

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
" A " BENCH, AHMEDABAD
(CONDUCTED THROUGH VIRTUAL COURT AT AHMEDABAD)

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
Ms MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./IT(SS)A No.110/AHD/2018
निर्धारण वर्ष/Asstt. Year: 2013-14

Rajesh Sajjanraj Bafna, 204, Sthapatya Flats, 1, Vrundavan Complex, Ellora Park, Baroda. PAN: ADGPB6747G	Vs.	D.C.I.T., Central Circle-1, Baroda.
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(Applicant)		(Respondent)
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Assessee by :	Shri Hardik Vora, A.R
Revenue by :	Shri Vijaykumar Jaiswal, CIT.D.R

And

आयकर अपील सं./IT(SS)A No.112/AHD/2018
निर्धारण वर्ष/Asstt. Year: 2013-14

Mihir P. Panchal, B-2, Gokool Socciety, Chital Road, Amreli. PAN: ABJPP7642M	Vs.	D.C.I.T., Central Circle-1, Baroda.
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(Applicant)		(Respondent)
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Assessee by :	Shri Sulabh Padshah, A.R
Revenue by :	Shri Vijaykumar Jaiswal, CIT.D.R

सुनवाई की तारीख / **Date of Hearing** : **14/03/2022**
घोषणा की तारीख / **Date of Pronouncement**: **30/03/2022**

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned two appeals have been filed at the instance of different Assessee against the separate orders of the Learned Commissioner of Income Tax (Appeals)-12, Ahmedabad, of even dated 21/02/2018 arising in the matter of assessment order passed under s. 143(3) r.w.s. 153A of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2013-14.

First, we take up the ITA No. 110/AHD/2018, an appeal by the assessee, Shri Rajesh Sajjanraj Bafna

2. The only issue raised by the assessee is that the learned CIT(A) erred in confirming the addition made by the AO for Rs. 1.2 crores on account of unexplained investment under the provisions of section 69B of the Act.

3. The necessary facts of the case are like this that there was a search operation carried out by the DGCEI in the case of Corner Point Infrastructure Pvt. Ltd (for short CPIPL) dated 19th February 2014. In the course of search operation, an excel sheet was recovered from the laptop of the employee of CPIPL namely, Shri Mitesh Patel containing the details of receipt of payment through cheque and cash against different flats and in the name of different persons. Such employee in the statement furnished before the search team of DGCEI, has admitted that such sheet contains the details of the on money received in cash by CPIPL against the Flats in different projects from different parties. This fact was also admitted by the director of CPIPL namely Shri Mehul Pandya to have received on money in cash against the Flats Booking.

3.1 The name of the assessee was also appearing in the excel sheet wherein the component of cash was recorded. Thus, it was inferred that the assessee has made the payment of cash which was not recorded in the books of accounts. The relevant extract of the excel sheet stand as under:

Heritage Corner

No.	Name of Owners	Flat No.	Date	Cash	Cheque	Total Amt.	PAN	Address
4.	Rajesh Bafna	3	16-Oct-12	11,00,000				
			25-Oct-12	29,00,000				
			27-Oct-12	30,00,000				
			29-Dec-12	25,00,000				
			29-Dec-12	25,00,000				
	Total			1,20,00,000				

3.2 In view of the above, the AO proposes to make the addition in the hands of the assessee for making the unexplained investment under section 69B of the Act a show-cause notice was issued to the assessee.

3.3 The assessee in response to such notice submitted that he has not purchased any property from CPIPL. Thus, the question of alleging that the assessee has made unexplained investment does not arise.

3.4 There was the survey operation in the case of CPIPL under the provisions of section 133A of the Act dated 16/17 October 2014 wherein the director Shri Mehul Pandaya has clarified that the impugned excel sheet is a dumb document. As such, the impugned excel sheet was prepared by its employee namely Shri Mitesh Patel who was trying to learn the accounting concept and he was doing practice for the same.

3.5 The impugned excel sheet was found from the premises of the 3rd party without any signature of the assessee. Likewise, there was a search operation under

section 132 of the Act dated 7 January 2014 at the premises of the assessee. But no such document demonstrating the investment in the nature as specified under section 69B of the Act was found from the premises of the assessee. Similarly there was no other corroborative document found either from the premises of CPIPL or of the assessee except the excel sheet. Thus in the absence of any corroborative document, no adverse inference can be drawn against the assessee.

3.6 However, the AO rejected the contention of the assessee by observing that there was the cash payment made by the assessee outside the books of accounts without recording the same. As there was no payment made by the assessee by cheque, there is a possibility of having no official documents for the property which would have been prepared by the assessee. But the date wise cash entries with the specific amounts against the name of the assessee were found from the premises of the 3rd party, containing the flat No. 3, which cannot be ignored.

3.7 The excel sheet found from the premises of the 3rd party cannot be considered as a dumb document. As per the AO, there were bank entries which were recorded in such excel sheet besides the cash entries which were matching with the records and the books of accounts. Likewise, relevant information were recorded in the excel sheet such as the date, customer name, scheme/ project details and that too in a proper order and in some cases addresses and PANs of customer were also mentioned. The entries shown in such excel sheet were duly admitted by the employee and the director of CPIPL in the course of search operation carried out by DGCEI and there was nothing brought on record suggesting that employee and the director of CPIPL have retracted from the statement furnished before the DGCEI.

3.8 The employee namely Shri Mitesh Patel has been working with the assessee for more than 15 years and was handling all cash and bank transactions. Thus employee of the assessee was the key person as well as having rich experience.

Therefore, the contention of the director of the CPIPL during survey proceedings under section 133A of the Act, that the employee was learning the accounts, is afterthought.

3.9 Admittedly, there was no document found in the course of the search operation carried out at the premises of the assessee demonstrating the unexplained investment in the projects of CPIPL. But it is not necessary to have recovered such document from the premises of the assessee to prove that the assessee has made unexplained investments under the provisions of section 69B of the Act. There is a possibility that the assessee might have kept the necessary documents at other premises or that the only one party will keep the necessary records as decided between them.

3.10 There is no need to bring any other document to corroborate the entries reflected in the excel sheet. It is for the reason that such excel sheet has been prepared in a very professional manner and contains all the necessary details such as the name of the scheme, name of the buyer, amount of payment through bank as well as cash, and in some cases address of buyers and their PAN. All these entries do not require any separate corroborative documents, particularly, in a situation where cheque entries matching with the books of accounts of the CPIPL. The contents of the excel sheet were duly admitted by the assessee and its employees during the search operation by the DGCEI.

3.11 It was also pointed out by the AO that the group concern of the assessee namely M/s Farmville Enterprise has arranged the land transaction deal for CPIPL which evidences that there was some nexuses between the assessee and CPIPL. Therefore, the contention of the assessee that CPIPL has no connection of whatsoever with the assessee does not appear to be correct. Since the group concern of the assessee has carried out the land transaction deal which establishes the nexuses of the assessee with the CPIPL. Based on the above, the AO treated

the sum of Rs. 1.2 crores as unexplained investments under section 69B of the Act and added the same to the total income of the assessee.

4. Aggrieved assessee preferred an appeal to the learned CIT(A) who confirmed the order of the AO by observing as under:

3.4 The submission is considered. The undisputed facts of the present case are that the DGCEI conducted search in the case of CPIPL on 19.02.2014 wherein digital evidences were found from the laptop of Shri Minesh Patel who is an employee of such company and later became a director in said company. The seized data found from the premises of such party contains details of cash receipt, cheque receipt, name of the owner of the property and flat number, which are reproduced by the AO at page No. 22 to 38 of Assessment Order. Such details reflect that the Appellant has made payment in cash for Rs.1,20,00,000/- on various dates in current Assessment Year to CPIPL against flat no.3 in the Scheme. Neither the appellant nor CPIPL has proved that these amounts were duly entered in the regular books of accounts and were disclosed for the purpose of Income-tax. The AO has provided copy of statement of Shri Mehul Pandya and Shri Minesh Patel recorded by the DGCEI to the Appellant. On careful consideration of above statements it is proved that in reply to Question No. 4, Shri Minesh Patel has categorically admitted that seized data found from his laptop contains details of receipt/sale of CPIPL and such details include cheque as well as cash portion. In reply to Question No. 5, said person has admitted that he is carrying out banking transactions as well as collection work as per instruction of Mehulbhai hence entries in laptop pertain to collection received from customers. It was also admitted by said person that amounts received through cheque are deposited in bank and cash received is given to Shri Mehul Pandya, owner of the project. Such statement clearly proves that CPIPL has received cash collection as well cheque collection towards its various bookings. During the course of search by DGCEI statement of Shri Mehul Pandya was also recorded on 19th/20th February, 2014 wherein in reply to Question No. 3 he has stated that he is agreeing with facts stated by Shri Minesh Patel and confirmed that entries shown on above pages are related to payment received in cash and cheque from their customers. Both the statements clearly prove that CPIPL has received cash/cheque payments towards sale of premises. The statements recorded are during the course of search only and have more evidentiary value than statement recorded during the course of survey.

3.5 It is also observed that subsequent to search carried out by the DGCEI, survey 1 u/s 133A of Income Tax Act was carried out at CPIPL on 17th October, 2014 wherein Shri Mehul Pandya has stated that entries were made by Shri Minesh Patel in his laptop only for learning data entries in excel sheet. On this basis Appellant has argued that statement of Shri Mehul Pandya as well as Shri Minesh Patel recorded by the DGCEI should not be relied upon. However, this contention of the Appellant cannot be accepted as Shri Minesh Patel was working as an accountant-in-charge for all the 1 banking transactions carried out by the Group since last 14 to 15 years and now during the course of survey, Shri Mehul Pandya is stating that Shri Minesh Patel was learning accounting basics, which clearly shows that such statement was given in survey proceedings to avoid taxation and same is clearly an afterthought. The explanation of the appellant does not stand on preponderance of probabilities and reasonableness of prudence. Even if Shri Minesh Patel is conceded momentarily to be learning accounting basics why will he, out of all things, make entries in the names of the persons and of the amount who booked the properties and why said entries were not in some other test/practice file establishing the appellant's later contention. No person will make dummy entries in the live data/file of a concern. Thus Shri Minesh Patel was not learning accounting basics and the entries are not random and imaginary. It is

undisputed fact that Shri Mehul Pandya, owner of CPIPL has clearly admitted on-money receipt during the search carried out by the DGCEI and his retraction in survey proceedings after a lapse of 8 months cannot have any evidentiary value more particularly when no evidences are submitted which can prove that the statement recorded by DGCEI are under threat or coercion. It is also not the case that the statement given during search is contradictory and false and suffers any infirmity. It is also observed that in entire statement recorded during the course of survey Mr. Mehul Fandya is unable to explain what seized data indicate other than the fact that it reflects cash as well as cheque receipts received from various customers. It is also gathered that the DGCEI has also issued demand notice for collection of service tax from CPIPL towards cash portion reflected in seized material and no appellate decision has been received till date which can prove that seized data does not show receipt of on-money by CPIPL. There is another clinching fact which totally goes against the appellant that the appellant's wife Smt. Rashmi Bafna has acquired a flat in the project (flat no.2 though in the incriminating document the mention is of flat no.3) and it is natural that the entry of the receipt has been kept in the name of the appellant and thus it is not a case that the appellant has not made any booking/ investment in the Project and that the entry in the incriminating document is fictitious and without any basis.

3.6 The Appellant has also argued that search was carried out in his case wherein no document for on-money payment is found hence addition cannot be made. However, this argument of the Appellant cannot be accepted as cogent evidences along with admission of relevant parties before the DGCEI were found from the premises of third party. The additions cannot be deleted merely on the ground that no data relating to payment is found from search at the Appellant's premises when other circumstantial evidences along with documents clearly prove that CPIPL has received on-money from various customers including the Appellant. It is quite possible that one party maintains record of all transactions and other party does not maintain record of any transaction or if the record is maintained it is kept at the place and in the form which could not be noticed/accessed by the search team. These are matter of habit/practice of a person/concern. The Appellant has not disputed the fact that no property was in fact booked or purchased by him or his family members which also prove that the Appellant has made on-money payment as reflected in laptop seized from the premises of third party. His wife has come to acquire flat no.2 in the Scheme, ft is also observed that during the course of Assessment Proceedings, the AO has provided relevant seized materials as well as statement of employee and director of CPIPL and the Appellant in his written submission, reproduced in Assessment Order, nowhere has asked for cross examination of above parties hence argument of the Appellant that statement of third party is not binding on him in absence of cross examination cannot be, accepted at this stage. The Hon'ble Gujarat High Court in the case of AmrapaJi Fincap Limited 73 taxmann.com 97 has clearly held that "where Settlement Commission denied Assesses for cross examination of different witnesses, whose statements were recorded behind its back and relying upon statement of these witnesses to some extent rejected application for settlement, since Settlement Commission has also taken into consideration other facts available on record, there was no scope for interference'. Even in present case seized material found from the premises of third party clearly proves that the Appellant has made on-money payment to them and even the Service Tax Department has issued demand notice for collecting additional service tax along with interest and penalty on such on-money portion received by CP1PL from various persons,

3.7 The Appellant has also argued that the AO has relied upon statement of third party hence addition should not be made. It is observed that data found from the laptop of the employee of CP1PL reflects data relating to booking received by them against various units and booking amount include both cheque amount and cash amount. As stated herein above, both employee and director in their statements before the DGCEI have admitted receipt of on-money and nowhere, they were able to prove that such documents do not reflect on-

money receipt. No cogent/plausible explanation was provided by both the parties which can support the argument of the Appellant that no on-money payment is made. The Appellant has relied upon various decisions in support of his argument but in all the decisions the Courts have categorically held that there was no tangible material available to prove that seized material found from the premises of third party does not reflect on-money transactions and additions were made on surmises whereas in present case the seized material itself proves that the Appellant has made on-money payment and even such receipt is admitted to be on-money by employee as well as director of CPIPL in their statements recorded on the date of search. The Hon'ble Delhi High Court in the case of Usha Iron & Ferrometal Corporation Limited V/s CIT, 42 tax.mann.com 3 has held that "where AO made addition on account of alleged bogus freight and forwarding expenditure by relying on testimony and deposition of employee of Assessee Company in view of fact that testimony of such employee remain unrebutted, impugned addition was to be confirmed." The Hon'ble Delhi High Court in the case of Gupta Perfumers Put. Limited V/s Income Tax Settlement Commission 348 ITR 86 has held that "where in a settlement application certain seized papers were referred to which belong to third persons, such seized papers can be used and utilised against such third persons." The Hon'ble Gujarat High Court in the case of Bhanuvijaysinh M. Vaghela V/s ITO, 33 taxmann.com 555 has held that "where loose paper seized from residence of third party was signed by Assessee as well as third party which indicated that amount in question was given by Assessee by way of loan, same was rightly taxed under Section 69". Reliance is also placed on Prakash Chand Dhadda V/s Income Tax Settlement Commission, Addl. Bench - H, New Delhi, the head note of which reads as under:

"IT: Where in search of third party, certain currency notes were seized bearing assessee jeweller's name with coded figures, in absence of any entry in books of account substantiating claim of purchase of emerald from said party, Settlement Commission was justified in holding that it was a case of undisclosed money lending for purpose of earning interest."

*3.8 Considering the facts of the case, and relying upon the various decisions cited supra, it is held that the Appellant did make on-money payment of Rs. 1,20,00,000/- for booking flat in the project developed by CPIPL and such amount was not recorded in the books of account hence the same represents unexplained investment in the hands of Appellant. It is also seen that Mrs. Rashmi Bafna, wife of the appellant did acquire a flat in the said project (flat no.2 though in the incriminating document the mention is of flat no.3) and it was natural that the entry of the receipt in the incriminating document was kept in the name of the appellant. Thus, the AO is held to be justified in making the addition of Rs.1,20,00,000/- in the hands of Appellant. Accordingly, the addition made by AO is confirmed and this ground of appeal is **dismissed**.*

5. Being aggrieved by the order of the learned CIT(A), the assessee is in appeal before us.

6. The learned AR before us filed a paper book running from pages 1 to 139 and contended that the sole basis of the addition made by the authorities below was the excel sheet recovered from the premises of the CPIPL in the course of the search by DGCEI. Based impounded excel sheet, it was concluded by the DGCEI that the transaction recorded in impugned excel sheet represents the amount

recovered from the customer on which service tax has not been paid by CPIPL. Accordingly the demand of services was raised. However, the Hon'ble CESTAT was pleased to delete the addition made by the service tax department treating the transactions found in such excel sheet in cash as dumb documents. Accordingly, learned AR requested that there cannot be any addition for unexplained investment in the hands of the assessee on the basis of such excel sheet.

6.1 The learned AR further contended that the premises of the assessee was also subject to the search under the provisions of section 132 of the Act and there was no document of whatsoever was found from the premises of the assessee suggesting any investment made by the assessee in the project of CPIPL. Thus the learned AR requested to delete the addition made by the authorities below.

7. On the contrary, the learned DR contended that the Hon'ble CESTAT has not deleted the demand of the service tax in entirety. Thus the contention of the assessee that the impugned addition cannot be made as the addition has been deleted by the CESTAT department cannot be relied upon.

8. The learned DR also contended that, the document found during the search by DGCEI is not a dumb document as it contains the banking transactions as well. The Id. DR vehemently supported the order of the authorities below.

9. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, we note that the addition was made in the hands of the assessee on account of unexplained investments made in the project developed by CPIPL. It was the allegation of the revenue that the assessee has made cash investments in the project of CPIPL. The basis of the allegation by the Revenue was that an excel sheet was recovered from laptop of key employee of the CPIPL in the course of the search conducted by DGCEI. The name of the assessee was very much appearing in such excel sheet

recovered by DGCEI and based on which the demand of service tax was raised upon CPIPL. Accordingly, based on such excel sheet, inference was drawn by the AO that the assessee has made investment in the projects of the CPIPL either directly or indirectly. The learned CIT(A) subsequently confirmed the order of the AO.

9.1 There is no ambiguity the fact that the entire rigmarole for making the addition in the hands of the assessee was revolving to the excel sheet found by the DGCEI the course of search proceedings. This fact, on confrontation to the learned DR, was also not disputed by him. Interestingly, the Hon'ble CESTAT in the proceeding of service tax has held the impugned excel sheet as dumb document with respect to cash transactions recorded therein and deleted the demand of service tax with respect to cash transactions recorded therein which was made on the basis of such excel sheet. The relevant finding of the Hon'ble CESTAT reads as under:

As regards the demand of Service Tax of Rs.67,10,232/- on certain Cash income, purportedly received by the Appellant and not taken in books of accounts, we agree with the Appellant the no independent corroborative evidence, except some loose entries in the computer on the Accountant has been adduced by the revenue authorities to substantiate such serious charge. No statement of any buyer is also recorded to corroborate such facts. Affidavits filed by Shri Mehul Pandyam being Affidavit dated 28.03.2014 and dated 28.03.2014 as well as Shri Minesh Patel, being affidavit dated 20.02.2014 to the effect that actually no such cash was received is also placed on record by the Appellant.

We also find merit in reliance on plethora of decisions by the Appellant in support of the contention that in absence of any independent corroborative evidence, mere loose entries done in computer for practice of accounts of statement that too when retracted, cannot form sole basis for demanding the tax. The CESTAT in the case of Gupta Synthetics Ltd. 2014 (312) E.L.T. 225 (Tri.- Ahmd.) has held that demand cannot be based on mere private records, without any other substantial corroborative proof. That similar view was taken in the case of M/s Bhor Rubber Factory 2006 (198) E.L.T. 549 (Tri.-Mumbai) the demand on this count therefore cannot be sustained.

9.2 Now the controversy arises, whether the basis on which the addition was made by the authorities below has been done away in service tax proceeding, can the same basis be used against the assessee under the income tax proceedings. The answer stands in negative for the reason that the entire basis of the addition, once has been done away, we are of the view that there cannot be made any

addition under the income tax proceedings on the same basis in the given facts and circumstances.

9.3 At this juncture, it is also important to note that, the Revenue has also not been able to establish based on cogent materials that the assessee directly or indirectly has made investments in the project developed by the CPIPL. As per the excel sheet cash amount of Rs. 1.2 crores has been received by CCIPL from assessee against the booking of flat No. 3 in heritage corner project of CPIPL. However, there is no information available with the revenue except that excel sheet, which has already been done away by the revenue Department, that such flat number was booked/registered in the name of the assessee or any other person associated to assessee. It is also interesting to note that the Department was empowered under various section of the Act such as 131/133(6) of the Act for necessary verification but none of the authorities below, has exercised such power to establish the trail that the assessee either directly or indirectly has booked the flat.

9.4 At this stage, it is also imperative to remind that the proceedings under the service tax and the income tax are distinct and independent to each other. Therefore, a question may arise that the outcome of the service tax proceeding with respect to any litigation can be used to draw an inference in the proceedings initiated under the income tax Act? Principally, it appears that both the proceedings being service tax and income tax are distinct and independent to each other on legal count but the factual aspect will be always remain the same in either of the proceeding. In the given case also, the fact is constant that an excel sheet was found by DGCEI during search procedure which was containing some amounts in cash which was recorded against particular flats number of particular project from some person. The cash entry recorded in such excel was treated by both service tax authority and authority under income tax as the unaccounted cash received by the CPIPL against booking of flats. Based on this fact, the income tax proceeding was triggered in the hands of the assessee for making unaccounted investment as such

sheet contained the assessee's name. However the Hon'ble CESTAT in appeal before it against demand raised under service tax held that such excel sheet as dumb document having no evidentiary value with respect to cash transactions. This finding of the Hon'ble CESTAT was based on facts and not on legal principle which will remain the same in any proceeding under any other Act. Therefore, once the basis of the addition has gone away, then to our considered view all other consequential proceedings will have no legs to stand.

9.5 At the time of hearing, a query was posted to both the learned AR and the DR whether the order of the Hon'ble CESTAT has been challenged before any higher authority. The learned AR submitted that there was no further appeal made by the services department to any higher authority against the finding of the CESTAT. This submission of the learned AR of the assessee was not controverted by the learned DR appearing on behalf of the Revenue. The learned DR has also not brought any evidence contrary to the finding of the Hon'ble CESTAT demonstrating that the entry recorded in such excel sheet are actual transaction.

9.6 It is also interesting to note that there was search operation under the provisions of section 132 of the Act carried out at the premises of the assessee but no document of whatsoever was recovered from the premises of the assessee suggesting that assessee has purchased any flats in the project of CPIPL or payment in cash was made by him (the assessee) to CPIPL. Thus, in the absence of any documentary evidence found during the course of search, no adverse inference can be drawn against the assessee.

9.7 In view of the above and after considering the facts in totality, we are of the view that no addition of whatsoever is warranted in the hands of the assessee for the reasons provided in the preceding paragraph. Accordingly, we set aside the finding of the learned CIT(A) and direct the AO to delete the addition made by him. Hence, the ground of appeal of the assessee is allowed.

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

Coming to ITA No. 112/AHD/2018, an appeal by the assessee Shri Mihir P. Panchal

10. At the outset, we note that issue raised by the assessee in its ground of appeal is similar to the grounds raised in the case of Shri Rajesh Bafna in ITA NO. 110/Ahd/2018. Therefore, the findings given in ITA No. 110/AHD2018 shall also be applicable for the assessee in his appeal in ITA No. 112/Ahd/2018. The appeal of the assessee Shri Rajesh Bafna has been decided by us vide paragraph No. 9 of this order in his favour. The learned AR and the DR also agreed that whatever will be the findings for the issue raised in ITA No. 110/Ahd/2018 shall also be applied for the issue raised by the appellant. Hence, the grounds of appeal filed by the assessee is hereby allowed.

10.1 In the result appeal of the assessee is allowed.

11. In the combined results, both the appeals filed by the different assessee are **allowed.**

Order pronounced in the Court on 30/03/2022 at Ahmedabad.

**Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER**

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

Ahmedabad; Dated **(True Copy)**
30/03/2022
Manish