

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "जी" मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

श्री सी. एन. प्रसाद, न्यायिक सदस्य एवं श्री राजेश कुमार, लेखा सदस्य के समक्ष
BEFORE SHRI C.N. PRASAD, JM AND SHRI RAJESH KUMAR, AM

ITA NO.103/Mum/2015
(निर्धारण वर्ष / Assessment Year: 2002-03)

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| Dr.Anjali Malpani, Januna Sagar, 6 th floor, Bhagat Singh Road, Colaba, Mumbai-400005 | <u>बनाम/</u> Vs. | Asst.Commissioner of Income Tax, 11(2), Aayakar Bhavan, M K Road, Mumbai-400020 |
| स्थायी लेखा सं./जीआइआर सं./PAN : AAHPM0693E | | |
| (अपीलार्थी /Appellant) | : | (प्रत्यर्थी / Respondent) |

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| अपीलार्थी की ओर से / Appellant by | : | Shri Hari Raheja |
| प्रत्यर्थी की ओर से/Respondent by | : | Shri G Nantha Kumar |

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| सुनवाई की तारीख /Date of Hearing | : | 26.12.2016 |
| घोषणा की तारीख /Date of Pronouncement | : | 28.12.2016 |

आदेश / ORDER

PER RAJESH KUMAR, A. M:

This is an appeal filed by the assessee challenging the order dated 10.11.2014 passed by the Id.CIT(A)-3, Mumbai for the assessment year 2002-03.

2. The issue raised in the various grounds of appeal is against the confirmation of penalty by the Id.CIT(A) as levied by the AO on the addition of Rs.12,19,055/-.

3. Facts of the case in brief are that the assessment was framed under section 143(3) of the Income Tax Act, 1961 (the Act) vide order dated 31.1.2005 making assessment of total income at Rs.88,32,200/- by making an addition of Rs.27,91,810/-. The assessee is a medical practitioner in Gynee. A survey under section 133A of the Act was carried out on the premises of the assessee on 17.1.2002 and the assessee was found to have suppressed the fees as recorded in the books of accounts apparent from the receipts books on which lesser amounts were entered whereas on the reverse of each receipt more amount was stated to be received. The AO during the course of assessment proceedings observed that the amount recorded in the books of account as per receipt book vis-a-vis compared to what has been mentioned on the reverse of each and every receipt which was detailed at page 5 to 7 of the Assessment Order to be Rs.27.91.810/- and the said amount was added to the total income of the assessee. Thereafter, the matter was carried to the First Appellate Authority who reduced the addition to Rs.12,19,055/- . On further appeal before the Income Tax Appellate Tribunal, the addition was further reduced to 7,00,000/- vide order dated 14.9.2016 passed in ITA No.7617/Mum/2013. The AO imposed the penalty of Rs.13,48,237/- being 150% of the tax sought to be evaded vide order dated 20.3.2007 passed u/s 271(1)9c) of the Act after the CIT(A) passed the order in the quantum appeal. On first appeal the Id CIT(A) partly allowed the appeal of the

assessee by directing the AO to reduce the penalty @ 100% of tax on the quantum confirmed by the FAA to Rs.12,19,055/- and hence the assessee is in appeal before this Tribunal.

4. The Id. AR vehemently argued before us that it was a case of purely estimation of income of the assessee based on the amount mentioned on the back side of receipts issued to the patients by the assessee. The Id. AR submitted that this total amount charged from customers was the amount mentioned on the front of the receipts in lieu of the medical services rendered to the patients. The Id. AR brought the attention of the Bench that the addition which was made at Rs.27,91,810/- by the AO was reduced to Rs.12,19,055/- by the FAA and it was further reduced by the ITAT vide decision rendered in ITA No.7617/Mum/13 (supra) to Rs.7 lakhs. The Id. AR submitted that fees received from the patients could not be explained before the lower authorities as the matter is very old and it is not possible to produce them before the AO for inquiry. It was only in order to buy peace of mind, the it was prayed before the Bench to make reasonable addition on this account. The Id. AR finally submitted that the Id.CIT(A) has grossly erred in confirming he penalty at 100% of the tax sought to be evaded on the assessee for the reasons that no penalty could be imposed where the addition was made on estimation basis. Finally, the Id.AR prayed before the Tribunal the order by the Id.CIT(A) be

set aside and direction be issued to the AO to delete the penalty as no penalty can be levied in the case of estimation of income.

5. The Id. DR relied on the orders of authorities below.

6. We have carefully considered the rival submissions and perused the material placed before us including the orders of authorities below. We find that during survey action on the assessee it was found there was some discrepancy in accounting the professional receipts which was not accounted accordingly to the gross amount mentioned on the back side of the receipts issued to the patients and the amounts mentioned on the front of the receipts were quite lower. The AO accordingly calculated the suppression of receipts at Rs.27,91,810/- and made the addition to the total income of the assessee which was reduced by the Id. CIT(A) to Rs.12,19,055/-. We also find that the Tribunal further reduced it to Rs.7 lakhs vide para 7 of the said decision which is reproduced below:

"7. We have considered the rival contentions and also perused the material available on record. We find that the assessee is a Doctor specialized in treatment of infertility. A survey action was conducted u/s 133A of the Act by the Revenue in the premises of the assessee on 17-01-2002. No incriminating material were found and seized by the Revenue during the course of survey action. As per the details submitted during the course of assessment proceedings u/s 143(3) read with Section 143(2) of the Act, receipt book as were inventorised during survey operations were impounded by the AO u/s 131(3)(a) of the Act. There was a difference between the amount mentioned in the back side of the receipt book and the books of accounts maintained by the assessee. The assessee explained that the inscription written on the back of the receipts indicates the total consolidated fees received from the patient for all

the four entities, i.e. the assessee, her husband Dr. Aniruddha Malpani, Malpani Infertility Clinic and fourthly the anesthetists. It is the say of the assessee that there is no discrepancy in the amounts recorded at the back of receipt book and the amount recorded by all the four entities in their books of accounts which was offered for taxation. The assessee has submitted a detailed reconciliation chart which is placed in the file. It is also the say of the Revenue that the assessee has charged lower amount of fees from patients as compared to the rate list in the book "How to have a Baby – Overcoming infertility" which book was authored by the assessee and her husband Dr. Aniruddha Malpani and hence to that extent income has not been recorded in the books of accounts and hence the undisclosed income which is brought to tax as confirmed by learned CIT(A). Now this is the second round of litigation before the Tribunal. The Tribunal in first round of litigation has, inter-alia, directed to get these amounts confirmed/verified from patients. The Revenue and the assessee both made an attempt to get the amount confirmed but the same could not be confirmed from all the patients as the patients after a long gap of period are now not available/traceable. The patients from whom confirmation was received confirmed the amount which is recorded in books of accounts by these four entities and nothing incriminating has come on record as their confirmation did not reflect any discrepancies in the amount paid by them and the amounts recorded in the books of accounts of these four entities. Rest of the patients are now not available/traceable despite efforts made by the assessee and the Revenue and virtually it has gone into realm of impossibility as the patients have either moved/changed addresses or were out of Mumbai/India and hence their present location is not traceable as around 14-15 years have elapsed. We could see the difficulty of both the revenue as well the assessee to get confirmation/verification from all the patients now after a gap of 14-15 years as the patients are now not traceable/available. The assessee has come forward and expressed her desire not to go for further litigation and to settle the matter to end this protracted litigation by offering a concession that keeping in view the entire facts and circumstances reasonable disallowance be sustained by the Tribunal which will be accepted by the assessee to end this litigation. Nothing incriminating which is conclusively confirmed by Revenue is on record but there is no doubt possibility of leakage which can only be confirmed once patients confirmation/ verification are on record. We have observed that the matter is very old and it is now almost an impossible task to get confirmations/ verification from patients at this stage after 15 years

and also that this is the second round of litigation before the Tribunal, We have also observed that the remaining addition sustained is of Rs. 12,19,055/- on this account in the hands of the assessee which is subject matter of litigation before us. The assessee has stated that she will not pursue further litigation if the matter is settled by the Tribunal and the learned counsel for the assessee has given concession in this regard. Keeping in view peculiar facts and circumstances of the case as enumerated above as well concession offered by the assessee and in exercise of our power u/s 254(1) of the Act with a view to render substantial justice to both the parties , we confirm/sustain the addition to the tune of Rs. 7 lacs as undisclosed income in the hands of the assessee as against the addition of Rs. 12,19,055/- sustained by the Id. CIT(A). Thus, the assessee will get relief of addition of Rs.5,19,055/- as undisclosed income as confirmed/sustained by the learned CIT(A) with the conditions that the assessee will deposit all due taxes and interest accrued thereon as per provisions of the Act on the additions sustained by us within 60 days of the receipt of this order. We order accordingly”

From the above stated facts, we observe that the income of the assessee was assessed purely on estimated basis which is further fortified by the fact that addition was reduced by the FAA and also by the tribunal in quantum appeal. In our view, it is trite law that in case difference of opinion, where the addition is made on the basis of estimation, conjecture and surmises, the penalty u/s 271(1)(c) cannot be levied. We are, therefore ,inclined to set aside the order of the Id.CIT(A) and direct the AO to delete the penalty.

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

Order pronounced in the open court on 28th Dec,2016

Sd

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(C.N. Prasad)

न्यायिक सदस्य / Judicial Member

(Rajesh Kumar)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated :28.12.2016
SRL,Sr.PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

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आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai