

IN THE INCOME TAX APPELLATE TRIBUNAL "G"
BENCH, MUMBAI
BEFORE SHRI RAJESH KUMAR, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.5385/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2013-14)

ACIT -25(2) R. No.508, C-10, 5 th Floor, Pratyaksha Kar Bhavan, Bandra Kurla Complex, Bandra (E), Mumbai- 400051.	<u>बनाम/</u> Vs.	Shirish Lakhamshi Keniya (HUF) 4, Kalpana, Vile Parle (E), Mumbai-400057.
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CO. No.188/Mum/2019
(Arising out of ITA. No. 5385/Mum/2018)
(निर्धारण वर्ष / Assessment Year: 2013-14)

Shirish Lakhamshi Keniya (HUF) 4, Kalpana, Vile Parle (E), Mumbai-400057.	<u>बनाम/</u> Vs.	ACIT-25(2) R. No.508, C-10, 5 th Floor, Pratyaksha Kar Bhavan, Bandra Kurla Complex, Bandra (E), Mumbai- 400051.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAAHK3064N		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Revenue by:	Shri S. Michael Jerald (DR)	
Assessee by:	Shri B. V. Jhaveri (AR) & A. Gopalkrishanan	

सुनवाई की तारीख / Date of Hearing: 27/11/2019
घोषणा की तारीख /Date of Pronouncement: 29/01/2020



आदेश / ORDER

PER AMARJIT SINGH, JM:

The Revenue as well as assessee have filed the above mentioned appeal as well as cross-objection against the order dated 20.07.2018 passed by the Commissioner of Income Tax (Appeals)-37, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2013-14.

ITA. NO.5385/M/2018

2. The revenue has filed the present appeal against the order dated 20.07.2018 passed by the Commissioner of Income Tax (Appeals)-37 Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2013-14

3. The revenue has raised the following grounds: -

"1. "On the facts and in the circumstances of the case and in w, the Ld. CIT(A) has erred in deleting the addition made by the AO to the tune of Rs.93,00,000/- on account of bogus donation made by the assessee and allowing the deduction claimed to the tune of Rs.1,62,75,000/- u/s 35(1)(ii) of the I.T. Act, 1961."

2. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that the AO has solely relied upon the report of Investigation Wing and has not carried out any worthwhile independent inquiry in this matter as it is evident form the record that post survey investigation was also carried out. Notices were also issued u/s 131 of the IT Act to various brokers. During post survey proceedings, statement of brokers who are providing the accommodation entries were recorded and they accepted during the statement that they had arranged accommodation entries in the form of bogus billing for School of Human Genetics & Population Health(SHG&PH), Herbicure Healthcare Bio-Herbal Research Foundation (HHBRF) and Matrivani Institute of Experimental Research & Education(MIERE) in lieu of commission."

3. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that addition has been done without any



investigation as enough evidence is placed on record to prove that the assessee was suppressing his income."

4. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the fact that the nature of donation was not proven to be genuine by the assessee and only because the transaction has been made through proper banking channel does not prove the genuinity of the transaction."

5. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the fact that the assessee neither submitted any evidence nor been able to produce the parties with respect to which donation has been made, in the office of the AO, thus it cannot be established that such donation is genuine."

6. "The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored."

7. "The appellant craves leave to amend or to alter any ground or add a new ground, which may be necessary".

4. The brief facts of the case are that the assessee filed its return of income on 29.09.2013 declaring total income to the tune of Rs.1,15,25,970/- for the A.Y.2013-14. Thereafter, the return was processed u/s 143(1) of the Act. The case was selected for scrutiny under CASS. Notices u/s 143(2) & 142(1) of the Act were issued and served upon the assessee. The assessee is an individual and during the year under consideration, the assessee derived income from business or profession as well as income from other sources. On verification, it was found that the assessee has debited an amount of Rs.1,44,00,000/- to the Profit & Loss Account admissible u/s 35 of the Act and claimed deduction of Rs.2,52,00,000/-. The assessee claimed deduction u/s 35 of the Act amounting to Rs.1,44,00,000/-. The assessee was asked to verify their claim and to produce the donation receipts. The assessee submitted the copy of receipts for Rs.41,00,000/- from School of Human Genetics, Rs.51,00,000/- to Shri Arvindo Institute of Applied Scientific Research Trust,



Rs.31,00,000/- from Herbicare Healthcare Bio-Herbal Research Foundation and Rs.21,00,000/- Matrivani Institute of Experimental Research and Education. Thereafter, an information was received from the DDIT(Inv.) Unit-4(1), Kolkata addressed to the ACIT-25(2), Mumbai dated 27.01.2016 in which it was conveyed that the survey action was carried out by the Kolkata Directorate on Institutions in the matter of facilitating bogus donation u/s 35(1)(ii) of the Income Tax Act, 1961. School of Human Genetics & Population Health, (SHG & PH), Herbicare Healthcare Bio-Herbal Research & Education (MIERE) were listed as the institution engaged in the bogus donation u/s 35(1)(ii) of the Act through various brokers in lieu of commission. The assessee was one of the beneficiary who had given donation of Rs.93,00,000/- to the institution engaged in the bogus donation u/s 35(1)(ii) of the Act through various brokers in lieu of commission and claimed deduction u/s 35 of the I. T. Act, 1961 to the tune of Rs.1,62,75,000/- and claimed of bogus donation in connection with the HHBRF to the tune of Rs.54,25,000/- and claimed of the bogus donation to MIER & E to the tune of Rs.36,75,000/- was disallowed and added to the income of the assessee. The total income of the assessee was assessed to the tune of Rs.2,78,05,289/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who allowed the claim of the assessee, therefore, the revenues has filed the present appeal before us.

ISSUE NOS. 1 to 6:-

5. All the issues are in connection with the allowance of the claim of the assessee by CIT(A) u/s 35(1)(ii) of the I. T. Act, 1961. The assessee has given the donation in sum of Rs.41,00,000/- to Human Genetics to Shri



Arvindo Institute of Applied Scientific Research Trust, Rs.31,00,000/- to Herbicare Healthcare Bio-Herbal Research Foundation and Rs.21,00,000/- to Matrivani Institute of Experimental Research and Education. The assessee's claim of deduction was to the tune of Rs.1,62,75,000/- u/s 35(1)(ii) of the Act. The claim of the assessee was allowed by CIT(A). Before going further, we deem it necessary to advert the finding of the CIT(A) on record.: -

“6.3 I have carefully gone through the additional evidence filed by the appellant, remand report and also the appellant's comments on remand report. In the remand report, the AO has objected to the admission of additional evidence. In the decision rendered in the case of Smt. Prabhavati S. Shah vs. CIT reported at 231 ITR 1, the Hon'ble Bombay High Court, categorically pointed out that with the object of ensuring that evidence is primarily led before the Assessing Officer, Rule 46A(1) puts fetters on the right of the appellant to produce before the Commissioner of Income-tax (Appeals) any additional evidence, not previously raised before the Assessing Officer. However, the Court has clarified that putting fetters on the right of appellant in the matter of producing additional evidence before the Commissioner of Income-tax (Appeals), clarified the Court, does not mean affecting in anyway the powers of the first appellate authority conferred by sub-rule (4) and section 250 of the Act. The relevant part of the said order is as under:

"3.On a plain reading of rule 46A, it is clear that this rule is intended to put fetters on the right of the appellant to produce before the MC any evidence, whether oral or documentary, other than the evidence produced by him during the course of the proceedings before the IT() except in the circumstances set out therein. It does not deal with the powers of the MC to make further enquiry or to direct the ITO to make further enquiry and to report the result of the same to him. This position has been made clear by sub-rule (4) which specifically provides that the restrictions placed on the production of additional evidence by the appellant would not affect the powers of the AAC to call for the production of any document or the examination of any witness to enable him to dispose of the appeal Under sub-section (4,) of section 250, the AAC is empowered to make such further inquiry as he thinks fit or to direct the ITO to make further inquiry and to report the result of the same to him. Sub-section (5) of section 250 empowers the AAC to allow the appellant, at the hearing of the appeal, to go into any ground of appeal not specified in grounds of appeal on his being satisfied that the



omission of the ground from the form of appeal was not wilful It is clear from the above provisions that the powers of the AAC are much wider than the powers of an ordinary court of appeal The scope of his powers is coterminous with that of the ITO. He can do what the ITO can do. He can also direct the IT() to do what he failed to do. The power conferred on the MC under sub-section (4) of section 250 being quasi-judicial power, it is incumbent on him to exercise the same if the facts and circumstances justify. If the MC fails to exercise his discretion judicially and arbitrarily refuses to make enquiry in a case where the facts and circumstances so demand, his action would be open for correction by a higher authority.

4. On a conjoint reading of section 250 and rule 46A, it is clear that the restrictions placed on the appellant to produce evidence do not affect the powers of the MC under sub-section (4) of section 250. The purpose of rule 46A appears to be to ensure that evidence is primarily led before the ITO.

5. We are supported in our above conclusion by the decision of the Orissa High Court in B. L. Choudhury v. CIT 17976] 105 ITR 371 in which it was held:

"Wide provision has, thus, been made conferring jurisdiction on the first appellate authority to make such inquiry as he deems fit The provision seems to have been based on the fact that before the Appellate Assistant Commissioner there is generally no opposite party. The appellate authority himself is the departmental authority representing the revenue. Therefore, he has been invested with the power of making further inquiry. He does not exceed his jurisdiction if he asks or allows the assessee to produce or file additional papers or additional evidence in the matter he thinks fit. It was further held that—

In fact, receiving new material by the Appellate Assistant Commissioner cannot be equated with receipt of additional evidence as contemplated in Order 41, rule 27 of the Code of Civil Procedure or even at the stage of second appeal by the Tribunal. ." (P. 376)-

Thus, a conjoint reading of section 250(4) and, (5) of the Act and rule 46A(1) and (4) of the Rules clarifies that only restriction is imposed on the appellant's right to produce additional evidence before the Commissioner of Income-tax (Appeals).

6.4 In the decision rendered in the case of K. Ravindranathan Nair reported at 184 CTR (Ker) 46, the Kerala High Court took cognizance of the decision in the case of Prabhavati S. Shah and further specified that "if the provisions of r. 46A sub-rule (1) thereof is held to be mandatory that will go against the provisions of section 250 of the Act conferring power on the first appellate authority to enquire into the matter and pass



appropriate orders. In other words, rule 46A without sub-rule (4) will be open to challenge as ultra vires section 250 of the Act". The Kerala High Court, in the instant case, accordingly held that in spite of the restrictive provisions of rule 46A(1), section 250 of the Act read with sub-rule (4) of rule 46A enable the Commissioner of Income-tax (Appeals) to accept additional evidence in appropriate cases. The Court, therefore, upheld the impugned order of the Tribunal whereby the Assessing Officer was directed to consider the evidence produced by the appellant before the first appellate authority to prove the genuineness of the credits.

6.5 Therefore, a bare reading of the exposition of law relating to the power of the Commissioner of Income-tax (Appeals) to admit additional evidence as made by the Bombay High Court and relied on by the Kerala High Court (discussed above) clearly indicates that even if the repeated opportunities were given to the appellant to produce evidence and even if the appellant does not suo-motu produce any additional evidence, in the spirit of justice and fair-play, it is incumbent on the first appellate authority, being a quasi-judicial authority, to require the appellant to produce requisite evidence or to make necessary inquiry and admit any such fresh and additional evidence, by virtue of section 250(4) and (5) read with sub-rule(4) of rule 46A.

6.6 In the present case, the details submitted by the appellant are crucial to the grounds raised in appeal. The impugned order and remand reports do not contain any details to controvert the assertion of the appellant nor do they bring on record anything to establish that the appellant willfully abstained from attending during the scrutiny proceedings. As noted before, the evidence produced by the appellant is relevant to the grounds in appeal. Therefore, after considering the principles laid down by the jurisdictional High Court in the case of Smt. Prabhavati S. Shah (cited supra) the additional evidence submitted by the appellant is admitted and taken on record.

6.7 During the year under consideration the appellant had given donations to the following three scientific research institutions and claimed deduction U/s. 35(1)(ii) as under: -

<i>Name of the Institution</i>	<i>Donation Amount</i>	<i>Deduction Claimed w/s 35(1)(ii)</i>
<i>School of Human Genetics & Population Health</i>	<i>41,00,000/-</i>	<i>71,75,000/-</i>
<i>Herbicare Healthcare Bio-Herbal Research Foundation</i>	<i>31,00,000/-</i>	<i>54,25,000/-</i>



<i>Matrivani Institute of Experimental Research & Education</i>	21,00,000/-	36,75,000/-
<i>Total</i>	93,00,000/-	1,62,75,000/-

6.8 The AO received an information from DDIT(Inv), Kolkata that appellant has taken bogus donations from above mentioned parties. Further, the A.O. observed that during the recordings of the statement u/s.131 of I.T. Act of the treasurer of the School of Human Genetics & Population Health (SHG & PH) stated that the source of the institution is mainly out of donation received through cheques or RIGS and simultaneously they are returning back the amounts to the donors by bogus billing after deducting commission of 7 to 8%. Further trustees admitted that they are operating through brokers who are mediating the donation between SHG & PH and the donors and also making arrangements for bogus billing and returning back the money to the donors. The survey team also observed that the Institute has violated Rule 5C, 5D and 5E of Income Tax Rules to be followed as an institution approved U/s. 35(1)(ii) of the Act. The institute filed an application U/s. 245C before the settlement commission and disclosed in the settlement application the additional income by way of service charges earned by the applicant by providing accommodation entries for 'donations' received and refunding amounts. The Hon'ble Settlement Commission, Kolkata has passed order u/s 245D(1) of the Income-tax Act, 1961 dated 25.03.2015. Further observed during the course of survey U/s. 133A of the Act, the Directors of the Herbicure Healthcare Bio-Herbal Research Foundation in the statements recorded U/s. 131 of the Act, had stated before the investigation team of the department that owing to severe financial crisis, genuine donations were not coming to them and they were compelled to accept the proposal to adopt the prevalent practice of scientific and research organizations giving accommodation entries on commission basis to different beneficiaries in the garb of donation receipts. The survey team also observed that the Institute has violated Rule SC, 5D and 5E of Income Tax Rules to be followed by an institution approved U/s. 35(1)(H) of the Act. Further, during the course of survey U/s. 133A, in the statements were recorded U/s. 131 of the Act, the authorized persons of the Matrivani Institute of Experimental Research & Education had stated before the investigation team of the department that MIER & E has earned service charges by providing accommodation entries for 'donations' received and refunding amounts after deducting such service charges. The survey team also observed that the Institute has violated Rule 5C, 5D and 5E of Income Tax Rules to be followed as an institution approved U/s. 35(1)(ii) of the Act.

6.9 The appellant had given donation of Rs.41,00,000/- to the School of Human Genetics & Population Health (SHG & PH) and claimed



donation of Rs.71,75,000/- u/s.35(1)(ii) of I.T. Act. During the appellate proceedings, appellant has stated that the School of Human Genetics & Population Health (SHG & PH) is registered as/an institution whose income does not form part of the total income U/s 12AA and also is an approved institution U/s. 35(1)(ii) of the Act as a scientific research organization for the purpose of deduction on account of expenditure on scientific research. The renewed by Ministry of Science & Technology vide their letter dated 17.06.2010 The assessing officer during the course of assessment proceedings had issued a show cause to the appellant. The appellant has submitted copy of Donation receipts issued by SHG & PH, certificate issued by the Registrar of Firms, Societies and non-trading corporation west Bengal certifying that SHG & PH is registered under the West Bengal Societies Act 1961 and extract from "The Gazette of India" wherein it was notified for general information that SHG&PH has been approved by the Government of India for the purpose of Clause (ii) of Sub Section (1) of Section 35 of the Income Tax Act read with Rules 5C and SE of the Income Tax Rules 1962 during the assessment proceeding. Further, appellant has submitted registration certificate U/s. 12A of the Act issued by Director of Income Tax (Exemptions) Kolkata dated 27.10.2004, renewal of approval U/s. 80G(5)(vi) by the ITO(Exem) Kolkata dated 08.02.2012 and letter from the Secretary, the School of Human Genetics and Population Health, West Bengal as regards renewal of recognition of Scientific and Industrial Research Organizations (SIRos).

6.10 The appellant had also given donation of Rs. 31,00,000/- to the Herbicare Healthcare Bio-Herbal Research Foundation and claimed deduction U/s. 35 of the Income Tax Act to the tune of Rs. 54,25,000/-. Appellant has stated that Herbicare Healthcare Bio-Herbal Research Foundation is recognized in 2006-2007 as a scientific and Industrial Research organization (SIRO) by the Department of Scientific and Industrial Research (DSIR), Ministry of Science and Technology, Government of India. The said institute was registered as an institution whose income does not form part of the total income U/s 12AA and also was an approved institution U/s. 35(1)(H) of the Act as a scientific research organization for the purpose of deduction on account of expenditure on scientific research. The assessing officer during the course of assessment proceedings had issued a show cause to the appellant The appellant has submitted Donation receipts issued by the said institute, Certificate of registration issued by Registrar of Companies, West Bengal, Extract from "The Gazette of India" wherein it was notified for general information that HHBRF has been approved by the Government of India for the purpose of Clause (H) of Sub Section (1) of Section 35 of the Income Tax Act read with Rules 5C and 5E of the Income Tax Rules 1962, Letter from the Secretary, the School of Human Genetics and Population Health, West Bengal as regards renewal of



recognition of Scientific and Industrial Research Organizations (SIROs) and Registration certificate U/s. 12A of the Act issue by Directorate of Income Tax (Exemptions) Kolkatta dated 03.02.2005.

6.11 Further, the appellant had given donation of Rs.21,00,000/- to the Matrivani Institute of Experimental Research & Education and claimed deduction U/s. 35 of the Income Tax Act to the tune of Rs.36,75,000/-. The appellant further stated that Matrivani Institute of Experimental Research & Education is also registered as an institution whose income does not form part of the total income U/s 12AA and also is an approved institution U/s. 35(1)(ii) of the Act as a scientific research organization for the purpose of deduction on account of expenditure on scientific research. The A.O. during the course of assessment proceedings had issued a show cause to the appellant. The appellant has submitted donation receipts issued by the said institute, Certificate of registration issued by Registrar of Companies, West Bengal, Extract from "The Gazette of India" wherein it was notified for general information that HHBRF has been approved by the Government of India for the purpose of Clause (ii) of Sub Section (1) of Section 35 of the Income Tax Act read with Rules 5C and SE of the Income Tax Rules 1962, letter from the Secretary, the School of Human Genetics and Population Health, West Bengal as regards renewal of recognition of Scientific and Industrial Research Organizations (SIROs), registration certificate U/s. 12A of the Act issued by Director of Income Tax (Exemptions) Kolkata dated 7.3.89, renewal of approval U/s. 80G(5)(vi) by the DIT(Exem) Kolkata dated 12.07.2007 and Registration under Foreign Contribution (Regulation) Act 1976 issued by Ministry of Home Affairs, Government of India dated 27.12.2004.

6.12 The appellant further submitted comments on remand report that the A.O. has reproduced the relevant extracts from the statement recorded U/s. 131 in the case of Shri Paras Mal Daga. The same extracts has been given to the appellant during the course of assessment proceedings along with the show cause notice. The same has been considered by the assessing officer during the course of assessment proceedings. The appellant has submitted detailed reply after considering the aforesaid extracts of the statement during the course of remand report. Further stated that the appellant has given the donations in good faith and on the basis of the validity of the recognition and approvals U/s. 35(1)(U) of the Income Tax Act 1961. Further, appellant has stated that the donation receipts issued by School of Human Genetics and Population Health and Herbicure Healthcare Bio - Herbal Research Foundation have been submitted during the course of assessment proceeding vide submission dated 12.10.2015 and it was duly acknowledged by the assessing officer in Paragraph 5, Page No. 2 of the assessment order itself. The A.O. has thereafter made an allegation that this was an exercise to re-route the money into the books of accounts. No



specific instances of re-routing have been pointed out by the assessing officer either at the time of assessment proceedings or in the remand report. The provisions of section 35(1)(H) of the Act, which reads as follows: -

"35. (1) in respect of expenditure on scientific research. the following deductions shall be allowed—

(ii) an amount equal to one and three fourth times of any sum paid to a research association which has as its object the undertaking of scientific research or to a university, college or other institution to be used for scientific research:

Provide that such association, university, college or other institution for the purposes of this clause-

(A) is for the time being approved, in accordance with the guidelines, in the manner and subject to such conditions as may be prescribed; and

(b) such association, university, college or other institution is specified as such, by notification in the official Gazette, by the Central Government....."

6.13 On perusal of section 35(1)(ii) of the Act, it can be observed that following conditions need to be fulfilled for claiming deduction of 175% of the donation amount.

a) Amount should be paid to a research association, university, college or other institution

b) Object of such research association should be of undertaking of scientific research

C) Other such association, university, college or other institutions are also included where for the time being they are approved in accordance with the guidelines, in the manner and subject to such conditions as may be prescribed.

d) Such association, university, college or other institution is specified as such, by notification in the Official Gazette, by the Central Government.

6.14 After perusal of submissions of appellant, it is found that the conditions prescribed u/s. 35(1)(ii) have been complied with by the appellant in respect of donations to all the above mentioned institutes. The only issue that arises out of the assessment order in this case is as to whether the appellant should have been granted deduction under section 35 of the I.T. Act on the basis of the certificate granted by the Institutions. In support of the same, the appellant has filed necessary



documents filed before the assessing officer during the course of assessment proceedings. The list of documents submitted clearly establish the fact that activities carried out by the institutes to which donations were given by the appellant is in accordance with the provisions of section 35(1)(ii) of the Act, i.e. scientific research. Hence it is evident that the appellant after obtaining all the relevant certificates/documents/verification has given the donation and subsequently claimed deduction u/s. 35(1)(ii) of the Act. The appellant is rely upon the certificate granted by the prescribed authority under section 35(1)(ii) to the institution.

6.15 The Hon'ble Mumbai High Court has discussed similar issue in the case of National Leather Cloth Manufacturing Co reported in 110 Taxman 511 (Bombay). While adjudicating the writ petition on the issue of re-opening of the assessment. The honorable Jurisdictional High Court had clearly held as under: -

The only question that arises for consideration is whether the assessee who donated a sum of Rs.2.00.000 to the scientific research association on the basis of the approval granted by the prescribed authority to it for the purposes of clause (ii) of sub-section (1) of section 35 of file Act by notification in the Official Gazette at the material time can be adversely affected the withdrawal of the approval subsequently with retrospective effect by the prescribed entitled to rely upon the certificate granted by the prescribed authority. We have already decided an identical controversy in the context of deduction under section 35CCA of the Act to the institution or association to which it had donated any sum of money for claiming deduction under that section if it was subsisting and valid at the time the donation was made. The retrospective withdrawal and/or cancellation of the certificate will have no effect upon the assessee who has acted upon it when it was valid and operative.

6.16 Further the Honorable Mumbai High Court while delivering the above decision had followed its own decision in the case of Ramdas Maneklal Gandhi reported in [2000] 108 Taxman 590 (Bombay). In the case of Ramdas Maneklal Gandhi applying the ratio of Honorable Supreme Court in the case of State of Maharashtra v. Suresh Trading Co. [1998] 109 SIC 439 the honorable Jurisdictional High Court had held as under:-

"The law is now well-settled that the assessee is entitled to rely upon the certificate granted by the prescribed authority under section 35CCA to the institution or association to which it had donated a sum of money for claiming deduction under that section which was valid and subsisting at the time the donation was made. The retrospective withdrawal and/or cancellation of the certificate will have no effect upon the assessee who had acted upon it when it was valid and operative. Applying the ratio of



the Supreme Court decision in the case of State of Maharashtra v. Suresh Trading Co. [1998] 109 STC 439, in the instant case, there was no escapement of income of the assessee as a result of the allowance of deduction under section 35CCA in the previous year relevant to the assessment year under consideration"

6.17 In the case of State of Maharashtra v. Suresh Trading Co. [1998] 109 SIC 439, the controversy before the Supreme Court was that whether the retrospective cancellation of the certificate of registration granted to a purchasing dealer under the Bombay Sales-tax Act, 1959 would affect any person who had acted upon the strength of such certificate when it was current. The Honorable Supreme Court has held as under:

"5. In our view, the High Court was right A purchasing dealer is entitled by law to rely upon the certificate of registration of the selling dealer and to act upon it Whatever may be the effect of a retrospective cancellation upon the selling dealer, it can have no effect upon any person who has acted upon the strength of a registration certificate when the registration was current The argument on behalf of the department that it was the duty of persons dealing with registered dealers to find out whether a state off acts exists which would pistil,' the cancellation of registration must be rejected To accept it would be to null& the provisions of the statute which entitle persons dealing with registered dealers to act upon the strength of registration certificates."

6.18 In the case of General Magnets Ltd reported in [2002] 123 TAXMAN 1015 (CAL.) the honourable Calcutta High Court held that it is impermissible to withdraw deduction allowed to assessee for which he is entitled under valid certificate issued by society which was approved by department on date of payment to that society, notwithstanding the fact that said approval was withdrawn with retrospective effect.

6.19 The Honorable Calcutta Tribunal in the case of Shri Mayapur Dham Pilgrim and vs. CIT(Exemptions), Kolkata I.T.A No. 1165/Ko1/2016 order pronounced 03.05.2017 has decided similar issue, wherein the appellant in that case had taken donation from School of Human Genetics and Population Health, Kolkata and subsequent after survey action by the Investigate(' Wring or Calcutta, the exemptions u/s. 12A has been denied to the appellant. The Honorable Tribunal had given IS findings in Paragraph No. 19 of the its order which is reproduced as under: -

"19. The fact that assessee's name figures in the list of donations given by SHG&PH as submitted by them in an application filed before the Settlement Commission of Income Tax u/s 245C of the Act, throws doubts about the genuineness of the Donation received by the assessee from SHG&PH. As far as the assessee is concerned all general Donations



received by it during the F. Y. relevant to A. Y. have been duly accounted for and spent for charitable purpose. The money representing the Donation from SHG & PH cannot be said to be money of the assessee. The case of the Revenue also is that the money representing the Donation is not that of assessee. The charge of the Revenue is that money representing the value of Donation has been laundered. The question as to whose money was laundered and by whom is not spelt out in the impugned order. There is no material brought on record to come to a conclusion that the assessee was part of the scheme of money laundering and that the Donation received by the assessee from SHG&PH was also part of such scheme of money laundering. The assessee is a charitable Trust and receives donations from donors and has utilized the Donations for charitable purpose. In the given facts and circumstances, it cannot be concluded that the assessee is not carrying out its objects or that the assessee's activities are not genuine."

6.20 It has been also held the Calcutta High Court in the case of CIT v. Borbheta Estate Pvt. Ltd. 252 ITR 0379 (Cal) that when the donation was given to the society and the society was approved by the Department for the purpose of deduction u/s 35CCA of the Act. Assuming that by mistake of the department, the department has wrongly approved the society for the purpose of deduction u/s 35CCA, but for mistake of the department why should the assessee suffer. The claim of the deduction cannot be withdrawn on the basis of withdrawal of the approval to the society by a subsequent order as has been done in this case. Further, the Hon'ble Income Tax Appellate Tribunal - Kolkata in the case of Vikas lagwayan, Kolkata vs. PCIT, Kolkata, I.TA No. 1813/Ko1/2017. A. Y. 2014-2015 - dated 17.06.2018. has discussed this issue. In the case of the appellant apart from others, donations were given to the same institute as well and the facts of the case of the appellant are exactly similar. In this case the assessee had given a donation to School of Human Genetics & Population Health (SHGPH) and claimed weighted deduction of u/s 35(1)(ii) of the Act @ 175%. The A.O. after taking note of the Gazette Notification dated 28.01.2010 issued by CBOT which recognized M/s. SHGPH as an institution which is entitled for weighted deduction u/s 35(1)(ii) of the Act, allowed the weighted deduction @ 175% for the donation given by the assessee. Later, Pr. CIT came across a communiqué of CBDT which conveyed the information that the Central Govt. has rescinded the relevant notification dated 28.01.2010 to the effect that the said notification would be deemed as not issued for any tax benefits under the Act to the said research institute. Taking note of this development, the Pr. CIT cancelled the assessment order passed by the AO. In an appeal to Tribunal, the honorable Tribunal held that the subsequent developments i.e. CBDT Notification rescinding the recognition for M/s. SHGPH on 15.09.2016 cannot be a ground to hold



that A.O' s order on 29.06.2016 is erroneous in the light of the explanation in section 35(1)(ii) of the Act (supra).

6.21 Further, the Hon'ble Income Tax Appellate Tribunal – Mumbai in the case of Vora Financial Services Private Vs Assistant Commissioner of Income Tax ITA No. 532/Mum/2018 A.Y. 2014-2015 dated 29.06.2018 is also decided the identical issue. The honorable jurisdictional Tribunal held that even if the approval is cancelled subsequently with retrospective effect, the weighted deduction claimed by the assessee u/s 35(1)(ii) of the Act cannot be denied, if there was valid and subsisting approval when the donation was given. The relevant part of decision is as under:

In the instant case, the assessee has given the donation of Rs. 50.00 lakhs to M/s. Bioved Research Society. In the assessment order passed by the AO in the hands of the above said society, he has only recommended for cancellation of the approval granted u/s.35(1)(ii) of the Act. According to Ld. A.R., the said approval has not been cancelled till date. Though the Survey proceedings conducted in the hands of certain donors, which revealed that the donations were bogus in nature, no such finding has been given in the hands of the assessee herein. Hence, we are of the view that the genuineness of payment of donations cannot be doubted in the instant case, particular in the absence of any material to support the view taken by the AO. Hence we agree with the contentions of Id A. R. that the AO was not justified in rejecting the claim of weighted deduction. We further notice that the Id CIT(A) has placed reliance on the cancellation of registration granted u/s. 12AA of the Act to Ails. Bioved Research Society M/s. Vora Financial Services P. Ltd. with retrospective effect The registration granted u/s. 12AA of the Act and the approval granted u/s.35(1)(ii) of the Act operates on different field. Hence we are of the view that the Ld. CIT(A) was not justified in placing reliance on the order of cancelation of registration u/s. 12AA of the Act

Even if the approval is cancelled subsequently with retrospective effect, various case laws discussed above bring out the ratio that the weighted deduction claimed by the assessee u/s.35(1)(ii) of the Act cannot be denied, if there was valid and subsisting approval when the donation was given. In the instant case, it is the contention of Ld. A.R. that the approval was not cancelled till date. Before us, the revenue did not furnish any material to refine the contentions of the Ld. A.R.

In view of the foregoing discussions, we are of the view that there is no justification in rejecting the claim of weighted deduction claimed u/s.35(1)(ii) of the Act Accordingly we set aside the order passed by Id. CIT(A) on this issue and direct the AO to allow the weighted deducted claimed u/s.35(1)(ii) of the Act



6.22 *The addition has been made by the A.O. on the basis of admission made in the statement recorded U/s. 131 of Act in the case of institution to which the appellant had given donations. However, no evidence/seized material has been mentioned/found in the statement with respect to such donation which would specifically establish that the same is bogus. It is settled proposition of law as held by the Hon'ble Madras High Court in the case of CIT V/s. S. Khader Khan Son reported in 214 CTR 589 and subsequently affirmed by the Honourable Apex Court reported in 352 ITR 0480 that the addition to income merely on the basis of statement recorded during the course of survey is not valid. In this regard the observation of the Hon'ble Madras High Court in the concluding portion is reproduced herewith which has considered Apex Court's decision in the case of Pullangode Rubber Produce Co. Ltd vs. State of Kerala reported in (1973) 91 ITR 18: -*

"(i) An admission is extremely an important piece of evidence but it cannot be said that conclusive and it is open to the person who made the admission to show that it incorrect and that the assessee should be given a proper opportunity to show that the books of accounts do not correctly disclose the correct state of facts. vide decision of the Apex Court in Pullangode Rubber Produce Co. Ltd. Vs. State of Kerala 1973 91 ITR 18 (SC)

(ii) In contradistinction to the power under s. 1334, s. 132(4) of the IT Act enables-1e authorized officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the IT Act On the other hand, whatever statement is recorded under s. 133A of the IT Act it is not given by any evidential)/ value obviously for the reason that the officer is not authorized to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law, vide Paul Mathews Sons vs. CIT (2003; 263 ITR 101 (Ker);

(iii) The expression "such other materials or information as are available with the Assessing Officer" contained in s. 158BB of the IT Act, 1961, would (not) include the materials gathered during the survey operation under s. 13324, vide CIT vs. G. K Senniappan 284 Iii? 220 ('Mad);

(iv) The material or information found in the course of survey proceeding could not the a basis for making any addition in the block assessment, vide decision of this Court in Tar Case (Appeal) No. 2620 of 2006 ("between CIT vs. S. Ajit Kumar);

(v) Finally the word "may" used in s. 133A(3)(iii) of the Act, viz., "record the statement of any person which may be useful for, or relevant to, any proceeding under this Act", as already extracted above, makes it



clear that the materials collected and the statement recorded during the survey under s. 133A are not conclusive piece of evidence by itself

6.23 The Hon'ble ITAT Mumbai has decided this issue in the case of Unitex Products Ltd. vs. ITO 22 SOT 429 and it is held that statement taken during course of survey has no evidentiary value; it is simply an information which can be used for corroboration purpose for deciding any issue in favour or against, assessee. The relevant part of decision are as under: -

Section 133A of the Income-tax Act, 1961 - Survey - Assessment years 1996-97 and 1997-98 - Whether section 133/1(3) (iii) authorises authority to record statement of any person which may be useful for or relevant to any proceedings under Act; however, officer is not authorized to record statement on oath and hence, statement taken during course of survey has no evidentiary value; it is simply an information which can be used for corroboration purpose for deciding any issue in favour or against, assessee - Held, yes

6.24 The Hon'ble Kerala High Court in the case of PAUL MATHEWS AND SONS V. C.I.T. reported in (2003) 263 ITR 101 (Ker) wherein it is held:

A power to examine a person on oath is specifically conferred on the authorized officer only under section 132(4) in the course of any search or seizure. Thus, the Income-tax Act, whenever it thought fit and necessary to confer such power to examine a person on oath, has expressly provided for it, whereas Section 1314 does not empower any Income-tax Officer to examine any person on Oath. Thus in contradistinction to the power under Section 133A. Section 132(4) of the Income-tax Act enables the authorised officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the Income-tax Act. On the other hand, whatever statement recorded under section 133A of the Income-tax Act is not given an evidentiary value.

6.25 Again the Hon'ble Madras High Court in the case of C.I.T. v. S. KADHER KHAN SON reported in (2008) 300 ITR 157 (Mad) further held that Statement given Survey Operations not conclusive proof of evidence. It held that:

"The principles relating to Section 133A of the Income tax Act, 1961 are as follows: (an admission is an extremely important piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the admission to show that it is incorrect and that the books of accounts do not show that the books of accounts do not



6.26 *The aforesaid decision of the Madras High Court was affirmed by the Supreme Court in the case of C.I.T. v. S. KHADER KHAN SON reported in (2013) 352 JTR 480 (SC). It was held by the Hon'ble ITAT Mumbai Bench 'D' in the case of Jaya S. Shetty v. A.C.I.T. (1999) 69 ITD 336 (Born) held as under:*

"Undisclosed income has to be determined on the basis of evidence, documents, material and information found during search and it has to be authentic, reliable and verifiable information - Held Yes. Whether additions based on conjectures and surmises or estimates and presumptions not supported by any evidence documents, etc. found in search have to be deleted - Held Yes. Whether papers seized from premises of assessee when he was not in city could not be said to have been found from possession or control of assessee and hence even if at all provisions of Sec. 132(44) were applicable to assessment of income. No presumptions that it should be assessee transactions or assessee handwriting could be drawn against assessee- Held Yes. Further appellant has relied on the following decisions of the Honourable Mumbai ITA T and submitted that these additions be deleted.

6.27 *From the assessment order, it transpires that the AO has solely relied upon the report of Investigation and did not carry out any worthwhile independent inquiry in the matter. He has totally ignored the documentary evidences submitted by the appellant. The AO has not pointed out any defect in the above mentioned documentary evidences submitted during assessment proceedings. Without pointing out any lacuna in the evidences submitted by the appellant, the genuineness of transaction cannot be doubted. Once evidences related to a transaction is submitted before the A.O., the onus shifts on him to prove these as non-genuine. The A.O. has not discharged the onus casted on him. In my opinion, merely based on the statement of a third person without any corroborative evidence will not make the donation, in question, as accommodation entries. As such, in the absence of any contrary evidence placed on record, the donation cannot be treated as accommodation entries. During the assessment proceedings, the appellant has submitted sufficient documents. The genuineness of the transaction is established from the fact that the payment had been made through banking channels. In the assessment order, the A.O. did not at all discuss the merit of submission made by the appellant and casually brushed aside details filed by the appellant. Further, the appellant has stated that the had & all the relevant details during the course of the assessment proceedings and duly discharged its onus. There was no material with the A.O. on the basis of which it could be justified its action. The registration of above three institutes was in force during the assessment year 2013-14. Therefore, the donor is entitled for deduction u/s.35(1)(ii) of I.T. Act.*



6.28 After considering the totality of facts, rival submissions, the applicable law and on the basis of discussion mentioned above, I find force in the argument of the appellant. The appellant had obtained all the relevant certificates / documents and after due verification to the best of his satisfaction had given donations to the above said institutions. There is no other material against the appellant to come to a conclusion that the donation given by the appellant are not genuine. The assessing officer has solely relied on statement and concluded that the donations are bogus and hence not eligible for deduction U/s. 35(1)(ii) of the Act. No other corroborative evidences are available with the A.O. in support of his conclusions. In view of the above, I have come to the conclusion that nature of donation of R.93,00,000/- stands explained and found genuine. Therefore, appellant is eligible for deduction of Rs.1,62,75,000/- u/s.35(1)(ii) of I.T. Act. This ground of appeal is allowed.”

6. On appraisal of the above mentioned finding, we noticed that the CIT(A) has relied upon the documentary evidence on record which has been produced by assessee. The AO declined the claim of the assessee on the basis of non submission of the record. However, the CIT(A) has placed reliance upon the number of decisions but on the similar facts and circumstances, the Hon’ble ITAT has also given the finding in the case of **Kitchen Essentials Vs. ACIT in ITA Nos. 6672 & 6673/Mum/2013 for A.Y. 2013-14 and 2014-15, Urnish Jewellers Vs. ACIT (2019) 107 taxmann.com 19, Vora Financial Services Pvt. Ltd. Vs. ACIT in ITA. No.532/M/2018 for A.Y.2014-15, Narbheram Vishram Vs. DCIT in ITA. No.42 & 43/Kol/2018 for A.Ys. 2013-14.** The said law was relied by the Ld. Representative of the assessee. The facts are not distinguishable at this stage. We nowhere found any reason to interfere with the finding of the CIT(A), therefore, in view of the said facts and circumstances, we are of the view that the finding of the CIT(A) is quite correct and justifiable which is not liable to be interfere with at this appellate stage. Accordingly, we decide these issues in favour of the assessee against the revenue.



ITA. No.5385/M/18
CO. No.188/M/2019
A.Y. 2013-14

In the result, appeal filed by the revenue is hereby dismissed.

C.O.188/Mum/2019

13. Since the matter of controversy has been adjudicated while deciding the ITA. No.5385/M/2018 for the A.Y. 2013-14, therefore, in the said circumstances, the matter of controversy raised in the present cross-objection has become infructuous, hence, is not required to be adjudicated and has dismissed.

19. In the result, the appeal filed by the **revenue is hereby ordered to be dismissed and the cross-objection of the assessee is also hereby ordered to be dismissed.**

Order pronounced in the open court on 29/01/2020

Sd/-

(RAJESH KUMAR)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai दिनांक Dated : 29/01/2020

Vijay Pal Singh/ Sr.PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

(Assistant Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai