आयकरअपीलीयअधिकरण,इंदौरन्यायपीठ,इंदौर

IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

IT(SS)A Nos.152 TO 156/Ind/2018
(Assessment Year: 2004-05,2005-06, 2007-08,2008-09 & 2010-11)
&
ITANo.539/Ind/2014
(Assessment Year 2013-14)

Sarvajanik Jankalyan Parmarthik Nyas, Peoples's Campus, Bhanpur,Bhopal	Vs.	ACIT, 1(2) Bhopal
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: AACTS2301Q		

IT No.613/Ind/2013
(Assessment Year: 2005-06)

ACIT, 1(2) Bhopal	Vs.	Sarvajanik Jankalyan Parmarthik Nyas, Peoples's Campus, Bhanpur Bhopal
(Appellant / Revenue)		(Respondent/ Assessee)
PAN: AACTS2301Q		

IT No.359/Ind/2013
(Assessment Year: 2011-12)

People's University Bhanpur Bypass, Karond Bhopal	Vs.	CIT, Bhopal
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: AAAJP1220B		
Assessee by	S/Shri Sumit Nema, Sr. Adv. With Gagan Tiwari, Piyush Parashar & Arun Dwivedi ARs	
Revenue by	Ms. Simran Bhullar, CIT-DR	
Date of Hearing	19.12.2023	
Date of Pronouncement	31.01.2024	

O R D E R

Per Bench:

These are total eight (8) appeals out of which five appeals by the assessee directed against the composite order of CIT(A) dated 30.10.2018 arising from the assessment orders passed u/s 153A for A.Ys. 2004-05, 2005-06 & 2007-08,2008-09 and u/s 143(3) for A.Y. 2010-11. One appeal by the department directed against the order dated 8th July 2013 arising against the scrutiny assessment u/s 143(3) for A.Y.2005-06. The remaining two appeals by the two assessees directed against two separate orders of the CIT(Exemption) dated 25th June 2014 and 28.03.2013 passed u/s 12AA(3) and 12AA whereby registration already granted to one assessee was withdrawn and the application for registration u/s 12AA in case of other assessee was rejected respectively.

2. We first take up the appeals filed by the assesse arising from the assessment orders framed u/s 153A and 143(3) in pursuant to the search and seizure action u/s 132(1) of the Act. The assessee has raised common grounds in these five appeals except the quantum of disallowance/addition made by the AO therefore, the grounds raised for Assessment Year 2004-05 are reproduced as under:

> *"1. The Id CIT(A) was not justified in sustaining the assessment order, which is bad-in-law, void ab initio, barred by limitation, illegal, contrary to the facts and circumstances of the case, liable to be annulled. - Tax Effect NIL*
>
> *2. That the additions are illegal and bad in law as they are not based on any incriminating material found during the course of search.- Tax Effect NIL.*
>
> *3. That on the facts and circumstances of the case, the Id CIT(A) erred in confirming that the assessee trust has violated the provisions of Section 13 of the Act and hence not eligible for the benefit of Sec 11 & 12 of the Act without giving any specific reason for the same and without appreciating the fact that the assessee trust shall be eligible for the benefit of section 11 & 12 of the Act. Tax Effect NIL.*
>
> *4. That the Id CIT (A) erred in confirming the income at Rs. NIL instead of loss of Rs. 90,64,273/-as returned by the appellant without mentioning any reason, which is unjust, unfair and bad in law. Tax Effect –NIL.*
>
> *5. That on the facts and in the circumstances of the case, the Id CIT(A) erred in not allowing the carry forward of the deficit being excess of expenditure over income of Rs. 90 ,64,273/- as returned by the assessee, to be adjusted against the income of succeeding year while computing the taxable income of that succeeding year without considering the explanation offered by the assessee and without appreciating the fact that carry*

forward of deficit was allowed by Hon'ble ITAT in case of assessee, thus the order confirming the disallowance of carry forward of deficit is unjust, unfair and bad in law. Tax effect – NIL.

6. That the Id CIT(A) erred in relying on the CIT order dated 25.06.14 cancelling the registration of the institution u/s 12AA(3), without considering the explanation offered by the assessee and without considering the fact that the assessee is in appeal before Hon'ble ITAT bench against the unjustified cancellation. Tax Effect - NIL

*7. That the Id CIT(A) erred in rejecting the books of accounts u / s * 145(3) of the Act and without considering the explanation offered by the assessee and without considering the fact that the appeal against the cancellation of the registration are pending before the Hon'ble ITAT bench. Tax Effect – NIL"*

3. The assessee is a trust registered with Registrar of Public Trust since 17th April 2000. The assessee was also granted registration u/s 12AA vide order dated 17.10.2000 w.e.f 07. 06.1999. As per the main objectives of the assessee it was formed to achieve charitable objects of health and education and thereby the assessee trust established hospitals, provisions of medical care, schools, colleges and research and development Centers. The assessee filed its return of income for A.Ys. A.Ys. 2004-05, 2005-06 & 2007-08,2008-09 & 2010-11 u/s 139(1) declaring total income as loss for all these five years. There was a search and seizure operation u/s 132 of the Act in the case of the assessee other connected persons on 23rd July 2009. Consequently the AO issued notices u/s 153A on 21.02.2011 to the assessee to file the return of income for A.Ys. 2004-05 to 2009-10 and A.Y. 2010-11. In response to the notice issued u/s 153A the assessee filed letter dated

11.03.2011 stated that the assesse has filed regular returns of income u/s 139(1) of the Act and there was no change in the original returns filed the same may be treated as return filed in response to notice u/s 153A. The details of the returns of income filed by the assesse for A.Ys. 2004-05 to 2009-10 are re-produced by the AO at page no.16 of the assessment order as under:

A.Y.	Returned income (in Rs.)	Date of filing original return
2004-05	(-) 90,64,273/-	31.10.2004
2005-06	(-) 4,06,24,367/-	30.10.2005
2006-07	(-)13,27,21,348/-	30.10.2006
2007-08	(-)14,08,66,035/-	23.10.2007
2008-09	(-)16,15,09,294/-	19.09.2008
2009-10	(-)18,55,92,403/-	29.09.2009

3.1 The regular return of income was filed for A.Y.2010-11 on 20.09.2010 declaring total loss of Rs.12,25,29,221/-. The AO has passed composite assessment order for all the seven assessment years i.e. 2004-05 to 2009-10 u/s 153A r.w. section 143(3) and for A.Y.2010-11 u/s 143(3) on 26.12.2011. The AO has denied the claim for exemption u/s 11 of Income Tax Act and also denied claim of loss declared by the assessee to be carry forward and assessed the total income of the assesse for all these seven years at nil as against the loss declared by the assessee. The assessee challenged the action of the AO before the CIT(A) but could not succeed.

4. Before the Tribunal the Ld. Sr. Counsel for the assessee has submitted that the assessee trust is dedicated to multifaceted philanthropy and its main objectives as to provide health and

education. Therefore, the assessee trust has established hospitals provisions of medical care for the under privileged, acquisition of medical equipment and construction of facility for welfare of society including schools, colleges and research and development centers. The assessee trust has established as many as 11 colleges and hospitals. These colleges have course of MBBS, MD/MS, BDS, MDS, B.Sc Nursing, Post B.Sc. Nursing, GNM, MSc. Nursing, BTech, MTech, BBA, MBA, BHMMCT, BPharma, MPharma and various course under Paramedical college like DMLT, BMLT and physiotherapy etc. The assessee trust also operates School which is affiliated with CBSE and having classes upto 12th.The search and seizure action u/s 132 was conducted at various premises of the Peoples group of 23rd& 24th July 2009. The Ld. Sr. Counsel has submitted that the AO while passing composite assessment orders for all these years u/s 153A r.w. section 143(3) has held that the assessee trust as violated the provisions of section 13 of the Act and therefore, the assessee is not eligible for claim of exemption u/s 11 & 12 of the Act. The AO held that the assessee is claiming to be trust and not business concern and therefore, also disallowed carry forward of losses.

4.1 Ld. Sr. Counsel has pointed out that in the assessment framed u/s 153A the AO has not referred any incriminating material found or seized during the course of search and seizure action u/s 132 of the Act but the AO has referred the order of the CCIT, Bhopal dated 24.10.2007 whereby the application of the assessee for approval u/s 10(23C)(vi) was rejected. The AO has reproduced the

grounds/irregularity noted by the CCIT, Bhopal while passing order dated 24.10.2007 rejecting application of the assessee for approval u/s 10(23C)(vi) of the Act. The AO has alleged that there was on money payment in respect of the purchase of two properties as disclosed by Shri Rajesh Bhalla in his statement. The Ld. Sr. Counsel has submitted that the benefit of section 11 & 12 was denied without giving finding that the assessee has not fulfilled the conditions mentioned in section 11 being the charitable institutions and the AO has simply relied upon order of the CCIT, Bhopal dated 24.10.2007 passed u/s 10(23C)(vi) of the Act as well as the order of the Hon'ble jurisdictional High Court in the writ petition filed by the some admission seekers wherein the Hon'ble High Court has observed some irregularities in the admission to the MBBS Course to the extent of providing admission to the students under management quota on the seats earmarked for Government quota. Thus, Hon'ble High Court vide order dated 24.02.2006 has directed the assessee to provide admission in the next academic session to the extent of 26 more seats of MBBS under State Quota by reducing the management quota. Thus, Ld. Sr. counsel has submitted that the said irregularity in the admission for the very first year of the medical colleges would not amount to violation of provisions of section 11 or section 13 of the Act. The dispute before Hon'ble High Court was only regarding the irregularity in the admission process for not providing the admission on the Government Quota seats. Further the order of the Pr. CIT passed u/s 10(23C)(vi) is also based on the allegations made by certain persons in the writ petition

filed before the Hon'ble High Court regarding irregularities in the admission and therefore, the allegation made in the writ petition cannot be a basis for denial of approval u/s 10(23C)(vi) as well as denial of benefit u/s 11 & 12 of the Act. Apart from the order u/s 10(23C)(vi) as well as order of the Hon'ble High Court the AO has also alleged the on money payment however this allegation of AO were without any basis as nothing is found or brought on record to show that the assessee has paid any on money in respect of any transactions alleged by the AO. The AO has relied upon the statement of Shri Rajesh Bhalla an employee of PGH International Pvt. Ltd. wherein he has stated that two property deals were done by M/s. PGH International Pvt. Ltd. and he delivered sum of Rs.85 lac in cash to Shri Vikash Arora to complete the deal out of which Rs.25 lac was carried from Bhopal to Mumbai and the money was withdrawn from the bank of the assessee trust.

4.2 The Ld. Sr. Counsel has submitted that though there was a withdrawal of Rs.25 lakhs from the bank account of the assessee trust but the same was re-deposited in the bank and therefore, the question of the payment of the said alleged amount in respect of the property deal does not arise. He has referred to the bank account statements of Peoples of the College of Dental Science, People college of medical Science & Peoples Dental Academy the medical institutions run by assessee and submitted that the amount of Rs. 25 lakhs was withdrawn from these accounts for purchase of property but subsequently the said property was purchased by the PGH International Pvt. Ltd. and consequently the said amount

withdrawal from the bank was redeposited in the banks within short period of time in the Month of January 2008 itself. All these transactions of withdrawal as well as redeposit in the bank account are prior to the date of search and therefore, no motive of afterthought explanation can be attributed. Even otherwise the said statement recorded found during the search is nothing but revealing the actual facts of withdrawal of the amounts and therefore, same cannot be treated as incriminating material against the assessee when the transactions of withdrawal as well as redeposit are duly recorded in the bank account statement as well as in the books of the assessee. The AO has relied upon the statement of Shri Rajesh Balla who has just explained the purpose of the said cash taken by the him but the allegation of payment of on money by the assessee are all unfounded and contrary to the true facts and record. Even otherwise the statement of Shri Rajesh Bhalla without any corroborative evidence cannot be relied upon when the evidence itself speaks transactions of withdrawal giving bank details amount and date of withdrawal which are matching with the transactions recorded in the bank account. Thus, Ld. Sr. Counsel has submitted that when the transaction of purchase of the property was not entered into by the assessee then question of payment of on money does not arise. The AO has made an addition of Rs.30 lac for A.Y.2009-10 and appeal against the order passed by the AO for A.Y.2009-10 is still pending before the CIT(A). Ld. Sr. Counsel then referred to the allegation of the AO regarding capitation fees amounting to Rs.8,65,00,000/- taken by the

assessee trust in lieu of providing admission. He has submitted that the AO has relied upon the loose paper impounded during the TDS survey proceedings u/s 133A on 09.08.2005 whereas the assessments were framed u/s 153A in pursuant to the search and seizure action carried out on 23rd July 2009. Ld. Sr. counsel has submitted that alleged loose paper was neither material nor documents nor found first time to discover new fact during the course of search and seizure action but it was a preexisting impounded paper in the survey carried on 09.08.2005. He has further submitted that on the basis of the survey proceedings the AO already completed the assessment u/s 143(3) for A.Y.2005-06 on 28.12.2007 but the CIT(A) set aside the order of the AO and allowed the claim of the assesse for exemption u/s 11 & 12 of the Act against which the revenue has filed the appeal pending before this Tribunal. Thus, Ld. Sr. Counsel has submitted that the loose paper impounded during the survey cannot be a basis for assessment u/s 153A and that too when the assessments were not pending as on the date of search. Even as per the said loose paper it contains list of the students who succeeded in admission and there are some notings in code on the margin of the said list with a pencil. The AO has presumed those pencil notes as the amount of capitation fees received by the assessee against admissions. The AO has referred various statements of the parents of the students however, as per RTI information obtained by the assessee only one statement was provided to the assessee of Mr. MohanlalBhannaria pertaining to his son's admissions at sr. No. 57 in the list.

4.3 Ld. Sr. Counsel has submitted that in the said statement he has alleged to have paid Rs.8 lakhs as capitation fee whereas the pencil note on the impounded paper against sr. no.57 is "12" therefore, the said figure is not matching with the allegation made in the statement. Ld. Sr. counsel has submitted that the AO did not provide the statements to the assessee before passing the assessment order or allowed the assessee to cross examine the said witness whose statement was relied upon by the AO. He has thus submitted that once the assesse has denied allegations of the receipt of any capitation fee then the AO should have allowed the assessee to cross examine their witness failing which the same cannot be used against the assessee.

4.4 In support of his contention he has relied upon the Judgement of Hon'ble Supreme Court in case of *Kishin chand Chellaram 125 ITR 713, Andaman Timber Industries vs. CCE 62 taxmann.com 3, Shri Trading Corporation vs. ITO 151 taxmann.com 486*. He has further submitted that third party statement cannot be relied upon without proper enquiry and providing proper cross-examination to the assessee as held by the Hon'ble Supreme Court in case of *CIT vs. P.V. Kalyana Sundaram 294 ITR 49(SC).* Collection of capitation fee is governed by Madhya Pradesh Niji Vyavsayik Shikshan Sanstha(Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, 2007. There is no violation noted by the State Authorities or Medical Council of India(MCI) and therefore, the decision of the AO on the basis of the loose sheets not found or seized during the course of search is not sustainable when the

impounded documents were subject matter of assessment u/s 143(3).

4.5 Ld. Sr. Counsel has thus submitted that though the AO has referred various statements in the assessment order but except one provided to the assessee there is no other statement available on record and hence the assessment order passed by the AO is not on the basis of the alleged statement available with the AO. He has further submitted that no such allegation or complaint made by any of the parents about capitation fee received by the assessee and the addition made by the AO in case of some of the parents of the students were deleted by this Tribunal/by the CIT(A). He has referred to the order of this Tribunal dated 4th July 2016 in case of Pradeep Kumar Bansal in ITANo.214/Ind/2016 whereby the Tribunal has deleted the addition made by the AO and held that the assesse denied the payment of any such capitation fee then the addition made by the AO on the basis of the allegation of some third person is in absence of any corroborative evidence is not justified. Ld. Sr. counsel has then referred to the order of this tribunal dated 14th July 2017 in case of Shashikant Varandani in ITANo.312/Ind/2016 whereby the Tribunal has again deleted the addition made by the AO on account of payment of capitation fee. He has also referred to the assessment order in case of Dr. Suresh Kumar Sharma placed at page no.150 & 151 of the paper book and submitted that the AO has accepted the claim of that assessee and no addition was made. He has then referred the order of the CIT(A) in case of Shri Pankaj Shukla placed at page no. 152 to 168 and

submitted that the CIT(A) had deleted the addition made by the AO on account of capitation fee. Thus, the Ld. Sr. Counsel has submitted that when the allegation of the AO regarding capitation fee was already examined by CIT(A) and this tribunal in the cases of the parents of the students and found that these allegations are not based on any tangible material or fact than the addition made by the AO are not justified. Ld. Sr. Counsel has than referred to the statement of one Dr. D.S. Badukar joint Director in the Government of Madhya Pradesh and submitted that there was no allegation of any capitation fee. Thus allegation of the AO regarding the capitation fee is not substantiated. The AO has also referred to the statement of Shri O.P. Mehar but there is nothing mentioned in the impounded list of students about any alleged payment of capitation fee and therefore, it goes to prove that allegations of the AO are without any basis. The Ld. Sr. Counsel then referred to the statement of one Shri Deepak Chaturvedi Director of the M/s. Akshay Meditech (India) Pvt. Ltd. and submitted that the AO considered that the Deepak Chaturvedi has paid sum of Rs. 12 lakhs but no details about mode of payment, timing or to whom the payment was made is disclosed in the alleged statement as referred by the AO in the assessment order. Moreover, the assessee was not provided opportunity to cross examine the witness whose statement is relied upon by the AO. Further the said allegation of the AO is otherwise baseless when the name of his son Shri Aman Chaturvedi does not appear in the impounded loose paper. Thus, Ld. Sr. Counsel has submitted that the allegations are baseless when his

son's name is not appearing in the list. He has submitted that even otherwise the statement recorded during the survey without any corroborative evidence has no evidentiary value. In support of his contention he has relied upon the order of Supreme Court in case of *CIT vs. S. Khader Khan Son 352 ITR 480*. He has also relied upon the decision of Hon'ble Kerala High Court in case of *Paul Mathew & Sons 263 ITR 101 (Ker).*

4.6 The AO has also referred to the action u/s 132A in case of one Shri Navneet Thakkar on 16.09.2006 in pursuant to the arrest of the said person by the Police on 24th August 2006 outside the premises of People's General Group, Bhopal with cash of Rs.14.65 lakhs. The statement of Shri Navneet Thakkar was recorded wherein he alleged that the cash found with him was for giving for the purpose of securing admission of daughter of Shri Narayan Bhai Nathu Bathwar in the MBBS course. Ld. Sr. counsel has submitted that those allegations were baseless and extracted by the department as Ku. Niharika Bathwar did not appear for DMAT examination conducted for admission to medical and dental colleges and her name did not appear in the list as she was never admitted to the People's College. Further the AO has not made any addition in case of Shri Navneet Thakkar while passing assessment order copy of which is placed at page no. 366 to 368 of the paper book. The order of AO is based on false contentions when the students did not apply and participate in the DMAT examination. Even otherwise when the said statement was not provided to the assesse

and no opportunity to cross examination was given than the same cannot be used against the assesse.

4.7 Ld. Sr. Counsel has submitted that the additions were made solely on the premises of assumptions and presumptions without any documentary and evidentiary basis. Such additions based on presumptions and assumptions and made without allowing cross-examination are not sustainable and warrant setting aside. He has further pointed out that the AO recorded statement of only 1 student out of more than 160 students and therefore, the said statement cannot be a basis of conclusion that the assessee has received capitation fee from other students. Ld. Counsel has relied upon the decision of Bengaluru Bench of Tribunal in case *of Shri DevarajUrs Educational Trust vs. vs. ACIT dated 16.08.2021 in ITANo.500 to 506/Bang/2020* and submitted that the Tribunal has held that when no violation was noticed by the State Authorities or Medical Council of India than it is not possible to conclude on the basis of the loose sheets and jottings that the assessee has collected unaccounted capitation fee from management and NRI quota. He has submitted that the assesse has been granted permission/approval of more and more MBBS sheets over the years and nothing was found by the State Authorities or Medical Counsel of India contrary to the law or rules in respect of the admission or managing the affairs of the medical institutions. He has referred to the details of the approved courses of MBBS, MD/MS seats and submitted that the authorities as well as Medical Council of India were fully satisfied with the functioning of the medical colleges of

the assessee and therefore, new courses have been approved year after year.

4.8 Ld. Sr. Counsel then referred to the allegations of the AO regarding the benefit given to the specified person namely SN Vijayvargiya in the transactions of exchange of lands. The ld. Sr. Counsel has pointed out that the AO has considered only area of the land which was given by the assessee in exchange of the land received by the assesse without considering the fact that guidance value of the land received by the assessee is more than the guidance/ market value of the land given by the assesse in exchange. He has pointed out that the assessee has transferred a land measuring 10.35 acres located at Gram Rasalkhedi, Tehsil Huzur, Bhopal and received in exchange land measuring 9.17 acres located at Gram Bhanpur, Tehsil Huzur, Bhopal and consequently the AO has considered the difference of 1.18 acres as benefit extended to the specified person in violation of the persons of section 13 of the Act. However, the guideline value of the land received by the assessee is Rs.25,00,000/- per hectare as against the guideline value/market value of the land given by the assesse is only Rs.18 lakhs per hectare. Therefore, the market value of the land received by the assessee is Rs. 92.80 lakhs in comparison to the market value of the land given by the assessee at Rs.75.42 lakhs. He has submitted that these guideline values are prescribed by the Government Authorities placed at page 241 of the paper book and therefore the AO has ignored the very relevant and crucial fact on this point. The Ld. Counsel has then referred to the prior

approval of Registrar of M.P. Public Trust under M.P. Public Trust Act 1951 placed at page no.242 & 243 of the paper book and submitted that as per section 14 of the M.P. Public Trust Act1951 a previous sanction of Registrar is required in case of sale etc. of property belonging to the public trust. Therefore, the allegation of the AO for giving benefit to the specified person is unfounded and contrary to the facts.

5. The next contention of the Ld. Sr. Counsel is against rejection of books of account by the Ld. CIT(A) and submitted that the CIT(A) has rejected the books of account of the assessee u/s 145(3) of the Act without issuing any show cause notice required u/s 251(2) of the Act. Ld. Sr. Counsel has submitted that the AO has though disallowed the claim of exemption u/s 11 of the Act on the ground of violation of provisions of section 13 of the Act but the AO did not raise any question about correctness of the books of account. Thus, the CIT(A) cannot invoke the powers of enhancement to reject the books of account without issuing show cause notice to the assessee. This act of the CIT(A) is in most perfunctory and preposterous. Ld. Sr. counsel has submitted that books of account of the assesse ware duly audited and without pointing out any specific defect the rejection of the same on the ground of alleged violation of provisions of section 13 as well as other allegations without any supporting evidence is not justified. In support of his contention he has relied upon following decisions:

i. Zuberi Engineering Company, Delhi v. D.C.I.T., Circle-2, Jaipur. (Hon'ble Jaipur ITAT) order dated 21/12/2018 passed in ITA No. 977/JP/2018

ii. Apeejay Shipping Ltd. Kolkata v. Assistant Commissioner of Income Tax, Central Circle-III, Kolkata ITA No.2485/Kol/2019 Order dated 31/05/2023

iii. State of Kerala Vs C. Velukutty 60 ITR 239 (SC).

iv. Order dated 26/08/2015 of Mumbai Benches of the Tribunal in the case of Malabar Hill Club Vs ACIT in ITA Nos. 517 & 518/Mum/2010m 1560/Mum/2012, 803/Mum/2010, 808/Mum/2010 and 4274/Mum/2012.

v. Decision of Mumbai Benches of the Tribunal dated 27/04/2016 in the case of DCIT Vs M/s Free India Assurance Services Ltd. in ITA No. 5588/Mum/2014 and 5934/Mum/2014.

vi. Decision of this Tribunal dated 25/05/2018 in the case of Sh. Jagdish Narayan Sharma Vs ITO in ITA No. 751 to 753/JP/2015.

5.1 Thus, Sr. Ld. Counsel has submitted that when the activities of the assessee trust are genuine and there was no allegation that the activities of the assesse are not being carried on in accordance with objects of the trust or the assesse is not imparting education then the disallowance of claim of exemption u/s 11 is not justified. There is no breach of conditions laid down in section 11 & 12 of the Act as the assessee is imparting education to the thousands of the students who are studying in the colleges of the assessee. The allegation of the AO is based on unsubstantiated material or statement without giving opportunity of cross examination to the

assesse. The findings of the AO that the activities carried out are not charitable in manner but in commercial manner deserve to be set aside. The assessee trust has been utilizing the funds for achieving objects of imparting education and there was no surplus over the years.

6. On the other Ld. DR has referred to the order of the AO and submitted that the application of the assessee for approval u/s 10(23C)(vi) was rejected by the CIT(E) by citing various defaults and particularly the loose papers were impounded during the TDS survey u/s 133A containing the details of the capitation fee received by the assessee from the students. There is a noting in the pencil against the names of the students the total of which comes to Rs. 8,65,00,000/- and therefore, assessee was not existing solely for education but charging capitation fee against law and regulations for admission in Medical Colleges as prescribed by the State Authority.

6.1 Ld. DR has further submitted that the AO in the assessment u/s 143(3) recorded the statements of the parents of the students and some of them have confirmed the payment of capitation fee. The AO while completing assessment u/s 143(3) for the A.Y. 2006-07 has made an addition of Rs.8,65,00,000/- on account of unexplained receipt in the form of donation. Thus, AO has given finding the assessee has received capitation fee from the parents of the students for admitting them in the MBBS Course in the medical

college run by the assessee. Ld. DR has further submitted that even the Hon'ble High Court vide order dated 24.02.2006 in writ petition filed by various students has observed that there are serious irregularities in the admission process followed by the assesse. The Hon'ble High Court has observed that the assessee has acted arbitrarily in denying admission to the students of the State quota in MBBS/BDS courses and they have been wrongly derived of admission in the aforesaid courses. All these facts established that the assessee is not carrying out the activities for achieving objects of the charity but indulged in the commercial and business activity for profit.

6.2 Ld. DR has further submitted that the AO has also given details of violation of section 13(3) of the Act as the assessee has given benefit to the trustee by transferring the land in garb of exchange of land therefore, there is a clear violation of provision of section 13(3) as well as 11(5) of the Act. The finding given by the CCIT while rejecting application for approval u/s 10(23C)(vi) as well as observation of the Hon'ble High Court show that the activities of the assessee cannot be considered to be charitable within the meaning of section 2(15) of the Act and consequently the assessee is not eligible for benefit of section 11 & 12 of the Act. She has relied upon the orders of the authorities below.

7. We have considered the rival submission as well as relevant material on record. A common issue arises in these five appeals filed by the assessee against assessment order passed u/s 153A

and 143(3) pursuant to search and seizure action is "whether the CIT(A) is justified in confirming the denial of benefit of section 11 & 12 of the Act to the assessee and also disallowing the claim of losses to be carry forward". The AO has passed common assessment order for A.Ys. 2004-05 to 2010-11. There was search and seizure action u/s 132 of the Act on 23rd July 2009 therefore, the assessment for assessment years 2004-05 to 2006-07 were not pending on the date of search and consequently the assessments for these assessment years were not got abated by virtue of search and as per the second proviso to section 153A(1) of the act. The AO has issued notice u/s 153A on 21.02.2011 for filing the return of income for A.Y.2004-05 to 2009-10. In response to the notices u/s 153A the assessee vide letter dated 11.03.2011 submitted that the assessee has filed regular returns and since there is no change in the original return filed same may be treated as return filed in response to notice u/s 153A for A.Y.2004-05 to 2009-10. The regular return was filed by the assesse for A.Y.2010-11 on 20.09.2010 declaring total loss of Rs.12,25,29,221/-. It is pertinent to note that in the return of income filed by the assessee u/s 139 of the Act for all these assessment years i.e. 2004-05 to 2010-11 the assesse declared losses. The assesse trust was registered with the registrar of public trust vide registration no. 6 dated 17.04.2000. The assesse was also granted registration 12A vide order dated 17.10.2000 w.e.f. 07.06.1999. The AO has recorded the facts regarding the registration of the assessee as well as objects of the assessee in brief in para 3 of the assessment order as under:

> *"3. The assessee is a trust registered with Registrar of Public Trust vide registration No.06 dated 17.04.2000. Registration u/s 12A of the Income-tax Act was also granted to it by CIT Bhopal vide certificate dated 17.10.2000 w.e.f. 07.06.1999. The objectives of the trust are to establish hospital for treatment of patients and to incur expenses for treatment of poor people, purchase equipments for the hospital for treatment of patients, for welfare of all the people of trust, to construct Dharmshala and Community welfare buildings, to establish school, college and development centre for welfare children, welfare centre for orphans, widows, to construct hostels for working women and female labours, welfare of handicapped, leprosy patient, old people, blind etc."*

7.1 Thus, the objects of the assessee being charitable in nature are not disputed either by the AO or by any other authority of Income Tax. The AO has also given the details of the educational institutions being Medical Colleges and schools as well as other educational institutions run by the assesse and therefore, the objects and activities of the assessee being imparting education are not in dispute. The AO has denied the benefit of section 11 & 12 to the assesse broadly on four reasons. The first reason given by the AO is that there are irregularities noted by the CCIT while passing order dated 24.10.2007 u/s 10(23C)(vi) of the Act. The extract of the said order has been reproduced by the AO in para 4.1 as under:

> *"4.1 The following irregularities were noticed vide CCIT's order dated 24.10.07:*
>
> *1. The trust is being run on commercial principle. What is more important is the founder/interested person are under no compulsion or legal obligations to apply the profits generated by the education business, a case of outright forfeiture of exemption claim. It has been*

held in the order that "the objects other than the objects 1, 5 and 15 of the object clause pertain to non educational and cannot even be termed as objects either incidental to attainment of the educational objects or ancillary to the educational objects. In the instant case the objects of applicant trust are distributed i.e., all the objects are independent of each other. There is nothing in the constitution of the trust to prevent the governing body from applying its income to non-educational objectives. Thus in this case the aliment of private profit is also there and the dominant object of the applicant trust is profit making and education is incidental. Therefore the applicant trust, which has its large number of non- educational objects and there is no restriction in the trust deed regarding application of income towards non-educational objects, does not qualify for approval u/s 10(23C) (vi) of the Income tax Act, 1961."

2. Non-Compliance with the laid down principles to satisfy public character as is evidenced by arbitrary pick and choose method in admission procedure. The trust does not exist solely for educational purpose as there are several objects of the trust, some of which are educational and some are non-educational and the trust is permitted to apply its income to any of the objects in its discretion. It is proved that the applicant has its own discretion to apply the income to educational purpose or otherwise.

3. The trust has violated the guidelines issued by the Hon'ble Supreme Court of India in terms of article 19 (1)(G) of the constitution of India in case of Inamdars, a case of Violation of the constitutions itself, not to speak of the violation of Income tax Act, 1961, a mere creature of the constitution.

4. Several writ petitions have been filed before the Hon'ble M.P. High Court against the applicant alleging that the applicant trust is discriminating amongst students for granting them admission in its various professional institutes. These writ petitions were preferred by the petitioners for quashment of admissions given by the management usurping seats of State Quota of MBBS/BDS courses, which were required to be filled on the basis of pre-medical test conducted by Professional Examination Board throughout the State of Madhya Pradesh. The averments made in these Writ Petitions are summarized as under: -

(i) The students whose names found place in the list sent by Director of Medical Education for admission in State quota were not given

admissions and seats reserved for them were rather given to the candidates of management exceeding its quotas.

(ii) Petitioners' case was that they were selected as per their merit in PMT examination for the year 2005-2006. Petitioners were allotted the seats in Peoples College of Medical Science and Research Centre, Bhanpura, Bhopal (hereinafter referred to as "the College"). At the time of counseling, they were asked to deposit an amount of Rs.10,000/- by way of security. The incumbents had deposited fee of Rs.1,87,000/- for 1st year of MBBS course and the requisite fee for BDS course. In addition bond was got executed from them that in case they leave pursuing further course of MBBS/BDS, they would deposit the entire fees of 4½ years. They were also verbally asked to furnish bank guarantee for admission in MBBS course of Rs.5,67,000/- and Rs.3,30,000/- for BDS course. When they approached the college in the month of October, 2005, the said amount was not accepted and they were told that their admissions were cancelled, without assigning any reasons.

(iii)Persons of lesser merit were admitted in management quota. Out of 150 seats of MBBS, 75 seats were reserved for management quota and 75 for state quota. College had received a sum of Rs.30 lacs from the persons to give admissions against State quota seats. However, state quota seats have been illegally usurped by the college and used for management quota.

(iv) During counseling petitioners were never told to furnish bank guarantee (as discussed above) as such demand of fixed deposit/ bank guarantee is per se arbitrary and bad in law.

(v)The College had admitted 101 students of management quota as against permissible strength of 75 seats. As per law, it was not permissible to the institution to admit students against the State quota. The students of the State quota were illegally deprived of admissions and the condition of furnishing bank guarantee was not informed at the time of counseling, which was a devise to deny the admissions. In the prospectus for the year 2005-06, no such condition was mentioned. In the advertisement also which was published for management quota, condition of furnishing bank guarantee was not mentioned. Even when petitioners had deposited huge fees along with the security, they had submitted a bond also which was required to be furnished and thereafter orally they were asked to furnish bank guarantee and when they wanted to furnish it

in the month of October, 2005, after anyhow managing for it, it was not accepted, their admissions as against State quota seats were illegally cancelled. On the other hand, from other students who were admitted in their place, bank guarantees were not asked and thus petitioners were discriminated with. As the admissions were already given to the students and the college wanted to give admission to the students of its choice even as against the State quota seats by accepting the donations, the students selected in PMT for MBBS/ BDS course in State quota have been deprived of admissions."

7.2 Thus, it is clear that the said order was already in existence since 24.10.2007 and is not incriminating material found or seized during the course of search. Further in the said order the CCIT observed that certain students have approached the Hon'ble Jurisdictional High Court in a writ petition against the irregularities in the admission to MBBS/BDS course and solely on the basis of the order of the Hon'ble Jurisdictional High Court dated 24.02.2006 the CCIT vide order dated 24.10.2007 denied the approval u/s 10(23C)(vi). Thus, except allegation of the irregularity in the admission to the course of MBBS/BDS there was nothing either pointed out or alleged by the CCIT while coming to the conclusion that the assessee is being run on commercial principal and not solely for education purpose. The AO has also reproduced the extract of the observation of the Hon'ble jurisdictional High Court vide order dated 24.02.2006 in the writ petition no.12623, 12694 & 12946/ 2005 as reproduced in para 4.2 of the assessment order as under:

Para No. of the order	Observation/decisions
9	It is not in dispute that the college has utilized the seats of state quota of MBBS and BDS course for

	the year 2005-06. It is not permissible to the management to give admissions as against State quota seats out of its own list.
9	Thus, we find that it was not permissible for college to exceed the admission of management quota for "any reason", hence management quota in MBBS course shall stand reduced in 2006-07 by 26 seats of MBBS and to the number of seats utilized of BDS course so as to set off effect of excess admission in the management quota in the year 2005-06.
10	Now we come to the question as to procedure adopted by the management for the purpose of admission in MBBS course. An enquiry was ordered by this Court into admissions made. A three member committee was constituted, enquiry has been conducted by Dr. P. Kumar Addl. Secretary, Medical Council of India, Dr. Manorama Singh, Joint Director of Medical Education and Dr. N. M. Shrivastava, Assistant Professor of Medical College, Bhopal. They have submitted report dated 26.11.2005 after conducting an enquiry.
10	26 seats were already filled up out of the State quota in last week of July, 05 and those students were attending the classes from 1 ^ mu August, 05 [conclusion of the enquiry report].
10	75 students admitted against management quota were also obtaining admissions with effect from 1.8.05 whereas they had deposited the fees on 2 ^ (nd) 3 ^ (rd) 5 ^ (th) and 13 ^ (fh) of August, 05 [conclusion of the enquiry report]
10	As against 26 seats of State quota, the students of management quota were admitted and they were shown to had been attending the classes with effect from 1.9.05 whereas their fees was shown to be deposited on 30 ^ (th) September, 05 [conclusion of

	the enquiry report).
10	A list was sent by Dean of the Medical College to the Secretary, Medical Council of India that as against 26 seats of MBBS of State, quota, the management had given admissions to the management quota students in the counseling held with effect from 26 ^ (fh) July to 30th July, 05 and they were attending the classes with effect from 01.8.05.
12	It is apparent that no semblance of procedure was adopted by the college for admission. Handwritten applications on plain paper were invited, to be handed over at admission cell counter during working hours, no call letters were issued, no intimation of selection was sent, no information of counseling and merit list was published on the notice board. In the information sent to Secretary, Medical Council of India on 05.10.05 it was mentioned that 26 students who were admitted against the State quota seats had started attending the classes with effect from 1.8.05, enquiry committee has found that prospectus was not made available to students which has been produced before us by the college. Record of presence/ absence of students at the time of counseling was not maintained. No intimation in writing was sent in entire process of selection except issuing the advertisement. Intimation of State quota seats which remained vacant on 27.9.05 was not sent to Director of Medical Education in order to enable the Director to make further allotment. It appears that students against State quota seats were already admitted and 26 of MBBS course students started attending the course from 1.8.05 as mentioned by Dean in letter to MCI which is clinching evidence. It is not a case of typographical error. Management appears to have adopted method to usurp the State quota seats, even before last for admission for State quota seats was over.

13	As such it cannot be said that as per merit, select list and waiting list of management quota were prepared. It is clear that lesser meritorious candidates were given admissions in management quota in select list as compared to waiting list candidates.
14	Students of State quota have been unjustly deprived the admission in the college. Procedure adopted by the college was not transparent and fair. Room was kept to pick and choose the students though they had deposited fess requisite bond of Rs.1,87,000/- for MBBS and for BDS fee for one year Rs.1,21,000/-.
15	Such onerous condition could not have been imposed subsequently. Oral condition of furnishing of bank guarantee was used as a devise by the college not to give admissions to the State quota candidates who were unable to put stake to management quota seats. They were not given sufficient time to manage for it and they have been deprived of admissions in illegal manner.
16	Obviously, respondent no.5 i.e. college wanted to give admissions by imposing such an onerous condition on the State quota candidates to give way to the students whose counseling was held in excess of management quota in last week of July, 2005.
17	Thus, we find that in the instant cases the demand made was unauthorized and illegal. It was a device to usurp the State quota by giving admissions to the students of management quota and the college had earlier given admissions to 26 students.
17	We find that college had acted arbitrarily in denying the admissions to the students of State quota in

	MBBS/ BDS course, they have been wrongfully deprived of the admissions in the aforesaid courses.
21	Resultantly, the writ petitions are allowed. It is directed that the admissions against 26 seats of MBBS of State quota filled in by the management by the students of its choice, the management quota for the academic session 2006-07 shall stand reduced to the extent of 26 seats, no additional seat shall be created. The petitioners who had opted for MBBS course shall be admitted in the next academic year 2006-07 as against the aforesaid seats to be reduced of the management quota and if still 26 seats are not utilized, additional students shall be allotted on the basis of merit of PMT, 2006 to the corresponding number of seats which remain vacant after admissions of the students in the aforesaid manner.

7.3 The AO has then concluded in para 4.3 as under:

"4.3 Considering the aforesaid findings given in the order of the Hon'ble Chief Commissioner of Income Tax, Bhopal as well as observation of Hon'ble High Court, activities of the assessee trust are not considered to be charitable within the meaning of section 2(15) of the Income Tax Act. As a consequence the assessee will not be eligible for the benefit of exclusion of income u/s 11(1) of the Income Tax Act."

7.4 Thus, the only grievance of the petitioners before the Hon'ble High Court was the irregularities in the admission and thereby the denial of admission to certain students of State Quota in MBBS/BDS Courses. The Hon'ble High Court has disposed of the writ petitions and directed the assessee to grant admission against

26 seats of MBBS of State Quota by taking the seats from management quota for the academic session 2006-07 and thereby the management quota for the academic year 2006-07 stand reduced to the extent of 26 seats. On compliance of the directions of the Hon'ble High Court the matter stood resolved and no more in existence. There is no further dispute or allegation regarding irregularities in admission. It is pertinent to note that 2005 was the first academic session and therefore, the assessee admitted the students in the management quota exceeding the permissible limit and thereby consumed the state quota of 26 seats also. But that irregularity and deficiency was rectified by the Hon'ble High Court and consequently complied with by the assessee. Thereafter no irregularities were reported and therefore, in the subsequent years the assesse was granted approval by Medical Council of India (MCI) for more and more courses as well as seats in various medical courses. The details of the increase in number of seats from time to time for the various medical colleges and other educational institutions are as under:

People's College ofMedical Science & R.C

Approvals of MBBS

SL NO	Name of Course	Nature of Permission	Date of Permission	No of Seat
1	MBBS	Establishment of New Medical College with 150 MMBS Seats	7/13/2005	150
2	MBBS	Renewal of Permission for 150 MBBS Seats	7/13/2010	150
3	MBBS	Continuance of Recognition of 150 MBBS Seats	5/5/2017	150
4	MBBS	Approval for Increase of MBBS seats from 150 to 200	2/10/2022	200
5	MBBS	Approval for increase of MBBS Seats from	12/29/2022	250

		200 to 250		

Aprrovals of MD/MS Seats

SL NO	Name of Course	Nature of Permission	Date of Permission	No of Seat
1	MD(Community Medicine)	Approval for starting of New Course	1/1/2011	4
2	MD(Microbiology)	Approval for starting of New Course	2/2/2011	3
3	MD(Pharmacology)	Approval for starting of New Course	2/17/2011	2
4	MD(Biochemistry)	Approval for starting of New Course	2/26/2011	2
5	MD(Physiology)	Approval for starting of New Course	2/26/2011	2
6	Ms(Obestetrics & Gynaecology)	Approval for starting of New Course	2/27/2011	4
7	MS(General Surgery)	Approval for starting of New Course	2/27/2011	4
8	MD(Anatomy)	Approval for starting of New Course	2/28/2011	2
9	MD(Anaesthesiology)	Approval for starting of New Course	2/28/2011	1
10	MD(ENT)	Approval for starting of New Course	2/28/2011	2
11	MD General Medicine	Approval for starting of New Course	2/28/2011	4
12	MD(Respiratory Medicine)	Approval for starting of New Course	2/28/2011	1
13	MD(DVL)	Approval for starting of New Course	3/3/2011	2
14	MD(Pathology)	Approval for starting of New Course	3/16/2011	2
15	Ms (Orthopaedics)	Approval for starting of New Course	3/31/2011	1
16	MD (Paediatrics)	Approval for starting of New Course	3/31/2011	2
17	MD(Psychiatry)	Approval for starting of New Course	3/31/2011	1
18	MD(Forensic Medicine)	Approval for starting of New Course	4/27/2011	3
19	MD(Radio-Diagnosis)	Approval for starting of New Course	4/27/2012	2
20	Ms (Ophthalmology)	Approval for starting of New Course	3/28/2013	1
21	MD(TB Respiratory Medicine)	Approval for starting of New Course	3/28/2013	2
22	MD(Psychiatry)	Increase of Seats	3/29/2013	2
23	MS(General Surgery)	Increase of Seats	2/22/2021	10
24	MD(Dermatology Venerology& Leprosy)	Increase of Seats	10/29/2021	5
25	MD(Anaesthesiology)	Increase of Seats	10/29/2021	8
26	MD(Radio-Diagnosis)	Increase of Seats	10/29/2021	4
27	Ms (Ophthalmology)	Increase of Seats	11/20/2021	3
28	MD(Respiratory Medicine)	Increase of Seats	11/30/2021	4
29	MS(ENT)	Increase of Seats	1/13/2022	3

30	MD(Psychiatry)	Increase of Seats	2/7/2022	3
31	MD General Medicine	Increase of Seats	2/9/2022	8
32	MD (Paediatrics)	Increase of Seats	2/17/2022	4
33	Ms (Orthopaedics)	Increase of Seats	4/4/2022	7
34	Ms(Obestetrics & Gynaecology)	Increase of Seats	9/1/2022	9

Aprrovals ofDM/MCH Seats				
SL NO	**Name of Course**	**Nature of Permission**	**Date of Permission**	**No of Seat**
1	DM(Endocrinology)	New Course	9/27/2022	2

Approvals for other colleges

Sno	**Name of College**	**Course**	**Seat**
1	People's Dental Academy	BDS	100
		MDS (Periodontology)	3
		MDS (Orthodontics & Dentofacial orthopedics	5
		MDS(Paedodonticsand Preventive Dentistry)	3
		MDS(Oral & Maxillofacial Surgery)	5
		MDS(Consevative Dentistry and Endodntics)	5
		MDS(Prosthodontics and Crown& Bridge)	5
		MDS(Oral Medicine & Radiology)	3
		MDS (Public Health Dentistry)	3
2	People's College of Dental Science & R.C	BDS	100
		MDS (Periodontology)	3
		MDS (Orthodontics & Dentofacial orthopedics	3
		MDS(Paedodonticsand Preventive Dentistry)	3
		MDS(Oral & Maxillofacial Surgery)	3
		MDS(Consevative Dentistry and Endodntics)	3
		MDS(Prosthodontics and Crown& Bridge)	5
		MDS(Oral Medicine & Radiology)	3
		MDS (Public Health Dentistry)	3
		Diploma Dental Mechanics	15

		Diploma in Dental Hygienist	15
3	People's College of Paramedical Science	Bachelor of Physiotherapy(Degree)	50
		Medical Lab Technician(Degree)	50
		Medical Lab Technician(Diploma)	50
		Dialysis Technician(Diploma)	50
		Master of Physiotherapy(Ortho)	5
		Master of Physiotherapy(Neuro)	5
		Master of Physiotherapy(Cardio)	5
		Master of Physiotherapy(Sports)	5
		Human Nutrition(Degree)	50
		Aneasthesia Technician(Diploma)	50
		X-Ray (Radiographer) Technician (Diploma)	50
		Ortrometric Refraction(Diploma)	50
		CathLab Technician(Diploma)	50
4	People's College of Nursing Science & Research Center	BSC Nursing	100
		G.N.M	60
		MSC (Nursing) Medical Surgicals Nursing	3
		MSC (Nursing) Community Health Nursing	5
		MSC (Nursing) Obestetric Nursing	6
		MSC (Nursing) Pediatric Nursing	6
		MSC (Nursing) Psychiatric Nursing	5
		P.B.B.Sc	30
5	School of Pharmacy and Research Center	B.Pharma	100
		D. Pharma	60
		M.Pharma	15
6	People's Institute of Management and Research Center	MBA	120
		MBA(Hospital Administration)	30
		B.COM Honors	30
		BBA	60
		Integrated MBA	30
		B.Com	30

		M.com	18
7	People's Institute of Hotel Management Catering Technology & Applied Nutrition	BHMCT	60
		BBA(HA)	30
		PGDHMCT	20
8	School of Research and Techonology	B-Tech Civil Engg	60
		B-Tech Computer Science Engg	60
		B-Tech Electrical Engg	60
		B-Tech Electronics and Communication Engg	30
		B-Tech Mechanical Engg	60
		Diploma In Civil Engg	60
		Dilpoma Computer Science Engg	60
		Diploma Electrical Engg	60
		Diploma Electronics and Communication Engg	60
		Diploma Mechanical Engg	60
		Master of Teconology -Thermal Engg	18
		Master of Teconology -Production Engg	18
		Master of Teconology -Computer Science Engg	18
		Master of Teconology - Cyber Security	18
		Master of Teconology -Construction Techonology Management	30
		Master of Teconology -Structural Engg	18
		Master of Teconology -Transportation Engg	18
		Master of Teconology -Urban Planning	18
		Master of Teconology -Digital Communication	18
		Master of Teconology -Power System	18

7.5 The above details of approval of the seats from time to time by the Medical Council of India(MCI) shows that there was no infirmity

or irregularity found by the authorities and particularly the medical council of India as well as State Authorities regarding functioning of the medical institutions run by the assessee as well as following prescribed rules/regulations and other laws governing admissions except for the first year where the Hon'ble High Court has passed the directions to undo the irregularities. When there is no objection or action taken by the MCI as well as other authorities constituted under Medical Council Act 1956 against the assessee then it is not a case of a continuous violation on the part of the assessee in functioning the educational institutions. Even otherwise the order of the Hon'ble High Court dated 24.02.2006, the order of the CCIT passed u/s 10(23C)(vi) are not incriminating material found or seized during the course of search and seizure action to be considered in the proceedings u/s 153A of the Act and particularly for the assessment years which were not pending as on the date of search.

7.6 Secondly, the order of the Hon'ble Jurisdictional High Court dated 24.02.2006 as well as order of the CCIT dated 24.10.2007 were the a basis of the assessment order passed by the AO u/s 143(3) for the A.Y.2005-06 on 28.12.2007. The AO while passing the scrutiny assessment for A.Y.2005-06 also denied the benefit of section 11 & 12 to the assessee relying on the above order of the Hon'ble jurisdictional High Court and consequential order of the CCIT dated 24.10.2007 passed u/s 10(23C)(vi) of the Act. The said denial of the benefit u/s 11 & 12 was challenged by the assessee before the CIT(A) who has reversed assessment order while passing

appellate order dated 08th July 2013. The revenue has filed an appeal before the Tribunal which is being disposed of by this composite order. Thus, in the assessment order passed u/s 153A the AO has just copied assessment order passed u/s 143(3) dated 28.12.2007 for A.Y.2005-06 which was already reversed by the CIT(A) and to that extent these two orders of CCIT passed u/s 10(23C)(vi) as well as the order of the Hon'ble jurisdictional High Court cannot be a basis for denial of benefit u/s 11 & 12 of the Act.

8. The next allegations on the basis of which the AO denied the benefit of section 11 & 12 is regarding on money payment of Rs.30 lakhs in respect of purchase of property B-104/X/Y/Z, 1st Floor, Royal Classic Co-operative Housing Trust, Andheri (W), Mumbai. The AO has stated in para 6 that during the search and seizure action in July 2009 at the office of PGH International Pvt. Ltd. cum residence of Shri Rajesh Bhalla located at 401, B-6 Veena Nagar, LBS Marg, Mulund (W) Mumbai two documents LPS-1 pages 78 to 90 were seized from the possession of Shri Rajesh Bhalla. The statement of Shri Bhalla was recorded allegedly u/s 132 of the Act wherein the purchase consideration was explained regarding the purchase of the two properties including the property in Royal classic Housing Cooperative Trust Andheri. Page 90 of LPS -1 of the seized material is a certificate of withdrawal of Rs.25 lakhs from the bank accounts of the Educational Institutions of the assessee trust based on the said letter being an authorization/certificate of withdrawal of a sum of Rs.25 lakhs the AO has concluded that the assessee has paid on money of Rs.30 lakhs in respect of the

purchase of the said property by PGH International Pvt. Ltd. The AO has not disputed the fact as recorded in the sale deed that the property was in fact purchased by PGH International Pvt. Ltd and not by the assesse. Further the letter which was found during the search is also not in dispute and the details of the said letter is part of the books of account as well as bank account statement of the assessee showing withdrawal of Rs.25 lakhs on various dates. The AO has concluded in para 6.6 to 6.9 page 28 & 29 of the assessment order as under :

> *"6.6 Thus, it is established and held that on money of Rs. 85,00,000/- has been paid in cash through Shri Rajesh Bhalla for purchase of two properties by M / s PGH International Pvt. Ltd. as detailed in para 6.1 of this order. This amount represents investment out of undisclosed sources in hands of M / s PGH International Pvt. Ltd. The same shall be added to the total income of M/s PGH International Pvt. Ltd. (Rs. 55 ,00,000/\ for AY 2008-09 and Rs. 30,00,000/- for AY 2009-10). Further, as discussed later in this order out of the total addition of Rs. 85,00,000/-, an amount of Rs. 30,00,000/- is added on substantive basis in the hands of the assessee trust and further this amount is added on protective basis in the hands of M/s PGH International Pvt. Ltd (relevant to A.Y 2009-10).*
>
> *6.7 It is also important to mention the following facts about payment of Rs. 30,00,000/- in cash as on money for purchase of property at serial no. 1 of table in para 6.1 of this order:*
>
> *1. On perusal of Balance Sheets of the assessee trust and its three institutions namely Peoples College of Dental Sciences, Peoples College of Medical Sciences and Research Centre and Peoples Dental Academy as on 31.03.2008 (the period during which such funds were transported to Mumbai for purchase of property in the name of PGH International Private Limited) it is found that no amount is receivable by the assessee trust either*

from the company M / s PGH International Private Ltd. or the Vijaywargiya family.

2. In its reply the assessee trust has duly confirmed that the cash amounts were drawn from the three accounts of the institutions of the trust and the same were carried by Shri Bhalla from Bhopal to Mumbai. The assessee trust has further contended that since the purchase of deal did not materialize therefore the said amount has been deposited back in the account of the trust. However, the assessee trust has neither given any details about the deal it wanted to materialize (which eventually did not materialize) nor as to how the said funds were brought back to Bhopal. It stands to reason that if the assessee trust had given the funds to Shri Rajesh Bhalla then his version about the purpose of utilization for the same has to be considered authentic even more so when there are over whelming corroborative evidences in support and no evidence to the contrary.

3. The property located at B-104 at Royal classic Co-operative Housing Trust, Andheri, Mumbai is used as the residence of Smt. Neha Vijayvargiya and her husband Shri Rohit Pandit. Smt. Neha Vijayvargiya is daughter of Shri S. N. Vijayvargiya and is trustee in the trust.

4. Therefore, it is crystal clear that this amount which is originating from the accounts of the assessee trust has been utilized to purchase property in the name of ML / s PGH International Pvt. Ltd. in Mumbai. Shri S. N. Vijayvargiya and Shri Ramvilas Vijayvargiya are directors in this company. They also happen to be the office bearers in the trust. Thus, it is established and held that funds of the assessee trust have been used to buy property in the name of the company where the office bearers directly have substantial interest. The documents seized during the course of search establish the origin, sequence and the final destinations of the money being utilized to pay on money to buy flat in the name of the company.

6.8 Thus, it is established and held from the above discussion that benefit has been given by the trust to the company in which

trustees are directors by using the funds of the trust in purchase of the property in the name of the company. Thus, it is also established and held from the facts mentioned as above, that person mentioned in sections 13(3) has been benefited from the institution as per provision of section 13(2)(c) of the IT Act. Therefore, the provisions of section 13(1) are applicable and section 11 and 12 will not operate in this case for the relevant assessment year ie. 2009-10. Therefore, for computation of total income of the assessee the normal provisions of law shall apply and exemption u/s 11 & 12 shall not be available to the assessee for this assessment year.

6.9 Further, this amount of Rs. 30,00,000/- siphoned off from the accounts of the trust used for the benefit of the trustees shall not be allowed an eligible expenditure by the assessee trust towards its objects. Therefore, an addition of Rs. 30,00,000/- is hereby made to the total income of the assessee trust for AY 2009-10 on sustentative basis. Further, as discussed before in this order, this amount of Rs. 30,00,000/- shall also be added in total income of M / s PGH International Pvt. Ltd. on protective basis for AY 2009-10. Penalty proceedings u/s 271AAA is also initiated for AY 2009-10."

8.1 The AO has presumed that out of Rs.85,00,000/- paid as on money by PGH International Pvt. Ltd the assessee has contributed a sum of Rs.30 lakhs and consequently the said amount was added in the hands of the assessee and it was considered as a violation of section 13(3) r.w. section 13(2)(c). Thus, the AO has denied the benefit of section 11 & 12 on account of violation of provisions of section 13(3) and in view of the provisions of section 13(1) of the Act. It is pertinent to note that there is no dispute about withdrawal of a sum of Rs.25 lakhs and the certificate found during the search contains details of the withdrawal from the bank accounts which is matter of record and not something detected or found during the

course of search and seizure action. The Ld. Sr. counsel has referred to the certificate of Central Bank of India regarding withdrawal of Rs.25 lakhs from three bank accounts. The details of which are as under:

	A/c No.	College Name	Amount	Withdral date
1	1282312668	Peoples College of Dental Science	Rs.9 lakhs	12.01.2008
2	1282312512	Peoples College of Dental Science	Rs.8 lakhs	14.01.2008
3	1282326342		Rs.8 lakhs	11.01.2008
		Total	Rs. 25 lakhs	

8.2 All these transactions are duly reflected in the respective bank account statements placed at page no.175 to 210 and the particular entries are reflected at page no.175, 187, 192 and 210 of the paper book.

8.3 Ld. Sr. Counsel has also took us to the bank account statement and submitted that entire amount was redeposit in these bank account on 16.01.2008, 28.01.2008 and 28.02.2008 and all the entries of deposit of Rs.9 lakhs, Rs.8 lakhs and Rs.8 lakhs in these three accounts were also reflected in the bank account statements at page no.177, 186,188,193, 197 & 201 of the paper

book. Thus, it is clear that the transactions of withdrawal of the said amount of Rs.25 lakhs in the month of January 2008 and re-deposit of the same except Rs.3,50,000/- is also in the month of January 2008 and Rs.3,50,000/- was re-deposited on 28.02.2008 which is 1-1/2 year prior to the date of search. Therefore, the said certificate of withdrawal of the money would not constitute an incriminating material leading to any addition in the hands of the assessee when both the withdrawals as well as redeposit were made prior to the search and even prior to the transactions of purchase of the said property by PGH International Pvt. Ltd. It is also pertinent to note that the transaction of the purchase of the property is not between the seller and the assesse as it is evident from the purchase deeds which were found during the search then the alleged on money payment cannot be attributed to the assessee. We further noted that except the statement of Shri Rajesh Bhalla there is no material found during the search to show any payment more than the payment recorded in the purchase deed through cheques by the purchaser company and therefore, in absence of any corroborative evidence of payment on money addition made and conclusion reached by the AO is purely on the basis of assumption and presumption. Even otherwise when the AO has relied upon the statement of Shri Rajesh Bhalla while passing the order then without giving opportunity of cross examination to the assessee the order of the AO based on the said statement is not sustainable. There is no quarrel on the point that the assessee has a right to be confronted with the information before the same is used against

assesse. It is incumbent upon the AO to disclose and confront to the assessee all the material on the basis of which he is going to pass the order. The assessee has all the rights to know the evidences and information which was to be used by the AO against it so that it would bring his own stand and material to meet such information/evidences brought against it by the AO. The AO has reached to the conclusion that the assessee has paid on money in respect of the purchase of the property by PGH International Pvt. ltd. solely on the basis of the statement of Shri Rajesh Bhalla but the assesse was not given an opportunity to cross examine Shri Rajesh Bhalla. The AO has stated in para 2.1 that the notice u/s 142(1) along with the questionnaire was issued on 19.08.2011 and thereafter no show cause notice was issued by the AO for giving assessee an opportunity to put up its stand or cross examine the witness whose statement was relied upon by the AO. Therefore, there is a clear violation of principle of natural justice as held by the Hon'ble Supreme Court in case of *Andaman Timber Industries vs. Commissioner of Central Excise (supra)* as under:

> *"6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such*

an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions."

8.4 Further the Hon'ble Delhi High Court in case of Principal Commissioner of Income-tax, Delhi-2 v. Best Infrastructure (India) (P.) Ltd. [2017] 397 ITR 82 (Delhi) has held as under:

"36. *Turning to the facts of the present case, it requires to be noted that the statements of Mr. Anu Aggarwal, portions of which have been extracted hereinbefore, make it plain that the surrender of the sum of Rs. 8 crores was only for the AY in question and not for each of the six AYs preceding the year of*

search. Secondly, when Mr. Anu Aggarwal was confronted with A- 1, A-4 and A-11 he explained that these documents did not pertain to any undisclosed income and had, in fact been accounted for. Even these, therefore, could not be said to be incriminating material qua each of the preceding AYs.

37. *Fourthly, a copy of the statement of Mr. Tarun Goyal, recorded under Section 132 (4) of the Act, was not provided to the Assessees. Mr. Tarun Goyal was also not offered for the cross-examination. The remand report of the AO before the CIT(A) unmistakably showed that the attempts by the AO, in ensuring the presence of Mr. Tarun Goyal for cross-examination by the Assessees, did not succeed. The onus of ensuring the presence of Mr. Tarun Goyal, whom the Assessees clearly stated that they did not know, could not have been shifted to the Assessees. The onus was on the Revenue to ensure his presence. Apart from the fact that Mr. Tarun Goyal has retracted his statement, the fact that he was not produced for cross- examination is sufficient to discard his statement.*

38. *Fifthly, statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material as has been explained by this Court in Harjeev Aggarwal (supra). Lastly, as already pointed out hereinbefore, the facts in the present case are different from the facts in Smt. Dayawanti Gupta (supra) where the admission by the Assessees themselves on critical aspects, of failure to maintain accounts and admission that the seized documents reflected transactions of unaccounted sales and purchases, is non-existent in the present case. In the said case, there was a factual finding to the effect that the Assessees were habitual offenders, indulging in clandestine operations whereas there is nothing in the present case, whatsoever, to suggest that any statement made by Mr. Anu Aggarwal or Mr. Harjeet Singh contained any such admission.*

39. *For all the aforementioned reasons, the Court is of the view that the ITAT was fully justified in concluding that the assumption of jurisdiction under Section 153A of the Act qua the Assessees herein was not justified in law.*

40. *Turning to the additions under Section 68 of the Act made on merits for three of the AYs. A perusal of the common impugned order of the ITAT reveals that a very detailed discussion has been undertaken after analysing the seized material. Para 38 of the impugned order is relevant in this context which reads as under:*

"38. Before the learned CIT (A), the assessee has produced the copy of bank account of all the share applicant companies. The CIT (A) has admitted the same as, additional evidence and has called for the remand report from the Assessing Officer. There is no cash deposit in the bank account of any of the share applicant before the issue of cheque for share application money to the group companies of the assessee. On the other hand, the credit is by way of transaction. During remand proceedings, the Assessing Officer has made necessary verification from the bank of the share applicant and no adverse finding is recorded by him in the remand report. Therefore, the facts on record are contrary to the allegation of the Revenue that the assessee gave cash to Shri Tarun Goyal and he, after depositing the same in the bank account of various companies, issued cheques for share application money. On these facts, the decision of Hon'ble Jurisdictional High Court in the case of Harjeev Aggarwal (supra) would be squarely applicable. Therefore, we hold that the statement of Shri Tarun Goyal cannot be used against the assessee because:

> *His statement was recorded behind the back of the assessee and the assessee was not allowed any opportunity to cross-examine him.*
>
> *There is no corroborative evidence in support of the statement of Shri Tarun Goyal. On the other hand, the material found during the course of search and other evidences placed on record by the assessee are contrary to the allegation made by Shri Tarun Goyal in his statement."*

41. *The Court has not been persuaded to hold that the above finding of the ITAT on the legal position regarding the Revenue*

being disabled from relying on the statement of Mr. Tarun Goyal suffers from any perversity. Further the ITAT has in the impugned order in paras 45 and 46 observed as under:

"45. Now, we come back to the facts of the assessee's case in respect of the share application money received. The assessee has furnished the affidavit of the director of share applicant company, share application form, confirmation from share applicant, certificate of incorporation of the shareholder company and copy, of income tax return of share applicant company. The Assessing Officer has disputed the validity of the affidavit on the ground that affidavit is not certified by the notary and the stamp paper for purchase of affidavit is dated prior to the application made for share application money. On verification of the copy of the affidavit which is placed at pages 48 & 49 of the assessee's paper book, we find that the affidavit is not made in the presence of notary public and, therefore, it cannot be considered as affidavit in legal sense. Nevertheless, it remains a self-declaration by the director of share applicant company in which he has confirmed that the company has applied to M/s Best City Developers (India) Private Limited for 15 lakhs equity shares for which payment of Rs.1,50,00,000/- has been made by cheque. The detail of cheque number and the name of the bank have also been provided. In paragraph 3, the permanent account number of the share applicant company has also been provided. In paragraph 2, it is mentioned that the share applicant company is registered with Registrar of Companies and registration number along with date of registration is also given. The assessee has furnished share application form for which also the address of the share applicant company, number of shares applied for, amount paid by cheque, details of cheque number as well as permanent account number of the company has been given. The confirmation has been filed by the share applicant company giving all necessary particulars and, for ready reference, we reproduce the same herein below:

Aries Crafts Private Limited

13/34, W.F.A., IVth Floor, Main Arya Samaj Road, Karol Bagh,

New Delhi-110005

To whom it may concern

Name of the Company:	*Best City Developers (India) Pvt. Ltd.*
Number of shares:	*15000000 Equity Shares of Rs.1 each at a premium of Rs.9 per share.*
Amount invested:	*Rs.150,00,000/- Rupee One Crore Fifty Lac Only.*

Details of Payment as under

Chq. No.	*Date*	*Amount (Rs.)*	*Bank*	*Branch*
474604	*15.03.2008*	*100,00,000*	*HDFC Bank Ltd.*	*New Delhi*
474615	*25.03.2008*	*50,00,000*	*HDFC Bank Ltd.*	*New Delhi*
		Total 150,00,000		

Bank Account No	*:*	*003142340000152*
Bank Particulars	*:*	*HDFC Bank Limited Ansari Road, Darya Ganj, New Delhi - 110 002*
Source of funds	*:*	*Out of sale of shares*
Occupation	*:*	*Business*

Income Tax PAN Number: AADCA5439P Ward 1(3), New Delhi.

Share Certificates Received: Yes

We do hereby confirm that the information furnished above is correct. For Aries Crafts Private Limited

Sd/-

Authorised Signatory

46. From the above, it is evident that the share applicant company has given the confirmation on its letter head which gives the complete address of the said company. In the confirmation, number of shares applied and the amount invested has been given. Details of payments i.e., cheque number, date of cheque and name of the bank on whom cheque is drawn is given. Address of the bank and bank account number has also been given, source of fund is given as well as permanent account number of the company is also given."

42. *Thereafter the ITAT held in para 48 as under:*

"48. .....In the case under consideration before us, the assessee has duly furnished the declaration of the director of the share applicant company, share application form, confirmation and certificate of incorporation from Registrar of Companies as well as income tax return of the share applicant company. The Assessing Officer did not make any verification from those documents. In this case, he even did not issue any summons to the director of the share applicant company neither made any cross verification from the income tax record of the share applicant company whose permanent account number was furnished before him. The Assessing Officer simply rejected the evidences furnished by the assessee. Hon'ble Jurisdictional High Court in the case of Gangeshwari Metal Pvt. Ltd. (supra) has disapproved the action of the Assessing Officer wherein the Assessing Officer sits back with folded hands till the assessee exhausts all the evidence or material in his possession and then comes forward to merely reject the same on the presumptions. The facts in the assessee's case are identical to the facts before the Hon'ble Jurisdictional High Court in the case of Gangeshwari Metal Pvt. Ltd. (supra). In the case under appeal before us also, the Assessing Officer simply sits back till the assessee submitted all the evidences and thereafter rejected those evidences on the basis of presumption and suspicion. He did not make any enquiry, he did not issue any summons to the share applicant company, he did not try to verify from the record of the share applicant company who are all assessed to

income tax. In view of the above, respectfully following the decision of Hon'ble Apex Court in the case of Orissa Corporation P. Ltd. (supra) and of Hon'ble Jurisdictional High Court in the case of Rakam Money Matters Pvt. Ltd. (supra), Victor Electrodes Ltd. (supra), Fair Finvest Ltd. (supra) and Gangeshwari Metal Pvt. Ltd. (supra), we hold that the assessee has duly discharged the onus which lay upon it to prove the credit in the form of share capital. Accordingly, the addition made for unexplained share capital is deleted."

43. *With the Assessees discharging the burden placed on them to explain the credit appearing in the books of accounts, the Court is satisfied that even on this aspect the impugned order of the ITAT suffers from no legal infirmity warranting interference."*

8.5 Thus it was observed by the Hon'ble High Court that without giving opportunity to cross examine the person whose statement has been used against the assesse is not sufficient to make an addition. Similarly the Hon'ble Telangana High Court in case of Sree Trading Corporation vs. ITO 151 taxmann.com 486 held in para 21 & 22 as under:

"21. In Kishinchand Chellaram (supra 1), the question for consideration was whether there was any material evidence to justify the finding that a sum of Rs. 1,07,350.00 was remitted by the assessee from Madras to Bombay and that it represented the undisclosed income of the assessee. Supreme Court noted that the only evidence before the Tribunal was a letter dated 18-2-1955 addressed by the banker to the income tax officer. Supreme Court held that such a letter could not have been relied upon by the Tribunal as a material piece of evidence because this letter was not disclosed to the assessee by the income tax officer. Like the present case, even though the first appellate authority had reproduced an extract of the letter in his order, he did not care to produce it before the assessee or give a copy of it to the assessee. On the above basis, Supreme Court held that even assuming that this letter was in fact addressed

by the banker to the income tax officer, no reliance could be placed upon it since it was not shown to the assessee and no opportunity to cross-examine the banker was given to the assessee. Before the income tax authorities can rely upon such a document, it is their bounden duty to produce it before the assessee to enable the assessee to controvert the statements contained in it by asking for an opportunity to cross-examine the banker with reference to the statements made in the letter. In the facts and circumstances of that case, Supreme Court while allowing the appeal had set aside the judgment of the High Court as well as that of the Tribunal.

22. Again in Andaman Timber Industries (supra 2), Supreme Court held that not allowing the assessee to cross- examine the witnesses by the adjudicating authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order a nullity in as much as it amounts to violation of the principles of natural justice. In the facts of that case, Supreme Court observed that order of the Commissioner was based on statements given by the two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, adjudicating authority did not grant this opportunity to the assessee. It was mentioned that adjudicating authority had referred to in the impugned order the request of the assessee for cross-examination, but such an opportunity was denied. Tribunal had simply stated that cross- examination of the two witnesses would not have brought about any material difference to the narrative of the assessee. Disapproving the stand of the Tribunal, Supreme Court observed that it was not for the Tribunal to second guess as to for what purpose assessee wanted to cross-examine the witnesses and what extraction assessee wanted from them. In the facts of that case, Supreme Court while allowing the appeal, set aside the order passed by the Tribunal."

8.6 Therefore, the statement relied upon by the AO for framing the assessment without allowing the assesse to cross examine the witnesses is a serious flaw which makes the order nullity as much

as violation of principle of natural justice. Similar view has been taken by the Hon'ble High Courts as well as this Tribunal in a series of decisions relied upon Ld. Counsel for the assesse but for sake for brevity we do not multiply the precedents on this point. Hence the statement of Shir Rajesh Bhalla which is contrary to the undisputed record of bank statement showing the withdrawal and redeposit of the said amount 1 ½ year prior to the date of search has no evidentiary value to hold that the assessee has paid the alleged on money of Rs.30 lakhs.

9. The next ground of the AO for denying benefit of section 11 & 12 is capitation fee received by the assessee as per the documents impugned during the TDS survey u/s 133A conducted on 09.08.2005. The AO has referred the survey proceeding conducted on the premises of the assessee in para 7 as under:

> *"7 A TDS survey u/s 133A was conducted on the premises of the assessee trust on 09.08.2005. During the course of survey proceedings, various incriminating document/ loose papers related to TDS default were found and impounded. Among these documents some of these documents were also found and impounded from the briefcase of Shri Ram Vilas Vijayyarigya. On perusal of the loose papers, it was found that these documents record amounts received by People College of Medical science and Research Center in lieu of admission given to various students in MBBS Course. One noticeable feature of these documents is that the amounts are written in coded form and that too in pencil. A copy of these documents is enclosed as Annexure B to this order."*

9.1 At the outset, it is pertinent to note that this survey was conducted in the year 2005 and thereafter the original assessment

order u/s 143(3) for A.Y.2005-06 was completed wherein the AO has referred this TDS survey conducted on 09.08.2005 and thereby denied the benefit of exemption u/s 11 & 12 of the Act. The said order was reversed by the CIT(A) and allowed the claim of the assessee against which the department is in appeal before us. Therefore, the said survey proceedings and outcome of the said survey proceeding is not incriminating material found or seized during the course of search and seizure action and hence, the same cannot be a basis for making any addition or denying benefit to the assessee in the proceedings u/s 153A of the Act particularly when the assessee was duly granted registration u/s 12A of the Act and has subsisted as on the date of the assessment order. Further the AO has referred the statement recorded during the survey from certain persons/parents of the students and concluded that the assessee received capitation fee for admitting students in the medical courses. The AO has stated in para 7.4 to 7.4.3 as under:

> *"7.4 It is worth mentioning that the following facts are available on record in this regard:*
>
> *7.4.1 During the course of assessment proceedings for A.Y. 2006-07, it was found that the list found contained the admission details of all the students mentioning the name, address phone numbers, date of birth, marks obtained in PCB (Physics, Chemistry and Biology) and DD amount received. The amounts written in pencil represent codes of figure in lakhs for securing admission in medical course.*
>
> *7.4.2 During the course of assessment proceedings for A.Y. 2006-07 the summons u/s 131 was issued by the then AO to all the above persons vide letter dated 01.10.2008. The statements of these persons were recorded on oath by then AO.*

7.4.3 In this connection, the statement of one Shri Mohanlal Bhannaria was recorded on oath on 20.10.2008. Shri Bhannaria is working as Assistant Manager in Union Bank of India and his son Shri Shashindra Bhannaria was admitted in the MBBS Course in the medical college run by the assessee trust. In the aforesaid paper impounded during the TDS survey, an amount of Rs. 12 (meaning thereby Rs. 12 lakhs) has been written in front of the name of his son."

9.2 After refereeing to the statement of one Shri Bhannaria the AO concluded in para 7.4.5 to 7.4.9 as under:-

"7.4.5 The authenticity of transactions contained in these documents was further authenticated by the statement of Dr. D S Badkur, Joint Director in Government of Madhya Pradesh. recorded on oath by the then AO. The impounded documents contained name of one student namely Kumari Deepika Badkur. On enquiry it was found that Kumari Deepika Badkur is daughter of Dr. D S Badkur, working as Joint Director in Government of Madhya Pradesh. However, before the name of his daughter namely Ku Deepika Badkur, the name of Shri M M Upadhyaya was written in pencil. At that time, Shri Upadhyaya was working as Principal Secretary, Medical Education under Govt. of Madhya Pradesh. During his statement, Dr. D S Badkur was asked to decode the name Shri M M Upadhyaya as well as five DD Numbers mentioned in the documents. Dr D S Badkur replied that Shri M M Upadhyay is real brother of his wife. He further stated that DD numbers represents the post dated cheques given to college on account of fees for five years.

7.4.6 Similarly, the authenticity of transactions contained in these documents was further authenticated by the statement of one Shri O P Mahor. Shri OP Mahor is father of Shri Rishi Mahor, a student studying in the medical college of the trust. During his statement, Shri O P Mahor, father of Shri Rishi Mahor was requested to decode, the name of one Shri Satyam written in pencil before the name of his son namely Shri Rishi Mahor. On the question of issue of decoding the word 'satyam' Shri O P Mohar stated that Shri Y Satyam is working as Chief

Conservator of Forest at Bhopal through whom the information about admission in People's College was received by him. In other words, Shri Y Satyam was the person dealing with the assessee trust on behalf of Shri O P Mahor.

7.4.7 Thus the above statements clearly establish that the amounts written in codes by pencil and the short form of the name like Satyam, MM Upadhyay etc were nothing but coded accounts maintained by the key persons of the assessee trust to keep a record of the unaccounted money received in lieu of admissions of students for various medical courses. In fact, this fact of receipt of unaccounted money by the assessee trust from the students is also in tune with the findings of the Hon'ble High Court on the various Writ Petitions filed against the assessee trust discussed above.

7.4.8 These findings of receipt of unaccounted funds by the assessee trust from the students is further corroborated by the documents found during the course of various survey and search actions taken at other independent persons by the Income tax department discussed below.

7.4.9 A survey under section 133A of the Income Tax Act 1961 was conducted at the business premises of M/s Akshyay Meditech (India) Pvt. Ltd and M/s Akshayay Heart Hospital Bhopal on 23.08.2007. During this survey proceedings, the statement of Shri Dr Deepak Chaturvedi, Director of the hospital was recorded on oath. In the course of his statement, Dr. Chaturvedi categorically admitted that cash payment of Rs. 12 lakhs was made to the People's College for securing admission of his son Shri Aman Chaturvedi in MBBS Course during the F Y 2006-07. The aforesaid amount of Rs. 12 lakhs was paid in the form of donation to the medical college, for which no receipt was given to him, meaning thereby that this was not accounted for in its books of accounts by the assessee trust."

9.3 The AO then referred to action u/s 132A undertaken in case of one Shri Navneet Thakkar on 16.09.2006 in respect of cash of Rs.14,64,000/- found in his possession by crime branch on 24th

August 2006 which is requisitioned by the department u/s 132A of the Act. It is pertinent to note that the cash was seized from 3rd person and there was no admission in any of the institutions of the assessee of child of the said person therefore, mere fact that the person was carrying cash with him would not ipso-facto lead to the conclusion that it was to be paid as capitation fees to the assessee when his daughter Ku Nisharika Bathwar, did not appear for DMAT examination and therefore, the question of her admission and receipt of capitation fee does not arise. Even otherwise seizure of cash from 3rd person not related to the assessee cannot be an incriminating material for framing assessment u/s 153A of the Act. These allegations are also pertaining to the earlier year and not incident which reveals any perpetual practice of charging capitation fee by the assessee from the parents of the students. The other allegations of capitation fee has been recorded in para 7.4.11 and to 7.6 of assessment order as under:

> *"7.4.11 Further, during the course of assessment proceedings the summons was also issued to Shri Ram Vilas Vijayvargiya and his statement was recorded on oath on 15/12 / 2008 Although, during his statement Shri Ram Vilas Vijayvargiya denied receiving any amount in cash by the management and executive body of the trust, however, the explanation of Shri Ram Vilas Vijayavargiya is not acceptable for the following reasons.*
>
> *1. During the course of TDS survey this documents was recovered from the brief case of Shri Ram Vilas Vijayvargiya.*
>
> *2. During the course of Shri Ram Vilas Vijayvargiya was specifically requested to decode the numbers written against each name. He was also asked to specify whether the codes*

'15' represents 'Rs. 15 lakhs'. In reply Shri Ram Vilas stated that theses codes do not represent amount. These are the rating representing the marks obtained by the students. Now during his statement in the course of assessment proceedings, Shri Ram Vilas Vijayvargiya in contradiction to his earlier statement has denied any information about these codes.

3 During the course of survey in his statement, Shri Ram Vilas Vijayvargiya was specifically required to decode the total of figures written in pencil amounting to '865.70'. In reply Shri Ram Vilas stated that this represents any expenses written by the staff. During the assessment proceedings, Shri Ram Vilas stated that this information is not known to him.

4 A number of donors have independently confirmed having made the cash payments to the assessee trust not recorded in its books of accounts for admission of students to medical courses.

5 The receipt of cash by the assessee trust is duly confirmed by all the circumstantial evidence discussed above in detail.

7.5 Thus it is evident that the whole gamut of events narrated above categorically establish that the assessee trust has been indulging in admitting the students in MBBS course in the college being run by it during the Financial Year 2005-06 after receiving cash amounts ranging from Rs. 5 lakhs to Rs. 24 lakhs per student, not recorded in its books of accounts. These payments were received in addition to the prescribed fees for the course which was paid by the students by demand draft / cheque, found recorded in its books of accounts.

7.6 The total of these 74 figures written in codes is '841.70' as appearing on page number 2 of these documents. However, after this figure of '841.70' is figure of - 24 deg thereby totaling to 865.70. As admitted by various parents in their statements, the figures represent the amounts in lakhs paid by them in cash to the assessee trust for admission of their children. Therefore, these documents record the cash receipts of Rs. 8,65,70,000/- received by Peoples College of Medical Science and Research Center (an institution run by the assessee trust) for giving

admission to students in the medical courses. As, this amount of Rs. 8,65,70,000/- received by the assessee trust during the previous year 2005 - 6 and the same has not been shown in its return of income and also books of accounts, therefore, this amount of Rs. 8,65,70,000/- is treated as unexplained income for the A Y 2006-07. Penalty proceedings u/s 271(1)(c) are also initiated for concealing the particulars of income for A.Y. 2006-07."

9.4 Therefore, once the assessee has denied receiving any capitation fee as alleged by the AO then considering statements of parents of certain students without allowing the assessee to cross examine them is in violation of principle of natural justice and renders the assessment order as nullity as held by the Hon'ble Supreme Court in case of *Andaman Timber Industries vs. Commissioner of Central Excise (supra).* We further note that except the few persons the others have denied to have paid any capitation fee and the AO himself has recorded this fact. Even in para 7.4.11 the AO has mentioned that statement was recorded on 15.12.2008 whereas the assessment proceedings u/s 153A were initiated in the month of August 2011. Therefore, the reference of statement as given by the AO may be recorded at the time of original assessment framed u/s 143(3). The AO has even not made it clear under which proceedings the statements were recorded. The assessee has pointed out various discrepancies in the statements of those persons and the figures written in the pencil on the paper impounded during the survey conducted on 9th August 2005. Though the AO has relied upon those statements recorded during the survey conducted on 9th August 2005 however, they denied the

payment of any capitation fee. Subsequently, the addition made by the AO in the hands of those persons were either deleted by the CIT(A) or by this Tribunal. The assessee has filed the orders of the CIT(A) as well as this Tribunal in respect of various persons. The details of the some of orders are as under:

i. In case of **Pradeep Kumar Bansal** vs. ITO in ITA No. 214/ IND/ 2016 for A.Y.2006-07 the Tribunal vide order dated 4th July 2016 has deleted the additions in para 5 as under:

> *"5. I have heard both the sides. Looking to the facts and circumstances I find that there was survey u/s 133A of the Act conducted on 9.8.2005 at the premises of Sarvajanik Jankalyan Parmarthik Nyas and during the course of survey from the brief case of Shri Ram Vilas Vijaywargiya some loose papers were found which revealed that the amount were received by People's College of Medical various students in MBBS in addition to the prescribed fees. At serial no. 40 name of student is mentioned 'Surbhi Bansal c/o Pradeep Bansal and the amount of donation is noted 15 lakh. Kum Surbhi Bansal is daughter of the assessee. The amounts were written in code in pencil. During the course of section 131 proceedings statements of all the persons whose names are appearing in these loose papers were recorded on oath. Some of the students have admitted that they have made cash payments to Peoples group for admission in medical course. In the chart of these loose papers one Surbhi Bansal's name is mentioned. She is the daughter of the assessee. Mr. Vijay Vargiya during the course of statement recorded on oath denied to have received any amount from the assessee. Similarly, the assessee has also denied to have made any payment. I am, therefore, of the view that the statement of the individual case has to be seen and it has to be used independently. In the statement recorded some of the students admitted that they have paid donation but this statement of the third party cannot be used against the assessee who has denied to have made any payment. I am of the view that there*

are 1000s of reasons for appearing her name in the code but it cannot be used against the assessee unless proper opportunity of making cross examination is given to the assessee after giving a copy of statement to the assessee and thereafter this statement can be used, but I am of the view that the statement recorded of the some persons is in their individual capacity but cannot be used against the assessee. Therefore, this will not serve the purpose for making the addition in the hands of the assessee. Moreover, the assessee's books of accounts are subject to audit. The assessee also denied to have made any payment then unless some incriminating material is found from the medical college, no addition can be made. For this proposition, I rely on the decision of the Chennai Bench of the Tribunal in the case of Saveetha Institute of Medical & Technical Sciences vs. ACIT; ITA Nos.90 & 204/Mad/2011 wherein it was observed as under:

We have examined the entire record before us. We have also treaded through the statements in question. Almost identical lines of arguments were taken by both sides as were taken before the Id. CIT(A). We have cogitated the entire facts, evidence and oral submissions in the light of provisions of the Act and related precedents. We have gone through the entire statement of Dr.B.Muthukumaran, a copy of which is enclosed in the paper book. From this statement, it is evidenced that the portion on which the Assessing Officer is relying has been recorded after the verification that too on the next day. The search party had added more questions viz. Question No.18 &19. There is a whisper of collection of capitation fees. But nowhere else there is such an admission made by him. The document No.56 on which heavy reliance has been placed by the Assessing Officer is nothing but a piece of paper containing details of number of seats allotted to Management Quota and Government Quota. This document cannot be said to be even an ITA 99&100/11 204 & 205/11:10: incriminating document because this is a declared truth which is also recorded in the books of the trust. The statement recorded after the verification cannot be accepted without doubt. So, we can safely conclude that document No.56 cannot be treated as incriminating

document by any stretch of imagination. Nothing incriminating is scribe on it. Nothing has been mentioned on this piece of paper regarding collection of any capitation fees or even the amount of fees which is legally chargeable. Hence, we cannot give meaning in one way or the other, more specifically, suitable to the Revenue's interest on the basis of alleged statement, which heavily suffers from contradictions and also stand refuted by the management when these statements were put to them during the course of assessment proceedings. It was categorically denied to have collected any capitatiori fees. After verification when something is recorded which is contrary to the main body of statement, it cannot be accepted as a voluntary statement. There being no incriminating evidence regarding receipt of capitation fees, particularly when no document was put to Dr.B.Muthukumaran regarding charging of capitation fees, such a statement cannot be made a basis for making such a huge addition. His statement was rather denied by the Managing Trustee/President. Shri T.A.Varadgarajan, Finance Manager also denied the statement of Dr. B. Muthukumaran. In any other case, even one goes by this ITA 99&100/11 204 & 205/11 : 11 - statement, this would not make any meaningful sense. Dr.B.Muthukumaran has stated that the moncy had been handed over to one Shri Saravanan, Accounts Officer, but Shri Saravanan was never enquired by the Department. The statement of Dr.N.M.Veeraiyan, who is the President/Mangement Trustee of the trust, never accepted having receipt of capitation fees or donation and he had rejected and denied the statement of Dr.B.Muthukumaran. Statement of Dr.N.M.Veeraiyan was recorded u/s 131 on 9.11.2007, in which he has stated that whatever was received from the students was reflected in the books of account. This statement confirms the contentior of the assessee that some well wishers were giving donations which were duly received and reflected in the books of account. In fact, the statement of Dr.N.M.Veeraiyan was recorded u / s 131 on 9.11.2007 which has also been made a basis for this addition. He was not examined u/s 132(4) of the Act. A statement made u/s 131 cannot be equated with a statement recorded u/s 132(4) of the Act. A statement recorded u/s 132(4) is a valid and relevant

*piece of evidence but a statement recorded u/s 131 is not so relevant. Nevertheless, even a statement recorded u / s * 132(4) can not be made a sole basis for any such addition unless corroborated by seized material. If any admission is made in a statement recorded u/s 132(4), this can be used with reference to any piece of evidence found ITA 998100/11 204 & 205/11 / - 12 during the course of search. In this case, as we have stated above, no such piece of evidence or to say any incriminating evidence was either found or seized. What was found was a noting giving break-up of number of students who were admitted under different quotas in various courses. In our well-considered view, this addition could not have been made at all in the hands of the assessee-trust on the basis of such evidence. Recording of some questions after verification could be viewed as a involuntary statement, extracted from the deponent. In any case, a possibility of such inference is always there. With regard to such statement, the CBDT has issued instructions vide Circular No * 0.286 / 2 / 2003 - T wherein it has been directed that search party shall not obtain confessions. So, the admission made u/s 132(4) by the concerned officer cannot be treated even as a valid piece of evidence. There being no incriminating document having been found or seized during search and the statement also being abstruse, the addition in question has no legs to stand on. Had there been a valid statement, even then, solely on the basis thereof, addition could not have been made. This is a well settled principle of law by now and there are umpteen decisions in support of this view.*

10. We are not convinced with the Id.DR that the letter dated 26.8.2003 written by the Director of Medical Education/Chairman, ITA 99&100/11 204 & 205/11 / - 13 - :Gri Committee alleging that the assessee was charging excess fee against the prescribed fee structure would prove the receipt of capitation fees by the assessee particularly when this is a search case and nothing was found during search to support this allegation. The decisions of Hon'ble Supreme Court in the case of CIT vs Durgaprasad More, 82 ITR 540 and Sumati Dayal vs CIT, 214 ITR 801, which speak about human

probabilities and realities which have to be taken into consideration while dealing with income-tax matters. In fact, this is not such a case. The ratio decidendi of these decisions would not apply in the absence of any direct piece of evidence available on record. The reality of life which may be treated as such in a particular case, may not be reality of life in another case. There is nothing on record to corelate between any such reality of life to which the Assessing Officer is pointing to. Who prevented the Assessing Officer to record the statements of the students; or their wards? On simple conjectures and surmises, no addition can be made under the Income-tax Act, 1961. We, therefore, confirm the order of the Id. CIT(A) in deleting the addition of 5, 37 ,00,000/-."

9.5 In case of *Mr. Pradeep Kumar Bansal vs. ITO (supra)* the assessee denied to have paid any capitation fee but the AO made the addition by relying upon other statement recorded during the survey from other persons. The said addition made by the AO was finally deleted by this Tribunal. Therefore, the veracity of the statement recorded u/s 133A was doubted in the absence of any corroborative evidences to show that the amount has actually exchanged hands.

9.6 Similarly in case of *Shashikant Varandani vs. ITO in ITANo.312/Ind/2016* this Tribunal vide order dated 14.07.2017 has again deleted the addition made by the AO on account of payment of capitation fee in para 6 to 15 as under:

"6.We have carefully considered rival contentions and carefully perused the material available on record including case laws cited before us. We note that there was survey u / s 133A of the Act conducted on 9.8.2005 at the premises of Sarvajanik Jankalyan Parmarthik Nyas and during the course of survey

from the brief case of Shri Ram Vilas Vijayvargiya some loose papers were found which revealed that the amount were received by People's College of Medical Science & Research Centre in lieu of admission given to various students in MBBS in addition to the prescribed fees. At serial no. 28 name of student is mentioned 'Souryakant Varandani s/o Shashikant Varandani and the amount of donation is noted 15 lakh. Master Sourakant Varandani is son of the assessee. The amounts were written in code in pencil. During the course of section 131 proceedings statements of all the persons whose names are appearing in these loose papers were recorded on oath. Some of the students have admitted that they have made cash payments to Peoples group for admission in medical course) In the chart of these loose papers, one name of Souryakant Varandani is mentioned He is the son of the assessee. Mr. Ramvilas Vijayvargiya during the course of statement recorded on oath denied to have received any amount from the assessee. Similarly, the assessee has also denied making any payment. We are, therefore, of the view that the statement of the individual case has to be seen and it has to be used independently. In the statement recorded some of the students admitted that they have paid donation but this statement of the third party cannot be used against the assessee who has denied to have made any payment. We are of the view that there are 1000s of reasons for appearing her name in the code but it cannot be used against the assessee unless proper opportunity of making cross examination is given to the assessee after giving a copy of statement to the assessee and thereafter this statement can be used, but we find and of the view that the statement recorded of the some persons is in their individual capacity but cannot be used against the assessee. Therefore, this will not serve the purpose for making the addition in the hands of the assessee. The assessee also denied to have made any payment then unless some incriminating material is found from the medical college, no addition can be made. For this proposition, Reliance is placed on the decision of the Chennai Bench of the Tribunal in the case of Saveetha Institute of Medical & Technical Sciences v. ACIT [2012] 25 taxmann.com 138 (Chennai-Trib) wherein it was observed as under :-

9. We have examined the entire record before us. We have also treaded through the statements in question. Almost identical lines of arguments were taken by both sides as were taken before the ld. CIT (A). We have cogitated the entire facts, evidence and oral submissions in the light of provisions of the Act and related precedents. We have gone through the entire statement of Dr.B. Muthukumaran, a copy of which is enclosed in the paper book. From this statement, it is evidenced that the portion on which the Assessing Officer is relying has been recorded after the verification that too on the next day. The search party had added more questions viz. Question No. 18 &19. There is a whisper of collection of capitation fees. But nowhere else there is such an admission made by him. The document No.56 on which heavy reliance has been placed by the Assessing Officer is nothing but a piece of paper containing details of number of seats allotted to Management Quota and Government Quota. This document cannot be said to be even an incriminating document because this is a declared truth, which is also recorded in the books of the trust. The statement recorded after the verification cannot be accepted without doubt. So, we can safely conclude that document No.56 cannot be treated as incriminating document by any stretch of imagination. Nothing incriminating is scribe on it. Nothing has been mentioned on this piece of paper regarding collection of any capitation fees or even the amount of fees, which is legally chargeable. Hence, we cannot give meaning in one way or the other, more specifically, suitable to the Revenue's interest on the basis of alleged statement, which heavily suffers from contradictions and also stand refuted by the management when these statements were put to them during the course of assessment proceedings. It was categorically denied to have collected any capitation fees. After verification when something is recorded which is contrary to the main body of statement, it cannot be accepted as a voluntary statement. There being no incriminating evidence regarding receipt of capitation fees, particularly when no document was put to Dr.B.Muthukumaran regarding charging of capitation fees, such a statement cannot be made a basis for making such a huge addition. His statement was rather denied by the Trustee/President.

Managing Shri T.A. Varadgarajan, Finance Manager also denied the statement of Dr.B.Muthukumaran. In any other case, even one goes by this statement, this would not make any meaningful sense. Dr.B. Muthukumaran has stated that the money had been handed over to one Shri Saravanan. Accounts Officer, but Shri Saravanan was never enquired by the Department. The statement of Dr.N.M. Veeraiyan, who is the President/Mangement Trustee of the trust, never accepted having receipt of capitation fees of 199 donation and he had rejected and denied the statement of Dr.B.Muthukumaran Statement of Dr.N.M. Veeraiyan was recorded u/s 131 on 9.11.2007, in which he has stated that whatever was received from the students was reflected in the books of account. This statement confirms the contention of the assessee that some well wishers were giving donations which were duly received and reflected in the books of account. In fact, the statement of Dr N.M.Veeraiyan was recorded u/s 131 on 9.11.2007 which has also been made a basis for this addition. He was not examined u/s 132(4) of the Act. A statement made u/s 131 cannot be equated with a statement recorded u/s 132(4) of the Act. A statement recorded u/s 132(4) is a valid and relevant piece of evidence but a statement recorded u/s 131 is not so relevant. Nevertheless, even a statement recorded u/s 132(4) can not be made a sole basis for any such addition unless corroborated by seized material. If any Imission is made in a statement recorded u/s 132(4), this can be used with reference to any piece of evidence found during the course of search. In this case, as we have stated above, no such piece of evidence or to say any incriminating evidence was either found or seized. What was found was a noting guing break-up of number of students who were admitted under different quotas in various courses. In our well considered view, this addition could not have been made at all in the hands of the assessee-trust on the basis of such evidence. Recording of some questions after verification could be viewed as a involuntary statement, extracted from the deponent. In any case, a possibility of such inference is always there. With regard to such statement, the CBDT has issued instructions vide Circular No. 286/2/ 2003-IT, wherein it has been directed that search party shall not obtain

confessions. So, the admission made u/s 132(4) by the concerned officer cannot be treated even as a valid piece of evidence. There being no incriminating document having been found or seized during search and the statement also being abstruse, the addition in question has no legs to stand on. Had there been a valid statement, even then, solely on the basis thereof, addition could not have been made. This is a well settled principle of law by now and there are umpteen decisions in support of this view.

10. We are not convinced with the Id. DR that the letter dated 26.8.2003 written by the Director of Medical Education/Chairman, Committee alleging that the Grievance assessee was charging excess fee against the prescribed fee structure would prove the receipt of capitation fees by the assessee particularly when this is a search case and nothing was found during search to support this allegation. The decisions of Hon'ble Supreme Court in the case of CIT vs Durgaprasad More, 82 ITR 540 and Sumati Dayal us CIT, 214 ITR 801, which speak about human probabilities and realities which have to be taken into consideration while dealing with income-tax matters. In fact, this is not such a case. The ratio decidendi of these decisions would not apply in the absence of any direct piece of evidence available on record. The reality of life which may be treated as such in a particular case, may not be reality of life in another case. There is nothing on record to correlate between any such reality of life to which the Assessing Officer is pointing to. Who prevented the Assessing Officer to record the statements of the students; or their wards? On simple conjectures and surmises, no addition can be made under the Income-tax Act, 1961. We therefore, confirm the order of the Id. CIT (A) in deleting the addition of Rs. 5,37,00,000/-.

7. The Ld. AR relied in the case of Pradeep Kumar Bansal [I.T.A. No. 214/Ind/2016 dtd. 04-07-2016] ITAT Indore,wherein following the above decision of the Tribunal, the addition made on identical facts was deleted.

8.The Ld. AR further relied in the case of CIT v. Pradeep Kumar Gupta [2008] 303 ITR 95 (Delhi) wherein reassessment based

on deposition of third party without allowing opportunity to the assessee to cross examination third party is held to be not valid.

9.The Ld. AR relied in the case of Nirmal Kumar Ashok Kumar [1991] 54 taxmann.com 138 (Bombayl wherein the facts were that the assessment was completed and loan account and confirmation were filed, later on there was a search on premises of S, a diary was seized and Mr. S stated that he was noting bogus and havala transaction in the diary. Held that mere mention of the assessee's name in the diary by third party cannot be the basis of reassessment. Similarly, in the case of the assessee, the statement of some of the students, who admitted that amount was given for admission, cannot be sole basis of addition. The assessee denied to have made any such payments. Therefore, this decision is squarely applicable to the facts of the case.The Ld. AR further relied in the case of Sarthak Securities Co. Pvt. Ltd. [2010] 195 Taxman 262(Del) wherein it was held that reasons recorded should be based on relevant material on the basis of which a reasonable person form requisite belief merely on basis of information, where the Ld.AO has not applied his mind cannot be the basis of reopening. In the instant case, also the reopening is based on the information obtained from the premises of third party, which was not corroborated by evidence.

11. In the case of CIT v. Paramjeet Kaur [2008] 168 Taxman 39(P&H) the Ld. AO initiated reassess...ent proceeding on the basis of the information received from survey Circle. Thus, he acted only on reasons to suspect and not on reason to belief.

12. The Ld. AR further relied in the case of CBI v. V. Shukla (SC) wherein held that loose paper found in possession of third party cannot be the basis of addition.

13. The Ld. AR fur relied in the case of Shree Parshwanath Construction [2014] 24 ITJ (Trib-Indore) wherein it was held that the statement of third person could not be read in evidence against another person unless and until it is corroborated with independent material. In the present case, there was no

independent material to prove that the assessee has made payment in lieu of the admission out of his undisclosed source.

14. The Ld. AR further relied in the case of Addl. CIT v. Miss Lata Mangeshkar [1974] 97 ITR 696 (Bom) wherein it was held that entries in the day book or the ledger would be corroborative piece of evidence and once the direct evidence of the person who was said to have made payments in 'black' to the assessee was disbelieved no value could be attached to the entries in the ledger or to the entries in the day-book even one had been produced. was received i.e. Shri Ramvilas Vijayvargiya has denied the fact of receiving any on-money payment for admission of his son. Thus, in absence of any direct evidence, the loose paper chart has no value.

15. In the light of ratio decidendi of aforesaid decisions, we are of the considered opinion that in absence of any direct piece of evidence available on record and same is corroborated with other documentary evidence, no addition can be made on the basis of only third party statement. whereas both parties under reference has also not admitted any payments and receipt of money over and above regular fees. There is nothing on record to correlate between any such is a reality of life to which the AO has pointed out. We find that the assessee has categorically denied making any payments for getting the admission of his son. Similarly, person from whom the loose papers/chart was found have denied receiving any money over and above the recorded amount in the chart found and seized com him. Thus, addition cannot be made on simple conjectures and surmises basis under the Income- tax Act, 1961. We, therefore, delete the addition sustained by Ld. CIT (A) and allow the appeal of the assessee."

9.7 We further note that in case of Dr. Suresh Kumar Sharma the AO himself has not taken up this issue of payment of capitation fee while passing the assessment order u/s 147 r.w. section 143(3) on 13.03.2013 placed at page no. 150 to 151 of the paper book. In case of Sh. Pankaj Shukla the addition made by the AO was deleted by

the CIT(A) vide order dated 23.01.2015 wherein the CIT(A) vide order dated 23.01.2015 has noted discrepancy in the figures written in pencil on the impounded documents and the amount stated in the statement of Shri Bhannaria and therefore, the addition made by the AO was deleted. No further appeal was filed by the revenue. Thus, the stands of the AO that capitation fee was received by the assessee and paid by the parents of the students was not found to be sustainable by this Tribunal as well as by the CIT(A). Accordingly when the assessee has specifically denied to have received any capitation fee and this issue was very much subject matter of assessment order passed u/s 143(3) after the survey conducted on 9th August 2005 and the addition/denial of benefit of u/s 11 & 12 by the AO in assessment framed u/s 143(3) was reversed by the CIT(A) and appeal for A.Y.2005-06 filed by the department is pending and being disposed off by us in this order then the outcome of the said survey proceedings conducted in the year 2005 cannot be a basis for assessment framed u/s 153A in pursuant to this search carried on 23rd July 2009.

9.8 The Hon'ble Rajasthan High Court in case of *Geetanjali University Trust[2013] 352 ITR 433* while considering the issue of rejection of application for approval u/s 10(23C)(vi) of the Act has held in para 8 to 13 as under:

> *"8.It would be seen that the learned CCIT was swayed by the fact that 'method of admission' was held illegal by this Court and, therefore, held that the institution did not qualify as an institution as envisaged in the section and as the provision was beneficial, the entity otherwise must be free of any defect.*

9. It would be appropriate to quote the provisions of Section 10(23C) (vi) & (via) of the Act, which read as under:-
"Incomes not included in total income.

10. In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included- .... (23C)- any income received by any person on behalf of-

(vi) any university or other educational institution existing solely for educational purposes and not for purposes of profit, other than those mentioned in sub- clause (iiiab) or sub-clause (iiiad) and which may be approved by the prescribed authority; or (via) any hospital or other institution for the reception and treatment of persons suffering from illness or mental defectiveness or for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation, existing solely for philanthropic purposes and not for purposes of profit, other than those mentioned in sub- clause (iiiac) or sub-clause (iiiae) and which may be approved by the prescribed authority:"

10. A plain reading of the said provisions would reveal that what is required for the purpose of seeking approval thereunder is that the University or other educational institution should exist 'solely for educational purposes and not for purposes of profit'.It is nowhere the case and / or finding of the learned CCIT that on account of the said defect in the admission procedure, the Trust ceased to exist solely for educational purposes and / or it existed for the purposes of profit. Further, it is not the case of the appellants that the students who were admitted were not imparted education in the college in which they were admitted and / or the admissions granted were fake or non-existent or that the income generated by admitting the said students was not used for the purpose of the Trust. The emphasis on part of the learned CCIT that the purpose of education would not be served if the education is for students who have been illegally admitted and the purpose of education as contemplated in the section would be served only if the students have been legally admitted and not otherwise, appears to be going beyond the D.B. CIVIL SPECIAL APPEAL (W) NO.128/2012 The Chief Commissioner of Income Tax, Udaipur & Anr.vs. Geetanjali University Trust requirements of the section. Of course, the requirement of an educational institution to provide admissions strictly in accordance with the prescribed rules, regulations and statute cannot be less

emphasized, rather the same need to be adhered to in letter and spirit, but then, the said violation cannot lead to its loosing the character as an entity existing solely for the purpose of education.

11. The Hon'ble Supreme Court in its judgment relating to the admissions at the college of the Trust, referred to above, while partly allowing the appeal and modifying the judgment of this Court, has held as under:-

"47. We accordingly hold:

47.1. That there was no agreement between the College and the State Government to admit students into its MBBS course on the basis of RPMT 2008 and the finding of the High Court in this regard is erroneous and the High Court could not have directed the College to fill up its seats on the basis of merit of students as determined in RPMT 2008 as per the law laid down in T.M.A. Pai Foundation as explained in P.A. Inamdar. Hence, the direction of the High Court to fill up the seats by students selected or wait- listed in the RPMT 2008 is set aside.

47.2. The admissions of 117 students to the MBBS course for the academic year 2008-2009 in the College were contrary to clause (2) of Regulation 5 of the MCI Regulations and were not within the right of the College under Article 19(1)(g) of the Constitution as explained by this Court in T.M.A. Pai Foundation and P.A. Inamdar.

47.3. In exercise of our power under Article 142 of the Constitution, we direct that none of the 117 students who were otherwise eligible for admission to the MBBS course will be disturbed from pursuing their MBBS course, subject to the condition that they will each pay a sum of Rs.3 lakhs within a period of three months from today to the State Government and in the event of default, the students will not be permitted to take the final year examination and the admission of the defaulting students shall stand cancelled and the College will have no liability to repay the admission fee already paid. The amount so paid to the State Government shall be spent by the State D.B. CIVIL SPECIAL APPEAL (W) NO.128/2012 The Chief Commissioner of Income Tax, Udaipur & Anr.

vs. Geetanjali University Trust Government for improvement of infrastructure and laboratories of the Government medical college of the State and for no other purpose.

47.4. The College which was responsible for making the admissions in violation of clause (2) of Regulation 5 of the MCI Regulations will surrender 107 (117 - 10) MBBS seats to the State Government phase wise, not more than ten in any academic year beginning from the academic year 2012-2013 and these surrendered seats will be filled up by the students selected in RPMT or any other common entrance test conducted by the State Government of Rajasthan or its agency for admissions to the government colleges and the fees payable by the students admitted to the surrendered seats would be the same as that payable by the students of government colleges.

47.5. The results of the students in the MBBS course held up on account of interim orders passed by the Court may now be published.

48. The impugned judgment of the High Court is modified accordingly and the appeals are allowed to the extent as indicated in this judgment. The pending I.A. Nos. 3 and 4 stand disposed of."

12. From the above, it is clear that the entire controversy was regarding procedure of admission and not the legality or character of the institution.
13.In view of the above, we do not find any reason to interfere with the order passed by the learned Single Judge, who has left it to the CCIT to decide afresh the proceedings for assessment year 2008-09 and onwards till assessment year 2010-11 by passing fresh speaking order after affording opportunity of hearing to the petitioner-Trust"

9.9 The Hon'ble High Court has observed that the requirement for the purpose of seeking approval u/s 10(23C)(vi) is that the university or educational institutions should exist solely for education purpose and not for purpose of profit and the violation of prescribed Rule and Regulation in the admission of students cannot lead to its loosing the character as entity existing solely for the purpose of education. Therefore, it was observed that the admissions taken by the institutions in violation of regulations of

MCI though liable to be canceled but the said irregularity regarding procedure of admission would not affect the legality or character of the institutions. Accordingly any allegations of receipt of capitation fee cannot be ground for holding the assessee has not carrying out its activity of charity by imparting education and therefore, denial of benefit of section 11 & 12 for all the assessment years is not warranted where there is no allegation except for a particular year that too in the initial stage of the institutions starting functioning for imparting education. Sub-section (4) of section 11 contemplates that property held under trust includes business undertaking so held and the claim of income of such undertaking shall not be included in the total income of the person in the receipt thereto has to be considered by the AO to determine whether the said undertaking has any excess income then the income shown in the accounts of the undertaking, such excess income shall be deemed to be applied for the purpose of other than charitable or religious purpose, which means only the excess income which is over and above the income shown in the accounts of a undertaking or institutions can be assessed to tax by treated the same as not applied for charitable or religious purpose. The mere existence of the excess income in comparison to the income shown in the books of account would not ipso facto render the activities carried out by the institions as not charitable in nature. Sub-section 4A of section 11 makes it clear that the profit and gain of business of an undertaking will not be eligible for benefit of section 11(1) until the business is incidental to the attainment of the objectives of

trust/institutions subject to the conditions that separate books of account are maintained by such trust or institutions in respect of such business. Therefore, even in case of business activity of the trust would not be a ground for denial of benefit u/s 11 & 12 so long as the activity is incidental to the attainment of the objectives of the trust.

9.10 We fortify our view by the recent decision dated 04.01.2024 o the Mumbai Benches of the Tribunal in case of *Padamshree Dr. D.Y. Patil vs. ACIT in ITA No.3264 to 3268/Mum/2022 & others* dated 04.01.2024 wherein this issue of allegation of capitation fee has been considered in para 24 to 50.2 as under:

> "*24. We shall now examine the facts prevailing in the instant case. We noticed earlier that the AO has come to the conclusion that the assessee- trust has collected capitation fees on the basis of data found in laptops, pen drives, diary, loose papers seized from various employees from their residences. The AO has also concluded that the cash found from the employees of the Trust are part of capitation fees collected by the assessee. But the fact remains that the revenue did not find any document/material/evidence with the assessee, which will corroborate the allegation of collection of capitation fees from the students.*
> *25. We also notice that the presumption given in sec. 132(4A) and section 292CC of the Act has been explained by the Tribunal in the case of Startex (India)(P) Ltd (supra), wherein it was held that the presumption shall apply to the person from whom the documents were seized. In Sheth Akshay Pushpavadan vs. DCIT (supra), it was held that the addition cannot be made on the basis of material seized from/statement given by a third party, unless those materials were corroborated with any other evidence and opportunity of cross examination was given. The Law on presumption given in sec. 132(4A) has been explained by Hon'ble Delhi High Court in the case of CIT vs. Radico Khaitan (2017)(83 taxmann.com 375)(Delhi) as under:-*

"24. Section 132 no doubt mandates a presumption in respect of search and seizure operations; yet textually the presumption relates to material documents and books of account seized of from the assessee's premises and the presumption that can be made from it, not from materials seized and statement recorded, of third parties. Only if Padmashree Dr. D. Y. Patil University the materials that are sought to be relied upon emanate from the premises of the party subject to assessment, that the presumption can be drawn. This is evident from Sections 132 (4) and (4A) of the Act, which read as follows:

"Section 132.... (4) The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income- tax Act, 1922 (11 of 1922), or under this Act.

Explanation.- For the removal of doubts, it is hereby declared that the examination of any person under this sub- section may be not merely in respect of any books of account, other documents or assets found as a result of the search, but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Indian Income- tax Act, 1922 (11 of 1922), or under this Act.] (4A) Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search, it may be presumed-

(i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;

(ii) that the contents of such books of account and other documents are true; and

(iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person' s handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and

executed or attested by the person by whom it purports to have been so executed or attested."

It is evident that in the absence of these foundational facts, the revenue is under an obligation to establish through materials relatable to the assessee, what it alleged against it. What were the best pointers for further investigation were the discovery of material and evidence, which the revenue claim pointed to the assessee's failure to disclose full facts and income, should have resulted in further investigation and unearthing of material in the form of seized documents from the assessee's premises. Unfortunately the linkage between the material seized from the assessee's premises and those from UPDA's premises as well as the statement of Sh. Miglani was not established Padmashree Dr. D. Y. Patil University through any objective material. It is now settled law that block assessments are concerned with fresh material and fresh documents, which emerge in the course of search and seizure proceedings; the revenue has no authority to delve into material that was already before it and the regular assessments were made having regard to the deposition, the inability of the revenue to establish as it were, that the assessee's expenditure claim was bogus, or it had underreported income and that it resorted to over invoicing and diversion of funds into the funds allegedly maintained by the UPDA, was not established. The findings of the Commission therefore cannot be faulted as contrary to law.
The Hon'ble Delhi High Court has explained that the presumption given in sec. 132(4A) could be applied only to the materials found with the searched person. If any material is found from some other person, the above said presumption could not be extended to the assessee. In that case, the revenue is under an obligation to establish that the information available in the materials is relatable to the assessee and allegation made in that material against the assessee has to be proved with some other independent material. In the case before Hon'ble Delhi High Court, alleged details of payment of money by the assessee for illegal purpose was found in the place of UPDA (trade association). Based on the above said information, the addition was made by the AO in the hands of the assessee. The Hon'ble Delhi High Court noticed that the assessing officer did not carry out further investigation and further no material that could link the above information with the assessee was found from the premises of the assessee. Accordingly, it was held that the decision

reached by Hon'ble Settlement Commission in not making addition was justified.

26. On the basis of legal principles explained in the above said cases, it can be noticed that the AO cannot invoke the presumption given in sec. 132(4A) in respect of materials seized from the employees, particularly when the revenue has not found any material from the assessee that will corroborate them. Further, it is not the case that the assessee trust has owned up the contents of documents/materials seized from the employees to Padmashree Dr. D. Y. Patil University be true. On the contrary, the trustees have categorically denied the receipt of capitation fees.

27. The Hon'ble Delhi High Court has examined the issue as to whether the evidences found from a third party could be used against the assessee in yet another case of CIT vs. Ansal Properties (2018)(98 taxmann.com 398)(Delhi). The relevant observations made by Hon'ble Delhi High Court in the above said case are extracted below:-

"23. The ITAT which rejected the Revenue's appeal on this point held as follows:

"Since the diary in question was not recovered from the premises of the assessee, which is independent public limited co., therefore, no presumption under section 132(4A) could be drawn against the assessee. In the block assessment, the burden is upon the AO to prove that the particular item is undisclosed income. Admittedly, no other evidence is recovered during the course of search to prove that in fact any payment of Rs. 30 crores outside the books of account has been made by the assessee to Sri S.K. Jatia. The AO has made addition in the case of the assessee in respect of payment of Rs. 30 crores made to Sri S.K. Jatia. Even in the seized diary the narration is "Adharshila Jatia [Anil Bhalla]". Neither Sri S.K. Jatia nor Anil Bhalla were examined by the AO during the course of assessment proceedings. Therefore, we fail to understand as to how the addition could be sustained in the hands of the assessee. It appears from the above circumstances that the department has made subsequent enquiries against the assessee in order to connect the assessee with the diary in question but such things are not permitted as is held by Bombay Bench of I.T.A.T. in the case of Sundar Agencies (supra). No addition could be made in the block assessment on the basis of assumption and presumptions. Merely some material is recovered during the search, no addition could be made in the hands of the assessee on the basis of some subsequent enquiries and that too

purely on assumption and presumptions. The AO observed in the assessment order while making the addition that he made enquiries from the villagers. This was the main reason to make up the theory of the payment made outside the books of account on the basis of inference drawn on estimate basis. It is an admitted case that the villagers had a dealing with M/s Aadharshila Towers Private Ltd. for selling of their land. These transactions were not at all connected with the assessee. The villagers have not made any incriminating statement against the assessee.

P a d m a s h r e e D r . D. Y. P a ti l U n i v e r s i ty The inference drawn by the AO that initially M/s ATPL was owned by Sri S.K. Jatia and then subsequently was taken by the assessee by itself is no ground to draw the presumption against the assessee that since some dealing outside the books of account had happened between the villagers and M/s ATPL, there is no presumption that such transaction would have also happened in between ATPL and the assessee.

24. The Revenue contests the findings of the ITAT and submits that the presumption drawn in the circumstances of the case was upon analysis of materials and that AO's view was justified. It was pointed out that independent corroboration in regard to the seized diary was by way of consideration paid for acquisition of shares in Aadharshila Towers for Rs. 70 crores. The diary clearly stated that the total cost was Rs. 100 crores. The farmers who received the consideration were paid partly in cash. These corroborative materials were insufficient in income tax proceedings, on an application of principles of evidence to hold that Rs. 30 crores was the undisclosed cash component of the consideration.

25. This Court is of the opinion both the CIT and ITAT have rendered findings that were sound and reasonable on the question of whether the seized diary per se could in the overall circumstances of the case result in the addition of Rs. 30 crores. The assessee's explanation consistently was that Rs. 30 crores was towards internal and external development charges. This was an aspect which could be easily decided by securing relevant information from the statutory authority, i.e. HUDCO who received the payments. Independent corroboration of these too could have been sought otherwise the relevant books of account could have been checked. Furthermore, the statute does not compel the Revenue to raise a presumption; even when a tax authority does so, the sole basis of an addition entirely

hinging upon the interpretation of certain figures in a diary would be flawed. For these reasons, this Court is of the opinion that since the inference drawn with respect to findings are based on essentially factual materials which were analyzed by the CIT and the ITAT, there is no reason to interfere with those findings. This question is accordingly answered against the Revenue and in favour of the assessee."

In this case also, it has been reiterated that corroboration of material seized from other persons with any other independent material is necessary for making addition on the basis of materials seized from other persons.

28. In the instant case, all the documents/materials have been seized from the employees only. It has been categorically stated by the trustees of the assessee trust that have not authorized anyone to collect capitation fees. The trustee has also stated that the employees might have collected it without the authority of the trust. Under the principle of vicarious liability, P a d m a s h r e e D r . D. Y. P a ti l U n i v e r s i ty the employer is normally liable for any act performed by his employees during the course of employment. However, when an employee does anything that is neither directed nor controlled by the employer, then the said action of employee cannot be considered to be within the scope of his employment. In that kind of situation, the employer is not liable for the action of the employee and hence is not liable for damages. We noticed earlier that Shri Pratap patil had stated that he has recorded transactions on instruction from Shri Abhijit Shirke. The Ld A.R submitted that the very same Shri Abhijit Shirke was arrested in 2015 in connection with accepting money of Rs.62.50 lakhs for securing a medical seat in D Y Patil Medical College, Nerul. The Ld A.R further submitted that the relevant news paper report is placed at pages 279 & 280 of paper book relating to AY 2015-16. This information further supports the case of the assessee trust that it is not collecting capitation fees and only the employees might have collected money without its authority. We notice that the co-ordinate bench of Tribunal, in the case of Anil Mahavir Gupta (2017)(82 taxmann.com 122)(Mum Trib) has considered the issue as to whether the documents seized from employees could be relied upon for making addition in the hands of the assessee. It was decided in favour of the assessee as under:-

11. Now the Grounds remaining in the appeal of the Revenue are Ground Nos. 9 & 10, which relate to an addition of Rs.30,00,000/- made by the Assessing Officer as unaccounted receipts.

11.1 In this context, the brief facts are that the said addition is in terms of the discussion in para 13 of the assessment order. The Assessing Officer has made an addition of Rs.30.00 lacs on the basis of a loose paper being page 13 of Annexure A-4 seized from the residence of one Mr. Bharat G. Shah, an employee of the assessee. The Assessing Officer notes that in the course of search, said Mr. Bharat G. Shah stated that such loose papers were given to him by the assessee to be kept with him. As per the Assessing Officer, the contents of the relevant seized material, which has been reproduced in para-13 of the assessment order, indicates that one Mr. Suresh Agarwal paid the assessee Rs.30,00,000/- in March, 2006 in two instalments of Rs.15,00,000/- each. It is further noticed by the Assessing Officer that though there was an account of Mr. Suresh Agarwal in the account books of asessee's proprietary concern, M/s. Gupta Steel Corporation, but the aforesaid amount was not accounted for. For the said Padmashree Dr. D. Y. Patil University reasons, the Assessing Officer treated the sum of Rs.30,00,000/- as unaccounted income of the assessee.

11.2 Before the CIT(A), assessee reiterated that the paper was found and seized from Mr. Bharat G. Shah and not from the assessee. Further, there was no material to say that such seized material related to the assessee for any of his activities. The assessee also pointed out that such loose papers were printed account papers and on top of it is written "Trial Data" and that assessee had no knowledge as to who has written or printed the same.

11.3 The CIT(A) has considered the submissions put forth by the assessee and found that there was no material brought on record to establish that the seized papers belonged to the assessee. The CIT(A) also found that the seized documents do not indicate who is the recipient of the amounts mentioned and in what connection the money was paid.

According to the CIT(A), merely because there is an account appearing in the account books of the assessee in the name of Mr. Suresh Agarwal, it would not lead to an assumption that the seizeddocument reflect transactions between assessee and Mr. Suresh Agarwal. In fact, the CIT(A) infers that the document reflects transaction between Mr. Bharat G. Shah and Mr. Suresh Agarwal, as the document was found in the possession of Bharat G. Shah. Under these circumstances, CIT(A) has deleted the addition in the hands of the assessee.

11.4 Before us, the ld. Departmental Representative pointed out that the employee from whom the impugned loose papers were found is a trusted employee of the assessee and the notings in the seized paper showed that it pertain to the assessee. It was, therefore, contended that the addition has been wrongly deleted by the CIT(A). 11.5 On the other hand, the ld. Representative for the assessee pointed out that the CIT(A) was justified in deleting the addition as there was no material to link the said seizeddocument with the transactions undertaken by the assessee with Mr. Suresh Agarwal; which were duly accounted for in the account books.

11.6 We have carefully considered the rival submissions. Quite clearly the seized paper in question was found from the premises of Mr. Bharat G. Shah, who is an employee of the assessee. Therefore, the primary onus was on Mr. Bharat G. Shah to explain the contents of the document so as to justify the inference of the Assessing Officer that it reflected unaccounted transactions of the assessee, and, such an onus does not appear to have been discharged, having regard to the material on record. Even otherwise, we do not find any infirmity in the conclusion of the CIT(A) that there is no material to connect the assessee with such loose papers. Therefore, under these circumstances, we find no reasons to interfere with the conclusion of the CIT(A) in deleting the impugned addition. The order of CIT(A) is hereby affirmed and accordingly Revenue fails on Grounds of appeal Nos.9 & 10 also."

P a d m a s h r e e D r . D. Y. P a ti l U n i v e r s i ty

29. In the instant case, we notice that the AO has relied upon statements taken from the trustees and also certain discrepancies in OMR Sheets found from the premises of the assessee in order to support his conclusion that the assessee has, in fact, collected capitation fees. We shall examine whether those materials actually support the case of the assessing officer.

(a) The AO has referred to the Statement given by Chairman/President of the trust Shri Vijay Patil. However, we notice that he has denied collection of capitation fee. No material was found from the assessee to disprove the said statement of the Chairman. Hence the statement of Shri Vijay D Patil cannot be taken support of by the AO.

(b) The AO has relied upon the statement given by another trustee Smt Shivani Patil, who is the spouse of Shri Vijay Patil, particularly on the following answer given by Smt Shivani Patil to arrive at the conclusion that she has admitted that the trust was collecting capitation fee.

Q 52 Please provide the fees for management seats reserved in each of the college specified above.
Ans:- I don't know about the management seats for engineering college. This year the admission for Dental College have not been done. As per my knowledge, last year the seats were sold for typically 7 - 8 lakhs per seat. For MBBS the price is typically 30- 40 lakh. However for post graduate seats the prices is higher than MBBS. However, I don't know the exact figure. The management rates for Ayurveda and Physiotheraphy is typically 4-5 lakhs per seat as these are not sought after courses."
However, it is the contention of the assessee that she has not mentioned about Capitation fee at all. She has only stated that the fees of management seats are higher than the regular seats. A perusal of the above said reply given by Smt Shivani Patil, in our view, does not show that she has confessed anything about collection of capitation fee. We notice that this aspect has been clarified by Shri Vijay Patil also in his statement in the following questions & answers:-
Q 8:- I am showing you the statement of Smt Shivani Patil recorded u/s 132(4) from 27-07-2016 to 31-07-2016 wherein at Q.51 P a d m a s h r e e D r . D. Y. P a ti l U n i v e r s i ty onwards it has been stated capitation fee in cash is collected at Colleges under D Y Patil University, Nerul. Please Comment.

Ans.:- As per my understanding, Smt Shivani Patil has stated that D Y Patil University has management seats and fees is collected for the same. I agree that various colleges under D Y Patil University, Nerul have management Quota as allowed by the relevant rules upto 15% and fees is collected for the same. The fees for the management quota is higher than other seats. Apart from the 15% management quota, there is no other seat for which higher fees is charged.

Q 9:- In the statement of Smt Shivani Patil, she has stated at Q 53 that fees for management quota is collected in cash. How is it you are able to say that no capitation fees is collected?

Ans.: I agree that fees is paid in cash by some students. We don't refuse cash payments. However, all cash payments are accounted in the books of accounts. Such cash payments are either regular fees for regular seats or fee for management quota fees. There is no cash collected towards capitation fee in the colleges under DY Patil University, Nerul, as no capitation fees is collected by our colleges.

Accordingly, we agree with the contentions of the assessee that neither Shri Vijay Patil nor Smt Shivani Patil has stated that the assessee trust is collecting capitation fees. Hence the AO could not have placed reliance on the statement given by Smt Shivani Patil.

(c) The AO has also found a file containing cheque details of certain amounts received by the assessee, in the pen drive of Shri Pratap Patil. It was noticed that those cheque receipts were found accounted for in the books of the assessee trust. Another file found in the pen drive was containing details of payments made outside the books of accounts.

Accordingly, the AO has expressed the view that the information found in the pen drive should be considered in totality and the payments details should also be considered to be true, since details of receipts by way of cheques were found to be true. We are unable to agree with the said opinion expressed by the AO. We notice that the AO is referring to two different files found in the pen drive, i.e., one file contained details of receipts by way of cheques, another file contained details of receipts by Padmashree Dr. D. Y. Patil University way of cash and yet another file contained payment details. There should not be any dispute that the pen drive is in the nature of 'Storage vault' containing several files. Each file may contain different details and hence it may not be proper to hold that the contents of one file, if found to be correct then the content of other files are also to be considered as true. The opinion of the AO may be accepted, if the same file contains details of partly accounted and partly unaccounted transactions, which is not the case. Further, the assessee herein is contending that the collection of capitation fee is an un-authorised act of the employees. The assessee is not accepting the transactions noted down in the pen drive. Hence, we are of the view that the AO was not right in extending the interpretation given to one file to another file. The Ld A.R contended that Shri Pratap patil was having access to the records of the college and it is quite possible that he might have copied the file relating to receipt of fees by way of cheques. Accordingly, he contended that it does not mean that the information contained in other files should also be considered to be correct. In any case, since there is no material to link these payment details to the assessee, the same cannot be used against the assessee. The details/documents which have not been accepted by the assessee can be used only by bringing any other corroborate/independent material on record which would vindicate those information. Accordingly, we are of the view that the AO was

not justified in accepting the details of payments without carrying out due examination and bringing any other corroborative evidence.

(d) The AO has also relied upon certain discrepancies found in the OMR answer sheets pertaining to entrance examinations conducted by the assessee trust for admitting students in the management quota. According to AO, signatures were missing in the attendance sheets in some cases or it did not tally with the signature available in OMR sheets. According to the AO, those discrepancies are available in the case of students from whom capitation fees has been collected. We notice that the assessee has given explanations with regard to this deficiency. Be that as it may, the point to be considered here is whether the deficiencies P a d m a s h r e e D r . D. Y. P a ti l U n i v e r s i ty found in the OMR sheets would show that the assessee was collecting capitation fees?. First of all, the explanation given by the assessee for the deficiencies has not been proved to be incorrect by the AO. Secondly, in the enquiry conducted by the AO with the students, all of them have expressed ignorance about the deficiencies. Thirdly, the deficiencies noticed were related to the signature in attendance sheets. There is no evidence to show that the answer sheets themselves were manipulated, which might be an important incriminating material. Fourthly and most importantly, the AO did not ask any question with the students about payment of capitation fees. Hence, we are of the view that the deficiencies noted in the OMR sheets do not prove the receipt of capitation fees by the assessee trust. The Ld A.R also submitted that some students have also filed affidavit stating that they have not paid any capitation fee. Accordingly, in our view, this detail also does not support the case of the AO.

(e) We also notice that the revenue has questioned the trustees, viz., Shri Vijay Patil and Smt Shivani Patil. We noticed earlier that both of them have denied collection of capitation fees. We notice that the revenue did not question other trustees with regard to the allegation of collection of capitation fees. We also notice that the officials at helm of affairs, viz., Vice Chancellor, Controller of Examinations were also not questioned.

(f) The AO had placed reliance on the statements given by the employees, trustee and certain employees of another trust. However, all of them have retracted the statements given by them. We notice that most of them have retracted within 15 days from the date of conclusion of search. The AO however rejected the retraction by holding that the same is an afterthought and without any reasoning. However, we notice that they have stated that they were under

mental pressure when the statement u/s 132(4) of the Act was taken from them and could not give proper reply. The Ld A.R also submitted that, since the employees have collected capitation fees without the authority of the assessee trust, naturally they would be under the threat of exposure. Hence, in order to save their skin, Padmashree Dr. D. Y. Patil University they might have stated initially that the capitation fees were collected upon the instruction of Shri Vijay Patil. Subsequently, when they reached proper mental state, they have filed retraction statements. The Ld A.R also submitted that the cash was recovered from the employees only and not from the assessee trust. The Ld A.R submitted that, it reinforces the fact that the employees were only collecting capitation fees without the authority. The Ld A.R also submitted that the employees have owned up the cash seized from them and have declared the same as their respective income under Income Declaration Scheme, 2016. This fact would support their respective retraction statement and also the stand of the assessee trust. The Ld A.R submitted that the income declared by the employees have been accepted by the revenue. Accordingly, it was contended by the Ld A.R that the original statements given u/s 132(4) could not have been relied upon by the AO. Considering the facts and circumstances of the case discussed above, in our view, these contentions of Ld A.R merit acceptance.

(g) We notice that the AO has also conducted enquiries with some of the parents. The Ld A.R has advanced his arguments on the reliability/effectiveness of their statements, which we have summarized in the earlier paragraphs. We have noticed that most of them have given donations by way of cheques only. The parents who had given cash had taken back the cash, as their respective children changed their minds. None of the parents have admitted that the assessee trust has collected capitation fees in the form of donations, i.e., there is no material to show that the donations were not voluntary. It is only the AO who has presumed that the donations given by the parents are in the nature of capitation fee collected by way of cheque. Hence, we are of the view that the AO could not have placed reliance on the statements given by the parents.

(h) The AO has also relied upon the documents seized from employees of another trust, viz., Taruna Maheswari and Pravin Patil and made additions on protective basis towards receipts of money recorded in those Padmashree Dr. D. Y. Patil University statements. Both of them said that the payments were received on behalf of Vijay D Patil. However, no corroborative material was

brought on record to prove the trustworthiness of the transactions recorded therein. We notice that the AO has only presumed that the payments have been given by Shri Vijay Patil, as noted in the above said documents, out of the capitation fees only. However, no material was available to support the above said presumption of the AO. If at all any such payment has been made by Shri Vijay D Patil, it may be his personal transaction and hence it is nothing to do with the assessee trust. Both the above said parties have initially stated that they had received money from Tukaram Patil and others, but later retracted it. In any case, no contra entry was available in the record maintained by Shri Tukaram Patil. Further, the revenue did not examine Tukaram Patil with regard to the entries of receipt of cash noted by Taruna Maheswari and Pravin Patil. In any case, those transactions are between two parties and there is no other material to show that the said transactions, if at all true, were related to the assessee.

The foregoing discussions would show that the above said statements/materials do not vindicate or link the information/evidences found from the employees. The revenue also did not find/seize any credible material from the assessee trust to corroborate the information/document seized from the employees. In respect of alleged receipt of capitation fee and in respect of payments recorded in the materials, the AO did not make enquiries with the payer/recipient of money. In the absence of any independent material to link/vindicate the information found from the employees, we are of the view that the AO could not have made additions on the basis of that information.

30. In the decision rendered by Hon'ble Supreme Court in the case of Common Cause (a registered society) reported in 394 ITR 220, it was held that the documents recovered by the authorities will have no evidentiary value unless it is corroborated with any other independent evidence, i.e., uncorroborated loose papers found in the search cannot be taken as sole P a d m a s h r e e D r . D. Y. P a ti l U n i v e r s i ty basis for determination of undisclosed income. The Hon'ble Supreme Court has held in the case of CBI vs. V C Shukla (supra) that even correct and authentic entries in books of account cannot fix a liability upon a person without independent evidence of their trustworthiness. We notice that the Hon'ble Supreme Court has dealt with the entries made in a diary which was considered to be regular books of account and held that it cannot be relied upon. However, in the instant case, the evidences relied upon by the AO are certain abstract statements maintained by the

employees in their respective laptops. Hence, in our view, it cannot be said that those uncorroborated materials have any evidentiary value viz-a-vis the assessee unless any other independent material is brought on record to prove the trustworthiness of those abstract information.

31. At this stage, we may refer to the decision rendered by Hon'ble Madras High Court in the case of The CIT vs. Balaji Educational & Charitable Public Trust (374 ITR 274)(Mad). We notice that the facts considered by the Hon'ble Madras High Court were to some extent identical with the facts of the present case. The relevant portion of the decision rendered by Hon'ble Madras High Court is extracted below:-

"7.5 As rightly held by the Tribunal, if the Assessing Officer had any doubt about the receipt of capitation fee or the explanation given, he should have conducted enquiry either with the students or with their parents or with any other person interested in the activities carried on by the assessee trust. But, without doing so, the Assessing Officer estimated the collection of contributions on the basis of the number of seats available under management quota multiplied by the amount of contribution attributable to individual seats. Any determination for purpose of tax cannot be based on hypothetical facts or conjectures or surmises. The inference drawn by the Original Authority is based on probability.

7.6 With regard to the seizure of cash of over Rs.44 Lakhs from the residence of the Chairman of the Assessee Trust, it is not in dispute that the said sum has been assessed in the hands of the Chairman for the assessment year 2008-2009 and the same was received from the petrol pump business, the turnover of which is more than Rs.30 Crores. Moreover, the Assessing Officer has accepted the disclosure of the seized cash as the income of the individual and, therefore, in our considered P a d m a s h r e e D r . D. Y. P a ti l U n i v e r s i ty opinion, it cannot be said that assessee trust had accepted contributions by way of capitation fee. The said issue cannot be used both ways. The assessment of the undisclosed income at the hand of the individual ends the issue there. It has no relevance to the affairs of the Trust and there is no material to hold so.

7.7 In our considered opinion, based on the loose sheets and cash seized, which have been held as irrelevant to the present issue, it cannot be held that for all the assessment years the assessee received capitation fee for admission of students in the management quota. This is a perverse inference. Without conducting any enquiry

in this regard to make allegation is unsustainable. The information obtained from the Public Information Officer to a query raised under the Right to Information Act to the effect that "There is no any complaint received from any student/parent regarding capitation fee charged by the above institutions so far" also tilts the balance in favour of the assessee. It disproves the department's allegation of involuntary collection of amounts. That apart, the order passed under Section 264 of the Act for the assessment years 1998-1999 to 2001-2002 clearly states that the donation received from students or the parents is not compulsory in nature and, therefore, the same is not capitation fee. There is no material to controvert this fact which is to the knowledge of the department. No endeavour is made to sustain the allegation of involuntary donation. In any event, as rightly held by the Tribunal, it is not relevant in the present case as the allegation is violation of Section 13 r/w Section 11 of the Act. 7.8 We find that factually the Commissioner of Income Tax (Appeals) and the Tribunal have come to the conclusion that the donations received do not partake the character of capitation fee. There is no element of involuntary nature of donation. A specific finding is given that no investigation has been done to show that any parent or student has complained about the nature of donation. The department has failed to dispel the finding of fact.

7.9 In any event, the learned Standing Counsel for the department pleads that since the assessee had not submitted the list of students, the Assessing Officer had to make an estimate adopting his own methodology. This we cannot accept for the simple reason that the show cause notice proceeds on the basis that the assessee has to submit the list of donors alone. A reply was submitted by the assessee and in paragraph 6(iii), the Assessing Officer states that all the statements tallied. However, the assessing officer comes to a different conclusion that contribution is not voluntary, and it is relatable to admission of students. We find this finding of the Assessing Officer, as has been rightly held by the Commissioner of Income Tax (Appeals) and the Tribunal, is not supported by documents, but on the basis of Assessing Officer's inference. It cannot be now stated that something was not furnished, nevertheless, he tallied all the materials and came to the conclusion as stated above. If the Assessing Officer has tallied the figures then the assessees case of actual contribution to Trust has to be accepted. It has been shown in the return of income. A bald statement in paragraph (7) of the assessment order that the assessee is P a d m

a s h r e e D r . D. Y. P a ti l U n i v e r s i ty not carrying on charitable activities for the purpose of Section 13 read with Section 11 of the Act appears to be the mainstay of the department's case.

7.10 In effect, it is clear that the authority has confused himself with the admission of students in management quota with the carrying on activities of the trust. The distinction is obvious that if the department wanted to make out a case of violation of Section 13 of the Act by the trust, it cannot be based on the perception of the Assessing Officer that donations to the trust are not voluntary. We hasten to add that there is no material to support the plea that the donations are not voluntary. 7.11 Having invoked Section 13, the mainstay of the case of the department should be based on the activities of the trust to plead that the same are not in consonance with Section 13 of the Act and, therefore, exemption under Section 11 of the Act should be denied, which we find is abysmally silent in the show cause notice and the assessment order. 7.12 We do not find any reason to come to a different conclusion on facts, as has been addressed by the Commissioner of Income Tax (Appeals) as well as the Tribunal on these two issues relating to seizure of cash and loose sheets. Apparently, there is no dispute on that fact. All that the department is trying to show is that there is something improper in the manner in which the donations are handled. Both these factors clearly establish that the allegations have nothing to do with the trust and its activities in relation to the charitable objects."

32. In view of the foregoing discussions, we are of the view that documents seized from employees cannot be considered as having any evidentiary value and cannot be considered to have trustworthiness, since no other corroborative material was brought on record to support the veracity of the same. None of the material would show that the assessee trust was collecting capitation fees. Hence, the AO could not have placed reliance on the materials seized from the employees to draw conclusion that the assessee was collecting capitation fees.
33. Another important aspect that was brought to our notice by Ld A.R is that the assessee is prohibited from collecting capitation fees under Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act, 1987. It is the submission of the assessee that there was no complaint against the assessee with regard to collection of capitation fees and the State P a d m a s h r e e D r . D. Y. P a ti l U n i v e r s i ty Government has not taken any action

against the assessee in this regard. This fact also goes against the presumption drawn by the AO.

34. We shall now advert to certain contentions raised by Ld D.R and also to the case laws relied upon by him.

(a) The first case law relied on by Ld D.R is the decision rendered by Pune bench of Tribunal in the case of Sinhagad Technical Education Society vs. DCIT (2022)(139 taxmann.com 270)(Pune-Trib). In this case, the AO had brought corroborative evidences in the form of refund of capitation fees, recommendation seeking waiver/reduction in capitation fee/donation. Further, enquiries were made with three persons and they have confirmed payment of capitation fees. Most importantly, the incriminating materials in the form of loose sheets were found at the premises of the assessee therein. Under these set of facts, it was held that the loose sheets would have evidentiary value. On the contrary, in the instant case, no material was found/seized from the premises of the assessee. The materials were found at the residences of the employees. The assessee has categorically denied collection of capitation fees. The AO could not bring any material on record to link those materials with the assessee or to prove that the assessee only was indulging in collection of capitation fees. Accordingly, we are of the view that the decision rendered by Pune bench of Tribunal in the case of Sinhagad Technical Education Society (supra) is not applicable to the facts of the present case.

(b) The Ld D.R also relied upon the decision rendered by Hon'ble Delhi High Court in the case of CIT vs. Jansampark Advertising & Marketing P Ltd (2015)(56 taxmann.com 286)(Delhi) and contended that the Tribunal may conduct proper enquiry, if the AO had failed to discharge his functions properly. In our view, this decision will also Padmashree Dr. D. Y. Patil University not apply to the facts of present case. We have noticed that there was no material to link the assessee with the materials seized from the employees and hence the very inference drawn by the AO was rejected by us. Thus, it is not case of lack of proper enquiry as envisaged in the above said decision rendered by Hon'ble Delhi High Court. Accordingly, this decision also does not support the case of the revenue.

(c) The Ld D.R submitted that the declaration of income by the employees under Income declaration scheme is not sacrosanct. He brought to our notice a news reported in a news paper that a person had declared Rs.13,860 crores under Income declaration Scheme and the same is being probed by the Income tax department. In our

view, there is no reason to suspect the facts of the present case on the basis of the facts prevailing in some other case, i.e., the revenue should bring some material to prove that the declarations given by the employees are not correct. On the contrary, the Ld A.R submitted that the declarations of the all the employees have been accepted by the revenue.

(d) The Ld D.R also invited our attention to a newspaper clipping, which described the memory of 12 year old student. Accordingly, he submitted that the statement given by Shri Tukaram Patil and Shri Unmesh Khanvilkar out of their memories should be taken as evidentiary value, since some people are gifted with good memory capacity. However, in the legal process, oral submissions do not carry much evidentiary value.

35. Accordingly, we are of the view that all the additions made by the AO including the protective additions, on the basis information found in the laptops, diaries and other documents found/ seized from the employees and third parties (employees of another trust) are liable to be deleted.

P a d m a s h r e e D r . D. Y. P a ti l U n i v e r s i ty Accordingly, we direct the AO to delete the addition made towards Capitation fees and other additions made on the basis of the materials seized from the employees in all the years under consideration. The details of addition of capitation fees made in various years are detailed below:-

Assessment Year	*Amount (Rs. In crores)*
2013-14	*2.290*
2014-15	*24.930*
2015-16	*33.385*
2016-17	*53.475*
2017-18	*54.950*

The order passed by Ld CIT(A) on this issue would stand set aside and the AO is directed to delete these addition in all the years under consideration.

36. We have noticed that the AO has rejected the books of accounts on the reasoning that the assessee has not accounted for capitation fees. Since we have held that there is no evidence to show that the assessee has collected capitation fees, the very foundation for

rejecting the book results would fail. Accordingly, we hold that there was no justifiable reason to reject the books of accounts. Accordingly, we set aside the order passed by Ld CIT(A) on this issue in all the years under consideration and hold that the books of accounts of the assessee trust should be accepted in all the years under consideration.

37. We have noticed that the assessing officer has rejected the claim for exemption u/s 11 of the Act on the reasoning that the assessee cannot be considered to be a charitable trust, when it collects capitation fees. In the earlier paragraphs, we have held that there is no evidence to show that the assessee has collected capitation fees. Hence the reasoning given by the AO to reject the claim for exemption u/s 11 would fail. We also notice that the registration granted to the assessee u/s 12A of the Act has not been P a d m a s h r e e D r . D. Y. P a ti l U n i v e r s i ty withdrawn. Hence, under the provisions of sec.11 to 13 of the Act, the AO is entitled to reject the exemption only when the provisions of sec.13 are attracted, i.e., there is any of the violations mentioned in sec. 13 of the Act. The possible case of the AO, in the instant case, would be that the trustees have siphoned off the capitation fees collected by the assessee trust, by not accounting the same in the books and it may attract the provisions of sec.13. We have noticed earlier that there is no evidence to show that either the trust or the trustees have collected capitation fees. We have also held that the AO has arrived at such a conclusion only on presumptions. In that view of the matter, it cannot be said that the trustees have siphoned off money belonging to the assessee trust. Hence it cannot be said that there was violation as mentioned in the provisions of sec.13 of the Act.

38. Another important point is that the CIT(E) has not withdrawn the registration granted u/s 12A of the Act to the assessee. When the registration granted u/s 12A was intact, the AO could not have denied exemption u/s 11 of the Act.

39. The assessee had received corpus donations in the form of development fees from some of the parents of the students. The assessee claimed the same as exempt u/s 11(1)(d) of the Act. The assessee had also received other corpus donations. The AO took the view that the donation given by the parents are not voluntary and it was given only to secure seats for their children. Since the AO had rejected the claim for exemption u/s 11 of the Act, he also rejected the claim for exemption u/s 11(1)(d) in respect of corpus donations received in the form of Development fees and also in respect of other corpus donations. In the earlier paragraphs, we have held that the

assessee cannot be denied exemption u/s 11 of the Act. Further, it was only a presumption on the part of AO that the corpus donations given in the form of development fees were not voluntary. We have seen that none of Padmashree Dr. D. Y. Patil University the parents have stated that the assessee trust had put such a condition for giving admission to their wards.
40. With regard to the above said issues, we take support from the decision rendered by Hon'ble Karnataka High Court in the case of Kammavar Sangham vs. DDIT (Exemption) reported in (2023)(146 taxmann.com
367)(Kar), wherein identical points were examined. The relevant observations made by Hon'ble Karnataka High Court are extracted below:-
"9. We have carefully considered the rival contentions and perused the records.

10. Assessee claims to be a charitable society and obtained certificate under section 12(A) of the Act.

11. The assessee has received donations and shown it in the Income and Expenditure account. By the impugned order, the ITAT has denied the benefit under section 11 of the Act.

12. Section 11(1)(d) of the Act relied upon by Shri. Sanmathi, makes it clear that the voluntary donation made with a specific direction shall form a part of the corpus. The person who makes a contribution can make such contribution either with a specific direction or without any direction. Section 11(1)(d) of the Act refers to only such contribution which are made for a specific purpose. For example, the donor may desire that his donation be used for construction of a building. If no direction is given by the donor, the money received by the assessee shall be taxable subject to such exemption which may be claimed under section 11 of the Act.

13. In the instant case, it is not in dispute that the entire amount received as 'contribution' has been shown in the Income and Expenditure account. The denial of benefit under section 11 of the Act is on the premise that the donations received are not voluntary in nature. This precise question was considered by Madras High Court in Balaji Educational & Charitable Public Trust's case (supra) and it is held as follows:

'4.7 The question, as has been posed by the Tribunal, is whether the contributions or donations are voluntary or involuntary and what is

the effect of such donation. The Tribunal was of the view that there is no concept of involuntary contributions and went on to hold that voluntary contributions should be treated as income under section 12 of the Act and that corpus donations to be treated as capital receipt under section 11(1)(d) of the Act and corpus donations are not generally in the nature of income. It further held that voluntary contributions are taxable only if not applied for charitable purposes. The emphasis is on, not applying the same for charitable purposes.

P a d m a s h r e e D r . D. Y. P a ti l U n i v e r s i ty 4.8 Whether contribution is voluntary or involuntary and its implication in relation to these provisions was considered by the Tribunal in the following manner:

"35. To proceed further, we have to examine the (30) scheme of law of charities provided under the Income-tax Act, 1961. There is no concept of involuntary contributions in that scheme. The only distinction recognized by law is the voluntary contributions to be treated as income under section 12 and the corpus donations to be treated as capital receipt under section 11(1)(d). The corpus donations are not generally in the nature of income. The voluntary contributions are taxable only if not applied for charitable purposes.

In the present case, the assessee-trust itself has treated the contributions as voluntary contributions in the nature of income. The assessee claims exemption under section 11 not on the basis of the nature of contributions but for the reason that the contributions were applied for charitable purposes. When the assessee-trust itself has treated the contributions as voluntary contribution in the nature of income, which is the best situation that the Revenue would always welcome, what is the relevance of arguing whether the contributions were voluntary or not?
36. Even if the contributions are treated as not voluntary what could be the legal consequence of that finding? Whether the Revenue will treat such (31) involuntary contributions as capital and give exemption from taxation? No, it will not. The Revenue will still find such involuntary contribution as income liable for taxation. If so, what is the real distinction between voluntary contribution and involuntary contribution as far as the taxation of charities is concerned? In both cases, it will be brought for taxation if the assessee has not utilised the contributions for charitable purposes.
37. The expression "voluntary contributions" is used in the Act instead of "contributions" to highlight the principle of non- compulsion

in matters of participating in charitable activities and to underline the gratuitous nature of donations and charitable activities. There is no compulsion in making contributions to charities. If the expression was "contributions" there could be a naunce of compulsion like contribution to provident fund and the like.

38. Therefore, we find that whether it is treated as voluntary or involuntary, the only course of action available before law is to see whether such contributions have been treated by the assessee as the income and also applied for charitable (30) purposes." This reasoning of the Tribunal, we are inclined to accept. 4.9 The finding of the Tribunal is that the department has not established a case that the assessee had in this case not utilized the donations or income for charitable purpose. The clear finding of the Tribunal is that if the assessee had not utilized the amount for P a d m a s h r e e D r . D. Y. P a ti l U n i v e r s i ty charitable purpose, it would automatically become taxable and the assessee would not be entitled to exemption. But, on the contrary, without there being a finding of violation of section 13 of the Act, an inference is drawn on an alleged receipt of donation and consequently, the allegation is made that there is a violation of section 13(1)(d) of the Act. A hypothetical finding is given that because capitation fee is charged, it is not an income in terms of section 11 of the Act and, therefore, there is a violation of section 13(1)(d) of the Act. The Tribunal held that such a reasoning cannot be accepted because if the donations are offered for income and if the department wants to disprove the nature of income on the basis of material, as has been pointed (33) out by the Commissioner of Income-tax (Appeals), it should be borne out by records based on investigation, which the Assessing Officer failed to do, except falling back on a statement which is not supported by materials'.

14. We are in respectful agreement with the view taken by the Madras High Court.

15. Sri. E.I. Sanmathi, learned advocate is also right in his submission that in each year of assessment, the Assessing Officer will have to examine the case independently. In the case on hand, the Assessing Officer for the A.Y. 2011-2012 has held that he has made enquiry with the parents and collected information that the amount was not made voluntarily.

16. It was argued by Shri. Chandrashekar that Assessing Officer's view that capitation fee was collected in violation of the Karnataka Educational Institution (Prohibitions of Capitation Fee) Act, 1984, is not sustainable because it is for the appropriate authority, which

deals with the said Act to investigate into the matter. In substance, his contention is, the Assessing Officer under the Income-tax Act cannot deny the exemption under section 11 of the Act on the assumption that there is violation of any other statutory provision. He also adverted to section 12(AA) (4) (b) of the Act and contended that the said provision has been substituted with effect from 1-9-2019, giving power to the Principal Commissioner or the Commissioner of Income-tax to cancel the registration of a trust or institution. Thus, it is clear that should there be any violation with regard to receipt of capitation fee, the Assessing Officer could not have denied the benefit under section 11 of the Act so long as the certificate is in force. Admittedly, assessee's certificate was in force. Though it was cancelled by the Revenue it has been restored by an order passed by this Court in ITA.No.421/2013.

17. In view of the above, these appeals merit consideration in favour of the assessee."

Identical view has been expressed by Hon'ble Karnataka High Court in another case, viz., PCIT vs. Rashtreeya Shiksha Samithi Trust (2023)(152 taxmann.com 664)(Kar) as under:-

P a d m a s h r e e D r . D. Y. P a ti l U n i v e r s i ty "7. We have carefully considered rival contentions and perused records.

8. This court in Kammavari Sangham has held that so long as the exemption certificate is in force, the assessee is entitled for its benefit.

In New Noble Educational Society's case (supra) relied upon by Shri Sanmathi, it is held that the compliance with registration under the different tax law is also a relevant consideration and it can legitimately weigh with the tax authority while deciding the applications for approval under section 10(23C).

9. Undisputed facts of this case in hand are, the exemption certificate was in force as on the date of issuance of notice. The AO has denied the benefit of exemption by holding that the assessee had received a sum of Rs. 27,23,55,000/- as capitation fee in the guise of voluntary contribution.

10. Shri Huilgol pointed out from para 18 of the impugned order that the assessee had filed an affidavit before the ITAT stating that no action under the KEI (Prohibition of Capitation Fee) Act, was initiated against the assessee. The ITAT has recorded that the learned departmental representative had not contradicted the said affidavit either orally or by filing a counter affidavit. Based on this factual aspect, the ITAT has recorded thus in the impugned order;

"37. In the light of the above, we are of considered opinion that the Appellant is carrying out education which is charitable within the meaning of section 2(15), it has applied and/or accumulated sums as required by section 11(1)(a), the explanation thereto and section 11(2), it is duly registered under section 12A and has not violated section 13. Further there is no private gain and all the funds are ploughed back only into education. Thus accumulations and application are as per the provisions of section 11. Therefore, exemption under section 11 and 12 has to be allowed to the assessee. We hold that the assessee is entitled to exemption u/s.11 and 12 of the Act. In the result grounds 3 to 5 of assessee appeal are allowed."

The AO had held that there was violation under the KEI (Prohibition of Capitation Fee) Act, and accordingly, brought the money collected by the assessee to tax. In challenge before the ITAT, the assessee has filed an affidavit stating that no action was initiated against the assessee by the State and that has remained uncontroverted. The resultant position is, the AO, based on assumption and surmise, has held that there was violation under the KEI (Prohibition of Capitation Fee) Act by the assessee and that incorrect assumption has been rightly reversed by the ITAT. So far as the authority in New Noble Educational Society's case (supra) is concerned, the Apex Court has held that the registration under different statues is also a relevant consideration while deciding the application for approval under section 10(23C) of the Act. In the case on hand, we are not dealing with a situation where the IT Department was considering any application for granting exemption. On the other hand, the department had issued the exemption certificate and the AO on an incorrect assumption has treated the money collected by the assessee as capitation fee under the KEI Padmashree Dr. D. Y. Patil University (Prohibition of Capitation Fee) Act. Therefore, the said authority does not lend any support to the Revenue. This court has already taken a view in Kammavari Sangham's case (supra) and the same is applicable to the facts of this case.
11. In view of the above, this appeal by the Revenue must fail .."
Accordingly, we hold that the assessee should be granted exemption u/s 11 of the Act in all the years under consideration. We order accordingly.
41. In view of the foregoing discussions, we hold that the corpus donations received in the form of development fees and also other

corpus donations are eligible for exemption u/s 11 of the Act. The details of additions made by the AO are tabulated below:-
Asst. Year Development Fees Other corpus donations 2013-14 9,88,60,344 3,37,58,000 2014-15 12,25,31,425 8,09,60,000 2015-16 13,92,85,176 46,80,000 2016-17 12,03,14,344 1,34,15,000 2017-18 10,13,32,005 1,63,16,749 Accordingly, we set aside the order passed by Ld CIT(A) on this issue in all the years under consideration and direct the AO to grant exemption u/s 11(1)(d) of the Act in respect of above items of corpus donations.

42. The AO did not allow capital expenditure incurred by the assessee as application of income, since he had denied exemption u/s 11 of the Act. Since we have restored the exemption u/s 11 to the assessee, the income of the assessee for all the years under consideration has to be computed in accordance with the provisions of sec.11 of the Act. Hence the capital expenditure incurred by the assessee is required to be treated as application Padmashree Dr. D. Y. Patil University of income. The capital expenditure disallowed in various years is tabulated below:-

Assessment year	*Capital expenditure*
2013-14	*8,28,49,654*
2014-15	*19,06,56,436*
2015-16	*23,13,80,737*
2016-17	*165,29,88,113*
2017-18	*49,17,30,341*

Accordingly, we set aside the order passed by Ld CIT(A) on this issue in all the years under consideration and direct the AO to allow the above said capital expenditure incurred by the assessee as application of income u/s 11(1) of the Act.
43. Since the AO had rejected the books of account, he denied exemption u/s 11 of the Act and assessed total income by making various additions including alleged capitation fees etc. Accordingly, the AO levied tax u/s 115BBE of the Act. In view of the decision rendered by us in the earlier paragraphs, the income has to be computed for all the years in terms of sec.11 of the Act. Accordingly, the tax could not be levied u/s 115BBE of the Act in all the years

under consideration. Accordingly, we set aside the order passed by Ld CIT(A) on this issue in all the years under consideration and direct the AO not to levy tax u/s 115BBE of the Act.

44. The assessing officer has denied depreciation on opening balance of assets on the reasoning that the value of concerned assets has been treated as application of income. We notice that such embargo to claim depreciation on the assets, whose value has been allowed as application of income has been brought into the statute with effect from AY 2015-16 only. Accordingly, we direct the AO to allow depreciation on the opening value of assets in AY 2013-14 and 2014-15. For other years, the disallowance of deprecation Padmashree Dr. D. Y. Patil University should be restricted only on those assets, whose value has been allowed as application of income in the earlier years.

45. The AO has rejected the claim of set off of deficit brought forward from earlier years. Since we have restored the exemption u/s 11 of the Act to the assessee, the claim of the assessee is allowable as per the decision rendered by Hon'ble Bombay High Court in the cases of DIT (E) vs. Maharashtra Industrial Development Corporation (ITA No.2652 of 2011) and CIT vs. Institute of Banking (264 ITR 110)(Bom). Accordingly, we direct the AO to allow set off of deficit brought forward from earlier years.

46. In AY 2013-14, the assessee has sold assets having value of Rs.20.00 lakhs. The AO assessed the sale value of Rs.20.00 lakhs as income of the assessee. The reasoning given by the AO is that the value of assets was treated as application of income at the time of purchase and hence the sale value should be treated as income. It is the submission of the assessee that the assessee has purchased movable assets aggregating to Rs.3,84,50,974/- during the year relevant to AY 2013-14, but claimed a sum of Rs.3,64,50,974/- only as application of income after deducting the value of assets deleted. In any case, it is the submission of the assessee that the capital gain arising on sale of assets is offered as income. The Ld CIT(A) confirmed the addition by observing that the same is consequential to rejection of benefit of exemption u/s 11 of the Act. Since we have restored the exemption u/s 11 to the assessee, this addition is not called for. Accordingly, we direct the AO to delete the disallowance of Rs.20.00 lakhs made in AY 2013-14.

47. In AY 2014-15, the assessee is challenging the decision of Ld CIT(A) in confirming the addition of Rs.84.50 lakhs treated by the AO as bogus purchases. The assessee has purchased certain materials from a company named M/s Monarch Trading Co in the years

relevant to AY 2013-14 and Padmashree Dr. D. Y. Patil University 2014-15. The value of material purchased was Rs.60.00 lakhs and Rs.24.50 lakhs respectively. The assessee made the payment of Rs.84.50 lakhs during the year relevant to AY 2014-15. Based on the statement given by Smt Taruna Maheswari, employee of another trust, the AO treated the above said expenses as bogus in nature and accordingly added the same u/s 69C of the Act.

47.1 We heard the parties on this issue and perused the record. We have noticed that Smt Taruna Maheswari is not the employee of the assessee and the allegation of bogus purchases has been made on the basis of noting made by her. On the contrary, the assessee could prove the genuineness of purchases before the AO. On the contrary, the AO has placed reliance on the statement given by Smt Taruna Maheswari, which has been retracted by her later. When the assessee is able to prove the genuineness of purchases and payments, the AO should have accepted the same, since there was no other material to support the noting made by a third person, i.e., Taruna Maheswari. Accordingly, we are of the view that the Ld CIT(A) was not justified in confirming the addition of Rs.84.50 lakhs made by the AO in AY 2014-15. Accordingly, we direct the AO to delete this addition.

48. We have noticed earlier that the revenue has seized cash from various employees of the assessee. We have also noticed that all the employees have owned up the cash and offered the same as their income under Income Disclosure Scheme, 2016. Since the AO had made addition on account of capitation fee receipts in the hands of the assessee in all the years under consideration and since the cash balance seized from the employees was treated as part of capitation fee, he did not make addition of cash balance separately. However, in order to safeguard the interests of revenue, the AO added the cash balance seized from Shri Pratap Patil (Rs.74,96,500/-) and from Shri Unmesh Khanvilkar (Rs.19,40,26,600/-) on protective basis. The Ld CIT(A) deleted the protective additions. However, he held that the same Padmashree Dr. D. Y. Patil University shall become substantive additions, if the additions on account of capitation fee are deleted by the higher appellate forum. Hence the assessee has raised an additional ground challenging the above said decision of Ld CIT(A) in Asst.Year 2017-18.

48.1 We heard the parties on this issue and perused the record. We have deleted the additions relating to capitation fee in the earlier paragraphs holding that there is no evidence to show that the assessee trust has collected capitation fee. Hence the additions

relating to above said cash balances will have to be treated as substantive additions, as observed by Ld CIT(A). We have earlier held that there is no material to show that the assessee has collected capitation fees. We also notice that there is no material to link the above said cash balances seized from the employees with the assessee trust. Hence there is no reason to make this addition in the hands of the assessee on substantive basis, since the onus to explain the cash balances will lie upon Shri Pratap Patil and Shri Unmesh Khanvilkar. We noticed that both these persons have owned up the cash balances and offered the same as their income under Income declaration Scheme, 2016. Accordingly, we direct the AO to delete both the above said additions in AY 2017-18.

49. We shall now take up the appeal filed by the revenue. In AY 2014-15, the revenue is aggrieved by the decision of Ld CIT(A) in deleting the addition of Rs.2.15 crores relating to unexplained expenditure. In AY 2016-17, the revenue is aggrieved by the decision of Ld CIT(A) in deleting the addition of Rs.6.10 crores relating to unexplained expenditure.

49.1 On examination of pen drive seized from Shri Pratap Patil, an Excel file titled as "Shree Swami" was found. It contained details of payment of Rs.2.15 crores to certain persons in June and July, 2013 to the tune of Rs.2.15 crores as detailed below:-

P a d m a s h r e e D r . D. Y. P a ti l U n i v e r s i ty Adv Singh Skin VD 25.00 (Amount in lakhs) 27-06-2013 Abhi 80.00 04-07-2013 Tare Akanksha 20.00 12-07-2013 Aditya Saboo (ADV singh) 40.00 Koparkar Makrand m 40.00 Vaje 10.00

GROSS	*215.00*
	========

The assessing officer assessed the amount of Rs.2.15 crores as unexplained expenditure of the assessee in AY 2014-15 and assessed the same u/s 69C of the Act.

49.2 In the similar manner, the details of payments made to various persons in financial year 2015-16 have been noted down in the Excel sheet.

The aggregate amount of the same was 609.91 lakhs. The AO has extracted the same at pages 30 & 31 of the assessment order relating to AY 2017-18. The AO treated the same as unaccounted expenditure of the assessee in AY 2016-17 and assessed the same u/s 69C of the Act.

49.3 The Ld CIT(A) noticed that the AO has taken the view, in respect of other payments/expenditure, that they have been incurred out of capitation fees collected. Hence the AO had made the additions of other such kind of payments/expenditure on protective basis. Noticing the same, the Ld CIT(A) took the view that there is no requirement to take a different view in respect of Rs.2.15 crores and Rs.609.91 lakhs referred above. Accordingly, he held that both the above said amounts should also be considered as having been paid out of unaccounted capitation fees. Since the Ld CIT(A) has confirmed the additions relating to capitation fees, he took the view that payments made out of the same should not be assessed again. Accordingly, he deleted the addition of RS.2.15 crores and Rs.609.91 lakhs made in AY 2014-15 and 2016-17 respectively.

P a d m a s h r e e D r . D. Y. P a ti l U n i v e r s i ty 49.4 We have heard the parties and perused the record. We have held that the information found in the pen drive/laptop of employees cannot be considered as credible evidences, unless they have been corroborated with any other evidence. Accordingly, no credence could be given to the abstract entries made in the pen drive/laptop. Accordingly, we are of the view that the AO could not have made additions on the basis of those information. Accordingly, we confirm the decision of Ld CIT(A) in deleting the additions in both the years for the reasons discussed above.

50. The revenue is aggrieved by the decision of Ld CIT(A) in deleting the addition of Rs.65.00 lakhs, being the cash seized from Shri Bhagirath Patil. We noticed earlier that Shri Bhagirath had originally stated that he has received the above said amount from Smt Shivani Patil for keeping it in safe custody one day prior to the date of search. Later, he retracted his statement and submitted the same represents his money accumulated out of savings and agricultural income. He also revised his return of income relating to AY 2016-17 in order to show availability of cash. The AO did not accept the revised version of Shri Bhagirath Patil. He noticed that Smt. Shivani had stated that she has received a sum of Rs.60.00 lakhs from Mr Pratap Patil one week prior to the date of search. The AO took the view that the amount received from Pratap Patil is out of capitation fees. Accordingly he took the view that the amount of Rs.65 lakhs

given to Shri Bhagirath Patil consisted of Rs.60 lakhs said to have been received from Shri Pratap Patil. Accordingly, the AO held that the amount of Rs.65 lakhs given to Shri Bhagirath Patil is also part of capitation fees only. Accordingly, he assessed the amount of Rs.65.00 lakhs as income of the assessee in AY 2017-18.

50.1 Before Ld CIT(A), the assessee contended that the above said amount of Rs.65.00 lakhs belongs to Shri Bhagirath Patil only. It was submitted that Smt Shivani Patil has also retracted her statement and hence no credence should be given to her statement. It was submitted that Shri Bhagirath Patil P a d m a s h r e e D r . D. Y. P a ti l U n i v e r s i ty has revised his return of income disclosing availability of cash balance and the said return of income has been accepted. Accordingly, it was contended that no addition is called for. In the alternative, it is submitted that the assessing officer should not have added the above said amount, once he has taken the view that the same has been sourced from capitation fees. The Ld CIT(A) accepted the alternative contention of the assessee and accordingly, he deleted the addition of Rs.65.00 lakhs.

50.2 We heard the parties on this issue and perused the record. First of all, we notice that it was a transaction between Smt Shivani Patil and Shri Bhagirath Patil. Nowhere, it is mentioned by both of them that this amount of Rs.65.00 lakhs has got any connection with the assessee trust. The AO has given credence to the statement of Smt Shivani Patil, wherein she had said that she received a sum of Rs.60.00 lakhs from Shri Pratap Patil one week earlier to the date of search. The submission of the assessee is that the records maintained by Shri Pratap Patil do not show any such payment to her. It is not the case of the AO that Shri Pratap Patil has also confirmed the said payment of Rs.60 lakhs made to Smt Shivani Patil, meaning thereby, the statement of Smt Shivani Patil remains uncorroborated. We also notice both Smt Shivani Patil and Bhagirath Patil have retracted their respective statements. In any case, it is submitted that Shri Bhagirath Patil has shown availability of cash through his return of income. In the absence of any material establishing any connection between the assessee and the above said cash balance, we are of the view that there is no reason to assess the amount of Rs.65.00 lakhs in the hands of the assessee. Accordingly, we confirm the relief granted by Ld CIT(A) on this issue for the reasons discussed above.

10. The next ground of denial of benefit of section 11 & 12 by the AO is that there was a transactions of exchange of land by the assessee trust with its trustee Shri S.N. Vijayvargiya. The AO issued show cause notice to the assessee on 30.11.2011 which was replied by the assessee vide letter dated 07.12.2011. The show cause notice and reply are reproduced by the AO in para 81. & 8.2 as under:

> *"8.1 During the assessment proceedings, the assessee trust was required to state the justification for this transaction. The relevant portion of the show cause notice 30.11.2011 on this count is reproduced as under:*
>
> *"..... During the course of search and seizure action at the premises of People's Group at project office, Peoples campus, Bhanpur, Bhopal following documents/loose papers was seized:*
>
> *Pg 50-62 of LPS-7 is copy of exchange deed between SJPN (trust) and SN Vijay where 1.04 acres of land has been exchanged b/w SN Vijay and SJPN. The land exchanged is at Kh no 45/1 / 2 / 2 * kh at Raslakhedi and 45/1 / 2 / 4 * kh at Raslakhedi. The original sellers of land were Pritam singh and Sangam associates. Pg 63-70 is copy of exchange deed b/w SJPN and SN vijay, land of 10.35 acres of trust exchanged with land 9.17 acres of SN Vijay on 21.09.07. You are required to explain and prove with support documentary evidences whether by virtue of exchange any unreasonable benefit has been rendered to the office bearers of the trust by the funds of the trust. Also show cause as to why sec. 13 of IT Act should not be invoked in this case and exemption /s 11 and 12 of the Act should not be disallowed.*
>
> *Your reply to the points mentioned herein above should be furnished to this office on or before 7/12 / 2011 ....."*
>
> *8.2In response to the above notice, the assessee vide its reply dated 07.12.2011 stated:*

..As regards allegation relating to the exchange deeds of 1.04 and 10.35 acres of Trust land:

The exchange deed of 1.04 acres was executed between the Trust and Shri S N Vijay on 13.4.2005 under which the same area of land at the same place, i.e., Village Raslakhedi, Bhopal, and at the same time, has been exchanged by the trust with Shri SN Vijay. Since there is no difference in price of the land situated at the same place, no loss has been caused to the trust. Similarly, by executing such exchange deed, Shri SN Vijay as a trustee has also not derived any personal benefit as only same area of land at the same place and at the same time has been exchanged. By such exchange the trust was benefiued by obtaining the exchanged land at an advantageous position.

As regards exchange deed of 10.35 acres and 9.17 acres between the trust and Shri S N Vijay on 21.9.2007, it is submitted that the detailed explanation alongwith documentary evidence has already been given to the department, a copy of which is enclosed herewith as Annexure-B for your ready reference. As submitted earlier as stated above, the value of the land of 9.17 acres which the trust has got in exchange is valued higher than the land it has given exchange to Shri SN Vijay. The land of trust exchanged is situated at Village Raslakhedi, Bhopal, whereas the land the trust has got in exchange from Shri SN Vijay is situated at Village Bhanpur, Bhopal, and on the proximity of the Bhanpur Karond Bye Pass Road. The higher value of the land which the trust got in exchange has already been certified by the Registrar of Public Trusts, Bhopal which has already been submitted to the department as stated above. In view of this there is no question of any unreasonable benefit to the office bearers of the trust. The exchanged pieces of land are duly recorded in the name of the Trust in the revenue records and office of Registrar, Public Trusts, Bhopal. It is also further submitted that no undue advantage or benefit has been derived in the exchange transactions by the funds of the trust to any of the office bearers of the trust.

Thus, the proposed punitive action by the department against the Trust to revoke Section 13 of the IT Act, 1961 and disallow

exemption under Section 11 & 12 of the Act is misconceived, unwarranted and untenable. In view of the proper explanation give as above, there is no legal justification to the proposed action. No evidence has been adduced to substantiate such punitive action against the trust.

It may kindly be appreciated that in the light of the submissions made as aforesaid, there is no legal justification for the department to proceed against the trust on the basis of any of the unfounded allegations as enumerated in the captioned show cause notice and it is therefore requested that no addition be made against the assessee trust and the matter may be concluded, in the interest of justice."

10.1 In the show cause notice the AO has pointed out that the assessee has transferred land measuring 10.35 acres in exchange of land measuring 9.17 acres and therefore, there is a difference in the areas of land and consequently the AO proposed to invoke the provisions of section 13 of the Act. The assessee in the reply explained that the exchange of the lands has been done after the same was duly approved by the Registrar of Public Trust after considering market value of the land transferred by the assessee is less than the land taken by the assessee. The AO did not accept this explanation of the assessee and held in para 8.4 as under:

"8.4 Thus, it is established and held from the above discussion that benefit has been given by the trust to Shri S. N. Vijay by giving more than one acre of land in exchange. Thus, it is also established and held from the facts mentioned as above, that person mentioned in sections 13(3) has been benefited from the institution as per provision of section 13(2)(c) of the IT Act. Therefore, the provisions of section 13(1) are applicable and section 11 and 12 will not operate in this case for the relevant assessment year i.e. 2008-09. Therefore, for computation of total income of the assessee the normal provisions of law shall

apply and exemption u / s 11 & 12 shall not be available to the assessee for this assessment year."

10.2 We have gone through the guideline value of these two lands placed at page no.241 to 243. These guidelines/market value of the land had been determined and notified by the competent authority reveals the market value/guidelines value of the land transferred by the assessee at the rate of Rs.18 lakhs per hectare and the guidelines value/market value of the land received by the assessee exchange is @ Rs. 25 lakhs per hectare. This value is also reflected in the deed of exchange therefore, it is matter of record that the land transferred by the assessee is having less value of Rs.75.42 lakhs than land received by the assessee of Rs.92.80 lakhs and hence, there is no benefit transferred by the assessee in favour of Shri S.N. Vijayvargiya. Thus, this transaction of exchange of land does not fall in the ambit of provisions of section13 as the land received by the assessee trust is having more market value than the land given by the assessee in exchange. The finding of the AO is based only on the area of the lands and not on the actual value of the lands under exchange. The AO just took the difference of 1.04 acre without considering market value of the lands in question. Therefore, the finding of the AO on this point is contrary to the undisputed record being the notified guidelines value/market value of the lands in question. Accordingly the said finding of the AO is not sustainable and liable to be set aside.

11. In the view of the facts and circumstances as discussed above and our finding on each and every issue involved in these appeals arising from the assessment orders passed u/s 153A of the Act we hold that the denial of benefit u/s 11 & 12 of the Act by the AO is highly arbitrary and unjustified and accordingly the assessee is entitled for the exemption u/s 11 & 12 of the Act when the registration u/s 12A was subsist at the relevant point of time. Having held that the assessee is entitled for the benefit of section 11 & 12 the disallowance of carry forward of losses by the AO is also not sustainable and therefore, the order of the AO to that extent is also set aside and the claim of the assessee for carry forward of losses is accordingly allowed.

11.1 The CIT(A) has rejected to books of accounts by invoking the provisions of section 145(3). It is manifest from the impugned order that before exercising the power of enhancement the show cause notice required u/s 251(2) was not issued by the CIT(A). Therefore, the rejection of books of account by CIT(A) resulting enhancement of assessment without mandatory show cause notice is not sustainable. The Jaipur Bench of Tribunal in case of *Zuberi Engineering Company vs. DCIT in ITANo.977/JP/2018* vide order dated 21.12.2018 has considered this issue in para 7 as under:

> *"7. We have considered the rival submissions as well as the relevant material on record. There is no quarrel on the point that the ld. CIT(A) can exercise its power to enhance the income U/s 251 of the Act on the issue which is subject matter of the assessment. However, the said power of enhancement of ld. CIT(A) cannot be exercised in respect of the issue which is not the subject matter of the assessment and therefore, there is a restriction on exercise of power of enhancement not to take up an altogether new source of income. The question arises what is subject*

matter of assessment and in our considered opinion it depends on the scope of the enquiry by the Assessing Officer during the scrutiny assessment proceedings. Therefore, if the Assessing Officer has taken up an issue or matter for scrutiny during the assessment proceedings and after considering the explanation/reply of the assessee has accepted the claim then though the Assessing Officer has not made any addition on that particular item or source of income but the said would be very much subject matter of the assessment. Consequently the ld. CIT(A) can exercise its power on such point or subject matter by scrutinizing the same again and in case it is found that the Assessing Officer has allowed the claim which is not allowable then the ld. CIT(A) in its power U/s 251 of the Act can enhance the assessment by disallowing or making an addition on such issue or subject matter. It is settled proposition of law as held in the series of decisions, some of which has been relied upon by the ld AR of the assessee and cited (supra) that the ld. CIT(A) while exercising its power for enhancement U/s 251 of the Act cannot bring a new source of which was not subject matter of assessment. There is a distinction between the subject matter of assessment and scope of assessment. The subject matter of assessment is confined only on the issue and subject which are taken up for scrutiny by the Assessing Officer whereas the scope of assessment is very wide which includes even an enquiry of any issue and claim but might not have been taken up by the Assessing Officer during the scrutiny assessment. Thus, the subject matter of assessment is the matters which were taken up by the Assessing Officer during the scrutiny assessment are very much subject matter of appeal so far as the power of the ld. CIT(A) exercising enhancement of income. Whereas the issue and subject matter which were falling under the scope of the assessment but were not taken up for scrutiny would fall in the ambit of provisions of Section 263 and the Commissioner in its revisionary power can take up those matters for revision of assessment order. Therefore, there is segregation of jurisdiction U/s 263 and Section 251 of the Act. In case of complete lack of enquiry on the part of the Assessing Officer while passing the assessment order, the same is subject matter of revision U/s 263 of the Act whereas if the Assessing Officer has taken up a particular issue or matter for enquiry but accepted the claim then the said matter can be taken up either by the ld. CIT(A) under the provisions of enhancement of income or by the Commissioner U/s 263 of the Act if it satisfies the conditions provided U/s 263 of the Act. Therefore, the overlapping of jurisdiction on such issue cannot be ruled out. But in case of complete lack of enquiry where the Assessing Officer has not at all taken up a matter for enquiry or scrutiny then the jurisdiction over such mater is exclusively under the provisions of Section 263 of the Act and not U/s 251 of the Act for enhancement of assessment. The ld. CIT(A), therefore, though, vested with very wide powers U/s 251(1) of the Act so far as the subject matter and aspects of the assessment about which the assessee makes a grievance as well as regarding any other matter considered by the Assessing Officer and determined in the assessment. Therefore, it is not open to the ld. CIT(A) to introduce in the assessment a new source of income and the assessment

must be confined to those items of income which were subject matter of original assessment which means the items of income and the aspects on which the Assessing Officer has taken up for scrutiny. This Tribunal in the case of Sh. Jagdish Narayan Sharma Vs ITO (supra) while considering an identical issue has discussed this question of jurisdiction of the ld. CIT(A) to enhance the assessment in para 44 to 51 as under:

"44. We have heard the rival contentions and perused the material available on record. The issue which arise for consideration is whether the ld CIT(A) was justified in bringing to tax long term capital gains, on sale of land by the assessee to his two daughter-in-laws, by way of enhancement of income in terms of provisions of section 251(1)(a) of the Act which reads as under:

" 251(1) In disposing of an appeal, the Commissioner(Appeals) shall have the following powers:

(a) In an appeal against an order of assessment, he may confirm, reduce, enhance or annual the assessment."

45. Regarding the powers of the ld CIT(A) by way of enhancement of income in hands of the assessee, the matter had come up for the consideration before the Hon'ble Supreme Court in case of CIT vs Shapoorji Pallonji Mistry reported in 44 ITR 891 wherein the question framed for consideration was "whether in an appeal filed by an assessee, the Appellate Assistant Commissioner can find a new source of income not considered by the Income-tax Officer and assess it under his powers granted by section 31 of the Income-tax Act ?

46. The legal proposition laid down by the Hon'ble Supreme Court reads as under:

"There is no doubt that the Appellate Assistant Commissioner can "enhance the assessment". It is admitted also by the assessee that within the four corners of the sources processed by the Income-tax Officer, the Appellate Assistant Commissioner can enhance the assessment. This power must, at least, fall within the words "enhance the assessment", if they are not to be rendered wholly nugatory. The controversy in this case is about his discovering new sources, not mentioned in the return and not considered by the Income-tax Officer. The High Court held following its earlier view in Narrondas Manordass v. Commissioner of Income-tax [1957] 31 ITR 909, that the Appellate Assistant Commissioner has revisional powers, but that they are confined to what was before the Income-tax Officer and considered by the latter. The correctness of this view is challenged in this appeal by the Commissioner of Income-tax, Bombay.

The earliest case, which considered the meaning of section 31(3), was Jagarnath Therani v. Commissioner of Income-tax AIR 1925 Pat. 408 decided by the Patna High Court. In that case, the assessee had three businesses at Purnea, Jalpaiguri and Calcutta. His income from Purnea only was assessed by the Income-tax Officer. On appeal by the assessee, the Appellate Assistant Commissioner assessed him with regard to the income from the other two businesses. The head of income was the same within section 6 of the Income tax Act, but the sources of income were different. The Patna High Court observed :

"Now this section relating to appeals is enacted for the benefit of the subject and also, to the limited extent therein stated, for the benefit of the Crown. But the subject-matter of the appeal is the assessment and the scope of the appeal must in my opinion be limited by the subject-matter. The appellate authority has no power to travel beyond the subject-matter of the assessment and, for all the reasons advanced by the appellant, is in my opinion not entitled to assess new sources of income."

The view of the Patna High Court receives support from a decision of the Madras High Court in Gajalakshmi Ginning Factory v. Commissioner of Income-tax [1952] 22 ITR 502 where, at page 510, the Divisional Bench observed as follows:

"Of course, it would not be open to the Appellate Assistant Commissioner to introduce into the assessment new sources, as his power of enhancement should be restricted only to the income which was the subject-matter of consideration for purposes of assessment by the Income-tax Officer."

In Bishwanath Prasad Bhagwat Prasad v. Commissioner of Income-tax [1956] 29 ITR 748, the Appellate Assistant Commissioner had actually remanded the case, but while considering the powers of the Appellate Assistant Commissioner, the Divisional Bench appears to have approved of the abovequoted passage from the Madras case. The observations in that case may be treated as obiter. In Narrondas Manordass v. Commissioner of Income-tax [1957] 31 ITR 909 is to be found the earlier case of the Bombay High Court, which was followed in the judgment under appeal. In that case, the assessee was carrying on business in Bombay and also in Rajkot. The profits from the Rajkot business were assessed by the Income-tax Officer at Rs. 1,17,643. The Income-tax Officer also found remittances to the extent of Rs. 4 lakhs from Rajkot to Bombay, but did not include that amount in the assessment in view of the concession allowed by the Part B States Taxation Concession Order. The assessee appealed with respect to the sum of Rs. 1,17,643, contending that the Rajkot business had no profits but only loss. The Appellate Assistant Commissioner accepted this contention, but set aside the assessment and remanded the case to the Income-tax Officer for reassessment with

a view to assessing the sum of Rs. 4 lakhs. In dealing with the case, the High Court held that the powers of remand were extremely wide, but it quoted with approval the decision of the Patna High Court in Jagarnath Therani v. Commissioner of Income-tax AIR 1925 Pat. 408 and also the above observation of the Madras High Court. The learned Chief Justice on that occasion added that there was a distinction between the subject-matter of the appeal and the subject-matter of the assessment, and that the Appellate Assistant Commissioner's powers under section 31 were not confined to the subject-matter of the appeal but extended to the subject-matter of the assessment. Those powers included a power of remand to include in the assessment something which ought to have been so included by the Incometax Officer, and a remand in that case was, therefore, proper.

The matter also came before this court in Commissioner of Income-tax v. McMillan & Co. [1958] 33 ITR 182 (SC); but the question, with which we are concerned, was left open. There is, however, a passage in the judgment, approving of the observations of Chagla, C.J., in Narrondas Manordass v. Commissioner of Income-tax [1957] 31 ITR 909 to the following effect:

"It is clear that the Appellate Assistant Commissioner has been constituted a revising authority against the decisions of the Income-tax Officer; a revising authority not in the narrow sense of revising what is the subject-matter of the appeal, not in the sense of revising those matters about which the assessee makes a grievance, but a revising authority in the sense that once the appeal is before him he can revise not only the ultimate computation arrived at by the Income-tax Officer but he can revise every process which led to the ultimate computation or assessment. In other words, what he can revise is not merely the ultimate amount which is liable to tax, but he is entitled to revise the various decisions given by the Income-tax Officer in the course of the assessment and also the various incomes or deductions which came in for consideration of the Income-tax Officer."

The learned Chief Justice in the judgment under appeal considers that this court has thus given approval to his view and also the view of the Patna High Court in the earlier case.

In our opinion, this court must be held not to have expressed its final opinion on the point arising here, in view of what was stated at pages 709 and 710 of the report. This court, however, gave approval to the opinion of the learned Chief Justice of the Bombay High Court that section 31 of the Income-tax Act confers not only appellate powers upon the Appellate Assistant Commissioner in so far as he is moved by an assessee but also a revisional jurisdiction to revise the assessment with a power to enhance the assessment. So much, of course, follows from the language of the section itself. The only question is whether in enhancing the assessment for any year he can travel outside the record that is to say, the

return made by the assessee and the assessment order passed by the Income-tax Officer with a view to finding out new sources of income not disclosed in either. It is contended by the Commissioner of Income-tax that the word "assessment" here means the ultimate amount which an assessee must pay, regard being had to the charging section and his total income. In this view, it is said that the words "enhance the assessment" are not confined to the assessment reached through a particular process but the amount which ought to have been computed if the true total income had been found. There is no doubt that this view is also possible. On the other hand, it must not be over looked that there are other provisions like sections 34 and 33B, which enable escaped income from new sources to be brought 16 ITA 977 to 979/JP/2018 & 1122/JP/2018_ Zuberi Engineering Vs DCIT.to tax after following a special procedure. The assessee contends that the powers of the Appellate Assistant Commissioner extend to matters considered by the Income-tax Officer, and if a new source is to be considered, then the power of remand should be exercised. By the exercise of the power to assess fresh sources of income, the assessee is deprived of a finding by two tribunals and one right of appeal. The question is whether we should accept the interpretation suggested by the Commissioner in preference to the one, which has held the field for nearly 37 years. In view of the provisions of sections 34 and 33B by which escaped income can be brought to tax, there is reason to think that the view expressed uniformly about the limits of the powers of the Appellate Assistant Commissioner to enhance the assessment has been accepted by the legislature as the true exposition of the words of the section. If it were not, one would expect that the legislature would have amended section 31 and specified the other intention in express words. The Income-tax Act was amended several times in the last 37 years, but no amendment of section 31(3) was undertaken to nullify the rulings, to which we have referred. In view of this, we do not think that we should interpret section 31 differently from what has been accepted in India as its true import, particularly as that view is also reasonably possible."

47. The Hon'ble Rajasthan High Court in case of Commissioner of Income-tax vs. Associated Garments Makers reported in 64 Taxman 215, following the above decision of the Hon'ble Supreme has held as under:

"7. Appeals are provided under section 246 of the Act before the AAC and the Commissioner (Appeals). These appeals are by the assessee aggrieved by the orders mentioned therein. Any order made under section 143(3) is appealable and the powers of the appellate court are provided in section 251 of the Act wherein appellate authority has power to confirm, reduce, enhance or annul the assessment or he may set aside the assessment and refer the case back to the ITO for making fresh assessment in accordance with directions given in appeal and after making such further enquiry as may be necessary. These powers are, inter alia, mentioned in the other powers. According to subsection (2) of section 251,

the AAC has no power to enhance assessment or a penalty, or reduce the amount or refund unless the appellant has a reasonable opportunity for showing cause against such enhancement or reduction. An explanation has been provided according to which the AAC may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding the fact that such matter was not raised before him. A perusal of sections 246 to 251 of the Act makes it clear that any questions arising out of the assessment orders in an appeal by the assessee can be possible and wide powers are given to the appellate authority, but these powers are circumscribed by the assessment order in the matters arising thereof or a matter arising out of the proceedings. Even the appellate authority has suo motu power to consider the questions arising thereof but there is no provision to go beyond the matter arising out of the proceedings before the assessing authority, more particularly as separate provisions for that are made in the Act. The Tribunal has elaborately discussed the provisions of the Act and the case law on the subject and has rightly come to the conclusion that new sources not mentioned in the return or considered by the ITO are beyond the scope of powers of the AAC. The case relied on by the learned counsel for the petitioner about the power of setting aside the assessment order remanding the case for re-consideration of the whole matter including the evasion by the assessee, is not applicable to the facts of the present case because the matter arising in that case was one which arose out of the proceedings before the ITO. The question was not about new and fresh material for the purposes of enhancement. On the contrary, the case is clearly covered by the decisions of the Supreme Court in CIT v. Shapoorji Pallonji Mistry's case (supra) wherein it has been held that, "In an appeal filed by the assessee the Appellate Assistant Commissioner has no power to enhance the assessment by discovering new sources of income not mentioned in the return of the assessee or considered by the Income-tax Officer in the order appealed against", and in the case of Rai Bahadur Hardutroy Motilal Chamaria (supra) wherein it has been held that, "It is not therefore open to the Appellate Assistant Commissioner to travel outside the record, i.e., the return made by the assessee or the assessment order of the Income-tax Officer, with a view to finding out new sources of income and the power of enhancement under section 31(3) is restricted to the sources of income which have been the subject-matter of consideration by the Income-tax Officer from the point of view of taxability". Their Lordships considered the meaning of the word 'consideration' and held that, " 'consideration' does not mean 'incidental' or 'collateral' examination of any matter by the Income-tax Officer in the process of assessment. There must be something in the assessment order to show that the Income-tax Officer applied his mind to the particular subject-matter or the particular source of income with a view to its taxability or to its nontaxability and not to any incidental connection". In the instant case, the AAC had himself, after issuing notice, considered the new material and had gone into new sources of income for the consideration of which he had no jurisdiction.

8. In fact, we fail to understand as to why when the order was brought to the notice of the Commissioner he proceeded into wrong direction when he had ample powers under other provisions of this Act. There are various other provisions under the Act which can be invoked in cases of escaped income or such situation where the new sources had been left to be considered, but that would not give powers to the AAC to transgress his jurisdiction."

48. In case of CIT v. Sardari Lal & Co. [2001] 251 ITR 864 (Delhi) (FB), the matter again came up for consideration before the Full Bench of the Hon'ble Delhi High Court regarding the first appellate authority's power to take into account a new source of income and to consider the correctness of the view expressed earlier in case of CIT v. Union Tyres [1999] 240 ITR 556, and the Full Bench of the Hon'ble Delhi High Court has held that the view expressed in Shapoorji Pallonji Mistry's case (supra) still holds the feet and it was further held as under:

"8. Looking from the aforesaid angles, the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the Assessing Officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147/148 and section 263, if requisite conditions are fulfilled. It is inconceivable that in the presence of such specific provisions, a similar power is available to the first appellate authority. That being the position, decision in Union Tyres' case (supra) of this Court expresses the correct view and does not need re-consideration. This reference is accordingly disposed of."

49. We have also look at the recent decisions on the subject and find that the Hon'ble High Court of Kerala in case of Commissioner of Income Tax, Thrissur v. B.P. Sherafudin reported in [2017] 87 taxmann.com 330 (Kerala) had an occasion to examine a similar issue as to whether the Appellate Authority has the power under section 251 of the Act to add income not at all considered by the AO? Referring to the catena of decisions including the decisions of Hon'ble Supreme Court in case of CIT vs Shapoorji Pallonji Mistry (supra) and in case of CIT v. Rai Bahadur Hardutory Motilal Chamaria [1967] 66 ITR 443 (SC), the decision of the Full Bench of the Hon'ble Delhi High Court in case of CIT v. Sardari Lal & Co. [2001] 251 ITR 864 (Delhi) (FB), besides various other decisions, it held that the powers under section 251 are, indeed, very wide; but, wide as they are, they do not go to the extent of displacing powers under, say, sections 147, 148 and 263. We deem it appropriate to reproduce the discussions and the relevant findings of the Hon'ble High Court as under:

"The Ambit of Appellate Power:

37. To begin with, let us examine section 251 of the Act. As the assessment year was 1995-96, we will examine the provision as stood then. Before the amendment by Act 18 of 2008, section 251 read as: 251.

Powers of the [* *] Commissioner (Appeals).--*

(1) In disposing of an appeal, the [* *] Commissioner (Appeals) shall have the following powers--*

(a) in an appeal against an order of assessment he may confirm, reduce, enhance or annul the assessment; [* *]*

(b) in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty;

(c) in any other case, he may pass such orders in the appeal as he thinks fit.

(2) The [* *] Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.*

Explanation.--In disposing of an appeal, the [* *] Commissioner (Appeals) may consider and decide any matter arising out of proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the [* * *] Commissioner (Appeals) by the appellant.*

38. The provision clarifies that in an appeal against an order of assessment, the Appellate Authority may confirm, reduce, enhance, or annul the assessment. In an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty. The explanation to the provision further emphasizes that the Appellate Authority may consider and decide any matter arising out of proceedings in which the order appealed against was passed, though such matter was not raised before him by the appellant.

Precedential Position:

39. A Full Bench of this Court in the CIT v. Best Wood Industries & Saw Mills [2011] 33 ITR 63/11 taxmann.com 278 has examined the powers of the AO, but not the Appellate Authority. It has held that once the assessment is reopened for any valid reason recorded under Section 148(2), then the entire assessment is open for the AO to bring to tax any item of escaped income which comes to his notice in such reassessment.

40. Under the old Income Tax Act, the corresponding provision is section

31. Interpreting that provision, the Supreme Court in CIT v. Kanpur Coal Syndicate [1964] 53 ITR 225 has held that under section 31(3)(a), in disposing of an appeal, the Appellate Authority may confirm, reduce, enhance or annul the assessment; under clause (b), he may set aside the assessment and direct the Income-tax Officer [now AO] to make a fresh assessment. The Appellate Authority has, therefore, plenary powers in disposing of an appeal. "The scope of his power is conterminous with that of the Income-tax Officer. He can do what the Income-tax Officer can do and also direct him to do what he has failed to do."

41. As we can see, CIT v. P. Mohanakala [2007] 291 ITR 278/161 Taxman 169 (SC) deals with the powers of High Court in interfering with the findings of fact--and concurrent findings, at that--by re-appreciating the evidence. The Supreme Court has held in the negative. The Supreme Court in Jute Corpn. of India Ltd. v. CIT [1991] 187 ITR 688/[1990] 53 Taxman 85 has stated that the declaration of law is clear that the power of the Appellate Authority is co-terminus with that of the Income Tax Officer, and if that is so, there appears to be no reason why the appellate authority cannot modify the assessment order on an additional ground even if not raised before the Income Tax Officer. No exception could be taken, held the Supreme Court in CIT v. Nirbheram Deluram [1997] 224 ITR 610/91 Taxman 181 to this view as the Act places no restriction or limitation on exercising appellate power. Even otherwise, an appellate authority while hearing the appeal against the order of a subordinate authority, has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitation, if any, prescribed by the statutory provisions. Absent any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have.

42. In CIT v. Shapoorji Pallonji Mistry [1962] 44 ITR 891 (SC) the assessment year was 1947-1948, and the case was finally decided in 14.02.1962. So the Act considered was pre-Independence enactment. Examining section 31 of the old Act, the Supreme Court has held that there is no doubt that the appellate authority can "enhance the assessment". This power must, at least, fall within the words "enhance the assessment", if they are not to be rendered wholly nugatory.

43. Now, we may examine the authorities that also have dealt with the powers of the appellate authority but seem to have taken a divergent path.

44. In CIT v. Rai Bahadur Hardutroy Motilal Chamaria,[1967] 66 ITR 443 (SC) a three-Judge Bench of the Supreme Court has observed that it is only the assessee who has a right conferred under section 31 to prefer an appeal against the order of assessment made by the Income-tax Officer. If the assessee does not appeal the order of assessment becomes final subject to any power of revision that the Commissioner may have under section 33B of the Act. Therefore, it would be

wholly erroneous to compare the powers of the appellate authority with the powers possessed by a court of appeal, under the Civil Procedure Code. The Appellate Assistant Commissioner is not an ordinary court of appeal. It is impossible to talk of a court of appeal when only one party to the original decision is entitled to appeal and not the other party, and because of this peculiar position the statute has conferred very wide powers upon the appellate authority once an appeal is preferred to him by the assessee.

45. Chamaria goes on to hold that the appellate authority has no jurisdiction under section 31(3) of the Act to assess a source of income not processed by the Income-tax Officer "and which is not disclosed either in the returns filed by the assessee or in the assessment order," and therefore the appellate authority cannot travel beyond the subject-matter of the assessment. In other words, the power of enhancement under section 31(3) of the Act is restricted to the subject-matter of assessment or the sources of income considered expressly or by clear implication by the Income-tax Officer from the viewpoint of the taxability of the assessee.

46. A question regarding powers of the first Appellate Authority came up for consideration before the Supreme Court recently in Nirbheram Daluram (supra). Following the earlier decisions in Kanpur Coal Syndicate and Jute Corporation of India, the Supreme Court reiterated that the appellate powers conferred on the Appellate Commissioner under Section 251 could not be confined to the matter considered by the ITO, as the Appellate Commissioner is vested with all the plenary powers which the Income Tax Officer may have while making the assessment.

47. Indeed, examining Daluram's holding, a Division Bench of the Delhi High Court in CIT v. Union Tyres [1999] 240 ITR 556/107 Taxman 447, has observed that Daluram did not comment whether these wide powers also include the power to discover a new source of income. So, Union Tyres concludes that the principle of law laid down in Shapoorji and Chamaria still holds the field.

48. The principle emerging from various pronouncements of the Supreme Court, Union Tyres observes, is that the first Appellate Authority is invested with very wide powers under Section 251(1)(a) of the Act and once an assessment order is brought before the authority, his competence is not restricted to examining only those aspects of the assessment about which the assessee makes a grievance and ranges over the whole assessment to correct the Assessing Officer not only regarding a matter raised by the assessee in appeal but also regarding any other matter considered by the Assessing Officer and determined in assessment.

49. There is a solitary but significant limitation, according to Union Tyres, to the power of revision: It is not open to the Appellate Commissioner to introduce in the

Assessment a new source of income and the assessment must be confined to those items of income which were the subject-matter of the original assessment.

50. In course of time, Union Tyres was doubted. In. Sardari Lal & Co.,(supra) the same issue--whether the appellate authority has the power under section 251 to discover a new source of income--was referred to a Full Bench. After examining the authorities holding the fielding on that issue, the learned Full Bench has held that the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the assessing officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147, or section 148, or even section 263 of the Act if requisite conditions are fulfilled. It is inconceivable, according to Sardari Lal, that in the presence of such specific provisions, a similar power is available to the first appellate authority. Eventually, Sardari Lal upheld the decision in Union Tyres.

51. Undeniably, the precedential position on the powers of the first appellate authority under section 251 undulates. There are seeming contradictions. But, as held by Union Tyres, and as affirmed on reference by Sardari Lal, there is a consistent judicial assertion that the powers under section 251 are, indeed, very wide; but, wide as they are, they do not go to the extent of displacing powers under, say, sections 147, 148, and 263 of the Act.

52. Therefore, we are in respectful agreement with the view taken by the Full Bench of the High Court of Delhi in Sardari Lal. As a corollary, we hold that the Tribunal's deleting the enhancement of Rs. 22,15,116/- and canceling the order of the CIT (A) on that issue call for no interference."

50. The issue which is being disputed before us has to be considered and decided in light of facts on record and the legal proposition which emerges from the above referred decisions. In the instant case, the enhancement of income by the ld CIT(A) relates to long term capital gains on sale transactions executed through the registered sale deeds of even date i.e, 11.01.2007 whereby the assessee has sold certain plots of land at Village Goner, Tehsil Sanganer, Jaipur to his two daughters-in-law namely Narangi Devi w/o Chhaju lal and Jamna Devi w/o Kaluram for a total consideration of Rs 1,62,72,000. Now, if we look at the return of income filed by the assessee, it is noted that pursuant to issuance of notice u/s 148, the assessee had filed his return of income disclosing agricultural income of Rs. 1,10,000/- and prior to that, no return of income was filed by the assessee. The notice issued under section 148 dated 15.03.2013 talks about an amount of Rs 16,50,000 deposited in assessee's bank account maintained with PNB, the source of which has not been explained and the same has thus escaped assessment. On perusal of the assessment order passed under section 143(3) read with section 147 of the Act, it is noted that the said deposits in assessee's bank has been

examined however, there is no linkage with the impugned sale transactions which are the subject matter of enhancement by the ld CIT(A). Further, there is a sale transaction which is the subject matter of assessment which relates to sale of ancestral land situated at the same village Goner, Village Goner, Tehsil Sanganer, Jaipur vide sale deed dated 26.12.2006 to M/s Fine Tech Macro Developers Pvt. Ltd for a consideration of Rs 13,20,000 and which has been valued by the stamp duty authorities at Rs 14,88,000. The said transaction has been brought to tax by the Assessing officer after providing the index cost of acquisition. We thus find that the impugned sale transactions relating to sale of land by the assessee to his two daughters-in-law for a total consideration of Rs 1,62,72,000 was neither the subject matter of notice issued under section 148 and the subsequent return filed by the assessee nor the subject matter of assessment order passed by the Assessing officer. It is clearly a new source of income which has been discovered by the ld CIT(A) while adjudicating the matter and not a matter arising out of the assessment proceedings. Our view is fortified by the fact that the impugned sale transactions relating to sale of land by the assessee to his two daughters-inlaw for a total consideration of Rs 1,62,72,000 was the subject matter of reopening of assessment for preceding A.Y. 2006-07 whereby these transactions were identified with specific particulars in the reasons recorded before issuance of notice under section 148 for the said assessment year. Subsequently, the AO while passing the assessment order for A.Y. 2006-07 has discussed the taxability of such transaction in the body of the assessment order and has brought the same to tax. It is therefore a case where the impunged transactions are subject matter of assessment and arising out of the assessment order for A.Y 2006-07 and not that of A.Y 2007-08. It is not a case that the additions in respect of the said transactions are made on substantive basis in A.Y 2006-07 and on protective basis in A.Y 2007-08. The ld CIT(A) while adjudicating the matter for A.Y. 2006-07 had determined that the said transaction pertains to A.Y 2007-08 and not to A.Y 2006-07 and has deleted the additions in A.Y. 2006-07 and brought the same to tax in the impugned A.Y 2007-08 by way of exercising her enhancement powers under section 251(1)(a) of the Act which is clearly beyond her powers. In light of the legal propositions so laid down by the Hon'ble Supreme Court and other High Courts referred supra, the powers of the ld CIT(A) are circumscribed by the assessment order in the matters arising thereof or a matter arising out of the proceedings. As held by the Courts, even though, the ld CIT(A) has suo motu power to consider the questions arising thereof but there is no provision to go beyond the matter arising out of the proceedings before the Assessing officer, more particularly as separate provisions for such eventuality are provided in the Act. In light of the same, the enhancement so done by the ld CIT(A) whereby the impugned sale transactions are brought to tax in the year under consideration are beyond the scope of her powers envisaged under section 251(1)(a) and the same thus cannot be accepted. However, the AO shall be free to take action as per law.

51. In light of the above discussions, having decided against the exercise of powers of the ld CIT(A) in bringing to tax the subject transaction, we do not deem it appropriate to examine and the address the arguments and contentions so raised by both the parties on merits of the taxability of the subject transaction."

In the case in hand, the Assessing Officer made certain disallowances of expenses while completing the assessment U/s 143(3) of the Act whereas the ld. CIT(A) invoked the powers to enhance the assessment by rejecting the books of account and consequently the income of the assessee was enhanced by applying the G.P. rate to estimate the income of the assessee. Therefore, it is clear that the said issue and aspect of not accepting the book results of the assessee was never taken up by the Assessing Officer in the scrutiny assessments of the assessee. Even if the Assessing Officer ought to have considered the said point of correctness of the books of account and rejection of same U/s 145(3) of the Act if the said matter was not taken up for scrutiny and enquiry then it is a subject matter falling in the ambit of revisionary power U/s 263 of the Act due to the reason that there was a complete lack of enquiry on the part of the Assessing Officer to examine the correctness of books of account. Since this was not at all subject matter of the assessment, therefore, it cannot be a subject matter of enhancement of income U/s 251 of the Act. Accordingly following the various decisions as relied upon by the assessee as well as the decision of this Tribunal in the case of Jagdish Narayan Sharma Vs ITO (supra) we set aside the order of the ld. CIT(A) qua this issue being beyond the jurisdiction of the ld. CIT(A)."

11.2 A similar view has been taken by the other Benches of this Tribunal on this issue in the various cases as relied upon by the Ld. Sr. counsel for assesse. Therefore, a consistent view has been considered by this Tribunal that the enhancement of assessment by CIT(A) without show cause notice is invalid and liable to be set aside. Following the order of this Tribunal we hold that the rejection of books of account by CIT(A) in exercise of the powers u/s 251(2) of the Act without show cause notice is not sustainable and the same is set aside.

11.3 The appeal for A.Y.2010-11 is also arising from the composite assessment orders passed by the AO dated 26.12.2011 and no separate finding has been given by the AO for Assessment year 2010-11 u/s 143(3). Hence, in view of our finding for A.Ys.2004-05, 2005-06, 2007-08 & 2008-09 the appeal of the assessee for A.Y. 2010-11 stands allowed.

Departmental Appeal

12. The department in appeal for A.Y.2005-06 arising from assessment order u/s 143(3) has raised following grounds:

> *" On the facts and circumstance of the case and in law the Ld. CIT(A) has erred in:*
>
> *1. Holding that the AO is not justified in denying exemption to the assessee trust u/s 11 of the Income Tax Act 1961."*

12.1 The relevant facts have already been discussed while deciding the appeal of the assessee for A.Ys. 2004-05, 2005-06 & 2007-08, 2008-09 & 2010-11 arising from the assessment order framed u/s 153A. The AO denied the claim of exemption u/s 11 & 12 on the basis of the order of CCIT dated 24.10.2007 passed u/s 10(23C)(vi) of the Act as well as by making reference of TDS survey carried out u/s 133A on 09.08.2005. These issues are common as taken by the AO while framing assessment u/s 153A of the Act. Further we have

already discussed implications of the directions of the Hon'ble High Court dated 24.02.2006 in the writ petition no.12623 of 2005 as only an irregularity in the admissions for the academic year 2005-06 and accordingly grievance of the students was redressed by the Hon'ble High Court with the directions that for academic session 2006-07 the assessee shall give 26 seats from management quota to Government quota and consequently the seats in the management quota shall reduce by 26 seats of MBBS course. Those directions of the Hon'ble High Court were duly complied with and thereafter there was no complaint either by any student or by any authority as under MCI Act or MCI itself.

13. We have also noted that for all these years subsequent to the first year of academic session which was before Hon'ble High Court, the authorities have granted more and more seats and approved new courses in the educational institutions run by the assessee. The details of which have already been reproduced in the forgoing part of this order. Hence, the order passed by the CCIT u/s 10(23C)(vi) as well as direction of the Hon'ble High Court in respect of irregularities in admission process cannot be a basis of denial of benefit u/s 11 & 12 of the Act. The CIT(A) has considered this issue while passing impugned order as under :

> *"Decision: I considered the submission made by the Ld.AR carefully with reference to the material available on record. The Chief Commissioner of Income- tax, Bhopal rejected the application dated 24.10.2007 for A.Y.2006-07 and application dated 26.10.2007 for A.Y.2007-08 for grant of registration u/s 10(23C)(v) for the irregularities incorporated in his order. The AO*

has extensively quoted the irregularities found out by the Chief Commissioner of Income-tax in his order of assessment. He has also relied on observation of the Hon'ble High Court in order dated 24.02.2006 disposing the Writ Petition filed by some students. Further, I find that reliance was placed by him on survey u/s 133A carried out in various premises of the Peoples Group, Bhopal of which the appellant trust is one of the main member and the incriminating papers/documents impounded were under investigation. The irregularities noticed from the order of the Chief Commissioner of Income-tax or from the order of Hon'ble High Court of Madhya Pradesh relate to findings of subsequent year(s). In other words, the AO was not identified any irregularity in the books of account of the appellant trust or irregularities in charitable activities on the basis of which the deduction available u/s 11 and 12 of the Act can be lawfully denied. Even the incriminate documents in course of survey are not related to the impugned year of assessment.

The registration of a trust u/s 12A is condition precedent to claim u/s 11 & 12 of the Income-tax Act, 1961 as has been decided by the Hon'ble Apex Court in the case of U.P.Forest Corporation Vs. DCIT reported in 297 ITR 1. The section has been amended w.e.f. 01.10.2004 to provide that if Commissioner of Income-tax is satisfied that activities of any trust or an Institution is not genuine or not carried out in accordance with the objects of Trust or Institution, he shall pass an order in writing cancelling the registration granted u/s 12AA of the Act. In view of the above, the AO was required to inform the undersigned as to the actual state of affairs i.e. whether registration u/s 12AA of the Act is still available in the face of alleged irregularities noticed by the Chief Commissioner of Income-tax, Bhopal and Hon'ble High Court of Madhya Pradesh on the basis of which the AO has denied deduction u/s 11 to the appellant trust. However, in spite of repeated reminders, the information is not forthcoming from the table of the AO. On the other hand, it appears from the assessment order of the subsequent year that the appellant trust is availing registration u/s 12AA of the Act. That apart, it is the fitness of the things that AO should take steps to intimate the concerned

jurisdictional Commissioner of Income-tax about predominantly commercial objectives of the trust and for not having carried out any charitable activity hitherto for purpose of cancellation of registration u/s 12AA of the Act or alternatively the jurisdictional Commissioner may consider taking suo motu cognigence of lack of charitable activities so far for purpose of cancellation of registration u/s 12AA granted earlier to the appellant trust rather than the AO denying exemption u/s 11 of the Act himself in his order of assessment as has been decided by Hon'ble ITAT Vishakapattanam Bench in the case of Cargo Handling (P) Workers Pool, Vishakapattanam Vs. DCIT Circle 1(1), Vishakapattanam reported in 18 Taxman.com 101. In view of the above, I find that the AO is not justified in denying exemption to the appellant trust u/s 11 of the Act though there is no claim of deduction since there is deficit in the income and expenditure account."

13.1 Thus, the CIT(A) has allowed the claim of exemption u/s 11 to the assessee by following the decision of Visakhapatnam bench of the Tribunal as well as Hon'ble Supreme Court. The impugned order of the CIT(A) is now fortified by our finding on this issue while deciding the appeal of the assesse for A.Ys. 2004-05, 2005-06 & 2007-08,2008-09. Hence, we do not find any error and illegality in the impugned order of the CIT(A) the same is upheld.

14. In the result, the Appeal of the revenue is dismissed.

ITA No. 539/Ind/2014 for AY 2013-14:

15. The assessee has raised following grounds of appeal:

"1. That on the facts and in the circumstances of the case, the learned Commissioner of Income-tax erred in passing the order u/s

12AA (3) of the Income-tax Act, 1961 cancelling the registration granted to the appellant vide CIT's order dated 17.10.2000 with effect from 17.06.1999, the effective date of registration of the trust without considering the explanation offered by the appellant properly and without considering the fact that the circumstances stated in the notice are not sufficient to cancel the registration already granted to the appellant and thus, the order passed by the learned Commissioner of Income-tax cancelling the registration already granted to the trust is unjust, unfair and bad in law and thus, liable to be quashed.

2. That on the facts and in the circumstances of the case, the learned Commissioner of Income-tax erred in cancelling the registration with retrospective effect from 17.06.1999, the date of registration of the trust without considering the fact that the registration granted earlier could not be cancelled u/s 12AA (3) because the power under the said section for cancelling the registration vested to the Commissioner w.e.f. 01.10.2004.

(i) Oxford Academy for Career Development Vs. Chief Commissioner of Income-tax and Ors. (2009) 315 ITR 382 (All.)

(ii) Kapoor Education Society Vs. CIT (2010) 134 TTJ 250 (Lukh)

(iii) Director of Income-tax (Exemption) Vs. Mool Chand Khairati Ram Trust (2011)339 ITR 622 (Del.)

(iv) Shri Chaitanya Educational Committee Vs. CIT (2007) 109 TTJ 359 (Hyderabad- Tribunal)

3. That on the facts and in the circumstances of the case, the findings given by the learned Commissioner of Income-tax that "as per the order of Hon Chief Commissioner of Income-tax, Bhopal as well as observation of Hon'ble High Court, activities of the assessee trust are not considered to be charitable within the meaning of section 2(15) of the Income-tax Act" is not correct because the appellant has not violated any provisions as stated in section 2(15) of the Act.

i.CIT Vs. Jeevan Deep Charitable Trust (2013) 212 Taxman 19 (All.)

ii. CIT Vs. Society of Advanced Management Studies (2013) 352 ITR 269 (All.)

4. That on the facts and in the circumstances of the case, the findings given by the learned Commissioner of Income Tax that "During the course of assessment proceedings several instances of utilization of funds of the Trust by the trustees for their own benefits and receipt of undisclosed income in cash in lieu of admission of students were noticed." is factually incorrect, without any basis and based on surmises only and hence, not tenable in the eye of law."

16. The assessee trust was registered with public trust vide order dated 17.04.2020 and it was also granted registration u/s 12A vide order dated 17.10.2020 w.e.f 07.06.1999. The CIT Bhopal issued a show cause notice on 13.01.2014 as to why the registration granted u/s 12A of the Act should not be cancelled. In response the assesse filed reply vide letter dated 23.01.2014 but the CIT was not satisfied with the reply of the assessee and passed impugned order dated 15th June 2014 whereby the registration grated u/s 12A was cancelled w.e.f. the date of registration i.e. 07.06.1999.

16.1 Before the tribunal Ld. Sr. Counsel for the assessee has submitted that the registration u/s 12AA can only be cancelled when the CIT is of the opinion that the activities of said trust or institutions are not genuine or are not being carried out in accordance with the objects of the trust or institution. However, no such finding is recorded by the CIT qua the objectives or the activities. The CIT while withdrawing the registration has erred in failing to appreciate that since inception appellant is carrying on the activities of providing education through the medical colleges and Hospitals and also other educational institutes run by the appellant which is a charitable activity as per the provisions of section 2(15) of the Act, and there is no change in the aforesaid

activities and hence, withdrawal of registration u/s 12AA(3) of the Act on the ground that the activities of the trust are not in accordance with the objects of the trust without pointing any such activities is wholly erroneous and unsustainable in law. The various adverse findings recorded in the impugned order related to violation of provision of Section 13 of the Act are factually incorrect, legally misconceived and untenable. The finding given by the ld. CIT that "during the course of assessment proceedings several instances of utilization of funds by the trustee for their own benefits and receipt of undisclosed income in cash in lieu of admission of students were noticed" is factually incorrect, without any basis and based on surmises only and hence, not tenable in the eye of law. The Ld. CCIT's rejection order u/s 10(23C)(vi) and observation of Hon'ble High Court in W.P No. 12623/2005 was never mentioned in the show-cause notice and hence it could not have been relied upon by the CIT in his order. Even otherwise the facts mentioned in the rejection order u/s 10(23C)(vi) and observation of Hon'ble High Court in W.P No. 12623/2005 are refutable and are not relevant for cancellation of registration u/s 12AA.

16.2. Ld. Sr. counsel has submitted that the assessee to achieve its object of charitable activities has established various colleges and hospitals. He has submitted that there are 11 colleges and other institutions being run by the assessee trust. These colleges have courses of MBBS, MD/MS, BDS, MDS, B.Sc Nursing, Post B.Sc. Nursing, GNM, MSc. Nursing, BTech, MTech, BBA, MBA, BHMMCT, BPharma, MPharma and various courses under Paramedical college

like DMLT, BMLT and and physiotherapy etc. and the trust also operates School which is affiliated with CBSE and having classes upto 12th class . He has also referred to the details of the seats in MD/MS as well as MBBS and other medical courses approved by the Government of India and medical council of India.

16.3 Ld. Sr. counsel has submitted that the Commissioner has issued show cause notice for cancellation of registration u/s 12A by giving reasons as alleged by the AO while framing the assessment u/s 153A r.w. section 143(3) for A.Ys. 2004-05 to 2010-11 by holding that the trust has violated provisions of section 13 of the Act and thereby denied the claim of exemption u/s 11 & 12. The CIT has also reiterated those reasons in the show cause notice and broadly on three points, viz. (i) On money payment for purchase of the property in Mumbai, (ii) Survey carried on 9th August 2005, and (iii) Existence of violation of section 13(3) in the transaction of exchange of land between the trust and its member. He has pointed out that against show cause notice issued by Commissioner the assessee has given point by point reply to all the objections raised in the notice. Thus, ld. Sr. counsel has submitted that the issue/allegation as raised in the show cause notice can be examined by the AO in the course of regular assessment proceeding and in fact already considered while passing the assessment order u/s 153A r.w.s. 143(3). The Commissioner can only cancel the registration u/s 12AA(3) if it is found that the activities of the assessee trust are either not genuine or are not being carried out in accordance with objects. There is nothing in the show cause notice

to show that the commissioner has gathered any record or conducted any inquiry to manifest that the activities of the assessee trust are not genuine or not being carried out as per objects of the trust. The CIT has referred the order of CCIT dated 24.10.2007 passed u/s 10(23C)(vi) of the Act and also referred to the order of the Hon'ble jurisdictional High Court dated 24.02.2006 regarding the irregularities of the admission in the medical course. By referring these two orders of CCIT and Hon'ble High Court, the commissioner has held that the activities of the assessee trust are not considered to be charitable within the meaning of section 2(15) of the Act.

16.4 Ld. Sr. counsel has has referred to the show cause notice issued by the Commissioner and submitted that the allegations mentioned in the show cause notice is regarding (i) alleged capitation fee on the basis of the loose documents impounded during the course of TDS survey u/s 133A on 9th August 2005 and statements of the parents of the students. ii) Violation of section 13 in reference to benefit given to the trustee in the transactions of exchange of land but without any subsistence. However, there is no mention about any charge against trust or institutions showing that its activities are not being carried out for charitable purpose or its activities are beyond the scope provided in the aims and objects of the trust.

16.5 Ld. Sr. counsel has submitted that undisputedly the assessee is running various hospitals, colleges and research centers which

are for achieving objects of the assessee trust apart from running of 1365 bedded multi-specialty hospital the assesse is also imparting education through its colleges having courses of MBBS, MDS, BDS. He has referred to the details of receipt and expenditure since assessment year 2001-02 to 2010-11 and submitted that right from the beginning the assessee trust has been incurring losses due to more expenditure then the receipts which are applied for the charitable activities. Even the AO while framing the assessment u/s 153A r.w.s 143(3) has assessed the income of the assessee at nil by denying the claim of carry forward of losses. Thus, the factum of losses in all the years has not been disputed by the AO but claim of carry forward is only denied by the AO.

16.6 Ld. Sr. counsel has submitted that violations of provisions of section 13 empowers an assessing officer to deny exemption u/s 11 & 12 to the limited extent of such violation but such a violation cannot form a ground to cancel registration by passing an order under section 12AA of the Act. In support of his contention he has relied upon the decision of the Mumbai Benches of the Tribunal in case of *Lilavati Kirtilal Mehta Medical Trust vs. Commissioner of Income Tax 108 taxmann.com 272.*

17. As regards the allegation of the cash withdrawn from the banks and given to Shri Rajesh Bhalla.

17.1 Ld. Sr. counsel has submitted that the withdrawal of cash from the bank account is not in dispute and the same was also re-deposited in the bank accounts in the month of January 2008

except a sum of Rs.3,50,000/- which was deposited on 28.02.2008 therefore, the withdrawal of the cash from the bank account in the months of January 2008 and redeposit of the same also in the month of January 2008 are much prior to the search and seizure action carried out on 23rd July 2009. These transactions of withdrawal and re-deposit of cash in the bank accounts were completed 1-1/2 year before the search and therefore, it cannot be considered as incriminating material or violation of provisions of section 13 of the Act. Further relying on the statement of Shri Rajesh Bhalla without allowing the assessee to cross examine is not permissible under the law as it is gross violation of principle of natural justice. He has relied upon the judgment of Hon'ble Delhi High Court in case of *Pr. CIT vs. Best Infrastructure(India) 397 ITR 82* as well as other decisions which were relied at the time of arguing appeals against assessment order passed u/s 153A r.w. section 143(3) of the Act.

17.2 Ld. Sr. counsel has submitted that Commissioner cannot go beyond the show cause notice issued for initiating proceeding u/s 12AA(3) of the Act. He has further submitted that it is pertinent to notice that the allegation of capitation fee are based on loose paper impugned during the survey proceedings on 09.08.2005 and show cause notice for cancelation of registration was issued on 13.01.2014 which is after a gap of more than eight years. Thus, there is no reason as to why the said instance was not taken as ground for cancelation for eight years. Even otherwise allegation of capitation fee cannot be a ground for cancelation of registration u/s

12AA(3) of the Act. In support of his contention he has relied upon the decision of the Coordinate Bench of the tribunal in case of *Padanilal Welfare Trust 20 vs. DCIT 20 taxmann.com 113 (Chennai)* and submitted that the tribunal has held that the commissioner cannot cancel the registration u/s 12AA on the ground of capitation fee received by the trust as this issue is to be investigated in the assessment proceedings.

17.3 He has then relied upon the judgment of Hon'ble Kolkata High Court in case of Jagannath Gupta Family Trust 86 taxmann.com 104 and submitted that one stance of capitation fee would not establish that the activity of the trust are not genuine or not being carried out in accordance with object of the trust. He has then relied upon the judgment of Hon'ble Allahabad High Court in case of *CIT vs. Society of Advanced Management Studies 352 ITR 269 (All)* and submitted that cancelation of registration u/s 12AA(3) based on the order of the Commissioner denying approval u/s 10(23C)(vi) without pointing out that the assessee has not fulfilled the condition under section 11 of the Act. The conditions for granting approval u/s 10(23C)(vi) are entirely different form the conditions as provided for registration u/s 12A of the Act. He has then relied upon the judgment of Hon'ble Allahabad High Court in case *of CIT vs. Jeevan Deep Charitable Trust 360 ITR 143* and submitted that the Hon'ble High Court has reiterated its view on this issue. The registration u/s 12AA(3) cannot be canceled solely on the basis of the order of denial of approval u/s 10(23C)(vi). Ld. Sr. counsel then relied upon the judgment of Hon'ble Punjab & Haryana High Court

in case of *CIT vs. Mahasabha Gurukul Vidyapeeth Haryana (2010) 326 ITR 25 (Pun)* as well as the order of Mumbai Benches of the Tribunal dated 27.07.2023 in case of Heart Foundation India vs. CIT in ITANo. 1524 of 2023 and submitted that the cancelation of registration u/s 12AA(3) cannot be retrospective but only prospective.

18. As regards the allegations of benefit given to the member/trustee of the assessee trust in the transactions of exchange of land.

18.1 The Ld. Sr. counsel has submitted that the market value of the land given by the assessee is less than the market value of the land received by the assessee in exchange. He has referred to the guidelines value as notified by the competent authority of these two lands under exchange and submitted that the guideline value of the land transferred by the assesse is Rs.25 lakhs per hectare whereas the guidelines value of the land received by the assessee in exchange is Rs. 18 lakhs per hectare. Therefore, the total value of the land received by the assessee in exchange is more than the total market value of the land given by the assessee. The Commissioner has taken and considered only the observations of the AO in the assessment order passed u/s 153A without considering the facts regarding any benefit in terms of the value of the land is given or not. He has also relied upon decisions as relied at the time of the arguments for the appeals against the assessment order passed u/s 153A r.w. section 143(3) of the act.

19. On the other hand ld. DR has relied upon the impugned order of the Commissioner and submitted that the Commissioner has given specific instances of receipt of capitation fee as found during the survey, the directions of Hon'ble High Court regarding impartial procedure of admission adopted by the assesse, the benefit to the specified person by way of paying on money for purchase of the land by the related party as well as exchange of land with trustee. All these events clearly established that the activities of the assessee are not for charitable purpose but for earning profit and providing the benefit to the specified persons prohibited u/s 13 of the Act. Thus, ld. DR has submitted that the activities of the assesse are not being carried out in accordance with objects of the assessee but the activities are carried out to provide benefit to the specified persons prohibited u/s 13 of the Act as well as the assessee has indulged in unauthorized activities of taking capitation fee for granting admission to the students in the medical courses.

20. We have considered rival submissions as well as relevant material on record. In the show cause notice as reproduced by the Commissioner in the impugned order was pointed out that during the course of assessment proceedings completed u/s 153A of the Act the AO has observed the loose paper found during the search showing the payment of Rs.30 lakhs for the property at Royal Classic Cooperative Society. Further commissioner has referred a loose paper impounded during the course of survey carried out u/s 133A on 9th August 2005 revealing the capitation fee received by the

assessee and finally transaction of exchange of land has resulted the benefit to the trustee in violation of section 13 of the Act.

20.1 All three allegations in the show cause notice are based on the assessment order passed by the AO u/s 153A r.w.s 143(3). In response to show cause notice the assesse has denied the allegations and also explained that there was no violation of section 13 of the Act so far as the allegation of payment of Rs.30 lakhs for transactions of purchase of property in Mumbai as well as exchange of land with Shri S.N. Vijayvargiya trustee of the assesse. The assessee has also denied the allegations of capitation fee and submitted that most of the parents of the students who were admitted to the course of MBBS have denied the said allegation except one or two and further the additions made by the AO in the hands of the parents of the students were finally deleted either by the CIT(A) or by this Tribunal.

20.2 All these three issues were also subject matter of the assessments proceedings u/s 153A r.w. section 143(3) of the Act. The AO has passed composite order for all the years from A.Y.2004-05 to 2010-11 and while deciding the appeals of the assessee against assessment order passed u/s 153A we have considered all these three issues and decided in favour of the assesse. Even the appeal of the revenue for A.Y.2005-06 against the original order passed u/s 143(3) is also decided against revenue. Therefore, in view of our finding in the appeals filed by the assesse as well as revenue these grounds raised by the Commissioner in the show

cause notice remains only allegations and have not been established against the assesse. Further the order of CCIT u/s 10(23C)(vi) cannot be a ground for cancelation for registration in the proceedings u/s 12AA(3) of the Act as held by the Hon'ble Allahabad High Court in case of *CIT vs. Society of Advanced Management Studies(supra)* in para No.3 to 5 as under:

> *"3. We have heard Sri Shambhu Chopra, learned senior standing counsel for the Revenue and Sri Kunal Ravi Singh, learned counsel appearing for the respondent-assessee.*
>
> *4. Sri Chopra, learned counsel, submitted that as the institution has been established solely for the educational purposes and is a profit-earning institution exemption under section 10(23C)(vi) of the Act having been rightly denied to it as it ceased to be a charitable institution, therefore, the Tribunal has erred in restoring the registration. The submission is wholly misconceived. Admittedly, one of the objects of the trust was for running educational institutions and imparting education. The trust, however, has other objects also, which are reproduced below:*
>
> *"(1) Development of scientific education amongst Indian children.*
>
> *(ii) Modern education with moral duty and character building in accordance with the Indian culture as well as development of educational atmosphere.*
>
> *(iii) To provide as well as arrange commercial and practical education to children.*
>
> *(iv) Development as well as publicize the Indian culture and arts.*
>
> *(v) To establish the school and management thereof from primary education to intermediate education.*

(vi) To publicize as well as to educate and propagate the cottage industries as well as industries based on village amongst the youth so that they may lead their life independently and freely."

5. In our considered opinion, exemption under section 10(23C)(vi) of the Act can be claimed by an assessee without applying for registration under section 12A of the Act as it is not required to fulfil the conditions mentioned under section 11 of the Act while claiming the exemption under section 10(23C)(vi) of the Act. Further, in the order passed by the Commissioner of Income-tax, there is no whisper that the assessee has not fulfilled any of the conditions of section 11 of the Act for claiming it to be a charitable institution. He had solely relied on the order of the Chief Commissioner of Income-tax passed under section 10(23C)(vi) of the Act while denying the exemption under the aforesaid sub-section. We are, therefore, of the considered opinion that the Tribunal had rightly restored the registration on the ground that in the assessment years 2004-05 and 2006-07 the benefit of exemption/deduction under section 11 of the Act was allowed to the respondent-assessee."

20.3 The Hon'ble High Court of Allahabad has reiterated this view in the case of *CIT vs. Jeevan Deep Charitable Trust (supra)* in para 3 & 5 as under:

"3. We have heard Sri Dhananjay Awasthi, learned Standing Counsel for the Revenue and Sri Kunat Ravi Singh, learned counsel appearing for the respondent-assessee. 294

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5. In our considered opinion, exemption under Section 10(23C)(vi) of the Act can be claimed by an assessee without applying for registration under Section 12A of the Act as it is not required to fulfil the conditions mentioned under Section 11 of the Act while claiming exemption under Section 10(23C) (vi) of the Act. Further in the order passed by the Commissioner of Income Tax, there is no whisper that the assessee has not fulfilled any of the conditions of the Section 11 of the Act for

> *claiming it to be a charitable institution. He had solely relied on the order of the Chief Commissioner of Income Tax passed under Section 10(23C) (vi) of the Act while denying the exemption under the aforesaid sub-section. We are, therefore, of the considered opinion that the Tribunal had rightly restored the registration on the ground that in the Assessment Years 2004-05 and 2006-07 benefit of exemption/deduction under Section 11 of the Act was allowed to the respondent-assessee."*

20.4 Thus, denial of approval u/s 10(23C)(vi) cannot be a basis of cancelation of registration granted u/s 12A by invoking provisions of section 12AA(3) of the Act. The conditions provided u/s 12AA(3) are to be satisfied for cancelation for registration. The twin-conditions for granting approval u/s 10(23C)(vi) are (i) firstly the educational institutions or hospital, any University or other educational institutions existing solely for educational purpose and (ii) secondly not for purpose of profit, whereas the registration u/s 12A/12AA is granted when conditions as provided u/s 2(15) as well as section 12AA/12AB of the Act which are distinct and separate from the conditions as provided u/s 10(23C)(vi) of the Act are satisfied. Therefore, the denial of approval u/s 10(23C)(vi) cannot be a basis for cancelation for registration u/s 12A of the Act. The Hon'ble P & H, High Court in case of *CIT vs. Mahasabha Gurukul Vidyapeeth Haryana (supra)* has also considered this issue in prara 4 & 5 as under:

> *"4. The only contention put forward by the learned counsel for the Revenue is that the conditions of section 10(23C)(m) having not been complied with, exemption could not be granted under section 11. He relies upon the judgment of the hon'ble the apex court in American Hotel & Lodging Association Educational Institute v. CBDT [2008] 301 ITR 86.*

> *5. We do not find any merit in the submission. Once it is held that all requisite conditions for exemption under section 11 have been met, even if conditions under section 10(23C)(vi) have not been complied with, there will be no bar to seek exemption under section 11. The judgment relied upon has no application to the present case as therein the question was as to the scope of enquiry under section 10(23C)(vi) read with the third proviso thereto. The view taken in Bar Council of Maharashtra [1981] 130 ITR 28 (SC) is not shown to have been affected. The Commissioner of Income-tax (Appeals) as well as the Tribunal have categorically held that all the conditions of section 11 were fulfilled and the judgment in Bar Council of Maharashtra was applicable. We are, thus, unable to hold that any substantial question of law arises."*

20.5 There are other judgments on this point including the judgment of Hon'ble Rajasthan High Court in case of Geetanjali University Trust [2013] 31 taxmann.com 304 (Rajasthan) as already referred by us and reproduced in the earlier part of this order in para 9.8. Therefore, for sake of brevity the same is not being reproduced here. Ld. Sr. Counsel for the assesse also referred the judgment of Ho'ble Madras High Court in case *of CIT vs. Sarvodaya Lakkiya Pannai 20 taxmann.com 546* wherein the Hon'ble High Court has held in para 5 to 10 as under:

> *"5. In order to avail the benefit of exemption under section 11 of the Act, a Trust can make an application to the Commissioner for registration under section 12A of the Act. On receipt of the said application for registration of a trust or institution, the Commissioner should satisfy himself about the genuineness of the activities of the trust or institution. In order to satisfy himself, the Commissioner may also make such enquiry as he may deem necessary in that behalf. In the event the Commissioner satisfies himself that the trust is entitled to registration keeping in mind the objects, shall grant registration*

in writing in terms of section 12AA(1(b)(i) of the Act. In the event the Commissioner is not satisfied, he shall refuse such registration in terms of section 12AA(1)(b) (ii) of the Act. Once such a satisfaction is arrived at by the Commissioner to grant, such registration cannot be cancelled by following the very same provision of section 12AA(b)(i) of the Act to go into the genuineness of the activities of the trust. However, the Commissioner is empowered to revoke the certificate in terms of section 12AA(3) of the Act. As per the said provision, in the event the Commissioner is satisfied subsequently i.e. after registration that the activities of such trust or institution are not genuine or not being carried out in accordance with the objects of the trust or the institution as the case may be, he shall pass an order in writing cancelling the registration of such trust or institution.

6. In order to apply the above provision, there must be a specific finding by the Commissioner that the activities of the trust or institution are not genuine or not being carried out in accordance with the objects of the trust or institution as the case may be. The question is, whether the order of the Comissioner of Income Tax could fall under the powers conferred on him under section 12AA(3) of the Act. The only reason given by the Commissioner of Income Tax to cancel the registration is that the activities of the trust were not charitable and therefore, the trust is not entitled to exemption under section 11 and consequently, cancelled the registration granted under section 12AA.

7. It is not as if that the registration was granted without considering the objects of the trust in question, namely, (a) The publication, sale and spread of Sarvodaya Literature.

(b) To support all activities connected with the constructive programmes of the father of the nation, Mahatma Gandhi. (c) To organize meetings, seminars, symposium and conferences to propagate Gandhian and Sarvodaya Ideologies.

(d) To do all other acts and things incidental to and necessary in the furtherance of the said objects.

(e) To apply the profit derived by the society to the activities connected with spreading and propagating of Gandhian and Sarvodaya Ideologies and to help the Sarvodaya movement".

8. The Commissioner of Income Tax, before granting the registration, had gone into the above objects and satisfied himself for grant of registration. Subsequently, by the order of the Commissioner of Income Tax dated 31.06.2011, the very same objects were considered and were found not to be the activities which are charitable in nature. While carrying on the activities of publication and sale of Sarvodaya Literature and Gandhian Ideologies as charitable activities, referring the same objects as not charity, it cannot be brought under the provisions of section 12AA(3) of the Act. The cancellation was made not on the ground that the activities of the trust were not genuine but the activities of the trust were not in accordance with the objects of the trust. When the trust was registered with definite objects, carrying on such activities would be in terms of the objects for which the registration was made. In fact, if those activities are not carried on, the trust may violate the objects for which the registration was granted.

9. Under section 12AA, the Commissioner is empowered to grant or refuse the registration and after granting registration, would be empowered to cancel and that too, only on two conditions laid down under section 12AA(3) of the Act. Whether the income derived from such transaction would be assessed for tax and also whether the trust would be entitled to exemption under section 11 are entirely the matters left to the assessing officer to decide as to whether it should be assessed or exempted.

10. The Tribunal had allowed the case of the assessee with the finding that none of the conditions under section 12AA(3) were violated and therefore, the satisfaction which was arrived at by the Commissioner of Income Tax was not justified. In that view of the matter, we find no reason to interfere with the order of the Tribunal and accordingly, both the questions require no further consideration,

The tax case appeal is dismissed as devoid of merits".

20.6 In the above case the registration was canceled on the ground that the activities of the trust were not charitable. The Hon'ble High Court has observed that when the registration was granted u/s 12A the activities of the assesse trust was considered as charitable in nature and therefore, subsequently those activities cannot be referred as not charity and brought under the provisions of section 12AA(3) of the Act. Once the trust was registered with definite object and carrying on such activities for achieving the objects for which the registration was made, then the registration cannot be canceled/withdrawn by holding that the activities carried out by the trust are not charitable.

20.7 We further note that Mumbai Benches of the Tribunal in case of Heart Foundation vs. CIT (supra) has also considered this issue in para 7 to 9 as under:

> *"7. We heard the parties and perused the materials on record. There was a search in the case of M/s.Emcure Pharmaceuticals group and its associate concerns on 16.12.2020. Simultaneously there was a survey under section 133A in the case of assessee and accordingly the case of the assessee and co-ordinate investigation was centralised with the Assistant Commissioner of Income-tax, Central Circle, Pune (the Assessing Officer). The Assessing Officer made a reference to the PCIT (Central), Pune under second proviso to sub section (3) of section 143 for cancellation of registration under section 12AB(4) of the Act. The PCIT, based on the statements recorded from one of the trustees and on perusal of various other documents came to the conclusion that the activities of the trust are neither genuine nor being carried out in accordance with the objects of the trust. It was further held that the assessee has violated other laws*

while carrying out the activities which are in the nature of specific violations specified in clause (e) and clause (f) of Explanation below section 12AB(4). The PCIT accordingly withdrew and cancelled the registration granted to the assessee with effect from A.Y. 2016-17. With regard to the contention that the PCIT (central) does not have the jurisdiction to cancel the registration and that too retrospectively, we notice that as per serial no.12 of the CBDT notification Nos 52 & 53, the jurisdiction for all cases in Greater Mumbai and Navi Mumbai, claiming exemption under sections 11 and 12 lies with the Commissioner of Income-tax (Exemption) Mumbai. Therefore we see merit in the submissions of the ld AR that the PCIT (Central) does not have jurisdiction to cancel the registration under section 12AB. It is also noticed that the Jodhpur Bench of the Tribunal in the case of Pacific Academy of Higher Education & Research (supra) has considered a similar issue and held that –

"6.3. We found from perusal of the record that a search and seizure operation has been carried out in the case of Pacific Group of Udaipur on 26.08.2015. Warrant of authorization under section 132(1) of the Act was also issued and duly executed in respect of the assessee trust being part of the Pacific Group. The Notification referred above does not provide that Id. CIT (E) can transfer his power or jurisdiction to other CIT or PCIT. In the said notification the CBDT has authorized the CIT (E) to issue order in writing for the exercise of powers and functions by the Addl. CIT or JCIT or TRO who are subordinate to him, and has authorized the Addl. CIT to issue order in writing for the exercise of powers by the Assessing Officer who are subordinate to him. In section 124 jurisdiction of Assessing Officer has been given, not the jurisdiction of Commissioner. Further, in section 127 power of transfer of cases has been given from one Assessing Officer to other Assessing Officer and not from CIT to CIT. Therefore, registration under section 12A or approval under section 10(23C)(vi) can be withdrawn only by the prescribed authority who is empowered to grant the same. Notification No. 52/2014 and 53/2014 dated 22.10.2014 only empower the CIT (E) to withdraw the registration/approval. The Pr. CIT has not been given power to withdraw/cancel the

registration/approval. 6.4 Further, in the said notification, there is no mention where CIT(E) can transfer to other CIT or Pr.CIT. The said notification of CBDT has authorized the CU(E) to issue order in writing for the exercise of the powers and functions by the Addl.CIT or JCT or TRO who are "subordinate" to them and has authorised the Addl.CIT to issue order in writing for the exercise of the powers by the Assessing Officer who are the subordinate to them. In section 124 of the Act, the jurisdiction of Assessing Officer has been given and not 'Jurisdiction of Commissioner'. 6.5 Further in Sec. 127 of the Act, the power of transfer of cases is given from one Assessing Officer to another Assessing officer not from CIT to CIT. For ready reference, we reproduce Sec. 127 of the Act, which provides as under: 127. (1) The Principal Director General or Director General or Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, transfer any case from one or more Assessing Officers subordinate to him (whether with or without concurrent jurisdiction) to any other Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) also subordinate to him. (2) Where the Assessing Officer or Assessing Officers from whom the case is to be transferred and the Assessing Officer or Assessing Officers to whom the case is to be transferred are not subordinate to the same Principal Director General or Director General or Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner,— (a) where the Principal Directors General or Directors General or Principal Chief Commissioners or Chief Commissioners or Principal Commissioners or Commissioners to whom such Assessing Officers are subordinate are in agreement, then the Principal Director General or Director General or Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner from whose jurisdiction the case is to be transferred may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, pass the order; . (b) where the Principal Directors

General or Directors General or Principal Chief Commissioners or Chief Commissioners or Principal Commissioners or Commissioners aforesaid are not in agreement, the order transferring the case may, similarly, be passed by the Board or any such Principal Director General or Director General or Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner as the Board may, by notification in the Official Gazette, authorise in this behalf. ' , (3) Nothing in sub-section (1) or sub-section (2) shall be deemed to require any such opportunity to be given where the transfer is from any Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) to any other Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) and the offices of all such officers are situated in the same city, locality or place. The transfer of a case under sub-section (1) or sub-section (2) may be made at any stage of the proceedings, and shall not render necessary the reissue of any notice already issued by the Assessing Officer or Assessing Officers from whom the case is transferred. Explanation.— In section 120 and this section, the word "case", in relation to any person whose name is specified in any order or direction issued there under, means all proceedings under this Act in respect of any year which may be pending on the date of such order or direction or which may have been completed on or before such date, and includes also all proceedings under this Act which may be commenced after the date of such order or direction in respect of any year. 6.6 Sec. 120 (4) to 120(6) also provide the work assigned to the subordinate officers which is reproduced below: (4) Without prejudice to the provisions of sub-sections (1) and (2), the Board may, by general or special order, and subject to such conditions, restrictions or limitations as may be specified therein, (a) authorise any Principal Director General or Director General or Principal Director or Director to perform such functions of any other income-tax authority as may be assigned to him by the Board; (b) empower the Principal Director General or Director General or Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner to issue orders in writing that the powers and functions conferred on, or as the case may be, assigned to, the Assessing Officer by

or under this Act in respect of any specified area or persons or classes of persons or incomes or classes of income or cases or classes of cases, shall be exercised or performed by an Additional Commissioner or an Additional Director or a Joint Commissioner or a Joint Director, and, where any order is made under this clause, references in any other provision of this Act, or in any rule made thereunder to the Assessing Officer shall be deemed to be references to such Additional Commissioner or Additional Director or Joint Commissioner or Joint Director by whom the powers and functions are to be exercised or performed under such order, and any provision of this Act requiring approval or sanction of the Joint Commissioner shall not apply. (5) The directions and orders referred to in sub-sections (1) and (2) may, wherever considered necessary or appropriate for the proper management of the work, require two or more Assessing Officers (whether or not of the same class) to exercise and perform, concurrently, the powers and functions in respect of any area or persons or classes of persons or incomes or classes of income or cases or classes of cases; and, where such powers and functions are exercised and performed concurrently by the Assessing Officers of different classes, any authority lower in rank amongst them shall exercise the powers and perform the functions as any higher authority amongst them may direct, and, further, references in any other provision of this Act or in any rule made thereunder to the Assessing Officer shall be deemed to be references to such higher authority and any provision of this Act requiring approval or sanction of any such authority shall not apply. (6) Notwithstanding anything contained in any direction or order issued under this section, or in section 124, the Board may, by notification in the Official Gazette, direct that for the purpose of furnishing of the return of income or the doing of any other act or thing under this Act or any rule made thereunder by any person or class of persons, the income-tax authority exercising and performing the powers and functions in relation to the said person or class of persons shall be such authority as may be specified in the notification. We also observe that as per Sec. 120(6) of the Act, the CBDT by its Notification No. 52/2014 and 53/2014 dated 22.10.2014 has given power to CIT(Exemption)

Jaipur for the State of Rajasthan for all cases of persons in the territorial area specified in column (4) claiming exemption under clauses (21), (22), (22A), (22B), (23), (23A), (23AAA), (23B), (23C), (23F), (23FA), (24), (46) and (47) of section 10, section 11, section 12, section 13A and section 13B of the Act and assessed or assessable by an Income-tax authority at serial numbers 131 to 140 specified in the notification of Government of India bearing number S.O. 2752 dated the 22nd October, 2014. Thus firstly as per above notification and provisions of Sec. 120 and 127 the Id. CIT(Exmp.) cannot transfer or hand over or given his work or power or duties to the other same rank of CIT at all to cancel the Registration u/s 12AA. However, in case, if it is necessary to do so then there has to be proper proceedings in writing. As there has to be some order in writing from higher authorities i.e. from Chief Commissioner of Income Tax (Exmp.) Delhi or CBDT in writing and an opportunity of being heard is to be given to the assessee before transferring the case whereas all these are absent in the present case and nothing has been demonstrated by the department. 6.7 We further observe that Sec. 127 of the Act empower to transfer cases among Assessing Officers but not to Commissioners of Income Tax as CIT is not an Assessing Officer. In our view, to pass an order u/s 12A for registration or cancellation is not within the jurisdiction or power of an Assessing Officer. Hence registration u/s. 12A can be withdrawn only by the "Prescribed Authority' who has been empowered to grant the same and by the Notification dated 22.10.2014 the ld.CIT(Exmp.) has empowered for the same, hence the Pr.CIT (Central) cannot cancel the same. 6.8 In assessee's case, the case u/s 127 was transferred to the Central Circle for limited purpose of Co-Ordinate assessment admittedly which do not mean that the Section 12A proceeding has been transferred to the Pr. CIT(Central) automatically, when both the proceedings are separately or independent and also has to be done or conducted by the different rank Authorities. More particularly when for the purpose of Exemption cases or 12A registration a Separate Commissioner of Income Tax has been Authorized for whole of Rajasthan by the CBDT by its Notification dated 22.10.2014. In support of the above contention, the Id AR has relied on the

decision in the case of Dilip Tanaji Kashid vs. M.I. Karmakar PR. CIT& ANR. (2018) 304 CTR 0436 (Bom) wherein It has been held Transfer of jurisdiction—Power of competent officers—Centralization of case-Dissenting note—Assessee was issued notice enshrining proposal for transfer of his case from Kolhapur to Mumbai, so as to centralise cases relating to D. Y. Patil Group—Assessee objected that such notice did not referred to any agreement being reached by officers of equal rank at Mumbai and Ko/hapur— These objections were however overruled and assessee's case was transferred—High Court quashed purported transfer u/s 127— Held, "Centralisation Committee" which took decision for transfer of jurisdiction, is not authority envisaged u/s 127(2)—Counter-affidavit filed on behalf of Revenue does not disclose that there was any agreement between authorities of equal rank, as a pre-condition for invoking powers u/s 127— "Absence of dissenting note" from officer of equal rank who has to agree to proposed transfer would not constitute agreement, envisaged u/s 123(2)(a)— - Assessee's petition allowed. 6.9 We further observe that the Id. Pr.CIT (Central) cancelled such approval from A. Y. 2014-15, though the assessee has already assessed from A.Y. 2014- 15 under section 143(3)/148 of the Act. It is also settled legal position of law that Registration cannot be cancelled from retrospective effects. In this regard, the Id AR has relied on the decision of the Hon'ble Supreme Court in case of State of Rajasthan and others vs Basant Agrotech India Ltd. and other 388 ITR 81(SC) wherein it has been decided that "only a legislation can make a low retrospective and prospectively subject justifiability and acceptability within the constitutional para-meters. The subordinate legislation can be given with retrospective effect if a power in this behalf is contained in the principle Act. In the absence of such conferment of power the Government the delegated authority has no power to issue a notification with retrospective effect. Therefore, in the absence of any provision contained in legislative Act the delegatee cannot make a delegated legislation with retrospective effect. When no power has been conferred by the act on the competent authority to withdraw the approval retrospectively, then the withdraw of the approval u/s 10(23C)(vi) of the Act can only be prospective.

Hence such of approval gentled under section 12A from back date are also not according to the law and facts of the case and at the worst after the year of notice it can be done if any." , In the case of Indian Medical Trust V/s PCIT (Central) 2019 (6) TMI 996 (Rajasthan) it has been held that: 28. Indisputably, the order dated 16th Jan, 2018, made by the Commissioner of Income Tax thereby canceling the registration granted under section 12A and withdrawing the approval given under section 10 (23C) (v) & 10 (23A) (via) of the Act of 1961, to the petitioner Trust with retrospective effect from the date of 01st April, 2006, was arbitrary in the face of the provisions of the Act of 1961; and therefore, cannot be deemed to be in consonance with any possible interpretation to be valid or legal. This court is of the opinion that the provisions of section 12AA (3) of the Act of 1961, empowers the Commissioner of Income Tax to initiate steps for cancellation of the registration of a Trust, but, the legislation had no intention of giving the said provision, a retrospective effect. For in such a situation, the same would have been clearly specified in the said provision. Interpretation of the said provision has to be harmonious rather than being prejudicial to the institutions as it would instigate and create a fear of the Income Tax Department. I find support in my opinion from the following cases with reference to the issue of cancellation or withdrawal of registration with retrospective effect:

In the case of Oxford Academy for Career Development Vs. Commissioner of Income Tax: (2009) 315 ITR 382, it was thus observed that 16. In the instant case, the petitioner is a registered society, which was earlier granted registration under Section 12A on 1-4-1999. A survey was conducted at the business premises on 20-9-2002, from where documents were impounded. The registration was cancelled for the assessment years 2000-01 and 2001-02 for the reasons that the surplus was quite heavy. In the impugned order, it was mentioned by the CJT that there was an unusual huge margin and the petitioner was engaged in the commercial activities rather than charitable. As per the balance-sheet, huge amount from the student was charged. The profit margin embodied in the

charges taken from the students are so huge and it proves the profit motive of the petitioner. The funds were misused by the president and his family members of the petitioner. 20. The expression "charitable purpose" is defined in Section 2(15) of the IT Act, 1961. It is of inclusive nature as revealed in the language. Earlier the words "the advancement of any other object of general public utility" in this definition were succeeded by the words "not involving the carrying on of any activity for profit". These words were omitted by the Finance Act, 1983, w.e.f. 1st April, 1984. 26. In the light of the above discussion and by considering the totality of the facts and circumstances of the case, we hold that the order dt. 9th March, 2004, passed by the CIT(Annex. No. 15 to the writ petition) as per the then law is without power and jurisdiction and therefore, it is liable to be set quashed. 27. Accordingly, the impugned order dt. 9th March, 2004, passed by opposite party No. 2 withdrawing/rescinding the order granting registration on 1st April, 1999, to the petitioner's society under Section 12A of the Act, is quashed. Consequently, the registration granted to the petitioner's society on 1st April, 1999, stands restored for the assessment years under consideration Thus, keeping in view the above discussion, we are of the opinion that in the present case the Id. Pr.CIT(Central) has no jurisdiction to pass the impugned order. Accordingly, we quash the same. Even otherwise we are also of the view that no retrospective cancellation could be made as neither in the Sec. 12AA(3) nor in Sec. 12AA(4) it has been provided or is seen to have explicitly provided to have a retrospective character or intend. Therefore, without a specific mention of the amended provisions to operate retrospectively no cancellation for the past years could be ordered. In this regard, the Hon'ble Madras High Court on the question as to whether the cancellation will operate from a retrospective date has dealt in the case of Auro Lab vs. ITO (2019) 411ITR 0308 (Mad) 20 wherein it was held as under: The amendment to Section 12AA(3) is prospective and not retrospective in character. The courts reasoned that even when the parliament had plenary powers to enact retrospective legislation in matters of taxation, the amended section is not seen to have explicitly provided to have a retrospective

character or intend. Therefore, without a specific mention of the amended provisions to operate retrospectively, the cancellation cannot operate from a past date. 21. On the third question of the effective date of operation of the cancellation order, it was held that the cancellation will take effect only from the date of the order/notice of cancellation of registration. Since the act of cancellation of registration has serious civil consequences and the amended provision is held to have only a prospective effect the effect of cancellation, in the event the pending Tax Appeal is decided in favour of the Revenue, will operate only from the date of the cancellation order, that is 30.12.2010. In other words, the exemption cannot be denied to the petitioner for and up to the Assessment Year 2010-11 on the sole ground of cancellation of the certificate of registration. Also refer Indian Medical Trust v/s Pr. CIT & ors 182 DTR 252(Raj.) is held that cancellation of registration with retrospective effect is invalid." Therefore, in view of the decision of Hon'ble High Court, we are also of the view that cancellation of registration with retrospective effect is invalid in the present case."

8. The ratio laid down by the Hon'ble Tribunal is that in the search case when the case is centralized it is for the purpose of assessment only. The CIT(Exemption) who is having the jurisdiction to handle cases claiming exemption under section 11 and 12 cannot transfer or hand over or give his work or power or duties. In case, if it is necessary to do so then there has to be proper proceedings in writing. In assessee's case the facts are identical where the assessment is centralized and there was no proceeding or communication to the assessee that the CIT(Exemptions) has transferred his power to PCIT. Therefore respectfully following the ratio laid down in the above decision by the Jothpur Bench of the Tribunal and considering the facts of the present case we hold that the PCIT does not have the jurisdiction to cancel the registration under section 12 AB.

9. In above decision, the Hon'ble Tribunal has also held that the withdrawal of registration cannot be retrospective. In assessee's case, the PCIT has cancelled the registration under the new section 12AB. The clause (ii) to subsection section (4) of section

12AB specifically provides that cancellation can be done for such previous year and all subsequent previous years which makes it clear that the cancellation cannot be retrospective. Therefore, we hold that even otherwise the cancellation of registration by the PCIT retrospectively from AY 2016-17 is not tenable."

20.8 Accordingly in view of our finding of these issues while deciding the appeals of the assessee against assessment order passed u/s 153A r.w.s 143(3) as well as decisions cited above the impugned order passed by the Commissioner withdrawing the registration u/s 12AA of the Act is not sustainable and the same is set aside. Consequently the registration of the assessee u/s 12A is restored.

ITA No. 359/Ind/2013 in case of People's University

21. The assessee has raised following grounds of appeal:

"1. That the order dated 28-03-2013 u/s 12AA of the Income Tax Act, 1961, passed by the Commissioner of Income Tax, Bhopal is contrary to facts on record and against the provisions of the Income Tax Act, 1961 and it is unjust, unreasonable and bad-in-law.

2. That the findings of the Id. Commissioner are biased and the said order has been passed by him rejecting the application for registration u/s 12AA with prejudiced mind.

3.That there is no evidence against the appellant for misutilisation of funds/receipts / income of the university for any purchase or cause other than charitable / educational purpose and therefore the Id. CIT (A) was not justified to refuse registration u/s 12AA.

4. That the Id. CIT was not justified in refusing to register the institution u/s 12A on technical lapse of not furnishing audit report in form 108 with the application.

5. That the Id. CIT was not justified in stating that there was no settler of the institution and that the application is not signed by proper person and therefore the institution does not deserve to be registered u/s 12AA.

6. That the Id. CIT erred and is not justified in mis-reading the objects of the university.

7. That the Id. CIT erred and he was not justified in rejecting the claim of registration u/s 12AA on the basis of criteria and procedure of admission of students to the MBBS/BDS course which facts are not related to the appellant.

8. That the Id. CIT erred and he was not justified in refusing to register the appellant u/s 12AA on the basis of Id. Chief Commissioner of Income Tax, Bhopal, order u/s 10 (23C) (vi) dated 24-10-2007 which fact is misplaced as the same is not an order in the case of the appellant but in the case of another person."

22. This appeal of the assesse is directed against the order dated 28.03.2013 of CIT, Bhopal passed u/s 12AA whereby the application of the assessee for registration u/s 12AA was rejected.

23. We have heard the Ld. Sr. counsel as well as Ld. DR and considered the relevant material on record. The Commissioner has passed order u/s 12AA on 28.03.2013 wherein the application for registration u/s 12A was rejected. The commissioner has cited the reasons for rejecting the application as audit report filed by the assessee was not in the form no.10B and further violation of

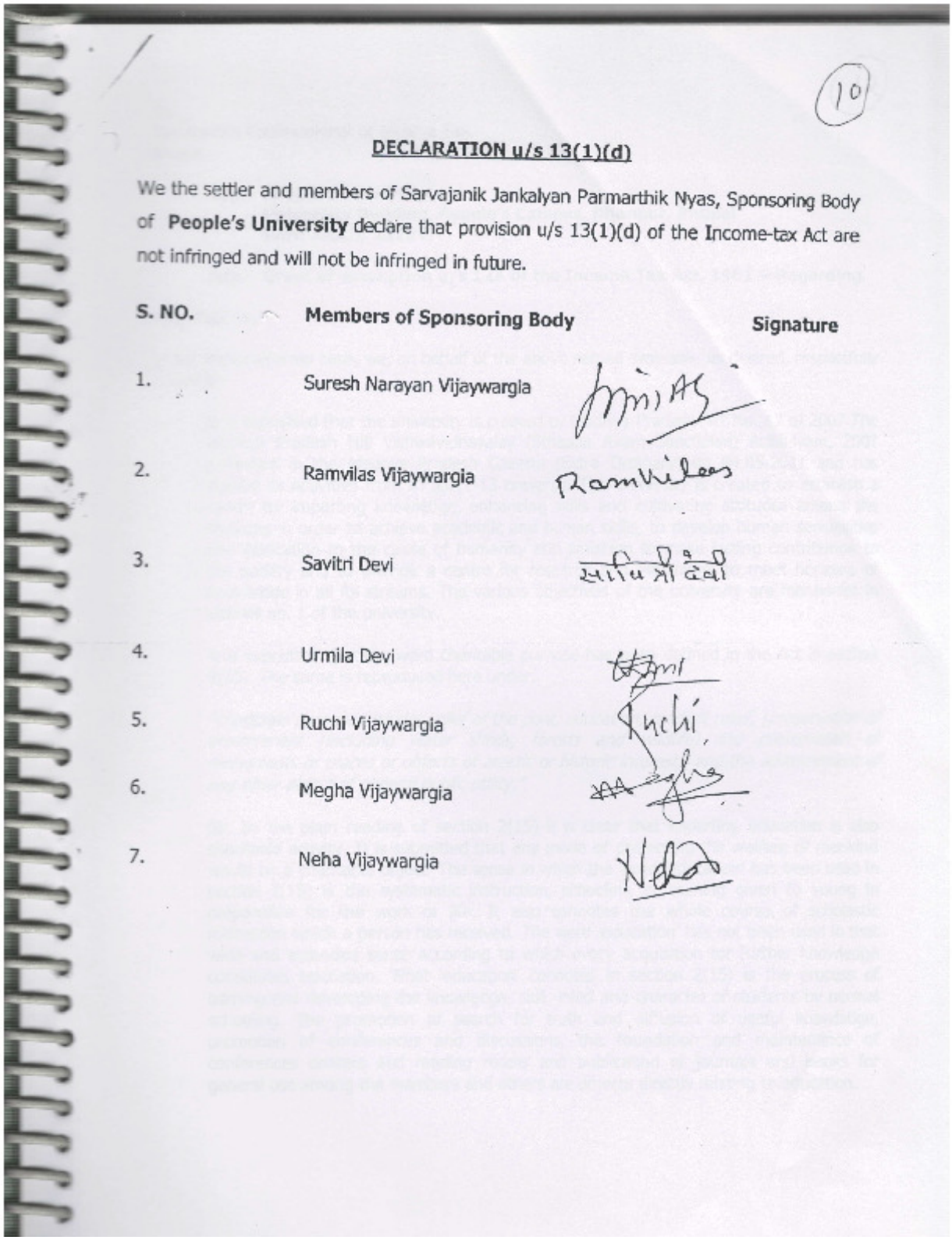
provisions of section 13(2)(c) & 13(1)(d) due to the reason that the declarations are signed by the members of Sarvajanik Jan Kalyan parmarthik Nyas. The Commissioner has further referred to the order of the Hon'ble High Court dated 24.02.2016 and the assessment order passed by the AO in case of Sarvajanik Jan Kalyan parmarthik Nyas u/s 153A r.w.section 143(3) for A.Ys. 2004-05 to 2009-10 and u/s 143(3) for A.Y.2010-11. The assesse is a University set up under M.P. Niji Vishwavidhyalaya (Sthapana Avam Sanchalan) Adhiniyam 2007. The assessee filed an application for registration u/s 12AA on 28.09.2012 which was rejected by the Commissioner. The assessee has filed gazette notification dated 04.05.2011 whereby MP Private University (Establishment and administration] Amendment Act 2011 was notified for recognizing the assessee as a Pvt. University. The said notification also contains name of sponsoring body and chairman who has also signed the application for registration u/s 12A of the Act. Therefore, the declaration as required u/s 13(1)(c) has been signed by all the members of governing body of assessee university. For ready reference the said declarations u/s 13(1)(c) and 13(1)(d) placed at page no. 9 & 10 reproduced as under:

(9)

DECLERATION u/s 13(1)(c)

We the settler and members of Sarvajanik Jankalyan Parmarthik Nyas, Sponsoring Body of **People's University** declare that no benefit is derived by the settler or member from the institution and no part of the income or any property of the institute is used or applied directly or indirectly for the benefit or personal purpose of the member and no provision u/s 13(1)(c) of the Income-tax Act are infringed.

S. NO.	Members of sponsoring Body	Signature
1.	Suresh Narayan Vijaywargia	
2.	Ramvilas Vijaywargia	
3.	Savitri Devi	
4.	Urmila Devi	
5.	Ruchi Vijaywargia	
6.	Megha Vijaywargia	
7.	Neha Vijaywargia	



(10)

DECLARATION u/s 13(1)(d)

We the settler and members of Sarvajanik Jankalyan Parmarthik Nyas, Sponsoring Body of **People's University** declare that provision u/s 13(1)(d) of the Income-tax Act are not infringed and will not be infringed in future.

S. NO.	Members of Sponsoring Body	Signature
1.	Suresh Narayan Vijaywargia	
2.	Ramvilas Vijaywargia	
3.	Savitri Devi	
4.	Urmila Devi	
5.	Ruchi Vijaywargia	
6.	Megha Vijaywargia	
7.	Neha Vijaywargia	

23.1 Thus, when all the members of governing body signed the declarations then there is no infirmity in these declarations as

alleged by the Commissioner. Ld. Sr. counsel also referred the audit report in form 10B placed at page no.87 to 91 and therefore, the audit report filed by the assesse along with application is duly reported in form 10B by the auditor. If there is any mistake in the audit report on account any particular item not reported in appropriate coloumn, then the same cannot be a reason for denying registration u/s 12A/12AA of the Act. The audit report is prepared and signed by the auditor and hence, if there is an error on the part of the auditor in reporting particular item then it is only a professional lapse on the part of the auditor. Further we find that the alleged lapse of not giving the statement of particulars as per Annexure to form 10B is also contrary to the record because the Annexure has duly reported all the items. Even the amounts of income accumulated, set a part for application for charitable or religious purpose and the amounts of income eligible for exemption u/s 11(1)(c) are also shown in the Annexure to form 10B. It has also given the amounts of income which is applied or utilized more than receipts and therefore, all the requisite details are given in the Annexure to Form 10B. The relevant part of the Annexure to Form 10B is reproduced as under:

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ANNEXURE
STATEMENT OF PARTICULARS

People's University
alongwith its Constituent Units, Bhopal

I. Application of income for charitable or religious purposes

1	Amount of income of the previous year applied to charitable or religious purposes in India during that year	Revenue Expenditure 241775464/- Capital Expenditure - NIL
2	Whether the trust/institution has exercised the option under clause (2) of the Explanation to section 11(1)? If so, the details of the amount of income deemed to have been applied to charitable or religious purposes in India during the previous year.	No
3	Amount of income accumulated or set apart/finally set apart for application to charitable or religious purposes, to the extent it does not exceed 15 per cent of the income derived from property held under trust wholly/in part only for such purposes.	Rs. 3,03,77,634/-
4	Amount of income eligible for exemption under section 11(1)(c)	NIL
5	Amount of income, in addition to the amount referred to in item 3 above, accumulated or set apart for specified purposes under section 11(2)	NIL. Excess Utilization is as under : F.Y. | Amount A.Y.2012-13 | 69635539 Carried Forward to next A.Y.
6	Whether the amount of income of mentioned in item 5 above has been invested or deposited in the manner laid down in section 11(2)(b)? If so, the details thereof.	NIL
7	Whether any part of the income in respect of which an option was exercised under clause (2) of the Explanation to section 11(1) in any earlier year is deemed to be income of the previous year under section 11(3)? If so, the details thereof.	NIL
8	Whether, during the previous year, any part of income accumulated or set apart for specified purposes under section 11(2) in any earlier year :-	NIL
a	has been applied for purposes other than charitable or religious purposes or has ceased to be accumulated or set apart for application therefo, or	NIL
b	has ceased to remain invested in any security referred to in section 11(2)(b)(i) or deposited in any account referred to in section 11(2)(b)(ii) or section 11(2)(b)(iii), or	NIL
c	has not been utilized for purpose for which it was accumulated or set apart during the period for which it was to be accumulated or set apart, or in the year immediately following the expiry thereof? If so, the details thereof	NIL

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23.3 Thus, the said objection of the commissioner is unfounded when the form 10B was duly filed by the assessee and Annexure to form 10B is also filed giving necessary details. All other grounds as raised by the commissioner are only regarding the order passed by the CCIT u/s 10 (23c)(vi) in case of Sarvajanik Jan Kalyan parmarthik Nyas, Bhopal dated 24.10.2007, the order of the Hon'ble Jurisdictional High Court and loose paper impounded during the survey conducted on 09.08.2005 as well as the assessment order passed by the AO u/s 153A r.w.s. 143(3) in case of Sarvajanik Jan Kalyan parmarthik Nyas for A.Ys.2004-05 to 2010-11.

23.3 All these grounds are common to the grounds and reasons taken by the Commissioner while canceling registration of Sarvajanik Jan Kalyan parmarthik Nyas. In view of our finding in the appeal against the cancelation of registration u/s 12A in case of Sarvajanik Jan Kalyan parmarthik Nyas in ITANo.539/Ind/2014 the impugned order passed by the Commissioner denying the registration u/s 12AA is not justified and liable to be set aside. Accordingly we set aside impugned order and direct the

Commissioner of Income Tax/commissioner of income Tax (E) to grant registration u/s 12AA to the assessee on the application filed on 28.09.2012.

24. In the result, All appeals of the Assesee in case of Sarvajanik Jan Kalyan parmarthik Nyas and appeal in case of People's University for A.Y. 2011-12 are Allowed and Appeal of the Revenue in Sarvajanik Jan Kalyan parmarthik Nyas in ITANo. 613/Ind/2013 is dismissed.

Order pronounced in the open court on 31.01.2024.

Sd/-	**Sd/-**
(B.M. BIYANI)	**(VIJAY PAL RAO)**
Accountant Member	Judicial Member

Indore,_ 31.01.2024
Patel/Sr. PS
Copies to: *(1) The appellant*
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore