senapati Bapat Marg Elphinstone Road-West Mumbai-400 013. PAN : AABCB8091L (Appellant)	Vs.	Principal CIT-2 Room No. 344 3 rd Floor Aayakar Bhavan M.K. Road Mumbai-400 020. (Respondent)
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Assessee by	Shri Yogesh Thar
Department by	Shri Rajeev Harit
Date of Hearing	10.08.2021
Date of Pronouncement	27.10.2021

O R D E R

Per Shamim Yahya (AM) :-

This is an appeal by the assessee directed against the order of learned Principal Commissioner of Income Tax under section 263 dated 31.3.2021 pertaining to assessment year 2016-17.

2. The grounds of appeal read as under :-

1. Ground No. 1: Initiation of the revision proceedings and the consequent order passed u/s. 263 is bad in law:

1.1 On the facts and circumstances of the case and in law, the Id. PCIT erred in issuing the notice invoking provisions of Sec. 263 of the Act and consequently passing the revision order u/s. 263 on the alleged ground that the original assessment order passed u/s. 143(3) of the Act was erroneous and prejudicial to the interest of the revenue.

1.2 The Appellant therefore prays that it be held that the order passed by the Id. AO is not erroneous and prejudicial to the interest of revenue and therefore the jurisdiction exercised u/s. 263 of the Act by the Id. PCIT was void-ab-initio and therefore the revision order deserves to be quashed.

Without prejudice to Ground No. 1:

2. Ground No. 2: Sec. 80G deduction claim vis-a-vis CSR contributions:

2.1 On the facts and circumstances of the case and in law, the Id. PCIT erred in directing the Id. AO to denovo examine the Appellant's Sec. 80G deduction claim vis-a-vis CSR contribution and frame a fresh assessment.

2.2 The Id. PCIT erred in appreciating that the Id. AO has acted in accordance with law and judicial precedents while allowing the deduction claim u/s. 80G.

2.3 The Appellant prays that the said direction of the Id. PCIT be annulled. Without prejudice to Ground No. 1;

3. Ground No. 3: Alleged improper verification of advertisement & business

3.1 On the facts and circumstances of the case and in law, the Id. PCIT erred in directing the Id. AO to re-examine allowability of advertisement and business promotion expenses and frame a fresh assessment.

3.2 The Appellant prays that the said direction of the Id. PCIT be annulled."

3. In this case learned PCIT observed as under and referred to the issue of notice under section 263 :-

1. In this case the assessee has filed return of income for A.Y. 2016-17 declaring total income of Rs. 37,54,91,340/ under normal provisions of the Act and Rs. 36,97,07,689/- u/s. 115JB of the Income-tax, Act 1961. The assessment u/s 143(3) was completed on 30.11.2018 accepting the income returned by the assessee.
2. On examination of records, it is observed that the assessment order dated 30.12.2018 passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue and requires revision. Accordingly, a show cause notice giving opportunity of being heard was issued to the assessee company on 24.02.2021 fixing the date of hearing on 04.03.2021. The following reasons for revision were mentioned in the show cause notice:-
 - (i) "On examination of records, it is seen that assessee claimed 80G deduction of Rs 21.5 lakhs on CSR expenses of Rs 43 lakhs. CSR expense are not allowable and as per companies act, a company is legally bound to spend CSR expense either itself or through other entity. By giving it to other entity, assessee is getting it spent for its CSR obligation, hence it cannot be treated as donation eligible for 80G. Since Rs 43 lakhs were used for assessee's CSR liability, this is not a

donation even if given to trust eligible for 80G as recipient trust is just spending assessee's CSR on behalf of assessee, Accordingly deduction u/s 80G of Rs 21.5 lakhs is not allowable. Failure of the assessing officer to consider the CSR expense as disallowable expense and to consider disallowance of deduction u/s 80G of Rs 21.5 lakhs has rendered the assessment order dated 30.11.2018 as erroneous in so far as it is prejudicial to the interests of the revenue.

- (ii) Assessee has claimed advertisement & business promotion expenses of Rs. 13,77,58,883/-. AO obtained details of this expense under various heads but no further details of major expense, at least above Rs 10 lakhs were called. In view of this the major expense was not examined properly from business purpose. AO could have also examined whether part of expense could be capital in nature or having enduring benefit. Failure of the assessing officer to examine the same has rendered the assessment order dated 30.11.2018 as erroneous in so far as it is prejudicial to the interests of the revenue."

4. Learned PCIT reproduced the reply of the assessee but he was not convinced he held as under :-

6.1 The first issue on which notice issued u/s.263 relates to assessee's claim of CSR expenses which is disallowed in computation and certain part of the same again claimed u/s.80G of the Act. In this regard, the Assessing Officer while allowing the said deduction has failed to consider and examine the legislature intent behind the CSR policy and allowability of the deduction u/s.80G on the same expenditure.

Section 135 of the Company Act 2013 w.e.-f. 01.04.2014 provides that every company having net worth of rupees five hundred crores or more, or turnover of rupees one thousand crores or more or a net profit of rupees five crores or more, during any financial year, shall spend at least two per cent of average net profit of company (of last three years) in pursuance of its Corporate Social Responsibility (CSR) Policy. Further as per Explanation 2 to Section 37 of the Act, introduced vide Finance Act 2014, any expenditure towards CSR referred to in section 135 of the Companies Act, 2013 shall not be deemed to be an expenditure incurred for the purpose of the business or profession.

The provisions under companies Act was brought on statute to encourage the specified companies to share their profits for the social economic development of country and made it mandatory for the specified companies on having fulfilled certain fixed criteria to spend at least two percent of their net profit i.e., the CSR expenses are a legal obligation on companies to share their profits with society. Thus, it is obvious that the CSR expenses u/s.135 of Companies Act are out of appropriation of net profits and not to be charged to the profit of the company. Incidentally the intent of legislature is clarified vide the Explanation 2 to Section 37 of IT Act, that the CSR

expenses incurred in compliance to Section 135 of the Companies Act, 2013 shall not be allowed as deduction for computing business income.

The Finance Act, 2014 inserted a new Explanation in sub-section (1) of section 37 clarifying that for the purposes of subsection (1) of the said section, 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 purposes of the business or profession. This amendment was effective from 1st April, 2015 i.e. to the assessment year 2015-16 and subsequent years.

The objective of CSR expenditure is to share burden of the Government in providing social services by companies having net worth/turnover/profit above a threshold.

Memorandum explaining the provisions of the Finance Bill (No.2),2014 clearly provided that If such expenses are allowed as tax deduction, this would result in subsidizing of around one-third of such expenses by the Government by way of tax expenditure.

In the instant case, the assessee had added back an amount of Rs.43 lakhs which was debited in the P&L A/c towards CSR expenses. However, these CSR expenses were claimed by the assessee under section 80G of the Act to the extent of Rs.21.5 lakhs. Thus, the total CSR expenditure of Rs.43 lakhs, which was originally disallowed as CSR expenses was again claimed through the route of 80G deductions. As per Computation of Income, the assessee himself declared that, they have claimed deduction u/s 80G for the CSR expenses. The assessing officer allowed deduction u/s 80G in the computation of income in the assessment made. Since both CSR expense and 80G donations are two different mode of ensuring fund for public welfare, treating the same expense under two different heads would defeat the very purpose of it. As mentioned above in the budget memorandum as well, the legislative intention was to ensure that companies with certain strong financials make the expenditure towards this purpose and by allowing deduction, the Government would be subsidizing one third of it by way of revenue foregone thereon and hence the same was required to be disallowed in the assessment. On going through the assessment records, it is seen that he assessee has claimed deduction u/s 80G in respect of payment of Rs 43 lakhs made to GoSports Foundation on 19.11.2015 for the programme "Rahul Dravid Athlete Mentorship Programme with GoSports Foundation". The said receipt of payment mentions "Contribution under CSR", thus it clearly shows the payment being contribution under CSR and not donation, for claim of deduction u/s 80G. The AO has not examined this aspect also and no specific query has been made regarding the allowability of CSR contribution for Deduction under section 80 G of the I.T.Act. Omission to do so by the assessing officer resulted into underassessment to the same extent with consequential short levy of tax and interest. Failure of the assessing officer to examine the CSR expense as disallowable expense and to examine disallowance of deduction u/s.80G for CSR spending in light of the above

stated legal position has rendered the assessment order dated 30.11.2018 as erroneous in so far as it is prejudicial to the interests of the revenue. Therefore the assessment order passed u/s.143(3) of the IT. Act., 1961 dated 30.11.2018 without verification of this aspect is erroneous. Since the enquiries with regard to correctness of claim have not been made, the order passed u/s.143(3) of the IT. Act., 1961 dated 30.11.2018 is prejudicial to the interest of revenue. Thus both the conditions specified u/s.263 of the Act are satisfied in this case and it is a fit case to invoke provisions of the said section. Therefore the order passed u/s. 143(3) of the IT. Act., 1961 dated 30.11.2018 in assessee's case for A.Y. 2016-17 is set aside within the meaning of the provisions of section 263 of the Act with a direction to the A.O to examine the above stated aspects with regard to allowability of deduction claimed u/s.80G of the Act as per law and frame a fresh assessment after affording an opportunity to the assessee of being heard.

6.2 The second issue on which notice issued u/s.263 relates is non-verification of allowability of assessee's claim of expenses incurred towards advertisement & business promotion expenses amounting to Rs. 13,77,58,833/- without examining all the relevant and material facts and circumstances. During the course of assessment proceedings, the AO has obtained only the list of various expenses under this head but no further details of major expense, at least above Rs 10 lakhs are called for. Vide order sheet noting dated 17.11.2018, the AO has asked the assessee to provide ledger copy of Business and advertisement expenses. In response, the assessee has not submitted any such ledger copy of Business and advertisement expenses and has submitted only a few invoices. On going through the list of head of expenses under Advertisement and Self Promotion expenses, expenses exceeding Rs. 10 lakhs are shown as incurred on account of advertisement, display charges, joint self promotion expenses, advance settlement, branch display charges, call centre operating charges, diwali gifts to clients, the assessee has merely submitted a few sample invoices showing payment in lakhs in respect of display charges and copy of supplementary agreement between the assessee and Maxsum Consultants Pvt. Ltd. No ledger account of individual heads of expenses under the head advertisement and business promotion expenses, contrary to the claim of the assessee, are obtained by the assessing Officer even though he has asked for the same and examined with regard to the genuineness of expenses, whether the same are fully incurred for business purpose and whether part of expenses are capital in nature or having enduring benefits. From the details called by the assessing officer and the details submitted by the assessee, it is quite evident that the AO has not properly examined these expenses and no independent enquiries have been made from the concerned parties. This proves beyond doubt that, the Assessing Officers action of allowing this expense without proper verification has rendered the assessment order dated 30.11.2018" as erroneous in so far as it is prejudicial to the interests of the revenue. Thus both the conditions specified u/s.263 of the Act are satisfied in this case and it is a fit case to invoke provisions of the said section. Therefore the order passed u/s.143(3) of the IT. Act, 1961 dated 30.11.2018 in assessee's case for A.Y. 2016-17 is set aside within the meaning of the provisions of section 263 of the Act with a direction to the A.O to examine the

above stated aspects with regard to allowability of advertisement and business promotion expenses claimed as per law and frame a fresh assessment after affording an opportunity to the assessee of being heard.”

5. Thereafter learned PCIT referred to certain case laws. He also referred to ITAT decision for the proposition that provisions of section 263 Explanation 2 are declaratory. He concluded as under :-

“In view of the detailed analysis of the assessment order, with reference to the submissions of the assessee, the assessment order dated 30.11.2018 in assessee's case for A.Y. 2016-17 is held to be erroneous in so far as it is prejudicial to the interests of the revenue due to lack of enquiry under Explanation 2 to Section 263 of the Income Tax Act, 1961. Accordingly, the assessment order dated. 30.11.2018 passed by the AO under section 143(3) of the Act is set aside as per provisions of Explanation 2 to section 263(1) of the Act to the Assessing Officer. He is directed to conduct the requisite enquiries to arrive at the correct conclusion as per law and frame the order of assessment de novo, keeping in mind the observations made in the foregoing paragraphs. Needless to add, adequate opportunity of being heard will be afforded to the assessee to file details and furnish its explanation.”

6. Against the above order the assessee is in appeal before us.

7. We have heard both the parties and perused the records. Learned counsel submitted that learned Pr.CIT erred in invoking jurisdiction under section 263 of the Act. That inadequate/improper inquiry cannot be a basis for invoking jurisdiction under section 263 of the Act as per extant provisions of the Act. That the issue of inadequate, improper inquiry vis-a-vis lack of inquiry has already been settled in the following case laws :-

- CIT Vs. Nirav Modi 390 ITR 292 (Bombay)
- Sunbeam Auto (332 ITR 167) (Delhi)
- Sir Dorabji Tata Trust (TS-684-ITAT-2020)
- Narayan Tatu Rane Vs. ITO (TS-290-ITAT-2016)

8. Thereafter learned Counsel of the assessee submitted that the issue of CSR expenses claim under section 80G of the Act has also settled by the following case laws :-

- M/s. Goldman Sachs Services Pvt. Ltd. (TS-331-ITAT-2020) (Bang)
- FNF India Pvt. Ltd. Vs. ACIT (TS-6-ITAT-2021)(Bang)

Further he submitted that the assessee has made due submissions and details with regard to the advertisement and sales promotion expenses before the Assessing Officer and after inquiry the same has been allowed and learned Pr.CIT grossly erred in holding that no inquiry has been done in this regard. The assessee's counsel further submitted an affidavit by a person claiming to have appeared before the Assessing Officer and claiming that some documents were by inadvertence not furnished to the Assessing Officer originally but were submitted subsequently. The operative para of the said affidavit reads as under :-

“That during the course of assessment proceedings referred above, I have submitted the ledger copies of advertisement and sales promotion expenses for the relevant AY 2016-17. Though at Annexure 25 of the submission dated August 31, 2018 made before the Assessing Officer, it was mentioned as submission of ledger copies, I had inadvertently missed to provide the same and submitted only the list detailing advertisement and sales promotion expenses. However, the ledger copies were submitted before the Assessing Officer subsequently vide submission dated November 28, 2018 alongwith the sample copies of invoices with respect to the details at Annexure 30 (details of display charges) and Annexure 31 (details of joint sales promotion) of the said submission.”

9. Per contra, learned Departmental Representative submitted that the Assessing Officer has not examined the issue of deduction under section 80G of the Act the expenses incurred on CSR expenses. He submitted that the payment has been done to the GoSports Foundation. In the heading of the receipt itself mentions contribution under CSR expenses and payment itself is earmarked to particular programme i.e. “Rahul Dravid Athlete Mentorship Programme with GoSports Foundation”. He submitted that the Assessing Officer has not at all examined this aspect, hence, he submitted that learned PCIT is correct in invoking jurisdiction under section 263 of the Act and directing for proper examination. He further submitted that assessee's claim of the Assessing Officer having duly examined the issues, is not backed by any evidence in the form of Assessing Officer's inquiry letter issued to the assessee. Further as regards the details of advertisement and sales promotion expenses, learned Departmental Representative submitted

that proper details have not been submitted and as a result of this assessee himself is now submitting an affidavit by a person claiming to have appeared before the Assessing Officer that details were submitted before the Assessing Officer which learned PCIT has found to be absent in the assessment folder. That the said affidavit has further admission that originally due to inadvertence the required detail was omitted to be submitted.

10. Upon careful consideration as regards the issue of claim of CSR expenses under section 80G of the Act we note that in the assessment order there is no discussion whatsoever on this aspect. As mentioned above by learned CIT-DR payment has been made to GoSports Foundation and receipt thereof mentions the same to be contribution under CSR for specific programme i.e. "Rahul Dravid Athlete Mentorship Programme with GoSports Foundation". Entire receipt nowhere mentions that these are contribution entitled to deduction under section 80G of the Act. The date of the receipt is 19.11.2015. Although it is a submission of learned Counsel of the assessee that the assessee has duly submitted the section 80G approval of the foundation before the Assessing Officer and who after examining has allowed the same. However as we have noted above there is no discussion on this aspect in the Assessing Officer's order. The receipt from the GoSports Foundation only mentions contribution under CSR and payment itself is earmarked to particular programme i.e. "Rahul Dravid Athlete Mentorship Programme with GoSports Foundation". In such circumstances issue of 80G deduction claim for this contribution vis-à-vis earmarking of same to a particular programme needed to be examined. There is no evidence whatsoever that any aspect whatsoever in this regard was examined by the Assessing Officer. This examination was inter alia needed to look into any personal element involved in the expenditure. Though there are case laws for expenditure under CSR having being allowed by the Appellate Forum under 80G but there is no law as such in this regard that this particular type of earmarked expenses will automatically qualify for deduction under section

80G claim, when originally done for CSR expenses that also without due examination. Further as per the existing law CSR expenses do not qualify for claim of deduction under section 37 of the Act. Hence, this claim of deduction under section 80G of the Act does require due inquiry in the facts and circumstances of the case. Since the Assessing Officer has failed to do so, learned PCIT has rightly invoking jurisdiction under section 263 of the Act and directed for a proper examination.

12. As regards the issue of non-verification of advertisement and business promotion expenses, the assessee claimed that the expenses were incurred towards advertisement, business promotion. We note that there is no discussion whatsoever in the Assessing Officer's order. However, it is the claim of the assessee that the Assessing Officer has duly examined the same and details were provided. However it is noted that this claim is not backed by any cogent evidence produced before us by the assessee either by way of copy of order sheet noting of the Assessing Officer or Assessing Officer's notice/letter to assessee asking for the relevant paper. Moreover, learned PCIT has noted that certain details which were required by the Assessing Officer were actually not provided. The assessee has tried to negate the same by giving an affidavit of the person namely Shri Megh Shah claiming that the said person inadvertently missed to provide certain details and the same were provided subsequently to the Assessing Officer. The Assessing Officer asking for the details and simply filing the assessee reply without any examination, can by no stretch of imagination be called on inquiry, alone due inquiry. This itself is a reflection of the lack of inquiry by the Assessing Officer and hence, absence of inquiry is palpable. Though we are not inclined to agree to the manner of examination suggested by learned PCIT in his order, we are of the opinion that this is not a case of inadequate inquiry but lack of inquiry and lack of application of mind by the Assessing Officer. Hence, in our considered opinion there is no infirmity in the order of learned PCIT asking the Assessing Officer to examine the same afresh.

13. As regards the case laws referred by learned Counsel of the assessee in our considered opinion the same are not applicable on the facts of the case present here. We are not adjudicating upon the issue whether CSR expenses can be claimed under section 80G of the Act but as pointed out hereinabove there is no inquiry by the Assessing Officer. Moreover peculiar aspects noted in the receipt hereinabove in our observation hereinabove clearly mandate inquiry on the facts and circumstances of the case. Further as regards case laws given for the proposition on the issue of inadequate, improper inquiry vis-a-vis lack of inquiry, we note that as noted above the Assessing Officer's order does not speak anything about the inquiry nor copy of order sheet or notice of the Assessing Officer to assessee in this regard are provided to us. Moreover issue of proper details having not been provided as noted above by learned PCIT is further supported by the assessee's affidavit itself that certain details were called for by the Assessing Officer and the assessee inadvertently failed to provide initially but the same were provided subsequently. This also is only a self serving statement devoid of any evidence. Hence, the case laws referred by the assessee's counsel are not applicable here. The assessee has submitted before us a paper book containing certain case laws and documents without any index or certification as to true copy and as to which document was before which authority or whether some of them are fresh/additional submission or evidence. In this paper book, there is no copy of notice issued by the Assessing Officer to assessee. Two letters addressed to the Assessing Officer are there which are not signed by the person, who has furnished an affidavit of having also appeared before the Assessing Officer as noted above.

14. In these circumstances, in our considered opinion proper examination by the Assessing Officer directed by learned PCIT is warranted and no prejudice is caused to the assessee due to that. Hence, we do not find any infirmity in the order of learned PCIT, hence, we uphold the same.

15. In the result, appeal of the assessee stands dismissed.

Pronounced in the open court on 27.10.2021.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 27/10/2021

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The PCIT
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

PS