

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 21.08.2017

CORAM

**THE HONOURABLE MR. JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR. JUSTICE D.KRISHNAKUMAR**

Tax Case Appeal No.536 of 2007

The Commissioner of Income Tax,
Chennai.

.. Appellant

Vs.

Dr.Hakeem S.A.Syed Sathar

.. Respondent

PRAYER: Appeal filed under Section 260A of the Income Tax Act 1961 against the order of the Income Tax Appellate Tribunal, Bench "A", Chennai, in I.T.(SS) No. 94/mds.2006 for the assessment year 1997-98 to 2002-2003.

For Appellant : Mr.M.Swaminathan
Standing Counsel for Income Tax
Department

For Respondent : Mr.A.S.Sriraman for
Mr.S.Sridhar

JUDGMENT

(Judgment of the Court was delivered by **D.KRISHNAKUMAR, J**)

This Appeal has been filed by the Revenue under Section

260A of the Income Tax Act 1961 against the order of the Income Tax

Appellate Tribunal, "A" Bench, Chennai, in I.T.(SS) No.94/mds.2006 for the assessment year 1997-98 to 2002-2003.

2. The facts of the case in nutshell are as follows:-

The respondent/Assessee is a medical practitioner in Unani medicine. A search was conducted in the respondent Clinic on 23.1.2003.

Consequent to the search, the following facts have come to light:

- (i) Suppression of Receipts
- (ii) Inflation of expenses in the purchase of medicine
- (iii) Investing the unaccounted income generated, by suppressing collection
- (iv) Bogus sundry debtors
- (v) Omission to account advertisement expenses
- (vi) No accounting of income received on lodging house.

Cash Rs.18,25,450/- was found and seized, gold jewellery weighing 1522.6 grams were found, but not seized. Hence, for the block period 1996-97 to 2002-2003 and for the period 1.4.2002 to 23.1.2003 assessment was framed under Section 158 BC read with Section 143 of the Act and notice under Section 158 BC of the Act was issued on 3.11.2003 and the assessment was completed u/s.158 BC read with Section 143(3) of the Act on 31.3.2005 and determined the total undisclosed income as Rs.2,59,57,634/- as against the income returns submitted by the respondent/Assessee of Rs.69,40,422/-.

3. Aggrieved by the Block Assessment order, the Assessee preferred an appeal before the Commissioner of Income Tax (Appeals) in I.T.A.No.27/2005-06. The Commissioner of Income Tax (Appeals) vide order dated 31.3.2006, partly allowed the appeal of the Assessee. The Commissioner of Income Tax (Appeals) confirmed all the additions but

deleted a sum of Rs.24,48,242/- on inflation or cost of medicines.

4. Challenging the order passed by the Commissioner of Income Tax (Appeals), the Assessee preferred an appeal before the Income Tax Appellate Tribunal in IT (SS) A.No.94/Mds/2006. The Income Tax Appellate Tribunal held that the Assessee has been suppressing the professional receipts and held that by considering the fact that 42% gross receipts calculated by the Revenue are allowed as deduction on account under receipt and/ or cost of medicines estimated towards non-receipt of fee as well as cost of medicines.

5. Challenging the said order, Revenue has preferred an appeal before this Court. The above Tax Appeal was admitted on the following substantial question of law:

Whether in the facts and circumstances of the case, the Tribunal was right in granting a relief of Rs.1,09,02,206/- while considering the issue relating to addition made on account of suppressed receipts of Rs.2,59,57,634/- when the said addition was made on the basis of the admission of the Assessee and seized materials at the time of the search ?

Whether in the facts and circumstances of the case, the Tribunal was right in granting the said relief when the consultation registers and the account books were put to the Assessee for verification and the difference that arose was arrived at Rs.2,59,57,634/- ?

6. Mr.M.Swaminathan, learned Standing Counsel for the Revenue/appellant would submit that as a result of search, block assessment was completed on 31.3.2005 under Section 158 BC read with

Section 143(3) of the Act by making following additions:

Suppression of receipts	Rs.2,59,57,634/-
Suppression of sale of old medicines	Rs. 25,05,120/-
Inflation or cost of medicines	Rs. 24,48,242/-
Marriage Hall income	Rs. 3,71,860/-
Madurai Mansion income	Rs. 2,00,000/-

7. The learned Standing counsel for the appellant contended that the Commissioner of Income Tax (Appeals) confirmed all the additions but deleted a sum of Rs.24,48,242/- on purchase of medicines. Against the said portion of the order, the appellant/Revenue has filed an appeal before the Income Tax Appellate Tribunal in IT (SS) A.No.156/Mds/2006. The Assessee has preferred an appeal in IT (SS) A.No.94/Mds/2006.

8. The learned Standing counsel for the appellant contended that the Income Tax Appellate Tribunal has held that the Assessee has been suppressing the professional receipts on the basis of consultation register. Further, the tribunal has held that initially the Assessee had submitted that 20% of the money was not received and later on submitted that upto 30% of the money was not received. The tribunal has accepted the contention of the Assessee by pointing out that the Assessing Officer himself estimated the cost of medicines about 42% in the assessment year 2001-02. Thus, the total cost for purchase of medicines admitted by the Assessing Officer is Rs.73,57,878/- as against the total collection including the unaccounted collection of Rs.1,74,05,435/- which comes to 42.27%. But the cost of purchase gone down to 26.46% and 18.82% for

assessment year 2002-03 and 2003-04 respectively. The tribunal has accepted the contention of the Assessee on the ground that Assessee is carrying on practice in Unani system of medicine and therefore, Assessee was charging lumpsum fees including the cost of medicines. Without giving any reasons and when no material has been placed by the Assessee to prove his contention, the tribunal has partly allowed the appeal filed by the Assessee allowing the deduction of 42% from the gross receipts towards non receipt fees as well as cost of medicines. Therefore, the order passed by the Tribunal is perverse in granting deduction of 42% without any materials. Hence, the order passed by the Tribunal is liable to be set aside.

9. Per contra, the learned counsel for the respondent/ Assessee would submit that on the basis of the statement made by the Assessee before the department, the respondent/Assessee had submitted before the Appellate Tribunal that the Consultation register and patient history register seized by the department during the course of search, contained payment schedule for the entire course of treatment and in many cases, some patients have not continued the treatment and in some cases, there were defaults in payment by the patients and in some cases, consultation fee of Rs.50/- alone was collected and patients have not preferred to take any medicine as prescribed. Hence, the respondent/ Assessee submitted that the Consultation register cannot be relied on in its entirety to make the said estimated additions.

10. The learned counsel for the respondent also placed

reliance on the sworn statement taken during the course of search from
<http://www.judis.nic.in>

the respondent/Assessee and his Assistant. The said statement of the Assessee is extracted as under:

"It is submitted once again that the "Quotation" noted in the prescription slips is for the entire course of treatment which is not collected in one lump in the first sitting. They are collected in parts in various sittings during the course of the treatment. Some patients do not complete the course, some discontinue in the middle and some patients after knowing the Quotation bolt away. In very few cases, the course is repeated. The totalling done by the A.D.I. of such Quotations is abstract and does not represent the correct collection and based upon such abstract totalling, the present proposed assessment will be nowhere near realities. Atleast 30% of the gross total thus arrived at is not collected or realised. Even the totalling made by the Department arriving at the figure of Rs.5,50,82,680/- was done in haste and it needs rechecking. Even admitting such total as correct, 30% has to be deducted as not collected and realised. This will further reduce the collection figures by Rs.96,35,673/-. Further, the amount collected as per Books works out to Rs.2,71,58,856/- and the figure adopted for this in your above letter is not correct."

11. The learned counsel for the respondent/Assessee would content that Net wealth of the Assessee did not match the income estimated by the Assessing Officer and the wealth of the respondent/Assessee stood as Rs.59 lakhs as against Rs.2.55 Crores and further submitted that there was no evidence in the hands of the department indicating the receipt of the above estimated income at Rs.2.55 Crores.

Further, it is the case of the respondent/Assessee that the Assessing

Officer himself had allowed the cost of purchase of medicine for the Assessment year 2001-02 at 42.27% of the total estimated collections. On the basis of the said deductions granted by the Assessing Officer, the respondent/Assessee pleaded for deductions with regard to expenses incurred on account of purchase of medicine, advertisement and further on account of non receipt of income mentioned in the Consultation register seized by the Department during the course of search.

12. Accepting the said contention, the tribunal has partly allowed the appeal of the respondent/Assessee. According to the learned counsel, there is no substantial question of law involved in the second appeal. Therefore, there is no error or illegality or perversity in the order passed by the tribunal. Hence, Tax appeal is liable to be dismissed.

13. Heard the learned Standing counsel appearing for the Revenue/Appellant as well as the learned counsel for the respondent/Assessee and perused the materials available on record.

14. As a result of search conducted by the Assessing Officer, an order has been passed under Section 158 BC read with Section 143(3) of the Income Tax Act for the block period 1996-97 to 2002-03 by determining the total undisclosed amount of Rs.2,55,19,500/-.

15. Challenging the said order, the Assessee filed an appeal in ITA No.27/05-06 before the Commissioner, Income Tax (Appeals), Chennai on the ground that 30% of the quotation was not realised and it was wrong to assess the gross total of quotations, as actual collection. Further, the Assessing authority erred in making an addition of Rs.14,04,120/- being the amount quantified on the sale of medicine to

outpatients. In the field of practising Unani medicine, generating receipts would not be possible without purchase of medicine, in as much as it is a case of dispensing in the Unani medicine prescribed, at the time of consultation of the patients. The Assessing Officer has not appreciated the contentions of the Assessee that regular books of account should not have been relied upon while rejecting the claim of purchase of medicine, especially in a search case. Further, it is the contention of the respondent/Assessee that the Consultation charges mentioned in the consultation register were not fully realised, only 20% to 30% of the said charges were realised. Therefore, the said aspect was not considered by the Assessing Officer and further contention that the Assessing Officer himself has given 42%, towards cost of medicine, against the undisclosed receipts.

16. There is no dispute that undisclosed receipts and unaccounted purchase of medicines were found during assessment. The Commissioner has come to the conclusion that a separate addition has been made towards inflation of purchase to the tune of Rs.24,48,242/-. In so far as the unaccounted purchase of medicine to the tune of the above said amount, has been disallowed as ordered by the Assessing Officer and in so far as the other addition is concerned, the Commissioner has upheld the order of the Assessing Officer. In the light of the above, the Commissioner has allowed deduction of Rs.24,48,242/- towards cost of medicines. In so far as the other dispute is concerned, the order of the Assessing Officer has been sustained.

17. Assailing the said order, the Assessee/respondent has

preferred an appeal in IT (SS) No.94/Mds/2006 before the Income Tax Appellate Tribunal, Chennai on the ground that the assessment should be framed on net asset method and estimation of professional receipts including discount on non-realisation of such purchases and deduction for purchase on medicines etc. and other grounds were also raised, in respect of other issues.

18. The tribunal by taking into consideration of the purchase of medicine for the assessment year 2001-02 allowed 42.27% for the above said period and set aside the order passed by the Commissioner of Income Tax (Appeals), Chennai and added 42% from the gross receipts estimated for non-receipts bills, as well as the cost of medicines.

19. In so far as the other issues are concerned, the Tribunal has partly allowed the appeal. Challenging the said order, tax appeal has been preferred raising the substantial questions of law as stated above.

20. The learned counsel for the appellant would submit that the only issue involved in this appeal is that ITAT has given a relief of Rs.1,09,02,206/- by directing the Assessing Officer to allow 42% as deductions from the total gross receipts Rs.2,59,57,634/-. The aforesaid relief granted by the Appellate tribunal from the total gross receipts is without any basis and thus erroneous.

21. The tribunal has clearly stated that Assessee has been suppressing professional receipts. Therefore, Revenue has given an option that there should not be professional receipts on the basis of

Consultation register and accepted the order passed by the authority. It

is also stated that initially Assessee has submitted that 20% of the money was not received and thereafter, submitted that upto 30% of the money was not received. The Tribunal has granted relief to the respondent/ Assessee on the ground that the Commissioner of Income Tax (Appeals) has passed an order by stating that there are unaccounted receipts and there would be unaccounted purchase of medicines, but no benefit was granted in the absence of any proof for the same. But the tribunal, by taking into consideration of the contention of the respondent/Assessee, granted deduction 42% from the gross receipts estimated for non receipts of fee, as well as cost of medicines. The block assessment has been made only, with the books seized and suppression of undisclosed income. Without any materials and guidelines, the tribunal has granted relief of 42% deduction on the cost of medicines and non receipt of fees. Simply by observing that the Assessing Officer himself has estimated the cost of medicine at about 42% for the year 2001-02, the Tribunal has granted deduction 42% towards cost of medicines and non receipt of fees, and the same which is not explained. Therefore, the respondent/ Assessee is not entitled for the deduction of 42% from the gross receipts towards non receipt of fees and cost of medicines. The Commissioner of Income Tax (Appeals) has granted deduction only for the purchase of medicines and not for the non receipt of fees by the respondent/ Assessee. There is no discussion or any evidence, to come to such conclusion by the tribunal, for granting deduction of 42% towards cost of medicines and non receipt of fees.

N.K.Dharmadas vs. State Transport Appellate Tribunal (AIR 1963

Ker 73) has held that as under:

"The power to remand was incidental to and implicit in the appellate jurisdiction. This is what the Full Bench observed in paras 16, 17, 18, and 19 of the said judgment:

"16. An appeal is a complaint to a superior body of an injustice done or error committed by an inferior one with a view to its correction or reversal. It is creature of statute, not a constitutional or inherent right. But, as pointed out by Maxwell, where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution.

17. A remand by an appellate court is usually made when the record before it is in such shape that the appellate court cannot in justice determine what final judgment should be rendered and the power to do so cannot but be an essential requisite of the very jurisdiction to entertain the appeal. It is an old maxim of the law that to whomsoever a jurisdiction is given, those thing also are supposed to be granted, without which the jurisdiction cannot be exercised."

23. In **Narayanan Chettiar Industries vs. Income-Tax Officer reported in [2005] 277 ITR 426 (Mad)** the First Bench of this

Court held as under:

"A perusal of the impugned order of the Income-tax Appellate Tribunal shows that there was no finding of the tribunal that any deduction or allowance was made in the assessment of the assessee in an earlier year. In the circumstances,

we set aside the impugned order of the Tribunal and remand the matter to the Tribunal for a fresh decision in accordance with law after hearing the parties concerned in which a clear finding should be given whether any deduction has been allowed in the assessment of the assessee in the earlier year so as to comply with section 41(1) of the Income-tax Act. This appeal is allowed, the impugned order of the Tribunal is set aside, and the matter is remanded to the Tribunal for a fresh decision in accordance with law."

24 In **Nitin Pahadiya vs. Union of India reported in (2006) 202 CTR (MP) 321 the Madhya Pradesh High Court (Indore Bench)** has held as under:

"9. When the Tribunal was reversing the finding of fact recorded by the CIT(A) on the that it was obligatory upon the tribunal to have discussed the factual evidence led by assessee in its proper perspective. Referring to a factual statement of a witness without giving his name and actually quoting what he said and where he said, the finding of Tribunal cannot be said to be a legally sustainable finding. It is a finding which is rendered de hors the evidence led. It is not supportable by evidence on record. Such finding is not binding on this Court and is incapable of being sustained.

10. This Court in its appellate jurisdiction cannot appreciate the evidence led by the parties for deciding the issue because our jurisdiction is confined to only substantial question of law framed. Similarly, we do possess power under

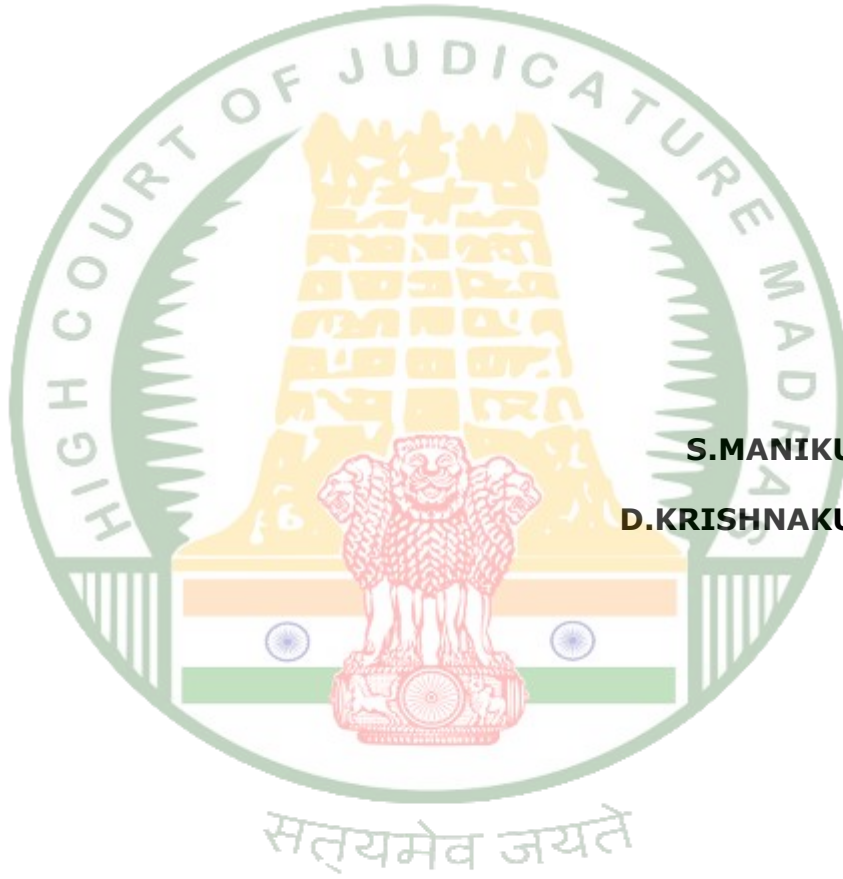
S.260A ibid to remand the case to Tribunal for deciding the appeal afresh on merits if we find that finding of fact recorded by the Tribunal for reversing the decision of CIT(A) was based on no evidence no non-consideration of evidence led. It then becomes a case of improper appreciation of oral evidence calling for interference. It is for this reason, we have formed an opinion to remand the case to Tribunal. In our view, the remand if made would not cause any prejudice to either of the parties as both will get an opportunity to put forth their submission again before the Tribunal in appeal."

25. In our view, there are no materials or guidelines or discussion of evidence with regard to deduction of 42% granted by the tribunal towards non receipt of fees and cost of medicines, in the light of the decisions cited supra, this Court is inclined to set aside the order passed by the tribunal. The substantial questions of law framed in this appeal are answered accordingly.

26. In the facts and circumstances of the case and the decisions cited supra, the appeal is allowed. The impugned order of the tribunal is set aside and the matter is remanded to the tribunal to consider the issues afresh and pass an appropriate order in accordance with the provisions of law. No order as to costs.

(S.M.K., J.) (D.K.K., J.)
21.8.2017

Speaking/Non Speaking order
Index : Yes / No
Internet : Yes / No.
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To
The Commissioner of Income Tax,
Chennai.

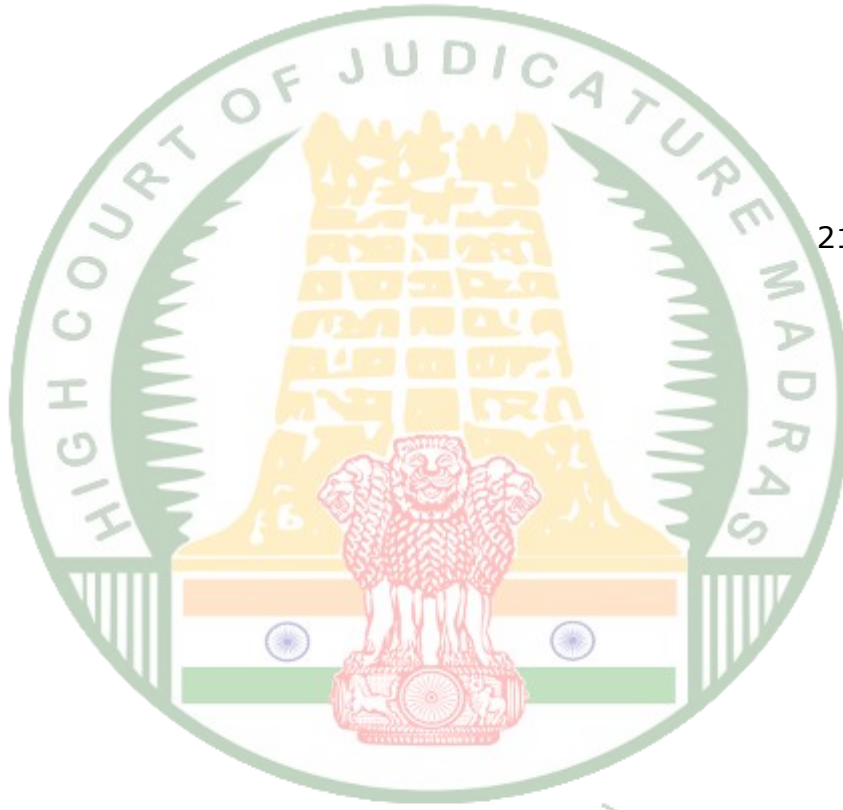


**S.MANIKUMAR, J
AND
D.KRISHNAKUMAR, J**

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Pre-Delivery Judgment in
T.C.A.No.536 of 2007



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