आयकर अपीलीय अधिकरण, हैदराबाद पीठ
IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad 'B' Bench, Hyderabad

Before Shri R.K. Panda, Vice-President
AN
Shri Laliet Kumar, Judicial Member

आ.अपी.सं /**ITA No.238/Hyd/2022**
(निर्धारण वर्ष/Assessment Year: 2017-18)

Asstt. Commissioner of Income Tax, Central Circle 1(3) Hyderabad	Vs.	M/s. Kiran Infertility Centre (P) Ltd Hyderabad PAN:AABCK6053F
(Appellant)		(Respondent)
राजस्व द्वारा/Revenue by:	Smt. Sheetal Sarin, DR	
निर्धारिती द्वारा/Assessee by:	Advocate S. Rama Rao	
सुनवाई की तारीख/Date of hearing:	26/03/2024	
घोषणा की तारीख/Pronouncement:	30/04/2024	

आदेश/ORDER

Per R.K. Panda, Vice-President

This appeal filed by the Revenue is directed against the order dated 08.03.2022 of the learned CIT (A)-11, relating to A.Y.2017-18.

2. Facts of the case, in brief, are that the assessee is a company engaged in providing medical services in connection with infertility among women/men and surrogacy treatment and is deriving income from business and other sources. A Search and

Seizure operation u/s 132 of the Income Tax Act, 1961 was conducted on 10.01.2017 in the case of the assessee. The assessee filed its return of income for the year under consideration on 6.11.2017 declaring total income of Rs.6,28,71,960/-. The case was selected for compulsory manual scrutiny (being the specified year for the search assessments) following the guidelines issued by the CBDT. Accordingly, statutory notices u/s 143(2) and 142(1) were issued and served on the assessee in response to which the assessee filed the requisite details from time to time.

3. During the course of assessement proceedings , the Assessing Officer noted that the assessee company is engaged in treatment options for Infertility such as Surrogacy, I.V.F, 1.C.S.., IUI, Egg/ Oocyte Donation, PGS/Embryo Donation, Oocyte/Embryo Freezing. During the year under consideration, the assesee has total receipts from medical services of Rs.14,39,94,684/- and other income of Rs 92,80,354/-. The company is recognizing income under following sub heads of revenue:

1) Consultancy
2) Hysteroscopy
3) Investigation
4) IUI
5) IVE/ICSI
6) Misc. treatments
7) Scanning
8) Surrogacy

4. The Assessing Officer noted that out of the above, the income from surrogacy is Rs 11,90,47,249 and the rest is from other sources. After claiming all expenses, the profit before tax is shown at Rs 5,91,15,388/-. In the computation of income, the assessee has shown income of Rs 45,90,235/ being on account of "ICDS effect" and after considering adjustments on account of depreciation etc. the net income from business is shown at Rs 6,28,71,957/-.

5. From the details furnished by the assessee, the Assessing Officer noted that the assessee derives most of the revenue from surrogacy. The other treatments referred to above also form part of the Surrogacy program but depends on case-to-case basis depending on the issues involved. The customers opt for Surrogacy program by signing Surrogacy Agreement. Thereafter it involves multiple persons such as Oocyte donor, genetic mother, genetic father, surrogate mother and the new born baby. After birth of baby the clinic facilities, arranging birth certificate, various declarations and affidavits, DNA test for paternity, passport for the baby, exit visa for the baby and arranging for the parental order for the baby etc., are also involved. The IVF process is a necessary component of any surrogacy arrangement. The entire process is spread over a period of time.

6. From the details furnished by the assessee the Assessing Officer further noted that the assessee is recognizing income from surrogacy from the clients once the surrogate child is born. However, during the course of search and seizure operation conducted on 10.01.2017 at the premises of the assessee company, it was found that even though in some of the cases the surrogate child is born, and full payments have been received from such patients, still the assessee was showing them as Advances from Surrogacy Clients in its Books of Accounts instead of recognizing them as revenue. Some of such cases identified during search and seizure operation are as follows:

S No	Name of Patient	Date of Birth of Child	Advance as on 10.01.2017 (Date of Search)
1	Mr Brian Stull	11.03.2016(Twins)	28,02,838
2	Mr Brue Elliot Barshay	05.12.2015	22,42,549
3	Mr Kristian Anisley French and Mrs.Clare Joanna French	22.06.2016 (Twins)	34,82,126
4	Mr. Madhu Reddy and Mrs. Julia Eduardovna Reddy	17.03.2016	17,66,383
5	Mr. Eric Watterson and Mrs. Deanna Watterson	28.06.2016 (Twins)	34,70,142

7. The Assessing Officer also noted that the assessee was showing substantial "Advances from Surrogacy clients" of Rs 15.88 crores as on 1/4/2016 and Rs 14.47 crores as on 10/1/2017 (date of search) and the assessee appeared to be not following even his own method of recognizing revenue in proper and complete manner and appearing to be deferring the revenue

to subsequent periods. He further noted that in these surrogacy treatment cases, which is spread over a period of time across different years, while the assessee is debiting the expenses related to surrogacy treatment in various cases in the profit and loss account but the revenue is not recognized proportionately and being deferred. When these specific discrepancies in the above cases were pointed out during the search and seizure operation the assessee admitted in the sworn statement stating that “surrogate child was born in many cases and full payment has been received from such patients." Further to cover up the above discrepancies, the Director of the company Dr. Samit Shekar had voluntarily admitted additional income of Rs.8.04 crores, out of the outstanding advances of Rs 14.47 crores for FY 2016-17.

8. During the course of search assessment proceedings, when the assessee was asked to clarify as to how he has reflected the admission of additional income in the declaration made u/s 132(4) during the search, the assessee vide letter dated 16/11/2018 submitted as under:

> *"During the F.Y. 2016-17, as in every financial year at the year end, all the cases pending were evaluated basing on the progress, complexity, completion and basing on qualifying nature, income was recognized and offered as were income. The remaining amounts considered as advances received from patients accordingly.*
>
> *The pending cases as on 31-03-2017 are shown as Advances received from patients the same is enclosed*

herewith in support of the above statement. During the Course of the search under duress the department enquired the basis of recognition of us to offer income & directed additional income from the advances as on the date of search without verifying relevant records, not taking into account whether or not the cases had reached the stage of completion & whether they were eligible to be offered as income as per the accounting standards followed by the company.

Under Duress and also being apprehensive that the search proceedings may affect treatment of patients and also in order to safe guard and protect the health of the patients undergoing treatment the declaration was taken despite informing the Department there was no way we can offer any income over and above the regular income for the said financial year.

However, after reconciliation of accounts & on the basis of finally audited accounts, we recognized income as per the income recognition treatment which has been consistently followed and included the same in gross receipts.

Similarly, where in certain instances company felt that income did not materialize as already observed, the company worked out proper income & declared as which is thus the final figure of receipts credited to the P & L account represent the true and correct figure of receipts hence the same may be taken into consideration."

9. However, the Assessing Officer was not satisfied with the above reply. He noted that the books of accounts seized from the assessee's premise during the course of search and seizure operation on 10.01.2018 show that, the assessee before the search and seizure operation itself has already recognized an amount of Rs. 8,31,71,560/- as revenue from surrogacy cases for the period 01.04.2016 to 09.01.2017.

9.1 Thus, for the period after the search and seizure operation, the assessee recognized revenue from surrogacy cases of approx. Rs 6.20 crores and thus the total revenue from surrogacy should have been Rs 14.51 crores but the assessee has finally shown revenue from surrogacy of Rs 11.90 crores only for the full F.Y. 2016-17. The Assessing Officer therefore, confronted the assessee regarding the discrepancy. However, the assessee did not give any reasonable explanation which could satisfy the Assessing Officer. Further, on examination of 37 cases aggregating to Rs.2,62,04,660/- with the books of account he found that in all the cases except Billy Cuthbert, which being a refund case, the balances are lying for more than 3 years. In fact, when considered till the month of Dec. 2018 then some of the balances are outstanding for more than 5 years.

10. He noted that when there is no progress in these cases and assessee itself submitted that "most of them were not completed on account of change in guidelines by Govt. of India by way of circulars", then the onus lies on assessee to establish that treatment is still in progress and refund is due to the clients if there is no favourable change in the guidelines, by way of confirmation letters from the clients in this regard.

11. The Assessing Officer, on perusal of the agreement copies that the assessee entered with the clients for surrogacy

treatment observed that there is no clause for the refund of the fees collected in the case of any contingency. Also, the fees are not collected at one go, they are collected based on the treatment provided at various stages. From the analysis of the cases, he noted that there is only a part receipts from the patients, that means there was commencement of treatment and to the extent of treatment given the fees were collected and subsequent treatment must have got halted due to change in guidelines by the Govt. of India by way of circulars and medical reasons as stated by the assessee. The assessee has already claimed the corresponding expenditure in the relevant years for the partial treatment carried out in the above mentioned cases, therefore, he held that no fresh expenditure on the same can be allowed.

12. Thus, considering all the above peculiar aspects of these cases and considering that some expenditure would have already been booked by the assessee in the partial treatment in these cases in the earlier years (but no revenue recognized from the same due to the revenue recognition method followed by the assessee) and also considering that the treatment itself is not permitted by law in these cases and no refund clause in the agreement itself and in any case, when the treatment for such patient itself has been banned by law and yet the assessee not having refunded the money to these patients and continues to show the same as advances from clients for more than three to four years now but has not recognized any revenue from the

same, the Assessing Officer held that this amount now represents business revenue of the assessee for the year under consideration. Further, the assessee itself has recognized these receipts of Rs 2,62,04,660/ as revenue from surrogacy clients in the books of accounts maintained by it as seized from the assessee's premises on 10/1/2017 during the search operation and it is only on a subsequent date that the assessee has reversed these entries. Thus, considering all the above aspects, the Assessing Officer treated the amount of Rs.2,62,04,660/- appearing as advance from surrogacy clients as income of the year. Since, the assessee would have already claimed expenditure for the partial treatment in these cases in earlier years, he did not allow any expenditure from the above income.

13. The Assessing Officer also asked the assessee to furnish the list and the status of cases outstanding as on 31.03.2017. From the details so furnished, he noted that an amount of Rs. 5,28,09,291/- is outstanding in certain cases due to change of guidelines by way of government circulars in 2012 & 2015, as per Supreme Court Verdict and on medical Grounds. On verification of the above-mentioned list of cases where the advances outstanding are aggregating to Rs. 5,28,09,291/-, with the Books of accounts the Assessing Officer found that it includes those cases whose outstanding advances summing up to Rs 2,62,04,660/- as mentioned earlier.

14. The remaining outstanding Advances cases shows that in 24 cases, totaling to Rs 2,66,04,631/- are almost same as that of 37 cases totaling to Rs 2,62,04,660/- except that in those 37 cases the assessee itself has recognized as revenue as per the seized books of account and later reversed but the facts of these cases otherwise are also almost same. Rejecting the explanation given by the assessee, the Assessing Officer made addition of Rs.2,66,04,631/- being advances from surrogacy clients as income of the year.

15. The Assessing Officer further made addition of Rs.55,46,136/- under ICDS in respect of 54 cases by estimating the income @ 15% on 3,69,74,242/- on the ground that the assessee itself has declared income under ICDS in respect of 32 cases as income from surrogacy.

16. The Assessing Officer further made addition of Rs.1,91,750/- on account of disallowance of ROC expenses which is not in dispute before us. He accordingly determined the total income of the assessee.

17. In appeal, the learned CIT (A) sustained the addition/ disallowance made on account of ROC expenses. So far as the remaining additions are concerned, he gave part relief to the assessee by observing as under:

6. The Decision:

In the instant case, the assessment was completed u/s 143(3) by making various additions of Rs.2,62,04,660/-, Rs.2,66,04,631/-, Rs.55,46,136/- and disallowance of ROC expenditure of Rs.1,91,750/-.

The appellant has filed an appeal only against the additions of Rs.2,62,04,660/-, Rs.2,66,04,631/- and Rs.55,46,136/-.

Going into the facts of the case, the appellant is engaged in treatment options for infertility and the same has been brought out in detail in the assessment order. During the year the appellant had total receipts from such medical services of Rs.14,39,94,684/- out of which the income from surrogacy was Rs.11,90,47,249/-. Thus, the income from surrogacy forms the substantial part of the receipt of the appellant.

The Assessing Officer examined the method of recognition of revenue and noted that the appellant was recognizing revenue on the basis of completion and in the other cases it was treated as advance.

The Assessing Officer noted that the appellant is recognizing income on the basis of the child birth and in the other cases, the quantum was considered as advance. The Assessing Officer further noted that the appellant has not been following this practice properly and substantial amounts have not been recognized and has been considered as advances by the appellant.

The Assessing Officer noted that the advances from surrogacy as on 01.04.2016 stood at Rs.15.88 crores and as on the date of search i.e 10.01.2017 at Rs.14.47 crores.

The Assessing Officer noted that in the cases of surrogacy the treatment is spread over the years, while the appellant is debiting the expenses, it is not recognizing the corresponding income pertaining to such expenses. During the course of search the appellant admitted an additional income of Rs.8.04 crores out of the outstanding advances of Rs. 14.47 crores as on the date of search.

However while filing the return of income post the search proceedings the appellant stated as under:

"During the F.Yr. 2016-17, as in every financial year at the year end, all the cases pending were evaluated basing on the progress, complexity, completion and basing on qualifying nature, income was recognized and offered as income. The remaining amounts were considered as advances received from patients accordingly.

The pending cases as on 31-03-2017 are shown as Advances received from patients the same is enclosed herewith in support of the above statement. During the Course of the search under duress the department enquired the basis of recognition of income & directed us to offer additional income from the advances as on the date of search without verifying relevant records, not taking into account whether or not the cases had reached the stage of completion & whether they were eligible to be offered as income as per the accounting standards followed by the company.

Under Duress and also being apprehensive that the search proceedings may affect the treatment of patients and also in order to safe guard and protect

the health of the patients undergoing treatment the declaration was taken despite informing the Department there was no way we can offer any inco over and above the regular income for the said Financial year.

However after reconciliation of accounts & on the basis of finally audited accounts, we recognized income as per the income recognition treatment which has been consistently followed and included the same in gross receipts.

Similarly where in certain instances company felt that income did not materialize as already observed, the company worked out proper income & declared as which is thus the final figure of receipts credited to the P & L account represent the true and correct figure of receipts hence the same may be taken into consideration."

The appellant stated that the correct proposition of the advances as on the date of search is Rs.14.47 crores i.e on 10.01.2017 and Rs.11.99 crores on 31.03.2017. The appellant further stated that the declaration was made without verifying the records and not in consonance with the accounting practices followed.

The Assessing Officer noted that as on the date of search i.e for the period 01.04.2016 to 09.01.2017, the revenue recognized was Rs.8,31,71,560/- and thus for the period 10.01.2017 to 31.03.2017 the revenue recognized is only Rs.3,58,75,659/-. The appellant stated that a sum of Rs.2.52 crores was the recognized revenue on account of non completion of cases as per the accounting guidelines and the change in the guidelines of the Government of India regarding the procedures conducted by them.

The Assessing Officer noted that there were 37 cases having a quantum of Rs.2,62,04,660/- which have been lying with the appellant for more than 3 years and as on date of the assessment i.e at 5 years, the same amount is outstanding.

These amounts pertains to foreigners as can be seen from the list and the appellant stated that the treatment or the process with regard to these

parties could not be completed because of the Government of India guidelines. Guidelines in Circular No. 462 in F.No. 25022/74/2011-F.I(Vo.III, MHA (Foreigners Division) dated 03.11.2015 which barred the foreign nationals for commission of surrogacy in India. The appellant stated that the as per these guideline the foreign patients are not permitted to seek the surrogacy treatments. The Assessing Officer himself has not disputed that the matter is pending with the Apex Court. The Assessing Officer further stated that these parties are not part of the litigants in the Apex Court in the writ petition filed by one of the foreign nationals in WP(Civil) 841 of 2015.

The observation of the Assessing Officer is incorrect in the manner with regard to that if the said parties are not litigants in the Apex Court it will result in the advances to be considered as income of the appellant. The Government of India guidelines bars foreigners of surrogacy treatment in India and if certain people have moved the Hon'ble Apex Court does not mean that every person has to approach the Court. As the Government of India guideline is general in nature for all foreigners, obviously the outcome of the litigation would not be litigants specific but for the general term of foreigners. Therefore this analogy is not correct.

The next observation noted by the Assessing Officer was that the appellant has not refunded the money, there is no businessman who would like to refund money unless demanded and would always hope for a favourable Apex court decision so that it can perform for the agreed deliverable and earn income. If the Apex Court had decided in favour of the Government of India circular, and if the said money was not refunded, then

the Assessing Officer would have been correct in recognizing the same as forfeiture of advances and as a receipt of the appellant.

In the present case, the appellant is still obliged and liable to perform for the deliverables as per the agreement, if the Apex Court decides otherwise then the Government of India circular and also the Surrogacy Regulation Bill(2020) is yet to be in acted.

The Assessing Officer further noted that there is no refund in case of contingency, that does not mean that the appellant is not obliged to perform its functions, in the case of the favourable decision for these foreigners, the income cannot be recognized just because the matter just subjudice and especially when the expenditure is bound to be incurred with regard to such agreement and also the same has not been disputed by the Assessing Officer.

The next argument laid out by the Assessing Officer is that some expenditure would have been incurred and thus the income has to be recognized is a fictional concept on a prima facie basis, which pre-supposes a concept without any evidence on record and then goes on to make an addition. It is a fact that as on date the treatment is barred by law subject to outcome of the Apex Court, thus the matter is still subjudice and in view of the above facts it would not be proper to recognize the advances so received as revenue especially when the appellant is obliged to render services in future if the Hon'ble Court decides in the favour of the origin of these parties who have given advances. As the appellant has summarized in the para a to para d of its submission which brings out the liability to render the service and thus as of now these amounts cannot be considered as income of the appellant till the outcome and the future course of action.

In view of the above, the addition of Rs. 2,62,04,660/- is hereby deleted.

The Assessing Officer further noted that in all a quantum of Rs.5,28,09,291/- is outstanding on account of change of the guidelines. The Assessing Officer after having added a sum of Rs.2,62,04,660/-, stated that the above amount is included in the list of Rs. 5,28,09,291/-. And went on to examine the other amounts and it noted that a sum of Rs. 2,26,48,125/- out of the residual is outstanding as on the date of assessment and a sum of Rs.39,56,508/- is outstanding as on 31.03.2018 as per the tables brought out in the assessment order. The quantum of Rs.2,26,48,125/- pertain to 14 parties and the sum of Rs.39,58,506/- pertain to 10 parties. The Assessing Officer noted that the cumulative amount of these 24 parties being a sum of Rs.2,66,04,631/- has a similar case pertaining to 37 parties cumulating to Rs.2,62,04,660/- and therefore considered the sum of Rs. 2,66,04,631/- as income of the appellant in the para 5.1 of the assessment order.

As the analogy followed is identical for the addition made, the adjudication made would also stay the same and the addition of Rs.2,66,04,631/- is hereby deleted on account of the same observations while deleted the sum of Rs.2,62,04,660/-.

In view of the same, the ground no. 2 and 3 are allowed.

The Assessing Officer further made an addition of Rs.55,41,136/-. The Assessing Officer noted that the appellant had disclosed an income of Rs. 45,90,235/- on the basis of ICDS, wherein the new patient advances for the period 01.04.2016 to 31.03.2017 are liable to be offered for income on the

considered only 32 cases pertaining to the advances received during the year and not on the earlier advances received in the prior years to 01.04.2016. The Assessing Officer considered that the sum of Rs.2,62,04,660/- and sum of Rs.2,66,04,631/- has already been added which cumulates to a sum of Rs.5,28,09,291/- and therefore the same has been excluded from the cumulative advances for the purpose of adjudication.

Before moving further it is important to note that for the said sums the matter is subjudice and no progress as such can be attributed and even if there was some progress, the same needs to be revived again so there cannot by any concept of income recognition with regard to this quantum of Rs.5,28,09,291/- as per the ICDS, therefore the quantum left is Rs.11,98,69,774 - Rs.5,28,09,291 which leaves a quantum of Rs.6,70,60,483/-. The appellant has already considered the sum of Rs.3,01,82,241/-, which leaves sum of Rs.3,69,74,243/- for which certain estimation needs to be worked out as per ICDS in the opinion of the Assessing Officer.

The appellant stated that in these cases there has been no progress in the matter and therefore the income pertaining to these amounts have not been recognized as per the list submitted to the Assessing Officer and reproduced in the page 21 of the assessment order.

The Assessing Officer out of the above list noted that in the case of certain persons, the date of birth of surrogate child was in the subsequent year, and within the 9 months of the subsequent year, which implies that there was activity with regard to these persons and the initial process would have been completed through the agreement between the appellant, the

natural parents and the surrogate mother. The list reflects that in 14 cases, there was a delivery within the 9 months of the end of F.Y. and the total amount in the same cumulates to a sum of Rs.94,11,140/- to the extent of above it could be said that certain works were conducted and therefore the Assessing Officer is directed to estimate a sum at 15% of the above amount which works out to be Rs.14,11,671/- as income for the year with regard to the 14 cases as stated above and the appellant's AR agreed for the said estimation. The Assessing Officer is directed further to give deduction in the subsequent year as the income in whole has been recognized by the appellant on the above advances otherwise it would tantamount to double addition.

Out of list of 54 cases mentioned on page 21, as on the date of the assessment order, no delivery has taken place in 20 cases therefore it would not be fair on the same. That leaves a balance of 20 cases out of which 7 pertain to the balance part of the subsequent F.Y of 3 months from a period of 01.01.2018 to 31.03.2018 of Rs.42,75,291/-, the Assessing Officer is directed to consider an estimated income of Rs.4,27,529/- @ 10% and allow the same as deduction in the subsequent year and the appellant's AR agreed for the same. The balance 13 cases were delivered in the subsequent year which would not need interference.

In view of the same addition of Rs. 18,39,200/- is confirmed out of the sum of Rs. 55,46,136/- and with a direction that the same has to be deducted from the income of the subsequent year as it would lead to double addition. In view of the same, the ground no. 4 and 5 are partly allowed.

The ground no. 6 pertains to levy of interest and is consequent to the adjudication above. The Assessing Officer is directed to levy interest as per law and accordingly the ground no.6 is allowed.

The ground no. 1 and 7 are general in nature and therefore needs no adjudication.

To sum up the appeal is **partly allowed.**

18. Aggrieved with such order of the learned CIT (A) the Revenue is in appeal before the Tribunal by raising the following grounds:

1. The Ld.CIT(Appeal) erred both in law and on facts of the case in granting relief to the assessee.
2. The Ld.CIT(Appeal) erred in deleting the addition of Rs. 2,62,04,660/- and Rs. 2,66,04,631/- made towards advances for surrogacy received from foreign clients.
3. The Ld.CIT(Appeals) failed to appreciate the fact that since the treatment could not be carried on due to Government guidelines and there was no provision for refund in the surrogacy agreement the advances were assessable as income.
4. The Ld.CIT(Appeal) ought to have considered that fact that the said amount were being shown as advances from surrogacy clients from 4 to 5 years and also that the assessee had itself recognized the advance of Rs. 2,66,04,660/- as revenue in its books but reversed the entries after the search.
5. The Ld.CIT(Appeal) erred in ignoring the fact that the assessee did not refund any part of the advances to any of these clints over the years when there was no progress being made in the treatment and also failed to file any confirmations from such clients.
6. The LD.CIT(Appeal) erred in granting relief of Rs. 37,06,936/- in respect of the addition made under ICDS, though the assessee did not furnish any documentary evidence to show that there was no progress in the treatment of the corresponding clients during the previous year so as to exclude the income under ICDS.
7. The appellant craves leave to amend or alter any ground or add any other grounds which may be necessary.

19. The learned DR strongly challenged the order of the learned CIT (A) in deleting the addition. He submitted that when the Assessing Officer had given categorical finding that the assessee itself recognized the receipts of Rs.2,62,04,660/- as revenue from the same in the books of account maintained which was seized from the assessee's premises on 10.01.2017 during the search operation and the assessee has on a subsequent date reversed these entries, the learned CIT (A) is not justified in deleting the addition of Rs.2,62,04,660/- and Rs.2,66,04,631/- respectively. Further, the learned CIT (A) is not justified in deleting an amount of Rs.37,06,936/- out of the addition of Rs.55,46,136/- made by the Assessing Officer under ICDS. She submitted that the when treatment could not have been carried out by the assessee again due to the government guidelines and when there was neither any provision for reviewing the surrogacy agreement nor any clause for refund of the advance therefore, the advances were assessable income.

21. The learned Counsel for the assessee, on the other hand, while supporting the order of the learned CIT (A) drew the attention of the Bench to the following written submission to support his case:

The appellant is a company in which public are not substantially interested and is providing medical services for Infertility for childless parents who are not capable of conceiving children. The activities of the assessee include surrogacy treatment. During the financial year 2016-17 relevant for the assessment year 2017-18, the gross receipts from the activity amounted to Rs. 14,39,94,684/-. Proper books of account have been maintained by the appellant and the said books of account have been audited both under the Company Law and under the Income-Tax Act. The appellant based on the final accounts, prepared its return of income (page No.1 of the annexures) and arrived at an income of Rs.6,28,71,960/-. The said income was admitted in the return of income filed for the assessment year under consideration. The Income-Tax Authorities conducted search and seizure operations u/s 132 of the I.T. Act on 10.1.2017. The authorities did not find any incriminating material. However, it was observed that there were advances received and opening outstandings in the books of account. The Assessing officer is of the view that the said amounts represent the income and accordingly made additions of Rs.2,62,04,660/- and Rs.2,66,04,631/-. The addition made is on account of the fact that the advances received were outstanding in the books of account without adjustment against the income.

According to the Assessing Officer, such outstanding advances represent the income as they were outstanding for a very long time. This view of the Assessing Officer is not correct.

The appellant submits that the liability to repay the advances received still exists and that, therefore, the advances cannot be termed as the income of the assesse as they are still representing the liability to the Genetic parents. The facts are as under:

a) The assessee is a company carrying on the activity of maintaining fertility centre and also maintaining diagnostic centre and pathological laboratory for the purpose.

b) The assessee submits that the patients i.e., mother and father who are desirous of conceiving children but are not capable of doing so, approach the assessee hospital. They are known as "genetic parents".

c) They would be examined for the reasons for their infertility. In most of the cases, the infertility in the couple/patient may be due to physiological disorder, hormonal or chromosomal disorders.

d) Once the reasons for infertility are identified and if such defect prevents the female partner from utilising her own eggs or carrying pregnancy to term the genetic parents choose a woman for donating eggs/ovum and a surrogate mother to carry the pregnancy to term.

e) A payment is to be made by the genetic parents for getting eggs/ovum from the woman who may be a relative in some cases or may be anonymous and also to the surrogate mother to carry the pregnancy to term.

f) The egg so obtained after ovarian stimulation is fused with the sperm of the genetic father and the resultant embryo is transferred in the

womb of the genetic mother. In such an event, there is no requirement of a surrogate mother. However, in many cases of infertility it is found that the woman is not capable of carrying a pregnancy in her womb to term which may be because of several disorders and therefore needs a surrogate mother to preserve the pregnancy.

g) The genetic parents choose the surrogate mother to carrying the pregnancy on behalf of the genetic mother. They choose the surrogate mother from others. Always it is the choice of the genetic parents to choose the surrogate mother and is not the choice of the hospital or the doctor. The duty of the appellant and the doctor is to give an opinion and to treat all the concerned.

h) All the connected parties i.e, the genetic parents, surrogate mother and the hospital (fertility centre) discuss about the issue after the surrogate mother is chosen by the genetic parents. At that stage the genetic parents, the hospital and the surrogate mother enter into a tripartite agreement, a copy of the sample agreement is placed in the paper book.

i) The fertility centre conducts the pathological and other tests in order to decide the possibility of transferring the embryo in the womb of surrogate mother. If she is found medically fit, the process commences as per the terms of the agreement.

j) The genetic parents would come, enter into an agreement and wait for their turn which would normally take about two to three years.

k) In some cases, the genetic parents would not come forward for the arrangement by the Hospital with a hope that they may get natural child and for this purpose they await. In such cases some delay occurs even after receipt of advances.

l) In the said agreement, the total amount is paid by genetic parents which includes hospital fee for treatment, the amount to be incurred towards surrogate mother for preserving/carrying the pregnancy for a

period of 9 months, for her well being and reasonable expenses to her is decided. The agreement specified that payments are to be made to surrogate mother towards her reasonable expenses. Such payments are to be made by the genetic parents.

m) In the process, some of the genetic parents were required to wait even after payment of the advance. The waiting period was more than two years.

While the activities were going on well for all the years since inception, on 3.11.2015, the Government of India issued a Circular No.462 No.25022/74/2011-F.I (Vol.III) Government of India, Ministry of Home Affairs (Foreigners Division) dated 3.11.2015 (pages No.33 to 36 of the annexures) debarring the foreign nationals from commission of surrogacy in India. The amounts outstanding as on 3.11.2015 paid by the foreign nationals was kept outstanding as the foreign nationals were not permitted to undergo surrogacy in India. At that stage, one of the foreign nationals filed a Writ Petition before the Supreme Court of India numbered as WP(Civil)841 of 2015. The Hon'ble Supreme Court admitted the Writ Petition and the said Writ Petition is pending.

The foreign nationals are still hopeful of getting a favourable judgement from the Supreme Court of India and that they can undergo surrogacy in India thereafter. Therefore those persons who have paid the advances have not asked for refund of the advances.

In view of the above, the advances received are kept in the books of account mostly from the year 2013 and onwards. Such advances are due to the foreign nationals as long as the liability to pay the amount subsists, it continues to be a liability and does not become the income of the assesse. The assesse humbly submits that such advances do not partake the character of income unless the foreign national who paid the advances surrenders their right. Till then the amounts are to be retained as liability and cannot be considered as income.

It is submitted that a liability cannot be considered as income unless the liability ceased to exist. In the case of the assesse, the liability exists and the assesse is bound to repay the amount or adjust the same against any future liability.

a) In case the Writ Petition filed before the Supreme Court is disposed of in favour of foreign nationals, the assesse may have to perform the procedure of surrogacy and at that time the assesse treat it as income;
b) If the apex court decides the WP against the foreign nationals and the foreign nationals demand the amount the advances have to be refunded.
c) In case the Supreme Court decides that the advances paid by foreign nationals be refunded, the amount has to be refunded to them.

d) The Surrogacy Regulation bill (2020) proposed by the Department of Health and family welfare, Governement of India is yet to be enacted. The Select committee of Parliament was tasked with preparing a detailed report to be tabled in Rajya Sabha to provide their views with regard to the Surrogacy Bill.

Page 3 (page No.49 of the annexures) of the Select Committee report of Parliament states that " Major recommendations made by the Parliamentary Standing Committee " The Committee was of the view that the altruistic Surrogacy be replaced with Compensated Surrogacy and Surrogacy procedures should also be available to PIO, NRI, OCI, live in couples, divorced women and widows".

Clause 4.36 on page 47- " The Committee, however, after having detailed discussions on the matter feels that the facility to avail surrogacy procedure may be extended to persons of Indian origin because they have their ancestral root in India."

In the outstanding advances -there are several patients who are of Indian origin and as and when the bill is passed in the Rajya Sabha and becomes a law these Patients will be eligible to restart their treatment with the clinic.

Till such time the final events happen, the cessation of liability cannot be foreseen. In such circumstances, the advances cannot be considered as income of the assesse.

In this regard the assesse relies on the decision of the Madras High Court in the case of CIT Vs Ganesh Chettiar reported in 133 ITR 103.

21. We have heard the rival arguments made by both the sides, perused the orders of the AO and the learned CIT (A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us by both sides. We find the AO in the instant case made addition of Rs.5,83,55,427/- (Rs.2,62,04,660+Rs.2,66,04,631/-)on the ground that the assessee has received these amounts from the surrogacy patients which are lying in the books of account for a long time and such outstanding advances represent the income of the assessee. Similarly, he made addition of Rs.55,46,136/- by estimating the income @ 15% on Rs.3,69,74,242/- under ICDS in respect of 54 cases. We find the learned CIT (A) gave part relief to the assessee, the reasons of which have already been reproduced in the preceding paragraph. It is the submission of the learned DR that since the treatment could not have been carried out due to government guidelines and since there was no provision for refund in the agreement, the advances were assessable as income of the assessee which the Assessing Officer has rightly done. It is also her argument that since the said amounts were being shown as advances from surrogacy clients for 4 to 5 years and since the assessee had recognized the advance of Rs.2,66,04,660/-as

revenue in its books, but reversed the entries after the search and since the assessee did not refund any part of the advances to any of these clients over the years, therefore, the learned CIT (A) was not justified in deleting the addition of Rs.2,62,04,660/- and Rs.2,66,04,631/- respectively. Similarly, in absence of furnishing any documentary evidence to show that there was any progress in the treatment of corresponding clients, the learned CIT (A) was not justified in granting relief of Rs.37,06,936/- in respect of the addition made under ICDS.

22. It is the submission of the learned Counsel for the assessee that when the liability to repay the advances received still exists, therefore, the advances cannot be termed as income of the assessee as they are still representing the liability to genetic parent. It is his argument that when the advances received are kept in the books of account mostly from the year 2013 and onwards and that such advances are due to the foreign nationals, as long as the liability to pay the amount subsists, it continue to be a liability and does not become income of the assessee. It is his argument that such advances do not partake the character of income unless the foreign national, who paid the advance surrenders his rights. It is also his submission that in subsequent years, the assessee has repaid most of the advances and therefore, making addition of the same to the total income of the assessee during the impugned assessment year is not justified.

23. A perusal of the order of the learned CIT (A) shows that he granted relief to the assessee on the ground that the matter is subjudice before the Hon'ble Supreme Court where the Rule notified by the Central Government was under challenge. We find the learned CIT (A) decided the appeal assuming the pendency of the writ petition. However, the record shows that the Hon'ble Supreme Court had already dismissed the writ petition before passing of the appellate order. Therefore, the order of the learned CIT (A) which is based on wrong fact is liable to be set aside. At the same the time, it is an admitted fact that the advances were received in the past years and do not pertain to the impugned A.Y. It is on account of the circular issued by the Govt. of India debarring the foreign nationals from commission of surrogacy in India, that the procedures could not take place and further the assessee had shown the amounts as advance outstanding in its books of account. We find merit in the argument of the learned Counsel for the assessee that when the advances are received in the books of account mostly from 2013 onwards and such advances received are from the foreign nationals, hence the liability to pay the amount subsists, it continues to be a liability and does not become the income of the assessee. At the same time when the assessee after doing certain procedures has recognized part of the income received from those foreign nationals as income of the assessee, the accounts of the assessee cannot be said to be true and correct. Since it is the submission of the learned Counsel for the assessee that it has recognized

most of the amounts due to the foreign nationals as well as the persons of Indian origins as income in subsequent A.Ys, therefore, considering the totality of the facts of the case and in the interest of justice, we deem it proper to restore the issue to the file of the Assessing Officer with a direction to give one more opportunity to the assessee to substantiate with evidence to his satisfaction that (a) the assessee has refunded the amounts to the foreign nationals where a request has been made and (b) whenever certain procedures have been conducted, the assessee has recognized part of such income as his income in the concerned assessment year and (c) the assessee has recognized such advances as income due to cessation of liability in any of the later years. The Assessing Officer shall decide the issue as per fact and law after giving due opportunity of being heard to the assessee. We hold and direct accordingly. The grounds raised by the Revenue are accordingly allowed for statistical purposes.

24. In the result, appeal filed by the Revenue is allowed for statistical purposes.

Order pronounced in the Open Court on 30th April, 2024.

Sd/-	Sd/-
(LALIET KUMAR) **JUDICIAL MEMBER**	**(R.K. PANDA)** **VICE-PRESIDENT**

Hyderabad, dated 30th April, 2024

Vinodan/sps

Copy to:

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2	M/s. Kiran Infertility Centre (P) Ltd, 6-2-966/4, Opp: Hindi Prachar Sabha Lane, Khairathabad 500004, Hyderabad
3	Pr. CIT -Central, Hyderabad
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order