

**IN THE INCOME TAX APPELLATE TRIBUNAL**

**PUNE “A” BENCH : PUNE**

**BEFORE SHRI RAMA KANTA PANDA, VICE PRESIDENT  
AND  
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

I.T.A.Nos.1696 to 1703/PUN./2024  
Assessment Years : 2013-2014 to 2020-2021

Garware Technical Fibres Limited, Plot No.11, Block D-1, MIDC, Chinchwad, PUNE – 411 019. Maharashtra. PAN: AAACG1377P	vs.	The DCIT, CC-1(3), 633, 6 <sup>th</sup> Floor, Aayakar Sadan, Bodhi Towers, Salisbury Park, Gultekdi, PUNE – 411 037. Maharashtra.
(Appellant)		(Respondent)

I.T.A.No.1831/PUN./2024  
Assessment Year : 2017-18

The DCIT, CC-1(3), Pune	vs.	Garware Technical Fibres Limited, Plot No.11, Block D-1, MIDC, Chinchwad, PUNE – 411 019. Maharashtra. PAN: AAACG1377P
(Appellant)		(Respondent)

For Assessee :	CA Ritu Kamal Kishore
For Revenue :	Shri Amol Khairnar, CIT-DR And Shri Ramnath P Murkude

Dates of Hearing :	28.11.2024 & 11.12.2024
Date of Pronouncement :	09.01.2025

**ORDER**

**PER BENCH :**

ITA Nos.1696/PUN/2024 to ITA Nos.1703/PUN/2024 filed by the assessee are directed against the common order dated 14.06.2024 of the Ld. CIT(A), Pune-11, relating to the assessment years 2013-2014 to 2020-2021 respectively. ITA No.1831/PUN/2024 filed by the Revenue is directed against the order dated 14.06.2024 of the Ld. CIT(A), Pune-11 for

assessment year 2017-18. Since common issues are involved in all these appeals, therefore, these appeals were heard together and are being disposed of by this consolidated order for the sake of brevity and convenience.

2. We are taking ITA.No.1701/PUN./ 2024 for the assessment year 2018-2019 as the lead appeal since the Ld. CIT(A) has considered assessment year 2018-2019 as the “lead” appeal before him.

3. Facts of the case, in brief, are that the assessee is a Public Limited Company and provides solutions in aquaculture cage nets, fishing nets, sports nets, safety nets, agricultural nets, coated fabrics, polymer ropes and geo-synthetics etc. The key products manufactured by the assessee viz., Garware Technical Fibres Ltd [in short “GTFL”] include ropes, trawling nets, gill nets, doe nets, nursery cages, predator cages, fitness ropes, reinforced soil structures, gabion gravity retaining walls and others etc. It has filed its original return of income under section 139 of the Income-tax Act, 1961 [in short “the Act”] on 31.10.2018 declaring total income of Rs.124,08,48,810/- for the impugned assessment year.

4. A search and seizure action u/s.132 of the Act was conducted in the assessee's case on 14.11.2019. In response to notice u/sec.153A of the Act issued on 04.01.2021, the assessee filed the return of income on 18.01.2021 declaring total income of Rs.124,08,48,810/-, which was the income

originally returned. Statutory notice u/s.143(2) and 142(1) of the I.T. Act were issued and served upon the assessee, in response to which, the learned Authorised Representative of the Assessee appeared before the Assessing Officer from time to time and filed the requisite details.

5. The Assessing Officer observed that during the course of search action in the case of the assessee at its head office at Plot- no. 11, Block-D-1, MIDC, Chinchwad, Pune on 14.11.2019, a pen drive was found from the cabin of the Head-Cashier Shri Shrikant S Dalvi. In the pen drive, various data including excel sheets were found wherein certain unaccounted transactions in the form of cash receipts and cash payments were mentioned. The print outs of these excel sheets found in the computer and the pen drive of Shri S.S. Dalvi were taken and subsequently seized as per Bundle nos. 2 to Bundle no.9 of Anneuxre A to the Panchanama. The Assessing Officer further observed that Shri Shrikant S Dalvi, on being confronted by the authorized officer during the course of the search, had in his statement recorded u/sec.131 of the Act had accepted that the sales appearing in bundle nos.2 to 9 contain the year-wise summary of sales made in cash by GTFL and payments made in cash by GTFL. He had further stated that these cash receipts are on account of sale of scrap materials and the payments made in cash are on account of GEO Project BD [Business Development] payments, sales incentive payments, miscellaneous payments for official work and the same are unaccounted.

6. The Assessing Officer reproduced the scanned copy of the statement of the same in the assessment order. He further noted that on being confronted by the Authorised Officer, it was admitted that these transactions are not recorded in the books of account. On the basis of the above facts and admission of the Head-Cashier Shri Shrikant S. Dalvi, the Assessing Officer computed the unrecorded cash transactions in bundle nos.2 to 9 assessment year-wise, the details of which are as under :

<i>Assessment year</i>	<i>Unaccounted Cash Receipts- in lakhs</i>	<i>Unaccounted Cash Payments – in lakhs</i>
2013-14	695.93	663.73
2014-15	609.81	588.68
2015-16	452.85	518.48
2016-17	314.14	325.80
2017-18	456.38	505.79
2018-19	420.44	386.42
2019-20	106.39	112.05
2020-21	109.81	126.79
<i>Total</i>	<i>3165.75 Lakhs</i>	<i>3227.74 Lakhs</i>

7. He, therefore, asked the assessee to explain as to whether the unrecorded cash receipts, details of which have been found during the course of search and admitted in the statement given by Shri Shrikant S. Dalvi, have been offered for tax in the return of income.

8. The assessee in response to the same filed a detailed written submission stating that there was neither any seizure of cash nor any unaccounted cash found at the office or factory premises of the assessee company or with Mr. Dalvi. Other than the excel sheets working as contained in the pen drive, no other documents such as invoices, bills,

vouchers, etc. were found/seized which supported the excel sheets. It was submitted that there is no corroborative evidence found to support the excel sheets having some figures alleged to be cash receipts and payments. Therefore, there is no "reliable" material or information having any direct relation or nexus with the excel sheets.

9. It was submitted that noting in the excel sheets saved in the pen drive represent items of estimated receipts/expenses in the nature of brief noting and they indicate some expenses of GTFL. It was submitted that noting was made by the Cashier for his information and for assessing the cash-flow requirements which could arise in the near future. It was further submitted that the actual receipts/expenses, if any, incurred would obviously be reflected in the books of account of GTFL as and when the same would have actually occurred. Relying on various decisions, it was submitted that the documents so seized being "dumb" documents and without having any corroborative material or evidence on record and without finding that such document has materialized into transactions giving rise to income of the assessee which has not been disclosed in the regular books of account by such assessee, have to be disregarded for the purposes of assessments to be framed u/s.153A of the Act.

10. Without prejudice to the above, it was argued that if it is considered that the records maintained by Mr. Dalvi were indeed with respect to the year-wise details of unrecorded cash receipts and cash payments of GTFL,

even then, the entire cash receipts cannot be added and the expenditure should be deducted from such payments for the following reasons :

1. *The expenditure is clearly marked and narrated as expenditure for business purposes.*
2. *The aggregate of cash expenditure is in excess of aggregate of cash receipts. Since the cash expenses incurred are Rs.3225.74 lakhs as against the cash receipts of Rs.3165.75lakhs there is no question of any income escaping assessment.*
3. *The notings in the excel sheets and the statement recorded by Mr. Dalvi, he has stated that the expenses are towards BD "Business Development" and there is no benefit either to the assessee company or any particular individual.*
4. *There can be no purpose to not account any income and corresponding business expenses other than if it is purely on estimation.*
5. *The cumulative summary excel sheet which forms part of Bundie No.9 mentions the source of the expenses and therefore the provisions of section 69C are not applicable.*
6. *The expenditure is not violative of section 40A(3) for the following reasons:*
  1. *These expenses have not been claimed/debited to the books of account.*
  2. *A plain reading of the seized documents reveal that multiple expenses has been aggregated and recorded in single entry thus these expenses are below Rs.10,000/- all though clubbed together and recorded periodically in larger amounts.*
7. *The plain analysis of the contents of Bundle No.2 to Bundle No.9 which was also submitted to Investigation Unit-II, Pune dated 27 Jan 2020 is attached as Annexure-1.*
8. *Your honour will appreciate that expenditure is clearly marked and narrated as expenditure for business purpose, considering the genuineness appropriate ratio/percentage can be applied and allowed.*

11. It was accordingly argued that the entire alleged cash receipts cannot be held to be the income of the assessee and at best the net profit ratio prevailing in the respective financial years can be applied vis-à-vis the receipts so recorded. The assessee also filed the year-wise details of net profit earned which is as under:

<i>F.Y.</i>	<i>Unaccounted Cash Receipts – in lakhs</i>	<i>Unaccounted Cash Payments – in lakhs</i>	<i>% PBT</i>	<i>Rs. Lakhs</i>
2012-13	695.93	663.73	5.5%	38.54
2013-14	609.81	588.68	5.7%	34.60
2014-15	452.85	518.48	7.7%	34.84
2015-16	314.14	325.8	10.6%	33.30
2016-17	456.38	505.79	14.5%	66.18
2017-18	420.44	386.42	17.3%	72.74
2018-19	106.39	112.05	17.9%	19.04
2019-20	109.81	126.79	22.9%	25.15
<i>Total</i>	<i>3165.75</i>	<i>3225.74</i>		<i>324.38</i>

12. However, the Assessing Officer was not satisfied with the arguments advanced by the assessee and made addition of Rs.4,20,44,000/- to the total income of the assessee for the impugned assessment year by recording as under :

*“3.7 The explanation given by the assessee has been carefully examined and considered. I do not see any reason to accept the explanation given by the assessee. During the course of search, the documentary evidences regarding cash receipts from sale of scrap and other activities were found from the control and possession of the assessee In the statement given under oath by the person responsible for maintaining the record of such transactions, he has admitted the fact of receipt from sales of scraps and other activities in unambiguous terms and it has also been admitted that these receipts are not recorded in the books of accounts. Now, the assessee has taken a U-turn and declared the documents found and seized during the search as "dumb documents".*

*3.8 The stand taken by the assessee is not in conformity with the provisions of section 292C of the Act under the heading "Presumptions as to assets, books of account etc" As per the provisions of section 292C of the IT Act, if any document is found during the course of search u/s 132 of the Act it may be presumed that such documents belong to the assessee and contents of such documents are true. For the sake of convenience and immediate reference, the provisions of the section are reproduced as under:*

***"292C. (1) 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 under section 132 or survey under section 133A, it may, in any proceeding under this Act, be presumed-***

- (i) *that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belongs to such person;*  
(ii) *that the contents of such books of account and other documents are true;”*

3.9. *A plain reading of this section makes it ample clear that the documents found during the course of search and the contents thereof are admissible as evidence in the eyes of law. The denial of the assessee by filing a letter has no evidentiary value when the transactions have been admitted by the person in his sworn statement. The case laws relied upon by the assessee are very old decisions and have been nullified by inserting the provisions of 292C by the Finance Act 2007 w..e.f. 01.10.1975. Hence the contention of the assessee is not found acceptable and is rejected. It is not a case of conjectures and surmises of AO. There is adequate material or details about the nature and ownership of the documents. Hence in the light of Section 292C and the nature of the transaction mentioned, the documents found cannot be considered as "Dumb Documents".*

3.10. *The next argument taken by the assessee is that if the receipts are taken for taxation, it cannot be said that the entire cash receipts is income of the respective assessment year. The assessee has further submitted that in the said excel sheet the details of expenditure incurred in cash is also given and considering the same, appropriate net profit ratio may be applied. The submission of the assessee has been carefully considered. During the course of search, a chart containing details of head wise cash receipts and expenditure was found and seized as per page no 20 and 21 of Bundle No. 9. On going through the details of the expenditure mentioned in this chart, it is seen that the assessee has categorized the receipts and payments year wise in the following categories :-*

<i>Sr.No.</i>	<i>Receipts</i>	<i>Payments</i>
<i>1.</i>	<i>Raw material sale collection</i>	<i>GEO project BD Payments</i>
<i>2.</i>	<i>Sale of Scrap material</i>	<i>Excise officers payment</i>
<i>3.</i>	<i>Export freight commission</i>	<i>Officers monthly payment</i>
<i>4.</i>	<i>Sales collection/coated sale</i>	<i>Sales incentive payment</i>
<i>5.</i>	<i>“H” Flying</i>	<i>Miscellaneous payment for official work</i>
<i>6.</i>		<i>Transferred to Account no.01</i>
<i>7.</i>		<i>Transferred to Account no.02</i>

3.11. *From the above details, it is seen that the nature of payments are not relatable to the income earned. It may be seen that the assessee has paid illegal payments to officers which is not admissible as deduction u/s.37(1) of the IT Act. The assessee also failed to co-relate the item and quantum of expenditure incurred for*

*earning income as shown in the above table. Hence, the plea taken by the assessee to estimate the profit from cash receipts is not acceptable and is rejected. The total amount of receipts of Rs.4,20,44,000/- for the assessment year under consideration is treated as undisclosed income of the assessee and accordingly added to the total income because the assessee was in receipt of cash income which was unrecorded and the assessee failed to offer it even in the return filed after the search action.”*

13. So far as the un-recorded expenditure is concerned, on being confronted by the Assessing Officer, it was replied by the assessee that the source of such expenditure is out of the cash receipts which is also recorded in the excel sheets. After considering the submissions of the assessee, the Assessing Officer held that the assessee has incurred less expenditure than the income received and therefore, the explanation of the assessee that the source of expenditure is out of the income shown in the excel sheets was accepted by him and no further addition was made.

14. The Assessing Officer further noted that in the computation of income, the assessee has claimed deduction u/sec.35(2AB) of the Act amounting to Rs.13,81,70,841/- on account of capital and revenue expenditure incurred for in house R & D activities. The Assessing Officer asked the assessee to furnish the details of capital and revenue expenditure incurred for R&D purposes along with the report given by the DSIR in form No.3CL as required under Rule 6(7A) of the IT Rules. The assessee submitted necessary documents such as approval granted by the DSIR in Form 3CL, copies of annual report in Form 3CLA, details of capital and

revenue expenditure incurred and supporting bills and invoices. However, the Assessing Officer noted that the assessee failed to submit the report given by the DSIR in Form-3CL quantifying the admissible revenue and capital expenditure. Therefore, the Assessing Officer vide letter dated 23.09.2021 asked the assessee to furnish copy of Form 3CL. It was mentioned there in that in the absence of report of the competent Authority in Form-3CL, the claim of deduction u/s 35(2AB) will not be allowed. Since the assessee failed to satisfy this condition, the Assessing Officer disallowed the claim of deduction u/s 35(2AB) amounting to Rs.13,81,70,841/- and added the same to the total income of the assessee.

15. The Assessing Officer accordingly, determined the total income of the assessee at Rs.142,10,63,651/- as against the returned income of Rs.124,08,48,810/-.

16. Before the Ld. CIT(A), apart from challenging the addition on merit, the assessee took a ground that the entire case has been built-up by the Assessing Officer on the basis of data retrieved from the pen drive in the form of print-outs of excel sheets and subsequent statement of Shri Shrikant S. Dalvi. Therefore, the authenticity of such data and admissibility of electronic evidence is very much essential to substantiate the allegations of unaccounted cash receipts and cash payments against the assessee. It was argued that the contents of the pen drive being electronic evidence have to

be certified in terms of section 65B of the Indian Evidence Act. However, the Assessing Officer, before relying upon such electronic evidence, has not brought the mandatory certificate u/s.65B(4) of Indian Evidence Act, on record. Further, before relying upon such evidence, a certificate u/s.65B(4) is a condition precedent to the admissibility of evidence by way of electronic record. Since the Assessing Officer has not obtained such certificate, it was argued that the entire addition made by the Assessing Officer should be deleted.

17. So far as the merit of the case is concerned, the assessee reiterated the same arguments as made before the Assessing Officer. It was submitted that the department had carried out extensive search operation at the business premises of the assessee company from 14.11.2019 to 16.11.2019 and no discrepancy was found either in the cash balance or in the stock. The entire addition was based on the basis of data retrieved from the pen drive in the form of print out of excel sheets and subsequent statement of Shri S S Dalwi. Further, the documents which have been relied upon by the Assessing Officer as per the documents in Bundles-2 to 9 of Annexure A to the Panchnama are dumb documents. Since there is no corroborative evidence or finding that notings on such documents had materialized into transactions giving rise to income of the assessee which had not been disclosed in the regular books of account, therefore, no addition could have been made. Relying on various decisions it was submitted that the addition made by the Assessing Officer for unrecorded cash of Rs.4,20,44,000/- should be deleted.

18. Without prejudice to the above, the assessee took an alternate ground that even if it is presumed that the assessee has received cash of Rs.4,20,44,000/- during the year under consideration, whole of this amount cannot be considered as income since the said seized pen drive and the excel sheet prepared contain expenditure for business purposes which were also stated by Shri S S Dalvi in his statement recorded u/s 131 of the Act. It was argued that the aggregate of cash expenditure is exceeding the total cash receipts. Since the cash expenses incurred for the entire period is 3227.74 lakh as against cash receipts of Rs.3165.75 lakh, therefore, there is no question of escapement of any income. It was further argued that such expenditure was also not in violation of section 40A(3) since such expenses have not been claimed / debited in the books of account. It was further submitted that a plain reading of the seized documents reveal that multiple expenses have been aggregated and recorded in a single entry and thus each expense is below Rs.10,000/- although clubbed together and recorded periodically in larger amounts. Relying on various decisions it was submitted that only a percentage of profit of such unrecorded sales should be taken and not the entire cash receipts can be added to the total income of the assessee.

19. So far as the denial of deduction u/sec.35(2AB) is concerned, it was argued that the assessee had completed all the formalities for claiming deduction u/sec.35(2AB) of the Act and the deduction was disallowed by the Assessing Officer only because the requisite Form-3CL was not issued by

DSIR. It was argued that the assessee had no control over the issuance of Form-3CL by DSIR. However, since the assessee has obtained the said certificate from DSIR after completion of the assessment, it was argued to admit the same as additional evidence and delete the disallowance.

20. Based on the arguments advanced by the assessee and submissions made including additional evidences filed, the Ld. CIT(A) called for a remand report from the Assessing Officer. After considering the remand report of the Assessing Officer and the rejoinder of the assessee to such remand report, the Ld. CIT(A) rejected the ground challenging the violation of mandatory condition of obtaining the certificate u/s 65B(4) of the Indian Evidence Act. So far as the addition on account of unrecorded cash receipt is concerned, the Ld. CIT(A) considering the fact that the seized documents contain both unaccounted cash receipts as well as unaccounted cash payments, directed the Assessing Officer to adopt 85% of such unaccounted cash receipts as income. So far as the deduction claimed u/s 35(2AB) is concerned, he gave part relief to the assessee. While doing so, he held that when the assessee discharged its responsibility by filing Form No.3CL in time, he should not have suffered on account of delay in issue of Form No.3CL by the DSIR beyond the statutory period of 120 days. He however, held that while the assessee is eligible for deduction u/s 35(2AB) on the capital expenditure as claimed and certified by the DSIR, however, the assessee is eligible for deduction u/s 35(2AB) on the revenue expenditure to the extent of Rs.7,17,38,000/- as determined by the DSIR in Form No.3CL

as against Rs.7,98,20,669/- claimed by the assessee. Thus, an amount of Rs.80,82,669/- (being the difference between Rs.7,98,20,669/- (-) Rs.7,17,38,000/-) is not eligible for deduction u/s 35(2AB). Since the Assessing Officer has not doubted the genuineness of the revenue expenditure and has allowed 100% of the expenses amounting to Rs.7,98,20,669/-, therefore, he directed the Assessing Officer to restrict the disallowance to Rs.40,41,335/- being 50% of revenue expenses not found eligible for 35(2AB) deduction by the DSIR.

21. Aggrieved with such order of the Ld. CIT(A), the assessee is in appeal before the Tribunal by raising the following concise grounds of appeal :

1. *On the facts in the circumstances of the appellant's case and in law, the Ld Commissioner of home Tax (Appeal) erred in not deleting in entirety, the addition of Rs.4,20,44,000/- which was entirely based on digital evidence, in the form of excel sheets contained in a pen drive, which is an inadmissible evidence, as per section 65B of the Indian Evidence Act, 1872.*
2. *On the facts and in the circumstances of the appellant's case and in law, the Ld. Commissioner of become Tax (Appeals) erred in not deleting in entirety, the addition of Rs.4,20,44,000/- as the mandatory conditions specified in section 65B of Indian Evidence Act, 1872 are not satisfied. The purported certificate under section 65B(4) is neither signed by the Authorized Officer, nor signed by the Forensic expert nor by any of the Witnesses, therefore constituting inadmissible evidence*
3. *On the facts and in the circumstances of the appellant's case and in law, the Ld. Commissioner of become Tax (Appeals) erred in not deleting in entirety, the addition of Rs.4,20,44,000/- based on digital evidence seized by the search party without following the mandatory procedure prescribed for seizure of digital evidence as laid down in Chapter 6 of Digital Evidence Investigation Manual 2014, issued by*

*CBDT u/s.119 of the Act, as is evident from the Panchnama prepared during search & seizure proceedings.*

- 4. Without prejudice to above, on the facts and in the circumstances of the appellant's case and in law, the Ld. Commissioner of Income Tax (Appeals) erred in estimating undisclosed income of the appellant company at Rs.3,57,37,400/- being 85% of the alleged unaccounted cash receipts of Rs.4,20,44,000/-, without bringing on record, any corroborative evidence in support of entries recorded in the pen drive and merely on the basis of a statement of Shri Shrikant S Dalvi recorded u/s 131(1A) of the Act.*
- 5. On the facts and in the circumstances of the appellant's case and in law, the Ld. Commissioner of Income Tax (Appeals) erred in estimating undisclosed income of the appellant company at Rs.3,57,37,400/- being 85% of the alleged unaccounted cash receipts of Rs.4,20,44,000/- without appreciating that the cash found during the course of search & seizure proceedings tallied with the cash balance available with the appellant company's audited books of accounts, thus neither any unaccounted cash indicative of unaccounted cash receipts nor any shortage of cash indicative of unaccounted cash payments was found at the time of search.*
- 6. On the facts and in the circumstances of the appellant's case and in law, the Ld. Commissioner of Income Tax (Appeals) erred in estimating undisclosed income of the appellant company at Rs.3,57,37,400/- being 85% of the alleged unaccounted cash receipts of Rs.4,20,44,000/- without appreciating that appellant company maintains complete stock details in respect of raw materials, finished goods etc. which are subject to rigorous checking, inspection and verification by Excise Department and that no discrepancy in the stock registers duly maintained in the course of business was found by the search party. The physical stock found on the day of search tallied with stock as per stock register, thus there being no excess or shortage of stock in support of Department's allegations of transactions not recorded in books.*
- 7. On the facts and in the circumstances of the appellant's case and in law, the Ld. Commissioner of Income Tax (Appeals) and the Assessing Officer both did not find any discrepancy in the audited books of account, which have been accepted. For any addition of unaccounted cash receipts and/or cash payments and any addition to be made on estimation basis, rejection of books is a sine qua non. Thus, addition sustained by Ld. Commissioner of Income Tax (Appeals) deserves to be deleted.*

8. *On the facts and in the circumstances of the appellant's case and in law, the Ld. Commissioner of Income Tax (Appeals) erred in sustaining the additions despite the fact that no corroborative evidence in the form of invoices, bills, vouchers, etc which supported the excel sheets was found during the course of extensive search & seizure proceedings. In the absence of any corroborative evidences and a finding that notings on such documents had materialized into transactions giving rise to income of the appellant which had not been disclosed in regular books of account, these documents are nothing but 'dumb documents'*
9. *Without prejudice to aforesaid grounds and on the facts and in circumstances of the appellant's case and in law, the Ld. Commissioner of Income Tax (Appeals) erred in ignoring the decision of Hon'ble Supreme Court in the case of P.R. Metrani, 157 Taxman 325 (SC), to consider that both receipts and payments recorded in seized material are part of same record and the presumption, once drawn under section 132(4A), about the contents of the seized material has to be either completely true or complete false and the revenue is not entitled to be selective or adopting a pick and choose approach. The nature of payments has been mentioned on the excel sheets which evidently proves that the expenses are incurred for business purposes only and once entire receipts are presumed to be of revenue in nature, the entire expenses side on the same document ought to have been allowed as deduction.*
10. *On the facts and in the circumstances of the appellant's case and in law, the Ld. Commissioner of Income Tax (Appeals) erred in allowing deduction u/s 35(2AB) only to the extent of Rs.13,41,29,506/- as against claimed at Rs.13,81,70,841/-, thereby disallowing the weighted deduction claimed u/s 35(2AB) of the Act to the tune of Rs.40,41,335/-, being 50% of the revenue expenses ignoring the fact that the books of accounts of the appellant company have been audited and no discrepancy have been pointed out by the auditors with regard to the eligible expenses.*
11. *The appellant craves leave to add to, alter, amend, modify and/or delete all or any of the foregoing grounds of appeal."*
22. The first issue raised by the assessee as per grounds of appeal No.1 to 3 relates to the order of the Ld. CIT(A) in not deleting the addition on

account of absence of certificate u/sec.65B(4) of the Indian Evidence Act and the digital evidence cannot be relied upon.

23. Learned Counsel for the Assessee, at the outset, submitted that no certificate u/sec.65B(4) of the Indian Evidence Act was drawn at the time of search and, therefore, the said data does not have any evidentiary value. Relying on various decisions including the decision of Hon'ble Supreme Court in the case of Anvar P.V. vs. B K Basheer 2014 (10) SCC 473 (SC), she submitted that no addition can be made on the basis of data found from electronic device in absence of certificate u/sec.65B(4) of the Indian Evidence Act.

24. The Learned DR on the other hand, submitted that the Ld. CIT(A) had asked the Assessing Officer to forward the copy of the certificate drawn u/sec.65B(4) of the Indian Evidence Act for the pen-drive seized from the cabin of Shri Shrikant S Dalvi which had been relied upon while making the additions. In response to the same, the Assessing Officer forwarded copy of the said certificate which was forwarded to the assessee for it's comments. However, the assessee could not give any comment on the certificate drawn u/sec.65B(4) of the Act. Since the Ld. CIT(A) had held that certificate u/sec.65B(4) of the Act was duly drawn at the time of search operation, therefore, the contention of the assessee that in the absence of said certificate, the digital evidence cannot be relied upon does not have any force. He accordingly submitted that the order of the Ld. CIT(A) is in

accordance with law and therefore the same should be upheld and the grounds raised by the assessee on this issue should be dismissed.

25. We have heard the rival arguments made by both the sides and perused the material available on record. We find although the assessee had never challenged the issue of no certificate drawn u/sec.65B(4) of the Indian Evidence Act before the Assessing Officer, however, the assessee has taken this ground before the Ld. CIT(A), who called for a remand report from the Assessing Officer. We find the Assessing Officer, vide his remand report, forwarded a copy of certificate drawn u/sec.65B(4) of the Indian Evidence Act and the Ld. CIT(A) thereafter confronted the same to the assessee. However, the assessee could not give any counter-comment as to how the certificate obtained u/sec.65B(4) of the Indian Evidence Act was improper. We find the relevant observation of the Ld. CIT(A) from paras 15 to 18 read as under :

#### *Findings*

15. *The first contention of the appellant is that the addition of Rs.4,22,44,000/- was made by the assessing officer on the basis of data contained in the pen- drive seized from the office of Sh. S.S. Dalvi. The appellant has contended that no Certificate u/s.65B(4) of Indian Evidence Act was drawn at the time of search and therefore, the said data does not have any evidentiary value. In support of this contention, the appellant, has relied on various case laws as mentioned in its submission.*

16. *Considering the above submission of the appellant, vide e-mail dated 29/01/2024, the assessing officer was requested to forward the copy of Certificate drawn u/s.65B(4), of Indian Evidence Act, for the pen-drive seized from the cabin of Shri S.S. Dalvi which has been relied upon while making additions. In response to this, the assessing officer vide e-mail dated 06/02/2024 has forwarded the*

*copy of Certificate u/s.65B(4) of Indian Evidence Act in respect of the pen-drive and other digital devices/evidences seized from the cabin of Shri S.S. Dalvi.*

17. *Vide this office notice dated 22/05/2024, the said Certificate u/s 65B(4) was forwarded to the appellant for comments. The relevant portion of this notice dated 22/05/2024 is as under :-*

*In your written submission you have claimed that certificate u/s.65B of the Evidence Act was not drawn during the search. The certificate u/s 65B of the Evidence Act was asked from the A.O., who has forwarded the same. A copy of certificate u/s 65B of the Evidence Act is enclosed for your comments, if any.*

18. *In response to this notice, the appellant vide letter dated 29/05/2024 has stated that its earlier submissions submitted on 19/12/2023, 11/01/2024 and 14/03/2024 may be considered and the appeal may be decided at the earliest This submission of the appellant suggests that it does not have any comments on the certificate drawn u/s 65B(4) of Indian Evidence Act. Since the certificates u/s 65B of the Indian Evidence Act were duly drawn at the time of search operation, therefore, the contention of the appellant that in the absence of Certificate u/s 65B(4) of Indian Evidence Act, the digital evidence cannot be relied upon, does not have any force.”*

26. Since in the instant case there was a certificate drawn u/sec.65B(4) of the Indian Evidence Act for the pen-drive seized from the cabin of Shri Shrikant S. Dalvi which was relied upon by the Assessing Officer while making the impugned addition and since such a copy of the certificate was provided to the assessee for its comments and the assessee could not make any counter-comments to the certificate so issued by the Assessing Officer u/sec.65B(4) of the Indian Evidence Act, therefore, in absence of any contrary material brought to our notice, in our opinion the Ld. CIT(A) is justified in rejecting the above grounds. So far as the various decisions relied on by the Learned Counsel for the Assessee are concerned, all those

decisions are distinguishable and not applicable to the facts of the present case especially when the Assessing Officer in the instant case has obtained a certificate u/sec.65B(4) of the Indian Evidence Act and copy of which was also forwarded to the assessee and the assessee had no answer to the same. Accordingly, the first issue raised by the assessee in the grounds of appeal nos.1 to 3 is dismissed.

27. Similar grounds have been raised by the assessee in other years also. Following similar reasonings the grounds raised by the assessee regarding the evidentiary value of the pen drive in absence of certificate u/s 65B(4) of the Indian Evidence Act for other years are dismissed.

28. The grounds of appeal No.4 to 9 relates to the order of the Ld. CIT(A) in treating 85% of the total cash receipts as income of the assessee.

29. The Ld. Counsel for the assessee at the outset reiterated the same arguments as made before the Assessing Officer and the Ld. CIT(A). She submitted that an extensive search operation took place in the business premises of the assessee company and not a single rupee of discrepancy was found between the physical cash and the cash as per the books of account. Further, the entire stock found during the course of search tallied with the stock as per the books of account and there was no discrepancy at all. She submitted that the entire addition is based on the basis of excel sheets in the pen drive found from the cabin of the head cashier Shri S S Dalvi whose

statement was recorded u/s 131 of the Act, who had accepted that the contents of the excel sheets contain year-wise summary of sales made in cash and the payments made in cash. He has also made a statement that these cash receipts are on account of sale of scrap material and the expenditure appearing in the excel sheets are the payments made in cash on account of business development, sales incentives, etc. which are not recorded in regular books of accounts. She further submitted that no corroborative evidence of any cash was unearthed other than the excel sheets which were obtained from the pen drive found during the course of search. Therefore, in absence of any corroborative evidence, no addition can be made.

30. In her alternate contention she submitted that when the excel sheets prepared from the pen drive so seized contain the details of receipts as well as expenditure, the expenditure cannot be ignored and only the profit element embedded in such cash receipts should be brought to tax. For the above proposition, the Ld. Counsel for the assessee apart from relying on the decisions cited before the Ld. CIT(A) relied on the following decisions:

- i) *Answar PV v. B.K. Basheer (2014) 10 SCC 473*
- ii) *KP Varghese vs. ITO (1981) 7 Taxman 13*
- iii) *P.R. Metrani vs. CIT (2006) 157 taxman 325*
- iv) *Vetrivel Minerals vs. ACIT (2021) 129 taxmann.com 126 (Mad)*
- v) *SKM Animal Feeds and Foods (India) (P.) Ltd. vs. ACIT (2023) 156 taxmann.com 385*
- vi) *CIT vs. D.K. Gupta (2008) 174 Taxman 476 (Del)*
- vii) *ACIT vs. Shri Anand Jaikumar Jain vide ITA Nos.3820 to 3823/MUM/2019, dated 22.04.2022*
- viii) *M/s. Simtools Pvt. Ltd. vs. DCIT vide ITA No.1574/Mum/2020, dated 09.02.2022*

- ix) *ITO vs. Kranti Impex Pvt. Ltd. vide ITA No.1229/Mum/2013, dated 28.02.2018*
- x) *S.P. Goyal vs. DCIT (2002) 82 ITD 85 (TM)*
- xi) *D.A. Patel vs. DCIT [(1999) (3) Tmi 639 – ITAT Mumbai]*

31. Referring to the copy of the assessment order she drew the attention of the Bench to the profit rate for the various assessment years which are as under:

<i>A.Y.</i>	<i>% PBT</i>
<i>2012-13</i>	<i>5.5%</i>
<i>2013-14</i>	<i>5.7%</i>
<i>2014-15</i>	<i>7.7%</i>
<i>2015-16</i>	<i>10.6%</i>
<i>2016-17</i>	<i>14.5%</i>
<i>2017-18</i>	<i>17.3%</i>
<i>2018-19</i>	<i>17.9%</i>
<i>2019-20</i>	<i>22.9%</i>

32. She accordingly submitted that the maximum addition that can be made cannot exceed Rs.324.38 lakh. Referring to the decision of Hon'ble High Court of Kerala in the case of CIT vs. P D Abrahm (2012) 20 taxmann.com 823 (Ker.) she submitted that the Hon'ble High Court in the said decision has held that when the department relies on the seized records for estimating undisclosed income, there is no reason why the expenditure stated therein should be disbelieved.

33. Referring to the decision of Hon'ble Allahabad High Court in the case of Lalchand Gopaldas vs. CIT 48 ITR 324 (All) she submitted that the Hon'ble High Court in the said decision has held that under the Income Tax Act only income is assessable and not a mere receipt. It has been held that

income tax authorities cannot assess all receipts; they can assess only those receipts that amount to income, it follows that before they assess a receipt, they must find it to be income and they cannot find so unless they have some material to justify their finding in the absence of sufficient material.

34. Referring to the decision of Hon'ble Delhi High Court in the case of CIT vs. Indeo Airways (P.) Ltd. (2012) 349 ITR 85 (Del) she submitted that the Hon'ble High Court in the said decision has held that where receipts recorded in searched documents are believed to be income, entries of expenditure recorded therein are also to be believed without asking for more evidence for such expenditure.

35. Referring to the decision of Hon'ble Gujarat High Court in the case of DCIT vs. Panna Corporation vide Income Tax Appeal No.323 & 325 of 2000, order dated 16.06.2012 she submitted that the Hon'ble High Court in the said decision has held that not the entire receipts, but only the profit element embedded in such receipts can be brought to tax.

36. Referring to the decision of Hon'ble Gujarat High Court in the case of CIT vs. Samir Synthetics Mill (2010) 326 ITR 410 (Guj) she submitted that the Hon'ble High Court has upheld the decision of the Tribunal accepting only the profit of unaccounted sales for the purpose of collecting tax.

37. Referring to the decision of the Hon'ble Bombay High Court in the case of CIT vs. Hariram Bhambhani vide Income Tax Appeal No.313 of

2013, she submitted that the Hon'ble High Court has upheld the decision of the Tribunal that the entire unaccounted sales cannot be brought to tax but only the profit attributable on that total unrecorded sales consideration which alone can be subject to income tax.

38. Referring to the decision of Hon'ble Madhya Pradesh High Court in the case of CIT vs. Sharda Real Estate (P) Ltd. 99 DTR 100 (MP) she submitted that the Hon'ble High Court in the said decision has directed the Assessing Officer to take a specific percentage of sale proceeds received in cash as income rather than making addition of entire amount of sale proceeds received in cash.

39. Referring to various other decisions, copies of which are placed in the paper book, she submitted that the entire amount of cash receipts on account of sale of scrap cannot be added to the total income either without allowing the credit for expenses so recorded in the seized documents or a specific percentage of the total cash receipts on account of sale of scrap.

40. The Ld. DR on the other hand heavily relied on the order of the Assessing Officer. He submitted that the Assessing Officer has given justifiable reasons for making the entire addition. In any case, the Ld. CIT(A) has already restricted such element of profit to 85% of the total cash receipts, therefore, the assessee should not have any grievance especially

when the Revenue has not filed any appeal against the part relief given by the Ld. CIT(A). He also relied on the following decisions:

- i) *Nagubai Ammal and others vs. B. Shama Rao and others (1956) SCR 451 (SC)*
- ii) *Pooran Mal vs. Director of Inspection (1974) 93 ITR 505 (SC)*
- iii) *Dr. Partap Singh vs. Director of Enforcement ((1985) 155 ITR 166 (SC)*
- iv) *CIT vs. Kamal & Co. (2009) 308 ITR 129 (Raj)*
- v) *Balwant Singh vs. Director of Inspection (1969) 71 ITR 550 (Del)*

41. We have heard the rival arguments made by both the sides, perused the orders of the Assessing Officer and Ld. CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us by both the sides. We find the Assessing Officer in the instant case made addition of Rs.4,20,44,000/- on the ground that the same is the unaccounted cash receipt found in the seized documents. According to him, the documents were found during the course of search and the contents thereof are admissible as evidence in the eyes of law when such transactions have been admitted by the person responsible for maintaining the records of such transactions in his sworn statement. The Assessing Officer further noted that the nature of payments mentioned in the seized documents are not relatable to the income earned and the excel sheets also contain the expenditure towards certain illegal payments to officers which is not admissible u/s 37(1). Similarly, the assessee failed to correlate the items and quantum of expenditure incurred for earning the income. He, therefore, rejected the claim of setting off of such income and expenditure or

estimation of income on account of cash receipts for sale of scrap which is not recorded in the books of account.

42. We find the Ld. CIT(A) restricted the addition to 85% of unrecorded cash receipts on account of sale of scrap on the ground that the seized documents also contain certain expenditure. According to him, while the entire expenditure cannot be allowed since it contains illegal payments to the officers, however, it cannot be entirely rejected as not being relatable to the unrecorded sales. It is the submission of the Ld. Counsel for the assessee that the seized documents i.e. excel sheets retrieved from the pen drive seized from the head cashier Shri S S Dalvi contain both receipts as well as expenditure and therefore such seized documents should be considered as a whole. It is also her submission that no discrepancy of any cash or stock was found at the time of search between the physical cash / stock and cash/stock as per the books of account. It is also her submission that either the addition can be restricted only to the net income i.e. after excluding the expenditure from the receipts or alternatively, a percentage of such unaccounted cash receipts at best can be brought to tax in the light of the various decisions cited by her.

43. We find some force in the above arguments of the Ld. Counsel for the assessee. It is an admitted fact that during the course of search, excel sheets which were retrieved from the pen drive seized from the cabin of head cashier Shri S S Dalvi, contain both unaccounted cash receipts as well as

unaccounted cash expenditure. While the Assessing Officer taxed the entire unaccounted cash receipts as income of the assessee, however, he ignored such unaccounted cash expenditure on the ground that the assessee could not correlate such expenditure as relatable to such unaccounted cash receipts and the said expenditure also contains certain expenditure not allowable as per provisions of Explanation to section 37. It is the settled position of law that the seized documents are to be considered as a whole and the department cannot consider a part of the seized documents which suits it and ignore the other part that does not suit it.

44. So far as the allegation of the Assessing Officer as well as the Ld. CIT(A) that such unaccounted expenditure contains certain illegal payments is concerned, there is no dispute to the fact that it contains certain payments to government officers. However, the same has not been quantified either by the assessee or by the Assessing Officer or by the Ld. CIT(A). We find the Ld. CIT(A) while analyzing the seized documents for assessment year 2018-19 has given the details of several cash expenses on test check basis which according to him are allowable expenses and the details of which are as under:

<i>Sr. No.</i>	<i>Narration and date of payment</i>	<i>Reference of seized page in Bundle No.2</i>	<i>Amount</i>
1	30/05/2017 – Payment on account of Scrap Sales adjust.	Page-32, GWRL-Cash Account	2,93,392
2	30/11/2017 – Payment on account of Scrap Sales adjust.	Page-29, GWRL-Cash Account	2,18,000
3	23/03/2018 – Payment on account of Scrap Sales adjust.	Page-29, GWRL-Cash Account	1,64,281
4	23/03/2018 – Payment on account of Scrap Sales adjust.	Page-29, GWRL-Cash Account	1,50,396

5	31/03/2018 – Payment on account of Scrap Sales adjust.	Page-28, GWRL-Cash Account	2,48,599
6	31/03/2018 – Payment on account of Scrap Sales adjust.	Page-28, GWRL-Cash Account	1,32,183
7	17/04/2017 – related to Bonus Payment	Page-29, GWRL-Cash Account	7,00,000
8	17/04/2017 – related to Bonus Payment	Page-29, GWRL-Cash Account	21,00,000
9	12/05/2017 – Labour Union Payment	Page-33	50,000
10	08/03/2018 – Pentha Project admin expense	Page-32	50,000
11	08/03/2018 – Dariba Project admin expense	Page-32	50,000
12	Various entries on different dates regarding Hel. Flying charges / pilot payment, etc.	Page-30 & 31	1,61,000
13	Various entries regarding advocate expense, adjudication expense, Court matter payments, etc.	Page 31	1,99,140
14	Advance Refund recd. for scrap	Page – 24	5,00,000
	<i>Total</i>		<i>50,16,991</i>

45. We find even after giving the finding as above, the Ld. CIT(A) gave part relief to the assessee by restricting the income to 85% of such unaccounted cash receipts. In our opinion, when the Revenue seized certain documents which contain both the receipts as well as expenditure, the natural thing that should have been done is taxing the net receipt i.e. gross receipts less expenditure and by making further addition of certain illegal payments which were not otherwise admissible as per Explanation to section 37(1) of the Act i.e. on account of illegal payments, etc. However, in the instant case, this exercise has not been done either by the Assessing Officer or the CIT(A). It is also not know as to whether the “officers monthly payment” and Excise Officers payment” mentioned by the Assessing Officer

as per the extracts of the excel sheet retrieved from the pen drive is in fact given to any government official or any middleman who in the name of the government official has pocketed the same. No name of any government official is found so as to treat the same as illegal. At the same time, if the contention of the Ld. Counsel for the assessee that the addition should be restricted to gross receipts less expenditure is accepted, then it also gives a distorted figure since in certain years such expenditure is more than the gross receipts. Under these circumstances, in our opinion, only a percentage of such receipts which is commensurate with the net profit for the respective years should be brought to tax to meet the ends of justice.

46. We find the Hon'ble Kerala High Court in the case of CIT vs. P D Abrahm (supra) has held that when the department relies on the seized records for estimating undisclosed income, there is no reason why the expenditure stated therein should be disbelieved.

47. We find the Hon'ble Allahabad High Court in the case of Lalchand Gopaldas vs. CIT (supra) has held that under the Income Tax Act only income is assessable and not a mere receipt. It has been held that income tax authorities cannot assess all receipts; they can assess only those receipts that amount to income, it follows that before they assess a receipt, they must find it to be income and they cannot find so unless they have some material to justify their finding in the absence of sufficient material.

48. We find the Hon'ble Gujarat High Court in the case of DCIT vs. Panna Corporation (supra) has held that not the entire receipts, but only the profit element embedded in such receipts can be brought to tax.

49. We find the Hon'ble Bombay High Court in the case of CIT vs. Hariram Bhambhani (supra) has upheld the decision of the Tribunal that the entire unaccounted sales cannot be brought to tax but only the profit attributable on that total unrecorded sales consideration which alone can be subject to income tax.

50. We find the Hon'ble Madhya Pradesh High Court in the case of CIT vs. Sharda Real Estate (P) Ltd. (supra) has directed the Assessing Officer to take a specific percentage of sale proceeds received in cash as income rather than making addition of entire amount of sale proceeds received in cash.

51. We find the Hon'ble Delhi High Court in the case of CIT vs. Indeo Airways (P.) Ltd. (2012) 349 ITR 85 (Del) has held that where receipts recorded in searched documents are believed to be income, entries of expenditure recorded therein are also to be believed without asking for more evidence for such expenditure. The relevant observations of the Hon'ble High Court are as under:

*“9. The above discussion reveals that consequent to the search, a sum in excess of ` 3 crores was determined as the undisclosed receipts of the assessee; it was sought to be brought to tax. The assessee contended, inter alia, that if that were correct, the other amounts shown as expenditure*

*should be allowed as business expenses. This was not upheld by the AO, who disallowed the entire amount. The CIT (A) accepted the assessee's contentions, and directed deletion of a major portion of the disallowance. The revenue's appeal was rejected by the Tribunal, which, by the impugned order, accepted the assessee's cross objection. The threshold point which this court has to decide is whether the assessee is right in contending that since the revenue has suffered concurrent findings on questions of fact, no substantive question of law arises for consideration by the court. There is authority for this proposition, in the form of this Court's judgment in Commissioner of Income Tax v. S.J. Knitting and Finishing Mills P. Ltd., [2004] 266 ITR 0582, that in such circumstances, the findings of the lower authorities are to be treated as pure findings of fact, and the reference consequently has to be answered against the revenue.*

*10. This court does not wish to rest its decision on the narrow ground of the appeals involving pure issues of fact, especially since the parties made elaborate submissions on the merits of the case.*

*11. In order to resolve the main issue in controversy, it would be relevant to notice certain provisions of the Income Tax Act. The Explanation to Section 37 (1) is relevant and reads as follows:*

*37. (1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively<sup>15</sup> for the purposes of the business or profession shall be allowed in computing the ITA-1620 & 1622/2010 Page 10 income chargeable under the head "Profits and gains of business or profession".*

*[Explanation.--For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.]*

*12. Section 37 is a residuary provision, and allows expenditure as deductible while computing the income on the subject to fulfilment of these conditions:*

- a) the expenditure should not be deductible under Sections 30 to 36 of the Act;*
- b) The expenditure must have been incurred wholly and exclusively for the purposes of the assessee's business;*
- c) It should not be personal in nature; and*
- d) It should not must not be capital in nature."*

13. *The Explanation to Section 37 (1) of the Act was inserted by Finance (No.2) Act, 1988 with retrospective effect from 01.04.1962, i.e., inception of the Act. This appears to have been a public policy driven amendment, disallowing deduction benefits in respect of illegal activities which could potentially be brought to tax. The phraseology of the provision clarifies that if the (business or commercial) activity is „an offence or which is prohibited by law" deduction, which might otherwise be eligible to the benefit of Section 37 (1) would not be granted.*

14. *In the present case, the AO and, to a certain extent, the CIT (A) appear to have proceeded inter alia, to disallow heads of expenditure towards commission payments, sundry expenses (termed „R") and green box expenses. As far as the "green box" expenses are concerned, the assessee had relied on the books relied on by the revenue to assess the income, to urge that these constituted expenses entitled to deduction. The AO held these expenses to be excessive. The assessee argues that once the revenue seeks to draw a presumption, by relying on Section 132 (4A) of the Act that presumption has to be given full effect. In other words, if the correctness of the contents of books and other materials is to be presumed, such a deemed state of affairs would have to be assumed in respect of all entries in the books, and not merely the entries of income (or receipts).*

15. *Section 132 (4A) reads as follows:*

*"(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 ITA-1620 & 1622/2010 Page 12 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."*

*As to the nature of the presumption, the Kerala High Court, in Income Tax Officer, B-Ward, Ernakulam v. T. Abdul Majeed, [1988] 169 ITR 440, held as follows: -*

*"It is true that section 132(4A) of the Act enables the court to presume the truth of the contents of such books. However, it is a presumption which can be rebutted. Moreover, the presumption*

*envisaged therein is only a factual presumption. It is in the discretion of the court, depending upon other factors, to decide whether the presumption must be drawn. The expression used in the sub-section is "may be presumed" as is used in section 114 of the Evidence Act, 1872. It is not a mandate that whenever the books of account are seized, the court shall necessarily draw the presumption, irrespective of any other factors which may dissuade the court from doing so."*

16. In *P.R. Metrani v. Commissioner of Income Tax, Bangalore (2007) 1 SCC 789* the Supreme Court elaborated upon the nature of presumption under Section 132 (4A) and the scheme of the provision, in the following words:

*"Sub-section (4A) was inserted by Taxation Law (Amendment) Act, 1975 with effect from 1.10.1975 to permit a presumption to be raised in the circumstances mentioned therein. Before the insertion of sub-section (4A) the onus of proving that the books of account, other documents, money bullion, jewellery etc. found in possession or control of a person in the course of a search belonged to that person was on the Income Tax Department. Sub-section (4A) enables an assessing authority to raise a rebuttable presumption that such books of account, ITA-1620 & 1622/2010 Page 13 money, bullion etc. belonged to such person; that the contents of such books of account and other documents are true, and, that the signatures and every other part of such books of account and other documents are signed by such person or are in the handwriting of that particular person. Raising of such presumption has been enacted by the Legislature to enable the assessing authority to make a provisional adjudication within the time frame prescribed under Section 132. Otherwise it may not be possible to do so. The object of introduction of Section 132 is to prevent the evasion of tax, i.e., to unearth the hidden or undisclosed income or property and bring it to assessment. It is not merely an information of undisclosed income but also to seize money, bullion etc. representing the undisclosed income and to retain them for the purposes of realization of taxes, penalties etc. Search and seizure is a serious invasion in the privacy of the person. Section 132 which is a complete code by itself provides that the money, bullion or the books of account etc. should not be retained unnecessarily and that the provisional assessment made under Section 132 for the purpose of retention of the books is passed within a specified time in accordance with law. It provides that the books of account, money and bullion which are not required are not retained unnecessarily thereby causing harassment to the person concerned. In order to see that the assessment order is framed within the time frame provided under Section 132, legislature provided for a rebuttable presumption to be raised against the person from whose possession and control the books of account, money, bullions etc. are seized so that the order can be passed within the time frame provided under Section 132. A*

*presumption is an inference of fact drawn from other known or proved facts. It is a rule of law under which courts are authorized to draw a particular inference from a particular fact. It is of three types, (i) "may presume", (ii) "shall presume"*

*and (iii) "conclusive proof". "May presume" leaves it to the discretion of the Court to make the presumption according to the circumstances of the case. "Shall presume" leaves no option with the Court not to make the presumption. The Court is bound to take the fact as proved until evidence is given to disprove it.*

*In this sense such presumption is also rebuttable. "Conclusive proof" gives an artificial probative effect by the law to certain facts. No evidence is allowed to be produced with a view to combating that effect. In this sense, this is irrebuttable presumption.*

*The words in sub-section (4) are "may be presumed". The presumption under sub-section (4A) therefore, is a rebuttable presumption. The finding recorded by the High Court in the impugned judgment that the presumption under sub-section (4A) is a irrebuttable presumption in so far as it relates to the passing of an order under sub-section (5) of Section 132 and rebuttable presumption for the purpose of framing a regular assessment is not correct. There is nothing either in Section 132 or any other provisions of the Act which could warrant such an inference or finding. Presumption under sub-section (4A) would not be available for the purpose of framing a regular assessment. There is nothing either in Section 132 or any other provision of the Act to indicate that the presumption provided under Section 132 which is a self contained code for search and seizure and retention of books etc. can be raised for the purposes of framing of the regular assessment as well." If the revenue was of the opinion that the expenses claimed towards "green boxes" was inadmissible or was excessive, or not genuine, in order to reject the entries in the books of account and other documents of the assessee, seized during the search, it ought to have relied on other materials. Having once drawn the presumption that the contents of the documents (of the assessee) taken into possession during the search were true, the revenue could not have, consistently with that presumption, proceeded to require the assessee to produce materials in support of the expenditure entries. Such an inconsistent approach in respect of the contents of the same book appears to have been founded only on suspicion that they were not genuine. However, suspicion ITA-1620 & 1622/2010 Page 15 cannot replace proof. Moreover, the full effect of the presumption should be given effect to, whenever the statute directs a particular non-existent state of affairs to be assumed. (Ref State of Bombay v. Pandurang Vinayak, AIR 1953 SC 244; Karnataka State Road Transport v B.A. Jayaram & Ors, AIR 1984 SC 790). In these circumstances, the effect of the presumption (which bade the revenue, when it chose to invoke it, to presume that the "contents of such books of account and other documents are true..". Therefore, in the absence of any materials, in the form of documents, the revenue could not have denied the benefit of any expenses which would otherwise have inured to the assessee, as an allowable deduction under Section 37 (1).*

*17. So far as the heads of expenses are concerned, the revenue was unable to show how any of them were prohibited by law, or amounted to offences. The assessee's business was to transport export goods, and ensure their door to door delivery in Moscow. Confirmations had been received during the course of proceedings, from some of the assessee's clients. The assessing officer himself allowed some deductions; which in turn implied that what aroused his suspicion was the seemingly high level of expenditure. On this aspect, however, the CIT (A) held that the margin of profit, a little over 17% compared favourably with the general trend in the business. In view of these facts, the ITAT, in the opinion of this court, did not commit any error of law in holding that such expenses were deductible under the main part of Section 37 (1) of the Act.*

*18. In view of the above discussion, all questions framed in these appeals are answered in favour of the assessee, and against the revenue. Consequently, the appeals fail and are dismissed."*

52. We find the assessee in the instant case has given before the Assessing Officer the net profit percentage for different assessment years which varies from year to year i.e. from 5.5% in assessment year 2013-14 to 22.9% for assessment year 2020-21, the details of which have already been reproduced in the preceding paragraphs (para 11 of this order).

53. Considering the totality of the facts of the case and considering the various judicial precedents cited (supra) according to which only the net profit embedded in such receipts should be taxed when both unaccounted receipts and unaccounted expenses are found during the course of search, we are of the considered opinion that the profit on account of such unaccounted cash receipts should be determined at the same rate or nearby rate of net profit that has been declared by the assessee and accepted by the Revenue for the respective assessment years. We, therefore, direct the Assessing Officer to adopt the net profit ratio as mentioned below for the respective assessment years:

A.Y.	Unaccounted cash receipts	Net Profit Percentage
2012-13	695.93	6%
2013-14	609.81	6%
2014-15	452.85	8%
2015-16	314.14	11%
2016-17	456.38	15%
2017-18	420.44	18%
2018-19	106.39	18%
2019-20	109.81	23%

54. The order of the Ld. CIT(A) is accordingly modified and the Assessing Officer is directed to re-compute the income from unaccounted cash receipts in the above percentage and make necessary additions. Thus, the grounds of appeal No.4 to 9 raised by the assessee are accordingly partly allowed.

55. Identical grounds have been raised by the assessee for the other years. Therefore, following similar reasonings and in the light of the above discussion, the grounds raised by the assessee in other appeals are also partly allowed.

56. Ground No.10 relates to the order of the Ld. CIT(A) in giving part relief on account of deduction claimed u/s 35(2AB) of the Act.

57. After hearing both the sides, we find the assessee has claimed deduction u/s 35(2AB) amounting to Rs.13,81,70,841/- on account of capital and revenue expenditure incurred for in house R&D activities. During the course of assessment proceedings, the assessee was asked to furnish the details of capital and revenue expenditure incurred for R&D purposes. In

response thereof, the assessee submitted the details and supporting documentary evidences along with report in Form No. 3CLA. Vide notice u/s 142(1) enclosed with a questionnaire dated 15.03.2021, the assessee was asked to furnish / submit the necessary documents including report given by the DSIR in form no. 3 CL as required under rule 6(7A) of the IT Rules. The assessee submitted necessary documents such as approval granted by the DSIR in Form 3CM, copies of annual report submitted in Form 3CLA, details of capital and revenue expenditure incurred and supporting bills and invoices. But the assessee failed to submit the report given by the DSIR in Form 3CL. quantifying the admissible revenue and capital expenditure. The assessee was again asked to furnish copy of Form 3CL vide letter dated 23.09.2021 and it was impressed upon him that in the absence of report of the competent Authority in Form 3CL, the claim of deduction u/s 35(2AB) will not be allowed. Since the assessee failed to satisfy this condition, the claim of deduction u/s 35(2AB) amounting to Rs. 13,81,70,841/- was disallowed and added to the total income.

58. Before the Ld. CIT(A) it was submitted that the assessee has completed all the formalities for claiming the deduction u/s 35(2AB) and the deduction was disallowed by the assessing officer only because the Form 3CL was not issued by DSIR. The assessee also contended that it had no control over the issuance of Form 3CL by DSIR, however, after the assessment, the DSIR has now issued Form 3CL on 03/10/2023, for AY 2018-19 as well as AY 2019-20. The assessee submitted an application

under Rule 46A of I.T. Rules requesting to admit the said certificate as 'additional evidence' as the same could not be filed before the AO because the said Certificate was issued subsequent to completion of assessment.

59. Based on the arguments advance by the assessee, the Ld. CIT(A) called for a remand report from the Assessing Officer. The Assessing Officer submitted his remand report, which was forwarded to the assessee for its comments. After considering the remand report of the Assessing Officer and rejoinder of the assessee to such remand report, the Ld. CIT(A) allowed the claim of deduction u/s 35(2AB) on whole of the capital expenditure as claimed by the assessee. He, however, restricted the deduction u/s 35(2AB) on the revenue expenditure to the extent of Rs.7,17,38,000/- as determined by the DSIR in Form No.3CL as against Rs.7,98,20,669/- claimed by the assessee. According to the Ld. CIT(A), the difference between the amount claimed by the assessee and the amount certified by the DSIR is not eligible for deduction u/s 35(2AB). He however, held that since the Assessing Officer has not doubted the genuineness of the revenue expenditure and has allowed 100% of the expenses amounting to Rs.7,98,20,669/-, therefore, he directed the Assessing Officer to restrict the disallowance to Rs.40,41,335/- being 50% of the revenue expenses not found eligible for 35(2AB) deduction by the DSIR. Against the order of the Ld. CIT(A), the assessee is in appeal before the Tribunal. Identical grounds have been raised by the assessee for assessment years 2016-17, 2017-18 and 2019-20.

60. We have heard the rival arguments made by both the sides, perused the orders of the Assessing Officer and Ld. CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us by both the sides. We find clause (b) of Rule 6 (7A) as applicable from 01-07-2016 reads as under:

- “(b) The prescribed authority shall furnish electronically its report –*
- (i) In relation to the approval of in-house research and development facility in Part A of Form No.3CL;*
  - (ii) quantifying the expenditure incurred on in-house research and development facility by the company during the previous year and eligible for weighted deduction under sub-section (2AB) of section 35 of the Act in Part B of Form No. 3CL;’.*

61. As per sub-clause (i) of clause (b) of Rule 6 (7A) the prescribed authority shall furnish its report in relation to the approval of in-house R&D facility quantifying the amount of expenditure incurred during the previous year, which is eligible for weighted deduction under sub-section (2AB) of section 35. We find it is on the basis of the above sub-clause (ii) of clause (b) of Rule 6(7A), the ld. CIT(A) held that the quantification of the expenditure incurred on in-house R&D facility has to be done by the prescribed authority and the amount eligible for weighted deduction cannot cross that threshold. It is no doubt true that sub-clause (ii) of clause (b) of Rule 6 (7A) categorically provides that the amount of weighted deduction u/s.35(2AB) has to be restricted to the amount quantified by the prescribed authority. However, we find the clause (b) as extracted above has been

substituted by the Income-tax (10<sup>th</sup> Amendment) Rules, 2016 w.e.f. 01-07-2016 and prior to this substitution, the clause (b) read as under :

*“(b) The prescribed authority shall submit its report in relation to the approval of in-house Research and Development facility in Form No.3CL to the Director General (Income-tax Exemptions) within sixty days of its granting approval.”*

62. We find as per the pre-existing clause (b), the prescribed authority was supposed to submit only its report in relation to the approval of in-house R&D facility to the Director General (Income-tax Exemptions) and the stipulation of quantifying the eligible expenditure by the competent authority for the purposes of weighted deduction u/s.35(2AB) was not there. The only requirement was to submit the report in relation to the approval of in-house R&D facility. Any amount of expenditure incurred in respect of in-house R&D facility is qualified for the deduction - whether or not approved by the prescribed authority. Only the existence of approval and incurring of the expenditure were relevant considerations in the pre-amended period and not the amount quantified by the prescribed authority. The new stipulations came to be introduced w.e.f. 01-07-2016. As the assessment year under consideration is 2018-19, the amended sub-clause (b) of Rule 6 (7A) is applicable. We, therefore, hold that the ld. CIT(A) was justified in restricting the amount of weighted deduction to the quantification done by the prescribed authority. We, therefore, hold that the assessee is not eligible for deduction of the entire revenue expenditure claimed by it u/s 35(2AB) for the assessment years 2017-18, 2018-19 and 2019-20 but only to the

extent quantified by the DSIR. However, as held above, since the stipulation came to be introduced w.e.f. 01.07.2016 the section of quantification by the DSIR is not applicable for assessment year 2016-17 and therefore, the Ld. CIT(A) is not justified in restricting the deduction to the extent determined by the DSIR for assessment year 2016-17. We therefore, set aside the order of the Ld. CIT(A) on this issue for assessment year 2016-17 and direct the Assessing Officer to allow the claim of deduction u/s 35(2AB) of the entire revenue expenditure. Thus, the grounds for assessment year 2016-17 on this issue are decided in favour of the assessee whereas the grounds for assessment years 2017-18, 2018-19 and 2019-20 on this issue are dismissed.

**ITA No.1831/PUN/2024 by Revenue (A.Y. 2017-18)**

63. The grounds raised by the Revenue are as under:

1. *On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in restricting the addition of Rs.4,56,38,000/- on account of undisclosed cash receipts to the extent of 85% of the cash receipts without appreciating the fact that the assessee has failed to prove the nature of transactions recorded in the seized material, nexus between receipts and payments found recorded in the seized material and its business expediency with necessary supporting documents.*
2. *On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.49,41,000/ on account of unexplained expenditure without appreciating the fact that the assessee has failed to prove the nature of transactions recorded in the seized material and the redrafted cash flow cannot be relied upon in absence of verification of availability of opening cash balance as on 01/04/2012 and correct understanding of nature of transactions recorded in the seized material.*
3. *The appellant craves leave to add, amend, modify or alter any of the grounds.*

64. Facts of the case in brief are that the Assessing Officer made addition of Rs.4,56,38,000/- being unaccounted cash receipts and also made addition of Rs.49,41,000/- as unexplained expenditure u/s 69C. In appeal, the Ld. CIT(A) restricted such undisclosed cash receipts to 85% of the cash receipts. He however, deleted the addition of Rs.49,41,000/- on account of unexplained expenditure u/s 69C holding that there is no cash deficit during the year after giving benefit of opening cash balance as on 01.04.2012 after redrafting the cash flow statement. Aggrieved with such order of the Ld. CIT(A), the Revenue is in appeal before the Tribunal.

65. We have heard the rival arguments made by both the sides, perused the orders of the Assessing Officer and Ld. CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us by both the sides. So far as the first issue i.e. restriction of addition to 85% of undisclosed cash receipts is concerned, we have already decided the issue in the preceding paragraphs and have given a direction to the Assessing Officer to adopt 18% net profit of the unaccounted cash receipts for the impugned assessment year. In view of our findings given therein, the ground of appeal No.1 raised by the Revenue is dismissed.

66. So far as the second issue is concerned, we find the Assessing Officer made addition of Rs.49,41,000/- on the ground that the cash expenditure during the year exceeds the unaccounted cash receipts. We find the Ld. CIT(A) deleted the addition by recording as under:

“87. The ground no. 3 raised by the appellant is regarding the addition of Rs.49,41,000/- made u/s 69C of the Act on account of shortfall in cash required for cash expenses. I have discussed this issue in detail while deciding the appeal for AY 2015-16 and re-drafted the cash-flow statement after considering the cash available as on 1.04.2012 (as per seized document). Since, after giving benefit of opening cash balance as on 1/4/2012, there is no cash deficit for the year under consideration, no addition u/s 69C of the Act can be made. Accordingly, the addition of Rs.49,41,000/- made by the assessing officer is directed to be deleted. The ground no. 3 is disposed accordingly.”

67. We find the Ld. CIT(A) while deciding the appeal for the impugned assessment year has followed his finding for assessment year 2015-16 on this issue at para 71 which reads as under:

“71. In view of above, by considering the opening cash balance as on 01/04/2012, the cash-flow statement for 01/04/2012 to the date of search is re-drafted as under:-

F.Y	Unaccounted Cash Receipts- (in lakhs)	Unaccounted Cash Payments – (in lakhs)	Excess cash / Short-fall cash (in lakhs)	Cash Balance in hand (in lakhs)
Opening balance on 01.04.2012				115.93
2012-13	695.93	663.73	+32.20	148.13
2013-14	609.81	588.68	+21.13	169.26
2014-15	452.85	518.48	-65.63	103.63
2015-16	314.14	325.80	-11.66	91.97
2016-17	456.38	505.79	-49.41	42.56
2017-18	420.44	386.42	+34.02	76.58
2018-19	106.39	112.05	-5.66	70.92
2019-20	109.81	126.79	-16.98	53.94
Total	3165.75	3227.74		

68. From the perusal of the above, it shows that after considering the opening cash balances as on 01.04.2012 as per the seized documents, there is no cash deficit for the impugned assessment year. The Revenue is not in appeal for assessment year 2015-16 for the availability of opening cash

balance determined by the Ld. CIT(A) as per the seized document. Therefore, we do not find any infirmity in the order of the Ld. CIT(A) deleting the addition made by the Assessing Officer of Rs.49,41,000/- on account of unexplained expenditure u/s 69C of the I.T. Act. The second ground of appeal by the Revenue is accordingly dismissed.

69. In the result, all the eight appeals filed by the assessee are partly allowed and the only appeal filed by the Revenue is dismissed.

Order pronounced in the open Court on 9<sup>th</sup> January, 2025.

Sd/-  
[ASTHA CHANDRA]  
JUDICIAL MEMBER  
Pune, Dated 9<sup>th</sup> January, 2025  
VBP/- / GCVSR

Sd/-  
[RAMA KANTA PANDA]  
VICE PRESIDENT

Copy to

1.	The appellant
2.	The respondent
3.	The CIT(A), Pune-11, Pune.
4.	The Pr. CIT, Pune concerned
5.	D.R. ITAT, "A" Bench, Pune.
6.	Guard File.

//By Order//

//True Copy //

Sr. Private Secretary, ITAT,  
Pune Benches, Pune.