

**IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI**

**BEFORE SHRI AMIT SHUKLA, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUH RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA NO. 805/MUM/2022 (A.Y: 2014-15)

Indicare Hospital Pvt. Ltd., Flat No. 6, 3 rd Floor Hosbanoo Mansion, Gokhale Road Near BPL Gallery, Naupada Thane - 400062 PAN: AABCI2433F	v.	ACIT – 1 6 th Floor, Ashar I.T. Park Road No. 16Z Wagle Industrial Estate Thane, Mumbai - 400604
(Appellant)		(Respondent)

Assessee Represented by	:	Shri Dharan Gandhi
Department Represented by	:	Shri Soumendu Kumar Dash
Date of Hearing	:	20.07.2022
Date of Pronouncement	:	06.09.2022

ORDER

PER S. RIFAUH RAHMAN (AM)

1. This appeal is filed by the assessee against order of the Learned Commissioner of Income Tax, National Faceless Appeal Centre, Delhi [hereinafter in short "Ld.CIT(A)"] dated 25.08.2021 for the A.Y.2014-15.
2. Brief facts of the case are, assessee filed its return of income on 20.11.2014 declaring total loss of ₹.1,32,19,650/ for the A.Y. 2014-15.

Subsequently assessee filed revised return of income on 30.09.2015 declaring total loss of ₹.1,31,20,139/-. The case was selected for scrutiny under CASS and notice u/s. 143(2) and 142(1) of Income-tax Act, 1961 (in short "Act") were issued and served on the assessee. In response AR of the assessee attended and submitted the relevant information as called for. Authorized Representative submitted computation of income, Audit Report in Form No. 3CB and 3CD along with financial statements with annexures, copies of returns of directors and other details.

3. Assessee is managing the business in the name and style of "Kalyan Diagnostic Centre" at Kalyan. The two directors of the company have equal shareholding and the directors are Dr. Hitendra Dahiwadkar and Dr.Swapna Dahiwadkar. During the year the turnover is declared at ₹.1,88,97,198/- and declared the net loss of ₹.63,36,192/-. During the course of assessment proceedings, Assessing Officer observed that assessee has made payment of rent to both of its directors aggregating to ₹.17,61,840/- @ ₹.150 sqft for the premises at Sarvoday Villa situated at Kalyan (West). The Assessing Officer observed that the rent paid to related parties were apparently on the higher side, a letter dated 08/11/2016 was issued to the assessee in order to explain the reasonableness of the rent paid. The assessee vide letter dated

12.11.2016 submitted that there was no escalation in the rent paid @ 150 per sq.ft since the last 5 years and if the normal escalation rate of 10% is considered, then the average current rent will be ₹.180/- per sq.feet. Accordingly, assessee contended that there is no excessive payment of rent.

4. After considering the submissions of the assessee, Assessing Officer deputed Circle Inspector to ascertain the rate of actual rent prevailing in the relevant area. The Circle Inspector submitted his report as per which the average rent prevailing in the area is of ₹.60 to ₹.75 per square feet. Based on the above Report, Assessing Officer rejected the contentions of the assessee and adopted average rate @ ₹.70/- per square feet and then he worked out excess rent paid by the assessee at ₹.9,43,680/- [₹.1761840 (-) ₹.818160] u/s. 40A(2B) of the Act.

5. Aggrieved assessee preferred an appeal before the Ld.CIT(A) and filed detailed submissions, for the sake of clarity it is reproduced below: -

"Submissions:

*4. The Ld. AO adopted rate of Rs. 70/- per sq.ft. and calculated reasonable annual rent of Rs. 8,18,160/- (970*70*12). He thus arrived at the excess rent of Rs. 9,43,680/- and disallowed the same.*

5. However, as per the rent agreement, the rent is paid @ Rs. 150/- per sq.ft. per month. Also, there is no escalation in rent for all the

years of tenure of the rent agreement. If the normal escalation is considered of 10%, the calculation will be as follows:

Year	Rent Per sq.ft
1	150
2	165
3	180
4	195
5	210

Then the average rate will be Rs. 180/- per sq.ft. Instead, assessee will be paying Rs. 150/- per sq.ft. Therefore, there is no excess payment.

6. Moreover, both the directors are in maximum tax slab and they have shown the rent income in their personal returns and paid tax accordingly. Hence, there is no loss to the revenue.

7. In fact, there is a loss to the company and directors are paying tax on the rent received at maximum rate. Income tax department doesn't have any right to decide as to what is a reasonable amount of expense. That is the prerogative of the management of the company.

8. In this respect, we rely on the following decisions:

Hon'ble Bombay High Court in case of Commissioner of Income Tax v. NoshiraDara Mody [2014], wherein it has been held that where recipient of commission payment accepted same and his return also disclosed amount received from assessee, no disallowance could be made under section 37.

Hon'ble Gujarat High Court in case of Principal Commissioner of Income Tax v. Gajarat Gas Financial Services Ltd [2015]. it was held that where assessee's company as well as assessee's parent company, both were assessed to tax at maximum marginal rate, it could not be said that service charge was paid by assessee company to parent company at unreasonable rate to evade tax.

9. We have already mentioned that the rent income has already been taxed in the directors' personal returns and they have also paid the taxes.

In view of above, you are therefore requested to delete the disallowance of Rs. 9,43,680/-."

6. After considering the submissions of the assessee Ld.CIT(A) sustained the additions made by the Assessing Officer.

7. Aggrieved assessee is in appeal before us raising following ground in its appeal: -

"1. The Ld Commissioner of Income Tax (Appeals), NFAC, Delhi has erred in confirming action of AO of confirming the disallowance u/s.40A(2)(b) in respect of rent paid to the directors to the tune of Rs. 9,43,680/- on the ground that it is excessive."

8. At the time of hearing, Ld. AR of the assessee brought to our notice the facts of the case and submitted that the directors of the company who are also in the tax bracket of 30% similar to the tax slab applicable to the assessee. Further, it was submitted that assessee has continually incurring loss. Therefore, there is absolutely no loss to the revenue. In this regard he relied on the following case laws: -

(i). CIT v. Indo Saudi Services (Travel) (P.) Ltd., [219 CTR 562 (Bombay)]

(ii). CIT v. V.S. Dempo & Co. (P.) Ltd., [244 CTR 102 (Bombay)]

9. Further, he submitted that Assessing Officer has adopted the report submitted by the Circle Inspector, however, he has not shared the above report with the assessee. Ld. AR submitted that Assessing Officer cannot adopt the rates submitted by the Circle Inspector without sharing the

same with the assessee. He prayed that the addition made by the Assessing Officer is excessive and prayed that the appeal may be allowed.

10. Ld.DR relied on the orders of the Authorities below.

11. Considered the rival submissions and material placed on record, we observe that assessee has paid rent to its own directors by adopting rate at ₹.150 per sq.ft to the properties owned by the directors. Whereas, we observe that Assessing Officer opined that the rent paid by the assessee are in excess of normal / market rate. Considering the fact that the directors are related parties, in order to verify the same Assessing Officer deputed the Circle Inspector to determine the actual rent payable in the same locality. Based on the report received from the Circle Inspector he adopted the rate @70 per sq.ft. Assessee objected to adoption of such rate without sharing the report with the assessee and without giving proper opportunity to the assessee. We are in agreement with the fact that Assessing Officer has adopted the rate without giving the proper opportunity to the assessee before adopting the rate. Further, we observe that the rent paid to the two directors who are the joint owners of the property (ground floor Sarvoday Villa). However, we noticed that Dr.Hitendra Vinayak Dahiwadkar has declared rent to the extent of

₹.8,80,920/- received from the assessee where as another director Dr.Swapna Hitendra Dahiwadkar has declared only ₹ 1,80,000/- as the rent received from the assessee. There is certainly a mismatch in the return of income declared by the directors. Therefore, we are inclined to remit this issue back to the file of the Assessing Officer to determine the actual rent after sharing the Circle Inspector report with the assessee. Needless to say that the Assessing Officer shall provide adequate opportunity of being heard to the assessee. At the same time, we direct the Assessing Officer to verify the return of income filed by the directors and in case it is found that the return declared by the directors are not fully declared the Assessing Officer may disallow the same as per the law.

12. In the result, appeal filed by the assessee is allowed for statistical purpose.

Order pronounced in the open court on 06th September, 2022

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER
Mumbai / Dated 06.09.2022
Giridhar, Sr.PS

Sd/-
(S. RIFAUH RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum