CORPORATE SOCIAL RESPONSIBILITY-By Ananya Kapoor, Advocate (Taxation)

INTRODUCTION

Augmenting profits is no longer the sole business performance indicator for the corporates and they have to play the role of responsible corporate citizens by undertaking activities for betterment of the society and the environment under the umbrella of Corporate Social Responsibility (CSR).

Organisations use resources that belongs to the society and it is expected that they should operate in a sustainable manner and spend some amounts for preservation and sustainability of resources which belong to the society. Over the last two decades, significant economic growth and integration has taken place in the global economy, resulting in several changes in the way businesses operate. Governments across the world have been using different forms of regulations to improve corporate behavior so as to promote increased accountability, disclosures and transparency from them. Gone are the days when Milton Friedman, the reputed Economics Nobel laureate, opined in 1960s that companies have no responsibility towards the society and that their objective was primarily the enhancement of shareholders' wealth.

With the enactment of the Companies Act, 2013, CSR became a norm in India. India is perhaps one of the few countries in the world where CSR is mandated under the Statute. Since this is undoubtedly a unique provision of law, it has given rise to many concerns amongst the stakeholders during the initial period of implementation. A High Level Committee was constituted by the Ministry of Corporate Affairs (MCA) in 2015 ("HLC-2015") under the Chairmanship of Shri Anil Baijal to suggest measures for monitoring and to help the Government to strengthen the CSR framework. The HLC-2015 was of the view that the first couple of years, would be a 'learning experience' for all stakeholders including the Government, companies, implementing agencies, auditors, etc. after which an in-depth analysis may be done based on disclosures from the filings made by the companies with respect to CSR provisions. HLC-2015 recommended that another Committee be set up after three years to revisit the CSR framework.

It is in this overall context that another High Level Committee was set up on 28th September 2018 (HLC-2018) under the Chairmanship of Shri Injeti Srinivas, the then Secretary, Ministry of Corporate Affairs (MCA), to review the CSR framework and make recommendations to develop a more robust and coherent CSR regulatory and policy framework and underlying ecosystem. The HLC-2018 identified specific issues arising out of the provisions of section 135 of the Act and rules made thereunder, Schedule VII to the Act and associated operational challenges. The HLC-2018 submitted its report on 7th August, 2019. Thereafter in 2021, amendments have also been introduced for some issued in light of the report.

Concept of CSR

CSR emerges from different sociological settings of each era to influence the way businesses adopt a more considerate and responsible behavior. Earlier businesses used to conduct these activities through especially dedicated charities. Later on the concept developed to welfare programs and activities in the nature of social responsibility.

The concept of CSR has evolved during the last few decades from simple philanthropic activities to integrating the interest of the business with that of the community which is being served by such business. By exhibiting socially, environmentally and ethically responsible behaviour in governance of its operations, business can generate value and long term sustainability for itself while making positive contribution towards the betterment of the society.

CSR is a concept whereby companies are not only to consider their profitability and growth, but also interests of society and the environment by taking responsibility for the impact of their activities on the society, environment and communities in which they operate. CSR aims to fulfill expectations that society has from business and it is viewed as a comprehensive set of social policies, practices and programs that are integrated throughout the business operations. The concept of CSR has evolved over the years and it is now used as a strategy and a business opportunity to earn stakeholders' goodwill.

CSR – The Indian Scenario

The philosophy of giving back to the society has been an integral part of the Indian culture and ethos, which has also been imbibed in traditional Indian businesses since time immemorial. The principle of doing good to society is enshrined in our holy scriptures. India's ancient wisdom, which is still relevant today, inspires people to work for the larger objective of the well-being of all stakeholders. Indian business has traditionally been socially responsible and some of the business houses have demonstrated their efforts on this front in a laudable manner.

Even today the foresight of Kautilya and his remarks in Arthashastra that "birds flock to a tree which yields fruits" is the ethos which reverberates across the organisations. However, the culture of social responsibility needs to go deeper in the governance of all business entities.

CSR in Indian Legislation

Though the legislature over a period of time has tried to address the basic responsibilities of a corporate towards its employees and environment by enacting various labour and environmental laws, the introduction of CSR provisions under the

Act is a significant legislative effort undertaken to involve corporates as partners in the social development process of the country and in strengthening the social responsibility of businesses.

Companies Act, 2013

Companies Act, 2013 is a legislation which officially embarked on one of the world's largest experiments of introducing the concept of CSR as a mandatory provision. CSR is an important and progressive concept for socio economic development. The inclusion of CSR is an attempt by the Government to engage businesses with the national development agenda. With the introduction of CSR provisions in the Act, there is a statutory responsibility on the corporates to take initiatives towards social, environmental and economic obligations. Section 135 of the Act and the CSR Rules framed thereunder form the legal framework of CSR in India. The detailed provisions are explained below:

Section 135

(1) Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during [2][the immediately preceding financial year] shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director:

[3][Provided that where a company is not required to appoint an independent director under sub-section (4) of section 149, it shall have in its Corporate Social Responsibility Committee two or more directors.]

(2) The Board's report under sub-section (3) of section 134 shall disclose the composition of the Corporate Social Responsibility Committee.

(3) The Corporate Social Responsibility Committee shall,--

(a) formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company [4][in areas or subject, specified in Schedule VII];

(b) recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and

(c) monitor the Corporate Social Responsibility Policy of the company from time to time.

(4) The Board of every company referred to in sub-section (1) shall,--

(a) after taking into account the recommendations made by the Corporate Social Responsibility Committee, approve the Corporate Social Responsibility Policy for the company and disclose contents of such Policy in its report and also place it on the company's website, if any, in such manner as may be prescribed; and

(b) ensure that the activities as are included in Corporate Social Responsibility Policy of the company are undertaken by the company.

(5) The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent. of the average net profits of the company made during the three immediately preceding financial years, [5][or where the company has not completed the period of three financial years since its incorporation, during such immediately preceding financial years] in pursuance of its Corporate Social Responsibility Policy:

Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities:

Provided further that if the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub-section (3) of section 134, specify the reasons for not spending the amount [1][and, unless the unspent amount relates to any ongoing project referred to in sub-section (6), transfer such unspent amount to a Fund specified in Schedule VII, within a period of six months of the expiry of the financial years].

[6][Provided also that if the company spends an amount in excess of the requirements provided under this sub-section, such company may set off such excess amount against the requirement to spend under this sub-section for such number of succeeding financial years and in such manner, as may be prescribed.]

[6][(6) Any amount remaining unspent under sub-section (5), pursuant to any ongoing project, fulfilling such conditions as may be prescribed, undertaken by a company in pursuance of its Corporate Social Responsibility Policy, shall be transferred by the company within a period of thirty days from the end of the financial year to a special account to be opened by the company in that behalf for that financial year in any scheduled bank to be called the Unspent Corporate Social Responsibility Account, and such amount shall be spent by the company in pursuance of its obligation towards the Corporate Social Responsibility Policy within a period of three financial years from the date of such transfer, failing which, the company shall transfer the same to a Fund specified in Schedule VII, within a period of thirty days from the date of completion of the third financial year.

[7][(7) If a company is in default in complying with the provisions of sub-section (5) or sub-section (6), the company shall be liable to a penalty of twice the amount required to be transferred by the company to the Fund specified in Schedule VII or the Unspent Corporate Social Responsibility Account, as the case may be, or one crore rupees, whichever is less, and every officer of the company who is in default shall be liable to a penalty of one-tenth of the amount required to be transferred by the company to such Fund specified in Schedule VII, or the Unspent Corporate Social Responsibility Account, as the case may be, or two lakh rupees, whichever is less.]

(8) The Central Government may give such general or special directions to a company or class of companies as it considers necessary to ensure compliance of provisions of this section and such company or class of companies shall comply with such directions.]

[8][(9) Where the amount to be spent by a company under sub-section (5) does not exceed fifty lakh rupees, the requirement under sub-section (1) for constitution of the Corporate Social Responsibility Committee shall not be applicable and the functions of such Committee provided under this section shall, in such cases, be discharged by the Board of Directors of such company.]

[9][*Explanation.*--For the purposes of this section "net profit" shall not include such sums as may be prescribed, and shall be calculated in accordance with the provisions of section 198.]

---

1. Subs. by Act 29 of 2020, s. 26, for sub-section (8) (w.e.f. 21-12-2020).

2. Subs. by Act 1 of 2018, s. 37, for "any financial year" (w.e.f. 19-9-2018).

3. The proviso ins. by s. 37, *ibid*., (w.e.f. 19-9-2018).

4. Subs. by s. 37, *ibid*., for "as specified in Schedule VII" (w.e.f. 19-9-2018).

5. Ins. by Act 22 of 2019, s. 21 (w.e.f. 15-8-2019).

6. The Proviso ins. by Act 29 of 2020, s. 27 (w.e.f. 22-1-2021).

7. Subs. by Act 29 of 2020, s. 27, for sub-section (7) (w.e.f. 22-1-2021).

8. Ins. by s. 27, *ibid*. (w.e.f. 22-1-2021).

9. Subs. by Act 1 of 2018, s. 37, for the Explanation (w.e.f. 19-9-2018).

Schedule VII, Companies Act, 2013

2. Activities which may be included by companies in their Corporate Social Responsibility Policies Activities relating to:-

(*i*)		eradicating extreme hunger and poverty;
(*ii*)		promotion of education;
(*iii*)		promoting gender equality and empowering women;
(*iv*)		reducing child mortality and improving maternal health;
(*v*)		combating human immunodeficiency virus, acquired immune deficiency syndrome, malaria and other diseases;
(*vi*)		ensuring environmental sustainability;
(*vii*)		employment enhancing vocational skills;

(*viii*)		social business projects;
(*ix*)		contribution to the Prime Minister's National Relief Fund or any other fund set-up by the Central Government or the State Governments for socio-economic development and relief and funds for the welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women; and
(*x*)		such other matters as may be prescribed.

In accordance with the FAQ's issued by the Ministry of Corporate Affairs dated 12.01.2016, under FAQ No. 7, Point - 5, it is provided that *' Activities undertaken by the company in pursuance of its normal course of business would not qualify as CSR'* for the purpose of Section 135 of the Companies Act,2013.

In accordance with the aforementioned discussion, it can be concluded that every company which fulfills above criteria shall mandatorily spend on CSR activities as specified in schedule VII and which shall not include the activities in the normal course of business of company.

1. Issue: Are CSR provisions applicable to private / section 8 companies?
   View: Yes, if such companies fulfill the criteria prescribed under section 135(1) of the Act.
2. Issue: Are CSR provisions applicable to joint venture companies? What if such companies have no business projects in India?
   View: Any company incorporated under the Act including joint venture company will come within the purview of CSR provisions if it fulfill the criteria prescribed under section 135(1) of the Act. Even if a company incorporated under the Act is carrying on business activities outside India and has no business activities in India, it still needs to comply with the CSR provisions if it fulfills the criteria prescribed under section 135(1) of the Act.

Income-tax provisions & CSR

Surprisingly, there is no specific provision in the Income-tax Act, 1961 which gives deduction for corporate social responsibility expenditure, till now. However, Section 80G and Section 37 and Section 35AC mandates discussion. Section 37(1) was the ideal section, which could have really lent a helping hand to charity-doers as it could fully allow corporate social responsibility expenses as business expenses. Let's start with this section, as it was the first step towards corporate social responsibility in income-tax arena.

Section 37(1), the original giver

Section 37(1) is considered to be the most benevolent provision, till date, which made Corporate Social Responsibility bloom and blossom, to full potential.

Section 37 (1) states that any expenditure which does not qualify under revenue expenditure within Ss. 30-36 or is a capital expenditure or personal expenses of the assessee shall be considered to be business expenditure if it is wholly and exclusively for the purposes of business or profession. It shall be allowed as business expenditure while computing income from profits and gains from business or profession.

Section 37 of the Income Tax Act, 1961 provides that -

> (1) 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 1*.-For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such an expenditure.
>
> *Explanation 2*.-For the removal of doubts, it is hereby declared that for the purposes of sub-section (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 (18 of 2013) shall not be deemed to be an expenditure incurred by the assessee for the purposes of the business or profession.

Explanation 2 to section 37(1) of the Income Tax Act, 1961, which was inserted by Finance (No.2) Act 2014 (applicable from assessment year 2015- 16), provides that any expenditure incurred by an assessee on the activities relating to CSR referred to in section 135 of Companies Act, 2013 shall not be deemed to be an expenditure incurred by the assessee for the purposes of business or profession and shall not be allowed as deduction under section 37(1) of the Income Tax Act, 1961.

FINANCE (NO. 2) BILL, 2014 - MEMORANDUM - PROVISIONS RELATING TO DIRECT TAXES AND EXPLANATORY NOTES TO THE PROVISIONS OF THE FINANCE(No.2) ACT, 2014- Dated the 21st January, 2015 - Circular No. 01/2015

"**CORPORATE SOCIAL RESPONSIBILITY (CSR)**

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. 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.

The existing provisions of section 37(1) of the Act provide that deduction for any expenditure, which is not mentioned specifically in section 30 to section 36 of the Act, shall be allowed if the same is incurred wholly and exclusively for the purposes of carrying on business or profession. As the CSR expenditure (being an application of income) is not incurred for the purposes of carrying on business, such expenditures cannot be allowed under the existing provisions of section 37 of the Income-tax Act. Therefore, in order to provide certainty on this issue, it is proposed to clarify that for the purposes of section 37(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 have been incurred for the purpose of business and hence shall not be allowed as deduction under section 37. However, the CSR expenditure which is of the nature described in section 30 to section 36 of the Act shall be allowed deduction under those sections subject to fulfilment of conditions, if any, specified therein.

This amendment will take effect from 1st April, 2015 and will, accordingly, apply in relation to the assessment year 2015-16 and subsequent years."

[Clause 13]

Whether the amendment is prospective or retrospective ?

The issue is whether the explanation has retrospective application, mainly because the same was introduced to remove the doubts. The tax authorities interpret that when an explanation has been introduced to remove the doubts, the said explanation will be deemed to have retrospective application.

Delhi ITAT ruling in the case of The National Small Industries Corp Ltd. NSIC Bhawan vs. DCIT ITA No. 1367/Del/2016, (25.02.2019) the Court held that-

"6.2. Ld.Sr.DR has alleged that, by way of amendment inserted by Finance Act (No. 2) 2014, no expenses are deductible incurred towards CSR against business income. He said that these should be treated as clarificatory in nature, and therefore expenses discharging corporate social responsibility were outside the ambit of expenses deductible under section 37 (1), by virtue of Explanation 2 inserted by Finance Act (No. 2) 2014. It is observed that Ld. AO/CIT (A) proceeded to make addition on the premises that Explanation 2 to section 37(1) was applicable to the present year under consideration.

7. We are unable to agree with plea advanced by Ld.Sr.DR. In our opinion Explanation 2 has been inserted in the section 37 (1) w.e.f. 01/04/15 and is prospective in nature. In our considered opinion amendment by way of Explanation 2 to Sec.37(1) cannot be construed as disadvantage to the assessee in the period prior to the amendment. It is a disabling provision, as set out in Explanation 2 to Sec.37(1), and refers to such Corporate Social Responsibility expenses u/s 135 of Companies Act, 2013 and as such cannot have application for period not covered by this Statutory Provision which itself came into existence in 2013. ***We draw our support from the decision of Hon'ble Supreme Court in case of CIT vs. Vatika Townships Pvt. Ltd. Reported in (2014) 367 ITR 466, wherein Hon'ble Court held as under****:*

"Of the various rules guiding how legislation has to be interpreted, one established rule is that unless a contrary intention appears, legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's background adjustment of it. Our belief in the nature of the law is founded on the bed rock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lexprospicit non respicit: law looks forward not backward. As was observed in Phillips vs. Eyre: a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law."

Thus we reject this argument of Ld.Sr.DR and hold that this amendment would not affect allowability of such expenses for the year under consideration, being assessment year 2012-13. It is observed that authorities below rejected claim of assessee only on the ground that Explanation 2 to Sec.37(1) is applicable to year under consideration.

8. We therefore allow grounds raised by assessee. As we have already allowed the said expenses under section 37 (1) for the year under consideration,….

ACIT vs. Jindal Power Ltd. (I.T.A. No.: 99/BLPR/2012) dated 23.06.2016, wherein the Court held that-

"19. We are unable to see legally sustainable merits in this plea either. The amendment in the scheme of Section 37(1), which has been introduced with effect from 1st April 2015, cannot be construed as to disadvantage to the assessee in the period prior to this amendment. This disabling provision, as set out in Explanation 2 to Section 37(1), refers only to such corporate social responsibility expenses as under Section 135 of the Companies Act, 2013, and, as such, it cannot have any application for the period not covered by this statutory provision which itself came into existence

in 2013. Explanation 2 to Section 37(1) is, therefore, inherently incapable of retrospective application any further. ***In any event, as held by Hon'ble Supreme Court's five judge constitutional bench's landmark judgment, in the case of CIT Vs Vatika Townships Pvt Ltd [(2014) 367 ITR 466 (SC)], the legal position in this regard has been very succinctly summed up by observing that-----***

It may appear to be some kind of a dichotomy in the tax legislation but the well settled legal position is that when a legislation confers a benefit on the taxpayer by relaxing the rigour of pre-amendment law, and when such a benefit appears to have been the objective pursued by the legislature, it would a purposive interpretation giving it a retrospective effect but when a tax legislation imposes a liability or a burden, the effect of such a legislative provision can only be prospective. We have also noted that the amendment in the scheme of Section 37(1) is not specifically stated to be retrospective and the said Explanation is inserted only with effect from 1st April 2015. In this view of the matter also, there is no reason to hold this provision to be retrospective in application. As a matter of fact, the amendment in law, which was accompanied by the statutory requirement with regard to discharging the corporate social responsibility, is a disabling provision which puts an additional tax burden on the assessee in the sense that the expenses that the assessee is required to incur, under a statutory obligation, in the course of his business are not allowed deduction in the computation of income. This disallowance is restricted to the expenses incurred by the assessee under a statutory obligation under section 135 of Companies Act 2013, and there is thus now a line of demarcation between the expenses incurred by the assessee on discharging corporate social responsibility under such a statutory obligation and under a voluntary assumption of responsibility. As for the former, the disallowance under Explanation 2 to Section 37(1) comes into play, but, as for latter, there is no such disabling provision as long as the expenses, even in discharge of corporate social responsibility on voluntary basis, can be said to be "wholly and exclusively for the purposes of business". There is no dispute that the expenses in question are not incurred under the aforesaid statutory obligation. For this reason also, as also for the basic reason that the Explanation 2 to Section 37(1) comes into play with effect from 1st April 2015, we hold that the disabling provision of Explanation 2 to Section 37(1) does not apply on the facts of this case."

Prior to passing of Finance Bill, 2014, there were several instances when the courts were seized with the question of whether CSR expenditure would qualify as business expenditure u/s. 37 (1). The decisions propounded that CSR expenditure qualified as expenditure "wholly and exclusively laid out for the purpose of business or profession" and as such could be allowed under business expenditure.

Some of these judgments along with a brief set of facts are given below:

Sri Venkata Satyanaryana Rice Mill Contractors Co. v. CIT [1996] 89 Taxman 92 (SC):

The assessee was in the business of rice export from Andhra Pradesh. Before exporting rice a permit had to be obtained from the District Collector, which was granted only after payment was made to a welfare fund established by him.

The assessee claimed the contributions made as business expenditure. The ITO disallowed the deduction. ITAT held that contribution to welfare fund showed that an advantage would accrue for the benefit of the assessee on the payment of contribution and, therefore, allowed deduction.

The Andhra Pradesh HC disallowed this deduction by adjudging this expenditure as a compulsory extraction.

The Supreme Court reversed the decision and held this to be business expenditure. It held the correct test for determining the nature of business expenditure was not whether it was compulsory for the assessee to make the payment or not but commercial expediency. The Apex Court reaffirmed a decision of House of Lords (*Atherton* v. *British Insulated & Helsby Cables Ltd.* [1924-26] 10 TC 155) in which it was held:

> *"A sum of money expended, not of necessity and with a view to direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of trade…"*

In the judgment, even though the Supreme Court did not expressly talk about CSR expenditure, the ratio impliedly suggested that if a company invests in any public welfare scheme, such amount would be allowed as business expenditure u/s. 37 (1), even if it were a voluntary investment. If such investment were made mandatory, it would be a measure to facilitate the continuance of business and as such would again qualify as business expenditure.

Krishna Sahakari Sakhar Karkhana Ltd. v. CIT [2000] 112 Taxman 246 (Bom.)

The assessee, a registered co-operative society, engaged in sale of sugar, paid a sum to an Education Fund of the State Federal Society as required under S. 68 of the Maharashtra Co-operative Societies Act and claimed deduction thereof as business expenditure. The CIT directed disallowance of the claim. The Tribunal upheld disallowance stating that the contribution made by the assessee to the education fund was not "wholly and exclusively" for the benefit of the assessee and there was no relation between the contribution made by the assessee-society and any advantage gained by it as a result thereof.

The Bombay HC allowed the expenditure u/s. 37 (1), relying on *CIT* v. *Malayalam Plantations Ltd.* [1964] 53 ITR 140 (SC) and opined that the phrase "for the purpose of business" in the section was not equivalent to, but instead had a wider ambit than "for the purpose of earning profits". A payment may also be made by a corporation with the object of rationalisation of its administration and modernisation of its machinery; it may include measures for the preservation of the business and for the protection of its assets and property from expropriation, coercive process or assertion of hostile title; it may also comprehend payment of statutory dues and taxes imposed as a pre-condition to commence or for the carrying on of a business; it may comprehend many other acts incidental to the carrying on of a business.

However this payment should be made only with the purpose of purpose of the business. This ratio also bolstered the allowability of CSR expenditure u/s. 37 (1).

CIT v. Madras Refineries Ltd. [2004] 138 Taxman 261/266 ITR 170 (Mad.)

This judgment squarely deals with CSR expenditure and is the bedrock on which the antagonists of the 2014 Amendment can build their castle.

The assessee, Madras Refineries Limited provided funds for establishing drinking water facilities to the residents in the vicinity of the refinery and also provided aid to the school run for the benefit of the children of those local residents. It incurred an expense of Rs. 15,32,000 for that purpose. The AO disallowed this expenditure u/s. 37 (1), but the Commissioner reversed decision stating that the amount was incurred by the company for the good and welfare of the community and, therefore, could be regarded as an activity for the promotion of the business. The ITAT allowed the entire expenditure under this section.

The Madras HC upheld the decision of the ITAT in its entirety. Addressing the issue of CSR, the HC opined:

> *"The concept of business is not static. It has evolved over a period of time to include within its fold the concrete expression of care and concern for the society at large and the people of the locality in which the business is located in particular. Being known as a good corporate citizen brings goodwill of the local community, as also with the regulatory agencies and the society at large, thereby creating an atmosphere in which the business can succeed in a greater measure with the aid of such goodwill. Monies spent for bringing drinking water as also for establishing or improving the school meant for the residents of the locality in which the business is situated cannot be regarded as being wholly outside the ambit of the business concerns of the assessee, especially where the undertaking owned by the assessee is one which is to some extent a polluting industry."*

In post-amendment scenario, corporate social responsibility took a severe blow, as judgments disallowing expenses under Section 37(1) came about.

CIT v. Wipro Ltd. [2014] 41 taxmann.com 190/222 Taxman 181 (Kar.)

The assessee-respondent had made contributions for the upliftment of a backward community in its nearby area. The AO disallowed the expenditure citing it as charity and not at all connected with the purpose of the business, and this decision was upheld by the CIT (A). On second appeal to ITAT, the addition made by AO was deleted.

The Karnataka HC upheld the decision of AO. It stated that the contributions made by the assessee were not direct but towards religious functions, charitable institutions, social clubs and certain acts of charity such as donating a borewell to the Municipality, etc. The HC, thus, decided this expenditure did not satisfy the test of commercial expediency u/s. 37 (1). Due to assessee's failure to adduce evidence, the expenditure under these heads cannot be stated to be exclusively for the purpose of business of the assessee and to allow it.

This judgment clearly spelt out the policy behind section 37 (1), *Explanation* 2 as added by Finance Bill, 2014. The effect of this law put CSR activities outside the scope of business.

Malayala Manorama Co. Ltd. v. CIT ***[2006] 150 Taxman 505 (Ker.)***

The company set up a trust for earthquake victims. It claimed it as business expenditure, under Section 37(1), saying that the act enhanced it's reputation as a philanthropist. The Kerala High Court disallowed deduction.

Expenditure being incurred voluntarily, does that matter ?

ACIT vs. Jindal Power Ltd. (I.T.A. No.: 99/BLPR/2012) dated 23.06.2016, wherein the Court held that-

“16. We have noted that fundamental objection of the Assessing Officer is that the expenses is voluntary, not mandatory and not for business purposes. As for the contention that the expenses being in the nature of voluntary expenses, which are not mandatory, and which the assessee was not statutorily required to incur, are not admissible deduction in computation of business income, we are of the considered view that as long as expenses are incurred wholly and exclusively for the purposes of earning the income from business or profession, merely because some of these expenses are incurred voluntarily, i.e. without there being any legal or contractual obligation to incur the same, those expenses do not cease to be deductible in nature. In other words, it is not necessary that every expense that could be allowed as a deduction should be such as a hardnosed, and perhaps devoid of senses of compassion, businessman alone would incur in furtherance of his business pursuits. We find guidance from a passage from the judgment of House of Lords in the case of Atherton vs. British Insulated & Helsbey Cables Ltd. (1925) 10 Tax Cases 155 (HL), referred to with approval by the Hon’ble Supreme Court in the case of CIT vs. Chandulal Keshavlal & Co. (1960) 38 ITR 601 (SC), which reads as follows: "It was made clear in the above cited cases of Usher’s Wilshire Brewery vs. Bruce (supra) and Smith vs. Incorporated Council of Law Reporting (1914) 6 Tax Cases 477 that a sum of money expended not with a necessity and with a view to direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency and in order to indirectly facilitate, carrying on of business may yet be expended wholly and exclusively for the purpose of the trade; and it appears to me that the findings of the CIT in the present case, bring the payment in question within that description. They found (in words which I have already quoted) that payment was made for the sound commercial purpose of enabling the company to retain the existing and future members of staff and for increasing the efficiency of the staff; and after referring to the contention of the Crown that the sum of Sterling Pound 31,784 was not money wholly and exclusively laid out for the purpose of the trade under the rule above referred to, they found deduction was admissible-thus in effect, though not in terms, negativing the Crowns contentions. I think that there was ample material to support the findings of the CIT, and accordingly hold that this prohibition does not apply." It will, therefore, be clear that even if an expense is incurred voluntarily, it may still be construed as 'wholly and exclusively'. Explaining this principle, Hon'ble Supreme Court has, in the case of Sassoon J David & Co. (P) Ltd. vs. CIT [(1979) 118 ITR 261 (SC)] inter alia observed that :"It has to be observed here that the expression "wholly and exclusively" used in s. 10(2)(xv) of the Act does not mean "necessarily". Ordinarily, it is for the assessee to decide whether any expenditure should be incurred in the course of his or its business. Such expenditure may be incurred voluntarily and without any necessity and if it is incurred for promoting the business and to earn profits, the assessee can claim deduction under s. 10(2)(xv) of the Act even though there was no compelling necessity to incur such expenditure. It is relevant to refer at this stage to the legislative history of s. 37 of the IT Act, 1961, which corresponds to s. 10(2)(xv) of the Act. An attempt was made in the IT Bill of 1961 to lay down the "necessity" of the expenditure as a condition for claiming deduction under s. 37. Sec. 37(1) in the Bill read "any expenditure.. laid out or expended wholly, necessarily and exclusively for the purposes of the business or profession shall be allowed." The introduction of the word "necessarily" in the above section resulted in public protest. Consequently, when s. 37 was finally enacted into law, the word "necessarily" came to be dropped. The fact that somebody other than the assessee is also benefited by the expenditure should not come in the way of an expenditure being allowed by way of deduction under s. 10(2)(xv) of the Act if it satisfies otherwise the tests laid down by law."

Section 80G

Section 80G provides the easiest avenue to invest in corporate social responsibility and clinch a deduction. Donations, which give 100% deduction, without any qualifying limit include Prime Minister's National Relief Fund, National Defence Fund, National Illness Assistance Fund etc; One can also earn a deduction by giving funds to an approved university or educational institution of national eminence. For those interested in rural development, there is the zilla saksharta samiti under collector, while the scientific promoters can give money to Fund for Technological Development. The philanthropic corporate can also donate to National Fund for control of Drug Abuse. Overall, there are many heads under this section, which give space for corporate social responsibility deeds.

Donations with 50% deduction are also available under Section 80G like contribution to Prime Minister's Drought Relief Fund.

Of course, to qualify for deduction, there should be no donation in kind like clothes, food and blankets

Swachh Bharat & Clean Ganga Provisions

6. Two new clauses have been introduced in Section 80G, which enable donation for Swachh Bharat Mission and Clean Ganga Campaign, with 100% deduction. The object is to provide for cleanliness and sanitation for a new India and also purification of the Ganga river.

But, the shocker is that deduction is not allowed, if it's part of corporate social responsibility.

[2021] 130 taxmann.com 118 (Kolkata - Trib.)

IN THE ITAT KOLKATA BENCH 'A'
JMS Mining (P.) Ltd.
v.
Principal Commissioner of Income-tax, Kolkata-2**
IT APPEAL NO. 146 (KOL.) OF 2021
[ASSESSMENT YEAR 2016-17]
JULY 22, 2021

"**17.** Coming next to the legality/correctness of the deduction allowed by the AO in respect of CSR/donation u/s. 80G of the Act, first of all, we agree with the Ld. CITDR that CSR expenses which are required to be mandatorily incurred by the assessee Company as per Section 135 of the Companies Act are not entitled to deduction u/s 37(1) of the Act for A.Y 2015-16 by virtue of the fetter placed by *Explanation 2* to section 37(1) of the Act which was inserted by the Finance Act *vide* no. 2.2014. The relevant provisions of *Explanation 2* to section 37(1) of the Act read as follows:

"*Explanation 2*. -For the removal of doubts, it is hereby declared that for the purposes of sub-section (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 (18 of 2013)27 shall not be deemed to be an expenditure incurred by the assessee for the purposes of the business or profession"

From a plain reading of the above provision shows that, 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 of the Act 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 "Income under the head Business".

18. So, it can be clearly seen that this *Explanation* 2 to section 37(1) of the Act which denies deduction for CSR expenses by way of business expenditure is applicable only to the extent of computing 'Business Income' under Chapter IV-D of the Act. The said *Explanation* according to us cannot be extended or imported to CSR contributions which is otherwise eligible for deduction under any other provision or

Chapter, to say donations made to charitable trusts registered u/s 80G of the Act for the reasons cited infra.

19. In the facts of the present case, it is an admitted position that the donation of Rs. 1.35 crores was disallowed and *suo-moto* added back by the assessee in terms of *Explanation 2* to Section 37(1) while computing "Income under the head Business". However, according to assessee, since the said CSR contribution comprised of donation made to registered charitable trust, it was legally entitled to claim deduction under section 80G of the Act to arrive at the "Total Income" in terms of Chapter VI of the Act, and AO has allowed it, which action of AO has been found fault by Ld PCIT, which issue need to be examined. For examining the same let us look in to the relevant provisions which we need to be taken in to consideration.

20. The provisions of Section 135(5) of the Companies Act, 2013 read as under:

"The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent. of the average net profits of the company made during the three immediately preceding financial years or where the company has not completed the period of three financial years since its incorporation, during such immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy:"

21. Let us also look at section 80G of the Act (relevant portions) which reads as under:

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**

(*i*) …..

(*ii*) ……

(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 -

(*i*) …..

(*ii*) ……

"(iiihk). 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

(iiihl). 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)."

(*iv*). Any other fund or any institution to which section applies; or

(3)………………….

(4)……………….

(5) This Section applies to donations to any institution or fund referred to in Sub-clause (*iv*) of clause (*a*) of Sub-section (2), only if it is established in India for a charitable purpose and if it fulfills the following condition namely:

(*i*) ……….

(*a*) ………….

(*b*) ……………

(*c*) ………………

(*ii*) …………………

(*vi*) in relation to donations made after the 31st day of March, 1992 , the institution or fund is for the time being approved by the PCIT or Commissioner in accordance with the rules 3 made in this behalf.

22. From a bare reading of the section 80G of the Act we note that deduction under this section has to be made in accordance with and subject to the provisions of this section *i.e.* section 80G of the Act. As per this section *i.e.* section 80G of the Act, an amount equal to fifty percent (50%) of the aggregate of the sums specified in sub-section 2 [refer sub-clause (*iv*) of clause (*a*) of Sub-section 2 of section 80G of the Act read with section 80G (1) (*ii*)] which allows the donation given to any other Fund or any institution to which this section applies and if it satisfies the requirement of sub-section (5) of section 80G of the Act, then 50% of the donation is allowable expenditure [refer section 80G (1) (*ii*)]even if the assessee has included the expenditure as CSR Expenditure because there is no prohibition or restriction placed by the Parliament on such a donation even if shown as CSR expenditure. The reason for saying so is that in section 80G of the Act certain restrictions in respect of deduction in respect of two (2) donations are expressly seen in this Section. So the Parliament has expressed its intention clearly by bringing in restriction in respect of expenditure classified by an assessee company while claiming deduction u/s. 80G of the Act *i.e.* CSR expenditure related to Swachh Bharat Kosh and Clean Ganga Fund. So if an assessee makes some donation to these projects and include/classify it as CSR expenditure while claiming deduction u/s. 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 u/s. 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 (iiihk) and (iiihi) of clause (*a*) of sub-section (2) of section 80G of the Act, then deduction u/s. 80G of the Act is not allowable, which can be illustrated by giving certain examples (infra). 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 100% deduction u/s. 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. So the assertion of Ld. PCIT that AO could not have allowed deduction u/s 80G of the Act to an assessee on the CSR expenditure/donation to an institution u/s 80G(2)(*a*)(*iv*) which is enjoying certificate 80G(5)(*vi*) of the Act, is erroneous and therefore cannot be accepted. For this, we rely on the interpretation maxim "Expressio Unius Esl Exclusio Alterius" which is a Latin phrase that means "express mention of one thing excludes all others. This is one of the rules used in interpretation of Statutes. The phrase indicates that items not on the list are assumed not to be covered by the Statute. When something is mentioned expressly in a Statute, it leads to the presumption that the things not mentioned are excluded. This is an aid to the construction of Statutes. Applying the legal maxim 'expressio unius est exclusio alterius', it can be safely inferred that when the Legislature in particular has provided for only the above referred two specific exceptions in Section 80G, then it is the implied intent of the Legislature to permit deduction u/s 80G in respect of CSR contributions made to funds/organizations referred to in all other sub-clauses of Section 80G [other than (iiihk) and (iiihl)] of the Act. The above analysis made by us, can be cumulatively illustrated by the following examples for ease of understanding purpose only and should not be cited for making claim which should be made subject to the facts and law involved in each case and also subject to section 80G(4) of the Act:

Example: A company has reported eligible net profit u/s 135 of Companies Act, 2013 at Rs. 100 crores. The minimum CSR contribution of 2% under section 135(5) of the Act works out to be Rs. 2 crores.

Situation 1 : The company has been spent the required minimum CSR contribution of Rs. 2 crores towards construction of roads & schools in the vicinity of the backward area where the factory is located.

Tax Treatment: The entire CSR expenditure of Rs. 2 crores is to be disallowed and added back in terms of *Explanation 2* to section 37(1) of the Act.

Situation 2 : The company has contributed Rs. 3 crores to Swach Bharat Kosh.

Tax Treatment: The entire CSR expenditure of Rs. 3 crores is to be disallowed and added back in terms of *Explanation 2* to section 37(1) of the Act. In terms of Section 135(5) of the Act read with Section 80G(iiihk) only the excess sum paid amounting to Rs. 1 crores [3 crores - 2% of 100 crores] can be availed as deduction u/s 80G of the Act.

Situation 3 : The company has contributed Rs. l crore to Swach Bharat Kosh and Rs. 1 crore to any other charitable trust registered u/s 80G(5) of the Act.

Tax Treatment: The entire CSR expenditure of Rs. 2 crores is to be disallowed and added back in terms of *Explanation 2* to Section 37(1) of the Act. In terms of section 135(5) of the Act read with Section 80G(iiihk) the donation of Rs. l crores made to Swach Bharat Kosh is not eligible for deduction u/s 80G of the Act. The company can claim deduction of fifty percent of the donation of Rs. 1 crores paid to any other registered charitable trust u/s 80G(2)(*iv*) read with Section 80G(1)(*ii*) of the Act.

Situation 4 : The company has contributed Rs. 1 crore to Prime Minister's National Relief Fund and Rs. 1 crore to any other charitable trust registered u/s 80G(5) of the Act.

Tax Treatment: The entire CSR expenditure of Rs. 2 crores is to be disallowed and added back in terms of *Explanation 2* to section 37(1) of the Act.
The company can claim deduction for hundred percent of the donation of Rs. 1 crores paid to Prime Minister's National Relief Fund u/s 80G(2)(iiia) read with Section 80G(1)(*i*) of the Act.
The company claim deduction to the extent of fifty percent of the donation of Rs. 1 crores paid to any other registered charitable trust u/s 80G(2)(*iv*) read with section 80G(1)(*ii*) of the Act.

23. As discussed *supra*, we concur with the contention of the assessee that since Parliament intended certain restrictions to only CSR expenditure in respect of two donations included by an assessee as CSR expenditure *i.e.* [Swachh Bharat Kosh and Clean Ganga Fund] has impliedly not made any prohibition/restriction in respect of claim of CSR expenses in other cases if it is otherwise eligible under section 80G of the Act."

Issue: Can a deduction be availed while computing income from business or profession in respect of CSR expenditure?

View: Explanation 2 to section 37(1) of the Income Tax Act, 1961, which was inserted by Finance (No.2) Act 2014 (applicable from assessment year 2015- 16), provides that any expenditure incurred by an assessee on the activities relating to CSR referred to in section 135 of Companies Act, 2013 shall not be deemed to be an expenditure incurred by the assessee for the purposes of business or profession and shall not be allowed as deduction under section 37(1) of the Income Tax Act, 1961.

Issue: Whether contribution made to funds specified under Schedule VII to the Act and covered by section 80G of the Income Tax Act, 1961 can be considered for allowing a deduction under the said section of the Income Tax Act, 1961?

View: The Ministry of Corporate Affairs has issued FAQ through general circular dated 12th January 2016 (FAQ No. 6), wherein, it has been clarified as under:

"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 exemption has been extended to expenditure incurred on CSR, spending on several activities like contributions to Prime Minister's Relief Fund, scientific research, rural development projects, skill development projects, agricultural extension projects, etc., which find place in Schedule VII to the Act, already enjoy exemptions under different sections of the Income Tax Act, 1961" It has thus been clarified by MCA that a deduction under different sections of the Income Tax Act, 1961 in respect of those funds specified in Schedule VII to the Act would be allowable subject to the conditions specified in those section of the Income Tax Act, 1961.

This view is also supported by decisions of Delhi and Bangalore ITAT in the following cases: 1. Escorts Skill Developments vs. CIT (2019 (178 ITD32) (Delhi) 2. Goldman Sachs Services P. Ltd. vs. JCIT (TPA No. 2355/Bangalore/2019) (117 Taxman.com 535)"

Further cases on this aspect-

First American (India) (P.) Ltd v. *ACIT* [IT Appeal No.1762 (Bang.) of 2019]
The Bangalore Tribunal, took up this case where the deduction under section 80G was disallowed, since CSR qualifying donations were not 'voluntary contributions'. The Tribunal allowed the deduction under section 80G and held that*, "assessee cannot be denied the benefit of claim under Chapter VI A, which is considered for computing 'Total Taxable Income". If assessee is denied this benefit, merely because such payment forms part of CSR, it would lead to double disallowance, which is not the "intention of Legislature."*

Allegis Services (India) (P.) Ltd. (*supra*)
The Bangalore Tribunal considering this case said: "In present facts of case, Ld.AR submitted that all payments forming part of CSR do not form part of profit and loss account for computing Income under the head, "Income from Business and Profession". It has been submitted that some payments forming part of CSR were claimed as deduction under section 80G of the Act, for computing "Total taxable income", which has been disallowed by authorities below. In our view, assessee cannot be denied the benefit of claim under Chapter VI A, which is considered for computing 'Total Taxable Income". If assessee is denied this benefit, merely because such payment forms part of CSR, it would lead to double disallowance, which is not the intention of Legislature.

FNF India (P.) Ltd. (*supra*)

The Bangalore Tribunal here quoted Allegis case, in this manner:

"For claiming benefit under section 80G, deductions are considered at the stage of computing "Total Taxable income". Even if any payments under section 80G forms part of CSR payments (keeping in mind ineligible deduction expressly provided u/s. 80G), the same would already stand excluded while computing, income under the held "income from Business and Profession". The effect of such disallowance would lead to increase in Business income. Thereafter benefit accruing to assessee under Chapter VIA for computing "Total Taxable income" cannot be denied to assessee, subject to fulfilment of necessary conditions therein………… authorities below have erred in denying claim of assessee under section 80G of the Act……."
Hence, it held: "In our view, assessee cannot be denied the benefit of claim under Chapter VI A, which is considered for computing 'Total Taxable Income". If assessee is denied this benefit, merely because such payment forms part of CSR, would lead to double disallowance, which is not the intention of Legislature."

HOW COMPANIES CAN BENEFIT

Companies should give CSR funds to Institutions that qualify for 100% tax exemption under section 80G without qualifying limit. These include Prime Minister's National Relief Fund, National Defence Fund National Illness Assistance Fund National Children's Fund, National Fund for Control of Drug Abuse, Army Central Welfare Fund, Indian Naval Ben. Fund, Air Force Central Welfare Fund.

A company can also bestow CSR funds on institutions that qualify for 50% deductions.

MY VIEW

This benefit now creates an un-wanted distinction between activities in Schedule VII which qualify for Section 80G deduction and those which do not. Only those activities which fall in Schedule VII of Companies Act, 2013 and are eligible for CSR and also find mention under the eligibility criteria for Section 80G deduction will be entitled to a tax benefit. Hence, the activities which fall in Schedule VII of Companies Act, 2013 and are eligible for CSR but do not fall under Section 80G, will naturally not be preferred by Companies any longer. Is it fair, is this correct ?

Expenditure on eligible projects or schemes.

Section 35AC.

(1) Where an assessee incurs any expenditure by way of payment of any sum to a public sector company or a local authority or to an association or institution approved23 by the National Committee for carrying out any eligible project or scheme, the assessee shall, subject to the provisions of this section, be allowed a deduction of the amount of such expenditure incurred during the previous year :

(7) No deduction under this section shall be allowed in respect of any assessment year commencing on or after the 1st day of April, 2018.