

**IN THE INCOME TAX APPELLATE TRIBUNAL "H", BENCH
MUMBAI
BEFORE SHRI R.C.SHARMA, AM & SHRI C.N. PRASAD, JM**

**ITA No. 7429/Mum/2018
(Assessment Year: 2014-15)**

Kiran Aluminum India Pvt. Ltd., 229-A, Kewal Industrial Estate, Senapati Bapat Marg, Lower Parel (W), Mumbai-490013.	Vs.	A.C.I.T., Circle-4(2)(2), Aayakar Bhavan, New Marine Lines, Mumbai.
PAN/GIR No.AAACK 2073 L		
(Appellant)	..	(Respondent)

Assessee by	Shri Kiran Mehta (AR)
Revenue by	Shri K.C. Selvamani (DR)
Date of Hearing	18/12/2019
Date of Pronouncement	06/01/2020

आदेश / O R D E R

PER: R.C. SHARMA, A.M.

This is the appeal filed by the assessee against the order of the Id. CIT(A)-9, Mumbai dated 26/10/2018 for the A.Y. 2014-15 in the matter of order passed U/s 143(3) of the Income Tax Act, 1961 (in short, the Act).

2. The solitary grievance of the assessee relates to disallowance of deduction U/s 35(1)(ii) of the Act in respect of donation of Rs. 30.00 lacs made to Herbicare Health Care Bio Herbal Research Foundation (in short, HHC BHRF).

3. The brief facts of the case are that the A.O. observed that the assessee had given donation to Herbicare Health Care Bio Herbal

Research Centre of Rs. 30.00 lacs and claimed deduction U/s 35(1)(ii) of Rs. 52.50 lacs in the computation of income. A search and seizure action was conducted on the said entity and report received from Investigation Wing in Kolkata brought out the modus operandi of the Trust taking donations and returning the amount in cash. The A.O. observed that the Central Government had retrospectively withdrawn the approval for deduction u/s 35(1)(ii) granted to the institution vide notification No. 79.2016/F No. 203/135/ITA dated 06/09/2016. Accordingly, the A.O. disallowed Rs. 52.50 lacs u/s 35(1)(ii) of the Act. By the impugned order, the Id. CIT(A) confirmed the action of the A.O., against which the assessee is in further appeal before the ITAT.

4. At the outset, the Id AR of the assessee placed on record the order of the ITAT Kolkata Benches in the case of DCIT Vs. M/s Desmet Reagent Pvt. Ltd. in ITA No. 15/Kol/2017 dated 10/10/2018 wherein under similar facts and circumstances, the donation given to the very same institution i.e. HHCBHRF was allowed U/s 35(1)(ii) of the Act.

5. On the other hand, the Id DR has relied on the orders of the lower authorities.

6. We had gone through the order of the ITAT, Kolkata Benches dated 10/10/2018 wherein similar disallowance made in respect of donation given to HHCBHRF and claimed deduction U/s 35(1)(ii) of the

Act was allowed in favour of the assessee after having the following observation:

“4. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the assessee company has donated Rs.60 lakh to M/s. Herbicare Healthcare Bio-Herbal Research Foundation (M/s. HHBHRF) and claimed weighted deduction of 175% on the said donation which works out to Rs.1,05,00,000/-. We note that M/s. HHBHRF is an institution which enjoyed the approval u/s. 35(1) of the Act as evident from the notification dated 14.03.2008 which is found placed at page 1 of paper book and the renewal of recognition of Scientific & Industrial Research Organisation (SIRO) given vide letter dated 13.08.2012 by the Govt. of India, Ministry of Science & Technology from 01.04.2012 upto 31.03.2015 found placed at page 2 of paper book. The donation amount of Rs. 60 lakh has been transferred by the assessee through RTGS to M/s. HHBHRF's IDBI Bank account on 26.03.2013 which fact is discernible from page 3 of paper book and M/s. HHBHRF vide letter dated 26.03.2013 Receipt No. HHBHRF/26.03.13/010 has confirmed the receipt of the sum of Rs. 60 lakh donation from assessee. We note that at the time when the assessee donated the donation of Rs. 60 lakh M/s. HHBHRF had approved from Central Govt. for the purpose of clause (ii) of sub-section (1) of sec. 35 of the Act read with Rule 5C & 5B of Income-tax Rules, 1962 with effect from 01.04.2007. The claim of weighted deduction @ 175% has been declined by AO to the assessee on the ground that subsequently vide notification No. 82/2016 dated 15.09.2016 and notification no. 79/2016 dated 06.09.2016 the registration granted to M/s. HHBHRF has been cancelled by CBDT, which action of the AO cannot be countenanced and the Ld. CIT(A) rightly allowed the claim of the assessee. It is not in dispute that M/s. HHBHRF was enjoying the approval within the meaning of Sec. 35(1)(ii) of the Act as on the date of receipt of donation and retrospective cancellation of approval of the concerned institution, the deduction claimed in respect of donation cannot be denied. This view of ours has

been approved by the Hon'ble Bombay High Court in Seksaria Biswan Sugar Factory Ltd. and Another vs. Inspecting Assistant Commissioner and Others (1990) 184 ITR 123 and this view this Tribunal has been consistently taken when application of weighted deduction claimed against M/s. HHBHRF has come before us. Moreover, our view is fortified by the Explanation given u/s. 35(1)(ii) of the Act is reproduced under:

“Section 35(1)(ii) - Explanation. The deduction, to which the assessee is entitled in respect of any sum paid to a research association, university, college or other institution to which clause (ii) or clause (iii) applies, shall not be denied merely on the ground that, subsequent to the payment of such sum by the assessee, the approval granted to the association, university, college or other institution referred to in clause (ii) or clause (iii) has been withdrawn.”

So the explanation given in the statute itself dispels all doubts and the Ld. CIT(A) has rightly allowed the weighted deduction claimed by the assessee for the donation given to M/s. HHBHRF in the facts and circumstances above.

5. *Moreover, in similar case of M/s. Saimed Innovation ITA No. 2231/Kol/2016 (for AY 2013-14), the Coordinate bench of this Tribunal “D” Bench, wherein the author of this order has in detailed dealt with the merits of the disallowance of the weighted deduction claim u/s. 35(1)(ii) of the Act for similar donation given to M/s. HHBHRF(which is referred in that case as M/s. Herbicure)wherein the Tribunal has observed as under:*

“5. We have heard rival submissions and gone through facts and circumstances of the case. We note that the assessee is a partnership firm engaged in the business of medical equipments. Due to the recessionary trend in the business of medical equipment, the assessee thought it prudent to diversify its business and ventured into manufacturing and marketing of herbal product. The assessee realized that since in the business of buying herbal products substantially depended upon the continuous upgradation of the technology which can be done only by a tie up with an accredited research organization. When this thought process was going on, the

assessee was introduced to M/s. Herbicare by a friend who was a Cardiologist Dr. Chakraborty and then the partners of the assessee firm visited two units located at Pailan and Baral and after inspecting the institution and satisfying themselves after taking note of various certificate issued by Income Tax Authorities and Govt. of India (details we will discuss later) on a bona fide belief they donated the amount taking into consideration that they would enjoy tax benefit at a weighted rate of 175% of the donation.

6. *We note that M/s. Herbicare was registered u/s. 12AA of the Act which was granted by the Ld. DIT(E), Kolkata w.e.f. 26.12.2003 vide his Memo dated 03.02.2005 (Paper book page 22). M/s. Herbicare was also having registration u/s. 80G(5)(vi) of the Act which was granted by the Ld. DIT(E). M/s. Herbicare was also having a registration u/s. 6(1)(a) of the Foreign Contribution (Regulation) Act, 1976 which was granted to it on 26.02.2008 vide registration no.147120804. M/s. Herbicare was also recognized in the year 2006-07 as a Scientific Industrial Research Organisation (SIRO) by Ministry of Science & Technology, Govt. of India. M/s. Herbicare was also recognized vide gazette notification no. 35/2008 dated 14.03.2008 issued by CBDT, Ministry of Finance u/s. 35(1)(ii) of the Act (Paper book page 23). The Ld. AR drew our attention to letter dated 01.02.2013 by M/s. Herbicare which is evident from page 21 of the paper book wherein the said M/s. Herbicare has requested the assessee for donation u/s. 35(1)(ii) of the Act. A perusal of the letter shown that M/s. Herbicare has claimed itself to be a non profitable scientific research institute carrying out research, drug testing and other allied activities as per the objective of the Ministry of Science & Technology, Govt. of India seeking generous donation and has given its details like name, certificate of incorporation, 12A registration, gazette notification u/s. 35(1)(ii) of the Act, renewal of SIRO dated 31.03.2015 vide order dated 13.08.2012 in Memo No. 14/444/2006TUV by the Ministry of Science & Technology, Govt. of India. FCRA registration renewal of 80G which was renewed vide certificate of exemption u/s. 80G(5)(vi) of the Act vide No. DIT(E)/438/8E/155/04-05 dated 18.08.2009 and PAN No. has been stated. We also note that the M/s. Herbicare has stated its project in brief which is reproduced as under:*

“The vision of Herbicare Healthcare Bio-Herbal Research Foundation is to meet the scientific research needs in Life Science and to constantly strive for excellence and global leadership in the field of

new drug discovery from natural resources for the purpose of prevention and management of burden of diseases at affordable cost and also to provide later healthcare services, education and training on scientific research for the welfare of the society.”

7. *We also note that Smt. Sujata Ghosh Dastider has stated in her letter to AO dated 27.01.2016 that she is Director of M/s. Herbicure and that she was ex-Emeritus Professor of Jadavpur University in Microbiology and now looks after the research work in M/s. Herbicure and that based on her contribution towards scientific research on microbiology for decades, she has been selected as the President of International Society of Non-Antibiotics (ISN) based in Denmark.*
8. *We note from the perusal of paper book pages 24 and 25 which is the letter dated 15.03.2013 and 26.03.2013 which are the letters by the assessee to M/s. Herbicure wherein description of payment of a sum of Rs.7,51,000/- by RTGS dated 15.03.2013 on Bank of Baroda to M/s. Herbicure Account No. 0060102000117470 with IDBI Bank, Brabourne Road Branch, Kolkata. Similarly, a payment was made on 26.03.2013 by RTGS dated 23.06.2013. At page 26 and 27 of the paper book, we note that the receipt of the said amounts has been placed on record. At page 28 of the paper book shows the Bank of Baroda statement wherein we note that on 15.03.2013 by RTGS to M/s. Herbicure Health an amount of Rs.7,51,000/- as well as on 26.03.2013 by RTGS of Rs.7,51,000/- was sent to M/s. Herbicure Health. We note that answer given by the founder director of M/s. Herbicure to ADIT, Investigation to question no. 22 and question no. 23 was the basis of disallowance of the claim made by the assessee which is reproduced below:*
 - “Q. 22. *Let me remind you that as one of the Directors of Herbicure Healthcare Bio-Herbal Research Foundation you are duty bound to keep complete information regarding transactions being made by the said entity and the genuineness of persons/entities with whom the said transactions are being made. Your attention is further been drawn to the computer extracts taken out of the tally which was found in your e-mail. These pages are related to the bank book of Herbicure Healthcare Bio-Herbal Research Foundation wherein it is clearly reflected that the amount of Rs.25 lakh (in two trenches) received from OCL India Ltd on 15.07.2011, Rs.25 lakh received from OCL India Ltd. on 11.08.2011 & 17.08.2011 are immediately being*

transferred to A.S. Enterprises which is a paper company on the same dates. Similar trend is visible in the case of Donations received from other parties where just immediately after the receipt of donation amount the same is being transferred to the account of any paper company.

In view of the same you are once again being given an opportunity to speak the truth and explain the transaction reflected from your bank book as above.

Ans. Sir, I wish to state that our concern Herbicare Health are Bio-Herbal Research Foundation was incorporated in the year 2003 u/s 25 of the Companies Act, 1956 which was recognized in 2006-07 as a scientific and industrial research organization (SIRO) by the Ministry of Science & Technology, Govt. of India and subsequently we became a Gazette notified company u/s 35(1)(ii) of the I. T. Act, 1961 in March, 2008. Despite of our sincere, honest and best intention we failed to procure any genuine donations till 2010-11. The situation was becoming bad to worse due to non-availability of funds for not agreeing to the prevalent practice in the donation market. The situation became so critical for us to survive and carry on our mission to do the work for the larger interest of the ailing population we had no other alternative but to become the victim of the circumstances against our will and principle.

Subsequently, I was approached by one Mr Kishan Bhawasingka with the proposal to adopt the prevalent practice of scientific and research organization of giving accommodation entries on commission to different beneficiaries in the garb of donation receipts to be finally given back to them in the form of cash or cheque. Since we were facing severe financial crisis and the genuine donations were not coming to us we were compelled to accept the proposal.

Q.23. Please explain in detail the modus operandi of giving the accommodation entries by way of accepting donations to different beneficiaries. Also state who is the/are the broker/brokers (while giving his mobile no. and address) through which you have given accommodation entries in the form of bogus donations on commission?

Please also state what are the commission charged by you and broker concerned for providing accommodation entries to different beneficiaries.

Ans. The entire accommodation entries of bogus donations are facilitated by Mr. Kishan Bhawasingka having his mobile nos. 9830087866 & 9883051515 who lives somewhere in Bhawanipore near Netaji Subhas Metro Station. The modus is like this. The information is given to us by Mr Kishan Bhawasingka as to bogus donation entry is needed by a particular party. Sometimes we come to know about the accommodation entry being given to a party when we directly receive communication from the concerned bank that the amount has been credited. Thus, the accommodation entry is completely controlled and managed by Mr. Kishan Bhawasingka. The bogus donations are received vide cheque/RTGS into any of the bank accounts mentioned by m in response to question no.7 of this statement. After this payment is made to any of the paper / bogus companies on account of bogus purchase/expenses on the advice of Mr Kishan Bhawasingka. The remaining transaction is also managed on paper by him only which happens in the form of routing of the donation amount through his bogus/paper companies in 2 to 3 layer. Finally, cheque of the donation amount (after deducting the cut of commission charged by us and broker Mr Kishan Bhawasingka) is given back to the original beneficiary who gave donation to us. Sometimes, the amount is withdrawn at 3rd or 4th level and cash is given back to the original beneficiary (after deducting the cut of commission charged by us and broker Mr Kishan Bhawasingka) who gave donation to us.

In this entire process of providing entry in the form of bogus Donation to different beneficiary Companies/ Individuals a commission of 5 % approx is charged by us which is the actual donation we receive front that particular donor in reality. The commission of almost 5 to 8 % is charged by Mr. Kishan Bhawasingka for facilitating the said accommodation entry.

Subsequently, a sanction letter is received from the donor reflecting the amount of donation and mode of payment. The particulars are then verified with the amount credited in our bank accounts after which an exemption u/s. 35(1)(ii) of the I. T. At, 1961 which qualifies him/her to claim 'one and three fourth' of the said donation as tax exempt u/s. 35(1)(ii) of the I. T. Act, 1961."

9. *We note that the sole basis for making the addition is on the basis of the statement recorded on oath during survey at M/s. Herbicure of Shri Swapan Ranjan Dasgupta, other than the said statement there*

is no other evidence to show that the assessee has received back the donation as suggested in his general statement about providing accommodation entry by Shri Swapan Ranjan Dasgupta. We also note that the said Shri Swapan Ranjan Dasgupta has not stated anywhere that the assessee indulged in bogus donation or that the amount donated to it (M/s. Herbicare) was given back to the assessee after deducting the commission. We note that the statement recorded on oath during survey cannot be the sole basis for making the disallowance as decided by the Hon'ble Supreme Court in CIT Vs. S. Kader Khan Son (2013) 352 ITR 480 (SC). In any case, if the AO was of the opinion that the statement of Shri Swapan Ranjan Dasgupta, the founder Director of M/s. Herbicare has adversely affected the veracity of the donation made by the assessee then he was duty bound to summon Shri Swapan Ranjan Dasgupta and allowed the assessee to have cross examined him, failing which the statement of Shri Swapan Ranjan Dasgupta could not be used against the assessee trust as held by the Hon'ble Supreme Court in Andaman Timbers Ltd. Vs. Commissioner of Central Excise 62 Taxman 3. We note that the AO had in fact, recorded the fact that the partners of the assessee firm desired to cross examine the founder Director of M/s. Herbicare Shri Swapan Ranjan Dasgupta regarding the purported deposition made at the time of survey. However, AO did not grant him that opportunity to cross examine Shri Swapan Ranjan Dasgupta. We also note that the AO issued notice u/s. 131 of the Act to the partners of the assessee firm and has recorded their statement on oath on 28.12.2015. We note for question no. 14 as to how the partner knew about M/s. Herbicare, the partner of the assessee firm has answered that Dr. Bhuvan Chakraborty, a Cardiologist friend introduced them to M/s. Herbicare and to question no. 15 as whether the partners have visited the office of M/s. Herbicare to which the partners answered that they had visited the premises of M/s. Herbicare on two occasions and for question no. 16 as to whether the partners were satisfied with the work of scientific research carried on by the said M/s. Herbicare, the partners of the assessee firm had replied that during their visit at Pailan and Baral they were satisfied with the scientific research work and for question no. 17 the partners replied that they had seen the certificate issued by Govt. of India and also have gone through the research paper of the people working there. For question no. 20 they have given the name of the doctor who was a Cardiologist who introduced them to M/s. Herbicare. We note that

the AO enquired about Dr. Bhuban Chakraborty's address for which the partner replied that the doctor resides at Kshudiram Sarani, Rathtala, Kolkata. For question no. 21 as to whether they knew about the Directorate of Investigation, Kolkata carried out survey u/s. 133A and that its investigation is found that the activities were not genuine, the partners replied that they were not aware of the survey, however, they added that after their visit of the two centers they were on a bonafide belief that M/s. Herbicare was a competent institute and based on the recommendation of the Cardiologist Dr. Bhuban Chakraborty they made donation to the said concern. We also note that the AO issued summons to Shri Swapan Ranjan Dasgupta who did not appear for cross examination due to ill health but the said Shri Dasgupta confirmed the donations made by the assessee firm to M/s. Herbicare in writing to the AO and clearly stated that no money was refunded back to assessee firm, which fact has been reproduced by the AO at page 7 of his order as under:

"Shri Swapan Ranjan Dasgupta, Director of M/s Herbicare Healthcare Bio-Herbal Research Foundation had filed a letter on 28/01/2016 stating "Referring to the above and your comments on my reply dated 22.01.2016, I would further request your good office to elaborate the financial years in question to enable our Accounts Deptt for verification and submission.

However, we apparently observe from our records that following donations were received by us from M/s. Saimed Innovation, the assessee in the financial years mentioned against each:

<i>F.Ys</i>	<i>Amount</i>	<i>Mode of transaction</i>	<i>Date</i>	<i>Receipt No.</i>
<i>2012-13</i>	<i>7,51,000/-</i>	<i>RTGS:UTR No. BARBH13074606758</i>	<i>15.03.2013</i>	<i>HHBHRF/15-03-13/004</i>
<i>2012-13</i>	<i>7,51,000/</i>	<i>RTGS:UTR No BARBH 13085899500</i>	<i>26.03.2013</i>	<i>HHBHRF/26-03-13/004</i>

Further, it is submitted for your kind record that no money was refunded to the above named assessee against donations given by them.

Meantime, I may submit that I am critically indisposed due to acute lumber scoliosis and am not able to move. I am under strict medical supervision. As such, my personal appearance may kindly be waived on compassionate ground. I am attaching the current medical prescription/advice along with MRI reports for your kind record.

However, the information as submitted above may please recorded as my witness.”

10. *Thus we note from the entire facts and circumstances, that the AO got swayed away with the statement recorded on oath of Mr. Swapan Ranjan Dasgupta during survey conducted at the premises of M/s. Herbicare. We have reproduced Question no. 22 and 23 and answers given by Shri Swapan Ranjan Dasgupta, wherein he admits to provide accommodation entries in lieu of cash. This information we should say can be the tool to start an investigation when the assessee made the claim for weighted deduction. The general statement of Shri Swapan Ranjan Dasgupta against donation made the claim of assessee for deduction suspicious. However, when the AO investigated, Shri Swapan Ranjan Dasgupta has confirmed that M/s. Herbicare was in receipt of the donation and it has not given any refund in cash, then the sole basis of disallowance of claim as a matter of fact disappeared. It should be remembered suspicion howsoever strong cannot take the place of evidence. The confirmation from Shri Swapan Ranjan Dasgupta fortifies the claim of the assessee for weighted deduction u/s. 35(1)(ii) of the Act. The sole basis of the addition/disallowance based on statement recorded on oath during survey cannot be allowed as held by Hon'ble Supreme Court in Kader Khan & sons (supra). Moreover, we note that if the AO was hell bent determined to disallow the claim of the assessee, then he should have granted an opportunity to cross examine Shri Swapan Ranjan Das Gupta and Shri Kishan Bhawasingka as held by Hon'ble Supreme Court in Andaman Timber (supra).*
11. *In the light of the aforesaid facts and circumstances, we cannot sustain the order of the authorities below. Therefore, we set aside the impugned order and direct the AO to allow the deduction of Rs.26,28,500/- u/s. 35(1)(ii) of the Act.”*

In view of the aforesaid discussion and the statutory provisions and the decision in similar case as cited above, we find no infirmity in the order of Ld. CIT(A) and the same is hereby upheld.”

7. We have carefully gone through the orders of the authorities below as well as order of the ITAT, Kolkata Benches dated 10/10/2018 in the case of DCIT Vs M/s Desmet Reagent Pvt. Ltd. (supra) and found

that the assessee has given donation of Rs. 30,00,000/- to Herbicare Healthcare Bio-Herbal Research Center and claimed deduction u/s 35(1)(ii) of Rs. 52,50,000/- in the computation of income. The assessee was informed that a search action had been undertaken in case of the said entity and report received from the investigation wing in Kolkata clearly brought out the modus operandi of the Trust taking donations and returning the amount in cash. A copy of the statement of the Trustee Mr. Swapan Ranjan Dasgupta, recorded during the course of the search action was provided to the AR. Further it was also pointed out that the Central Government had retrospectively withdrawn the approval for deduction U/s 35(1)(ii) of the Act granted to the institution vide notification No. 79/2016/F.No.203/135/ITA dated 6th September, 2016.

8. It was contended by the Id AR before the A.O. that the claim was valid when the amount was donated and hence the assessee is fully entitled to claim the deduction u/s 35(1)(ii) of the Act. However, the A.O. did not agree with the assessee's contention and declined the claim of deduction u/s 35(1)(ii) of the Act. By the impugned order, the Id. CIT(A) confirmed the action of the A.O. We found that the facts and circumstances during the year under consideration are pari material to the facts discussed by the ITAT Kolkata Benches in the case of DCIT Vs M/s Desmet Reagent Pvt. Ltd. (supra). Therefore, respectfully following the order of ITAT, Kolkata Benches dated 10/10/2018 in the case of

DCIT Vs M/s Desmet Reagent Pvt. Ltd. (supra), we do not find any merit in the disallowance of claim of deduction U/s 35(1)(ii) of the Act.

8. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 06th January, 2020.

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 06/01/2020

*Ranjan

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai