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Allowability of Contribution from the CSR Funds as Deduction Under Section 80G of the Income Tax Act 1961: A Jurisprudential Critique

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ABSTRACT

The deductibility of payments out of the CSR funds as a donation under the Indian tax law severely undermines the legislative intent of addressing the menace of tax subsidization of corporate CSR burden through the 2014 amendment, even though there is some judicial support for its deductibility. This article argues against its deductibility from two perspectives: firstly, from the point of view of the meaning and context of donation in Indian tax law and the tests laid down by the Indian Supreme Court in this regard; and secondly in terms of it being a colourable attempt at tax subsidizing.

Keywords: *Corporate social responsibility funds; Deduction under section 80G; Section 37(1); Donation; Test of voluntariness; Tax benefits for CSR contribution to charitable institutions.*

1.0 Introduction

1. One of the recent tax polemics relates to the admissibility of contribution from the corporate social responsibility funds ('the CSR funds', for short) as a deduction under Section 80G of the Indian Income Tax Act 1961('the Act', for short). The question has assumed greater significance in view of some of the tax tribunal decisions ruling in favour of its deductibility. A few benches of the tax tribunals in India[1] have taken a view that the amendment to section 37(1) of the Act and the insertion of Explanation 2[2], merely restrict the admissibility of CSR expenses from business income and not as a deduction under Section 80G, if it is paid to any charitable institution. The intent of this article is to investigate this contentious question and evaluate the jurisprudence on the subject with certain degree of certitude.

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2.0 Section 80G and Meaning of Donation

2. As per Section 80G (2) of the Act, a deduction is admissible in respect of any sum, paid by the taxpayer in the previous year as donations to various bodies/institutions indicated in that section. Thus, from a bare reading of the provision, it is clear that the primary requisite of admissibility of deduction under Section 80G is that the sum paid must be a donation. While the term donation has not been defined in the Act, its meaning will have to be construed from the meaning assigned to it in common parlance and legal dictionaries.[3] According to *Corpus Juris Secundum*, the expression 'donation' means 'an act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another without any consideration; a gift or grant in gratuity ...' (*Corpus Juris Secundum, vol. 28, page 53*). Thus, to constitute a donation, the payment must be voluntary and not forced or by coercion or operation of law as a part of mandatory legal requirement.

3.0 The PVG Raju Case

3. This aspect of law came to be expounded by the Andhra Pradesh High Court in ***PVG Raju, Raja of Vizianagaram v Commissioner of Expenditure-Tax***[4] in the following words:

"5. We shall, therefore, first advert to the question whether the items of expenditure sought to be exempted under Section 5(j) are or are not donations within the meaning of Section 5(j) of the Act. The term "donation" has not been denned in the Act. Hence, we may refer to the meaning of "donation" as given in the Concise Oxford Dictionary and Corpus Juris Secundum:

'Donation \ thing presented, gift, (esp. of money given to institution ....' (The Concise Oxford Dictionary, page 357)."

6. Donation means 'an act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another without any consideration; a gift or grant in gratuity ...' (Corpus Juris Secundum, vol. 28, page 53).

7. However, the expression "donation" is not equivalent to gift and it is of wider import. The distinction between donation and gift has been succinctly brought out by the following passage in Corpus Juris Secundum:

'The term 'donation' is often used as equivalent in meaning to gift; but a donation need not have all of the essentials of a gift. Thus, a gift must be without a consideration, but a donation may be for a consideration; and a gift must be entirely executed, while a

donation need not be. The term 'donation' is more aptly used to describe that which is given to a public cause or charity than to indicate a bounty to an individual.' (Corpus Juris Secundum, vol. 38, page 783).'

[Emphasis Supplied]

4. The aforesaid view of the High Court was ratified by the Indian Supreme Court in ***Commissioner of Expenditure-Tax v PVG Raju, Raja of Vizianagaram***[5], wherein Krishna Iyer J, speaking for the Court, observed, thus:

*"When a person gives money to another without any material return, he donates that sum. An act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another, without any consideration, is a donation. A gift or gratuitous payment is, in simple English, a donation. We do not require lexicographic learning nor precedential erudition to understand the meaning of what many people do every day, viz., giving donations to some fund or other, or to some person or other***.** Political donations are not only common, but are assuming deleterious dimensions in the public life of our country. It is therefore clear that when this Raja assessee[6] gave money to the candidates of his Party for them to meet their election expenses, he made donations. Even if he met their election expenditure, it was money gratuitously given on their behalf and therefore amounted to donation. Without straining language, we reach the natural conclusion that what the respondent expended for the other candidates during the elections was 'donation' in the language of the law. There is no suggestion nor evidence that any material return was in contemplation when he spent these sums. Being a politically important man with plenty of money and vitally interested in boosting his party's standing in the State, he donated liberally for candidates set up by the party. In this view s. 5(j) applies to these donations which earn exemption from the expenditure tax."

[Emphasis Supplied]

5. Thus, according to the law explained by the Supreme Court and the Andhra Pradesh High Court in ***PVG Raju*** cited *supra*, for a payment to constitute a donation, it must satisfy the test of voluntariness.

4.0 The Hindustan Dorr Oliver Case

6. Following the law laid down by the Apex Court in ***PVG Raju*** cited *supra*, the Bombay Bench of the ITAT[7], in ***DCIT v Hindustan Dorr Oliver Ltd***[8]**,** negatived the claim of deduction under Section 80G where payment made to 'Academy of General Education, Manipal' failed the test of voluntariness as under the scheme introduced, each donor who donated Rs. 1,00,000 could nominate one student for admission to the

Manipal Institute of Technology in Karnataka, every alternative year and a donor who paid Rs. 2,00,000 could nominate one student for admission every year. The Assessing Officer took a view that it was not a voluntary contribution but rather a scheme for mutual benefit in present of future, and, therefore, the contribution cannot be treated as a donation. Ratifying the action of the AO, the ITAT held as follows:

"28. Coming now to the provisions of S. 80G, this section is included under Chapter VIA of the IT Act, 1961 with a heading "Deductions to be made in computing total income". *Clause (2) to S. 80G lays down that the sums in relation to which deduction shall be allowed are, inter alia, any sum paid by the assessee*[9] *as "donation" to any fund or institution to which S. 80G applies.* The assessee has furnished a copy of certificate from the concerned CIT, that exemption under S. 80G is applicable to "donation" made to the Manipal Institute of Technology. We have now to see further, whether the amount of Rs. 2 lakhs given by the assessee to Manipal Institute of Technology can be called as "donation".

29. The word "donation" has not been defined in the IT Act. It was not defined under the Expenditure-tax Act, 1958 either, but the Supreme Court has explained its meaning in ***Commr. of Expenditure-tax vs. P. V. G. Raju (supra)*.** The Act levied tax on expenditure of an assessee but certain exemption was provided in respect of any expenditure incurred by the assessee by way of a donation. The relevant part of S. 5 of the Expenditure-tax Act, 1958 is reproduced below:

'5. No expenditure-tax shall be payable under this Act in respect of any such expenditure as is referred to in the following clauses, and such expenditure shall not be included in the taxable expenditure of an assessee –

(a) any expenditure, whether in the nature of revenue expenditure or capital expenditure, incurred by the assessee wholly and exclusively for the purpose of the business, profession, vocation or occupation carried on by him or for the purpose of earning income from any other source....

(i) any expenditure incurred by the assessee by way or, or in respect of, any gift, donation or settlement on trust or otherwise for the benefit of any other person...'

30. The Supreme Court described the meaning of the word "donation" in the following words:

'When a person gives money to another without any material return, he donates that sum. An act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another, without any consideration, is a donation. We do not require lexicographic learning nor precedential erudition to understand the

meaning of what many people do every day, viz., giving donations to some fund or other, or to some person or other.'

Indeed, many rich people out of diverse motives make donations to political parties. The hope of spiritual benefit or political goodwill, the spontaneous affection that benefaction brings, the popularisation of a good cause or the prestige that publicised bounty fetches -these and other myriad consequences or feelings may not mar a donation to make it a grant for a quid pro quo. Wholly motiveless donation is rare, but material return alone negates a gift or donation.'

31. The essence of the matter, therefore, is whether the assessee gave Rs. 2 lakhs to Manipal Institute of Technology without any material return and without any consideration and whether it was a grant for quid pro quo. The letter from the Registrar of the Academy of General Education makes it clear that each benefactor who donates Rs. 2 lakhs can nominate one student for admission to the Manipal Institute of Technology every alternate year and the benefactor who had paid Rs. 2 lakhs or more can nominate one student for admission every year. This sponsored student was not required to pay any capitation fee and had to pay only the tuition and other special fees. The enclosed brochure also mentioned the following privileges:

'1. They can refer any of their engineering problems to the Manipal Institutes of Technology to find a solution. The engineering college will charge the actual cost thereof and the development work done in this regard will be the exclusive property of the industry which has sponsored the project.

2. The Manipal Institute of Technology will provide all the testing facilities at a very nominal cost.

3. The Manipal Institute of Technology will conduct short courses in continuing education for the benefit of the engineers and the personnel of the benefactor industries.

4. They can recommend first class students who have aptitude for admission to engineering course.'

32. *In view of the above, we are of the opinion that the sum of Rs. 2 lakhs does (sic) not qualify as a "donation" at all, and was only a grant for a quid pro quo for a material return. In view of this, even if the Manipal Institute of Technology holds a certificate of exemption under S. 80G, the sum of Rs. 2 lakhs will not be entitled to a benefit under S. 80G, since it is not a "donation".''*

[Emphasis Supplied]

7. In view of the legal principles emerging with regards to the meaning of 'donation', it becomes evident that the payment made from the funds, cast aside under corporate social responsibility requirements of the Companies Act 2013, is only a

mandatory, statutory compliance and does not constitute 'donation' as it fails the test of voluntariness.

5.0 Meaning of Voluntary

8. In ***CIT v Divine Light Mission,***[10] BC Patel CJ, as his lordship then was, explicated the term voluntary contribution in the following words:

17. Voluntary contribution is an act not coupled with compulsion. One may contribute or one may not contribute. Therefore, it is rightly said that it is in the nature of a gift. But so far as subscription is concerned, it is with some compulsion. If one wants to become a member of a trust and if he is required to pay subscription, as in the instant case, then, it amounts to compulsion. Sometimes it becomes a question of prestige i.e., to say that a person is a member of a charitable institution. If a person had made voluntary contribution to the said trust, then on payment of such contribution he does not become a member. The membership may be coupled with benefits or duties and that all depends on the nature of the trust and terms and conditions of the contract.

[Emphasis Supplied]

9. One may also gainfully refer to the words of ND Ojha CJ, as his lordship then was, in ***CIT v Madhya Pradesh Anaj Tilhan Vyapari Mahasangh,***[11] concerning the interpretation of the expression 'voluntary contribution':

"The contributions, in order to be voluntary, had to be made willingly and without compulsion and the money was to be gifted or given gratuitously without consideration and these tests were satisfied on the facts of the present case."

[Emphasis Supplied]

10. One may also recall the observations of Lord Campbell in ***Russel v Vestry of St. Giles***[12] to the effect that 'voluntary contributions' here do not mean annual subscriptions (or entrance fees) paid for value received or expected to be received by the party paying, but means a gift made from disinterested motives for benefit of others. In ***Society of Writers to the Signet v IRC,***[13] the court held that the entrance fees and subscriptions paid by entrants to a society or institution as a condition precedent to their membership and as the price of admission to the privileges and benefits of the society or institution are given under a contract and are not voluntary. Thus, *sans* voluntariness, any contribution, whether for selfish motive or under duress or force of law cannot partake the character of donation.

6.0 Tribunal Decisions in **JMS Mining, FNF India, Goldman Sachs etc.**

11. A bare reading of the tribunal decisions in ***JMS Mining, FNF India, Goldman Sachs Services and First American (India)***[14]**,** makes it explicit that in none of these cases, the tribunal has considered the test of voluntariness in assessing the deductibility of payment under Section 80G and the judgment of the Supreme Court in ***PVG Raju*** cited *supra*. It has merely gone by the reasoning that the embargo created by Explanation 2 inserted in Section 37 was to deny deduction for CSR expenses incurred by companies, as and by way of regular business expenditure while computing income under the head 'business' and that the same cannot be extended or imported to CSR contributions which are otherwise eligible for deduction under any other provision or chapter, so as to say donations made by charitable trust registered under Section 80G. Thus, the tribunal in these cases has merely proceeded on the assumption that the deduction under Section 80G was admissible in respect of payments made to charitable institutions from the CSR funds and has not examined the question whether such payments partake the character of donation in terms of the law laid down by the Supreme Court in ***PVG Raju*** cited *supra*.

12. In ***First American (India)***[15]**,** the tribunal has placed reliance on the Memorandum to the Finance Bill, 2014 ('the Memorandum', for short). It may be noted here that the said Memorandum only clarifies that no deduction will be allowed for CSR expenditure as a business expenditure and the same does not explain the context of deductions under Section 80G. The Memorandum deals only with business expenditure and, therefore, its extension to other areas stands expressly excluded in terms of the settled principle of interpretation that the explicit mention of one (thing) is the exclusion of another**.** *'Expressio unius est exclusio alterius'* goes the Latin maxim, which has been judicially recognized by the Supreme Court in a catena of cases.[16] The Memorandum expressly mentions business expenditure under Section 37 and merely bars, in terms, the deduction of CSR expenses. It is not at all associated with Section 80G because if something is not allowed in a situation given by the Act, there is no presumption in law that it is allowed in other situations.

13. Thus, ***JMS Mining, FNF India, Goldman Sachs Services*** **and** ***First American*** **cases**[17] were not correctly decided by the tribunal.

7.0 Circular Dated 12 January, 2016 of the Ministry of Corporate Affairs

14. Sometimes a circular dated 12 January, 2016,[18] issued by the Ministry of Corporate Affairs ('MCA', for short) is pressed in service to argue the admissibility of

contributions made from CSR funds as donations under Section 80G of the Act. It may, however, be noticed in this regard that MCA has issued Frequently Asked Questions ('FAQs') through this circular, which reads as follows:

"Question No. 6: What tax benefits can be availed under CSR?

Answer: No specific tax exemptions have been extended to CSR expenditure per se. The Finance Act, 2014 also clarifies that expenditure on CSR does not form part of business expenditure. While no specific tax exemptions have been extended to expenditure incurred on CSR, spending on several activities like Prime Minister's Relief Fund, scientific research, rural development projects, skill development projects, agriculture extension projects etc., which fund place in Schedule VII, already enjoys exemptions under different sections of the Income-tax Act, 1961."

15. This circular, albeit cognizant of the fact that no specific tax exemptions are extended to the CSR expenditure, only illustrates the presumed tax benefits by the concerned authorities and cannot be taken as a pronouncement of law to the effect that the contribution out of the CSR funds be treated as donation in terms of Section 80G, more so when it runs afoul of the dicta laid down by the Supreme Court in ***PVR Raju*** and other cases cited *supra*.

16. The matter can be viewed from another angle as well. The CSR provisions were introduced vide the Companies Act, 2013 in order to enable the corporate entities to share the burden of the Government in providing social services by companies having net worth, turnover or profit above a threshold. The Company, however, started claiming CSR expenditure under Section 37(1) which resulted in subsidization of a part of such expenses by the Government by way of tax expenditure. This defeated the very objective of the CSR provisions. With a view to plugging this mischief, the Government inserted, vide the Finance Act, 2014, an Explanation to section 37 (1) of the Act, barring deduction of such expenditure from the business income of the taxpayer. The **Explanatory Memorandum to Finance Act, 2014** brings out this aspect in the following words:

"Under the Companies Act, 2013 certain companies (which have net worth of Rs.500 crore or more, or turnover of Rs.1000 crore or more, or a net profit of Rs.5 crore or more during any financial year) are required to spend certain percentage of their profit on activities relating to Corporate Social Responsibility (CSR). Under the existing provisions of the Act expenditure incurred wholly and exclusively for the purposes of the business is only allowed as a deduction for computing taxable business income. 14 CSR expenditure, being an application of income, is not incurred wholly and exclusively for the purposes of carrying on business. As the application of income is not allowed as

deduction for the purposes of computing taxable income of a company, amount spent on CSR cannot be allowed as deduction for computing the taxable income of the company. *Moreover, the objective of CSR is to share burden of the Government in providing social services by companies having net worth/turnover/profit above a threshold. 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."*

[Emphasis Supplied]

16.1 Thus, where the statute expressly bars tax subsidization of CSR expenditure, taking recourse to a circuitous route of making payment to charitable institutions and then claiming deductions under Section 80G, is a colourable stratagem of achieving tax subsidization, which is not permissible in law.

16.2 It is a settled proposition of law that when anything is forbidden, everything which leads to the same result is also forbidden. The principle is contained in the Latin maxim *'Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.'* In other words, what cannot be done directly, is not permissible to be done obliquely, meaning thereby, whatever is prohibited by law to be done, cannot legally be effected by an indirect and circuitous contrivance. This principle is too well-recognized in India.[19] Thus, tax subsidization of CSR expenses cannot be countenanced in law through the indirect mechanism of Section 80G.

8.0 Conclusion

17. In view of the foregoing discussion, the payment made as a part of legal compliance of corporate social responsibility requirements under the Companies Act 2013, cannot be said to be a voluntary payment so as to constitute a donation for the purposes of granting deduction under Section 80G. Secondly, when the ogre of tax subsidization is sought to be addressed by the legislature by barring its deductibility as business expenditure under Section 37(1), the same menace cannot be resurrected by its alternative deduction under Section 80G of the Act to thwart and subvert the legislative intent.

Endnotes

1. See JMS Mining (P) Ltd v Pr CIT [2021] 130 taxmann.com 118 (Kol - Trib), FNF India (P) Ltd v ACIT [IT A No. 1565 (Bang) of 2019, dated 15-1-2021], Goldman Sachs Services Pvt Ltd v JCIT [2020] 117 taxmann.com 535 (Bangalore - Trib) and First American (India) Pvt Ltd v ACIT [ITA No. 1762/Bang/2019 dated 29/04/2020].

2. Vide the Finance Act, 2014.
3. CIT v Venkateswara Hatcheries (P) Ltd [1999] 103 Taxman 503 (SC).
4. 1972 86 ITR 267 AP.
5. 1976 SCR (1)1017.
6. Taxpayer
7. Income Tax Appellate Tribunal in India.
8. (1994) 48 TTJ Mumbai 552.
9. See n (6).
10. [2005] 146 Taxman 653 (Delhi).
11. [1988] 37 Taxman 230 (MP).
12. (3 E&B 416.
13. [1886] 2 TC 257 (C Sess).
14. See n (1).
15. ibid.
16. See Justice K. S. Puttaswamy v UOI [2018] 97 taxmann.com 585 (SC), A. B. C Laminart (P.) Ltd. v AP Agencies [1989] 44 Taxman 442 (SC), Rojer Mathew v South Indian Bank Ltd. [2019] 111 taxmann.com 208 (SC), GVK Industries Ltd. v ITO [2011] 197 Taxman 337 (SC), and SEBI v Kanaiya Lal [2017]85 taxmann.com 267 (SC).
17. See n (1)
18. See General circular no 01/2016 dated 12 Jan 2016.
19. See Jagir Singh v Ranbir Singh, AIR 1979 SC 381, MC Mehta v Kamal Nath & Ors, AIR 2000 SC 1997, Sant Lal Gupta & Ors v Modern Co-operative Group Housing Society Ltd & Ors, JT 2010 (11) SC 273, State of Tamil Nadu & ors v K Shyam Sunder and Ors, ((2011) 8 SCC 737.