

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD “B” BENCH, AHMEDABAD**

[Coram: Pramod Kumar AM and Mahavir Prasad JM]

ITA No. 3411/Ahd/2015
Assessment Year: 2012-13

Income Tax Officer

Ward 2(1)(3),
Ahmedabad

.....Appellant

Vs.

Hemato Oncology Clinic (Ahmedabad) Pvt Ltd

Vdanta, Nr. Samved Hospital,
Commerce College Road,
Navrangpura, Ahmedabad
[PAN : AABCH 4932 Q]

.....Respondent

Appearances by:

Mudit Nagpal for the Appellant

SN Divetia for the Respondent

Date of concluding the hearing : 25.01.2018

Date of pronouncing the order : 24.04.2018

O R D E R

Per Pramod Kumar, AM:

1. This appeal is directed against learned CIT(A)'s order dated 8th September 2015 for the assessment year 2012-13.

2. Grievance of the appellant is that “learned CIT(A) has erred in law and on facts in deleting the disallowance of Rs.52,57,032/- made under section 40A(2)(b) of the Act, without properly appreciating the facts of the case and material on record”.

3. The issue in appeal lies in a narrow compass of material facts. The assessee before us is a closely held company engaged in running a clinic providing treatment to hemato oncology patients. During the course of scrutiny assessment proceedings, the Assessing Officer noticed that, out of the total professional receipts of Rs.5,93,44,045/-, the assessee company has paid Rs.3,50,46,881/- to four doctors – namely Dr. Bhavin Shah, Dr. Chirag Desai, Dr. Sandip Shah and Dr. Shailesh Talati, who are promoter directors of this company, whereas only Rs.64,09,696/- payments cover the payments to seven other doctors. Even though it was explained to him that these four doctors are highly reputed specialists, the Assessing Officer was of the view that 84% of salaries being paid to four doctors, and 16% salaries being paid to the remaining seven doctors, by itself, shows that the payment to the four doctors, who are promoter directors as well and, as such,

covered by the definition of 'specified persons', shows that the payment is excessive and unreasonable. He thus disallowed 15% of payments made to these four doctors, under section 40A(2). The disallowance was thus quantified at Rs.52,57,032/-. Aggrieved, assessee carried the matter in appeal before the CIT(A) who deleted the aforesaid disallowance by observing as follows:-

"3.10. Having considered the facts and submission, it is apparent that it is undisputed fact that the services of professional doctor is not comparable with any other doctor of a similar line because of various factors including the skills, competency, experience and its popularity. Therefore, the comparison of any payment to a doctor who is promoter having vast experience of a long duration cannot be compared with a junior doctor employed in the company. In the appellant's case, the AO has made the comparison of the four promoter doctors with the professional fee of the employee doctors who are not at par. The AO has not make out the case that in what manner the provisions of section 40A(2) (b) are applicable on the facts of the case. In the instant case, it is found that the average increase in the professional fee of the promoter directors was 42% as compared to preceding year. But at the same time, there was also substantial increase of 56% and 64% in the professional fee with regard to the doctors other than directors namely; Dr. Abhishek Kakru and Dr. Deepaben respectively. Even, here the increase of professional fee in the case of doctors other than promoter directors as mentioned above was much higher than the average increase of the professional fees of the promoter directors. So, the comparison of scale as adopted by the AO in respect of doctors is not correct and justified.

3.11. Further, the appellant has given the comparative study of the professional fee sharing from the direct income in the case of appellant which was 55.64%, while in a similar nature of appellant namely; Aastha Oncology Pvt. Ltd., this ratio was 78.08% in the year under consideration in spite of the fact that the appellant company was older by more than 3 years. Thus, by no parameter the payment of professional fee to the promoter directors was unreasonable and excessive, having regard to the fair market value of the services for which payment was made.

3.12. It has also been seen that promoter directors have included the professional fee in their returns of income and paid the tax at the maximum marginal rate thereupon. Thus, there is no planning of any tax evasion by making any excess payment to the promoter directors as has been held by the AO.

3.13. The taxes on such professional receipts were paid by the promoter at the maximum marginal rate as was applicable in the case of appellant and this was a revenue neutral exercise. Therefore, no adverse view is required to be taken in view of the judgment of Hon'ble Supreme Court in the case of CIT, Delhi Vs. Glaxmo Smithkline Pvt. Ltd. (supra). Judgment of Hon'ble Bombay High Court in the case of Indo Saudi Services (Travel) (P) Ltd. (2009) 310 IT 306 also supports this view. Further, Circular No. 6-P dated 6/7/1968 also supports the appellant's plea for no disallowance under the provisions. It has

also been noticed that in the preceding years even the professional fee paid to promoter directors vis-a-vis professional fee to other doctors have been compared and it is found that in A. Y. 2009-10, the total fee paid to promoter directors was 7.21 times of the professional fee to other doctors, while in A. Y. 2010-11 it was 4.10 times, in A. Y. 2011-12 it was 3.35 times and in the year under consideration it was 5.22 times. Thus, it can be seen that even in A. Y. 2009-10, the ratio of professional fee to promoter directors vis-a-vis the other doctors was higher as compared to the year under consideration, even though no adverse view has been taken by the AO in that year. Thus from the above, it is obvious that the professional fees payment to promoter doctors in the year under consideration was almost on similar lines and no excess payments to them were made.

3.14. In view of the aforesaid discussion, the disallowance made by the AO invoking the provisions of section 40A(2)(b) is found not correct and justified and the same is deleted. This view finds support from the judgments as reproduced below:-

- DCIT Vs. Jagga Prints Pvt. Ltd. [ITA No. 985/AHD/2011 dt. 19/6/2015]

The Id. Assessing Officer has not brought any evidence with regard to the comparability of the services rendered by these persons vis-a-vis availability in the open market. The Assessing Officer has simply compared the payments with the payments made by the assessee in earlier years. The requirement of the section is that such payment is to be compared with the fair market value of the services or whether these services can be availed at a lower rate from the persons who are not covered by sub-clause "b". No such evidence has been brought on record; therefore, Id. Commissioner of Income Tax [Appeals] has rightly deleted the disallowance.

- CIT Vs. Sarjan Realities Ltd. (2014) [50 Taxman.com 52] (Guj)
- Taktawala Glass India P. Ltd. Vs. ACIT [Tax Appeal No. 1058 of 2006 dated 26/11/2014]

It is held that the onus is on the AO to prove that the payment made by the assessee to the specified persons was unreasonable or excessive

- DCIT Vs. M/s. MGS Hos Hospitalities, Delhi Bench of ITAT

It has been held that in absence of any inquiry about fair market value of services rendered by Shri Anil Gupta and comparable case, the disallowance u/s. 40A(2)(b) was not justified.

- CIT Vs. Siya Ram Garg, HUF [237 CTR 321] [PH]

It is held that in view of the sister concerns were being taxed at the same rate, there was no reason for the assessee to show higher rate for purchases made by it from them.

- *DCIT Vs. Meet Heat Engineers* [ITA No. 3654/07 dt. 23/07/2010]
- *ITO Vs. Cello Paper Co.* [ITA No. 1815/AHD/2010 dt.28/12/2012]
- *Bativala and Karani Vs. ACIT* [2 SOT 379 (Mum)]

3.15. *The related grounds of appeal are accordingly allowed."*

4. Aggrieved by the relief so granted by the CIT(A), the Assessing Officer is in appeal before us.

5. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

6. We have noted that there is no finding by the Assessing Officer about as to what constitutes fair market price of the services rendered by the promoter directors and that he has simply proceeded to make an adhoc disallowance @ 15% out of the payments made to these persons. As to the question whether such a disallowance is permissible, we find guidance from the judgment of Hon'ble jurisdictional High Court, in the case of CIT vs. Ashok J. Patel [(2013) 43 taxmann.com 227 (Guj.)], wherein confirming the views articulated by the Tribunal through one of us (i.e. Accountant Member) in the case of ACIT vs. Ashok J Patel (59 SOT 53), Their Lordships have, inter alia, observed as follows:-

"The learned CIT(A) also observed that no comparative prices for similar transport services was cited by the AO and therefore, was not justified in making ad-hoc disallowance of 5% under section 40A(2)(b) of the Act and therefore, the CIT(A) as such rightly deleted the disallowances made under section 40A(2)(b) of the Act. Considering the provisions of Section 40A(2)(b) of the Act and the Evidence Act, if the AO was of the opinion that the payment for which disallowance is claimed, is excessive or unreasonable. In that case, it was for the AO to assess fair market price and give comparative instances for payment for similar transport service. In absence of such comparative cases brought on record, as rightly observed by the ITAT it was not open for the AO to make disallowance under section 40A(2)(b) of the Act. While deleting disallowance made by the AO under section 40A(2)(b) of the Act, the learned ITAT has observed and held in para 7 as under :—

"7. It is plain on principle that, so far as disallowance under Section 40A(2) for payment being excessive or unreasonable can only be made when the payment is made to the "specified persons" under clause 40A(2)(b) and "the Assessing Officer is of the opinion that such expenditure is excessive or unreasonable having regard to the fair market price of the goods, services or facilities for which the payment is made". The opinion of the Assessing Officer for the expenditure being excessive or unreasonable is to be formed vis-a-vis fair market price of such goods services or facilities. It is thus sine qua non for making a disallowance under section 40(A)(2) that the Assessing Officer has to ascertain the fair market price of such goods, services or facilities, and then make a 'disallowance for the amount which is in excess of fair market value of such goods, services or facilities. Unless there is a categorical finding about the 'fair market value' and the assessee has an opportunity to be heard on Assessing Officer's finding about such

'fair market value', there cannot be an occasion to make a disallowance under section 40A(2). The very scheme of Section 40A(2) does not envisage an adhoc disallowance as has been made in the present case. For this short reason alone, the impugned deletion of disallowance must stand confirmed. There is, however, one more reason for doing so. As evident from a plain reading of the assessment order, the Assessing Officer, had called upon the assessee to demonstrate that the payment made by the assessee to the specified persons is not unreasonable or excessive, and it is thus failure of the assessee which has resulted in disallowance under section 40A(2). However, proving a negative, as the assessee has been called upon to do in this case, is an impossible onus to perform. In any event, this onus is on the Assessing Officer and the AO has failed to discharge the said onus. For this reason also, the disallowance is unsustainable in law. As regards the discrepancy in the figures of the tax audit report and the assessee, neither such a situation can be a reason enough to make a disallowance under section 40A(2) nor the onus of explaining such a variation is on the assessee. A tax auditor is an independent professional and any errors in his report cannot be put to assessee's disadvantage. In view of these discussions, as also bearing in mind entirety of the case, we approve the conclusions arrived at by the CIT(A) and decline to interfere in the matter."

We are in complete agreement with the view taken by the ITAT and the observations made by the learned ITAT while deleting disallowances made by the AO under section 40A(2) (b) of the Act on motor bus rent. No error has been committed by the learned ITAT which calls for interference of this Court. No question of law much less any substantial question of law arises."

7. The adhoc disallowances under section 40A(2) are thus simply not permissible. For this short reason alone, the impugned relief granted by the CIT(A) must be upheld.

8. Even on merits of the matter, the case of the revenue must fail. There is an inherent fallacy in the approach of the Assessing Officer. The fallacy is this. In the cases of seasoned professionals – whether doctors, lawyers, painters or actors, such comparisons, as made by the Assessing Officer, are uncalled for. Their remuneration must depend on their market worth, and determination of such market worth is uninfluenced by what other professionals in their area of expertise earn. The Assessing Officer has, despite the above position, challenged the payments made to four doctors, who are admittedly seasoned and reputed professionals in their fields, on the basis of what other doctors are being paid in that area of expertise. This is very simplistic or rather naive approach which cannot meet any judicial approval. Learned CIT(A) was indeed justified in reversing the stand of the Assessing Officer.

9. One must also bear in mind the fact that simply because a payment is 'high', it need not be 'excessive' too, but then the Assessing Officer has used the expressions 'high' and 'excessive' rather interchangeably. The expression 'excessive' has to be considered vis-a-vis fair market value of such services, as statutory provisions categorically state when someone makes a payment of say Rs. 50 lakhs for an appearance by a very eminent lawyer, it may be high, but as experience tells us,

when someone can actually afford it, it is not really excessive. The mere fact that there are equally experienced, even if not equally successful lawyer, are available for much lower fees, would not imply that the payment to the very eminent counsel is excessive.

10. In view of the above discussions, as also bearing in mind entirety of the case, we uphold the relief granted by the CIT(A) and decline to interfere in the matter.

11. In the result, the appeal is dismissed. Pronounced in the open court today on the 24th April, 2018

Sd/-

Mahavir Prasad
(Judicial Member)

Sd/-

Pramod Kumar
(Accountant Member)

Ahmedabad, the 24th day of April, 2018

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Copies to: (1) The appellant
(2) The respondent
(3) Commissioner
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

TRUE COPY

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad