

IN THE INCOME TAX APPELLATE TRIBUNAL “G” BENCH, MUMBAI
BEFORE SHRI ABY T. VARKEY, JM AND AMARJIT SINGH, AM

आयकर अपील सं/ I.T.A. No. 901/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2014-15)

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आयकर अपील सं/ I.T.A. No. 900/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2015-16)

Sitaram Narayandas Patel (Deceased) by his legal heir Ashok Patel Plot No. 91, Ambey Vila, Next To Grant Hyatt, Vakola Bridge, Shivaji Nagar, Santacruz (East), Mumbai-400055.	बनाम/ Vs.	ACIT, Circle-22(3) At present jurisdiction with ACIT, Circle-22(1) Piramal Chamber Lalbaug, Parel, Mumbai-400012.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAKPP6860D		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Nishit Gandhi/Madhuri Tambe	
Revenue by:	Shri Suresh D. Gaikwad (Sr. AR)	

सुनवाई की तारीख / Date of Hearing: 13/07/2023

घोषणा की तारीख /Date of Pronouncement: 24/08/2023

आदेश / O R D E R

PER ABY T. VARKEY, JM:

These are appeals preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)/NFAC, Delhi dated 08.02.2023 for AY. 2014-15 and order dated 09.02.2023 for AY. 2015-16.

2. The main grievance of the assessee for AY 2014-15, is against the action of the Ld. CIT (A) confirming the action of the AO disallowing an amount of Rs.1,00,00,000/- [donations of Rs.75 Lakhs paid to M/s. Sahara Health and Education Society (hereinafter “M/s. Sahara Health”) and Rs.25 Lakhs paid to M/s. Tulsi Gramudyog Seva



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Samithi, Lucknow (hereinafter “*M/s. Tulsi Seva*”)] and the assessee also is aggrieved by the action of Ld. CIT(A) for violating principles of natural justice.

3. Brief facts of the case for AY. 2014-15 are that the assessee is a builder and developer carrying on the business under the name ‘Ambika Construction’ and has declared total income of Rs.3,13,26,420/-. Later, the case of the assessee was selected for scrutiny and the AO noted that the assessee had claimed deduction u/s 35AC of the Income Tax Act, 1961 (hereinafter “the Act”) [*Rs.75 Lakhs paid to M/s. Sahara Health and Rs. 25 Lakhs paid to M/s. Tulsi Seva*]. When asked by AO to file supporting documents for making the claim u/s 35AC of the Act, the assessee vide letter dated 15.11.2016 submitted his explanation as under: -

“Assessee has made donation to Tulsi Gramodyog Seva Samity and Sahara health education society. Both organization are notified u/s. 35AC. The scheme are approved by notional committee u/s.35AC of the IT. Act. Assessee has made payment to the institution approved by the notional committee for eligible project. The assessee has submitted form no.58B The assessee has incurred expenses by payment of donation to notified institution and hence assessee is subject to provision of section 35AC is allowed a deduction of the amount of such expenditure. There are no other condition except (1) payment is made to the institution (2) certificate is produced. Section 35AC speaks that expenditure should be incurred. f does not restricted to business income. One can spend on donation out of property income, business income, interest income, capital gain. In fact project approved u/s. 35AC are welfare of society. In the said case an integrated project on water and natural resource management, providing shelter and mobile health services to the BPL & Tribal family.”



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4. After taking note of the reply of assessee, the AO in order to verify the genuineness of the donation (supra) issued notice u/s 133(6) of the Act to both the organizations requesting them to submit the details viz (i) Registration of the Organization, (ii) Financial Statement for AY. 2014-15, (iii) Income Tax Return and (iv) details of donations received from the assessee. The AO noted that the notices issued to M/s. Sahara Health got returned back unserved and the notice issued to the M/s. Tulsi Seva though served, didn't elicit any reply. Therefore, he asked the assessee to give details of both the organizations. And simultaneously AO issued commission u/s 131(1)(d) of the Act to the respective Assessing Officer's of both the organizations for verification of genuineness of their activities as well as receipt of donation as claimed by assessee. Pursuant to the commission (supra), the AO received information from AO of (*donee*) M/s. Sahara Health that donations given to the it [*M/s Sahara*] had been withdrawn after the deposit through a middle man and the copy of the letter of M/s. Sahara Health (*donee*) which was received by the AO (ITO) exemption Kolkata in respect of the donation received by it from the assessee are as under: -



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Sahara Health & Education Society



(An NGO/Society Registered Under Societies Registration Act, 1961 Govt. of West Bengal)

Registered since 1993

Ref. No. SHE/20/13-14

Date 12/12/2016

To
Income Tax Officer, Ward – 1(3) (Exemption), Kolkata
Office of the Income Tax Officer, Ward – 1(3), Kolkata,
AAYAKAR BHAWAN
P-7, Chowringhee Square, 6th Floor
Kolkata – 700069


Sub: Information in respect of Shri Sitaram Narayandas Patel, having PAN: AAKPP6860D for AY 2014-15
Sir / Madam,

This is in reference to the letter dated 18.11.2016 from Shri Rajeev S. Kadam, Asst. Commissioner of Income Tax – 22(3), Room No.305, 3rd Floor, Piramal Chambers, Lalbaug, Mumbai – 400012 regarding donations given by Shri Sitaram Narayandas Patel, Proprietor of Ambica Construction Co. us during FY 2013-14.

We hereby confirm that Rs.75,00,000/- from M/s Ambica Construction Co. was transacted from our account during FY 2013-14. The whole process was done through a middle man, a Broker Mr. Raj Kumar Mishra, New Alipore, Kolkata. Though Rs.75,00,000/- was deposited in our bank account, but in fact he had collected Post Dated Cheque from us to collect donation for us U/S 35AC of IT Act 1961 to do development work and in the process using those cheques, they have taken back Rs.73,20,000/- in different names and we were left with only Rs.1,80,000/-. This was done without any information to us or our knowledge. We further confirm that we never knew any such organization or individual to whom the money has gone.

I am attaching herewith the following documents for your kind reference and information.

Thanking you
Yours faithfully


(N. K. Roy)
Secretary
(N. K. Roy)
Secretary

Sahara Health & Education Society

Encl:

1. Copy of relevant pages of Pass book of IndusInd Bank
2. Summary of the bank statement (IndusInd Bank)
3. Copy of PAN card of Sitaram Narayandas Patel



Office :

F4/42, Defence Park, Moynagarh, Kolkata-700 141, West Bengal, INDIA

Office Ph. No. : 09836612779

Mobile No. : 09674045038

Email : oursahara1993@gmail.com

Website : www.jeevansahara.org



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Amount Received from Sitaram Narayandas Patel: Proprietor of Ambica Construction Company : For the Financial Year 2013-14			
DATE	CHQ. NO.	BANK	AMOUNT
11-07-13	RTGS	Indusind Bank	1,500,000
16-07-13	RTGS	Indusind Bank	1,500,000
27-08-13	RTGS	Indusind Bank	1,500,000
01-10-13	RTGS	Indusind Bank	1,500,000
18-12-13	RTGS	Indusind Bank	1,500,000
		Total Received	7,500,000
Amount Transfer to Other Account on behalf of Sitaram Patel:			
MONIPUR WOMEN SOCIETY			
DATE	CHQ. NO.	BANK	AMOUNT
12-07-13	10704	Indusind Bank	610,000
13-07-13	10706	Indusind Bank	255,000
29-08-13	10710	Indusind Bank	259,500
		TOTAL	1,124,500
DREAM OF THE CENTURY			
DATE	CHQ. NO.	BANK	AMOUNT
12-07-13	10705	Indusind Bank	500,000
17-07-13	10707	Indusind Bank	600,000
29-08-13	10725	Indusind Bank	300,000
		TOTAL	1,400,000
17-07-13	10708	Gopal	590,000
24-07-13	10721	Kunj	265,000
29-08-13	10722	Afterlink	540,500
29-08-13	10724	Afterlink	355,000
03-10-13	186191	New View	727,500
03-10-13	186187	New View	727,500
21-12-13	267708	Bluesnow Commercial Pvt Ltd	794,750
21-12-13	267709	Bluesnow Commercial Pvt Ltd	705,250
		TOTAL	4,705,500
		Total Transfer	7,320,000
		Actual Receipt	180,000
		Percentage	2.4

5. In the light of the above reply and the inquiry conducted by the respective AO of the done (as per commission), the AO of assessee issued summons on 20.12.2017 (sic) (*typographic error must be 20.12.2016*) along with letter explaining him about the outcome of the inquiry conducted by him (supra), and also directed the assessee to be present before him on 23.12.2016 to explain as to why the donations



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made to M/s. Sahara Health should not be disallowed. And since the assessee did not turn up and failed to produce any evidence or explanation in support of genuineness of the donations made by the assessee to the tune of Rs.75 Lakhs, the AO disallowed the same. Likewise, in respect of donation of Rs.25 Lakhs to M/s. Tulsi Seva, the AO noted that the he received information from ITO(E), Lucknow that deposit made on account of donation had been transferred/withdrawn. And therefore, he presumed that the same modus operandi have been followed by M/s. Tulsi Seva as done by M/s. Sahara Health. Therefore, he disallowed the donation of Rs.25 Lakhs also. Thus, the AO disallowed the claim of assessee u/s 35AC to the tune of Rs.1 crores for AY. 2014-15.

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6. Brief facts are that the assessee had claimed deduction u/s 35AC of the Act on account of donation of Rs.75 Lakhs given to M/s. Sahara Health. And the AO give notice to the assessee as to why the donation given to M/s. Sahara Health should not be disallowed. According to the AO, the notice sent to the assessee were returned unserved. However, the AO notes that the assessee filed letter dated 13.12.2017 which was reproduced by him at page no. 7 & 8 of the assessment order dated 19.12.2017 wherein the assessee brought to the notice of the AO that assessee had paid donation to the said society working for project on common cause providing shelter and mobile services to BPL and Tribal families as duly approved by the



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Government. According to assessee, the said donation was made in response to appeal made vide letter dated 05.02.2014 sent with copy of the amendment notification dated 10.10.2012 and notification dated 09.10.2012 and attached copies of it. According to assessee, the society (M/s Sahara) had duly acknowledged the receipt of donation by issuing certificate in form no. 58A mentioning various details therein as required. According to assessee, the notification issued by the Competent Authority was valid and in existence on the date of donation and the approval granted u/s 35AC has not been cancelled by the authority till the last donation made by him on 16.01.2015. However, the reply of assessee was rejected on the strength of inquiry conducted by him for AY. 2014-15 and disallowed the claim of deduction of Rs.75 Lakhs. And the Ld CIT(A) have confirmed the action of AO in both years and assessee is before us.

7. Having heard both the parties, it is noted that the main grievance of the assessee is against the action of the Ld. CIT(A) confirming the action of the AO disallowing the claim of deduction u/s 35AC of the Act. According to the Ld. AR Shri Nishit Gandhi the assessee had given donation to the eligible project/organization (supra) and satisfied all the conditions prescribed u/s 35AC of the Act. According to the Ld. AR, the assessee has filed the Form No. 58A mandated by section 35AC of the Act which is the certificate of expenditure for payment made to eligible projects/schemes and drew our attention to page no. 41 of the PB wherein our attention was



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drawn to certificate issued by donee i.e. M/s. Sahara Health. It is noted that Form 58A certified that Ambica Construction (assessee's proprietary-ship concern) had paid a sum of Rs.15,00,000/- on 14.01.2015 for the project "*Providing shelter & Mobile Health Services*" which was notified u/s 35AC of the Act by MOF and submitted that similar payment totalling Rs.75 Lakhs was donated to M/s. Sahara Health vide four (4) transactions of Rs.15 Lakhs each. Thus, according to the Ld. AR, the assessee has made the payment of Rs.75 Lakhs to M/s. Sahara Health for AY. 2014-15 and AY. 2015-16. The Ld. AR also brought to our notice that AO did not give proper opportunity to the assessee before concluding the assessment. And he also pointed out that the AO after conducting inquiry behind his back has used the material against him without giving an opportunity to rebut, therefore, the impugned action of the AO is vitiated. According to the Ld. AR, even though, the AO has power to conduct inquiry and collect material, but if it is going to be used against the assessee, then he was duty bound to confront the assessee with those material, which, AO did not do in this case, so the material could not have been used against the assessee. Thus the Ld AR contented that there was violation of natural justice. And also pointed out that AO during assessment proceedings did not give proper opportunity to assessee . In this context, it is noted that the AO for AY. 2014-15 in the assessment order itself at page no. 5 had admitted the fact that he had issued summons to the assessee on 20.12.2016 (wrongly typed as 20.12.2017) directing the assessee to be present before him on



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23.12.2012 and thereafter he has passed the assessment order on 24.12.2016, which action of AO itself shows that assessee was not given proper opportunity to rebut the adverse material collected by him. Since there is violation of natural justice, we are inclined to set aside the assessment order for AY. 2014-15 and further take note of the fact that for AY. 2015-16, the AO has mainly relied on his own action/order for AY 2014-15 [i.e. material collected from ITO (E), Kolkata] in the case of M/s Star Health. Therefore, we set aside the impugned order of Ld. CIT(A) and restore the assessment back to the file of AO for de-novo assessment on this issue and for that we rely on the decision of the Hon'ble Supreme Court in the case of **Tin Box Company Vs. CIT (249 ITR 216) (SC)** wherein their Lordships has held that if an assessee did not get proper opportunity before the AO, then it should be restored back to the file of the AO for fresh assessment. The Hon'ble Supreme Court observed as under: -

““ It is unnecessary to go into great detail in these matters for there is a statement in the order of the Tribunal, the fact-finding authority, that reads thus :

"We will straightway agree with the assessee's submission that the ITO had not given to the assessee proper opportunity of being heard."

That the assessee could have placed evidence before the first appellate authority or before the Tribunal is really of no consequence for it is the assessment order that counts. That order must be made after the assessee has been given a reasonable opportunity of setting out his case. We, therefore, do not agree with the Tribunal and the High Court that it was not



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necessary to set aside the order of assessment and remand the matter to the assessing authority for fresh assessment after giving to the assessee a proper opportunity of being heard.

2. Two questions were placed before the High Court, of which the second question is not pressed. The first question reads thus :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in not setting aside the assessment order in spite of a finding arrived at by it that the Income-tax Officer had not given a proper opportunity of hearing to the assessee ?"

In our opinion, there can only be one answer to this question which is inherent in the question itself : in the negative and in favour of the assessee.

3. The appeals are allowed. The order under challenge is set aside. The assessment orders, that of the Commissioner (Appeals) and of the Tribunal are also set aside. The matter shall now be remanded to the assessing authority for fresh consideration, as aforestated. No order as to costs."

8. Since we have found in the present case that no proper opportunity has been granted to the assessee while framing assessment for AY. 2014-15 which order has been relied by him for framing assessment for AY. 2015-16, we hold that AO failed to give proper opportunity to assessee before framing assessment. Consequently, the impugned order of Ld. CIT(A) are set aside and restored back to the file of AO for fresh assessment in accordance to law.



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9. For completeness we note that the Ld. AR for assessee took pains to bring to our notice that M/s. Sahara Health is engaged in philanthropic activities which are given in page no. 16 to 40 of PB and has also asserted that by filing the certificate under Form No. 58A, the assessee has discharged the burden and so, eligible for deduction u/s 35AC of the Act. He also drew our attention to the Notification No.14/2015, wherein Central Government has notified the project of M/s. Sahara Health “*Providing Shelter and Mobile Health Services to the BPL and Tribal Families*” as an eligible project for a period of three (3) years at an estimated been cost of Rs.8.45 crores ending initially in financial year 2011-12 and which was further extended for a period of three (3) financial years ending with financial year 2014-15. And since the project cost got increased from Rs.8.45 crores to 11.75 crores, further period of two (2) years was also extended i.e. for two (2) years for F.Y. 2015-16 and FY. 2016-17. According to the Ld. AR, assessee has fulfilled the conditions as prescribed u/s 35AC of the Act and therefore deduction should be allowed. He also brought to our notice that sub-section (6) of section 35AC of the Act makes it clear that even if the institution (donee) loses its approval for the project or scheme is withdrawn, then the donation given to it (donee) shall be deemed to be income of such institution (donee) and tax shall be charged on such income at the maximum marginal rate in force for the year. Thus according to the Ld. AR, when assessee is entitled to deduction (on fulfilment of condition), it cannot be denied merely on



the ground that subsequent to the payment of donation, the approval granted to it has been withdrawn.

10. Per Contra the Ld DR submitted that it is true that if the assessee satisfies the condition for deduction u/s 35AC of the Act, in normal circumstances should be granted deduction. However, in this case, the factual matrix is different. According to him, the AO has made inquiry from the Assessing Officer of the donees (M/s. Sahara Health & M/s. Tulsi Seva) and found that both were involved in giving accommodation entry in lieu of commission i.e, by returning back the money to the donor through middlemen, which fact has been admitted by donee/M/s Sahara Health. And therefore, the AO of the assessee has disallowed the deduction. According to him, *it is trite law that fraud vitiates any transaction* and in this case it is crystal clear that assessee is trying to play fraud by making such claim of deduction. According to him, the deduction is allowed for genuine donors for projects/philanthropic activities; and by adopting the nefarious *modus-operandi*, the donor (assessee) ensures that the money/donation never reaches the beneficiaries, rather it finds its way back to assessee/donor or persons he direct, which according to Ld DR, defeats the noble purpose for which deduction is allowed. And therefore, the AO has rightly disallowed the same after inquiry and admission made by M/s Sahara that they got only 2.4% of the donation, and still assessee is claiming 100% deduction which is un-



justified and un-reasonable. And therefore, he doesn't want us to interfere with the impugned action of Ld CIT(A).

11. Be that as it may be, we are not inclined to look into the merits of the disallowance, since we find that assessee did not get proper opportunity to rebut the adverse material collected by the AO (supra). Therefore, there is violation of natural justice and therefore, we direct the AO to give a copy of the material/inquiry conducted by him (supra) and give an opportunity to rebut the same and then after hearing the assessee, to take a decision in accordance to law in respect of assessee's claim of deduction of Rs.1 crores for AY. 2014-15 & Rs.75 Lakhs for AY. 2015-16. For that we rely on the decision of the Hon'ble Supreme Court in the case of ITO Vs. M. Pirai Choda (2011) 334 ITR 262 which was followed by Hon'ble Delhi High Court in the case of CIT Vs. PC Chemicals (Delhi High Court) dated 13.09.2012 wherein their Lordship has held that if there were procedural lapses on the part of the AO while making the assessment, the proper course would be not to invalidate the assessment or delete the additions but to remand the assessment back to the AO, so that the procedural lapses which had prejudicially affected the assessee can be set right and the assessment be completed after duly complying with the rules of natural justice.

12. In the light of the discussion (supra), we direct the AO to furnish a copy of the inquiry/adverse material collected by him (in the first round) to the assessee and give opportunity to assessee to rebut



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the same. After the reply/explanation is furnished by assessee, the AO after verification of the same may decide the deduction claimed by the assessee for AY. 2014-15 & AY. 2015-16 in accordance to law. The AO to decide the issue without being influenced by any of the observation made (supra).

13. In the result, the appeals filed by the assessee are allowed for statistical purposes.

Order pronounced in the open court on 24/08/2023.

Sd/-

(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

Mumbai; Dated 24/08/2023.
Vijay Pal Singh, (Sr. PS)

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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



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