

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "SMC, MUMBAI

Before Shri R P Tolani, Judicial Member

ITA No.6535/Mum/2016
Assessment Year : 2001-02

Late Shri Kantilal C Kothawala By Legal Heir Dr. Asha Jhaveri A/22, Technocraft Society, V S Marg, Prabhadevi, Mumbai- 400 025 PAN AABPK1498H	Vs.	ITO 18(1)(3), Mumbai
(Appellant)		Respondent)

Appellants By : Shri Jitendra Jain
Respondent By : Ms. Beena Santosh

Date of Hearing :31.01.2017

Date of Pronouncement : 31.01.2017

ORDER

Per R P Tolani, Judicial Member

This is assessee's appeal.

2. Ground no.I in relation to section 148(1) was not pressed and, hence, dismissed.
3. One issue is raised by following ground:

"II Merit

3. *The Ld. CIT(A) erred in upholding the action of A.O. in making addition of Rs.11,02,500/- relying on the diary seized from the premises of a third party without verifying the authenticity of the contents of the said diary. The Appellant, therefore, prays that the addition of Rs.11,02,500/- under section 68 of the Act is unjustified and the same may be deleted.*

4. *The Ld. CIT(A) failed to appreciate that Mr. Shashikant J Mandavkar, purported to have been maintained the seized diary, during the cross examination categorically denied of receiving any money from the Appellant. Hence, the addition of Rs.11,02,500/- under section 68 of the Act is without any basis and the same may be deleted."*

4. The learned counsel for the assessee contends that identical issue arose in various other cases, which have been considered by the Tribunal vide its order dated 11.09.2015 in ITA 306/Mum/2014 for A.Y. 2001-02 in the case of Dr Prakesh Kher, which are as under:

- i. Mr. Babanrao V Mande, ITA 3441/Mum/2009, A.Y. 2000-01, dated 20/08/2010
- ii. Mr. Vijay D Dagha, ITA No. 3718/M/2011, A.Y. 2001-02 dated 27/08/2014
- iii. Mr. Vilas Shankar Dalvi, ITA No.1807/Mum/2013 dated 12/06/2013

Considering all these orders, it was held that

- i) no material has been brought on record by the AO that any clinching evidence of payment of capitation fees to Shri Prakash Patil was brought on record.
- ii) The burden was on the AO to demonstrate by sufficient evidence that the assessee had indeed paid separate cash donation/capitation fees in cash to DY Patil Group for medical college.

In the aforesaid three judgments, on similar facts and circumstances, learned CIT(A) had deleted the additions, whereas in the case of Dr. Prakash Kher and the assessee in question, the learned CIT(A) has taken different view without giving any cogent reason as to why a different view has been taken.

5. The learned counsel for the assessee contended that the issue in question, on facts and circumstances, is covered in favour of the assessee by numerous judgments as mentioned above.
6. The learned DR supported the orders of the authorities below.
7. I have heard the rival submissions and have perused the material available on record. The facts and circumstances are similar in the above referred cases, which has been decided by the Mumbai Bench of this Tribunal in the case of Dr. Prakash Kher (supra). Respectfully following them the ground raised on merits is allowed.
8. In the result, the assessee's appeal is partly allowed.

Order pronounced in the open court on this day of 31st January, 2017.

**Sd/-
(R P Tolani)
JUDICIAL MEMBER**

Mumbai, Dated : 31st January, 2017.
SA

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai.
4. The CIT
5. The DR, 'SMC' Bench, ITAT, Mumbai

BY ORDER

//True Copy//

(Assistant Registrar)
Income Tax Appellate Tribunal, Mumbai