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IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "F", MUMBAI

BEFORE SHRI AAKASH DEEP JAIN, HON'BLE VICE PRESIDENT
AND
SHRI OM PRAKASH KANT, HON'BLE ACCOUNTANT MEMBER

ITA No. 697/MUM/2021
Assessment Year: 2015-16
&
ITA No. 698/MUM/2021
Assessment Year: 2016-17

JM Financial Foundation, 141, Maker Chambers III, Nariman Point, Mumbai - 400021 PAN: AAATJ2474M	Vs.	Commissioner of Income Tax (Exemptions), R. No. 617, 6 th Floor, Piramal Chamber, Lal Baug, Parel, Mumbai- 400012
(Appellant)		(Respondent)

Assessee by : Shri K Shivaram (AR)

Revenue by : Shri Deepkant Prasad (DR)

Date of Hearing : 20/12/2021

Date of Pronouncement: 31/01/2022

ORDER



These appeals by the assessee are directed against two separate orders dated 22/03/2021 and 09/03/2021 passed in terms of section 263 of the Income-tax Act, 1961 (in short 'the Act') by the Ld. Commissioner of Income-tax (Exemption)-Mumbai [in short the Ld CIT (E)] for assessment year 2015-16 and 2016-17 respectively. Identical grounds have been raised in these appeals in same set of circumstances and therefore, we have heard above appeals together and disposed off by way of this consolidated order for convenience and avoid repetition of facts.

2. The grounds of appeal raised by the assessee for assessment year 2015-16, are reproduced as under:

"1. The learned CIT (E) erred in revising u/s 263 r.w Explanation 2 the assessment order passed u/s. 143(3) dt.14/12/2017 by passing an ex-parte order without giving sufficient opportunity of hearing and ex-parte order of Ld CIT(E) may be quashed as passed in violation of principles of natural justice.

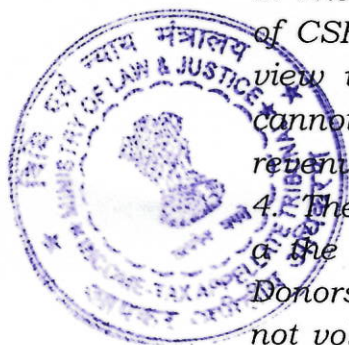
2. The learned CIT (E) erred in revising u/s 263 r.w Explanation 2 the assessment order passed u/s. 143(3) dt.14/12/2017 by holding that AO has passed order without the basic verification of the issue of taxability of CSR fund received by the Assessee without appreciating that assessee had furnished all details relevant to the issue of taxability of CSR fund during the course of assessment proceedings and the learned Assessing Officer had accepted the claim after making proper enquiry and due application of mind and thus the said assessment order was neither erroneous nor prejudicial to the interest of the revenue and hence the order of revision is bad in law.

3. The learned CIT (E) failed to appreciate that on the issue of taxability of CSR fund the Assessing Officer had adopted a possible view which view was not unsustainable in law and thus the assessment order cannot be termed as erroneous and prejudicial to the interest of the revenue and hence the order of revision is bad in law.

4. The learned CIT (E) failed to appreciate that the CSR fund received by the Assessee were given in the nature of corpus donation by the Donors with specific directions regarding its utilisation and were thus not voluntary in nature and were thus treated as earmarked restricted fund in the balance Sheet as per the relevant Accounting Standards issued by ICAI and hence, the view of Ld CIT to treat the CSR fund as income u/s 2(24) is contrary to the direction of Donors, accounting standard and law and hence revision is bad in law.

5. Without prejudice to above, the learned CIT (E) failed to appreciate that the order of Assessing Officer cannot be termed as prejudicial to the revenue as he CSR funds were in-fact utilised in the subsequent years thereby complying with the requirements of Section 11 hence the order of revision is bad in law."

3. Briefly stated facts of the case are that the assessee trust is registered with the Ld. Commissioner of Income-tax (Exemption)- Mumbai under section

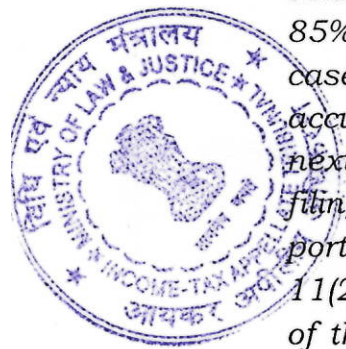


12A of the Act. The return of income for assessment year under consideration was filed by the assessee trust on 16/06/2016 declaring nil income. The return of income filed was selected for scrutiny and assessment under section 143(3) of the Act was completed on 30/12/2017 at returned income. The Ld. CIT(E) called for the record and after examination, he was of the view that assessment order passed by the Assessing Officer was erroneous insofar as prejudicial to the interest of the revenue, on following two issues:

“(a) The CSR funds are the funds received from corporate under Sub section 1 of Section 135 of Companies Act, 2013. The companies are required to spend 2% of the average Net profit either by directly donate the same to any trust or NGOs. The CSR Fund received by the trust becomes its income as per the Section 2(24) as the same are received as voluntary donation from the company. The trust is required to spend 85% of the amount received on the object of the trust. Alternatively, in case the income received remained unspent, the same is required to be accumulated or Set a-art for utilization for the objects of the trust in the next five years by filing statutory prescribed forms before due date of filing of return of income u/s 139(1). On verification from the e-filing portal it is found that the assessee has not exercised an option u/s 11(2) of the Act. Hence, the receipt by way of CSR fund becomes income of the trust and in the absence of utilization and/or accumulation the same is required to be brought to tax.

(b) On examination of records of A.Y. 2015-16, it is noticed that the assessee has received CSR funds of Rs. 2,71,50,000/-, during the year under consideration, out of which only Rs. 75,00,000/- has been transferred to income & expenditure account. It is noticed from the submission that the assessee has not included the donation received on account of CSR Fuse of Rs. 1,96,50,000/- in the income & expenditure account and the same has not been considered as income of the trust for the year under consideration.

The AO has passed order without the basic verification of the above facts stated above and therefore the order is prejudicial to the interest of revenue.”



4. The Ld. CIT(E) issued notice for commencing the proceedings under section 263 of the Act, which was sent to the assessee on 11/03/2021 through speed post as well as through registered email. According to the Ld. CIT(E), the notice was received by the assessee on 15/03/2021, however none attended before the Ld CIT (E) on said date. In view of the non-compliance, the Ld. CIT(E) after considering judicial precedents on the issue in dispute, held that the Assessing Officer did not undertake the necessary verification required and therefore assessment order was erroneous insofar as prejudicial to the interest of the Revenue. Accordingly, the Ld. CIT(E) vide his order dated 22/03/2021, in terms of section 263 of the Act, set aside the order of the Assessing Officer for passing a fresh assessment order. Aggrieved, the assessee is in appeal before the 'Tribunal' raising the grounds as reproduced above.

5. Before us, the Ld. Counsel of the assessee filed a paper book in three volumes containing pages from 1 to 353.

6. The ground No. 1 (one) of the appeal relates to contention of the assessee that no sufficient opportunity of heard was allowed to the assessee. The Ld. CIT(E) in the impugned order has mentioned that notice under section 263 of the Act providing opportunity of being heard to the assessee was issued and served physically as well as electronically but on the stipulated date none attended. Before us, an affidavit has been filed by the 'trustee' of the assessee trust, which is available on page 116 to 119 of the paperbook. In the said affidavit, trustee Mr. Manish Seth has affirmed as under:

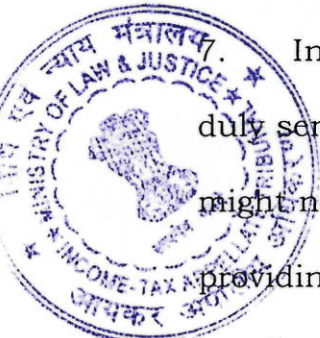
"3. I say that one Mr. Surendra Nayak was looking after the tax related affairs of the Trust till 28th October, 2020 and his email-id

surendra.nayak@jmfl.com was provided to the Income Tax Department for communication. After he stopped working for the Trust, his email-id surendra.nayak@jmfl.com was deleted from the organisation's system on 10th November, 2020.

4. I say that after he stopped working for the Trust from 28th October, 2020 the Trust had edited it's profile on the Income Tax Portal on 24th November, 2020 vide Transaction ID 9337320422 and provided the email - id of Mr. Soyeb Halai for communication which is soyeb.halai@jmfl.com.

5. I say that for A.Y. 2015-16 it was found on subsequent enquiry that Notice u/s 263 dated 11/3/2021 as well as the order u/s 263 dated 22/03/2021 was sent on the email id of Mr. Surendra Nayak which was deleted from our organisation's system and hence the Trust was not aware of the notice.

6. I say that Notice u/s 263 dated 11/03/2021 as well as the order u/s 263 dated 22/03/2021 for A.Y. 2015-16 was physically received by the security guard Mr. Rohan Tawade on 15/03/2021 and 25/03/2021 respectively."



In view of the above, affidavit of trustee, it is undisputed that notice was duly served upon the assessee trust physically, albeit notice sent electronically might not have been served, therefore the Ld. CIT(E) cannot be faulted for not providing sufficient opportunity of being heard. It was due to the reasons mentioned in the affidavit, the trust could not be represented before the Ld. CIT(E). In view of the above facts and circumstances, the order passed cannot be held in violation of the principle of natural justice. The ground No. one of the appeal of the assessee is, accordingly, dismissed.

8. In ground No. 2 (two), the assessee has challenged the finding of the Ld. CIT(E) that the assessment order was passed without basic verification on the issue of taxability of 'Corporate Social Responsibility' (CSR) funds received. In ground No. 3 (three) and 4 (four), the assessee has raised the issue that unless

the view of the Assessing Officer is unsustainable in law, revision of order cannot be made for substitution of one view by the other.

9. Before us, the Ld. Counsel of the assessee submitted that assessee had been identified by the 'JM Financial Group of Companies' as the implementing agency for the purpose of undertaking 'Corporate Social Responsibility' (CSR) activities in accordance with the applicable provisions of Companies Act, 2013 and the rules made thereunder. Accordingly, during the year under consideration, the assessee trust received contribution from various entities aggregating to ₹ 2,71, 50,000/- to be applied toward 'CSR' activities. He further submitted that 'CSR' funds were contributed by the companies to meet their CSR obligation of carrying out CSR activities/projects through the assessee trust as per the direction and timelines of utilisation provided by their respective CSR Committee in accordance with the Companies (Corporate Social Responsibility Policy) Rules, 2014. He submitted that the assessee trust has accounted those CSR funds under a separate head in its balance sheet. According to him, the CSR funds are involuntary corpus funds, which are treated as capital in nature and therefore computation provision of section 11 are not applied to the same.

10. The Ld. Counsel referred to notice under section 142(1) of the Act dated 22/06/2017 issued by the Assessing Officer asking for details of corpus and non-corpus donation, which is available on page 10 to 12 of the paper-book. In response to the said notice of the Assessing Officer, the assessee filed balance sheet and income and expenditure account for assessment year under consideration, where CSR funds are shown as earmarked funds in the balance



sheet, which is available on page 41 to 47 of the paper-book. The assessee also filed details on 05/07/2017 of corpus and non-corpus donation which reflected CSR donations, which is available on page 13 to 57 of the paper-book.

11. The Ld. Counsel also referred to the specific query raised by the Assessing Officer through order sheet on 05/07/2017, wherein he asked the assessee to show cause as why the CSR funds should not be considered as income of the assessee under section 2(24)(iiiia) of the Act. The Assessing Officer also called for various details relating to CSR funds. A copy of said order sheet is available on page 114 of the paper-book.

12. The Ld. Counsel further referred to submission of the assessee dated 18.08.2017 before the Assessing Officer, wherein the assessee had filed a letter

from JM Financials group companies stating the purpose for which funds were to be deployed, quarterly reports submitted by the assessee confirming deployment of the funds as per the direction of the JM Financials group companies, status report from the 'Ashoka University' for which CSR funds were received and minutes of meeting of CSR committee of various companies of JM financial group. A copy of all these details are available on page 58 to 86 of the paper-book. The assessee also filed a detailed note dated 14/12/2017 on CSR activities before the Ld. Assessing Officer, which is available on page 87 to 107 of the paper-book.

13. The Ld. Counsel submitted that in view of the above queries by the Assessing Officer and reply by the Assessing Officer, the issue of taxability of CSR fund being outside the scope of definition of income, was thoroughly examined by the Assessing Officer.



14. The Ld. Counsel further submitted that the Ld. CIT (E) while holding the order of the Assessing Officer as erroneous insofar as prejudicial to the interest of the revenue in terms of Explanation 2(a) below section 263, however said explanation was not invoked in the show cause notice issued and therefore the order under 263 of Act is bad in law, relying upon decision of Hon'ble Gujarat High Court in the case of **PCIT Vs Shreeji prints Private Limited (2021) 130 taxmann.com 293 (Guj)**.

15. It was further submitted by the Ld. Counsel that even otherwise, the Explanation 2(a) of the Act is not attracted in the facts of the present case as the Assessing Officer has done all specific inquiries with respect to CSR donations as well as applicability of section 2(24)(ii) of the Act. In support of the contention, the learner Consul relied on the decision of the Tribunal in the case of **Sir Dorabji Tata trust Vs DCIT (2020) 122 taxmann.com 274**

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16. It was further submitted that the Assessing Officer has verified the issue of the CSR donation in the course of original assessment proceeding and has adopted one possible view and therefore exercise of jurisdiction under section 263 of the Act is not sustainable.

17. The Ld. Counsel further submitted that view of the Assessing Officer with respect to non-taxability of CSR donations is one of the possible view in law. In support of the contention that donations received by the charitable trust with the specific instruction of application of the funds , being in the nature of specific tied up grants, are not in the nature of the income under section 2 (24) of the Act, he relied on following decisions:

(i) *DIT Vs Society for development alternatives (2012) 18*

taxmann.com 364 (Delhi)(HC)

(ii) *Touching heart ministries Vs ITO (2017) 60 ITR 140 (Vishalha)(Trib.)*

18. On the contrary, the learned Departmental Representative (DR) relied on the order of the Ld. CIT(E) and submitted that donations received are in the nature of income of the trust and the Assessing Officer has adopted an incorrect view in law and therefore learned CIT(E) is justified in invoking section 263 of the Act.

19. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The assessee trust has received certain donations from the companies of 'JM Financial Group'. Those companies directed the assessee to utilise those donations toward specific activities of Social Corporate Responsibility laid down under the Companies Act, 2013. The assessee has partly utilised those funds towards the activities as specified by the donors, which are in the nature of the charitable activity. But, part of those funds remain unspent during the year. According to the assessee those donations were with the specific directions for development work of 'Ashoka University' and therefore in the nature of corpus donation for capital purpose. Thus, not to be treated as income for the year under consideration for the purpose of section 11 and 12 of the Act. This version of the assessee was accepted by the Assessing Officer. But, on the examination of the record, the Ld. CIT(E) held the order of the Assessing Officer as erroneous insofar as prejudicial to the interest of the revenue on the ground that the



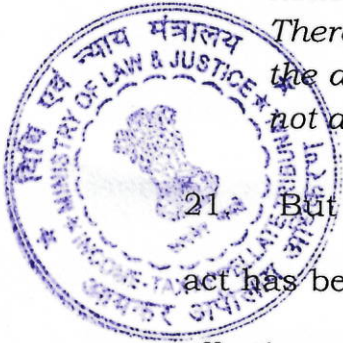
Assessing Officer has not examined the taxability of donations received and therefore, he set aside the order of the Assessing Officer.

20. The Ld. Counsel of the assessee has assailed the impugned order on many grounds. The first ground being that the Ld. CIT(E) has invoked the Explanation-2 below section 263 in the impugned order however said Explanation was not invoked in the show cause notice issued and therefore the order under 263 of that is bad in law, relying upon decision of Hon'ble Gujarat High Court in the case of PCIT Vs Shreeji prints Private Limited (supra), wherein Hon'ble High Court held as under:

"5 The Tribunal has found that in the order passed by the PCIT, Explanation 2 of Section 263 of the Act, 1961 is made applicable. The Tribunal observed that the PCIT has not mentioned in the show cause notice to invoke the Explanation 2 of Section 263 of the Act 1961. Therefore, by invocation of Explanation in the order without confronting the assessee and giving an opportunity of being heard to the assessee is not appropriate and sustainable in law."

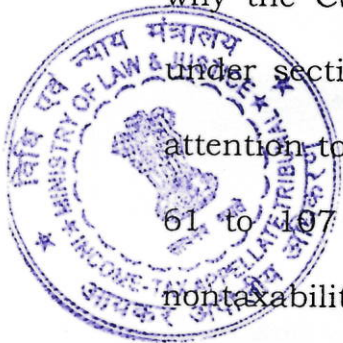
21. But we are of the view that the Explanation -2 below section 263 of the act has been inserted by Finance Act, 2015 with effect from 01/06/2015 i.e. effective prospectively from assessment year 2016-17, and therefore said Explanation-2 is not applicable in the instant assessment year and therefore decision of Hon'ble Gujarat High Court in the case of M/s Shreeji Prints Private Limited (supra) cannot be relied upon in the case of the assessee.

22. The second ground on which the Ld. Counsel has assailed the impugned order is that there is no lack of enquiry on the part of the Assessing Officer on the issues raised by the Ld. CIT(E). As far as instant assessment year is concerned, in view of the various decisions of Hon'ble



courts, it is settled that an assessment order becomes erroneous if it is a case of total lack of enquiry by the Assessing Officer on the issues raised by the Ld. CIT. The Ld CIT (E) has raised the issue that the Assessing Officer has not examined the taxability of CSR funds received by the assessee trust. Before us, the learned Counsel of the assessee has referred to the various queries raised by the Assessing Officer and replies sent by the assessee on the issue of taxability of CSR funds which we have already reproduce in preceding paras. The learned Counsel brought our attention to the specific query raised by the Assessing Officer in order sheet noting dated 05/07/2017, which is available on page 114 of the paperbook. In the said noting the Assessing Officer has specifically asked the assessee to show as why the CSR funds should not be considered as income of the assessee under section 2(24)(iia) of the Act. The Ld. Counsel has also brought our attention to the reply submitted by the assessee, which is available on page 61 to 107 of the paper-book. In said reply, the assessee is justified nontaxability of the said funds being in the nature of corpus funds which were tied up with the specific projects of capital nature. The learned DR could not controvert above submission of the learned Counsel of the assessee. In the circumstances, it cannot be held that there was total "lack of enquiry" on the part of the Assessing Officer on the issue pointed out by the Ld. CIT(E).

23. The third issue on which the Ld. Counsel has assailed the impugned order is that view of the Assessing Officer on the issue of nontaxability of the CSR fund, is one of the view sustainable in law and therefore Ld. CIT(E)



cannot substitute the view of the Assessing Officer and hold the order as erroneous. The learned Counsel to support that donations which are in the nature of tied up grants, are not in the nature of the income under section 2(24) of the Act, has relied on the decision of the Hon'ble Delhi High Court in the case of DIT Vs Society for development alternatives (supra), wherein it is held as under:

"7. With regard to the second contention, the findings recorded by the tribunal are that the respondent-assessee had received grants for specific purposes/projects from the government, non-government, foreign institutions etc. These grants were to be spent as per the terms and conditions of the project grant. The amount, which remained unspent at the end of the year, got spilled over to the next year and was treated as unspent grant. The Commissioner of Income Tax (Appeals) while deleting the said addition had observed as under:-

"I have considered the assessment order and submissions of the appellant along with evidences placed on record. On perusal of the evidences regarding the project grants placed on record, it is seen that the said amounts are received/sanctioned for a specific purpose/project to be utilized over a particular period. The utilization of the said grants is monitored by the funding agencies who send persons for inspection and also appoint independent auditors to verify the utilization of funds as settled terms. The appellant has to submit inter/final progress/work completion reports along with evidences to the funding agencies from time to time. These agreements also include a term that separate audits accounts for the project will be maintained. The unutilized amount has to be refunded back to the funding agencies in most of the cases. All the terms and conditions are simultaneously complied with otherwise the grants are withdrawn. The appellant has to utilize the funds as per the terms and conditions of the grant. If the appellant fails to utilize the grants for the purpose for which grant is sanctioned, the amount is recovered by the funding agency. On the basis of the evidences placed on record, it is seen that the appellant is not free to use the funds voluntarily




as per its sweet will and, thus, these are not voluntary contribution as per Section 12 of the Act. These are tied up grants where the appellant acts as a custodian of the funds given by the funding agency to channelize the same in a particular direction.

In case of voluntary contribution, the appellant is free to use the money as per its will and neither have to render the account of the same to the donor nor the same is monitored by the donor. The said amount becomes income of the appellant and has to be used for charitable purposes as per its objects. However, in case of specific tied up grants, money is received for specific purposes and is to be utilized for the same."

8. *The Commissioner of Income Tax (Appeals) has also referred to the judgment of the Rajasthan High Court in Sukhdeo Charity Estate Vs. CIT (1984) 149 ITR 470 (Raj.).*

9. *In view of the aforesaid factual position, the Tribunal has upheld the order passed by the Commissioner of Income Tax (Appeals) and has not accepted the appeal filed by the Revenue.*

10. *In view of the aforesaid factual position, we are not inclined to entertain the present appeals on the second aspect."*



24. In the instant case, the Ld. Assessing Officer has also accepted the explanation of the assessee that CSR funds received from the companies of JM Financial group were specific tied up grants for development of capital nature of project of Asoka University and therefore same were not to be considered for application of 85% of the income during the year under consideration. In view of the above, the view of the Assessing Officer is one of the view sustainable in law and therefore the Ld. CIT(E) is not justified in holding the order of the Assessing Officer as erroneous and substituting his own view.

25. In view of above facts and circumstances and discussion made above, we are of the opinion that Ld. CIT(E) is not justified in holding the order as erroneous insofar as prejudicial to the interest of the Revenue and accordingly,

we set aside the impugned order. The grounds raised by the assessee in ITA No. 697/Mum/2021 are accordingly allowed.

26. In ITA No. 698/ Mum/2021 for assessment year 2016-17, both parties agreed that circumstances identical to assessment year 2015-16 exist in assessment year 2016-17 also, except that in assessment year 2016-17 ground of not providing of opportunity being heard has not been raised. In the year under consideration also the Assessing Officer has raised identical queries and identical replies have been furnished by the assessee before the Assessing Officer which have been filed before us by the Id. Counsel of the assessee in paper book containing pages from 1 to 277. In view of identical facts and circumstances on the issue of the merit, to maintain consistency in our decision, the finding of the Ld. CIT(E) in the assessment year 2016-17 also are set aside and the grounds raised by the assessee are allowed.

27. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open court on 31st January, 2022.

Sd/-

Sd/-

(AAKASH DEEP JAIN)
VICE PRESIDENT

(OM PRAKASH KANT)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 31/01/2022

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)- *MA*
4. आयकर आयुक्त / CIT *Exemption*
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /

DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai

वरिष्ठ निजी सचिव
Senior Private Secretary
आयकर अपीलीय अधिकरण
Income Tax Appellate Tribunal
मुंबई / Mumbai



