IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E", MUMBAI

BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER AND
SHRI ANIKESH BANERJEE, JUDICIAL MEMBER

ITA No.4089/Mum/2024
(Assessment Year: 2019-20)

Kety Medicare Centre Kety Nagar, Jawhar Road, Dahanu – 401 602 **PAN : AABFK7498M**	**vs**	**ACIT CC-2, Thane** Ashar IT Park, Thane-400 604
APPELLANT		**RESPONDENT**

Assessee by	:	Shri Mani Jain
Respondent by	:	Shri Hemanshu Joshi (SR DR)
Date of hearing	:	16/01/2025
Date of pronouncement	:	10/02/2025

O R D E R

PER ANIKESH BANERJEE:

Instant appeal of the assessee was filed against the order of the Learned Commissioner of Income-tax (Appeal), Pune-11, [for brevity, 'Ld.CIT(A)') passed under section 250 of the Income-tax Act, 1961 (for brevity, 'the Act'), date of order 14/06/2024 for A.Y. 2019-20. The impugned order was emanated from the order of the Ld. Assistant Commissioner of Income-tax, Central Circle-2, Thane passed under section 143(3) of the Act, date of order 25/09/2021.

2. The assessee has taken the following grounds of appeal:-

"The following grounds of appeal are without prejudice to one another.
1. On the facts and circumstances of the appellant's case and in law the Id. CIT(A) erred in confirming the findings of Id.AO that the appellant has suppressed its professional receipts.

2. On the facts and circumstances of the appellant's case and in law the Id. CTT(A) erred in confirming the addition of Rs. 86,25,000/- made by the Id. AO on account of alleged suppressed professional receipts.

The appellant prays this Hon'ble Tribunal to delete the addition made by the Assessing Officer, which is confirmed by the Id. Commissioner of Income Tax (Appeals)."

3. The key facts of the case are as follows:

The assessee is a partnership firm operating a nursing home under the name "Kety Medicare Centre." A survey was conducted under Section 133A of the Income Tax Act on 08/03/2019. During the survey, it was discovered that the assessee had suppressed its receipts. The statement of one of the partners, Dr. A.S. Poonawala, was recorded, wherein he admitted to an additional income of Rs.86,25,000/- due to the suppression of receipts for the relevant financial year.Subsequently, the assessee filed its income tax return (ITR), declaring a total turnover of Rs.1,40,15,090/-. The profit was reported under Section 44AD of the Act at a rate of 8.9% of the turnover, amounting to Rs.12,47,373/-. The assessee also disclosed interest income, and the total income declared in the return was Rs.15,98,720/-.During the assessment proceedings, the Ld. AO considered the recorded statement of the partner, particularly paragraph 18, in which the additional income of Rs.86,25,000/- was acknowledged. The Ld.AO rejected the assessee's declared income in the return and added back the undisclosed income

of Rs.86,25,000/-.Dissatisfied with the assessment order, the assessee filed an appeal before the Ld.CIT(A), which was ultimately dismissed. Aggrieved by the decision, the assessee has now filed an appeal before us.

4. We heard the rival submission and considered the documents available in records. The revenue authorities have placed reliance on the statement of partner Dr. Attahussain S. Poonawala wherein he has offered the difference in the receipts from the nursing home amounting to Rs. 86,25,000/-.

5. While filing the return of income, assessee has already declared business receipts of Rs.1,40,15,090/- which is includes the above receipts of Rs. 86,25,000/- and has offered profit @ 8% on the same. In the assessment order, Ld. AO has added the entire receipts as income of the assessee.

6. The Ld. AR argued that the action of the Ld. AO in adding the entire income is incorrect. In the statement recorded, it was clearly explained that the books of accounts were not complete for the year under consideration and therefore, the entire receipts were not recorded. On direction of the officials, a tentative incomplete profit & loss statement was prepared and presented at the time of survey action. On the basis of the said statement, the partner stated that the receipts of Rs. 86,25,000/- has not been accounted and accordingly, the said receipts were offered.

7. The assessee has already offered the profit @ 8% on the said receipts and accordingly, the question of any addition cannot arise. Moreover, when the assessee has followed the presumptive taxation scheme u/s 44AD, only net profit @ 8% can be added as income. It is stated by the Ld. AR that the assessee has been offering the profit in the range of 6-11% in the previous and subsequent

year which has been accepted by the department. A chart showing the GP chart is as under: -

A.Y.	Net Profit (In %)
2020-21	9.01%
2019-20	8.90%
2018-19	5.94%
2017-18	11.77%
2016-17	10.15%
2015-16	10.93%

However, while adding the entire receipt of Rs. 86.25lakh as income, the net profit of the assessee is almost 84% which is not possible for any business.

Accordingly, it is submitted that the action of taxing the entire receipts as income is incorrect.

8. Without prejudice to the above, it is also submitted that the statement recorded during the survey does not have evidentiary value. In this regard, reliance is placed on the decision of Hon'ble Madars High Court in the case of **CIT vs. S. Khader Khan Son**, **300 ITR 157**, which was later upheld by Hon'ble Supreme Court reported in **25 taxmann.com 413(SC)** wherein it was held that statement recorded under section 133A has no evidentiary value and any admission made during such statement cannot be made basis of addition. The relevant part of the said decision is reproduced as under:-

"A power to examine a person on oath is specifically conferred on the authorities only under section 132(4) of the Act in the course of any search or seizure. Thus, the Income-tax Act whenever it thought fit and necessary to confer such power to examine a person on oath, has expressly provided for it, whereas section 133A does not empower any Income-tax Officer to examine any person on oath. Thus, in contradistinction to the power under section 133A, section 132(4) of the Income-tax Act enables the authorised officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the Income-tax Act. On the other hand, whatever statement recorded under section 133A

of the Act is not given an evidentiary value, vide a decision of the Kerala High Court in Paul Mathews and Sons v. CIT [2003] 263 ITR 101.

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For all these reasons, particularly, when the Commissioner and the Tribunal followed the circular of the Central Board of Direct Taxes dated March 10, 2003, extracted above, for arriving at the conclusion that the materials collected and the statement, obtained under section 133A would not automatically bind upon the assesses we do not see any reason to interfere with the order of the Tribunal."

9. The Ld. AR argued that addition made purely relying upon the statement recorded during the survey action is incorrect and it is necessary that income should be assessed based on the correct law. In this present case, when it has been explained that the entire receipts cannot be added as per law and based on section 44AD of the Act, the question of adding the same on the basis of statement, is bad in law and incorrect.

10. In the appellate order, Ld. CIT(A) has relied upon the decision of Hon'ble Bombay High Court in the case of **Dedicated health Care service TPA(India) (P.) Ltd. vs. ACIT**, **324 ITR 345**in order to contend that the services provided by hospital are professional services. In this regard, the reliance placed by Ld. CIT(A) is distinguishable. It is submitted that the issue decided by Hon'ble High Court is limited to the scope of the professional fees for the purpose of sec.194J of the Act. The Hon'ble High Court in this case has held that the services provided by hospital which employs qualified doctors also provide medical professionals which is included within the meaning of professional services u/s section 194J. Accordingly, while making the payment to such hospital, the provision of section 194J of the Act are applicable. The Hon'ble Court has clearly made distinction while rendering the decision that the inclusion of the hospital within the meaning of professional services is limited for the purpose of section 194J and not

otherwise. The Court has also taken a cognizance that the medical profession cannot be rendered by a corporate enterprise. It also taken noted that decision of Hon'ble Gujrat High Court in the case of **CIT vs. Dr. K. K. Shah 135 ITR 146 (Guj)** wherein it was held that where a group of doctors were doing business, the same would come under the ambit of business activity. With such findings, Hon'ble Court held that the hospital which is corporate company in nature, would be covered under the professional services for the limited point of deduction of tax u/s 194J. However, where the doctors were engaged in the business activity, the same cannot be covered as profession.

11. The assessee firm is earning income only from IPD services, room rent, X-ray charges, etc. whereas the entire OPD income from doctor services were directly shown as income by concerned partners. This fact along with the return of income of partners were filed before Ld. CIT(A). Therefore, as such, no medical professional services income has been shown by the appellant whereas in the decision referred above, the hospital was earning income from doctor services. Therefore, the decision relied upon by Ld. CIT(A) is distinguishable on facts and cannot be relied upon.

12. Further, reliance is placed on decision of Coordinate Bench of ITAT-Hyderabad in the case of **Shalini Hospitals vs. ACIT**, **108 ITD 534** wherein the Bench has held that the activities of the nursing home who was rendering IPD services, constituted business and not profession for the purpose of section 44AD of the Act. The relevant part of the decision of ITAT Hyderabad is as under :-

> *5.3 There is no doubt that the assessee, which is a partnership firm, is a 'person' within the meaning of section 2(31), but the dispute is whether the assessee-firm is 'carrying on business' as contemplated under clause (a); or 'carrying on profession' as contemplated under clause (b) of section 44AB extracted above. According to the assessee, its activities*

constitute 'business' and hence the limit of Rs. 40 lakhs prescribed in clause (a) above applies. However, since its gross receipts were less than Rs. 40 lakhs, the mandatory requirements of section 44AB of getting the accounts audited, etc. do not apply to it. On the other hand, it is the contention of the Revenue that the activities of a nursing home in providing medical care and nursing required by the patients, which require specialized professional skill and knowledge, constitute 'profession' and as such the ceiling of Rs. 10 lakhs prescribed in clause (b) of section 44AB applies, and consequently, it is liable to comply with the mandatory requirements of getting its accounts audited, etc. as contemplated under section 44AB.

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5.5 Disputing the above findings of the Assessing Officer, the assessee contends that it is the surgeons and doctors, who treat the patients, have professional knowledge, qualification and skill to render professional service and receive professional fees from the patients, whereas the running nursing home, as such, does not have any of the above attributes, nor is it recognized by the Indian Medical Association. The assessee further contends that it is only room rent, operation theatre rent and nursing charges that are accounted for in its books of account, whereas the professional fees for the services rendered by surgeons and doctors who treat the patients are directly received by them. The assessee further more contends that a nursing home need not necessarily be run by doctors, but there is no legal bar on the same being run by non-doctors, by engaging the services of doctors.

5.6 There is a very narrow demarcation between a profession and a business. The word "profession" is of wider scope than "business". What may not amount to business may amount to 'profession' and what may not amount to 'profession' may amount to 'vocation' and what may not amount to vocation may amount to occupation. A 'profession' in the present use of language involves the idea of an occupation requiring either purely intellectual or if any manual skill, as in painting and sculpture, or surgery, skill controlled by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale, or arrangement for the production or sale of commodities. Bringing out the distinction between a business and a profession, Rajasthan High Court in the case of CIT v. Bhagwan Broker Agency [1995] 212 ITR 133 held as follows-

> *"The word "business" has been defined under clause (13) of section 2 of the Income-tax Act, 1961, to include any trade, commerce or manufacture or any*

adventure, or concern in the nature of trade, commerce or manufacture. The word "profession" has been defined in section 2(36) to include vocation, which refers to a way of living and not necessarily a course of activity indulged in, for earning one's livelihood or making any income. "Business" is a term with a wider import than "profession". All professions are businesses but all businesses are not professions. There should be some special qualification of a person apart from skill and ability which is required in carrying on any activity which could be considered as profession. This could be by having education in a particular system either in a college or university or it may be even by experience...."

5.7 Added to the thin margin of difference between a profession and a business, there is one more factor that complicates the issue of determining whether a particular activity constitutes 'business' or 'profession'. That is, there is no bar that prohibits a business being carried on by a professional. Thus, a professional may carry on his activities on commercial lines, by expanding his base and hiring the services of several professionals and non-professionals. In these days of advanced science and ebullient development commensurate with the need of the community, society and country, a centrifuged activity, though related to a profession as such, may not in a given case be interpreted as a wooden exercise thereof, if other compelling and surrounding circumstances need an expansive understanding of it in a commercial way. An expert professional, if he has the inclination, capacity and zeal to expand his activity, may do so. As a result thereof, he might tread into the arena of business activity. Such a composite activity is conceivable and indeed plausible in modern days. If, for instance, an expert equips himself with plant and machinery with which, he, with the aid of his professional skill and in collaboration with qualified assistant, is able to turn out an activity which is not strictly a professional activity but savours of a commercial activity as well, it is a case of commercial activity telescoped to professional activity and amounts to a 'business'. In these days of even corporate hospitals rendering medical services on commercial lines, it is too late in the day for the revenue to contend that the activities of a hospital/nursing home, carried on by a partnership firm, did not constitute 'business' but 'profession'.

5.8 Considering the totality of facts and entirety of the circumstances of the instant case in the light of the above discussion, we find merit in the above contentions of the assessee. One important aspect to be remembered is that what is assessed here is a 'Nursing Home', a partnership firm, which is a distinct assessable entity distinct from the professionals who run it or engaged by it. Added to it, it is the contention of the assessee, uncontroverted by the Department, that it is only the room rent, operation

theatre rent and nursing charges that are accounted for in the books of the assessee, whereas the fee for the professional services rendered by the surgeons and doctors, are directly received by them from the patients. Therefore, what is earned by the assessee-firm in the course of business is for letting out the facilities possessed by it as a nursing home and for provision of nursing and other supportive services provided by it to the patients who take treatment from the doctors in the nursing home. Therefore, the activities of a nursing home constitute business and not profession."

13. Further, reliance is placed on the decision of Hon'ble Kerala High Court in the case of **CIT vs. Upasana Hospital reported 139 CTR 518 (Kerala)**, wherein the Hon'ble High Court has held that the activity of the running a hospital and diagnostic center would constitute business activity. The relevant part of the Hon'ble High Court decision is as under: -

"14. Broadly speaking, all professions are businesses. When a professional man organises an activity which consumes his time and labour in connection with his professional work, either individually or in collaboration with others, it cannot be said that there is no profit motive behind such adventure. When there is an element of profit motive it will be a business activity whether it actually derives profit or not. When a medical practitioner, without confining himself to his conventional function of examining patients and prescribing medicines, establishes an X-ray plant and machinery for augmenting his professional work, it cannot be said that he has no profit motive in such adventure. That means he is carrying on a business activity which attracts the investment allowance under section 32A. This being our view, the reasonings contained in the decisions of the Income-tax Appellate Tribunal in the case of Dr. Vittal Bhat [1983] 6 ITD 560 (Bang) [SB] and of Dr. Surender Reddy [1989] 30 ITD 296 (Hyd) cannot be said to be erroneous. We have observed this because the Tribunal in the present case has placed reliance on those decisions."

14. Considering above we find that the activity carried out by the assessee firm are in the nature of business and not profession as per provisions of section 44AD (6) and section 44AA(1) of the Act.The Ld. AO in the alleged assessment order made reference to clause 6 of section 44AD of the Act which provides certain

exclusion to which provision of section 44AD are not applicable. The clause 6 of section 44AD is reproduced as under:-

> *"(6) The provisions of this section, notwithstanding anything contained in the foregoing provisions, shall not apply to—*
> *(i) a person carrying on profession as referred to in sub-section (1) of section 44AA;*
> *(ii) a person earning income in the nature of commission or brokerage; or*
> *(iii) a person carrying on any agency business."*

Further, clause 1 of section 44AA of the Act is reproduced as under: -

> *(1) Every person carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or any other profession as is notified by the Board in the Official Gazette shall keep and maintain such books of account and other documents as may enable the Assessing Officer to compute his total income in accordance with the provisions of this Act.*

15. A combined reading of the above two sections clearly establishes that the provisions of Section 44AD do not apply to individuals engaged in the medical profession. However, it is submitted that the assessee is a partnership firm providing services such as patient room rentals, X-ray facilities, and other ancillary inpatient department (IPD) services. The income generated from doctors' fees is separately declared by the respective doctors in their individual tax returns. Therefore, the assessee cannot be classified as a 'person' engaged in the 'medical profession.'We respectfully rely on the rulings in **Dr. K. K. Shah** (supra) and **Shalini Hospitals** (supra), which support this position. Accordingly, the turnover of the assessee firm should not be considered as professional income. The addition of Rs.86,25,000/-, based solely on the partner's statement, is unwarranted, particularly when the remaining receipts have been treated as business income

and the net profit rate has been accepted by the Ld. AO.In this regard, we place reliance on the decision in **S. Khader Khan Son** (supra). The assessee has consistently maintained a net profit ratio ranging between 6% and 11% on its turnover in preceding and succeeding years, which has been accepted by the revenue authorities.

Considering these facts, we find no merit in the impugned appellate order. Accordingly, the addition of Rs.86,25,000/- is quashed.

16. In the result, the appeal of the assessee bearing **ITA No.4089/Mum/2024** is allowed.

Order pronounced in the open court on 10th day of February 2025.

Sd/- sd/-

(AMARJIT SINGH) (ANIKESH BANERJEE)
ACCOUNTANT MEMBER JUDICIAL MEMBER
Mumbai,दिनांक/Dated: 10/02/2025
Pavanan

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकरआयुक्त CIT
4. विभागीयप्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
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BY ORDER,

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(Asstt. Registrar), **ITAT, Mumbai**