

**IN THE INCOME TAX APPELLATE TRIBUNAL  
"C" BENCH, MUMBAI**

**BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER AND  
SHRI PAVAN KUMAR GADALE, HON'BLE JUDICIAL MEMBER**

**ITA.NO. 943/MUM/2021 (A.Y: 2015-16)**

Pegasus Properties Pvt. Ltd., 2413, 1 <sup>st</sup> Floor Kumar Capital, East Street Camp, Pune – 411001  <b>PAN: AAEC1420E</b>	v.	DCIT – Central Circle – 2(3) 8 <sup>th</sup> Floor, Old CGO Annexe Building M.K. Road, Mumbai - 400020
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>Assessee by</b>	:	<b>Shri Rajan Vora</b>
<b>Department by</b>	:	<b>Shri Dhramveer Singh</b>
<b>Date of Hearing</b>	:	<b>23.02.2022</b>
<b>Date of Pronouncement</b>	:	<b>19.05.2022</b>

**ORDER**

**PER S. RIFAUR RAHMAN (AM)**

1. This appeal is filed by the assessee against order of the Learned Commissioner of Income Tax (Appeals)-48, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 16.3.2021 for the A.Y. 2015-16.
2. Brief facts of the case are, the Assessee is a private limited company registered under the Companies Act, 1956 and engaged in business of

building, maintaining, operating of information technology parks and industrial parks and residential projects. Assessee filed original return of income on 30<sup>th</sup> September 2015 wherein total income of ₹.135,76,37,850 was declared and paid taxes of ₹.47,21,33,545. The said return was revised subsequently on 17<sup>th</sup> October 2016 declaring total income of ₹.135,78,75,050 and paid taxes of ₹.47,22.18,245. On the basis of search and survey action on ABIL Group on 21<sup>st</sup> July 2017, the proceedings under section 153 of the Income-tax Act, 1961 ('the Act') were initiated by the DCIT, Central Circle-2(3), Mumbai in case of the Assessee u/s. 153A of the Act. Accordingly, assessment proceedings for AY 2015-16 were completed by passing order u/s. 153C r.w.s. 143(3) of the Act.

**3.** In response to notice under section 153A of the Act, the assessee had filed return of income on 11<sup>th</sup> October 2018 and again against notice u/s. 153C, same returned was filed on 22.01.2019 declaring same total income as reported in revised return. The Assessing Officer passed an order u/s. 153C r.w.s. 143(3) of the Act by making various disallowance/additions of ₹.2,11,10,895 to the total income of the Assessee. Further, on appeal before the Ld.CIT(A). the Ld.CIT(A) confirmed the additions/disallowance made by the Assessing Officer. Aggrieved, assessee is in appeal before us.

4. Assessee has raised following grounds in its appeal: -

*"On the facts and in the circumstances of the case and in law, the learned CIT(A) has:*

**General:**

1. *erred in upholding the action of the learned AO to the extent of additions made of ₹.1,66,26,648 to the total income of the Appellant:*

**Addition on account of deemed rental income of Rs 92,09,165 on unsold flats/units held by the Appellant as stock in trade**

2. *erred in upholding the action of the learned AO in making notional addition to the income of the Appellant under the head Income from House Property (IFHP) of ₹.92,09,165 under section 23(4) of the Act, on account of deemed rental income on unsold flats held as stock in trade;*

3. *erred in upholding that, deemed rental income would be chargeable to tax as IFHP (irrespective of the nature of business of the Appellant), on the basis of ownership, even if no rental income is earned on the same;*

4. *failed to appreciate that, the unsold flats which are held as inventory in the business of construction, would amount to flats occupied for the purpose of Appellant's business and therefore by virtue of exemption given in section 22 of the Act, annual value of such flats cannot be brought to tax under the head IFHP;*

5. *erred in not appreciating that, income if any, on account of sale of stock in trade or exploitation of stock in trade would always resemble to and chargeable to tax under the head income from Business and Profession (IFBP), and thereby notional income cannot be charged on the same, as there is no concept of notional income in IFBP;*

6. *erred in upholding the action of the learned AO in bringing notional rent on stock-in-trade under IFHP, without being there any corresponding section and legislative intention to tax the same as income from such sources during the year under appeal,*

7. *erred in upholding the action of the learned AO of not taking the assessable value (i.e. rateable value) as per Municipal Authority for the purpose of computing deemed notional rent as per section 23 of the Act;*

8. *erred in not following the decision of Hon'ble Tribunal in assessee's own case against the 143(3) proceedings for AY 2013-14 and AY 2014-15 and incorrectly relying on the decision of Hon'ble Bombay High Court in case of Mangla Homes P Ltd (325 ITR 281) without appreciating the fact that in the case of said assessee, it was in the business of letting out of house property and therefore income earned was taxed as IFHP, whereas the assessee is in the business of builders and developers of residential property and income earned is taxable as IFBP;*

9. ***Without prejudice to the above,*** *erred in upholding the action of the learned AO of considering the fair market rent at Rs 12 per square feet as deemed rent from such house property without bringing any cogent material on record;*

10. ***Without prejudice to the above,*** *erred in upholding the action of the learned AO of not granting vacancy allowance with respect to the unsold stock in trade, as the entire stock in trade were vacant during the year under appeal.*

11. *Without prejudice to the above, erred in not appreciating that, the entire stock in trade was not in habitable condition, and hence, the very existence of property which could be given on rent is not present, and therefore, no addition on account of deemed rental income should be made;*

12. *Without prejudice to the above, erred in making notional addition of rental income for one month without appreciating the fact that completion certificate was obtained in between the month and the flat cannot be let out for the part of the month of its immediate completion.*

***Deduction under section 80G of Rs 31,00,000 not granted in respect of eligible donations of Rs. 62,00,000 made from the CSR expenses***

13. *erred in not allowing deduction under section 80G of the act on eligible donations made out of the CSR expenses debited to the Profit and Loss account.*

**Ad-hoc disallowance of advertisement and sales promotion expenses amounting to Rs 9,71,368**

14. erred in upholding the action of learned AO of disallowing 2% of the total advertisement and sales promotion expenses debited Profit and Loss account which comes to Rs 9,71,368 holding that, the same has not been fully substantiated through supporting;

15. erred in upholding the action of learned AO of making Ad-hoc disallowance without appreciating that books of accounts are audited and accepted without any variation and hence, adjustment is not sustainable in the eyes of law.

**Addition of Rs 2,46,115 under section 69C of the Act**

16. erred in law in upholding the action of the learned AO in disallowing a sum of Rs 2,46,115 on account of alleged unexplained expenditure (i.e. difference in cash as per books vis-a-vis physical cash) u/s. 69C of the Act.

**initiation of penalty under section 271(1)(C) of the Act**

17. erred in upholding the initiation of penalty proceedings on the above u/s 271(1)(c)."

5. The assessee has raised several issues in the above grounds of appeal and we shall deal the above issues raised by the assessee ground wise.

6. Ground No.1 is general in nature and needs no adjudication. Accordingly, ground No.1 is dismissed.

7. Coming to Ground Nos. 2 to 12 which are in respect of addition on account of deemed rental income of ₹.92,09,165 on unsold flats/ units

held by the Assessee as stock in trade. Ld. Counsel for the assessee furnished detailed submissions which are reproduced below: -

"Ground no. 2 to 12 - Addition on account of deemed rental income of Rs. 92,09,165 on unsold flats/ units held by the Appellant as stock in trade

7. During the year under consideration, the Appellant shown income from business or profession. The Appellant, as regular practice of its business, starts advertisement for selling the flats once the project is launched. The booking for the project starts from the day the project is launched and continues till the entire project is sold out. The Appellant recognizes the income from the flats sold, on the basis of completion. The income earned from sale of flats is offered to tax as business income in the return of income filed by the Appellant

8. In certain cases and again a regular phenomena, the Appellant is not able to always sell all the flats forming part of the project before its completion. This is due to the various factors such as excess supply as against the demand, incentives from the government for promoting housing industry, new investments in the region around the project location etc. which are beyond the control of the Appellant. However, the Appellant as a businessman tries to sale the flats on the first available opportunity, when an interested customer is identified or approaches the Appellant.

9. On completion of the project, the unsold flat is treated as stock-in-trade under the head "Inventories". As at 31st March 2015, the Appellant had 85 unsold flats for which completion certificate was received. The project and site-wise details of the unsold flats as on 31 March 2015 are given below:

Sr No.	Name of the project	No of unsold flats	Area (sq.ft)
1.	Sangria	59	84,070
2.	Sparklet	01	950
3.	Sunway	03	3,759
4.	Splendor	22	29,666
Total		85	1,18,445

10. The learned AO followed the decision of Hon'ble Delhi High Court in case of CIT vs. Ansal Housing & Construction (2016) (389 ITR 373) (Delhi) and CIT vs. Ansal Housing Finance & Leasing Co. Ltd

*(2013) (354 ITR 180) (Delhi) for determining the ALV of the unsold flats/units as per section 23 of the Act. The Ld. AO took the fair value of the rent which can be fetched in that area and considered Rs. 12 per Sq. Ft. Based on the same, the learned AO applied the fair value rent of Rs.12 per sq. ft. to the total saleable area of the unsold flats/units and thereby calculated deemed rent on proportionate basis on these units and disallowed the same and allowed standard deduction. The details of the additions are as follows -*

<i>Sr. No.</i>	<i>Particulars</i>	<i>Amount (Rs)</i>
<i>A</i>	<i>Notional income on account of deemed rent (as per para 6.8 on page 11 of the Assessment Order)</i>	<i>1,31,55,950</i>
<i>B</i>	<i>Less: Standard deduction @ 30% as per sec 24(a)</i>	<i>(39,46,785)</i>
<i>C</i>	<i>Net addition (A - B)</i>	<i>92,09,165</i>

*11. The Hon'ble CIT(A) did not follow the decision of the Hon'ble Tribunal for AY 2013-14 and AY 2014-15 in Appellant's own case dated 9 November 2019 which had in turn relied upon the decision of Hon'ble Gujarat High Court in case of Neha Builders Pvt Ltd (296 ITR 661) but followed decision of the and Hon'ble Delhi High Court in case of Ansal Leasing Finance & Co. Ltd (354 ITR 180) and Hon'ble Bombay High Court in case of Mangla Homes P LTd (325 ITR 281) and upheld the addition made by the Ld. AO on account of notional rent on unsold flats vacant.*

*In this regard. the Assessee wishes to submit as under:*

*12. The Appellant wishes to submit that the unsold flats as on 31 March 2015 are in the nature of stock-in-trade, which the Appellant occupies as inventory for its regular business activities i.e. development and sale of flats. (Refer page no. 68 of the financials in factual paper book) The provisions of section 22 of the Act, which is the charging section for the purpose of house property income, specifically grants exemptions to the properties occupied by the Assessee during the course of business.*

*13. In the current case under consideration, the Appellant wishes to submit that unsold flats are occupied for business & ensured that the flats are ready, properly cleaned and maintained in a saleable conditions, so that the same can be displayed to a customer who wishes to purchase the property.*

14. *The unsold flats cannot be let out for the very reason being it forms part of business stock in trade and such stock is required to be in possession of the Appellant so that the property can be sold to the desired customers at any point of time which cannot be the case in case the desired property is let out and is not under possession of the seller.*

15. *Thus, for the above it is quite clear the Appellant occupies the flats only for purpose of carrying on the business.*

16. *The Appellant wishes to draw your Honour's attention to the decision of the Hon'ble Supreme Court in case of Chennai properties & Investment Ltd vs CIT [2016] 373 ITR 673 (SC), which was delivered after the decision of Ansal Housing (supra). In this decision, the Hon'ble Supreme Court after considering the aforesaid decisions referred in the decision of Ansal Housing (supra) has held that where the assessee company engaged in the activity of letting out properties and the rental income received was shown as business income, the action of the AO to treat the rental income as IFHP is not justified.*

17. *The principle laid down by the Hon'ble Apex Court is that merely nature of asset cannot decide the charge under the Act. It is the fact of the case. i.e. activity carried out, needs to be considered for charging the income. So, additions made merely based on the nature of assets is incorrect and unjustified.*

18. *The Appellant wishes to submit that following the decision of Chennai Properties (supra), the Hon'ble Supreme Court in Rayala Corporation (P.) Ltd. vs ACIT (2016) (386 ITR 500). has held that where the assessee is engaged in the business of leasing out its house properties to earn rent, income so earned as rent should be treated as 'business income' and not as 'income from house property'.*

A. *The decision of the Hon'ble Income Tax Appellate Tribunal. Mumbai in Appellant's own case for AY 2013-14 and AY 2014-15 and AY 2016-17 to AY 2018-19*

19. *The Appellant wishes to submits that the issue of addition of deemed rent on account of unsold units has been dealt with by the Hon'ble Mumbai Tribunal in the Appellant's own case for AY 2013-14 and AY 2014-151 (ITA No 3081/PUN/2017 & ITA No 646/PUN/2018) dated 9 November 2019 (Refer page 227 to 243 of legal paperbook), wherein the Hon'ble Tribunal following the decision of Hon'ble*

*Gujarat High Court in case of Neha Builders Pvt Ltd (296 ITR 661) directed the AO to delete the addition made towards deemed rent on unsold flats.*

20. *Further, recently, the Hon'ble Tribunal in Appellant's own case for AY 2016-17 to AY 2018-19 (ITA No. 350-352/MUM/2021 dated 23 December 2021). Copy enclosed at page no. 252 to 274 of the paper book respectively). The relevant extracts of the Hon'ble ITAT order have been reproduced below -*

*"5.14. In view of the aforesaid observations and respectfully following the judicial precedents relied upon hereinabove, we hold that no addition on account of deemed rental income could be made in respect of unsold stock of flats held as 'stock in trade' upto A.Y.2017-18. However, the amendment has been brought in the statute in Section 23(5) from A.Y. 2018-19 providing a moratorium period of two years. Hence, no addition could be made even for A.Y.2018-19 also.*

*5.15. Accordingly, the ground raised by the assessee for all the three years in respect of addition made on account of deemed rental income of unsold stock of flats as 'stock in trade' are allowed."*

21. *Further. the Appellant wishes to rely on the following decisions of Hon'ble Mumbai Tribunal:*

- Palm Grove Beach Hotels Pvt Ltd vs DCIT, (ITA No. 4296/Mum/2019), Dated 1 July 2021, (Mumbai Tribunal)*
- Palm Grove Beach Hotels Pvt Ltd vs DCIT, (ITA No.1973/Mum/2019), Dated 22 July 2021, (Mumbai Tribunal)*
- Saranga Estates Pvt Ltd vs DCIT, (ITA No.4420/Mum/2017), Dated 13 March 2019, (Mumbai Tribunal)*
- S.D. Corporation Pvt Ltd. [2019] 175 ITD 164 (Mumbai), Dated 26 December 2018. (Mumbai Tribunal)*

*B. The favorable decisions of Hon'ble Pune Tribunal in case of Appellant's sister concerns"*

22. *The Appellant would like to submit that the recently the Hon'ble Pune Tribunal in the case Kumar Properties and Real Estate Pvt Ltd (Assessee's sister concern) (ITA No. 2977/PUN/2017 dated 28 April 2021 for AY 2013-14) has decided the issue of deemed rental income*

*in the Assessee's favour. Copy of the decision is enclosed at page no. from 275 to 289 of the paperbook. In this case, the the Hon'ble Tribunal held that all the four conditions for exclusion from section 22 of the Act are cumulatively satisfied and directed the AO to delete the disallowance made. Further, the Appellant also wishes to place reliance on the decision of another sister concern of the Appellant, Kumar Construction and Properties Pvt Ltd (ITA No. 5681PUN12018 for AY 2013-14, Dated 7 September 2021), wherein the Hon'ble Tribunal has deleted the addition made by the Ld. AO on identical issue (copy is enclosed at page 290 to 293 of the paperbook).*

*Prayer*

*23. In view of the above submission. the Appellant requests your Honour that the learned AO be directed to delete the entire addition of Rs 92,09,165 made on account of notional rent on unsold flats held by the Appellant as stock-in-trade."*

**8.** Ld. Counsel for the assessee submitted that the assessee is engaged in business of building, maintaining, operating of information technology parks and industrial parks and residential projects. On completion of the project, the unsold flat is treated as stock-in-trade under the head "inventories". As at 31st March 2015, the assessee had 85 unsold flats for which completion certificate was received. Ld. AR submitted that Assessing Officer followed the decision of Hon'ble Delhi High Court in case of CIT v. Ansal Housing & Construction (2016) (389 ITR 373) (Delhi) and CIT v. Ansal Housing Finance & Leasing Co. Ltd (2013) (354 ITR 180) (Delhi) for determining the ALV of the unsold flats/units as per section 23 of the Act. He further submitted that the Assessing Officer took the fair value of the rent which can be fetched in that area and considered

₹.12 per Sq. Ft. Based on the same, Assessing Officer applied the fair value rent of ₹.12 per sq. ft. to the total saleable area of the unsold flats/units and thereby calculated deemed rent on proportionate basis on these units and disallowed the same and allowed standard deduction.

**9.** The Ld.CIT(A) did not follow the decision of the Hon'ble Tribunal for AY 2013-14 and AY 2014-15 in Assessee's own case dated 9 November 2019 which had in turn relied upon the decision of Hon'ble Gujarat High Court in case of Neha Builders Pvt Ltd (296 ITR 661) but followed decision of the Hon'ble Delhi High Court in case of Ansal Leasing Finance & Co. Ltd (354 ITR 180) and Hon'ble Bombay High Court in case of Mangla Homes P Ltd (325 ITR 281), upheld the addition made by the Assessing Officer on account of notional rent on unsold vacant flats.

**10.** Ld. Counsel for the assessee submitted that in view of the following ITAT decisions in Assessee's own case for A.Y. 2012-13 to 2014-15 and 2016-17 to 2018-19 and decisions of Hon'ble Tribunal in Assessee's sister concerns, he humbly submit that the Assessing Officer be directed to delete the entire addition of ₹.92,09,165 made on account of notional rent on unsold flats held by the assessee as stock in trade.

*"The decision of the Hon'ble Income Tax Appellate Tribunal Mumbai in appellant's own case for earlier and subsequent years:*

- *ITAT order in own case (ITA No 3081/PUN/2017 & ITA No 646/PUN/2018) dated 9 November 2019 for AY 2013-14 and 2014-15.*
- *ITAT order in own case (ITA No 01/Mum/2021) dated 20 October 2021 for AY 2012-13 to 2014-15.*
- *ITAT order in own case (ITA No 350 to 352/Mum/2021) dated 23 December 2021 for AY 2016-17 to 2018-19.*

*The favorable decisions of Hon'ble Pune Tribunal in case of Appellants sister concern*

- *Kumar Construction and Properties Private Ltd (ITA No. 2977/PUN/2017 dated 28 April 2024 for AY 2013-14)*
- *Kumar Properties and Real Estate Pvt. Ltd., (ITA No.2977/PUN/2017 for AY 2013-14, Dated 7 September 2021).*

**11.** Ld. DR vehemently supported the orders of the authorities below.

**12.** Considered the rival submissions and material placed on record, we observed that the identical ground raised by the assessee has been considered and decided by the Tribunal in assessee's own case for earlier and subsequent Assessment Years i.e. A.Y. 2012-13 to 2014-15 and 2016-17 to 2018-19. In recent order dated 23.12.2021 in ITA.No. 350 to 352/Mum/2021, the Tribunal considering the decision of Kumar Properties and Real Estates Pvt. Ltd., v. DCIT in ITA.No. 2977/PUN/2017 for the A.Y.2013-14, held as under: -

"5.11. It is not in dispute that the assessee is a builder or developer and had been showing the income derived from sale of flats as and when they are sold and the flats remaining unsold are shown as inventories in the balance sheet of the assessee as 'stock-in-trade'. These unsold stocks when it is sold subsequently would again get taxed only under the head 'income from business'. We find that the assessee being a builder or developer would be interested in selling those flats and earn profits out of the same. No business man would be interested in keeping the properties idle. Hence, the intention of the assessee company being a builder or developer was always to sell the same.

5.12. Since all the unsold flats are lying as 'stock in trade', the resultant income arising out of sale would only from income from business, We find that amendment has been brought in the statute in Section 23(5) of the Act where in respect of unsold stock of properties held as 'stock in trade' for a period of two years from the date of obtaining completion certificate from the competent authority, the annual value of such property would be determined as 'Nil'. In other words, there would be no addition towards deemed rental income in respect of unsold stock of properties held as 'stock in trade' for a period of two years from the date of obtaining the completion certificate from the competent authority. This specific provision has been brought in the statute from A.Y.2018-19 onwards. Hence, prior to A.Y.2018-19, there is no provision provided in the Act to tax the deemed rental income on unsold stock of properties lying as 'stock in trade' under the head 'income from house property'. The provisions of Section 23(4) of the Act are meant only for properties that are held as investments and not as stock in trade. We find that decision rendered by the Hon'ble Jurisdictional High Court in the case of Mangla Homes Pvt. Ltd., reported in 325 ITR 281 would not be applicable in the instant case as the main object of that company was to make investment in properties, flats, warehouses, shops etc and let out the same and derive rental income. In any case, principle laid down in Mangla Homes Pvt. Ltd., had been subsequently reversed by the Hon'ble Supreme Court in the case of Chennai Properties and Investment Ltd., vs. CIT reported in 373 ITR 673. We also find that the charging provisions of Section 22 of the Act specifically gives exemption from determination of actual value of the property which is used for the purpose of any business or provision carried on by the assessee. There is no dispute that the assessee had retained the unsold stock of flats as stock in trade in the capacity of builder. Hence there is no dispute that the unsold stock of flats were used only for the purpose of business of the

*assessee. The exception provided in charging section 22 of the Act seems to be indirectly taxed only from A.Y.2018-19 after providing the moratorium period of two years. Hence, upto A.Y.2017-18, no addition could be made in respect of deemed rental income on unsold stock of flats lying as stock in trade as they are used for the purpose of business of the assessee.*

*5.13. We find that all the decisions relied upon by the Hon'ble Bombay High Court in Mangla Homes Pvt. Ltd., were prior to the decision of the Hon'ble High Court in the case of Chennai Properties referred to supra. This is the background in which all the Tribunal decisions had followed the decision of the Hon'ble Gujarat High Court in the case of Neha Builders reported in 296 ITR 661. We find that the issue in dispute is also covered by the decision of Pune Tribunal in the case of Kumar Properties and Real Estates Pvt. Ltd., vs. DCIT in ITA No.2977/PUN/2017 for A.Y.2013-14 dated 28/04/2021. For the sake of convenience, the entire order is reproduced hereunder:-*

.....

*5.14. In view of the aforesaid observations and respectfully following the judicial precedents relied upon hereinabove, we hold that no addition on account of deemed rental income could be made in respect of unsold stock of flats held as 'stock in trade' upto A.Y.2017-18. However, the amendment has been brought in the statute in Section 23(5) from A.Y.2018-19 providing a moratorium period of two years. Hence, no addition could be made even for A.Y.2018-19 also.*

*5.15. Accordingly, the ground raised by the assessee for all the three years in respect of addition made on account of deemed rental income of unsold stock of flats as 'stock in trade' are allowed."*

**13.** Respectfully following the above said decision and coordinate bench has already considered the decision of Hon'ble Bombay High Court decisions in the case of Mangla Homes Pvt Ltd (supra) and Hon'ble Gujarat High Court decision in Neha Builders (supra) and distinguished the same. Therefore, we hold that no addition on account of deemed rental income

could be made in respect of unsold stock of flats held as 'stock in trade' for this assessment year also i.e. A.Y. 2015-16. Ground Nos. 2 to 12 are allowed.

**14.** Coming to Ground No. 13 which is in respect of deduction u/s. 80G of ₹.31,00,000 (being 50% of the eligible donation) not granted in respect of eligible donations of ₹.62,00,000 made from the CSR expenses. In respect of Ground No.13, Ld. Counsel for the assessee submitted as under: -

*"Ground no. 13 — Deduction under section 80G of Rs. 31,00,000 (being 50% of the eligible donation) not granted in respect of eligible donations of Rs. 62,00,000 made from the CSR expenses*

*24. During the year the Appellant had incurred CSR expenditure of Rs. 62,00,000. These expenses were in the form of donations to the charitable organizations working for the promotions of education and other social welfare programs. The details of donations are as under (copy of donation receipts along with certificate under section 80G issued to the trusts are enclosed at page no. 110 to 132 of the paperbook):*

Sr No	Details of Donee	Amount of Donation (Rs)	Receipt details		Last validity granted by the Commissioner	Remarks
			No.	Date		
1	ABIL Foundation, Ganeshkhind Road, Pune	15,00,000	01	27 January 2015	Valid upto 31 March 201 2	Relying on amendment that w.e.f. 1.10.2009 that validity is perpetual unless withdrawn. Please refer circular 7 of 2010 [F.NO. 197/21/2010-ITA-I] dated 27 October 2010 issued by the CBDT clarifying /explaining the amendment (refer page no. from 133 to 134)
2		13,50,000	02	31 March 2015	Valid upto 31 March 201 2	
3		2,50,000	03	1 <sup>st</sup> March 2015	Valid upto 31 March 201 2	
4	Keshirimal Himmatlal Charitable Trust	5,00,000	-	2 April 2015	Valid for perpetuity till it is rescinded	The trust is old of 1985. It has been carrying on charitable activities. Application for renewal of registration u/s 80G filed on 12 May 2014, which was
5		10,00,000	-	3 January 2015	Valid for perpetuity till it is rescinded	
6		5,00,000	-	22 February 2015	Valid for perpetuity till it is rescinded	

Sr No	Details of Donee	Amount of Donation (Rs)	Receipt details		Last validity granted by the Commissioner	Remarks
			No.	Date		
7		2,50,000	-	2 April 2015 (cheque dated 31 March 2015)	Valid for perpetuity till it is rescinded	subsequently accepted and accordingly, order for approval u/s 80G(5)(vi) is received on 31 August 2019. It is submitted that though renewal was granted in 2019, delay is not attributable to the trust. Renewal is dated back of 2014. Hence, Donar cannot be penalized for belated renewal granted by the Department.
8		8,50,000	-	31 March 2015	Valid for perpetuity till it is rescinded	
Total		62,00,000				

25. During assessment proceedings. the Appellant submitted that such expenses were inadvertently not added back in the taxable income and thus, same be added to the total income considering purely unintentional mistake.

26. The learned AO had accordingly added such CSR expenses to the total income of the Appellant. However, the learned AO did not grant any consequential deduction under section 80G of the Act in respect of eligible donations made out of these CSR expenses. The relevant findings of the learned AO can be referred to in para 8 on page no. 13 of the assessment order.

27. During appeal proceedings before learned CIT(A), the Appellant submitted that deduction under section 80G should be allowed in respect of eligible donations made by the Appellant from the CSR expenses. It was also submitted that CSR expenditure is entitled for deduction under section 80G of the Act. In this regard, the Appellant placed reliance on the decision of the Bangalore ITAT in case of *Allegis Services (India) Pvt Ltd vs. ACIT* [ITA No. 1693/Bang12019] dated 29 April 2020 wherein the Hon'ble ITAT held that authorities below have erred in denying claim of the assessee for CSR expenditure under section 80G of the Act. Further, the Appellant also like to place reliance on following judicial precedents:

- *FNF India Private Ltd vs ACIT* (ITA No. 1565/Bang/2019 dated 5 January 2021)
- *Goldman Sachs Services Pvt Ltd vs JCIT* (ITA(TP) No. 2355/Bang/2019 dated 15 June 2020)
- *JMS Mining Pvt Ltd vs PCIT* (PTA No. 146/Kol/2021 dated 22 July 2021)

28. However, the learned CIT(A) had denied the deduction under section 80G of the Act by deciding on merits of the case on the ground that the donations given to the Trusts are not eligible for 80G deduction and upheld the disallowance made by the leaned tax officer based on following findings -

*Trust I - ABIL Foundation - Rs. 31,00,000*

*In para 5.5 to 5.6 on page 13 of the CIT(A) order, the learned CIT(A) stated that the ABIL Foundation was eligible for the benefit of deduction u/s 80G(5)(vi) of the Act in the hands of donors for the period from 19.01 .2009 to 31 .03.2012. However, as the date of approval in case of ABIL Foundation i.e., 17.08.2009 which is before the required date i.e., 1.10.2009 as per CBDT Circular 7 of 2010 (F.NO. 197/21/2010TA-I dated 27.10.2010), the assessee is not eligible for deduction under section 80G of the Act.*

*Trust 2— Keshirimal Himmatlal Charitable Trust Rs. 31,00,000*

*In para 5.7 on page 13 of the CIT(A) order, in respect of donation to Keshirimal Himmatlal Charitable Trust, the learned CIT(A) stated that on verification of the details submitted, it is seen that the Commissioner of Income Tax - Pune, Vide order dated 31.08.2019 has granted approval u/s 80G(5)(vi) of the Act specifically from AY 2019-20 onwards and thus, deduction u/s 80G is not granted to the Assessee.*

*Appellant's submission before the Hon'ble ITAT*

*A. Donations paid to ABIL Foundation*

*29. As mentioned above, the Appellant had paid donations of Rs. 31.00,000 to ABIL Foundation during AY 2015-16. As donations paid to ABIL Foundation were eligible for deduction under section 80G(5)(vi) vide order dated 17 August 2009, the Appellant had requested to grant deduction from taxable income during appellate proceedings before the learned CIT(A). The Appellant had submitted that exemption certificate granted to the ABIL Foundation under section 80G(5)(vi) is valid for the period from 19 January 2012 to 31 March 2012 which is ultimately made valid for perpetuity as per Circular No. 7 of 2010 dated 27 October 2010 unless specifically withdrawn. However, the learned CIT(A) misinterpreted the provisions of the said Circular and upheld the disallowance made by AO.*

30. *The Appellant submits that as per provisions contained in clause (vi) to sub-section (5) of Section 80G, the approval was to be granted by the CIT in accordance with rules prescribed in Rule 1 1AA and as per the proviso to Section 80G(5)(vi), the approval was to be renewed from time to time. However, considering this hardship, the legislature in all its wisdom has sought to omit this proviso on 1st October 2009. Accordingly, existing approvals expiring on or after 1st October, 2009 shall be deemed to have been "extended in perpetuity unless specifically withdrawn. However, in case of approvals expiring before 1st October, 2009, these will have to be renewed and once renewed these shall continue to be valid in /perpetuity, unless specifically withdrawn."*

31. *Therefore, now once approval is granted, it shall be considered as continued to be valid in perpetuity. These provisions are also clarified by the Central Board of Direct Taxes (CBDT) by way of Explanatory Circular for the Finance (No. 2) Act, 2009 vide Circular No. 5/ 2010 dated 3 June 2010 wherein para 29.7 reads as under (copy of the Circular is enclosed at page no. 294 to 300 of paperback)*

*"29.7 Applicability - This amendment has been made applicable with effect from 1st October, 2009. Accordingly, existing approvals expiring on or after 1st October, 2009 will be deemed to have been extended in perpetuity unless specifically withdrawn. However, in case of approvals expiring before 1st October, 2009, these will have to be renewed and once renewed these shall continue to be valid in perpetuity, unless specifically withdrawn."*

32. *Further the CBDT had also clarified aforesaid point in para 5 of Circular No. 7 of 2010 [F. NO. 197121/2010-ITA-I] dated 27 October 2010, that existing 80G approvals expiring on or after 1st October 2009 shall be deemed to have been extended in perpetuity unless specifically withdrawn. The relevant extracts of the Circular are reproduced below (copy of the Circular is enclosed at page no. 133 to 134 of factual paperback).*

.....

*5. As regards approvals granted upto 1-10-2009 under section 80G by the Commissioners of Income- tax/Directors of Income-tax, proviso to section 80G(5)(o) clarified that any approval shall have effect for such assessment year or years not exceeding five assessment years as may be specified in*

*the approval. The above proviso was deleted by the Finance (No. 2) Act, 2009. The intent behind the deletion of above proviso as explained in the explanatory memorandum to Finance (No. 2) Bill, 2009 was as under:*

*"Further as per clause (vi) of sub-section (5) of section 80G of the Income-tax Act, 1961, the institutions or funds to which the donations are made have to be approved by the Commissioner of Income-tax in accordance with the rules prescribed in rule 11AA of the Income-tax Rules, 1962. The proviso to this clause provides that any approval granted under this clause shall have effect for such assessment year or years, not exceeding five assessment years, as may be specified in the approval.*

*Due to this limitation imposed on the validity of such approvals, the approved institutions or funds have to bear the hardship of getting their approvals renewed from time to time. This is unduly burdensome for the bona fide institutions or funds and also leads to wastage of time and resources of the tax administration in renewing such approvals in a routine manner.*

*Therefore, it is proposed to omit the proviso to clause (vi) ) of sub-section (5) of section 80G to provide that the approval once granted shall continue to be valid in perpetuity. Further, the Commissioner will also have the power of withdraw the approval if the commissioner is satisfied that the activities of such institution or fund are not genuine or are not being carried out in accordance with the objects of the institution or fund. This amendment will take effect from 1st day of October, 2009. Accordingly, existing approvals expiring on or after 1st October, 2009 shall be deemed to have been extended in perpetuity unless specifically withdrawn."*

*33. From the above, it is crystal clear that the approval once granted under section 80G(5)(vi) of the Act shall continue in perpetuity. Accordingly, it is submitted that certificate granted to the ABIL Foundation which is valid 31 March 2012 and same should be considered as valid in perpetuity in view of the omission of the proviso to Section 80G(5)(vi) with effect from 1 October 2009. Therefore, it is submitted that the approval granted to ABIL Foundation is continued to be valid in perpetuity and based on the*

same, aforesaid donations paid by the Appellant are eligible for deduction under section 80G of the Act.

34. In this regard, the Appellant would also like to place reliance on the following judicial precedents wherein it is held that once the approval under section 80G is granted which is valid on 1 October 2009, same is valid for perpetuity unless it is specifically withdrawn by way of valid show cause notice issued to the applicant trust/institutions. In these cases approval under section 80G was getting expire after 1 October 2009 and accordingly. The Hon'ble Courts have held that the approvals shall be continue unless and until the concerned authority takes appropriate action in accordance with law:

- *Association for Advocacy and Legal Initiates vs CIT (2011) 130 ITD 573 (Lucknow) dated 28 February 2011 (Copy is enclosed at page 301 to 306 of the paperbook)*
- *Shri Vishay Namdhari Sangat vs CIT (ITA No. 805/Chd/2011 dated 17 May 2012) (Copy is enclosed at page 307 to 314 of the paperbook)*
- *Bhole Bhandari Charitable Trust vs CIT (ITA No. 140/Chd/2012 dated 17 May 2012)*

*Prayer*

35. In light of the above, the Appellant prays before your Honour that the donation paid to ABIL Foundation should be considered as eligible under section 80G of the Act as the approval granted to ABIL Foundation is valid for perpetuity in terms of aforesaid provisions. Accordingly, learned AO be directed to grant the deduction of 50% of amount paid to ABIL Foundation from taxable income of the Appellant.

*B. Donations paid to Keshirimal Himmatlal Charitable Trust*

36. The Appellant submits that the Keshirimal Himmatlal Charitable Trust is old of 1985. It has been carrying on charitable activities. The Trust had received 12A registration certificate. On that basis, the Trust had also received 80G certificate on 25 June 1991 valid from 1 April 1990 to 31 March 1991. The renewal was not done by the Trust after 31 March 1991. However, in 2014, the Trust had filed application for renewal of registration under section 80G of the Act on 12 May 2014. The acknowledged copy of said application filed by this trust is enclosed at page no. 130 of the paperbook.

37. Subsequent to the above, the Trust had filed various follow up letters with the learned Commissioner of Income Tax (exemptions) requesting to grant of necessary certificate under section 80G(5)(vi) of the Act on several occasions.

38. However, the learned Commissioner of Income Tax (Exemptions), vide order No. ITBA/EXM/S/80G/2019-2011017694192(1) dated 31 August 2019, has granted the approval under section 80G(5)(vi) to the trust. Copy of the approval order passed by the Commissioner of Income Tax (Exemptions) is enclosed at page no. 131 to 132 of factual paperbook.

39. In view of the above, it is submitted that as the Trust is not in fault whereas it has followed up time to time with the learned Commissioner of Income Tax (Exemptions) to grant the certificate under section 80G(5)(vi) of the Act, the certificate received in 2019 should be relate back to year application and the deduction should be allowed the Appellant for donations paid under section 80G of the Act. In this regard, the Appellant has followed up with the CIT(E) to grant certification under section 80G(5)(vi) of the Act on following dates:

- 12 May 2014
- 3 November 2014
- 13 November 2014
- 25 May 2017
- 14 June 2017
- 14 July 2017
- 24 January 2018
- 18 February 2019

*In this proposition, we would like to place reliance on the following judicial precedents -*

*Judicial precedents in the context of approvals under section 1 2AA and 80G of the Act*

40. The Appellant places reliance on the decision of Hon'ble Supreme Court in case of CIT vs Society for Promn. of Edn (2016) 382 ITR 6 (SC) (Copy is enclosed at page 315 to 316 of the paperbook) wherein the Hon'ble Supreme Court, in the context of application under section 12A of the Act, held that when application under section 12A for grant of registration was not responded to within stipulated period of six months, said application for registration to deemed to have been allowed.

41. *In case of S. Lanka Singh Bahra Charitable Trust vs CIT (2011) 133 ITD 201 (Amritsar) dated 15 June 2011, (Copy is enclosed at page 317 to 318 of the paperbook) the Hon'ble Amritsar Tribunal held when the assessee made application for renewal under section 80G(5)(vi), however, the competent authority (i.e. CIT) failed to take appropriate action within prescribed time under Rule 11 AA(61-of the Income-tax Rules, 1962. There is no specific provision prescribing consequences for non-passing of such order. When the assessee has done what was expected of it under the law, the department should have acted vigilantly to pass an appropriate order in the matter. Having not done so, the competent authority has placed the assessee in a jeopardy and helpless situation. Thus, negligence on the part of the revenue authority cannot be conferred judicial benediction. The assessee- appellant, cannot be kept at the mercy of the revenue authority, having complied with his part in the matter, as it would subvert the soul of rule of law. In view of this, the assessee is legitimately entitled for approval of renewal, as applied for. Further, the Appellant places reliance on the following decisions:*

- *S.J.A. Alumni Association vs CIT [2016] 47 ITR(T) 274 (Delhi - Trib.) dated 1 Feb 2016*
- *Karnataka Golf Association vs DIT [2004] 91 ITD 1 (BANG.) dated 31 July 2003*
- *Ess Kay Foundation vs CIT(E) (2021) 188 ITD 903 (Jaipur - Trib), Dated 1 March 2021*

*Judicial precedents in the context of approvals under section 35(2AB) of the Act*

42. *In following decisions, the Hon'ble Courts have held that even though approval of concerned Ministry of Central Government was under consideration or awaited, the deduction under section 35(2AB) is available to the assessee -*

*CIT vs Claris Lifesciences Ltd (2010) 326 ITR 251 (Gujrat)  
(Copy is enclosed at page 319 to 321 of the paperbook)*

*CIT vs TVS Electronics Ltd (2019) 419 ITR 187 (Madras)  
(Copy is enclosed at page 322 to 325 of the paperbook)*

*Maruti Suzuki India Ltd vs CIT (2017) 397 ITR 728 (Delhi)  
(Copy is enclosed at page 326 to 336 of the paperbook)*

*Judicial precedents in the context of approvals under section 40A(7) of the Act*

*43 The Appellant places reliance on the decision of Hon'ble Calcutta High Court in case of CIT vs Shalimar Wire and Industries Ltd (1991) 118 ITR 814 (Cal) (Copy is enclosed at page 337 to 338 of the paperbook) wherein it is held that if the Department does not accord approval within a reasonable time and the approval comes after four years, for that the assessee cannot be penalized. In addition to this, in following decisions it is held that when application is filed for renewal of gratuity fund within prescribed time then it is immaterial when such approval is accorded, same would relate back to date of application for such approval.*

- CIT vs Continental Commercial Co. Ltd (1991) 192 ITR 66 (Calcutta HO) (Copy is enclosed at page 339 to 340 of the paperbook)*
- Pr. CIT vs English Indian Clays Ltd [2018] 89 taxmann.com 134 (Kerala) (Copy is enclosed at page 341 to 342 of the paperbook)*

*44. Accordingly, it is submitted that though renewal was granted to the Keshirimal Himmatlal Charitable Trust in August 2019, the delay is not attributable to the trust whereas the same is happened from the Department's side. Hence, it is submitted that the donor should not be penalized for belated renewal granted by the department and accordingly, deduction of donation paid to said trust should be granted as eligible under section 80G of the Act.*

*45. Prayer*

*In light of the above, the Appellant prays before your Honour that the donation paid to Keshirimal Himmatlal Charitable Trust should be considered as eligible under section 80G of the Act. Accordingly, learned AO be directed to grant deduction 50% of amount of donation under section 80G of the Act from taxable income of the Appellant for AY 2015-16."*

**15.** Ld. Counsel for the assessee further submitted that during the year the assessee had incurred CSR expenditure of ₹.62,00,000. These expenses were in the form of donations to the charitable organizations

working for the promotions of education and other social welfare programs. The Assessing Officer added such CSR expenses to the total income of the assessee. However, the Assessing Officer did not grant any consequential deduction u/s. 80G of the Act in respect of eligible donations made out of these CSR expenses. However, the Ld.CIT(A) denied the deduction u/s. 80G of the Act and upheld the disallowance made by the learned tax officer based on following findings:

*- the ABIL Foundation was eligible for the benefit of deduction u/s 80G(5)(vi) of the Act in the hands of donors for the period from 19.01.2009 to 31.03.2012. However, as the date of approval in case of ABIL Foundation i.e., 17.08.2009 which is before the required date i.e., 1.10.2009 as per CBDT Circular 7 of 2010 (F.NO. 197/21/2010-ITA-) dated 27.10.2010), the assessee is not eligible for deduction under section 80G of the Act.*

*-in respect of donation to Keshirimal Himmatlal Charitable Trust, the learned CIT(A) stated that on verification of the details submitted, it is seen that the Commissioner of Income Tax — Pune, Vide order dated 31.08.2019 has granted approval u/s 80G(5)(vi) of the Act specifically from AY 2019-20 onwards and thus, deduction u/s 80G is not granted to the Assessee."*

**16.** Ld. Counsel for the assessee furnished relevant details which are mentioned below and the same are placed on record to substantiate the donation paid to ABIL Foundation and Keshirimal Himmatlal Charitable Trust should be considered as eligible u/s. 80G of the Act: -

*"copy of submission filed with the CITA) dated 18 December 2020 alongwith following annexures.*

*Receipts of donation in Case of ABIL Foundation alongwith order of approval u/s 80G(5)(vi) of the Act.*

*Receipts of donation in Case of Kesarimal Himmatmal Charitable Trust alongwith the Trust deed and order of approval was 80G(5)(vi) of the Act Circular no. 7/2010 dated 27 October 2010 for clarifying the period of validity u/s 10(23C) an 80G(5) of the Act.*

*- Copy of remand report issued by AO dated 9 February 2021*

*- Submission against remand report dated 16 February 2021*

*Submission filed against the AO dated 23 April 2019 along with a note on CSR expenses*

*In relation to the Trust 1 — ABIL Foundation*

*Approvals granted and expiring after 1.10.2009 shall continue to be valid in perpetuity unless specifically withdrawn*

*- Circular No. 5 of 2010 dated 3 June 2010 (only relevant extract enclosed)*

*- Circular 7 of 2010*

*- Association for Advocacy and Legal Initiates vs CIT (2011) 130 ITD 573 (Lucknow Tribunal) dated 28 February 2011*

*- Shri Vishav Namdhari Sangat Vs CIT (ITA No. 805/Chd/2011 dated 17 May 2012) (Chandigarh Tribunal)*

*In relation to the Trust al Himmatial Charitable Trust*

*Judicial precedents in the context of approvals under section 12AA and 806 of the Act*

*CIT vs Society for Promn, of Edn (2016) 382 ITR 6 (SC)*

*S. Lanka Singh Bahra Charitable Trust vs CIT (2011) 133 ITD 201 (Amritsar) dated 15 June 2011*

*Judicial precedents in the context of approvals under section 35 2AB of the Act*

*CIT vs Claris Lifesciences Ltd (2010) 326 ITR 251 (Gujrat HC)*

*CIT vs TVS Electronics Ltd (2019) 419 ITR 187 (Madras HC)*

*Maruti Suzuki India Ltd vs CIT (2017) 397 ITR 728 (Delhi HC)*

*Judicial precedents in the context of approvals under section 40A 7 of the Act*

*CIT vs Shalimar Wire and Industries Ltd (1991) 118 ITR 814 (Calcutta HC)*

*CIT vs. Continental Commerce. Ltd (1991) 192 ITR 66 (Calcutta HC)*

*CIT vs English Indian Clays Ltd. (2018) 89 taxmann.com 134 (Kerala HC)*

**17.** Ld. Counsel for the assessee prays that the donation paid to ABIL Foundation and Keshirimal Himmatlal Charitable Trust should be considered as eligible for deduction u/s. 80G of the Act as the approval granted to ABIL Foundation is valid on perpetuity in terms of aforesaid provisions. Accordingly, Assessing Officer be directed to grant the deduction of 50% of amount paid to above foundations from taxable income of the assessee.

**18.** Ld.DR vehemently supported the finding of the Ld.CIT(A) and submitted that assessee has made donations to ABIL Foundation and Keshirimal Himmatlal Charitable Trust. With regard to donation paid to ABIL Foundation, he brought to our notice, the validity of 80G approval was up to the date of 31.03.2012 whereas assessee has made the donation on 27.01.2015. He submitted that the donation was made subsequent to the expiry of the grant of approval. Further he objected that assessee is relying on the amendment made w.e.f. 01.10.2009 that

the registration validity is perpetual unless it is withdrawn. He submitted that perpetuity of the approval is not applicable to the ABIL Foundation.

**19.** With regard to donation made to Keshirimal Himmatlal Charitable Trust, he submitted that the donation was made on 03.01.2015, 21.02.2015, 02.04.2015 and 31.03.2015. He further submitted that above donations were made without proper approval be available on the record. He submitted that there is no concept of deemed registration applicable to these parties and further he submitted that donor i.e. assessee is not expected to make any donation without proper compliance on record to prove that there existed proper approval on the date of making donation. Therefore, he supported the order passed by tax authorities.

**20.** Considered the rival submissions and material placed on record, we observe that assessee has made donation to ABIL Foundation during this assessment year, from the record we observe that ABIL Foundation was granted exemption u/s. 80G(5)(vi) of the Act, is valid for a period from 19.01.2012 to 31.03.2012. The CBDT Vide Circular No 7 of 2010 dated 27.10.2010 extended the validity of the registration with the perpetuity clause so that existing approval expiring before 01.10.2009, these will

have to be renewed and once renewed these shall deem to be valid in perpetuity, unless specifically withdrawn. With regard to approvals expiring on or after 01.10.2009 these are renewed automatically and to be valid in perpetuity unless specifically withdrawn. The above amended provision is clarified by CBDT (Vide Circular No. 5/2010 dated 03.06.2010 in Para No .29.7). From the above it is clear that the approvals expiring on or after 01.10.2009 are automatically renewed unless it is specifically withdrawn.

**21.** In the case of AIBL foundation the registration granted and valid up to 31.03.2012, this approval was granted subsequent to issue of circular by CBDT relating to the period on or after 1.10.2009 that means these approvals are automatically renewed with the concept of perpetuity as amended by the Finance Act, 2009. Therefore, the approval granted subsequent to the cut off date of 1.10.2009. In our considered view the donation given to ABIL Foundation are eligible for exemption u/s.80G(5)(vi) of the Act.

**22.** Coming to the donation made to Keshirimal Himmatlal Charitable Trust, we observe that the original approval u/s. 80G of the Act was granted on 25.06.1991 valid from 01.07.1990 to 31.03.1991. The Trust

did not prefer to renew the exemption u/s. 80G of the Act after 31.03.1991. However, it filed application for renewal for registration u/s.80G on 12.05.2014. This application was kept on record and not renewed by the department, even though as submitted before us that the Trust was following it up with the revenue closely. Subsequently, it is fact that the department granted the registration on 31.08.2019. Assessee prays before us that the case of the Keshirimal Himmatlal Charitable Trust should be considered as deemed approval considering the fact that department has not approved the application even after expiry of six months from the date of application. In this regard, they relied on several case laws to submit that it amounts to automatic approval. However, after considering the facts on record, we observe that the Trust chose not to renew the approval until the year 2014. Only during financial year 2014, it chose to apply for registration, accordingly, the application was filed. In our view, it is subjective that the above said Trust may or may not be approved by the department. Further, the issue of deemed approval can be contested only by the above Trust, certainly not by the assessee. It is the duty of the assessee to make sure, before making any donation, that the recipient has been properly approved and complied with all aspects as per law. The assessee cannot be pray after making donation that the

deemed approval should be considered for the above said Trust considering the fact the assessee has made the donation, the assessee cannot give donation on the expectation that the approval shall be granted. Therefore we are in agreement with the submissions of the Ld.DR that the above said Trust is not approved as on the date of making donation. Therefore, we are inclined to reject the submissions of the assessee with regard to the donations made to Keshirimal Himmatlal Charitable Trust. Accordingly, we are inclined to allow the claim of the assessee on the ABIL Foundation and reject the Keshirimal Himmatlal Charitable Trust. Accordingly, ground raised by the assessee is partly allowed.

**23.** Coming to Ground Nos. 14 and 15 which are in respect of Ad-hoc disallowance of advertisement and sales promotion expenses amounting to ₹.9,71,368/-. Ld. Counsel for the assessee filed his submissions in respect of this issue as under: -

*"Ground no. 14 to 15 - Ad-hoc disallowance of advertisement and sales promotion expense amounting to Rs 9,71 368*

*46. During the year, the Appellant had incurred advertisement and sales promotion expenses of Rs. 4,85,68,391. All the said expenses are incurred by the Appellant wholly and exclusively for the purposes of its business. Accordingly, a deduction under section 37 of the Act was claimed by the Appellant.*

47. *The learned AO had disallowed Rs. 9,71,368 (i.e. 2% of Rs. 4,85,68,391) out of said advertisement and sales promotion expenses stating that the Appellant could not fully substantiate these expenses. The relevant findings of the learned AO can be referred to in para 9 on page no. 13 of the assessment order.*

48. *Although, all the facts were also submitted before the learned CIT(A) vide our submission dated 18 December 2020 (refer page no. from 135 to 143 of the paperbook). However, without appreciating the same, the learned CIT(A) upheld the addition made by the learned AO. The observations of the learned CIT(A) are mentioned at para 6 on page no. 14 of the CIT(A) order.*

49. *The Appellant submits that the advertisement & sales promotion expenses were incurred wholly and exclusively for the purpose of business and hence, admissible as deduction. The books of accounts for the year under consideration have been audited by the Statutory Auditors of the company and there is no variation made by the auditors in this regard. The learned AO has simply made a general comment without substantiating the basis of making disallowance. If the learned AO ought to have alleged that the expenses are not substantiated, the learned AO ought to have specifically pointed out, the nature expense and specific quantification of expenditure which was unsubstantiated.*

50. *The learned AO, without asking for details/ submission on the genuineness of advertisement expenditure and without bringing anything contrary on record, merely on the basis of surmises and conjecture made an ad-hoc disallowance of 2% of the total expenditure by simply relying on order for AY 2014-15. Therefore, the Appellants submits that in the absence of any specific discrepancy being pointed out by the learned AO, the ad-hoc disallowance is unjustified and should be deleted.*

51. *Separately, the Appellant would like highlight that the learned CIT(A) has deleted similar disallowance for advertisement and sales promotion expenses made in assessment order u/s 143(3) for AY 2014-15 and also deleted disallowance made in the assessment order u/s 153C read with section 143(3) for the other assessment years covered in this block period of assessment proceedings for AY 2016-17 to AY 2018-19. However, the learned CIT(A) has taken different stand for AY 2015-16 without assigning any cogent reasons for doing so. Copy of the relevant pages of submission filed for advertisement and sales promotion expenses and relevant pages of*

*CIT(A) order for aforesaid AYs are enclosed at page no. from 165 to 187 and page no. from 188 to 208 respectively of the factual paperbook). For ease of reference, the summary of AY wise disallowance of advertisement and sales promotion expenses is tabulated below –*

AY	Turnover (Rs)	Advertisement expenses as per financial statements (Rs)	%of advertisement and sales promotion expenses in proportion to turnover	Amount disallowed by learned AO (Rs).	Findings of learned CIT(A)	Whether department is in appeal before the Hon'ble ITAT'
2014-15 (In 143(3) proceedings)	4,42,00,01,953	4,83,81,452	1.09%	9,67,629	Disallowance deleted (Refer page 207 of paperbook)	No
2015-16	5,69,07,32,272	4,85,68,391	0.85%	9,71,368	Disallowance upheld	For this AY, the Assessee is in appeal before your Honours
2016-17	4,53,97,21,743	3,74,16,389	0.82%	7,48,328	Disallowance deleted (Refer page 163 to 164 of paperbook)	No
2017-18	1,12,57,71,081	2,20,86,649	1.96%	4,41,733	Disallowance deleted (Refer page 192 to 193 of paperbook)	No
2018-19	58,06,96,702	3,64,65,954	6.28%	7,29,319	Disallowance deleted (Refer page 198 to 199 of paperbook)	No

*52. In this regard, the Appellant relies on the Pune ITAT decision in the case of Eagle Aggro Farms P Ltd v ITO (ITA No 825/PN/10) (Copy is enclosed at page 343 to 345 of the paperbook) wherein it has been held that the expenses which are audited under the Companies Act as well as Income-tax Act, disallowance in a mechanical and routine manner cannot be warranted.*

***No addition can be made on the basis of mere surmise and conjecture***

*53. The addition made by learned AO was merely based on assumptions, presumption and had no basis whatsoever and hence should be deleted. The various courts have held that the disallowances made by the Assessing Officer merely based on assumptions, presumptions, surmises and conjectures cannot be sustained and have to be summarily deleted. Reliance in this regard is also placed on the following decisions:*

- *Sayaji Iron & Engg Co. (253 ITR 749) (Guj HC) (Copy is enclosed at page 346 to 350 of the paperback)*
- *M/s Johnson & Johnson Ltd (ITA No. 9437/Mum/2004) dated 15 February 2013 (Copy is enclosed at page 351 to 367 of the paperback)*

#### 54. Prayer

*In view of the above. the Appellant prays before your Honour that the learned AO be directed to delete the ad-hoc disallowance of advertisement and sales promotion expenditure."*

**24.** Ld. Counsel for the assessee submitted that during the year, the Assessee had incurred advertisement and sales promotion expenses of ₹.4,85,68,391. All the said expenses are incurred by the Assessee wholly and exclusively for the purposes of its business. Accordingly, a deduction u/s. 37 of the Act was claimed by the Assessee. He submitted that the Assessing Officer had disallowed ₹.9,71,368 (i.e. 2% of ₹.4,85,68,391) out of said advertisement and sales promotion expenses stating that the Assessee could not fully substantiate these expenses, even the Ld.CIT(A) upheld the order of the Assessing Officer by holding that the Assessee did not furnish any evidence and explanation, without appreciating the documents and details filed at the time of first appellate proceedings.

**25.** In order to substantiate the above submissions, Ld. Counsel for the assessee filed relevant details below and relied on the case law as mentioned below:

*"Copy of submissions filed with the CIT(A) dated 18 December alongwith following annexures: -*

*- Details of advertisement and sales promotion expenses incurred during FY 2014-15*

*Relevant extracts of submissions filed before CIT(A) in Appellant's own case for the issue of advertisement for AY 2016-17 to AY 2018-19 alongwith following documents:*

*- Relevant pages of the CIT(A) order for AY 2017-18 to 201 8-19 - Relevant pages of the CIT(A) order for AY 2014-15 (against 143(3) order)*

*Expenses which are audited under the Companies Act as well as Income-tax Act cannot be disallowed in a mechanical and routine manner*

*Eagle Aggro Farms P Ltd v ITO (ITA No 825/PN/10)*

*No addition can be made on the basis of mere Surmise and conjecture*

*- Sayaji Iron & Engg Co. (253 ITR 749) (Guj HC)*

*- M/s Johnson & Johnson @9437/Mum/2004) dated 15 February 2013*

*- Copy of rectification application dated 05 May 2021 u/s. 154 of the Act alongwith the CIT(A) order of AY 2016-17*

*In view of the above, the Appellant prays before your Honour that the learned AO be directed to delete the hoc disallowance of advertisement and sales promotion expenditure. (Refer brief synopsis of submissions at page 410 to 411)"*

**26.** Ld. DR vehemently supported the orders of the authorities below.

**27.** Considered the rival submissions and material placed on record, we observe from the record that assessee has incurred advertisement and sales promotion expenses, from the record we further observe that

assessee has incurred these expenses in the previous assessment year as well as subsequent assessment years and the Assessing Officer has consistently disallowed these expenses. However, In A.Y.2014-15 Ld.CIT(A) has deleted the addition proposed by the Assessing Officer, similarly in A.Y. 2016-17, 2017-18 and 2018-19. Only during this assessment year, Ld.CIT(A) has sustained the addition made by the Assessing Officer. It is fact on record that assessee has to incur certain sales and promotion expenditure for the purpose of business and the Assessing Officer cannot disallow the expenditure by adopting the method adhoc disallowance without there being any cogent information or proper reasons. In case Assessing Officer has not satisfied with the submissions made by the assessee, he can resort to disallow the whole expenditure. He cannot proceed to adhoc disallowance based on the assumptions or presumptions. The courts have held that Assessing Officer cannot resort for adhoc disallowance. Consistent with the other assessment years these expenditures are part of business carried on by the assessee and accordingly, we direct the Assessing Officer to allow the whole expenditure consistent with the views of the CIT(A) in other Assessment Years. Accordingly, ground raised by the assessee is allowed.

**28.** Coming to Ground No. 16 which is in respect of addition of ₹.2,46,115/- under section 69C of the Act. Ld. Counsel for the assessee submitted as under: -

*"Ground no. 16 — Addition of Rs 2.46,115 under section 69C of the Act.*

*55. The Appellant submits at the time when search was conducted, the books of accounts of the Appellant showed cash balance of Rs.21,18,315, whereas the physical cash found was Rs. 18,72,200. The Appellant vide its explanation has stated that the difference of Rs. 2,46,115 was pertaining to the reason that it incurred certain expenditure on the site and the same was yet to be recorded in the books of accounts until the time search and survey was conducted on the premises of the Assessee. The alleged excess cash of Rs.2,46,115 found was issued to meet the day-to-day expenditure at the various projects sites of the Appellant.*

*56. These facts were also stated to survey team officers vide question no. 14 of the statement recorded on oath of Mr. Manish Jain wherein it was also stated that the cash is of entire group companies and not only related to the Appellant. The Appellant had also brought these facts to the notice of the learned AO vide submission dated 23 April 2019 (refer page no. 214 of paperbook).*

*57. Therefore, there was more cash balance in the books of accounts as compared to the physical cash found during survey action. There is no concrete rule so as to keep the entire cash balance at one place whereas for running business smoothly some cash balance is always required to be kept at project office/s of the Appellant so that urgent needs (such as advances for certain small items/ urgent payments of labours, etc.) can be met without waiting for the handover of the cash on day-to-day basis.*

*58. As noted in above table at para no.48, the Appellant submits that company had turnover of almost Rs.570 crores during the year under consideration. It also had on going projects at different places which is reflected by way of inventory as construction work in progress in the note 14 of the financial statements (refer page no. 68 of paperbook). Accordingly, it is submitted that Appellant which is having such high turnover and various on going projects, cash of approx. Rs.2.46 lakhs can be remained unaccounted for in such huge*

*organization until the concerned personnel at the site submit actual bills for expenses incurred by them to the accounting department.*

*59. However, without appreciating the facts, the learned AO disallowed a sum of Rs 2.46,115 on account of alleged unexplained expenditure under section 69C of the Act. The relevant findings of the learned AO can be referred to in last para on page no. 5 of the assessment order.*

*60. The aforesaid facts were also brought to the notice of the learned CIT(A). However, without appreciating the same, the learned CIT(A) upheld the addition made by the learned AO. The observations of the learned CIT(A) are mentioned at para 7.2 on page no. 15 of the CIT(A) order.*

*61. It is submitted that section 69C deals with unexplained source of expenditure and the whole intent of the section is to add to total income of the Assessee, the expenditure which is incurred out of undisclosed income i.e. to say expenditure for which the Assessee could not substantiate/ satisfy the AO as to the source of such expenditure. The relevant extracts of section 69C of the Act is reproduced below -*

*"Where in any financial year an assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof or the explanation, if any, offered by him is not, in the opinion of the Assessing Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year:*

*Provided that notwithstanding anything contained in any other provision of this Act, such unexplained expenditure which is deemed to be the income of the assessee shall not be allowed as a deduction under any head of income."*

*62. In this regard. the Appellant wishes to place reliance on the decision of Kesarwani Sheetalaya Sahson (ITA No. 440/Alld/2012) dated 30 November 2012 approved by the Allahabad High Court in 418 ITR 369 (Copy enclosed at page 368 to 400 of the legal paperbook), which has held that no addition can be made under section 68 or 69A, when the cash in hand found is lesser than as compared to books of accounts in which the cash in hand shown is higher. The relevant extract of the findings of the High Court is as under:*

*"19. In the present case, learned Counsel for the Revenue has mainly relied upon the two deletion made by the ITAT of the addition so made by the AO as confirmed by the CIT (A). As to the addition made of Rs.37,30,710/-, which is lesser cash in hand as compared with the books of accounts in which the assess has shown more cash in hand, the Tribunal held that it is neither a case under Section 68 of the IT Act nor Section 69-A of the Income Tax Act. The Tribunal further went on to hold that it was not a case where money is not recorded in the books of account of assessee, and in the present case cash in hand in the books of account was found to be more than the actual cash found during the course of search. At the most, authorities could have presumed that assessee has spent the difference of amount in question somewhere as per cash in hand, as per books of account and lesser cash as per seized documents, but that would also not suffice to make addition under any of the above propositions.*

*25. Having considered the facts and circumstances of the case and going through the records of the case, we are of the considered opinion that the Revenue has failed to establish that the order of the Tribunal is manifestly illegal and suffers from error apparent on face of the record. As the Tribunal being the last fact finding court has categorically recorded finding that the authorities below had wrongly made the additions without any material on record on the basis of mere presumption and assumption.*

*26. The appeal is dismissed. The question of law is, therefore, answered against the Revenue and in favour of the assessee."*

*63. However, in present situation considering the fact that the expenditure was incurred from accounted cash balance of the Appellant (i.e. accounted source), the question of unexplained source/undisclosed income for such expenditure does not arise.*

*64. The Assessee submits that, there was simply timing gap in incurring the expenditure and recording the same in books and it is not the case of incurring expenditure from an unexplained source.*

*65. It is submitted that the learned AO as well as learned CIT(A) has grossly erred in interpreting the provisions of section 69C, the result of which is double taxation of Rs. 2,46,115. Once when the Assessee has recorded the receipt/ sales in the books and accordingly increased its cash balance. Accordingly, the timing difference*

*between incurring the expenditure and recording of the same in the books of accounts cannot be equated with unexplained expenditure under section 69C of the Act.*

*66. Prayer*

*In view of the same. the Appellant prays before your Honour, that the learned AO be directed to delete the addition made on account of alleged unexplained expenditure under section 69C of the Act."*

**29.** Ld. Counsel for the assessee submitted that during the course of survey, excess cash of ₹.2,46,115 was found as per books which was owing to the reasons that certain cash was issued to meet the day to day expenditure at the various project sites of the assessee which were pending for accounting on the date of survey. These facts were also stated to officers during survey, particularly while answering the question no. 14 of the statement recorded on oath of Mr. Manish Jain. However, without appreciating the facts, the Assessing Officer disallowed a sum of ₹.2,46,115 on account of alleged unexplained expenditure under section 69C of the Act. The Ld.CIT(A) upheld the order of the Assessing Officer.

**30.** Ld. Counsel for the assessee relying on his submissions requested that Assessing Officer be directed to delete the addition made on account of alleged unexplained expenditure u/s. 69C of the Act. Ld. Counsel for the assessee submitted that no addition u/s. 69C can be made if actual cash found is less than that in books of accounts and relied in the case of

Kesarwani Sheetalaya (ITA.No. 440/Alld/2012) dated 30.11.2012 approved by Allahabad High Court in 413 ITR 369.

**31.** Ld. DR vehemently supported the orders of the authorities below.

**32.** Considered the rival submissions and material placed on record, we observe that during survey excess cash of ₹.2,46,115/- was found as per the books, it was submitted that certain cash was issued to meet the day to day expenses at the various projects sites of the assessee which were pending for accounting on the date of survey. These facts were also stated before the officers at the time of survey and particularly answered to the question No. 14 of the statement recorded on oath from Mr. Manish Jain. We observe that the above said undisclosed cash was added as unexplained expenditure u/s. 69C of the Act. We observe that in the similar situation in the case of Kesarwani Sheetalaya Sahson (supra) ITAT Allahabad Bench has adjudicated as under: -

*"10 We have heard the rival submissions and the material on record. It is a case of excess cash in books shown by the assessee, but at the time of search, actually lesser cash was found. Therefore, it is admitted fact that no excess cash was found during the course of search with the assessee in order to fasten liability upon the assessee. The AO initially made the addition with the help of section 68 of the IT Act, which the Id. CIT(A) has rightly held not applicable to the facts of the case. The Id. CIT(A), however, applied the provisions of section 69A of the IT Act while confirming the addition in this case. Section 69A of the IT Act reads as under :*

*"Unexplained money, etc.*

*69A. Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year."*

*10.1 Before applying the above provision, it is necessary for the AO to record findings of fact that the assessee is found to be owner of any money and such money is not recorded in the books of account, if any, maintained by him for any source of income and the assessee offers no explanation about the nature and source of acquisition of money or explanation offered by him is not in the opinion of the AO satisfactory. In the present case, the cash in hand in the books of account was found to be more than the actual cash found during the course of search. Therefore, it is not a case where money is not recorded in the books of account of the assessee. The assessee maintained regular books of account in past, on which regular assessments have been framed, have not been disputed during the course of arguments. According to submissions of the Id. DR, the opening cash balance in the seized paper tally with the books of account. Therefore, there is no question of rejection of books of account maintained by the assessee. Merely because the books of account maintained by the assessee were not found during the course of search is no ground to reject the books of account produced by the assessee before the AO. The AO compared the seized paper on perusal of the audit report in the assessment year under appeal while making the addition on this issue. Since the balances were coming up from the earlier years, therefore, it was the duty of the AO to have scanned the entire cash book in order to say that the cash balance shown in the books of account in hand at Rs.64.70 lacs is correct or not, but the AO did not do any exercise and merely comparing the seized paper from the audit report made the addition. The AO was not definite in his finding while making the addition because he was of the view that either the bogus liability has been created or unexplained cash has been introduced by the partners and for both the propositions, the AO has not brought any*

*evidence on record to substantiate his allegations. There is no case of bogus liability or introduction of unexplained cash by the partners in this case. Thus, it appears that the AO made the addition merely on presumptions. On the one hand, the AO relied upon the balance sheet and the audit report prepared by the assessee showing excessive cash in books and on other side considered the seized paper which has shown lesser cash in hand for the purpose of making addition. Considering the above discussion, it is clear that the AO has done only artificial working of lesser cash as against higher cash shown in the books of account of the assessee. Therefore, it is neither a case of addition u/s. 68 of the IT Act nor section 69A of the IT Act. We, therefore, do not subscribe to the view of Id. CIT(A) in sustaining the addition. As noted above, it is a case of lesser cash in hand as per seized paper as compared with the books of account in which the assessee has shown more cash in hand. Therefore, the authorities below were not justified in holding it to be unexplained money not recorded in the books of account of the assessee. At the most, the authorities below could have presumed that the assessee has spent the difference of amount in question somewhere as per cash in hand as per books of account and lesser cash as per seized documents, but that would also not suffice to make addition under any of the above provisions because every person is at liberty to spend their own amount anywhere as per his choice because the assessee has not claimed any deduction in this case. Examining the case of the assessee from every possible angle, we find the addition of Rs.37,30,710/- wholly unjustified. We, accordingly, set aside the orders of the authorities below and delete the addition of Rs.37,30,710/-. These grounds of appeal of the assessee are accordingly allowed."*

The above decision has been affirmed by the Hon'ble Allahabad High Court which is reported in 418 ITR 369.

**33.** Respectfully following the above said decision, we observe that the assessee had the record of the excess cash, which was meant for the other projects and assessee could explain the same before the tax

authorities, therefore this cannot be a case to make addition u/s 69C of the Act, we are inclined to delete the addition made u/s. 69C of the Act. Accordingly, ground raised by the assessee is allowed.

**34.** Coming to Ground No.17 which is in respect of challenging the initiation of penalty proceedings u/s. 271(1)(c) of the Act, which would be premature for adjudication at this stage.

**35.** In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 19.05.2022.

Sd/-  
**(PAVAN KUMAR GADALE)**  
**JUDICIAL MEMBER**

Mumbai / Dated 19.05.2022  
Giridhar, Sr.PS

Sd/-  
**(S. RIFAUR RAHMAN)**  
**ACCOUNTANT MEMBER**

**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.

//True Copy//

BY ORDER

(Asstt. Registrar)  
**ITAT, Mum**