

ITA No. 445 of 2006

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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No. 445 of 2006

Date of Decision: 3.12.2010

The Commissioner of Income-tax, Jalandhar

....Appellant.

Versus

M/s Kap Scan & Diagnostic Centre Pvt. Ltd.

...Respondent.

**CORAM:- HON'BLE MR. JUSTICE ADARSH KUMAR GOEL.
HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.**

PRESENT: None for the appellant.

Mr. Rohit Sud, Advocate for the respondent,
in ITA No. 445 of 2006

Mr. Akshay Bhan, Advocate for the respondent
in ITA Nos. 522, 533, 549 of 2006.

AJAY KUMAR MITTAL, J. सत्यमेव जयते

1. This order shall dispose of ITA Nos. 445, 522, 533, 549 of 2006 as common questions of law are involved therein. For brevity, the facts are being extracted from ITA No. 445 of 2006.

2. ITA No. 445 of 2006 has been filed by the revenue under Section 260A of the Income Tax Act, 1961 (in short "the Act") against the order of the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar dated 8.12.2005 passed in ITA No. 408(ASR)/2004 for the assessment year 1997-98 claiming the following substantial question of law:-

"Whether, on the facts and in the circumstances of

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the case and in law, the ITAT was right in holding that the commission paid by the assessee to the doctors was allowable as it was in keeping with a trade practice and thus ignoring the fact that it was an illegal payment not allowable as per Explanation to section 37(1) of the Act?"

3. Briefly stated the facts for adjudication as narrated in the appeal are that the assessee is a private limited company doing the business of CT scan, ultra sound and X-rays. It filed its return on 28.11.1997 for the assessment year 1997-98 declaring loss of Rs.24,40,650/-. During the assessment proceedings, it was found that the assessee had debited a sum of Rs.3,68,400/- to the P&L account as expenditure on account of commission stated to have been paid to the practising doctors who referred the patients to the assessee for various tests. The Assessing Officer vide order dated 31.12.1999 disallowed the claim of such commission to the assessee and assessed Rs.1,68,870/- as deemed income under Section 115JA of the Act. Feeling aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) [in short "the CIT(A)"]. The CIT (A) allowed the appeal and deleted the addition made on account of the commission vide order dated 10.3.2004. Against the order of the CIT (A), the revenue filed an appeal before the Tribunal who vide order dated 8.12.2005 while dismissing the appeal has held that the commission paid to the doctors was an allowable expenditure being a trade practice and this gave rise to the department to approach this Court by way of instant appeal.

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4. We have heard learned counsel for the assessee.
5. Learned counsel for the assessee has raised three fold submissions.
6. Firstly, that the question of admissibility regarding the aforesaid deduction under Section 37(1) was never raised before the Tribunal and, therefore, the same cannot be raised before this Court for the first time. He relied upon a judgment of this Court in **Commissioner of Income-Tax v. Bank of Punjab Ltd., [2006] 286 ITR 630 (P&H)** in support of the said submission.
7. Secondly, that giving of commission to the private doctors referring the patients for various medical tests was a trade practice which could not be termed to be illegal and, therefore, the same cannot be disallowed under Section 37(1) of the Act even after insertion of Explanation to said Section by Finance Act, 1998, w.e.f. 1.4.1962. He cited the judgment in **Commissioner of Income Tax v. Pt. Vishwanath Sharma, [2009] 316 ITR 419 (All)** to support the submission that payment of commission for soliciting patients for diagnosis in case of private doctors would not be against law.
8. Lastly, the learned counsel urged that the revenue had not shown, proved or argued that the commission which was paid by the assessee was illegal practice and was not admissible as deduction. In this regard, reliance was placed on the judgments in **Commissioner of Income Tax v. Sigma Paints Ltd., [1991] 188 ITR 6 (Bom)**, **Dr. G.G. Joshi v. Commissioner of Income Tax, [1994] 209 ITR 324 (Guj)** and **Commissioner of Income Tax v. Septu India P. Ltd. [2008] 305 ITR 295 (P&H)**.

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9. Effort was also made by the learned counsel to draw support from the Apex Court judgment in **Dr. T.A. Quereshi v. Commissioner of Income Tax, Bhopal, [2006] 206 CTR 489 (SC)** to his aforesaid submissions.

10. We have given our thoughtful consideration to the submissions of learned counsel for the assessee but do not find any merit in the same. A perusal of the orders passed by the Assessing Officer, the CIT(A) and the Tribunal shows that the issue was with regard to admissibility of deduction of the commission paid by the assessee to the doctors for having referred the business to its diagnostic centre. Once that is so, it cannot be said that the point with regard to Section 37(1) of the Act was never raised though it was only under the said provision. The argument, thus, does not carry any weight.

11. Adverting to the second and third arguments, the payment of commission to the private doctors for having referred the business for diagnosis to its centre requires examination with reference to Section 37 of the Act.

12. Section 37 is a residuary provision. An assessee is entitled to deduction of all expenditure which is wholly and exclusively laid out or expended for the purposes of the business which has not been expressly covered by any other specific provision of the Act.

13. In order to be eligible for an allowance under this residuary provision, the following conditions are required to be fulfilled:-

“(i) The expenditure must not be governed by the provisions of Sections 30 to 36.

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- (ii) The expenditure must have been laid out wholly and exclusively for the purposes of the business of the assessee.
- (iii) The expenditure must not be personal in nature.
- (iv) The expenditure must not be capital in nature.”

14. Explanation to sub-section (1) was inserted by the Finance (No.2) Act, 1998 with retrospective effect from 1.4.1962, which reads thus:-

“Explanation.- For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purposes of business or profession and no deduction or allowance shall be made in respect of such expenditure.”

15. The purpose for incorporation of this Explanation had been explained by CBDT in circular No. 772 dated 23.12.1998 **(1999) 235 ITR (st.) 35** as under:-

“20. Disallowance of illegal expenses.- 20.1 Section 37 of the Income-tax Act is amended to provide that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purposes of business or profession and no deduction or allowance shall be made in respect of

such expenditure. This amendment will result in disallowance of the claims made by certain assesseees in respect of payments on account of protection money, extortion, hafta, bribes, etc., as business expenditure. It is well decided that unlawful expenditure is not an allowable deduction in computation of income.

20.2 This amendment will take effect retrospectively from 1st April, 1962, and will, accordingly, apply in relation to the assessment year 1962-63 and subsequent years.”

16. It, thus, emerges that an assessee would not be entitled to deduction of payments made in contravention of law. Similarly, payments which are opposed to public policy being in the nature of unlawful consideration cannot equally be recognized. It cannot be held that businessmen are entitled to conduct their business even contrary to law and claim deductions of payments as business expenditure, notwithstanding that such payments are illegal or opposed to public policy or have pernicious consequences to the society as a whole.

17. Now we proceed to examine whether soliciting of business by the assessee by paying commission to the private doctors is unethical, against public policy and forbidden by law.

18. Medical Council of India in exercise of powers conferred under Section 20A read with Section 33(m) of the Indian Medical Council Act, 1956 has made “The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulation, 2002 which describes

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Unethical Acts under Chapter 6 of the said regulations. Regulations 6.4 provides that no physician shall give, solicit, receive, or offer to give, solicit or receive, any gift gratuity, commission or bonus in consideration of a return for referring any patient for medical treatment. Regulation 6.4 reads thus:-

“6.4.1 A physician shall not give, solicit, or receive nor shall he offer to give solicit or receive, 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. A physician shall not directly or indirectly, participate 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.

6.4.2 Provisions of para 6.4.1 shall apply with equal force to the referring, recommending or procuring by a physician or any person, specimen or material for diagnostic purposes or other study/work. Nothing in this section, however, shall prohibit payment of salaries by a qualified physician to other duly qualified person rendering medical care under his supervision.”

19. If demanding of such commission was bad, paying it was equally bad. Both were privies to a wrong. Therefore, such commission paid to private doctors was opposed to public policy and

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should be discouraged. The payment of commission by the assessee for referring patients to it cannot by any stretch of imagination be accepted to be legal or as per public policy. Undoubtedly, it is not a fair practice and has to be termed as against the public policy.

20. Further, Section 23 of the Contract Act equates an agreement or contract opposed to public policy, with an agreement or contract forbidden by law. Section 23 of the Contract Act reads thus:-

“23. What consideration and objects are lawful, and what not.- The consideration or object of an agreement is lawful, unless-

it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or

involves or implies, injury to the person or property of another; or

the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.”

21. The judgments relied upon by the assessee cannot be of any assistance to the assessee as they are prior to insertion of Explanation to sub section (1) of Section 37 of the Act. Reference may also be made to the Apex Court Judgment in **Dr. T.A. Quereshi's case**

(supra) on which reliance has been placed by the learned counsel for the assessee. The Hon'ble Supreme Court in that case was seized of the matter where heroin forming part of the stock of the assessee's trade was confiscated by the State authorities and the assessee claimed the same to be an allowable deduction. The Hon'ble Supreme Court held that seizure and confiscation of such stock in trade has to be allowed as a business loss and Explanation to Section 37 has nothing to do as that was not a case of business expenditure. Since the present case is not a case of business loss but of business expenditure, that judgment is distinguishable and does not help the assessee.

22. The issue with regard to the amount illegally paid to the police authorities for running their business came up for consideration before the Madhya Pradesh High Court in **Gwalior Road Lines v. Commissioner of Income-tax, [1998] 234 ITR 230 (MP)** wherein it was held that after insertion of Explanation to Section 37(1) by the Finance Act, 1998 w.e.f. 1.4.1962, the assessee could not claim such payment as expended for commercial exigency and, therefore, the same was not an allowable deduction.

23. Allahabad High Court in **Pt. Vishwanath Sharma's case (supra)** while considering the issue relating to commission paid to Government doctors for prescribing assessee's medicines to patients held it to be contravening public policy and an inadmissible expenditure. However, no distinction can be made in respect of Government doctors and private doctors as has been canvassed by the learned counsel for the assessee.

24. Thus, the Commission paid to private doctors for referring

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patients for diagnosis could not be allowed as a business expenditure. The amount which can be allowed as business expenditure has to be legitimate and not unlawful and against public policy.

25. Consequently, the order passed by CIT(A) and the Tribunal whereby deduction had been allowed to the assessee cannot be sustained.

26. In view of the above, the appeals are allowed and the substantial question of law is answered in favour of the revenue and against the assessee.

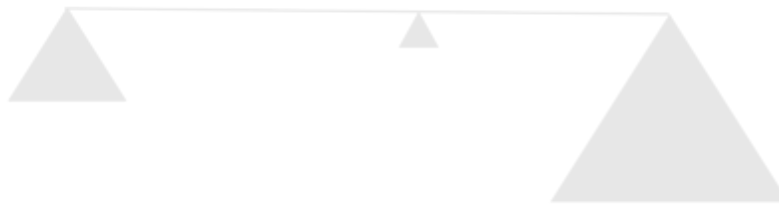


**(AJAY KUMAR MITTAL)
JUDGE**

December 3, 2010
gbs

**(ADARSH KUMAR GOEL)
JUDGE**

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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No. 522 of 2006

Date of Decision: 3.12.2010

The Commissioner of Income-tax, Jalandhar

....Appellant.

Versus

M/s Kap Scan & Diagnostic Centre Pvt. Ltd.

...Respondent.

**CORAM:- HON'BLE MR. JUSTICE ADARSH KUMAR GOEL.
HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.**

PRESENT: None for the appellant.

Mr. Akshay Bhan, Advocate for the respondent.

AJAY KUMAR MITTAL, J.

The appeal is allowed.

For reasons, see the detailed order of even date recorded
in **ITA No. 445 of 2006 (The Commissioner of Income-tax, Jalandhar
v. M/s Kap Scan & Diagnostic Centre Pvt. Ltd).**

**(AJAY KUMAR MITTAL)
JUDGE**

December 3, 2010
gbs

**(ADARSH KUMAR GOEL)
JUDGE**

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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No. 533 of 2006

Date of Decision: 3.12.2010

The Commissioner of Income-tax, Jalandhar

....Appellant.

Versus

M/s Kap Scan & Diagnostic Centre Pvt. Ltd.

...Respondent.

**CORAM:- HON'BLE MR. JUSTICE ADARSH KUMAR GOEL.
HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.**

PRESENT: None for the appellant.

Mr. Akshay Bhan, Advocate for the respondent.

AJAY KUMAR MITTAL, J.

The appeal is allowed.

For reasons, see the detailed order of even date recorded
in **ITA No. 445 of 2006 (The Commissioner of Income-tax, Jalandhar
v. M/s Kap Scan & Diagnostic Centre Pvt. Ltd).**

**(AJAY KUMAR MITTAL)
JUDGE**

December 3, 2010
gbs

**(ADARSH KUMAR GOEL)
JUDGE**

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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No. 549 of 2006

Date of Decision: 3.12.2010

The Commissioner of Income-tax, Jalandhar

....Appellant.

Versus

M/s Kap Scan & Diagnostic Centre Pvt. Ltd.

...Respondent.

**CORAM:- HON'BLE MR. JUSTICE ADARSH KUMAR GOEL.
HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.**

PRESENT: None for the appellant.

Mr. Akshay Bhan, Advocate for the respondent.

AJAY KUMAR MITTAL, J.

The appeal is allowed.

For reasons, see the detailed order of even date recorded
in **ITA No. 445 of 2006 (The Commissioner of Income-tax, Jalandhar
v. M/s Kap Scan & Diagnostic Centre Pvt. Ltd).**

**(AJAY KUMAR MITTAL)
JUDGE**

December 3, 2010
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**(ADARSH KUMAR GOEL)
JUDGE**