

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

Income Tax Appeal No. 76 of 2015 (O&M)
Date of Decision: 09.09.2016

Commissioner of Income Tax-2, Chandigarh

..Appellant

versus

M/s International Institute of Neuro Sciences and Oncology Ltd. Chandigarh
..Respondent.

**CORAM: HON'BLE MR. JUSTICE S.J.VAZIFDAR, CHIEF JUSTICE.
HON'BLE MR. JUSTICE DEEPAK SIBAL, JUDGE.**

Present : Ms. Urvashi Dugga, Advocate, for the appellant.

Mr. B.M.Monga, Advocate and
Mr. Rohit Kaura, Advocate, for the respondent(s).

S.J.VAZIFDAR, CHIEF JUSTICE

This is an appeal against the order of the Income Tax Appellate Tribunal in respect of the assessment year 2005-06.

2. The assessee filed a return of income declaring a business profit of ₹ 47,81,166/-. The profits were set off against the brought forward depreciation and the return income was shown as 'nil'.

3. The assessee runs a hospital. The assessment was completed under section 143(3) of the Income Tax Act, 1961 (for short 'the Act') at an income of ₹ 71,41,939/-. The Commissioner of Income Tax (Appeals) confirmed the order of the Assessing Officer to a large extent. The Tribunal upheld certain additions and restored to the file of the Assessing Officer certain issues for further verification/adjudication.

4. The assessee has raised the following questions of law:-

- i) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is right in deleting the addition of ₹ 1,22,35,474/- made by the AO u/s 40(a)(ia) for assessment year 2005-06 whereas the assessee has failed to deposit the tax deducted prior to 28.02.2005 on or before 31.03.2005 as per provisions effective for assessment year 2005-06 as amended by the Finance Act, 2008 effective from April, 2005?
- ii) Whether on the facts and in the circumstances of the case, the ITAT was right in holding that amendment brought in Section 40(a)(ia) by Finance Act, 2010 are applicable to the assessment year 2005-06 also whereas no retrospective applicability was incorporated by the Parliament and as per Circular No.1 of 2011 dated 06.04.2011, CBDT has clarified that this amendment takes effect from 1st July, 2010?
- iii) Whether on the facts and in the circumstances of the case, the order of the Tribunal is not perverse in allowing relief of ₹ 16,75,771/- (i.e. ₹ 21,75,771- ₹ 5,00,000/-) to the assessee by restricting the addition to ₹ 5 lacs without assigning any basis even after conforming with the orders of the authorities below that the disallowance on account of commission paid to the Doctors for referring the patients to the hospital are to be added as income in the hands of the assessee in view of the provisions of section 69C of the Act?

Re: Question No. (i)

5. The assessee contended that the main reason for delay in depositing the TDS was due to financial crisis and that the deposit was made suo-moto without any notice from the department. It was further contended that the Finance Act, 2008 made the amendment to section 40(a)(ia) of the Act w.e.f. the assessment year 2005-06. The Tribunal noted that the assessee had deposited the entire amount of TDS before the due date of filing of the

return of income. The Tribunal held that the amended provisions were retrospective. The Tribunal, however, directed the Assessing Officer to verify the claims of the assessee as to the date of deposit and to recompute the disallowance, if any, in respect of such payments where the tax deducted at source had not been deposited before the due date of filing of return of income. We see no reason to interfere with this order of remand to this limited extent. The Tribunal could have as a fact finding body decided the issue itself. However, the Tribunal is not prevented from directing the Assessing Officer to verify such an aspect. Question No. (i) therefore, does not raise a substantial question of law. It does not even affect the appellant's rights. The appeal in this regard is, therefore, dismissed.

Re: Question No. (ii)

6. This issue is covered in favour of the assessee by the judgment of a Division Bench of this Court dated 07.10.2014 in ITA No. 179 of 2014 *Commissioner of Income Tax, Faridabad v. M/s Foremost International Pvt. Ltd.* where it is held that section 40(a)(ia) of the Act is retrospective.

Re: Question No. (iii)

7. It is necessary to refer to the assessment order for it deals with the issue in detail. The statement of the assessee's accountant one Shri S.K.Sharma was recorded under section 131 of the Act. He admitted that the assessee had been paying commission to various Doctors for referring the patients to the hospital and that payments were not recorded in the regular books of account. He stated that the details of the Doctors who referred the patients were noted by the person at the counter preparing bills. These details were sent to the marketing personnel; the marketing personnel decided the amount to be paid to such Doctors; the details prepared by the

marketing personnel were checked and signed by the Director who in turn sent the same to the accountant for payment. The accountant thereafter signed the details sheet and gave the same to the cashier for making payments. It was stated that the payments were in the range of ₹ 15,000/- to ₹ 20,000/- per month. The payments were collected by the marketing personnel to handover the same to the Doctors concerned. The payments to the Doctors were made in cash and separate accounts were maintained in respect thereof. Daily/weekly reports submitted by the cashier reflected the payments. It is of vital importance to note that admittedly the records in this regard were destroyed and were not produced for the examination of the Assessing Officer.

8. The assessment order records that there was no response furnished to the Assessing Officer's query as to why additions should not be made to the assessee's income in view of the above facts. It is also important to note that the assessee was put to notice by the Assessing Officer that if it failed to respond to the query the Assessing Officer proposed estimating the payments at 5% of the total receipt. As rightly pointed out by Ms. Dugga, learned counsel appearing on behalf of the appellant, it was not contended on behalf of the assessee that the patients in the hospital were other than those referred by the Doctors. The statement of another employee of the assessee regarding these payments was also recorded. He was not cross-examined on behalf of the assessee.

9. In the circumstances the fact that the payments were made to the Doctors who referred the patients to the assessee is established. The question is whether the Assessing Officer was justified in estimating the payment as 5% of the total receipt.

10. The Assessing Officer as we noted earlier dealt with the facts in considerable detail. He rightly observed that the facts are within the knowledge of the assessee. The assessee, however, never disclosed the same.

The Assessing Officer further noted as under:-

“So the said claim of the assessee cannot be accepted that the said cash received against bogus purchases may be assumed to have been paid to the Doctors. Another aspect which comes into picture is that by claiming the above aspect the assessee indirectly admits that the quantum of such payment of commission is covered by the quantum of such bogus purchases which is ₹ 28,10,500/- (₹ 19,75,000/- relating to bogus purchases shown from M/s Kind Remedies, ₹ 15,07,500/- from M/s P.K.Enterprises and ₹ 3,28,400/- from M/s Amit Juneja & Co.) and thus it is not disputing the quantum of commission determined by applying rate of 5% on the hospital receipts. Considering all these aspects, the addition on account of commission payment is treated as from sources not disclosed by the assessee and no benefit, as claimed by the assessee is given.”

11. The Assessing Officer thereafter determined that an amount of ₹ 4.35 crores was received by the assessee and computed the commission at 5% of the same which amounted to ₹ 21,75,771/-. The Assessing Officer infact took a balanced approach. He noted that the normal practice in the profession was to give a commission of 10% of the billed amount to the Doctor referring the patients but that it was possible that some patients came without reference and that some Doctors did not take such commission. Considering the same the Assessing Officer computed the commission at 5% and not 10% of the total medical receipts. The approach adopted by the

Assessing Officer was reasonable and fair and after considering all the relevant facts. It is important to note at the cost of repetition that the assessee had admittedly destroyed the documents relating to these payments. The Tribunal agreed with the finding on facts. Infact the Tribunal did so after furnishing detailed reasons itself. Having done so the Tribunal in one sentence in the concluding paragraph observed as under:-

“However, we restrict the said addition to ₹ 5 lacs for the year under consideration. The ground of appeal No.9 raised by the assessee is thus partly allowed.”

The Tribunal has furnished no reason whatsoever for differing with the order of the Assessing Officer in this regard which is confirmed by the CIT(A). There is no basis on which a sum of ₹ 5 lacs was computed. The order of the Tribunal is, therefore, perverse.

12. In the circumstances, question No. (iii) is answered in favour of the department and against the assessee. The addition made by the Assessing Officer is confirmed.

13. The appeal is accordingly disposed of.

(S.J.VAZIFDAR)
CHIEF JUSTICE

(DEEPAK SIBAL)
JUDGE

09.09.2016
'ravinder'

Whether speaking/reasoned	√Yes/No
Whether reportable	Yes/No√