IT : Where research institution was enjoying approval as per section 35(1)(ii) on date of receipt of donation, on retrospective cancellation of approval, donor's claim of deduction could not be denied

[2018] 96 taxmann.com 185 (Jaipur - Trib.)

IN THE ITAT JAIPUR BENCH

P.R. Rolling Mills (P.) Ltd.

v.

Deputy Commissioner of Income-tax,Circle-3, Jaipur*

VIJAY PAL RAO, JUDICIAL MEMBER
AND BHAGCHAND, ACCOUNTANT MEMBER
IT APPEAL NO. 529 (JP.) OF 2018
[ASSESSMENT YEAR 2014-15]
JULY 5, 2018

Section 35 of the Income-tax Act, 1961 - Scientific research expenditure [Sub-section (1)(ii)] - Assessment year 2014-15 - Assessee-company made donation to a scientific research institute which was enjoying approval in terms of section 35(1)(ii) - Assessee claimed weighted deduction under section 35(1)(ii) - Approval under section 35(1)(ii) was cancelled retrospectively - Accordingly, Assessing Officer disallowed deduction claimed by assessee - Whether since research institution was enjoying approval within meaning of section 35(1)(ii) as on date of receipt of donation from assessee-company, on retrospective cancellation of approval of concerned institution, weighted deduction claimed by assessee in respect of donation could not be denied - Held, yes [Para 7] [In favour of assessee]

Circulars and Notifications : CBDT Notification No. 82/2016, dated 15-9-2016 and CBDT Notification No. 4/2010, dated 28-1-2010

FACTS

- The assessee-company was engaged in manufacturing of rolled steel products which was called as hot rolling of steel. During the year under consideration, the assessee had made donation to an institution SHG & PH, engaged in scientific research and same was notified by the CBDT for claiming deduction under section 35(1)(ii) vide notification no. 4/2010 dated 28-1-2010. The assessee claimed weighted deduction under section 35(1)(ii). The CBDT had rescinded said notification no. 15-9-2016 retrospectively with effect from 1-4-2007. Accordingly, the deduction claimed under section 35(1)*(ii)* by the assessee was disallowed.
- On appeal, the Commissioner (Appeals) also upheld the order of the Assessing Officer.
- On second appeal:

HELD

- The institute, whom the donation was made was in existence and notified during the financial year 2013-14 when the assessee has made donations. The CBDT had rescinded notification on 15-9-2016. Although, it has been made retrospective effect from 01-4-2007. This institute was validly recognized by the CBDT on the date of donation made by the assessee. The approval granted to the institute was very much in force at the time of donation made by the assessee. The assessee had no reason to disbelieve the operation of approval and notification of the institute. In such a situation, the deduction claimed by the assessee is justified. The subsequent notification by the CBDT rescinding the approval retrospectively shall not or should not affect the claim of the assessee. There was no information with the assessee regarding non-genuinity or not observing the standard fixed by the CBDT for making eligible itself for deduction under section 35. The assessee's act was in a *bona fide* manner. It is well settled proposition of law that no additional tax burden can be put on the assessee by making retrospective operations of certain notifications or withdrawal of notifications. A procedural statute should not generally speaking be applied retrospectively, where the result would be to create new disabilities or obligations, or to impose new duties in respect of transactions already accomplished.
- Further, a statute which not only changes the procedure but also creates new rights and liabilities shall be continued to be prospection in operation, unless otherwise provided, either expressly or by necessary implications. The beneficial amendment which effects the public generally and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given retrospective effect. Thus, the retrospective effect can be given only for the beneficial amendments but not to put the additional burden that too on third party.
- Further, the *Explanation* to section 35(1) also provides that deduction to which 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 association, university, college or other institution, referred to in clause (*ii*) or clause (*iii*) has been withdrawn. The assessee has made donation *i.e.* on 13-01-2014, the institute was having a valid approval from the appropriate authorities and the assessee's claim cannot be denied. The Coordinate Bench of Kolkata ITAT in the case of *Dy. CIT* v. *Maco Corporation (India) (P.) Ltd.* in [ITA No. 16/Kol/2017, dated 14-3-2018] wherein the donation was made to the same institute *i.e.* SHG & PH was held that in view of *Explanation* to section 35(1)(*ii*), would not be withdrawn subsequently when recognition has been rescinded. The authorities below were not justified in denying claim of deduction under section 35(1)(*ii*). [Para 7]

CASE REVIEW

Hitendra Vishnu Thakur v. *State of Maharashtra* AIR 1994 SC 2623; *CIT (Central-1)* v. *Vatika Township (P.) Ltd.* [2014] 49 taxmann.com 249/227 Taxman 121/367 ITR 466 (SC); *Dy. CIT* v. *Maco Corpn. (India) (P.) Ltd.* [IT Appeal No 16 (Kol) of 2017, dated 14-3-2018] and *Saimed Innovation* v. *ITO* [IT Appeal No. 2231 (Kol) of 2016, dated 13-9-2017] (para 7) *followed.*

CASES REFERRED TO

Hitendra Vishnu Thakur v. *State of Maharashtra*, AIR 1994 SC 2623 (para 5), *CIT* v. *Vatika Township (P.) Ltd.* [2014] 49 taxmann.com 249/227 Taxman 121/367 ITR 466 (SC) (para 5), *Dy. CIT* v. *Maco Corpn. (India) (P.) Ltd.* [IT Appeal No 16 (Kol.) of 2017, dated 14-3-2018] (para 5), *Industrial Infrastructure Development Corpn. (Gwalior) M.P. Ltd.* v. *CIT* [2018] 90 taxmann.com 281/253 Taxman 480/403 ITR 1 (SC) (para 5), *Rajda Polymers* v. *Dy. CIT* in [IT Appeal No. 333 (Kol.) of 2017, dated 8-11-2017] (para 5), *Andaman Timber Industries* v. *C.CEx* 2015 (324) ELT 641 (SC) (para 5), *CCE* v. *Shyam Traders* 2016 (333) ELT 389 (All.) (para 5), *P.S. Abdul Majeed* v. *Agricultural Income Tax & Sales Tax Officer* [1994] 209 ITR 821 (Ker.) (para 5), *CIT* v. *Eastern Commercial Enterprises* [1994] 210 ITR 0103 (Cal.) (para 5), *CIT* v. *D.M. Joshi* [1999] 239 ITR 315 (Guj.) (para 5), *CIT* v. *Sunita Dhadda* [SLP (Civil) No. (s) 9432 of 2018, dated 28-3-2018] (para 5), *Saimed Innovation* v. *ITO* [IT Appeal No. 2231 (Kol.) of 2016, dated 13-9-2017] (para 5), *B.P. Agarwalla & Sons Ltd.* v. *CIT* [1993] 71 Taxman 361/[1994] 208 ITR 863 (Cal.) (para 5), *ITO* v. *Nahar Singh Sadhu Singh* [2001] 118 Taxman 930/[2002] 253 ITR 471 (Punj. & Har.) (para 5), *Jai Kumar Kankaria* v. *CIT* [2002] 120 Taxman 810/[2001] 251 ITR 707 (Cal.) (para 5), *K.M. Scientific Research Centre* v. *Lakshman Prasad* [1998] 229 ITR 23 (All.) (para 5), *Seksaria Biswan Sugar Factory Ltd.* v. *IAC* [1990] 52 Taxman 257/184 ITR 123 (Bom.) (para 5) and *Chotatingrai Tea Estate (P.) Ltd.* v. *CIT* [1999] 236 ITR 644 (Gau.) (para 5).

Manish Agarwal, (CA) and **O.P. Agarwal** (CA) *for the Appellant.* **Smt. Seema Meena**, (JCIT-DR) *for the Respondent.*

ORDER

Bhagchand, Accountant Member - The appeal filed by the assessee emanates from the order of the ld. CIT(A)-I, Jaipur dated 21/03/2018 for the A.Y. 2014-15.

2. The brief facts of the case are that assessee is a private limited company incorporated in the year 1997 under The Companies Act, 1956 and is mainly engaged in manufacturing of rolled steel products which is called as Hot Rolling of Steel. Return of income for the year under appeal was filed electronically on 26.09.2014 declaring total income at Rs. 3,19,04,990/-. The case was selected for scrutiny and details and explanations sought by the AO were provided and assessment was completed vide order dated 26.12.2016 by making disallowance of weighted deduction claimed u/s 35(1)(ii) of the Income Tax Act, 1961 (in short the Act) towards the donation of Rs. 1.00 crore made to a society engaged in scientific research and thereby determining total income at Rs.4,94,04,990/-. The ld. CIT(A) has confirmed the action of the Assessing Officer.

3. Now the assessee is in appeal before the ITAT by taking following grounds of appeal:

> "1. On the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in confirming addition of Rs. 1,75,00,000/- made by way of disallowance of deduction u/s 35 of the I.T. Act, 1961 arbitrarily and merely on the basis of assumptions and presumptions. Thus, the addition of Rs. 1,75,00,000/- deserves to be deleted.
>
> 1.1 That, the Ld. CIT(A) has further erred in holding that the donation given by appellant as accommodation entry solely on the basis of statements of certain persons recorded behind the back of the assessee by some other officer, without even allowing the opportunity to cross-examine such persons in spite of specific requests being made by appellant. Thus, the addition of Rs. 1,75,00,000/- deserves to be deleted.
>
> 1.2 That, the AO has further erred in ignoring the fact that the approval granted to the said institution u/s 35(1)(ii) of the Act was in existence as on the date when donation was given by the appellant, and was rescinded by CBDT in subsequent assessment years, and therefore did not affect

the deductability of the payment made by appellant previous to such rescission. Thus, the addition of Rs. 1,75,00,000/- deserves to be deleted.

1.3 That the Ld. CIT(A) has further erred in relying upon the settlement petition filed by the Institute which in no way has any bearing on the case of the appellant, thus such observation of the Ld.CIT(A) deserves to be ignored and excluded.

1.4 That the Ld.CIT(A) has further erred and based his finding on the order of ITSC in the case of the Institute without providing opportunity to the appellant to rebut the same, thus the same is in gross violation of principles of natural justice and the consequent order based on such violation deserve to be quashed.

2. The appellant craves the right to add, delete or amend any of the grounds of appeal either before or at the time of hearing of appeal."

4. Grounds No. 1 to 1.4 of the appeal are interlinked and the main issue involved in the appeal is confirming the addition of Rs. 1,75,00,000/-made by way of disallowance of deduction U/s 35 of the Act by the ld. CIT(A). The ld. CIT(A) has dealt the issue in paragraph No. 3.1.2 of his order, which is reproduced as under:

3.1.2 *Determination:*

(*i*) The brief facts of the case are that the appellant company was engaged in manufacturing of rolled steel products which is called as Hot Rolling of Steel. It filed its return of income for the year under consideration declaring total income at Rs. 3,19,04,990/- and the assessment was completed wherein the deduction of Rs. 1.75 Crore claimed u/s 35(1)(ii) was disallowed and the total income was determined at Rs. 4,94,04,990/-. During the year under consideration, the appellant had made donation of Rs. 1 Crore to "School of Human Genetics & Population Health" (M/s SHG & PH), which was notified by the CBDT for claiming deduction u/s 35(1) (ii). A survey u/s 133A of the Act was conducted at the said institute on 27.01.2015 and it was found that the said institute was providing accommodation entries and accordingly, CBDT, vide Notification No. 82/2016 (F N 203/64/2009/ITA.II) dated 15.09.2016 has rescinded the notification number 4/2010 dated 28.01.2010. During the appellate proceedings, the appellant has referred to the provisions of section 35 of the Act and submitted that the AO has neither denied the fact of payment of donation by the appellant, nor has raised any objection regarding approval status of said institute at the time when the payment was made by the assessee to the said society and thus there was no reason to disallow the deduction claimed by it.

(*ii*) It was submitted by the appellant that various sub sections of section 35 provide tax concessions for scientific research. Section 35(1)(ii) in particular, provides deduction in case of assessee who are not engaged in carrying out research work on their own and rather contribute to some other scientific research organization having its main object of undertaking scientific research or to a university, college, or other institution to be used for scientific research. It was further submitted that Proviso to section 35(1)(ii) provides that such institution, university, college, other institution has to be "approved" for such purposes by prescribed authority. Thus, before making contribution, an assessee has to ensure that institution is approved by prescribed

authority, and then sum paid as donation would eligible for deduction in accordance with section 35(1)(ii). Thus, a common person/ entity, who wishes to avail the benefit of section 35(1)(ii) by contributing a specified sum, is not supposed to and in fact is not equipped with so much tools to verify genuineness of the activities of such institution. It is bonafide belief that once approval is granted by CBDT, contribution can be safely made to such institution more particularly when such institution is not related at all and assessee has no control whatsoever over such activity of such institution in any manner. It was also stated that in the instant case also, the appellant has acted under bonafide belief that institution to which donation is being made, is engaged in research activity as per its objects, as obviously after detailed enquiries reporting investigation etc. the CBDT must have issued notification No. 4/2010 dated 28.01.2010 treating the institute to be covered for Sec. 35(1)(ii). Thus, deduction claimed by assessee is absolutely in accordance with law and deserves to be allowed.

(*iii*) It was further submitted that donation of Rs. 1.00 crore was paid by assessee company through payee's account cheque, which was duly debited in its accounts to "School of Human Genetics & Population Health" in terms of the receipt issued by the said society. However, the same has been denied by Ld. AO solely on the basis of statements of Smt. Moumita Raghwan [Treasurer] and Smt. Samadrita Mukherjee Sardar [Secretary], of the institute recorded during the course of survey. It was further submitted by the appellant that from the perusal of the statements of above executives, it was noticed that there are contradictions and anomalies in the statements and thus, it cannot be conclusively said that the society was not engaged in the research work and had not actually received the donation for the research activity actually carried out by them. It was further submitted that at no stage, they had accepted that the society was solely indulged in the issue of bogus donation receipts as against which, actually the society was engaged in regular research works which is evident from the statement of Smt. Moumita Raghwan (Q. No. 20) and Smt. Samadrita Mukherjee Sardar (Q. No. 8). It was the contention of the appellant that nowhere in the statements, any of the office bearers have stated that they had issued any bogus donation receipts to the appellant company and they have not admitted that they had refunded the donation amount received by the society to the appellant company in cash or by any other mode and there was no such documentary evidence also. It was also stated that no such opportunity of cross examination was provided by the AO though specific request was made in this respect.

(*iv*) It was submitted by the appellant that it is evident that in the year under consideration when it had made the donation, the society was having a valid approval from the appropriate authorities according to which the claim of the appellant could not be denied based on any event having occurred subsequently i.e. in next financial year.

(*v*) In view of the above submissions, it was prayed by the appellant that the deduction claimed by it was duly supported by a valid approval through gazette notification of the Government of India which was not withdrawn in the year under consideration. Therefore, in view of the Explanation to section

35(ii), disallowance made by AO in the year under consideration deserves to be deleted.

(*vi*) I have duly considered the submissions of the appellant, assessment order and the material placed on record. There is no dispute that at the time of making donation by the appellant to M/s SHG & PH, it was approved by the CBDT u/s 35(1)(ii), which was subsequently rescinded by notification dated 15/09/2016 w.e.f. 01/04/2007. It is to be noted that after survey proceedings conducted by the Income Tax Department in the case of M/s SHG & PH, M/s SHG & PH has filed an application before the Hon'ble Income Tax Settlement Commission, Kolkata offering additional income of Rs. 15.75 crore for the AY 2012-13, 2013-14 and 2014-15 and the same has been admitted u/s 245D(1) of the Act by the Hon'ble ITSC on 25.03.2015. It would be appropriate to reproduce the relevant extracts from the above referred order of Hon'ble ITSC as under:

"9. The additional income worked out year wise and disclosed before the settlement commission is as under:

Financial year	*Assessment Year*	*Amount*
2011-12	2012-13	1,95,00,000
2012-13	2013-14	4,00,00,000
2013-14	2014-15	15,75,00,000

10. It was finally submitted by the Ld. AO that as the facts have been fully and truly disclosed in the settlement application by way of service charges earned by the applicant by providing accommodation entries for donations received and refunding amounts after deducting such service charges, the applicant had paid taxes and interests on the additional income with fees of Rs. 500/-, along with the intimation made to the AO under section 245C, it was prayed, that the settlement application submitted u/s 245C be admitted for the aforesaid years u/s 245D(1) of the I.T. Act.

11. We have considered the above facts carefully. The facts of this case are rather peculiar in as much as the above entity is a registered society as noted in para 2 above. Registration under Section I2A has been granted by the 171 (Exemption) on 27,10.2004. Registration u/s HOG was initially granted on 27.10.2004 was therefore also available to it since 12,10.2011 till withdrawn. Similarly, registration under section 10(230) had been granted on 27.2.2004, which had been renewed on 16.1.2014, A gazette notification No.4/2010 dated 28.1.2010 had also been issued by the CBDT in the Ministry of Finance under section 35(1) (ii) of the Act. We have noted that though the objects of the Applicant Society are indeed laudable and enjoyed exemption from taxation, it has misused its exempt status under different provisions of law. As various approvals for registration are mandated by the provisions to be granted by different authorities under the law, therefore, at the outset, we would like to point out that we would be refraining from disturbing any order that the authority is empowered for granted to it for various years, including the years before us. Subject to these remarks, we also find that, though such income earned was in contravention of the relevant precisions of the Act, prima fade, the applicant society has made full and true disclosure of its income now taxable in the relevant years.

12. Be that as it may, we also find that the income declared for the assessment years results in additional tax payable which exceeds the prescribed limits u/s. 245C The application has paid fee of Rs.500/-. The additional tax and interest of Rs.6,47,00,000/- has also been fully paid in respect of the proceedings pending of the Assessment Years 2012-13, 2013-14 and 2014-15. Therefore,, the application is allowed to be proceeded with u/s. 245D(lj of income Tax Act for Assessment Years 2012-13,2013-14 & 2014-15."

(*vii*) It is pertinent to mention that M/s SHG & PH has also paid taxes including interest to the tune of Rs. 6.47 Crore on the income disclosed before the Hon'ble ITSC. The above income was offered for taxation on the basis of commission charges earned by M/s SHG & PH on the bogus donations received by it.

(*viii*) It is to be noted that during the survey proceedings, the statements of the office bearers of the said Institute were recorded on oath, wherein Smt. Moumita Raghvan, Treasurer of M/s SHG & GH since 2002 and authorized signatory of M/s SHG & PH stated that:

"Q-10 Please explain in detail the sources of income and major heads of expenses of your organization.

Ans. The sources of income of this organization is mainly out of donation from corporate bodies as well as from individuals. In fact, we receive donations through cheques. RTGS and simultaneously we issue cheques in the name of some companies and in this process our organization originally receives @ 7% to 8% of the donation amount. The total process has been maintained by brokers whose details are given as below:

(*i*) Shri Navin Kumar Choucharia - His office is as Centre Point, 2 Floor, Opposite Great Eastern Hotel, Kolkata. His Contact Nos. are 9831498341, 8478972771.

(*ii*) Shri Makhan Lai Satnaniwala - His office is at Bentinck Street. 1st Floor, beside Haldiram Shop. His Contact No. is 9331023766.

(*iii*) Shri Vijay Agarwal - His office is at Room No.48B. 2nd Floor, 207, Maharshi Devendra Road. Kolkata-7. His contact nos. 9051726402, 9007118177, 9051726425.

(*iv*) Shri Amit Gupta - His office address is not known to me. His contact No is 9804359206.

(*v*) Shri Madan Gupta - He is brother of Shri Amit Gupta. His office address is also not known to me. His contact No. is 8282967343.

(*vi*) Shri Avijit Sinharoy - His office is at Grant Lane. Kolkata and his contact Nos. are 9674111333, 9830777757.

(*vii*) Shri Sailesh Gupta - His office address is not known to me. His contact No. is 8013142439, 9903546784, 8017002888.

(*viii*) Shri Yoges Agarwal His office is at 27. Weston Street, top floor, Kolkata. His contact No. is 9831683393.

(*ix*) Shri Govind Choudhuri - His office is not known to me. His contact No. is 9831631716, 9830030496.

Q. 11 How the above persons, as you mentioned in your answer to question

no. 10, came to know that they can get this type of services from your organization, i.e. they can donate their money to you and route back their money through your organization?

Ans. As our organization is entitled to receive donation which are exempted u-s.SOG and u/s.35, the brokers. Shri Avijit Sinharoy, Shri Vijay Agarwai Shri Amit Gupta and Shri Madan Gupta, who gathered this information from market sources and came to us. Primarily, they offered to receive their money in the guise of donation exempted us. 80G & u/s.35 and they will return back their money after providing us actual donation @ 30%. But factually, we got at 3% of total amount during the first year which has been raised to 8% as on date. As our organization desperately needs money for its research and development activities, we accepted their proposal.

Q. 12 How do your organization adjust the refund of said amount and in what form?

Ans. The donations are made mainly in the form of RTGS and a few of them are in the form of cheque. The amounts are returned within 2 days in the names of various companies provided by the donor alter deducting the amount of actual donation (a 8%. The records have been managed by issuing normally back-dated appeal letters to the donors."

(*ix*) It may further be mentioned that the above referred statement of Smt. Moumita Raghvan was agreed to by Smt. Samadrita Mukherjee Sardar, the founder member of M/s SHG & PH and Secretary of M/s SHG & PH since 1999, in her statement recorded on oath during the course of survey. The relevant extracts of her statement is being reproduced as under:

"Q.7 Please go through the statement recorded of Suit. Moumita Kaghavan. Treasurer of your organization which has been recorded in your presence. Do you agree with the replies given In Suit. Moumita Raghavan in her statement?

Ans. Yes Sir, I fully agree with the statement made by Smt. Moumita Raghavan which has been recorded in my presence.

Q.10 During the course of survey, no books of accounts of sour organization w.e.f. 01.04.2014 till date has been found in your office either manually or in computerized form. Where do you keep the books of accounts for this period?

Ans. Sir, as I have mentioned earlier, we have to adjust our accounts for the said donations received and as such, the data in tally software in the computer of the office is entered at the end of the financial year after receiving all the bogus bills which supports the bogus expenses made and reflected in our accounts. The bills for the said period has not been finalized and so no accounts has been prepared for this year.

Q.11. Please explain in detail the sources of income and major heads of expenses of your organization.

Ans. The sources of income of this organization is mainly out of donation from corporate bodies as well as from individuals. In fact, we receive donations through cheques, RTGS and simultaneously we issue cheques in the name of some companies and in this process our organization originally

receives commission @ 7% to 8% of the donation amount. The total process has been maintained by the brokers whose details are given as below:

(*i*) Shri Navin Kumar Choucharia - His office is at Centre Point 2nd Floor, Opposite Great Eastern Hotel. Kolkata. His Contact Nos. are 9831498341, 847897277).

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Q. 12 How the above persons, as you mentioned in your answer to question no, 10, came to know that they can get this type of services from your organization, i.e., they can donate their money to you and route back their money through your organization?

Ans. As our organization is entitled to receive donation which are exempted u/s.80G and u/s.35, the brokers, Shri Avijit Sinharoy, Shri Vijay Agarwal. Shri Amit Gupta and Shri Madan Gupta, who have this information from their own source and propose us to receive amounts as donation through RTGS or Cheque, which has to be returned back to them and in turn, they will give us commission. Primarily, they offered to receive their money in the guise of donation exempted u/s.80G & u/s.35 and they assured us that they return back their money after providing us actual donation @ 30%, But factually, we got @ 3% of total amount as commission during the first year which has been raised .to 8% as on date. As our organization desperately needs money for its research and development activities, we accepted their proposal.

Q.13 How do your organization adjust the refund of said amount and in what form?

Ans. The donations are made mainly through RTGS and a few of them are in cheque. The amounts are returned within 1 days in the names of various companies provided by the donor after deducting the amount of actual donation to 8%. The records have been managed by-issuing normally back-dated appeal letters to the donors, (he money which has been returned back to them is shown as expenses in our books of accounts mainly under the head R&D expenses.

(*x*) It is to be noted that it has been observed by the AO in the assessment order that the contribution of the said Institute to scientific research was negligible in contrast to the kind of donations received by it. In fact, the research facilities like instruments, lab, skilled staff, storage facilities etc. are almost negligible at the institute.

(*xi*) It has already been stated earlier that the appellant was engaged in the business of rolled steel products which is called as Hot Rolling of Steel and it has made donation to "School of Human Genetics & Population Health" i.e. there is no connect between the two. Though there is no bar on making donation to any entity not related with the business of the appellant, but it is to be noted that if a donation is made to a scientific research Institute, it is a normal tendency to keep in mind what advantage would a person would be deriving from donation to such research institute, whether it would be helpful in inventing a new process or method which may be beneficial to the industry or business of the person concerned etc. The appellant has not brought on record why such donation was made to the said institute at Kolkatta and how did it come to know about the activities of M/s SHG & PH. It is noted that the amount of donation appears to be received by M/s SHG & PH through Shri Amit Gupta, a broker and the name of the appellant company was appearing in the list of bogus donation entries obtained through the said broker. The appellant has not brought on record, about the identity of Shri Amit Gupta, its association with the appellant company etc. In fact, the appellant has not stated anything about Shri Amit Gupta at any stage of proceedings so far.

(*xii*) It is noted from the official website of the income tax Department (https://www.incometaxindia.gov.in/Pages/utilities/Notified-Scientific Research.aspx) that a number of research institutes have been approved u/s 35 (1)(ii) of the Act, which are located only at Jaipur and in Rajasthan, some of them are as under:

- Birla Science & Technology Centre, Jaipur
- M/s Indian Institute of Health Management Research, Jaipur
- Social Policy Research Institute, Jaipur
- Indian Institute of Marwari Enterpreneurship, Jaipur
- Jain Vishva Bharati, Ladnun, Rajasthan,

(*xiii*) The appellant has not stated anything why it had made such huge donations to M/s SHG & PH at such a far off place and whether it has verified about the genuineness of its activities before making such huge donation. I fail to understand why the appellant did not choose to make donations to the research institutes located at Jaipur or in the state of Rajasthan. It is pertinent to mention here that the appellant has made donation of Rs. 1 Crore each in three financial year i.e. 2011-12, 2012-13 and 2013-14 and has claimed deduction of Rs. 1.75 Crore in each of these years. These facts cannot be ignored.

(*xiv*) The appellant has also relied upon Explanation to section 35(ii) & (iii) of the Act, which reads as under:

Explanation- The deduction to which 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 association, university, college or other institution referred to in clause(ii) or clause(iii) has been withdrawn.] [emphasis supplied]

(*xv*) It is to be noted that the above Explanation is of no help to the appellant as the deduction was not disallowed by the AO to the appellant company merely on the ground that subsequent to such payment, the approval granted was withdrawn by the competent authority. In fact, it is the specific admittance of the authorized signatories of M/s SHG & PH in unequivocal terms that the said institute was used for providing accommodation entries of donations to various persons on commission basis @ 8% of such amount. Further, their admission in their statements was followed by filing application before the Hon'ble ITSC, wherein the income from such commission was offered for taxation, as discussed earlier in this order and has paid the huge taxes thereon, as is evident from the order of Hon'ble ITSC passed u/s 245D(1) of the Act.

(*xvi*) The contention of the appellant that opportunity of cross examination was not provided to it by the AO is devoid of any merit. It is to be noted that the AO has provided the copies of the statements recorded during the course of survey as relied upon, to the appellant, during the course of assessment proceedings i.e. it has confronted these statements. The appellant could not state who was 'Amit Gupta', who working as a broker for arranging the bogus donation entries and why its name appeared in the list of bogus donations arranged by him and how does the appellant has come into contact with him. Further, it is to be noted that the strict rules of Evidence Act do not apply to income tax proceedings. It may be mentioned that the AO is not debarred from relying on private sources of information, which he may not disclose to the assessee at all. But, when he proposes to use the same against the assessee, the result of any private inquiry, he should communicate to the assessee, the substance of such information so as to put the assessee in possession of full particulars of the case he is expected to meet and should further give him sufficient opportunity to meet it. On a perusal of assessment order that the AO has confronted to the appellant gist of the enquiries made and required it to explain why the donation to M/s SHG & PH should not be treated as bogus. There is no doubt that AO must place before the assessee all evidence gathered from private sources but he is not required by law in each & every case, to give to the assessee the right to cross-examine the parties from whom the evidence was gathered. In fact, he needs not even disclose the names of the parties because in that event confidentiality of the names of the parties would not be maintained. If the parties who have given evidence are to be assured confidentiality, the question of cross-examination would not arise. Such an assessment would be valid in law, so long as the assessee has been confronted with evidence gathered by the Assessing Officer from private and confidential sources and the assessee is given the opportunity of meeting the case made out in the assessment order. Further, the right of cross examination is not an absolute right as decided in *Nath International Sales* v. *UOI*, AIR 1992 (Del) 295 wherein Hon'ble Court has

also held that the right of hearing does not necessarily include right of cross examination. The right of cross examination must depend upon the circumstances of each case and also on the statute concerned (*State of J&K* v. *Bakshi Gulam Mohammad* AIR 1967 SC 122). The question, whether the assessee is entitled to cross examination is a question which may largely depends on the facts and circumstances of the case (*Shyamlal Biri Merchant* v. *UOI* 1993 (68) ELT 548, 551 (All.) In the present case no such circumstances are warranted as in the list of beneficiaries to whom accommodation entries were provided by the M/s SHG & GH contains the name of the appellant and the name of the broker who arranged such bogus transaction and the categorical admittance of the authorized signatories of M/s SHG & GH, as discussed earlier in this order. The appellant is trying to use this shield of "absence of opportunity of cross-examine" of the persons who were managing the show. But that will be miscarriage of justice if assessee be given benefit on this account. Even, it is also not possible to allow opportunity of cross-examination of each of the share broker, associated concern etc. to all the beneficiaries of the accommodation entries in view of the wide spread of the beneficiaries throughout India. Further, the Hon'ble Rajasthan High Court in the case of *Rameshwar Lai Mali* v. *CIT* 256 ITR 536(Raj.) has held that "there is no provision for permitting the cross examination of the persons whose statements were recorded during survey." it is further noted that the requirement of the statute for a valid assessment would be met if the appellant is confronted with the material which is to be used against the assessee while framing the assessment order. It may be mentioned that the appellant has not brought on record any material which may indicate that the persons whose statement were stated in the assessment order and relied upon by the AO, have retracted their statements.

(*xvii*) It is pertinent to mention here that in the written submissions, the appellant has harped upon the legal issues only and not even a single word has been stated about the findings of the AO as recorded in the assessment order, regarding the justification for making donation to M/s SHG & PH except stating that M/s SHG & PH was approved by the competent authority u/s 35 of the Act.

(*xviii*) Therefore, in view of the above discussion and looking to the particulars facts and circumstances of the case, it is held that the AO was justified in not allowing deduction of Rs. 1.75 Crore claimed by the appellant u/s 35(1)(ii) of the Act and hence, the same is hereby sustained. Hence, this ground of appeal is hereby rejected."

5. While pleading on behalf of the assessee, the ld AR has submitted as under:

All these grounds of appeal relate to disallowance of weighted deduction claimed by assessee u/s 35(1)(ii) of the Income Tax Act, 1961 on the contribution made of Rs. 1.00 Cr and are interlinked, thus the same are canvassed together for the sake of convenience.

Facts of the case are that during the year under consideration, assessee had made donation of Rs.1,00,00,000/- to "School of Human Genetics & Population Health" (in short SHGPH) an institute engaged in Scientific Research and notified by Central Board of Direct Taxes in terms of section 35(1)(ii) of the Income Tax Act, 1961 (the Act) vide notification no.4/2010 dated 28.01.2010 (F No.

203/64/2009/ITA.II) which was very well in existence and was valid during F.Y. 2013-14 relevant to A.Y. 2014-15 in which assessee made donation to the institute (APB 25). However, it was as late as in F.Y. 2016-17 i.e. vide order dated 15.09.2016 that the said notification was rescinded by the CBDT, vide notification no.82/2016 (F N 203/64/2009/ITA.II). Moreover same was ordered to be done with retrospective effect from 1.04.2007 (APB 39) on the basis of some enquiries done in the case of the institute i.e. SHGPH. Accordingly, ld. AO disallowed the weighted deduction claimed u/s 35(1)(ii) on the donation of Rs.1,00,00,000/-, which disallowance has been confirmed by ld.CIT(A).

At the outset, kind attention of your goodself is invited to provisions of section 35(1)(ii), which reads as under:

Expenditure on scientific research.

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

(*i*)…..

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

[Provided that such association, university, college or other institution for the purposes of this clause—

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

(B) such association, university, college or other institution is specified as such, by notification in the Official Gazette, by the Central Government;]

It is submitted that various sub sections of section 35 provide tax concessions for scientific research. Section 35(1)(ii) in particular, provides deduction in case of assesses who are not engaged in carrying out research work on their own and rather contribute to some other scientific research organization having its main object of undertaking scientific research or to a university, college, or other institution to be used for scientific research.

Proviso to section 35(1)(ii) provides that such institution, university, college, other institution has to be "approved" for such purposes by prescribed authority. Thus, before making contribution, an assessee has to ensure that institution is approved by prescribed authority, and then sum paid as donation would eligible for deduction in accordance with section 35(1)(ii).

It is noteworthy that weighted deduction equal to 175% of donation is available to assessee if it:

(*i*) pays donation to a research institution having object of undertaking scientific research; and

(*ii*) which is "APPROVED" as well as "NOTIFIED" for the purposes of this section in accordance with guidelines prescribed.

Your goodself would appreciate that lower authorities have:

- neither denied the fact of payment of donation by assessee;
- nor have raised any objection regarding approval status of said institute at the time when the payment was made by the assessee to the said society.

In this scenario, there is no reason to disallow the deduction claimed by assessee which was legitimately

available to it since it had complied all the conditions enumerated therein for claiming such weighted deduction.

It is submitted that CBDT in exercise to power conferred upon it, issues notifications, grants approvals wherever required by the Act. Before issuing such notifications/ granting approvals, CBDT makes necessary enquiries, investigation etc. to ensure the genuineness of such institutions and after analysis of the objects, activities, personnel (whether they hold requisite qualification or not) etc. notifies such organization for this purpose and publishes in Official Gazette of Government of India. Thus, a common person/ entity, who wishes to avail the benefit of section 35(1)(ii) by contributing a specified sum, is not supposed to and in fact is not equipped with so much tools to verify genuineness of the activities of such institution. It is bonafide belief that once approval is granted by CBDT, contribution can be safely made to such institution more particularly when such institution is not related at all to the assessee and assessee has no control whatsoever over the activities of such institution in any manner.

In the instant case also, assessee has acted under bonafide belief that institution (SHGPH) to which donation is being made, is engaged in research activity as per its objects, as obviously after detailed enquiries, reporting, investigation etc. the CBDT must have issued notification No. 4/2010 dated 28.01.2010 treating SHGPH to be covered for Sec. 35(1)(ii). Merely for the reason that such notification has been rescinded after the expiry of more than 2 year from the end of the previous year relevant to assessment year under appeal (precisely on 15.09.2016) (APB 39) that too with retrospective effect from 01.04.2007, the ld. AO has made the disallowance.

Accordingly, it is very much clear and evident that approval granted to SHGPH was very much in force at the time when assessee made donation to it and assessee had no reason to disbelieve the operation of approval and notification of the SHGPH at the relevant time and thus deduction was rightly claimed by assessee. The approval and notification continued to be in force even till the end of previous year relevant to present assessment year. Disallowing deduction by Ld. AO, on the basis of the subsequent notification through which the CBDT has rescinded the approval, is unjust and unlawful, as not only on the date of giving donation but even afterwards till the end of previous year, the notification of granting approval was in force. If at all some retrospective action was to be taken against SHGPH, it should adversely affect the society and cannot and should not affect the other persons including the assessee company who acted in bonafide manner. It is settled proposition of law that any amendment in statute with retrospective operation cannot be made which had the effect of additional tax burden meaning thereby any levy of tax with retrospective operation cannot be made which is against the spirit of law.

It has been held by Hon'ble Supreme Court in the case of *Hitendra Vishnu Thakur* v. *State of Maharashtra*, AIR 1994 S.C. 2623 (Case law PB 46-63) that a procedural statute should not generally speaking be applied retrospectively, where the result would be to create new disabilities or obligations, or to impose new duties in respect of transactions already accomplished. Further, a statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.

The Hon'ble Apex court in the case of *CIT* v. *Vatika Township (P.) Ltd.* [2014] 49 taxmann.com 249/227 Taxman 121/367 ITR 466 (relevant para 30-37) (Case law PB 17-45) has held that the beneficial amendment which effect the public generally and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given retrospective effect.

Hon'ble Courts have held that any retrospective changes or orders having retrospective effect have to be passed in rarest cases where it is very much warranted. Moreover the scope of retrospective order is limited to the person/ entity concerned (here in this case the society i.e. SHGPH). This retrospective effect cannot in any way be extended to third parties and doing so would not only be against the settled

position of law but would also be clearly doing un-justice to third parties who acted in bonafide manner. Thus further adverse action in the hands of third parties (like that of assessee) on account of retrospective notification passed in the case of institute be held as unjust and unlawful.

In fact, the fact of cancellation of notification was not in the knowledge of assessee till the time it was conveyed by Ld. AO during assessment proceedings. Thus, assessee was under bonafide belief that SHGPH has a valid approval in terms of the above stated gazette notification available with it who after examining the legality of the said approval has made the contribution and claimed the deduction.

Apart from the above submission, kind attention of the Hon'ble bench is invited to explanation to section 35(ii) & (iii), which reads as under:

[Explanation- The deduction to which 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 association, university, college or other institution referred to in clause(ii) or clause(iii) has been withdrawn.] [emphasis supplied]

On perusal of above, it is evident that in the year under consideration when the assessee company had made the donation i.e. on 13.01.2014, SHGPH was having a valid approval from the appropriate authorities and according to this explanation the claim of the assessee could not be denied based on any event having occurred subsequently after more than two years.

The Hon'ble Kolkata ITAT in the case of *DCIT* v. *Maco Corporation (India) (P.) Ltd.* [IT Appeal No.16 (Kol) of 2017, dated 14-3-2018] (Case Law PB 82-91) has allowed relief to assessee in the identical circumstances where deduction on account of donation to same Institute i.e. School of Human Genetics and Population health (SHGPH) was disallowed by ld. AO, by holding that at the outset we find that Taxation Laws (Amendment) Act 2006 has introduced explanation to section 35(1)(ii) of the Act. The provisions of the Act, in view of the explanation, are very clear that payer (the assessee) 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.

It was further observed by the Hon'ble Tribunal that there is absolutely no provision for withdrawal of recognition u/s 35(1)(ii) and case of assessee falls on much better footing than the facts before Hon'ble Apex Court in the case of *Industrial Infrastructure Development Corporation (Gwalior) M.P. Ltd.* v. *CIT* [2018] 90 taxmann.com 281/253 Taxman 480/403 ITR 1 Gwalior as in that case, the power of cancellation of registration u/s 12A of the Act was conferred by the Act on the ld. CIT w.e.f. 01.10.2004 and the Hon'ble Apex Court held that prior to that date, cancellation of registration could not happen. But in the instant case, there is absolutely no provision for withdrawal of recognition u/s 35(1)(ii) of the Act. Moreover it was also held 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 weighed deduction u/s 35(1)(ii) of the Act.

Thus, deduction claimed by assessee is absolutely in accordance with law and deserves to be allowed.

It is further submitted that while confirming the order of ld. AO, ld. CIT(A) has further observed that :

- the donee institute i.e. SHGPH has filed an application before Hon'ble Settlement Commission , Kolkata offering additional income of Rs.15.75 crores for A Y 2012-13, 2013-14 and 2014-15 and the same has been admitted.

- why assessee has made such huge donations to such a far off place
- right to cross examination is not absolute

In this regard, it is submitted that merely because such done (SHGPH), who is completely unrelated to the assessee, accepts certain income subsequent to receiving such donation for the errors and wrongdoing on its part, the same cannot be a reason to deny the assessee from a valid deduction available to it. Also appellant was not confronted with any such petition as stated to have been filed by the donee institute (SHGPH) before the Hon'ble Settlement commission, by ld. CIT(A) nor any order of the Hon'ble Settlement commission was provided to the appellant. Such contention of assessee is supported by following decision:

Hon'ble Kolkata ITAT in the case of *Rajda Polymers* v. *DCIT* in [IT Appeal No. 333 (Kol) of 2017, dated 8-11-2017] (case law PB 96-102), wherein Hon'ble Bench has observed that "…..Merely because the donee goes to Hon'ble Settlement commission and declares some additional income thereon, it does not automatically implead the assessee herein on the negative side and the express provisions of the Act cannot be ignored thereon. There cannot be any malafide that could be attributed on the assessee herein. We find that the assessee was under the bonafide belief and had made proper due diligence before granting donation to HHBRF which was duly recognized u/s 35(1)(ii) of the Act at the time of giving donation. We hold that if the subsequent notification cancelled the registration u/s 35(1)(ii) of the Act, the same does not attract the donation made by the assessee when the said notification was in force. The bonafide belief of assessee donor at the time of granting donation to an institute on the basis of recognition then available, cannot be disturbed by subsequent event. This is more clearly spelt out in the provisions of the Act itself by way of explanation to section 35(1) of the Act. Hence even as per the provisions of the Act, the denial of deduction u/s 35(1)(ii) of the Act is not in order……."

The ld. CIT(A) while confirming the disallowance, has also alleged that when there were other notified institutions in Jaipur also, then why assessee has donated such huge amount to an institution located outside Jaipur. In this regard it is submitted that it is the outlook of assessee as to which institution it wishes to donate and AO or other authority cannot ask to make the donation to any specified institute. It is also relevant to state that the institute to whom assessee has made the donation had a valid approval in force at the time of making donation.

In this regard, reliance is placed on decision of Hon'ble Kolkata ITAT in the case of *Rajda Polymers* (*supra*) (Case Law PB 96-102) wherein Hon'ble bench in para 5.6 at page 7 of the order has categorically observed that it is well settled that it is always the prerogative of the assessee to give or not to give any donation to a particular institution, which wisdom cannot be questioned by the revenue. The question of business expediency of an expenditure had to be viewed from the point of view of the businessman and not from the view point of the revenue.

It is further submitted that while making disallowance, Ld. AO solely relied upon the statements of Smt. Moumita Raghwan [Treasurer] and Smt. Samadrita Mukherjee Sardar [Secretary], office bearer of SHGPH which were recorded during the course of survey conducted at its premises on 27.01.2015 wherein they have stated to have accepted that SHGPH is not working for the research activity and is mainly issuing the donations receipts on commission basis. Copies of the same were supplied to the assessee (ABP 27-38). From the perusal of the statements of above said executives supplied by Ld.AO, it could be noticed that there were contradictions and anomalies in the statements and thus it could not be conclusively said that the society was not engaged in the research work and had not actually received the donation for the research activity actually carried out by them. It is further submitted that at no stage, they had accepted that SHGPH is solely indulged in the issue of bogus donation receipts as against which actually the society was engaged in regular research works which is evident from the answer to question No. 20 of the statements of Smt. Moumita Raghwan (ABP 31) which is reproduced as under:

"Q.20 Please state in detail all the activities done by your organization since last four years.

Ans 20. I am submitting the details of research publications made by our organization during last few years separately. Our organization also extends its charitable activities such as development of health consciousness among downtrodden people, strengthening basic public health system, intervening to combat HIV / AIDS epidemic etc."

Similarly in the statement recorded on oath u/s 133A Samadrita Mukherjee Sardar (ABP 33) in reply to question No. 8 has clearly stated the activity of SHGPH and also in reply to question No. 16 (ABP 35) stated the details of the research scientists associated with SHGPH.

It is further submitted that nowhere in the statement any of the office bearers have stated that they had issued any bogus donation receipts to the assessee company. Moreover none of the office bearer any where admitted that they had refunded the donation amount received by the society to the assessee company in cash or by any other mode. However, a reference of some Amit Gupta, stated as a middleman is made but neither any statements of Amit Gupta, if any, were provided nor any enquiry report, if any, was provided and also no opportunity to cross examine him was allowed. It is also submitted that no evidences / material has been brought on record by Ld. AO, from which it could be established that the assessee company had either made a bogus donation or had received back the donation amount in cash or in any other mode.

Thus the allegation of the bogus donation is solely based on the presumptions without any cogent material against the assessee company. During the course of assessment proceedings, a request was made before Ld. AO to provide opportunity for cross examination of the office bearers (APB 19-24) of whose statements have recorded behind the back of assessee and made basis for making addition in the hand of assessee, however no such opportunity was provided by Ld.AO. Moreover, it was also requested to the Ld. AO to examine other office bearers of the society and the results of the examination please be intimated to assessee for rebuttal by assessee company. However, ld. AO failed to examine any other office bearer and thus acted only on half baked information / presumptions. Even ld.CIT(A) confirmed such action of ld. AO in denying opportunity of cross examination by simply observing that strict rules of Evidence Act do not apply to income tax proceedings and that the right of cross examination is not an absolute right by placing reliance on some judicial pronouncements, however such judgements have been passed in different set of facts and furthermore have been superseded by Hon'ble Apex Court judgement in the case of *Andaman Timber Industries* v. *C.CEx* 2015 (324) ELT 641 which now governs the field wherein it has been held as under (Case law PB 13-16):

"Assessment - Natural justice - Denial of opportunity to cross-examine witnesses - Denial of opportunity to the assessee to cross-examine the witnesses whose statements were made the sole basis of the assessment is a serious flaw rendering the order a nullity in as much as it amounted to violation of principles of natural justice - Impugned order as passed by the Tribunal is set aside."

Further, reliance is placed on the judgment of Hon'ble Allahabad High Court in the case of *CCE* v. *Shyam Traders* 2016 (333) ELT 389 wherein, the judgment of Supreme Court in Andaman Timber Industries was followed and the requirement of allowing cross-examination of witnesses was held as in-dispensable for adjudication.

Reliance is also placed on the following decisions:-

P.S. Abdul Majeed v. *Agricultural Income Tax & Sales Tax Officer* [1994] 209 ITR 0821 (Ker.)

"Reliance on the auctioneers' records and treating them as if they were conclusive and as gospel truth is doing violence to the principles of the natural justice. Petitioner had in fact questioned the correctness of those records and stated that he had not sold any cardamom to the extent of 241 kgs.

suggested by the assessing authority through auctioneers. He denied the sales in toto. He also prayed for an opportunity to cross-examine the auctioneers. When such a request was made it was incumbent on the officer to afford opportunity to the assessee to cross-examine the authors of those books. When such a request was made it was incumbent on the officer to afford opportunity to the assessee to cross-examine the authors of those books as was laid down by this Court in *Shaduli* v. *State of Kerala* [1972] 29 STC 44 (Ker.), which was confirmed by the Supreme Court in *State of Kerala* v. *KT. Shaduli* [1977] 39 STC 478."

CIT v. *EASTERN COMMERCIAL ENTERPRISES* [1994] 210 ITR 0103 (Cal.)

"As a matter of fact, the right to cross-examine a witness adverse to the assessee is an indispensable right and the opportunity of such cross-examination is one of the corner-stones of natural justice."

CIT v. *D.M. JOSHI* [1999] 239 ITR 0315 (Guj.)

"The Tribunal after considering all the relevant material on record, held that the AO ought not to have relied upon the affidavit of J.C. Dave made on 11th June, 1988, without affording an opportunity to the assessee of cross-examining J.C. Dave and that reliance placed on the affidavit without giving the assessee an opportunity to cross-examine J.C. Dave at the time when he was alive, was in violation of the principles of natural justice."

It is further submitted that conclusions reached or inferences drawn upon incomplete examination / enquiry of the facts tantamount to infringement of the fundamental right of equality of the Petitioner guaranteed under Article 14 of the Constitution of India.

Very Recently, Hon'ble Supreme Court in the case of *CIT* v. *Sunita Dhadda* [Special Leave Petition (Civil) No. (s) 9432 of 2018, dated 28-3-2018] (case law PB 1-12) after considering all the judgements including of Andman Timber has again affirmed the importance of cross examination and held that if the AO wants to rely upon documents found with third parties, the presumption u/s 292C against the assessee is not available. As per the principles of natural justice, the AO has to provide the evidence to the assessee & grant opportunity of cross-examination. Secondary evidences cannot be relied on as if neither the person who prepared the documents nor the witnesses are produced. The violation of natural justice renders the assessment void. The Dept cannot be given a second chance.

It is further submitted that such persons whose statement were relied upon for making disallowance were neither summoned during assessment proceedings nor any commission was issued to the competent authorities for their examination during the course of assessment proceedings before coming to the conclusion that the donation made by the assessee company was not genuine. In fact no material was brought on record by Ld. AO so as to prove that how the donation paid by assessee was received back except the so called statements of some office bearers recoded during the course of survey at the premises of the society.

Reliance is also placed on the decision of Hon'ble Kolkatta ITAT 'D' Bench in the case of *Saimed Innovation* v. *ITO* in [IT Appeal No. 2231 (Kol) of 2016 order dated 13.09.2017] (Case Law PB 92-95) wherein under identical facts, the Hon'ble bench has allowed the weighted deduction claimed u/s 35(1)(ii) by holding that the statements recorded on oath during the survey cannot be relied upon. Further held that when opportunity for cross examination the third party was not given, no addition could be made on the basis of such statements.

Your goodself would appreciate that assessee has fulfilled all the conditions specified for claiming deduction u/s 35(1)(ii) and on the other hand, Ld.AO has not discharged his onus of proving it otherwise by bringing on record any evidences on the basis of independent enquiries made during the course of assessment proceedings.

In the circumstances it is submitted that the deduction claimed by the assessee company is duly supported by a valid approval through gazette notification of the Government of India which was not withdrawn in the year under consideration, when the assessee made the donation to SHGPH. Therefore in view of the explanation to section 35(1) (ii), disallowance of weighted deduction on the donation of Rs.1,00,00,000/- deserves to be deleted.

- *B.P. Agarwalla & Sons Ltd.* v. *CIT* [1993] 71 Taxman 361/[1994] 208 ITR 863 (Cal.) (case law PB 78-81)
- *ITO* v. *Nahar Singh Sadhu Singh* [2001] 118 Taxman 930/[2002] 253 ITR 471 (Punj. & Har.) (case law PB 72-74)
- *Jai Kumar Kankaria* v. *CIT* [2002] 120 Taxman 810/[2001] 251 ITR 707 (Cal.) (case law PB 75-77)
- *K.M. Scientific Research Centre* v. *Lakshman Prasad* [1998] 229 ITR 23 (Allahabad)
- *Seksaria Biswan Sugar Factory Ltd.* v. *IAC* [1990] 52 Taxman 257/184 ITR 123 (Bom.)
- *Chotatingrai Tea Estate (P.) Ltd.* v. *CIT* [1999] 236 ITR 644 (Gau.)
- *ITO* v. *M.C. Ponnoose* (SC) 118 ITR (St.) 32

6. On the other hand, the ld CIT DR has relied on the orders of the authorities below.

7. The Bench have heard both the sides on the issues raised in appeal, perused the material available on the record and also considered the case laws relied upon. The assessee is a private limited company engaged in manufacturing of rolled steel products. Return of income was filed electronically on 26/09/2014. The assessee has claimed weighted deduction U/s 35(1)(ii) of the Act. The assessee had made donation to a institute engaged in Scientific Research. The authorities below has not allowed the deduction. The assessee had made donation of Rs. 1,00,00,000/- to School of Human Genetics & Population Health, an institute engaged in scientific research and notified by the Central Board of Direct Taxes in terms of Section 35(1)(ii) of the Act vide notification No. 4/2010 dated 28/01/2010. The institute, whom the donation was made was in existence and notified during the F.Y. 2013-14 when the assessee has made donations. The CBDT has rescinded notification on 15/9/2016. Although, it has been made retrospective effect from 01/4/2007. This institute was validly recognized by the CBDT on the date of donation made by the assessee. The approval granted to the institute was very much in force at the time of donation made by the assessee. The assessee had no reason to disbelieve the operation of approval and notification of the institute. In such a situation, the deduction claimed by the assessee is justified. The subsequent notification by the CBDT rescinding the approval retrospectively shall not or should not affect the claim of the assessee. There was no information with the assessee regarding non-genuinity or not observing the standard fixed by the CBDT for making eligible itself for deduction U/s 35 of the Act. The assessee's act was in a bonafide manner. It is well settled proposition of law that no additional tax burden can be put on the assessee by making retrospective operations of certain notifications or withdrawal of notifications. In the case of *Hitendra Vishnu Thakur* v. *State of Maharastra* (*supra*), the Hon'ble Supreme Court has held that a procedural statute should not generally speaking be applied retrospectively, where the result would be to create new disabilities or obligations, or to impose new duties in respect of transactions already accomplished. Further, a statute which not only changes the procedure but also creates new rights and liabilities shall be continued to be prospection in operation, unless otherwise provided, either expressly or by necessary implications. Similarly in the case of *Vatika Township (P.) Ltd.* (*supra*), the Hon'ble Supreme Court has held that the beneficial amendment which effects the public generally and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a

purposive construction, would warrant it to be given retrospective effect. Thus the retrospective effect can be given only for the beneficial amendments but not to put the additional burden that too on third party. Further the explanation to Section 35(1) of the Act also provides that deduction to which 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 association, university, college or other institution, referred to in clause (ii) or clause (iii) has been withdrawn. The assessee has made donation i.e. on 13/01/2014, the institute was having a valid approval from the appropriate authorities and the assessee's claim cannot be denied. The Coordinate Bench of Kolkata ITAT in the case of *Maco Corporation (India) (P.) Ltd.* (*supra*) copy of which has been placed at page Nos. 82 to 91 of the paper book, wherein the donation was made to the same institute i.e. school of Human Genetics and Population Health, was held that in view of explanation to Section 35(1)(ii) of the Act, would not be withdrawn subsequently when recognition has been rescinded. Similarly the Coordinate Bench of Kolkata ITAT in the case of *Saimed innovation* (*supra*) has held that weighted deduction claimed U/s 35(1)(ii) of the Act cannot be denied on the basis of statement recorded during the survey and no opportunity was provided to cross examine the third party, who has given such statement. Further in view of the decision of Hon'ble Allahabad High Court in the case of *Shyam Traders* (*supra*) and the decision of Hon'ble Supreme Court in the case of *Andaman Timber Industries* (*supra*) and the various other case laws relied upon by the ld. A.R., we find that the authorities below were not justified in denying claim of deduction U/s 35(1)(ii) of the Act to the assessee, hence, we set aside the orders of the authorities below.

8. In the result, appeal of the assessee is allowed.

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*In favour of assessee.