

आयकर अपीलिय अधिकरण, 'सी' न्यायपीठ, चेन्नई
**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH: CHENNAI**

श्री एबी टी. वर्की, न्यायिक सदस्य एवं
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष

**BEFORE SHRI ABY T. VARKEY, JUDICIAL MEMBER AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No.231/Chny/2024
निर्धारण वर्ष/Assessment Year: 2008-09

Shri Aragounder Muthusamy, 24A, Thiruvalluvar Street, Bhavani Main Road, Perundurai Taluk, Erode District-638 052.	v.	The ITO, Ward-2(2), Erode.
[PAN: ADQPM 7930 E]		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)
अपीलार्थी की ओर से/ Appellant by	:	Shri Y. Sridhar, FCA
प्रत्यर्थी की ओर से /Respondent by	:	Shri P. Sajit Kumar, JCIT
सुनवाईकीतारीख/Date of Hearing	:	24.06.2024
घोषणाकीतारीख /Date of Pronouncement	:	09.08.2024

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Learned Commissioner of Income Tax (Appeals)/NFAC, (hereinafter in short "the Ld.CIT(A)"), Delhi, dated 10.01.2024 for the Assessment Year (hereinafter in short "AY") 2008-09.

2. The main grievance of the assessee is against action of the Ld.CIT(A) confirming the action of the AO making an addition of Rs.50 lakhs. The brief facts are that the AO reopened the assessment based on



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information that assessee had paid capitation fee and regular fees to M/s.Santhosh Medical College, Ghaziabad for his son Dr.M. Kumanan during the relevant year i.e, AY 2008-09 in respect of the course of MS(Ortho). The AO noted the details of payments made by assessee as under:

1.	Date of payment of capitation amount paid in cash	20-11-2007
2.	Capitation/donation amount paid	Rs.45,00,000/-
3.	Regular fees paid	Rs.20,00,000/-
4.	Regular fees paid	Rs.20,00,000/-
TOTAL		Rs.65,54,500/-

3. Further he noted that the assessee had filed return of income (RoI) on 28.09.2008 for AY 2008-09 admitting total income of Rs.2,22,230/- which return was processed u/s.143(1) of the Income Tax Act, 1961 (hereinafter in short 'the Act') on 18.03.2009. Later, he issued notice u/s.148 of the Act on 20.03.2015 to the assessee, informing him, his desire to re-open the assessment based on the information that assessee had paid capitation fees for securing admission for his son in PG (Ortho) in M/s. Santhosh Medical College; and during the re-opening proceedings AO noted that pursuant to search u/s.132 of the Act conducted at the premise of M/s. Santhosh Medical College/Dr. P. Mahalingam on 27.06.2023, the department seized various documents and registers in respect of collection of capitation fees & regular fee (received from the students of the said college). According to the AO, from the seized records, it revealed that Dr. M. Kumanan (son of the assessee) had studied PG course of MS (Ortho) during the FY 2007-08 and that the



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assessee had paid capitation fees & regular fees amounting to Rs.66,54,500/- to the medical college; and Rs.50 lakhs out of the total amount of Rs.66,54,500/- was paid in the year under consideration. The AO noted that the assessee had paid Rs.5 lakhs on 30.03.2008 by way of several Demand Drafts and the balance was paid as cash. Further, the AO noted that the DDIT (Investigation), New Delhi, has recorded the sworn statement of Dr. P. Mahalingam of M/s.Santhosh Medical College on the date of search and he deposed that huge capitation fees & regular fees were received to the tune of Rs.11,738.07 lakhs which included capitation & regular fees given by the assessee to the to the tune of Rs.66,54,500/- for his son. According to the AO from verification of records, it was found that there was no source in respect of Rs.50 lakhs paid towards capitation & regular fees to M/s. Santhosh Medical College; and he inferred that amount of Rs.50 lakhs have been paid by the assessee from his undisclosed income. The AO further noted that the assessee had filed an application u/s.144A of the Act before the ACIT, Range-2, Erode, to issue direction to the AO for allowing assessee facility for cross-examination before completing the proceedings in support of his claim that no such capitation fees was paid as alleged by Dr. P. Mahalingam. The AO further noted that the ACIT, Range-2, Erode, vide order dated 04.03.2016 directed the AO to proceed on the basis of evidences available with him (AO) and asserted that there was no



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requirement to allow assessee cross-examination of witness by observing as under:

"Therefore, AO is directed to proceed in this case on the basis of evidences available with him and no requirement is there to allow assessee any cross-examine of witness. However, AO must give sufficient opportunity to the assessee to refute the claims made by the witness and assessee also may disprove all evidences available with AO by submitting contrary evidences"

4. Thereafter, the AO noted that the assessee objected to the proposal of the AO to make addition of Rs.50 lakhs, but he rejected the same and held that assessee paid Rs.50 lakhs to M/s. Santhosh Medical College towards capitation & regular fees for the course of MS (Ortho) for his son Dr. M. Kumanan and therefore, he made an addition of Rs.50 lakhs.

5. Aggrieved, the assessee preferred an appeal before the Ld.CIT(A) who was pleased to confirm the same.

6. Aggrieved, the assessee is in appeal before this Tribunal.

7. We have heard both the parties and perused the material available on record. The Ld.AR of the assessee submitted that similar issue had come up before the Delhi Bench of this Tribunal in the case of Shri Manjit Singh Gahlot and Shri Shaleen Prasad in ITA No.1620/Del/2020 for AY 2007-08 order dated 10.03.2023, wherein, on similar allegation that capitation fees has been paid by that assessee (Shri Manjit Singh Gahlot), the AO made similar addition in the hands of that assessee an amount of Rs.19,75,000/-. According to the Ld.AR, in that case also, similar



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allegation was made that payment was made by that assessee to M/s. Santhosh Medical College and the AO relied upon the very statement of Dr. P.Mahalingam recorded during the course of search u/s.132(4) of the Act, which was challenged before the Delhi Tribunal; and the Tribunal was pleased to delete the addition made by the AO, since no opportunity for cross-examination was granted to the assessee. We note that similar/identical issues had come up before the Tribunal in the case of Shri Shaleen Prasad, wherein, the Tribunal by order dated 10.03.2023 was pleased to delete the addition on the ground that the AO failed to supply the copy of statement of Dr. P.Mahalingam and no cross-examination was allowed, which omission according to the Tribunal vitiated the addition. It is noted that in the present case also, the addition of Rs.50 lakhs was made based on the statement of Dr. P.Mahalingam, and even though, assessee requested for cross-examination by filing an application before the Addl.CIT, the same was denied which act of omission on the part of the AO/ACIT violates the natural justice, and therefore, we do not countenance such an action of the AO and for that we rely on the decision of the Hon'ble Supreme Court in the case of Kishan Chand Chellaram v. CIT reported in [1980] 125 ITR 713 (SC) and also the decision of the Hon'ble Supreme Court in the case of M/s Andaman Timber Industries [2015] 281 CTR 214 (SC), wherein, their Lordships are held omission to cross-examination of



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third party statement would make the statement null in the eyes of law. It would be gainful to refer to the order of Delhi Tribunal in the case of Naresh Pamnani v. ITO in ITA No.1561/Del/2018 for AY 2010-11 dated 05.03.2019 which has been referred to by the Co-ordinate Bench of Delhi Tribunal in the 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, wherein, it was held as follows:

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 crossexamination 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



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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.

8. In the light of the discussion (supra) and respectfully following the decision of this Tribunal (supra) in identical matter, we held that the AO's



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action of omission to allow assessee cross-examination of Dr. P. Mahalingam vitiates the addition and therefore, we direct deletion of addition of Rs.50 lakhs.

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

Order pronounced on the 09th day of August, 2024, in Chennai.

Sd/-
(मनोज कुमार अग्रवाल)
(MANOJ KUMAR AGGARWAL)
लेखा सदस्य/**ACCOUNTANT MEMBER**

Sd/-
(एबी टी. वर्की)
(ABY T. VARKEY)
न्यायिक सदस्य/**JUDICIAL MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 09th August, 2024.
TLN, Sr.PS

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT, Chennai / Madurai / Salem / Coimbatore.
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF