IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH : KOLKATA

[Before Hon'ble Shri M.Balaganesh, AM & Hon'ble Shri S.S.Viswanethra Ravi, JM]

I.T.A No. 16/Kol/2017

Assessment Year : 2013-14

DCIT, Circle-12(1), Kolkata	-vs-	M/s Maco Corporation (India) Pvt. Ltd. [PAN: AACCM 8740 L]
(Appellant)		(Respondent)

For the Appellant : Shri S. Dasgupta, Addl. CIT(DR)

For the Respondent : Shri Miraj D Shah, AR

Date of Hearing : 07.03.2018

Date of Pronouncement : 14.03.2018

ORDER

Per M.Balaganesh, AM

1. This appeal by the Revenue arises out of the order of the Learned Commissioner of Income Tax(Appeals)-4, Kolkata [in short the ld CIT(A)] in Appeal No.10687/CIT(A)-4/Circle-12(1)/16-17 dated 24.10.2016 against the order passed by the DCIT, Circle-12(1), Kolkata [in short the ld AO] under section 143(3) of the Income Tax Act, 1961 (in short "the Act") dated 28.03.2016 for the Assessment Year 2013-14.

2. The only effective issue to be decided in this appeal is as to whether the ld CITA was justified in deleting the disallowance made u/s 35(1)(ii) of the Act in the sum of Rs 3,06,25,000/- in the facts and circumstances of the case.

3. The brief facts of this issue is that the assessee is a private limited company engaged in the business of import and export of machinery spares, equipment & component and project execution work. The return of income for the Asst Year 2013-14 was filed by the assessee on 29.9.2013 disclosing total income of Rs 32,41,51,490/-. The ld AO observed that the assessee claimed donation of Rs 3,06,25,000/- (being 175% of Rs 1,75,00,000/-) u/s 35(1)(ii) of the Act for the scientific research organization donation made as under:-

School of Human Genetics & Population Health (SHGPH in short)	19.11.2012	25,00,000
SHGPH	27 11.2012	25,00,000
Herbicure Healthcare Bio-Herbal Research Foundation (HHBHRF in short)	19.3.2013	50,00,000
HHBHRF	20.3.2013	50,00,000
HHBHRF	22.3.2013	25,00,000
		1,75,00,000

Survey Operations u/s 133A of the Act were conducted on 27.1.2015 in the premises of SHGPH and HHBHRF by the Directorate of Investigation, Kolkata. In such survey, it was found that the aforesaid concerns were engaged in collecting bogus donations u/s 35(1)(ii) of the Act to beneficiaries to enable them to claim weighted deduction of 175% of the amounts actually paid by such beneficiaries. The ld AO issued a show cause notice asserting the following :-

- As per Tax audit report column 15(a), the amounts debited and deduction allowable u/s 35 is being shown as “NA”.
- These institutions are engaged in the bogus donation u/s 35(1)(ii) of the Act through various brokers in lieu of commission. Bogus donations are received

through cheques/RTGS and thereafter cash is returned to the donors after deducting commission.

- Statements of key persons like secretary/Treasures/President and other persons recorded during the survey has confirmed the above bogus activity by these institutions.
- Statement of auditor recorded during the course of survey clearly shows lacunas in the audit done by them.
- Statements of number of brokers/entry operators recorded in course of survey proceedings have confirmed the bogus billing or accommodation entries from these institutions.
- Pre survey & post survey enquiries have found that most of the expense side parties are paper & bogus concerns.
- The Bank statements of these institu ions show clear pattern of donation coming and going vide the above modus operandi.
- SHG&PH have gone in settlement commission admitting that in lieu of service charge they have provided accommodation entries of donation to the donors.
- The books of accounts were not there at the registered offices. In case of SHG&PH there are broker wise ledgers of commission. No purchase bills were found for financial year 2014-15. Documents related to commission were found and impounded.
- These institutions have few persons with good CV who are associated only in honorary position and they are not involved in the day to day activities.
- The research work shown is just reproduction of published material. Details in respect of research work could not be furnished by these institutions.
- These institutions have miniscule presence and their contribution to scientific research is too negligible for the kind of donation they received. The research facilities are near about missing in these institutes.

- These institutes have blatantly violated Rule 5C, 5D & 5E of Income Tax Rules which are required to be complied by the institutes approved u/s 35(1)(ii) of the Act.

In the light of above points the AO wanted the appellant to explain its claim of deduction amounting to Rs. 3,06,25,000/- u/s 35(1)(ii) of the Act.

4. The assessee in response to show cause notice replied as under:-

- These institutions are duly registered with the registrar of companies, Income Tax Department, SIRO and other authorities and are engaged in the research activities. These institutions enjoy registrations u/s 35(1)(ii) of the Act.
- These are not bogus donations as alleged. The donations are genuine and no commission whatsoever was paid to any person with respect to these donations. At the time of making these donations no such discrepancy came to the knowledge of the assessee company.
- The assessee company is subjected to regular assessment every year and it can be seen from the accounts that for several years the assessee group has been supporting several institutions by giving donations. This is the philosophy of the group.
- The deduction claimed is correct and should be allowed in full. In support of its claim the assessee company furnished following:-
  a) Registration & renewal certificate of department of Science & Technology, Government of India.
  b) Request letter of HHBHRF.
  c) Income Tax Exemption of Certificate.
  d) Receipt of R.s 50,00,000/- issued by SHG&PH
  e) Receipt of Rs. 1,25,00,000/- issued by HHBHRF.

- Assessee requested the AO to provide all material proposed to be used against the assessee company in respect of transaction with foundation. The assessee also requested to cross examine the parties who have given adverse statements.
- It was also mentioned that in view of the judicial cases, where any donation is made by an assessee to an approved institution and claimed deduction, the subsequent withdrawal of the approval of such institution would not entitle the department to disallow the deduction to the assessee.
- It was also submitted by the assessee that merely on submission made by the done trust during the course of their income tax proceedings, the assessee company should not be denied the benefit of deduction as on the date of the donation the donor trust was carrying on activities based on which recognition was given by the Income Tax authorities
- If further stated that assessee company should be given an opportunity to cross examine the done trust before making any disallowance on the presumption that the donation is bogus.

5. The ld AO observed that the donations made through banking channel reflected the urgency in making the arrangement and donation being made towards the fag end of the financial year wherein the actual profit earned during the financial year 2012-13 had become crystal clear. The ld AO further relied on the survey report and observed that the assessee company's name appear at serial number 301 of the survey report amongst the list of names furnished by the DDIT (Inv.) Unit 4(1), Kolkata in the case of SGHPH reflecting bogus donation transaction of the assessee company. The ld AO also observed that from the broker wise list of bogus donation for FY 2012-13 reproduced in his order that the assessee had indulged in this transaction through mediator 'Abhijit'. The ld AO then extracted the statements recorded by the DDIT, Investigation Wing, Kolkata from various persons belonging to SGHPH and HHBHRF. The ld AO finally

at page 51 of his order stated that on perusal of extracts of survey reports and statements of Sri manoj Kumar Kothary and Sri Swapan Ranjan Dasgupta, it is clear that the assessee company had paid bogus donation. The ld AO also issued summons u/s 131 of the Act to Shri Nagesh M Patel, Managing Director of the assessee company and recorded statement from him. He concluded that the assessee company had not verified the concerns properly. The MD of the assessee company does not know any person of these concerns and does not remember the name of the broker who had brought the details of these concerns. Accordingly, the ld AO disallowed the weighted deduction claimed in the sum of Rs 3,06,25,000/- u/s 35(1)(ii) of the Act in the assessment.

6. The assessee filed a detailed written submissions before the ld CITA meeting out each and every point of the order of the the ld AO which are reproduced in pages 7 to 19 of the order of the ld CITA which are not reiterated herein for the sake of brevity. The ld CITA deleted the disallowance by observing as under:-

> *"5.1. I have gone through the assessment order, written submissions filed by the AR of the appellant company as well as the documents filed in the form of paper book by the AR of the appellant. The sole issue to be decided in this appeal is whether the donation of Rs. 1,75,00,000/- made by the appellant to two concerns viz. SHG&PH amounting to Rs. 50,00,000/- and HHBRF amounting to Rs. 1,25,00,000/- is eligible for weighted deduction of Rs. 3,06,25,000/- i.e. 175% of the donated amount u/s 35(1)(ii) of the Act or not. For the sake of convenience section 35(1)(ii) of the Act is reproduced as follows:*
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> > *"sec 35(1): In respect of expenditure on scientific research, the following deduction shall be allowed-*
> > *ii) any sum paid to a scientific research association which has its objects the undertaking of scientific research or to a university, college, or other institution to be used for scientific research: Provided that such association, university, college or institution is for the time being approved for the purposes of this clause by the prescribed authority by notification in the official gazette."*
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> *From the above, it is clear that any assessee can claim deduction u/s 35(1)(ii) of the Act provided it gives donation to any undertaking which has its objects of scientific research and such undertaking is approved for the purposes of this clause by the prescribed authority. As far as eligibility of the appellant is concerned there is no doubt expressed by the AO in the entire assessment order that the appellant is not eligible to claim weighted deduction of donations paid u/s 35(1)(ii) of the Act. Briefly stated facts of the case are that the appellant is engaged in the business of import & export of*

machinery & machinery spare, equipment & component and project execution work. For the assessment year under consideration the appellant has filed its return of income on 29.09.2013 declaring total income at Rs. 32,41,51,490/-. In course of the assessment proceedings the AO noted that the appellant has claimed a sum of Rs. 3,06,25,000/- u/s 35(1)(ii) of the Act. In support of its claim the appellant has filed copies of donation receipts, notification issued u/s 35(1)(ii) in favour of the donee institutions; etc. The AO disallowed the2claim of the appellant entirely on the ground that these' institutions were engaged, in providing, bogus donation to beneficiaries in lieu Of commission income. In doing so the AO has relied upon the survey report of the DDIT (Inv), Kolkata. A survey was conducted by the DDIT (Inv), Kolkata upon these institutions on 27.01.2015. Pursuant to such survey, statements of various persons were recorded by the DDIT (Inv), Kolkata. The AO has heavily relied upon the survey report as well as the statements recorded by the DDIT (Inv), Kolkata. In fact, if the statements recorded are ignored the independent finding of the AO remains minimal. I find that the arguments of the AR are multifold. However his arguments can be categorized into two limbs. First limb being violation of principles of natural justice and second limb being on the merits of the case. The AR has vehemently argued that there had been gross violation of principles of natural justice in this case as the survey report or the copies of the statement relied upon by the AO were never provided to the appellant in spite of several written as well as verbal requests made by the appellant before the AO. In support of its contentions the AR drew my attention towards the relevant pages in the paper book. Thus the contentions of the AR of the appellant were found to be correct.

5.2 From the facts emerging from records, it is not in dispute that indeed the AO has neither provided the copies of statements recorded by the DDIT(Inv), Kolkata or the survey report prepared by him to the appellant for rebuttal. I find that the AO has relied upon by the entire findings of DDIT (Inv), Kolkata in framing the impugned assessment order. The AO has also not allowed any cross examination of such persons whose statements were relied upon by the AO in course of assessment proceedings. In support of his contentions AR has relied upon several judgments of the High Courts and Apex Court. Thus, before giving any finding on the merits of the case, it becomes incumbent upon me to decide whether assessment done in gross violation of principles of natural justice can stand the test of law or not. I find that apart from other judgments relied upon by the AR or the appellant the judgment of the Apex court in the case of M/s Andaman Timber Industries vs. Commissioner of Central Excise, Kolkata-II bearing civil appeal No. 4228 of 2006 dated 02.09.2015 is squarely fitting into the facts of this case. It was held by the apex court as follows:

"According to us 1 not allowing the assessee to cross-examine the witness 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 in as much 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 was total/y untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought 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 what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

As mentioned. above, the appellant has 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 mentioned 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 direction to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

In view the above, we are of the opinion that is the testimony of these two witnesses is discredited/there was-no, material with the Department on the basis of which it could justify its action as the statement of the -aforesaid two witnesses was the oily basis of issuing the show cause notice.

We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal.

From the reading of the assessment order, it is apparent that the AO has never furnished the copies of statements of various persons named herein above recorded by the DDIT (Inv) Kolkata to the appellant, Neither at the time of issuing the show cause notice dated 29.01.2016 nor before the completion of assessment u/s 143(3) of the Act the statements were furnished or cross-examinations were allowed to the appellant. It is further observed that the appellant was never allowed any opportunity to appear either before the concerned DDIT (Inv) or before the AD to contradict the statements of the aforesaid persons recorded. In my considered view in any assessment principles of natural justice plays most important role and no addition or disallowance can be made without following such principles. Natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. I find that the purpose of following the principles of natural justice is the prevention of miscarriage of

justice. No one should be condemned unheard. I find that the AO has relied upon 20 person's statement in the case of SHG & PH and 13 persons in the case of HHBFR. The extracts of the. statements have been reproduced in the assessment order at various places. The contents of such statements were never shared with the .appellant in course of the proceedings before the DDIT (Inv) or in course of assessment proceedings, hence there is no doubt that there has been gross violation of principles of natural justice and thus I have no hesitation in holding that the assessment-is devoid' of natural justice and the same is held to a nullity.

5.3 Without prejudice to the findings given at para 5.2, I now proceed to decide the matter on the merits of the case. In course of the assessment proceedings AO observed from schedule 22 of notes forming part of financial statement of affairs of the appellant company that the appellant company has debited its profi & loss account by a sum of Rs. 1,75,00,000/- under the head Other expenses towards the donations paid to two concerns named herein above who were eligible concerns u/s 35(1)(ii) of the Act. It has further claimed additional deduction of Rs. 1,31,25,000/- representing the weighted deduction portion in the computation of income. Thus the appellant has claimed total deduction of Rs. 3,06,25,000/- u/s 35(1)(ii) of the Act. On requisition from the AO, I find that the appellant furnished complete details of deduction claimed by it u/s 35(1)(ii) of the Act. The AO observed that sum of 50,00,000/- was paid to School Of Human Genetics & Population Health (SHG & PH) and sum of Rs. 1,25,00,000/- was paid to Herbicure Healthcare Bio-Herbal Research Foundation (HHBHRF). The AO issued a show cause notice dated 29.01 2016 to the appellant seeking explanation as to why the deduction claimed u/s 35 amounting to 3,06,25,000/- should not be disallowed. The whole basis for the show cause was that on 27.01.2016 the investigation wing, Kolkata conducted a survey in the premises of these concerns and found that these concerns are engaged in providing bogus donation to the beneficiaries/ donors in lieu of commission payments. Statement of several persons associated with these concerns were recorded by the DDIT investigation wing, Kolkata who admitted to the modus operandi followed by these concerns in providing benefit of bogus donation to the beneficiaries. The details of the show cause notice is already summarized at para 4.1 of this order. The reply of the appellant filed in this regard has also been summarized at para 4.2 of this order. I find that appellant has tried to justify its claim of deduction amounting to Rs. 3,06,25,000/-. The AO has not controverted any of the submissions of the appellant. The AO has not been able to prove that the evidences filed by the appellant in this regard are either false or bogus or not genuine by conducting any enquiry. The facts mentioned in the reply filed by the appellant in response to the show cause notice are not under challenge by the AO. The appellant explained that the donations to these concerns were made purely on the basis of the fact that these concerns were established since long time and engaged in the research activities 'and were also granted registration u/s 35(1)(ii) of the Act. I. find that the AO did not bother to deal with any of the submissions of the appellant re-iterating the fact that the donations paid by the appellant were genuine donations and there was no commission payment made in this respect. The AO did not verify the correctness of such submission. I find that indeed the appellant had been regularly giving donations to several religious; and charitable organizations. The appellant also filed. supporting evidences in respect of claim of

donations paid. I also find that the appellant has explained before the AD that the donation was made by the appellant during the -relevant 'assessment year and during this relevant year these concerns were duly approved concerns u/s 35(1)(ii), therefore, the subsequent withdrawal of approval of such concerns would not entitle the Department to disallow the genuine claim of donation paid by the appellant. The AD has not discussed anything on the reply filed by the appellant. I find that the AD was completely guided by the Survey report of the DDIT (Inv), Kolkata. He has not made any independent enquiry in this regard. The AD has relied' upon statements of several persons recorded by the DDIT (Inv) Wing, Kolkata. I find that these are just plain statements without any supporting material or evidences in support of such statements. I find force in the argument of the AR of the appellant that these statements were given by concerned persons only to avoid any kind of enquiry or investigation by the DDIT (Inv), Kolkata into the respective person's books of accounts. I also agree with the submissions of the AR of the appellant that all the positive materials filed by the appellant have been ignored by the AD and the conclus on is drawn by him that these donations were bogus donations. The copies of such statements were never furnished to the appellant in course of assessment proceedings. In spite of seeking cross examination of these persons the AO did not issue a single summon u/s 131 to enforce the attendance of any of the persons whose statements were relied upon by the AO. It is found that the AD recorded statement of managing director of the appellant company in course of the assessment proceedings who confirmed the donations made and the basis of making such donation by the appellant company. I also find that the appellant has, given its comment on each of the person whose statements were recorded by the DDIT (Inv), Kolkata. I have gone through such extracts of the statement and 1. agree with the contentions of the AR of the appellant that none of the person has mentioned anything specific about the appellant I find from page 9 of the assessment order which gives broker wise list of bo us donation in case of SHG & PH for the FY 2012-13 that in front of the appel ant's name one mediator's name as "ABHIJIT" appears. Probably ABHIJIT happens to be mediator who has arranged for the donation. But in the statements relied upon by the AO including the statement of brokers/ entry .operators etc, I fail to find any person with name "ABHIJIT". Thus this part of the allegation by the AO remains unsubstantiated. However at page 29 the AO has relied upon statement of one Shri Avijit Sinha Roy, recorded by the DDIT (Inv) on 13.04.2015. Even if it is presumed that "ABHIJIT" is the same person as Shri Avijit Sinha Roy, then also from the perusal of statement of Shri Avijit Sinha Roy it can be seen that he was involved as a broker for arranging the donation upto the Month of February 2011 only, the appellant has made the aforesaid donation in November, 2012. Therefore, I agree with the contentions of the AR of the appellant that. statement of Shri Avijit Sinha Roy cannot have any applicability in the appellant's case. In respect of HHBHRF no such specific person's name has been mentioned by the AO who has acted as a mediator between the appellant and HHBHRF.

5.4 I find that the appellant has explained that it has paid the donation to SCH & PH based on the profile of the organization. The appellant has also explained with documentary evidences that SCH & PH was registered as a society under the W.B.

Societies Registration Act, 1961 and it was also registered u/s 12AA of the Act. Its scientific research facilities were duly approved u/s 35(1)(ii) of the Act by the Central Government when the appellant made donation to this institute. Such approval was valid from AY 2008-09 onwards. The appellant has also furnished copy of the notification approving the institute under section 35 (1)(ii) of the Act. It was also explained that the said ·institute was carrying on scientific work in the field of genetic counseling, epidemiologic study and human genetic research & development. I find that the institute had indeed been awarded Bharat Nirman Award for the area of Rural development in 2005. It was also awarded Global Achievers foundation award in 2012 and Bharat Vibhushan Samman Puraskar in 2013. I find that the evidences filed in this regard before the AO has not been rebutted by the AO. The AO has not conducted any examination or enquiry in this regard before arriving at the conclusion that the concern was not doing any research work and it was only involved in receiving bogus donations through banks and returning cash in lieu' of such receipts. It is also found that approval is granted to an organization u/s 35(1)(ii) by CBDT only after strict compliance of law. The approval is granted after various levels of scrutiny and checks and to concerns having track record of doing research activity. In respect of donation made HHBHRF it was explained that the said concern was duly registered with the Registrar of Companies, Income Tax Department as well by SIRO (Scientific and Industrial Research Organization). The research publications were also furnished before the AO. It was also explained by the appellant that the said institute was registered u/s 35(1)(ii) of the Act by notification issued by the Government under Notification No. 35/2008, dated 14.03.2008. Documents in support of its claim were also furnished before the AD. But the AD ignored all these positive materials without even commenting upon any of the evidences filed in this regard. The AO chose to remain silent on these documentary evidences furnished by the appellant. I find that the AD has not dealt with the objections of the appellant at all The AO has not been able to find any discrepancy in the details filed by the appellant or controvert that the concerns were not engaged in any scientific research work The evidences filed by the appellant have not been found to be false or incorrect

5.5 It has been brought to my notice that vide notification No. 82/2016 dated 15.09.2016 and notification No. 79/2016 dated 06.09.2016 the registration of SHG&PH & HHBHRF respectively has been cancelled by CBDT. Thus there remains no doubt that these concerns were engaged in the improper utilization of moneys received by them. If the statements are taken at face value then on perusal of extracts of statements of brokers/mediators/and entry operators as reproduced in the assessment order I find that there remains no doubt that the management of these concerns were directly or indirectly engaged in misappropriating the funds and not utilizing the donation amounts entirely for research related activities. However the connivance of appellant in this scheme of arrangements between these concerns as well as the bogus billing parties is not established either by DDIT,(lnv), Kolkata or by the AD. The allegation that the cash was refunded to the appellant after deducting commission by these concerns remains in serious doubt. It is observed that a suspicion how so ever strong it may be cannot form basis for disallowing any claim of the appellant until any material is brought on record.

5.6 The AR drew my attention to the Explanation attached to section 35(1)(ii) of the Act and the CBDT circular No.1/2007 dated 27.04.2007. According to such circular the Explanation has been introduced in the statute itself so that the deduction to which the donor is entitled in respect of any sum paid to a research association, university, college or other institution to which clause (ii) applies shall not be denied merely on the ground that subsequent to the payment of such sum by the assessee, the approval granted-to the association, university, college or other institution referred to in clause(ii) or clause (Hi) has been withdrawn. Thus, I find that the statue has itself brought it-all the donors under the protective wings of explanation attached to section 35(1)(ii) of the Act. Further, even if it is presumed that the approval granted to these concerns u/s 35(1)(ii) has been withdrawn with retrospective effect because these concerns had breached the terms of approval , and the purported donation to the said concerns is a make- believe transaction then also in my considered opinion by virtue of this explanation attached to section 35(1) ,the disallowance made by the AO amounting to f3,06,25,0001- does not stand the test of law and is equired to be reversed. I find that the ratio of decision of Calcutta High Court in the case of Jai Kumar Kankaria relied upon by the AR is relevant to the facts of the present case and accordingly it is held that since the donation was effected in FY 2013-14 and the validity of such registration of these institutes were not cancelled at that material point of time hence the benefit of weighted deduction of 175% cannot be denied to the donor i.e. the appellant in the instant case. The AR argued in support of the grounds by placing his reliance on the decision of Calcutta High Court in the case of B.P.Agarwalla & Sons Ltd. reported in 208 ITR 863 wherein it is stated that this order of withdrawal of approval cannot be given retrospective effect. I agree that an executive order cannot have any retrospective effect to the utter detriment of and prejudice to the person who has already acted upon it and altered his position: Therefore, applying the aforesaid decision, in my considered view the very- basis of the withdrawing the approval granted to these concerns from retrospective effect itself is without jurisdiction and thus the benefit of claim of weighted deduction cannot be denied to the appellant.

5.7 I find that the AO has observed that that-the appellant has made payment of donation at the fag end of the year after fully knowing the profits of the financial year and the payments of the- Donation through RTGS further supports the facts why it has to be done hastily. Otherwise, there is no reason for donation to be paid through RTGS and there is no such requirement that ,it should be paid just before the financial year ends. This simply supports the bogus nature of the donation paid by the assessee. I d that the observation of AO is based on suspicion and surmises only. There is no supporting material for ,this allegation. It is observed that the donation to SHG&PH were made in the month of November, 2012 only and not the fag end of the financial year; Thus the allegation of AO that the do s ere made only at the fag end of the financial year is found to be incorrect as far as it relates to SHG&PG. I find that the AO has made some enquiries in the bank account of the appellant company in respect of donation paid to HHBRF. After conducting enquiries in the bank statements filed by the appellant in course of the assessment proceedings the AO noted that the donation which were made through RTGS by the appellant to HHBRF got transferred to the account of Top link Dealers & Sri Sai Enterprises Ltd on the very same day. The AO

has made an analysis of the money trail which is similar to the report of Investigation wing, Kolkata at page 50 of the assessment order. It was thus concluded by the AO that through this trail HHBRF booked bogus expenses and generated cash. It is observed that these concerns may have been indulged in bogus billing of expenditure and siphoned or misappropriated the money which was received as donation, but the claim of donation made by the appellant cannot be denied to it merely on this ground. I find that these concerns were headed by renowned doctors and professionals and were awarded several times by the Government of India for their research related activities. I agree with the submissions of the AR of the appellant that after making the donation, the appellant was neither authorized nor required to check the end use of the funds by the said organizations. Thus, if any irregularity has happened it has happened at the level of the said concerns and the appellant is in no way connected to this scheme of arrangement particularly in absence of any material evidence to prove that the cash in lieu of the RTGS made by the appellant has come back to either the appellant or any of his representative. I further find from the extracts of he statement of Shri Nagesh Patel the MD of the appellant company recorded & reproduced by the AO in the assessment order that the appellant has checked the premises of these concerns and based on their performance and approvals granted to these concerns by various Government organizations the donation was made by the appellant. I find that the AO has recorded the statement of MD but did not put a single question or did not seek any explanation or clarification on the statements of various parties which were intended to be relied upon by the AO. The AO has conveniently ignored this vital aspect. Therefore, I am inclined to hold that the action of AO was predetermined and completely guided by the DDIT(Inv), Kolkata's report Thus, after careful consideration of the entire gamut of assessment order, statements recorded by the DDIT(Inv), written submissions as well as the paper book and the decisions relied upon by the AR of the appellant the disallowance made by AO is directed to be deleted in full. This ground of appeal is allowed."

7. Aggrieved, the revenue is in appeal before us on the following grounds:-

1. "That on the facts & circumstances of the case and in law, the Ld. CIT(A) has erred by deleting the disallowance of deduction u/s. 35(1)(ii) of the Act of Rs. 3,06,25,000/-."

2. "That on the facts & circumstances of the case and in law, the Ld. CIT(A) has erred by not appreciating the facts that the A.O. had made enquiries and established the same in the assessment order before making disallowance of deduction u/s. 35(1)(ii) of the Act."

3. "That on the facts & circumstances of the case and in law, the Ld. CIT(A) has erred by not appreciating the facts that against the said concern i.e. School of Human Genetics & Population Health and Herbicure Healthcare Bio-Herbal

Research Foundation, a survey operation was conducted by the Investigation Wing of the Department, Kolkata on 27.01.2015 in the premises of aforementioned concern in which it had been found that the said concern is engaged in providing bogus donation u/s. 35(1)(ii) in the name of various parties so as to enable them to avail 175% deduction u/s. 35(1)(ii) of the IT. Act."

4. "That on the facts & circumstances of the case and in law, the Ld. CIT(A) has erred by not appreciating the facts that the name of the assessee company was appearing in Serial No. 272 & 301 of the survey report amongst the names of list furnished by the DDIT(Investigation), Unit-4(1), Kolkata in the case of School of Human Genetics & Population Health and Herbicure Healthcare Bio- Herbal Research Foundation reflecting wherein bogus donation had been availed."

5. "That on the facts & circumstances of the case and in law, the Ld. CIT(A) has erred by not appreciating the facts that CBDT, vide Notification No. 79/20 16/F. No. 203/ 135/2007 /IT A.II dt. 06.09.2016 & 82/20 16/F. No. 203/64/ 2009/ITA.II dt. 15.09.2016 has withdrawn the approval Notification of donees concern namely School of Human Genetics & Population Health, Kolkata and Herbicure Healthcare Bio-Herbal Research Foundation, Kolkata with effect from 1st April, 2007."

6. That on the facts & circumstances of the case and in law, the Ld. CIT(A) has erred by not appreciating the facts that on the basis of enquiry made on Survey & post survey operations by the Investigation Wing of the Department in the case of the done conce ns, the Hon'ble CBDT has withdrawn the approval Notification of the done concern w.e.f. 1st April, 2007.

8. We have heard the rival submissions and perused the materials available on record. The brief facts pertaining to HHBHRF are as under:-

a) HHBHRF was registered u/s 12AA of the Act by the ld DIT(Exemptions), Kolkata with effect from 26.12.2003.

b) HHBHRF was also recognized in the year 2006-07 as a scientific industrial research organization (SIRO) by Ministry of Science & Technology, Government of India. The renewal of recognition as SIRO by the Department of Scientific and Industrial Research under the Scheme on Recognition of Scientific and Industrial Research Organisation , 1988 was made for the period from 1.4.2012 to 31.3.2015 vide communication in F.No. 14/444/2006-TU-V dated 13.8.2012.

c) HHBHRF was recognized vide Gazette Notification No. 35/2008 dated 14.3.2008 issued by the Central Board of Direct Taxes (CBDT in short), Ministry of Finance, Government of India, u/s 35(1)(ii) of the Act.

8.1. The brief fact pertaining to SGHPH are as under:-

a) SGHPH was recognized vide Gazette Notification dated 28.1.2009 issued by the Central Board of Direct Taxes (CBDT in short), Ministry of Finance (Department of Revenue), Government of India, u/s 35(1)(ii) of the Act.

b) SGHPH was also recognized as a scientific industrial research organization (SIRO) by Ministry of Science & Technology, Government of India. The renewal of recognition as SIRO by the Department of Scientific and Industrial Research under the Scheme on Recognition of Scientific and Industrial Research Organisation , 1988 was made for the period from 1.4.2010 to 31.3.2013 vide communication in F.No. 14/473/2007-TU-V dated 17.6.2010.

8.2. At the outset, we find that the Taxation Laws (Amendment) Act, 2006 with retrospective effect from 1 4.2006 had introduced an Explanation in Section 35 of the Act which reads as under:-

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

Hence the aforesaid provisions of the Act are very clear that the payer (the assessee herein) would not get affected if the recognition granted to the payee had been withdrawn subsequent to the date of contribution by the assessee. Hence no disallowance u/s 35(1)(ii) of the Act could be made in the instant case.

8.3. We find that there is no provision in section 35(1)(ii) of the Act to withdraw the recognition granted to the assessee therein. When there is no provision for withdrawal of recognition in the Act, the action of the revenue in withdrawing the recognition with retrospective effect from 1.4.2007 is unwarranted. In this regard, the recent decision of the *Hon'ble Supreme Court in the case of Industrial Infrastructure Development Corporation (Gwalior) M.P. Ltd vs CIT Gwalior reported in (2018) 90 taxmann.com 281 (SC)* wherein it was held that :-

> ***21.*** *In our considered opinion, the CIT had no express power of cancellation of the registration certificate once granted by him to the assessee under Section 12A till 01.10.2004. It is for the reasons that, first, there was no express provision in the Act vesting the CIT with the power to canc l the registration certificate granted under Section 12A of the Act. Second, the order passed under Section 12A by the CIT is a quasi judicial order and being quasi judicial in nature, it could be withdrawn/recalled by the CIT only when there was express power vested in him under the Act to do so. In this case there was no such express power.*
>
> ***22.*** *Indeed, the functions exercisable by the CIT under Section 12A are neither legislative and nor executive but as mentioned above they are essentially quasi judicial in nature.*
>
> ***23.*** *Third, an order of the CIT passed under Section 12A does not fall in the category of "orders" mentioned in Section 21 of the General Clauses Act. The expression "order" employed in Section 21 would show that such "order" must be in the nature of a "notification", "rules" and "bye laws" etc. (see - Indian National Congress(I) v. Institute of Social Welfare [2002] 5 SCC 685.*
>
> ***24.*** *In other words, the order, which can be modified or rescinded by applying Section 21, has to be either executive or legislative in nature whereas the order, which the CIT is required to pass under Section 12A of the Act, is neither legislative nor an executive order but it is a "quasi judicial order". It is for this reason, Section 21 has no application in this case.*
>
> ***25.*** *The general power, under Section 21 of the General Clauses Act, to rescind a notification or order has to be understood in the light of the subject matter, context and the effect of the relevant provisions of the statute under which the notification or order is issued and the power is not available after an enforceable right has accrued under the notification or order. Moreover, Section 21 has no application to vary or amend or review a quasi judicial order. A quasi judicial order can be generally varied or reviewed when obtained by fraud or when such power is conferred by the Act or Rules*

under which it is made. (See Interpretation of Statutes, Ninth Edition by G.P. Singh page 893).

26. *……*

27. *It is not in dispute that an express power was conferred on the CIT to cancel the registration for the first time by enacting sub-Section (3) in Section 12AA only with effect from 01.10.2004 by the Finance (No.2) Act 2004 (23 of 2004) and hence such power could be exercised by the CIT only on and after 01.10.2004, i.e., (assessment year 2004-2005) because the amendment in question was not retrospective but was prospective in nature.*

28. *The issue involved in this appeal had also come up for consideration before three High Courts, namely, Delhi High Court in the case of DIT (Exemptions) v. Mool Chand Khairati Ram Trust [2011] 11 taxmann.com 42/199 Taxman 1/339 ITR 622, Uttaranchal High Court in the case of Welham Boys' School Society v. CBDT [2006] 285 ITR 74/[2007] 158 Taxman 199 and Allahabad High Court in the case of Oxford Academy for Career Development v. Chief CIT [2009] 315 ITR 382.*

29. *All the three High Courts after examining the issue, in the light of the object of Section 12A of the Act and Section 21 of the General Clauses Act held that the order of the CIT passed under Section 12A is quasi judicial in nature. Second, there was no express provision in the Act vesting the CIT with power of cancellation of registration till 01.10.2004; and lastly, Section 21of the General Clauses Act has no application to the order passed by the CIT under Section 12A because the order is quasi judicial in nature and it is for all these reasons the CIT had no jurisdiction to cancel the registration certificate once granted by him under Section 12A till the power was expressly conferred on the CIT by Section 12AA(3) of the Act w.e.f. 01.10.2004.*

We hold that the ratio decidendi of the aforesaid judgement of the Hon'ble Apex Court would squarely be applicable to the facts of the instant case. Infact the assessee's case herein falls on a much better footing than the facts before the Hon'ble Apex Court. In the case before Hon'ble Apex Court, the power of cancellation of registration us 12A of the Act was conferred by the Act on the ld CIT w.e.f. 1.10.2004 and the Hon'ble Apex Court held that prior to that date , no cancellation of registration could happen. But in the instant case, there is absolutely no provision for withdrawal of recognition u/s 35(1)(ii) of the Act . Hence we hold that the withdrawal of recognition u/s 35(1)(ii) of the Act in the hands of the payee organizations would not affect the rights and interests of the assessee herein for claim of weighted deduction u/s 35(1)(ii) of the Act.

8.4. We also find that the co-ordinate bench of this tribunal in exactly similar facts had decided the issue in favour of the assessee in the following cases:-

a) Rajda Polymers vs DCIT in ITA No. 333/Kol/2017 for Asst Year 2013-14 dated 8.11.2017.

b) Saimed Innovation vs ITO in ITA No. 2231/Kol/2016 for Asst Year 2013-14 dated 13.9.2017.

The findings of those decisions are not reiterated herein for the sake of brevity.

8.5. In view of the aforesaid findings in the facts and circumstances of the case and respectfully following the various judicial precedents relied upon hereinabove, we hold that the ld CITA had rightly deleted the disallowance u/s 35(1)(ii) of the Act in the sum of Rs 3,06,25,000/- made by the ld AO Accordingly, the Grounds raised by the revenue are dismissed.

9. In the result, the appeal of the revenue is dismissed.

Order pronounced in the Court on 14.03.2018

Sd/-	Sd/-
[S.S. Viswanethra Ravi] Judicial Member	[M.Balaganesh] Accountant Member

Dated : 14.03.2018

SB, Sr. PS

Copy of the order forwarded to:
1. DCIT, Circle-12(1), Kolkata, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-700069.
2. M/s Maco Corporation (India) Pvt. Ltd., 7A, Sukhsagar Appt., 2/5, Sarat Bose Road, Bhowanipore, Kolkata-700020.
3..C.I.T.- 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O , ITAT Kolkata Benches