

## **Tax Alert: Kolkata ITAT on allowability of CSR expense under Section 80G**

### ➤ **Brief Facts of the Case**

Kolkata Income Tax Appellate Tribunal ('ITAT') had recently adjudicated on the vexed issue of allowability of CSR expenses from an income tax perspective in the case of [JMS Mining \(P.\) Ltd. Vs. Principal Commissioner of Income-tax, Kolkata-2 \[2021 130 taxmann.com 118\]](#). In the said case, Assessee had made donation of Rs. 1.25 crores to Shree Charity Trust which had certificate under Section 80G(5)(vi) and another payment of Rs. 10 Lakhs to Pt. Jashraj Music Academy Trust which was also approved under Section 80G(5)(vi) of the Act. Therefore, since the assessee satisfied the condition under Section 80G of the Act, the assessee's claim for deduction of CSR expenses/contribution under Section 80G of the Act was allowed after due enquiry(ies) by the jurisdictional AO. However, Principal Commissioner invoked revision jurisdiction under Section 263 on ground that action of Assessing Officer in allowing such claim of assessee for deduction under Section 80G was erroneous because CSR expenditure could not be allowed as per express prohibition laid down in Explanation 2 of section 37(1).

### ➤ **Section - 37, Income-tax Act, 1961 - FA, 2021**

*“Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".*

**Explanation 2.**—*For the removal of doubts, it is hereby declared that for the purposes of subsection (1), 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.]”*

➤ **Section 80G, Income-tax Act, 1961**

Contributions made to certain relief funds and charitable institutions can be claimed as a deduction under Section 80G of the Income Tax Act. All donations, however, are not eligible for deductions under section 80G. Only donations made to prescribed funds qualify as a deduction. This deduction can be claimed by any taxpayer – individuals, companies, firms or any other person.

*“Section 80G : Deduction in respect of donation to certain funds, charitable institution, etc.*

*(1) In computing the total income of an assessee, there shall be deducted in accordance with and subject to the provision of this section*

*(2) The sum referred to in sub-section (i) should be the following namely -*

*(a) Any sums paid by the assessee in the previous year as donations to -*

*"(iihk). The Swachh Bharat Kosh, set up by the Central Government, other than the sum spent by the assessee in pursuance of Corporate Social Responsibility under sub-section (5) of Section 135 of the Companies Act, 2013 (18 of 2013); or (iihl). The Clean Ganga Fund, set up by the Central Government, where such assessee is a resident and such sum is other than the sum spent by the assessee in pursuance of Corporate Social Responsibility under Sub-section (5) of Section 135 of the Companies Act, 2013 (18 of 2013)."*

➤ **Ratios laid down by ITAT Kolkata:**

As per Explanation 2 to section 37(1), any expenditure incurred towards CSR activities as referred to in section 135 of the Companies Act, 2013 shall not be allowed as 'business expenditure' and shall be deemed to have **not** been incurred for purpose of business. The embargo created by this Explanation 2 inserted in section 37 by the Finance (No. 2) Act, 2014 was to deny deduction for CSR expenses incurred by companies, as and by way of regular business expenditure while computing *profits or gains of business or profession* ('PGBP'. The said embargo does not apply to Section 80G as the same is out of the purview of PGBP.

If an assessee makes some donation to these projects (Section 80G(2)(a)(iihk) and Section 80G(2)(a)(iihl)) and include/classify it as CSR expenditure while claiming deduction under Section 80G of the Act then it will be allowed only the amount that is other than the sums spent

by the assessee in pursuance of CSR under Section 135 of the Companies Act. In other words, if an assessee company spends only the mandatory expenditure of 2% of net profit for CSR activity, which includes the amount of donation to Swach Bharat Kosh & Clean Ganga Fund (iihk) and (iihi) of clause (a) of sub-section (2) of section 80G of the Act, then deduction under Section 80G of the Act is not allowable.

However, in a case scenario, wherein the assessee expends the mandatory expenditure and gives donation to these two projects i.e. over and above the mandatory CSR expenditure u/s. 135 of Companies Act, that sum donated to Swach Bharat Kosh & Clean Ganga Fund will be eligible for deduction under Section 80G of the Act [refer section 80G (1)(i) and subject to section 80G (4)]. However, such a restriction in respect of expenditure made by an assessee to any other fund or institution as referred to in sub clause (iv) of clause (a) of sub-section 2 of section 80G of the Act had not been placed by the Legislature. And if the Parliament desired, it could have been made such kind of restriction or any restriction like in the case of donation to Swach Bharat Kosh & Clean Ganga Fund (Applying the legal maxim 'expressio unius est exclusio alterius' which is a Latin phrase that means "express mention of one thing excludes all others". Accordingly, it was held that the assessee was eligible to claim exemption under Section 80G of the IT Act in case of CSR expenditure where the amount was over and above the mandatory 2% prescribed amount.