

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G' NEW DELHI**

**BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
AND
SHRI N.K. CHOUDHRY, JUDICIAL MEMBER**

**ITA No. 6118/Del/2019
Assessment Year: 2015-16**

Sudhir Chadha,
A-1/5, Janakpuri, New
Delhi.

PAN: AEEPC2928R
(Appellant)

Versus ACIT, Circle 61(1),
New Delhi

(Respondent)

Appellant by : Sh. Atul Puri, Ld. Adv.

Respondent by : Sh. Pradeep Gautam, Ld. Sr. DR

Date of hearing : 12.09.2022

Date of order : 28.11. 2022

ORDER

PER N.K. CHOUDHRY, J.M.

This appeal has been preferred by the Assessee against the order dated 26.11.2018, impugned herein, passed by the learned Commissioner of Income-tax (Appeals)-20, New Delhi (in short "Ld. Commissioner"), u/s. 250(6) of the Income-tax Act, 1961 (in short 'the Act') for the assessment year 2015-16.

2. Brief facts, relevant for adjudication of the instant appeal, are that the Assessee by filing its return of income on dated 12.09.2015 declared its total income of Rs.86,65,830/-. Case of the Assessee was selected for limited scrutiny and in response to the notice issued by the Assessing Officer u/s. 143(2) of the Act, the Assessee filed necessary details, information/documents along with books of account and vouchers before the Assessing Officer which were examined on test check basis.

2.1 During the course of assessment proceedings, the Assessing Officer, noticed that the Assessee had debited expenses of Rs.4,80,000/- to its profit and loss account under the head "commission to others", therefore the Assessee was show caused to explain the commission expenses incurred by the Assessee, being a Medical Doctor by profession. In response to the show cause notice, the Assessee vide reply dated 25.08.2017 submitted as under:

"That in view of the competitive market and to be retained in medical practice, the Assessee had to make various expenses to generate new cases and that the Assessee has deducted proper tax at source on such payments towards commission. Copy of TDS certificate and income tax returns of the recipient of commission were also filed before the Assessing Officer. The Assessee further submitted that the commission is paid purely for the purpose of the business and therefore, such payment is an allowable expense."

2.2 The Assessing Officer, after considering the reply of the Assessee observed that the Assessee is a Doctor and is barred by Medical Council Rules from giving of and receiving any commission, gifts or gratuity and bonus paid to any person/entity and therefore,

the commission of Rs.4,80,000/- paid to others is not a valid business expense and ultimately by passing order u/s 143(3) of the Act, disallowed the same and added it to the income of the Assessee.

3. Being aggrieved with the assessment order, the Assessee preferred first appeal before the Id. Commissioner and on merit claimed as under:

“That the Assessee had hired a marketing agency to improve the business, better management of the patients, co-ordination of the surgeries to improve efficiency and counselling of the patients. The payments made to this agency were through banking channels after deducting tax at source. The Assessing Officer had not doubted the genuineness of such payments, but has disallowed the same by misunderstanding the facts of the case misinterpreting this amount as referral fee paid to other doctors, diagnostic centres etc., which is banned by Indian Medical Association, whereas even a fraction of this amount paid and disallowed by the Assessing Officer was not paid to any doctor, diagnostic Lab or chemist or any other party engaged in any medical related activity. Therefore, the treatment of professional fee as referral fee is based on assumptions and presumptions of the Assessing Officer, which cannot be sustained under law.”

3.1 The Assessee before the Ld. Commissioner also raised the legal issue by submitting as under:

“That as per notice u/s. 142(1) of the Act and questionnaire attached therewith, the case of Assessee was picked up for “LIMITED SCRUTINY” on the ground of (i) mismatch in amount to related persons u/s. 40A(2)(b) as reported in audit report and (ii) receipts u/s. 194C and 194J (as per 26AS) are more than the receipts shown in ITR 4/5/6 and that the Assessee had

deposited large cash in saving bank accounts. In order to meet out both these objections, the Assessee submitted necessary documents, bank statements in the assessment proceedings and explained that in view of the documentary evidence, none of the aforesaid two reasons were found applicable. The Assessing Officer also got verified the documents and information furnished by Assessee and did not make any addition on any of these grounds, on the basis of which the case was picked up for limited scrutiny. However, the Assessing Officer exceeded her jurisdiction by making roving and fishing enquiries on other aspects of the case and asked the Assessee for documents and information relating to other heads of expenses, for which the Assessing Officer had no jurisdiction to extend the proceedings beyond the limited scrutiny, that too without seeking any approval from the designated authority and giving an opportunity to the Assessee to contest the same. Therefore, the assessment proceedings are vitiated on this legal aspect of the case only.”

3.2 The Id. Commissioner, after considering the contentions of the Assessee on merit, sustained the disallowance made by the Assessing Officer on the premise that there is contradiction between the statements of the Assessee made before the Assessing Officer and that made in the appeal proceedings, inasmuch as, before the Assessing Officer, the Assessee claimed the expenses under the head commission to others and submitted that under the competitive market and to be retained in practice he has to make various expenses to generate new cases, whereas in the appeal proceedings, he stated that the amount was paid to a marketing agency hired by the Assessee to improve business, better management of patients, co-ordination of the surgeries to improve efficiency and counselling of the patients.

In view of such contradictory stand on this issue, the Id. Commissioner affirmed the action of the Assessing Officer vide impugned order.

4. Being aggrieved, the Assessee is in appeal before us.

5. Heard the parties and perused the material available on record and given thoughtful consideration to the orders passed by the authorities below. On merit of the case, we observe, as it clearly appears in the assessment order, that the Assessee vide reply dated 25.08.2017 tried to substantiate the amount of Rs.4,80,000/- debited to the Profit & Loss Account under the head '**commission paid to others**', which reads as under :

*"a) The Assessee is a Doctor/Surgeon by profession. Looking the circumstances of the competitive market and **to be retained in practice have to make various expenses to generate new cases.** The Assessee had **made payments towards commission** and deducted proper tax at source. (Copy of TDS certificate enclosed).*

b) Copy of Income Tax return of the recipient of commission is also enclosed.

*Furthermore, the **commission is paid purely for the purpose of the business** and looking the ground of the case it is pleased before your goodself that the commission expenses may please be allowed."*

(Highlighted by us for reference)

5.1 However, during the appeal proceedings before the Id. Commissioner, the Assessee changed his stand by claiming that the

Assessee had hired a marketing agency, Karanjeet Thukral HUF, to improve the business, better management of the patients, coordination of the surgeries to improve efficiency and counselling of the patients and therefore, paid Rs.4,80,000/- to it. The Assessee further claimed that the Assessing Officer had made addition by completely misunderstanding and misinterpreting the facts of the case. Further, the Assessee is a law abiding and responsible surgeon having more than three decades of experience and not even in his imagination he will violate any law or directions of IMA, as the Indian Medical Association had banned the payment of referral fee to be paid to other doctors, diagnostic centres etc. and not professional fee to improve the business and efficiency. In the case under consideration, not even a fraction of the amount paid and disallowed by the A.O. was paid to any Doctor, Diagnostic Lab or Chemist or any other party engaged in any medical related activity.

5.2 We have given thoughtful consideration to the contradictory stand taken by the Assessee before the Assessing Officer and the Id. Commissioner. The Apex Court time and again reminded that the receiving of any freebies, bonus or commission, etc. by medical practitioner(s) from the allied health industry including hospitals for referring any patient by them for medical investigation, surgical, or other treatment purposes is prohibited under The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (in short "the Regulations").

In the same way clause 6.4.1 of the regulation prohibits the medical practitioner (s) from giving, soliciting , or receiving or offering to give any gift, gratuity, commission or bonus in consideration of or return for the **referring, recommending or**

procuring of any patient for medical, surgical or other treatment. Further prohibits the medical practitioner (s) from directly or indirectly, participating in or be a party to act of division, transference, assignment, subordination, rebating, splitting or refunding of any fee for medical, surgical or other treatment etc.

The Hon'ble Apex Court also reminded that if demanding of commission is bad then paying of the same is also equally bad and therefore commission paid by medical practitioner is opposed to public policy and should be discouraged as the same is not a fair practice and has to be termed as against the public policy as the consideration or object of the agreement between the Medical practitioner and the commission agent is not only unlawful but also void as per Contract Act.

5.3 The Hon'ble Apex Court in the case of M/S Apex Laboratories P. Ltd. vs The Deputy Commissioner Of Income ... on 22 February, 2022 Indian Kanoon - <http://indiankanoon.org/doc/43893743/> 12 also reminded as under:

“27. It is also a settled principle of law that no court will lend its aid to a party that roots its cause of action in an immoral or illegal act (ex dolomalo non oritur action) meaning that none should be allowed to profit from any wrongdoing coupled with the fact that statutory regimes should be coherent and not self- defeating. Doctors and pharmacists being complementary and supplementary to each other in the medical profession, a comprehensive view must be adopted to regulate their conduct in view of the contemporary statutory regimes and regulations. Therefore, denial of the tax benefit cannot be construed as penalizing the assessee pharmaceutical company. Only its participation in what is plainly an action prohibited by law, precludes the Assessee from claiming it as a deductible expenditure.”

5.4 It is the also mandate of law that it is the onerous duty of the litigant to come to the Court with clean hands. In the case

of Kishore Samrite vs. State of U.P. & Others reported in 2013(2) SCC 398, the Hon'ble Apex Court held as follows:

"32. With the passage of time, it has been realised that people used to feel proud to tell the truth in the Courts, irrespective of the consequences but that practice no longer proves true, in all cases. The Court does not sit simply as an umpire in a contest between two parties and declare at the end of the combat as to who has won and who has lost but it has a legal duty of its own, independent of parties, to take active role in the proceedings and reach at the truth, which is the foundation of administration of justice. Therefore, the truth should become the ideal to inspire the courts to pursue. This can be achieved by statutorily mandating the Courts to become active seekers of truth. To enable the courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, prevarication and motivated falsehood, must be appropriately dealt with. The parties must state forthwith sufficient factual details to the extent that it reduces the ability to put forward false and exaggerated claims and a litigant must approach the Court with clean hands. It is the bounden duty of the Court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the Court must ensure that there is no wrongful, unauthorised or unjust gain to anyone as a result of abuse of the process of the Court. One way to curb this tendency is to impose realistic or punitive costs.

5.5 A litigant is not only required to come with clean hands and bound to make full and true disclosure of facts, but it is imperative to come with clean mind, clean heart and clean objective that are the equi-fundamentals of judicious litigation. One should not be enriched by the loss or injury to another, is the percept for Courts. The jurisdiction of the court should not become a source of abuse of the process of law by the disgruntled litigant. Careful exercise is also necessary to ensure that the litigation is genuine, not motivated by extraneous considerations and imposes an obligation upon the litigant to disclose the true facts and approach the court with clean hands. No litigant can play hide and seek with the courts or adopt pick and choose. True facts ought to be disclosed as the Court knows

law, but not facts. Suppression or concealment of material facts is impermissible to a litigant. The Court is also a Court of Equity. It is, therefore, of utmost necessity that when a party approaches a Court, he must do equity and place all the facts before the Court without any reservation. If there is suppression of material facts on the part of the petitioner or twisted facts have been placed before the Court, the Court may refuse to entertain the petition and dismiss it without entering into merits of the matter.

5.6 In the instant case it is a undisputed fact that the Assessee himself had debited the amount of Rs.4,80,000/- to the Profit & Loss Account under the head '**commission paid to others**' and by filling reply dated 25.08.2017 in the assessment proceedings tried to justify/substantiate the said claim of '**commission paid to others**'. However before the Ld. Commissioner in appeal changed its stand and also claimed that the Assessing Officer had made addition by completely misunderstanding and misinterpreting the facts of the case. It is not the case of the Assessee that the Assessee inadvertently or unknowingly claimed the said amount as '**commission paid to others**', and it is also not the case of the Assessee that the reply dated 25.08.2017 (supra) does not belongs to the Assessee. Therefore the claim of the Assessee that the Assessing Officer had made addition by completely misunderstanding and misinterpreting the facts of the case is frivolous and totally unwarranted and therefore not to be encouraged.

On the aforesaid reasons, in cumulative effects, we are unable to accept the contradictory stand of the Assessee taken before the

L. Commissioner because the contradictory stand of the Assessee clearly seems to be concocted story, twisting facts, erratic, vague and superfluous and thus liable to be depreciated. Even otherwise as per the judgements referred to above, the payment of commission by the Assessee for referring patients to it by any stretch of imagination, cannot be accepted as legal or as per public policy of India, hence such commission is not an allowable expense. Consequently the Assessee in any case is not entitled for any relief on merit, we are thus inclined not to interfere in sustaining the addition of Rs.4,80,000/-by the Ld. Commissioner on merit.

5.7 Coming to the legal aspect of the case, as the case of the Assessee was selected for limited scrutiny and the addition in hand does not emanate from the grounds on which the case of the Assessee was picked up for limited scrutiny. Though the Ld. Commissioner, in the impugned order incorporated the legal contention of the Assessee objecting to the jurisdiction of the Assessing Officer to extend the assessment proceedings beyond the points of limited scrutiny, but the Ld. Commissioner has not adverted to decide this contention of Assessee in the impugned order.

As it is settled law that the Revenue Authorities are not allowed to travel beyond the issues involved in limited scrutiny cases, except in exceptional circumstances and by completing the relevant formalities before proceeding to other issues, which in the instant case does not appears to have adhered to. Hence, we deem it appropriate to delete the addition in hand. Consequently, the appeal of the Assessee is liable to be allowed.

- 6.** In the result, the appeal filed by the Assessee stands allowed.

Order pronounced in the open court on 28/11/2022.

Sd/-

(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

Sd/-

(N.K. CHOUDHRY)
JUDICIAL MEMBER

*aks/-