

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "SMC" NEW DELHI**

**SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER**

आ.अ.सं./I.T.A No.1620/Del/2020

निर्धारणवर्ष/Assessment Year: 2007-08

Shaleen Prasad A-51, Sector-50, Noida, Uttar Pradesh.	बनाम Vs.	ITO Ward 52(2) New Delhi.
PAN No. ALBPP4385M		
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

निर्धारितीकीओरसे /Assessee by	Shri Ruchesh Sinha, Adv.
राजस्वकीओरसे /Revenue by	Shri Om Prakash, Sr. DR

सुनवाईकीतारीख/ Date of hearing:	27.12.2022
उद्घोषणाकीतारीख/Pronouncement on	10.03.2023

आदेश /ORDER

This appeal has been filed by the assessee against the order of the Commissioner of Income Tax (Appeals)-35, New Delhi dated 13.02.2019 for AY 2007-08.

2. At the very outset, the Ld. Counsel of the assessee submitted that the assessee does not want to press legal grounds. Therefore, ground nos. 1 to 4 of assessee are dismissed as not pressed. Ground no. 10 of assessee is general in nature. The remaining effective ground nos. 5, 6 & 7 read as follows: -

5. *"That the Ld.CIT(A) has erred in holding that it was the burden of the appellant to establish that no amount of capitation fees has been paid to M/s Santosh Medical College.*

6. *That the Ld.CIT(A) has erred on facts and in law in upholding the addition of Rs.32,50,000/- on account of alleged payment to M/s Santosh Medical College without providing any opportunity of cross examination and relying upon the information collected behind the back of the appellant.*

7. *That the impugned assessment order is arbitrary, illegal, bad in law and the violation of rudimentary principle of contemporary jurisprudence.”*

3. The Ld. Counsel of the assessee submitted that the Ld. CIT(A) has erred in holding that it was the burden/onus on the assessee to establish that no amount of capitation fees has been paid to M/s Santosh Medical College. The Ld. Counsel also submitted that the Ld. First Appellate Authority has erred in upholding the addition in the hands of the assessee on account of alleged payment to M/s Santosh Medical College without providing any opportunity of cross examination and relying upon the information collected behind the back of the appellant. The Ld. Counsel vehemently pointed out that the impugned assessment order is arbitrary, illegal, bad in law and has been passed in violation of rudimentary principle of contemporary jurisprudence. Therefore, addition made by the AO and uphold by the CIT(A) may kindly be deleted. The Ld. Counsel also placed reliance on the order of the ITAT, Delhi dated 05.03.2019 in ITA No. 1561/Del/2018 for AY 2010-11 in the case of Shri Naresh Pamnani Vs. ITO and subsequent order dated 04.10.2022 in ITA No. 219/Del/2020 for AY 2013-14 in the case of Shri Manjit Singh Gahlot Vs. ITO and submitted that the AO or the Investigation Wing have not supplied copies of statement of Dr. P Mahalingam to the assessee and no cross

examination to his statement have been allowed any stage. Therefore, addition made on the basis of information and material collected on the back of the assessee cannot be tackled as valid basis for making addition in the hands of the assessee.

4. Replying to the above, the Ld. Sr. DR supported the orders of the authorities below and submitted that the addition made by the AO and upheld by the Ld. CIT(A) is sustainable as the assessee failed to substantiate source of cash given to M/s Santosh Medical College as capitation fees.

5. On careful consideration of rival submissions, first of all I may point out that under identical facts and circumstances, a coordinate bench ITAT, Delhi in the case of Shri Naresh Pamnani Vs. ITO (supra), which has been referred by the coordinate bench of Delhi Tribunal in the subsequent order in the case of Shri Manjit Singh Gahlot Vs. ITO (supra), the Tribunal held as follows: -

*“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 statements 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 AO. 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/-."*

6. The Ld. Sr. DR has not controverted the factual position and the facts and circumstances of present case are quite identical and similar to the facts in the said case of Shri Naresh Pamnani (supra) and Shri Manjit Singh Gahlot (supra). In view of foregoing discussion and considering the totality of the facts and circumstances of the case noted above in the light of material on record as well as Order of the Tribunal in the case of Shri Naresh Pamnani, Delhi (supra), I am of the view that no addition could be made in the hands of assessee on account of payment of capitation fees. In view of the above, I set aside the Orders of the authorities below and delete the entire addition in the hands of the assessee.

7. In the result, appeal is partly allowed on merits.

Order pronounced in the open court on 10/03/2023

  
(C.M. GARG)  
JUDICIAL MEMBER

Dated: 10.03.2023

\*Kavita Arora, Sr. P.S.

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi