आयकर अपीलीय अधिकरण
कोलकाता ' सी' पीठ, कोलकाता में
IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA

डॉ मनीष बोरड, लेखा सदस्य
एवं
श्री संजय शर्मा, न्यायिक सदस्य
के समक्ष
Before

DR. MANISH BORAD, ACCOUNTANT MEMBER
&
SRI SONJOY SARMA, JUDICIAL MEMBER

I.T.A. No.: 977/Kol/2018
Assessment Year: 2014-15

DCIT, Circle-12(1), Kolkata.....Appellant

Vs.

AMRI Hospitals Ltd.....Respondent
[PAN: AAECS 6786 N]

Appearances by:

Md. Atahar H. Choudhury, CIT, appeared on behalf of the Revenue.

Sh. A.K. Tibrewal, FCA &
Sh. Amit AGrawal, Adv., appeared on behalf of the Assessee.

Date of concluding the hearing : July 27th, 2022
Date of pronouncing the order : October 20th, 2022

आदेश

ORDER

Per Manish Borad, Accountant Member:

This appeal filed by the Revenue pertaining to the Assessment Year (in short "AY") 2014-15 is directed against the order passed u/s 250 of the Income Tax Act, 1961 (in short the

"Act") by ld. Commissioner of Income-tax (Appeals)-4, Kolkata [in short ld. "CIT(A)"] dated 07.02.2018 which is arising out of the assessment order framed u/s 143(3) of the Act dated 26.12.2016.

2. Brief facts of the case as culled out from the records are that the assessee is a limited company and runs a hospital in the name of Amri Hospital and also runs a diagnostic centre. E-return for AY 2014-15 furnished on 30.09.2014 declaring loss of Rs. 63,89,91,819/-. Case selected for scrutiny followed by serving of notices u/s 143(2) & 142(1) of the Act. Various details called for by ld. AO were submitted. On going through the same ld. AO observed that the assessee has claimed expenditure of Rs. 10,87,28,000/- on account of compensation paid to Mr. Kunal Saha as per the directions of the Hon'ble Supreme Court of India vide order dated 24.10.2013 for the negligence on the part of the hospital in providing proper treatment of Late Anuradha Saha. This compensation was given to Mr. Kunal Saha, husband of Late Anuradha Saha. The said compensation was claimed as an expenditure by the assessee company. However, ld. AO was of the considered view that the said compensation cannot be allowed as an expenditure on account of two reasons; firstly, the said amount is in nature of the penalty and therefore, disallowable u/s 37(1) of the Act and secondly, the said amount is not of revenue in nature but a capital expense. Ld. AO also made disallowance of excess depreciation of Rs. 38,98,013/-, disallowance of advance written off of Rs. 4,41,000/-, treating of house property income as income from other sources and minor other additions. Loss assessed at Rs. 54,49,56,416/-.

3. Aggrieved, the assessee preferred appeal before ld. CIT(A) and partly succeeded.

4. Now, the Revenue is in appeal before the Tribunal raising the following grounds of appeal:

> *"1. That in the facts and circumstances of the case and in law, the Ld. CIT(A) is erred by stating that the payment of compensation of Rs. 10.81 Crore for the negligence of the assessee company to provide proper treatment to the patient amounts to breach of contract and the payment of compensation made therefore is an allowable business expenditure u/s 37 of the I.T. Act.*
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> *2. That in the facts and circumstances of the case and in law, the Ld. CIT(A) is erred by not appreciating the fact that the aforesaid compensation was not breach of contract & it was clearly for infringement of medical norms and negligence on the part of the hospital & doctors.*
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> *3. That in the facts and circumstances of the case and in law. the Ld. CIT(A) is erred by not appreciating the fact that any compensation paid on account of breach of medical norms & negligence is not an allowable expenditure.*
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> *4.That in the facts and circumstances of the case and in law, the Ld. CIT(A) is erred by not appreciating the fact that compensation is in the nature of capital expenditure and not revenue & the same is not allowable as per Section 37(1) of the Act.*
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> *5. That in the facts and circumstances of the case and in law, the Ld. CIT(A) is erred by stating that the rent received from IBS Tower is income from House Property.*
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> *6. That in the facts and circumstances of the case and in law. the Ld. CIT(A) is erred by not appreciating the facts that not only the premises have been provided by the assessee company but electricity had also to be provided by the assessee company including backup power & space apart from the rented area, for earth pit on the ground floor & all these indicate that the aforesaid issue was more than what can be considered as rent of property i.e. Income from House Property.*
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> *7. That in the facts and circumstances of the case and in law, the Ld. CIT(A) is erred by not appreciating the facts that the assessee*

company was required to provide additional services and facilities other than just its property given on rent.

8. That in the facts and circumstances of the case and in law, the Ld. CIT(A) is erred by stating that the advances written off by the assessee company on account of property advance is business loss.

9. That in the facts and circumstances of the case and in law, the Ld. C'IT(A) is erred by not appreciating the facts that the aforesaid advance was never a part of receipt or for that matter a profit & Loss item.

10. That in the facts and circumstances of the case and in law, the Ld. CIT(A) is erred by not appreciating the facts that the amount of advance was a capital advance arising out of a deal for property and the advance was never a part of or ever declared as receipt in its books of account by the assessee company & accordingly, the aforesaid advance of property is not allowable expenses of the assessee.

11. The appellant craves leave to add/alter/modify the grounds of appeal."

5. We will first take up ground nos. 1 to 4 through which Revenue has challenged the finding of ld. CIT(A) deleting the disallowance made by ld. AO u/s 37(1) of the Act and allowing the compensation of Rs. 10.81 Cr. paid by the assessee as an expenditure.

6. Ld. D/R vehemently argued referring to various observations of the Hon'ble Apex Court, the submissions furnished at page 1 to 15 of the paper book filed by the Revenue as well as reliance placed on the judgments placed in the paper book running from page 16 to 196 and stated that the compensation awarded by the Hon'ble Supreme Court of India is on account of violations of Consumer Protection Act, 1986 and Indian Medical Council Act, 1956 and also the payment of compensation money is for negligence on the part of the hospital causing severe pain to its patient and death

and the same cannot be construed as an expenditure incurred in ordinary course of business. Ld. D/R further, referred to the following detailed finding of the ld. AO:

> *"108. Even in the case of Savita Garg Vs. National Heart Institute (supra) this Court, while determining the liability' of the Hospital, observed as under:*
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> *"15. Therefore, as per the English decisions also the distinction of "contract of service " and "contract for service", in both the contingencies the courts have taken the view that the hospital is responsible for the acts of their permanent staff as well as staff whose services are temporarily requisitioned for the treatment of the patients. Therefore, the distinction which is sought to be pressed into service so ably by learned counsel cannot absolve the hospital or the Institute as it is responsible for the acts of its treating doctors who are on the panel and whose services are requisitioned from time to time by the hospital looking to the nature of the diseases. The hospital or the Institute is responsible and no distinction could be made between the two classes of persons i.e. the treating doctor who was on the staff of the hospital and the nursing staff and the doctors whose services were temporarily taken for treatment of the patients……*
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> *16. Therefore, the distinction between the "contract of service " and "contract for service has been very elaborately discussed in the above case and this Court has extended the provisions of the Consumer Protection Act, 1986. to the medical profession also and included in its ambit the services rendered by private doctors as well as the government institutions or the non-governmental institutions, be it free medical services provided by the government hospitals. In the case of Achutrao Haribhau Khodwa v. State of Maharashtra their Lordships observed that in cases where the doctors act carelessly and in a manner which is not expected of a medical practitioner, then in such a case an action in tort would be maintainable. Their Lordships further observed that if the doctor has taken proper precautions and despite that if the patient does not survive then the court should be very slow in attributing negligence on the part of the doctor. It was held as follows: (SCC p. 635)*
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> *'A medical practitioner has various duties towards his patient and he must act with a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. This is the least which a patient*

expects from a doctor. The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may he advisable for treating a patient. Courts would indeed he slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the court finds that he has attended on the patient with due care, skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence. But in cases where the doctors act carelessly and in a manner which is not expected of a medical practitioner, then in such a case an action in torts would be maintainable.'

Similarly, our attention was invited to a decision in the case of Spring Meadows Hospital v. Harjol Ahluwalia. Their Lordships observed as follows: (SCC pp. 46-47, para 9)

'9.... Very often in a claim for compensation arising out of medical negligence a plea is taken that it is a case of bona fide mistake which under certain circumstances may be excusable, but a mistake which would tantamount to negligence cannot be pardoned. In the former case a court can accept that ordinary human fallibility precludes the liability while in the latter the conduct of the defendant is considered to have gone beyond the hounds of what is expected of the skill of a reasonably competent doctor.....'

Therefore, as a result of our above discussion we are of the opinion that summary dismissal of the original petition by the Commission on the question of non-joinder of necessary parties was not proper. In case the complainant fails to substantiate the allegations, then the complaint will fail. But not on the ground of non-joinder of necessary party. But at the same time the hospital can discharge the burden by producing the treating doctor in defence that all due care and caution was taken and despite that the patient died. The hospital/Institute is not going to suffer on account of non-joinder of necessary parties and the Commission should have proceeded against the hospital. Even otherwise also the Institute had to produce the treating physician concerned and has to produce evidence that all care and caution was taken by them or their staff to justify that there was no negligence involved in the matter. Therefore, nothing turns on not impleading the treating doctor as a party. Once an alienation is made that the patient

was admitted in a particular hospital and evidence is produced to satisfy that he died because of lack of proper care and negligence, then the burden lies on the hospital to justify that there was no negligence on the part of the treating doctor or hospital. Therefore, in any case, the hospital is in a better position to disclose what care was taken or what medicine was administered to the patient. It is the duty of the hospital to satisfy that there was no lack of care or diligence. The hospitals are institutions, people expect better and efficient service, if the hospital fails to discharge their duties through their doctors, be inn employed on job basis or employed on contract basis, it is the hospital which has to justify and not impleading a particular doctor will not absolve the hospital of its responsibilities. " (Emphasis laid by this Court)

109. Therefore, in the light of the rival legal contentions raised by the parties and the legal principles laid down by this Court in plethora of cases referred to supra, particularly, S a vita Garg's case, we have to infer that the appellant- AMR! Hospital is vicariously liable for its doctors. It is clearly mentioned in Savita Garg's case that a Hospital is responsible for the conduct of its doctors both on the panel and the visiting doctors. We, therefore, direct the appellant-AMRI Hospital to pay the total amount of compensation with interest awarded in the appeal of the claimant which remains due after deducting the total amount of Rs.25 lakhs payable by the appellants-doctors as per the Order passed by this Court while answering the point no-7.

4.2 In light thereof, the payment being contravention of set norms and moresover also held by none less the Supreme Court of India as negligent breach cannot be allowed. It was clearly for infringement of medical norms and hence has to be disallowed. Further, compensation is in the nature of capital expenditure and not revenue. As per Section 37(1) of the I.T. Act. 1961, only (hose expenses which are incurred in the normal course of business are allowed. Those expenses which are in the nature of penal are not allowed as per Section 37(1) of the Act. The aforesaid expenses as incurred on account of infringement of medical norms and accordingly, the Apex Court had directed the assessee company to pay compensation. Hence, in view of the facts above, the aforesaid expenses of Rs. 10.87.28.000/- is being disallowed and added back to the income of the assessee company for the A.Y. 2014-15.

4.3 Penalty proceedings *u/s. 271(1)(c) of the I.T. Act. is initiated separately."*

7. On the other hand, ld. Counsel for the assessee, apart from placing reliance on the finding of ld. CIT(A), further, stated that the said amount was not in nature of penalty disallowed u/s 37(1) of the Act. There was no offence or a criminal activity or infraction of law as is envisaged under Explanation 1 to Section 37 of the Act. Further, ld. Counsel for the assessee referred to the following supplementary note extracted below:

> *"1. The said supplementary note, in addendum to the notes filed earlier at pages 331 to 338 of the Case Law PB, Volume II, is being filed to deal in brief the arguments raised by the Ld. CIT/DR in his written arguments dated 28.02.2022. The main arguments raised by the Ld. CIT/DR and our rebuttal to the same is set out as under:*
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> *a) Negligence, which may be defined as breach of duty, is an offence under law of Torts, Indian Contract Act, Consumer Protection Act...The Assessee has been charged with payment of Compensation solely due to its negligence. The Assessee had claimed deduction of compensation and allowing of said deduction will tantamount to letting Assessee go scot free.*
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> *The Respondent Assessee states and submits that as has been held by the Hon'ble Supreme Court it is not liable for being charged with criminal negligence under section 304A of the Income Tax Act. 1961. Now coming to allegation of the department that Negligence of the Respondent Hospital in the treatment of the patient was offence under law of Torts, Indian Contract Act, Consumer Protection Act, in this respect we first and foremost refer to judgment rendered in Malay Kumar Ganguly vs. Dr. Sukumar Mukherjee & Ors (2009) 9 SCC 221, wherein while holding that AMRI cannot be charged with Criminal Negligence under section 304A of the Indian Penal Code, the Hon'ble Supreme Court had held as under:*
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> *"....For negligence to amount to an offence the element of mens rea must be shown to exist. "*
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> *It is not the case of the department that Respondent Assessee negligence had an element of mens-rea/Guilty Mind. Even otherwise, the infringements of provisions of law of Torts, Indian Contract Act, Consumer Protection Act can give rise to an action for damages under Civil Law and cannot be stated to be an offence under Criminal*

Jurisprudence. The National Consumer Disputes Redressal Commission has awarded Compensation and the Hon'ble Supreme Court has revised the quantum of said Compensation, as "deficiency" was found in the services rendered by the Respondent Assessee in the treatment of patient within the meaning of Consumer Protection Act, 1986. The definition of "deficiency" as per Section 2(g) of the Consumer Protection Act, 1986 is as under:

"deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service;

Allowing deduction of expenses towards Compensation payment, which has been made at the directions of Hon'ble Supreme Court, cannot be stated to Prohibited by law and allowing the said deduction of expense, can by no means be taken to be allowing Assessee to go scot free.

b) Further, the Ld. CIT/DR has alleged that the Assessee had violated the provisions of The Medical Council Act, 1956 and the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 and thus the claim of Compensation cannot be allowed within the meaning of Explanation 1 to Section 37 of the Income Tax Act, 1961.

The Assessee states and submits that Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the Regulations) have been framed in exercise of the power conferred under Section 20-A read with Section 33 (m) of the Indian Medical Council Act, 1956, and these regulations and the provisions of Indian Medical Council Act, 1956 do not govern or have any concern with the facilities, infrastructure or running of the Hospitals and secondly, that the Ethics Committee of the MCI acting under the Regulations had no jurisdiction to pass any direction or judgment on the infrastructure of any hospital which power rests solely with the concerned State Govt. The Respondent Assessee refers to the judgment of Hon'ble Delhi High Court rendered in the case of Max Hospital, Pitampura vs Medical Council of India [9 W.P. (C) No. 1334/2014 / ILR (2014) 1 Delhi 620, dated 10.01.2014] wherein it had been held and observed as under:

"5. The DMC issued notices to the concerned doctors and after hearing them opined that there was no medical negligence on the part of the doctors (of Max Hospital, Pitampura, New Delhi) in the treatment administered by them to the deceased Nitika Manchanda. Being dissatisfied with the opinion given by the DMC, Shri S.P. Manchanda, the deceased's father made a representation in the form of an Appeal to the Medical Council of India (MCI) which after notice to the concerned doctors and the Petitioner hospital passed the impugned order which has been extracted above.

6. The Petitioner's grievance is twofold. Firstly, that since the Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the Regulations) have been framed in exercise of the power conferred under Section 20-A read with Section 33 (m) of the Indian Medical Council Act, 1956, these regulations do not govern or have any concern with the facilities, infrastructure or running of the Hospitals and secondly, that the Ethics Committee of the MCI acting under the Regulations had no jurisdiction to pass any direction or judgment on the infrastructure of any hospital which power rests solely with the concerned State Govt. The case of the Petitioner is that the Petitioner hospital is governed by the Delhi Nursing Homes Registration Act, 1953. It is urged that in fact, an inspection was also carried out on 22.07.2011 by Dr. R.N. Dass, Medical Superintendent (Nursing Home) under the Directorate of Health Services, Govt, of NCT of Delhi and the necessary equipments and facilities were found to be in order which negates the observations dated 27.10.2012 of the Ethics Committee of the MCI. It is also the plea of the Petitioner hospital that the Petitioner was not provided an opportunity of being heard and thus the principles of natural justice were violated.

7. In the counter affidavit filed by the Respondents, it is not disputed that the MCI under the 2002 Regulations has jurisdiction limited to taking action only against the registered medical practitioners. It's plea however, is that it has not passed any order against the Petitioner hospital therefore; the Petitioner cannot have any grievance against the impugned order. At the same time, it is stated that only simple observations were made by the Ethics Committee of the MCI about the state of affairs in the Petitioner hospital and the same did not harm any legal right or interest of the Petitioner. It will be apposite to extract the relevant paragraphs of the counter affidavit filed by the MCI as under:

"4. Preliminary Objections:

(i) That the instant writ petition is not maintainable under Article 226 of the Constitution of India as there is no cause of action for filing of this instant petition. The MCI has not passed any order against the petitioner in the impugned minutes of meeting dated 27.10.2012, therefore, there is no cause of action for filing the instant writ petition.

(ii) That the MCI has not passed any order against the petitioner and nor does the impugned minutes of meeting dated 27.10.2012 affect any legal right or interest of the petitioner which the petitioner seeks to enforce by filing this writ petition and thus the same is not maintainable.

(iii) That the jurisdiction of MCI is limited only to take action against the registered medical professionals under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (hereinafter the 'Ethics Regulations') and has no jurisdiction to pass any order affecting rights/interests of any Hospital, therefore the MCI could not have passed and has not passed, any order against the petitioner which can be assailed before this Hon'ble Court in writ jurisdiction.

(iv) That a simple observation made by the Ethics Committee of MCI about the state of affairs in the petitioner Hospital has harmed no legal right/interest of the petitioner for which a writ can be issued by this Hon'ble Court against the answering respondent.

(v) That the petitioner contends that an adverse order has been passed by the MCI and that too without hearing the petitioner. Both these contentions of the petitioner are incorrect and frivolous as firstly, there is no adverse order made by the MCI against the petitioner as MCI does not have any such jurisdiction; secondly, the petitioner was throughout represented before the Ethics Committee of MCI during the proceedings initiated on complaint of one Mr. Sunil Manchanda against some of the doctors working in the petitioner hospital. The petitioner was heard through its advocates on several occasions and had submitted several documents also in support of their stand."

8. It is clearly admitted by the Respondent that it has no jurisdiction to pass any order against the Petitioner hospital under the 2002 Regulations. In fact, it is stated that it has not passed any order against the Petitioner hospital. Thus, I need not go into the question whether the adequate infrastructure facilities for appropriate post-operative care were in fact in existence or not in the Petitioner hospital and whether the principles of natural justice had been followed or not

while passing the impugned order. Suffice it to say that the observations dated 27.10.2012 made by the Ethics Committee do reflect upon the infrastructure facilities available in the Petitioner hospital and since it had no jurisdiction to go into the same, the observations were uncalled for and cannot be sustained.

9. Since the MCI had no jurisdiction to go into the infrastructure facilities, I need not also go into the aspect that in the year 2011, the facilities available in the hospital were inspected and were found to be in order.

10. The petition therefore has to succeed. I hereby issue a writ of certiorari quashing the adverse observations passed by the MCI against the Petitioner hospital highlighted in Para 1 above.

11. The writ petition is allowed in above terms."

c) The Ld. CIT/DR has relied on the judgment of Apex Laboratories vs. DCIT, LTU-II (SLP Civil No. 23207 of 2019) wherein it had been held Gifting Freebies to Doctors is Prohibited By Law and thus the Pharma Companies Cannot Claim It As Deduction u/s. Sec 37(1) Income Tax Act.

The Respondent Assessee states and submits that the said judgment is distinguishable on the facts involved in the case. In the case of Apex Laboratories (supra), the Hon'ble Supreme Court was concerned with the case of gifting of freebies to Doctors. In its judgment The verdict was passed while dismissing a plea of a pharmaceutical firm seeking deduction under the Income Tax (IT) Act on account of giving incentives to medical practitioners. The pharma company Apex Laboratories Pvt. Ltd claimed that though medical practitioners are restrained under the regulations from accepting such gifts, it was not an offence under any law and hence, companies are entitled to the tax benefit. The Court in these facts held that "This court is of the opinion that such a narrow interpretation of Explanation 1 to Section 37(1) defeats the purpose for which it was inserted, i.e., to disallow an assessee from claiming a tax benefit for its participation in an illegal activity," The top court termed it as a "matter of great public importance and concern" the manipulation of doctors' prescriptions in lieu of freebies offered to them by pharmaceutical companies. The Court noted that freebies range from gifts such as gold coins, fridges, and LCD TVs to funding international trips for vacations or to attend medical conferences. The Court stated and held that "pharmaceutical companies' gifting freebies to doctors, etc, is clearly 'prohibited by

law', and not allowed to be claimed as a deduction under Section 37(1). Doing so would wholly undermine public policy. The well-established principle of interpretation of taxing statutes - that they need to be interpreted strictly - cannot sustain when it results in an absurdity contrary to the intentions of Parliament."

However, in the facts of the instant case the Respondent Assessee state and submit that negligence attributed to it, as per the Judgment of Hon'ble Supreme Court, cannot be stated to be for any offence. Furthermore, the expense incurred by it towards payment of Compensation, as per directions of Hon'ble Supreme Court, cannot be said to be Prohibited by Law. In the case of Apex Laboratories (supra), the expense incurred by Assessee towards freebies etc. was prohibited by law as per CBDT Circular No.5/2012 dated 01.08.2012 and as per Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the Regulations), framed in exercise of the power conferred under Section 20-A read with Section 33 (m) of the Indian Medical Council Act, 1956. But in the present case, there is no CBDT Circular which provides for not allowing deduction of expenses incurred towards Compensation and as has been already stated hereinabove the provisions of Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations, 2002 and the Indian Medical Council Act, 1956 does not apply on Hospitals. As has been stated hereinabove, Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the Regulations) the provisions of Indian Medical Council Act, 1956 do not govern or have any concern with the facilities, infrastructure or running of the Hospitals and secondly, that the Ethics Committee of the MCI acting under the Regulations had no jurisdiction to pass any direction or judgment on the infrastructure of any hospital which power rests solely with the concerned State Govt. The West Bengal Clinical Establishments (Registration and Regulation) Act, 2010 was formulated by the West Bengal Legislature for the first time for regulating Private Hospitals in 2010 and evidently there was no law before that which provide for regulating of Private Hospitals. In this regard we must refer to the Principles of Law laid down In Article 20(1) of Constitution of India which provides that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. The contention of the Respondent Assessee about there being no law to regulate Private Hospitals finds supports from the

observations of Hon'ble Supreme Court, at Para 150, Page 207 of Case Law PB, Volume I, rendered in his own case in Civil Appeal No.2867 of 2012 with Civil Appeal No.692 of 2012 (Pages 1 to 210 of Case Law PB, Volume I).

At the relevant time of 1998, when the patient unfortunately died due to medical complications and negligence in treatment attributed to Doctors and Respondent Hospital, there was no provision of law/regulation which was regulating/governing Private Hospitals like Respondent Assessee.

It is important to note that the National Consumer Disputes Redressal Commission has awarded Compensation and the Hon'ble Supreme Court has revised the quantum of said Compensation, as "deficiency" was found in the services rendered by the Respondent Assessee in the treatment of patient within the meaning of Consumer Protection Act, 1986. The definition of "deficiency" as per Section 2(g) of the Consumer Protection Act, 1986 is as under:

"Deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service; The definition of the word "deficiency" was re-casted under Section 2(11) of the Consumer Protection Act, 2019 as under:

"Deficiency means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service and includes

(a) any act of negligence or omission or commission by such person to the consumer and

(b) deliberate withholding of relevant information by such person to the consumer."

The Courts have held that there was deficiency in the services rendered by the Respondent Assessee Hospital. But the Courts have nowhere held and pointed that the services of Respondent Hospital was not maintained in the manner as was required to be maintained by or under any law for the time being in force. Thus, the Courts have very evidently found those services of the Respondent Hospital being

deficient, which services the Hospital have undertaken to perform when they have admitted the patient at their Hospital. Thus, the Hospital has been charged for breach of services only.

The Assessee thus also submits that payment of Compensation for negligence, which cannot be attributed to any offence as is in the instant case, cannot be said to Prohibited by law. The Respondent Assessee Company at the cost of repetition refers to the binding Third Member Judgment of the Hon'ble Jurisdictional Calcutta Tribunal rendered in the case of Eveready Industries India Limited vs. DCIT [2001] 78 ITD 175 (Cal)(TM) In the said judgment the Hon'ble Calcutta Bench was concerned with the case of Compensation paid to victims of Bhopal Gas Leak Tragedy as per the Judgment of Hon'ble Supreme Court. The Hon'ble Third Member held that such Compensation was paid to compensate the parties for the injuries they suffered and in no way it was granted by way of penalty, fine or punitive damages and thus the same was allowable expenditure incidental to and incurred for the purposes of carrying on the business of the Assessee. [Kindly refer to page Nos. 243 to 249 of Case Law PB] The facts of the instant case are quite similar to the facts involved in the case of Eveready Industries India Limited vs. DCIT [2001] 78 ITD 175 (Cal)(TM) and thus the same will applicable in the facts of the instant case. Further, the allegation of the AO that the payment of Compensation is penal in nature and is not incurred in the normal course of business is baseless. The AO has failed to show as to how the payment of compensation can be said to be penal in nature. Nowhere in the Judgments of the Orders passed by the Hon'ble Supreme Court it was stated that the Compensation being awarded therein is penal in nature. On the other hand the Hon'ble Supreme Court had held that there was deficiency in the services rendered by AMRI which resulted in Negligence but there was no Gross Negligence for imposing Criminal Liability. It cannot be disputed that there was no offence, Criminal Activity, or any infraction of law as is envisaged under Explanation 1 to Section 37 of the Act.

As stated hereinabove, the Hon'ble Supreme Court in its Judgment rendered in Malay Kumar Ganguly vs. Dr. Sukumar Mukherjee & Ors (2009) 9 SCC 221 had absolved the Respondent Assessee Hospital from Criminal liability and furthermore department had not been able to show that the Compensation paid was for "any purpose which is an offence or which is prohibited by law". Reliance in this connection is also placed on the Judgment of Full Bench of Hon'ble Punjab & Haryana High Court rendered in the case of Jamna Auto Industries

vs. CIT [2008] 167 taxmann.com 192 (P&H) [See Pages 211 to 219, of Case Law PB (more particularly pages 212 to 213)].

Further, the Hon'ble Supreme Court in its Judgment dated 24.10.2013 wherein they had awarded Compensation had held that the Respondent Assessee Hospital is vicariously liable and responsible for the conduct of its doctors both on panel and the visiting doctors. The Assessee Hospital refers to and relies on the judgment of Hon'ble Amritsar ITAT in M/s. Ashwani Financial Services Pvt Ltd. vs. JCIT [see pages 226 to 231 of Case Law PB] wherein it had been held that loss arising due to negligence of employees should be allowed as being incurred in the normal course of business."

8. We have heard rival contentions and perused the records placed before us. Revenue's grievance in ground nos. 1 to 4 is that ld. CIT(A) erred in allowing the payment of compensation of Rs. 10.81 Cr. as an expenditure without appreciating that the said amount was paid as a compensation on the direction of Hon'ble Supreme Court of India for the negligence of the assessee to provide proper treatment to the patient. We observe that a patient named Anuradha Saha was undergoing treatment in the hospital run by the assessee. Due to negligence on the part of the doctors and other authorities of the hospital, the patient Anuradha Saha died. Civil case was filed by the husband Mr. Kunal Saha on the assessee company and the doctors who treated his wife. The aforesaid Civil case was carried up to Hon'ble Supreme Court of India where the Hon'ble Apex Court vide its order dated 24.10.2013 awarded compensation of Rs. 6,08,00,550/- with 6% interest per annum. After making the calculation for the compensation and interest the total compensation paid by the assessee during FY 2013-14 amounted to Rs. 10,87,27,521/-. In the books of account the assessee claimed it as a business expenditure. Ld. AO while examining the said amount, denied the

claim on two grounds; firstly, the said amount is of penalty in nature which is paid by the assessee for an offence of negligently dealing with the patient and secondly, ld. AO disallowed the said amount treating it to be a capital expenditure and not revenue expenditure.

8.1. Further, we find that ld. CIT(A) has deleted the said disallowance by only referring to the first observation of ld. AO that the said expenditure is a penalty for an offence and not allowable as an expenditure u/s 37(1) of the Act. Finding of ld. CIT(A) is as follows:

> *"4.2 I have gone through the assessment order and written submission filed by the appellant and also the judgment dated 24-10-2013 of the Hon'ble Apex Court. It is seen that the compensation has been awarded by the Hon'ble Apex Court due to the negligence on the part of the hospital in providing proper treatment to the said Mrs. Anuradha Saha. The Hon'ble Apex Court has categorically held that the appellant was negligent and had therefore awarded the compensation. During the course of carrying on its business the appellant is under obligation to provide proper treatment to the patients as per the standard norms prescribed. Since the appellant failed to provide proper treatment and was held as negligent in doing so, it amounts to breach of contract. The learned AR has relied on various judgments.*
>
> *4.3 I have considered the submissions and find substantial merit and agree with the appellant that the payment of compensation for its negligence to provide proper treatment to the patient amounts to breach of contract and that the payment of compensation made therefore is an allowable business expenditure u/s 37 of the IT Act. Hence the AO is directed to delete the addition of Rs. 10,87,27,521/-. Ground No. 2 of the appeal is allowed."*

8.2. Now, on perusal of the above finding of ld. CIT(A) and also considering the plethora of judgments filed by the assessee in the paper book so far as the proposition of ld. Counsel for the assessee

is concerned that the said amount is not a penalty for an offence or for being any act prohibited by law, we find merit since the said compensation was awarded for the negligence on the part of the hospital in providing proper treatment to the patient named Anuradha Saha but there is lack of *mensrea*. There is no reference in the litigation before us that the assessee has committed any offence prohibited under the law. Therefore, so far as the finding of ld. CIT(A) that explanation 1 to Section 37 of the Act is not applicable on the assessee is found to be correct and to this extent that the alleged sum is not in the nature of any penalty paid for committing an offence prohibited under the law, the finding of ld. CIT(A) is confirmed.

8.3. However, as regards the second observation of ld. AO that the compensation paid by the assessee is a capital expenditure and not a revenue expenditure, we find that ld. CIT(A) has nowhere discussed and not adjudicated this issue. *Prima facie* we notice that the said amount is a compensation which includes interest and the same has been awarded on the direction of Hon'ble Supreme Court of India. The said amount is not co-related to any business expenditure to be incurred in the hospital for carrying out the treatment of the patient or to earn any revenue. There is no direct nexus of the alleged compensation with the gross earning/revenue of the hospital. The negligence on the part of the doctors and hospital completely shattered the faith and belief of the public and most importantly the patients who have/were undergoing treatment in the hospital. The goodwill of the hospital was at stake. By paying this compensation the assessee was able to recoup with its lost image/goodwill to some extent.

8.4. For carrying out the business activity the assessee has to incur the expenditure both in the nature of capital and revenue. Revenue expenditure normally includes the expenses required to meet the ongoing operational cost of running a business whereas capital expenditure are funds used by a company to acquire, upgrade and maintain physical assets, purchase of fixed assets which are used for revenue generation over a long period. Before us, the issue relates to a compensation paid by a company for negligence on the part of its doctors and other hospital authorities. It is not the case that the said sum is paid for earning revenue during the year or which have any direct nexus with any revenue received during the year. By paying the said sum, the assessee company has certainly been able to clean its image to some extent as it paid the compensation to the affected party and this action may have brought a positive impact on the goodwill which fell down drastically when the Civil case was filed against it.

8.5. So, whether the said sum is a revenue expenditure is still in doubt and the first appellate authority has also not adjudicated this issue which has been observed by ld. AO in the assessment order for making the alleged disallowance. The alleged sum is admittedly not a penalty in nature but whether it a revenue or capital expenditure still needs to be examined. We, therefore, are of the considered view that this issue that *"whether the alleged sum i.e. compensation paid by the assessee company on the direction of Hon'ble Supreme Court of India to the relative of a patient who died due to the negligence of the doctors and the hospital authority is in the nature of capital expenditure or revenue expenditure"* needs to be restored to ld. CIT(A) for necessary

adjudication. Needless to mention that the assessee shall be provided fair opportunity of being heard and to file necessary submissions as well as to place reliance on judicial pronouncements if considered necessary so that ld. CIT(A) can decide the issue in accordance with law. We therefore, restore the issue raised by the Revenue in ground nos. 1 to 4 to the file of ld. CIT(A). In the result, ground nos. 1 to 4 are allowed for statistical purposes.

9. Now, we take ground nos. 5 to 7 through which the Revenue has challenged the finding of ld. CIT(A) holding that the rent received from IBS tower is Income from house property.

10. We have heard rival contentions and perused the records placed before us. We notice that the assessee received Rs. 25,50,462/- as rental income from various parties for allowing them to instal IBS towers on the terrace of the building owned by it. The assessee disclosed this rent as income from house property. However, ld. AO held it to be an Income from other sources. Thereafter, ld. CIT(A) following the decision of the Coordinate Bench of this Tribunal in assessee's own case in ITA No. 2277/Kol/2014 dated 12.02.2017 for AY 2010-11 held it as an Income from house property. Ld. D/R failed to controvert that the issue is covered in favour of the assessee by the decision of this Tribunal in assessee's own case by placing before us any binding precedence in Revenue's favour. We therefore, respectfully following the decision of this Tribunal, hold that the alleged rental income from installation of IBS tower has been rightly offered to tax as Income from house property. Thus, no interference is called

for in the finding of ld. CIT(A) and ground nos. 5 to 7 raised by the Revenue are dismissed.

11. As regards ground nos. 8 to 10, they all relate to disallowance of business advance written off amounting to Rs. 4,41,000/-. The assessee advanced the said sum to various persons in relation to another hospital project at Siliguri. But, subsequently the project was abandoned and the allotment of land was surrendered. The assessee claimed the said amount expenditure by writing it off from the profit & loss account. Ld. AO disallowed the sum treating it as capital in nature.

12. We, however, find merit in the finding of ld. CIT(A) who has rightly observed that the said advance was given in relation to the business transaction for setting up a hospital project and since the project was abandoned and the advance given could not be recovered, the said sum is a business loss u/s 28(1) of the Act and for this view he placed reliance on the judgment of Hon'ble Apex Court in the case of *CIT vs. Woodward Governor* reported in *179 taxmann 326 (SC)*. Thus, no inference in the finding of ld. CIT(A) allowing the said sum as revenue expenditure. Thus, ground nos. 8 to 10 raised by the Revenue are dismissed.

14. Ground no. 11 is general in nature which needs no adjudication.

15. In the result, the appeal filed by the Revenue is partly allowed for statistical purposes.

Kolkata, the 20th October, 2022.

Sd/-	*Sd/-*
[Sonjoy Sarma]	[Manish Borad]
Judicial Member	Accountant Member

Dated: 20.10.2022

Bidhan (P.S.)

Copy of the order forwarded to:

1. ***DCIT, Circle-12(1), Kolkata.***
2. ***AMRI Hospitals Ltd., P-4 & 5, CIT Scheme-LXXII, Block-A, Gariahat Road, Dhakuria, Kolkata-700 029.***
3. CIT(A)- 4, Kolkata.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata