

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : B : NEW DELHI

BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SHRI C.M. GARG, JUDICIAL MEMBER

ITAs No.4329/Del/2019
Assessment Year: 2012-13

Shiv Kumar Sharma,
B-2/28A, Yamuna Vihar,
Delhi – 110 053.

Vs. ACIT,
Circle-57(1),
New Delhi.

PAN: ANDPS3834N

(Appellant)

(Respondent)

Assessee by	:	Shri Ved Jain, Advocate; Shri Aman Garg, CA; & Ms Uma Uphadya, CA
Revenue by	:	Ms Kirti Sankratyayan, Sr. DR
Date of Hearing	:	21.12.2022
Date of Pronouncement	:	23.02.2023

ORDER

PER C.M. GARG, JM:

This appeal filed by the assessee is directed against the order dated 15.03.2019 of the CIT(A)-38, New Delhi, relating to Assessment Year 2012-13.

2. The Id. Counsel of the assessee submitted that the assessee does not want to press grounds No. 4 to 11 which are repetitive and general in nature, therefore, grounds No.4 to 11 of the assessee are dismissed as 'not pressed.' The remaining effective grounds No.1 to 3 read as follows:-

"1. On the facts and circumstances of the case Ld CIT(A) erred in confirming the reassessment made by AO when the ingredients of section 147 were not fulfilled.

2. On the facts and circumstances of the case Ld CIT(A) erred in confirming the reassessment made by AO when reasons for reopening were recorded by AO by merely relying on report of Investigation department without independently applying his/her mind for forming belief that appellant income has escaped assessment.

3. On the facts and circumstances of the case and in law, Ld. CIT(A) has erred in confirming the action of AO in adding sum of Rs. 57,00,000/- in appellants income as undisclosed expenditure on account of payment of capitation fee paid for admission of his son in medical college on the basis of presumption and not on any evidence."

3. The Id. Counsel of the assessee submitted that the issue is squarely covered in favour of the assessee by the order of the ITAT Delhi Bench dated 05.03.2019 in ITA No.1561/Del/2018 for AY 2010-11 in the case of Shri Naresh Pamnani vs. ITO wherein under identical facts and circumstances, the addition made by the AO has been deleted in absence of any material on record against the assessee and in absence of cross-examination of the statement of Dr. P. Mahalingam on behalf of the assessee. The Id. AR also submitted that in such a situation the material which was not confronted to the assessee cannot be used against the assessee for making the impugned addition, therefore, the addition made in the hands of the assessee may kindly be deleted.

4. Replying to the above, the Id. Sr. DR strongly supported the orders of the authorities below. However, she did not controvert that under identical facts and circumstances the addition made by the assessee has been deleted on merits.

5. On careful consideration of the above submissions, first of all, we may point out that the ITAT Delhi Bench in the case of *Shri Naresh Pamnani (supra)* held as follows:-

"2. Briefly the facts of the case are that assessee filed return of income declaring income of Rs.29,14,950/-. An information was received from DDIT, Investigation, New Delhi, on the basis of which, the case of the assessee was reopened under section 147 of the Income-Tax Act, 1961. The reasons are reproduced in the assessment order, in which, it is mentioned that information was received from DDIT, Investigation, New Delhi, regarding donation/ capitation fees paid for the regular course fees to Santosh Medical College, Ghaziabad, for assessment year 2009-2010 through Pr.CIT, Delhi-15. The DDIT, Investigation New Delhi has submitted that a search and seizure action under section 132 of the Income Tax Act was carried out on 27th June, 2013 in Santosh Group of Institute & Dr. P. Mahalingam. During the search, certain documents/books of account were seized from the premises of H-1 to H-6, Santosh Nagar, Pratap Vihar. The main administrative block of the college which revealed receipts of donation/capitation fee, over and above the regular course fees, paid in cash by the parents of students admitted of accepting the donation/ capitation fees in cash and offered the unaccounted money so received for taxation in the relevant assessment year, In the case of the assessee, it was mentioned that he had made cash payment of Rs.19,75,000/- towards donation/ capitation fee over and above the regular course fees to the above college. Therefore, notice under section 148 was issued. The assessee was confronted with the query regarding cash payment to the above college. The assessee was asked to furnish documentary evidences of the source of the aforesaid payments in cash. The assessee is a Doctor by profession. During the course of assessment proceedings, statement of assessee was recorded under section 131 of the Income-Tax Act. The A.O. noted that Dr P Mahalingam has admitted in his statement under section 132(4) of the Income Tax Act that he had accepted the capitation fees from the assessee and surrendered the amount for taxation. The assessing officer, therefore, made addition of Rs.19,75,000/- in the hands of the assessee.

2.1 The assessee challenged the reopening of the assessment as well as the addition on merit before the Ld. CIT(A). However, appeal of assessee has been dismissed.

3. *The assessee, in the present appeal, challenged the reopening of the assessment as well as the addition on merit.*

4. *I have heard the Learned Representatives of both the parties and perused the material available on record.*

5. *Learned Counsel for the Assessee submitted that assessee raised specific ground on merit to challenge the addition on merit, but, the Ld. CIT(A) without any reason noted in the impugned order that assessee has not raised any ground in this regard. He has submitted that Ld. CIT(A) has reproduced all the grounds in the appellate order, in which, in Ground No.6, assessee has challenged the addition of Rs.19,75,000/-. He has submitted that A.O. or the Investigation Wing have not supplied copy of the statement of Dr P Mahalingam to him for rebutting his statement and no cross-examination to his statement have been allowed at any stage, therefore, this statement cannot be read in evidence against the assessee. He has referred to the statement of assessee recorded at assessment stage, copy of which is filed on record, in which he has denied to have paid any amount to Dr P Mahalingam or the above college as capitation fees. He, therefore, submitted that since no material has been confronted to assessee, therefore, no addition could be made against the assessee.*

6. *On the other hand, Ld. D.R. relied upon orders of the authorities below.*

7. *After considering the rival submissions, I am of the view that addition on merit is wholly unjustified. It is well settled Law that unless the incriminating documents or statement used against the assessee are confronted to assessee and assessee have been allowed to cross-examine such statements, no such material or statement, could be read in evidence against the assessee. I rely upon the decision of the Hon'ble Supreme Court in the case of Kishan Chand Chellaram 125 ITR 713 (SC). In the present case, the A.O. has relied upon the statement of Dr P Mahalingam, recorded during the course of search, under section 132(4) of the Income Tax Act against the assessee, in which he has admitted to have received capitation fees from the assessee of Rs.19,75,000/- in cash. The assessing officer recorded statement of assessee at assessment stage, in which, the statement of Dr P Mahalingam recorded under section 132(4) of the Income Tax Act, have been referred to, but, it is nowhere mentioned in which statement, if such copy of the statement was provided to assessee for explanation of assessee. The assessee denied to have made any cash payment to Dr P Mahalingam. The assessing officer in the assessment order also did not mention any fact if statement Dr*

P Mahalingam have been provided to the assessee for his comments or was confronted to assessee at any stage. The assessing officer did not record in the assessment order if statement of Dr. P Mahalingam recorded at the back of the assessee by the Investigation Wing, was allowed for cross examination on behalf of the assessee at any stage, therefore, statement of third party, cannot be used against the assessee unless assessee has been allowed a right to cross-examine such statement. The A.O. in the assessment order also did not mention, if any, material found during the course of search, was confronted to the assessee. Thus, assessee was justified in denying in making any cash payment to Dr. P Mahalingam at any stage. There is no material available on record to justify the addition against the assessee on merits. In the absence of any material on record against the assessee and in the absence of cross examination to the statement of Dr P Mahalingam on behalf of the assessee, such material cannot be used against the assessee so as to make the impugned addition. I, accordingly, set aside the Orders of the authorities below and delete the addition of Rs.19,75,000/-.

8. Both the parties also argued on initiation of reassessment proceedings and have also cited various case Laws and Ld. D.R. also submitted written submissions. However, in view of the fact that addition on merit have been deleted, the issue of reopening of assessment is left with academic discussion only. I do not propose to decide the same. In view of the above, appeal of assessee is allowed.

9. In the result, appeal of Assessee is allowed.”

6. Considering the totality of the facts and circumstances in the case of *Shri Naresh Pamnani (supra)* and facts and circumstances of the present case, we have no hesitation in holding that the facts and circumstances of both the cases are identical and similar. Therefore, respectfully following the said order of the coordinate Bench, we are of the view that no sustainable addition could be made in the hands of the assessee. Hence, the orders of the authorities below are set aside and the AO is directed to delete the addition in the hands of the assessee. Since the addition has been deleted on merit by following the order of the coordinate Bench of the Tribunal

in the case of *Shri Naresh Pamnani (supra)*, the issue of reopening of assessment is left with academic discussion only and we do not propose to decide the same. Accordingly, ground No.3 of the assessee is allowed.

7. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 23.02.2023.

Sd/-

(ANIL CHATURVEDI)
ACCOUNTANT MEMBER

Dated: 23rd February, 2023.

dk

Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Sd/-

(C.M. GARG)
JUDICIAL MEMBER

Asstt. Registrar, ITAT, New Delhi