IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, AHMEDABAD

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT &
Ms. MADHUMITA ROY, JUDICIAL MEMBER

I.T.A. No. 3213/Ahd/2016
(Assessment Year : 2012-13)

CIMS Hospital Pvt. Ltd., Nr. Shukan Mall, Off Science City Road, Sola, Ahmedabad.	Vs.	DCIT, Circle – 1(1)(2), Ahmedabad.

And
I.T.A. No. 3299/Ahd/2016
(Assessment Year : 2012-13)

DCIT, Circle – 1(1)(2), Ahmedabad.	Vs.	CIMS Hospital Pvt. Ltd., Nr. Shukan Mall, Off Science City Road, Sola, Ahmedabad.

[PAN No. AABCC 6721 A]
(**Appellant**) .. (**Respondent**)

Appellant by	**:**	Shri S. N. Soparkar & Parin Shah, A.R.
Respondent by	**:**	Shri Vinod Tanwani, Sr. D.R.

Date of Hearing	02.07.2019
Date of Pronouncement	05.09.2019

O R D E R

PER Ms. MADHUMITA ROY - JM:

These two cross appeals (filed by the assessee and the revenue) are directed against the order dated 23.09.2016 passed by the Commissioner of Income Tax (Appeals)-1, Ahmedabad under section 143(3) of the Income Tax Act, 1961 (hereinafter referred as to "the Act") arising out of the order dated 04.03.2015 passed by the DCIT, Circle-1(1)(2), Ahmedabad for the Assessment Year 2012-13.

Since both the appeals relate to the same assessee, hence the same are heard analogously and are being disposed of by a common order.

2. **ITA No. 3213/Ahd/2016 for A.Y. 2012-13 :** Assessee has filed following grounds of appeal:

(1) "The Learned Commissioner (Appeal) failed to understand the facts and circumstances of the ease and the provisions of law.
(2) The Learned Commissioner (Appeal) erred in fact and in law in confirming disallowance of Rs.2,65.40,195/- u/s 40A(2)(b) of the Income 'fax Act. 1961 considering it as diversion of income by the appellant to CCCPL and from CCCPL to ('('('PL's directors.
(3) The Learned Commissioner (Appeal) erred in fact and in law in confirming the disallowance of Rs.35,825/- being 0.5% of average investments as administrative expenditure u/s 14A of Income Tax Act by applying rule 8D though assessee has not incurred such expenditure.
(4) The Learned Commissioner (Appeal) erred in fact and in law in confirming the disallowance of Rs.134863/- being late payment of employee's contribution to PF/ESIC u/s 2(24)(x) of Income Tax Act though there is no substantial delay.
(5) The Learned Commissioner (Appeal) erred in fact and in law in not adjudicating the additional ground of appeal raised vide letter dated 26/10/2015:

> *"The Learned Assessing Officer erred in fact and in law in adding back Rs.35,825/- as disallowance u/s 14A of the Income Tax Act, 1961 while calculating Book Profit for the purpose of MAT u/s 115JB of Income Tax Act, 1961 even though Scope section 14A is limited it to the Chapter VI i.e. Section 15 to 59 of the Income Tax Act, 1961."*

(6) Your Appellant preys for appropriate relief on above grounds of appeal.
(7) *Your appellant craves leave to add. alter, amend, substitute or withdraw any of the grounds of appeal stated hereinabove."*

3. **Ground No.1, 6 & 7** These grounds of appeal are general in nature, hence, no order need to be passed.

4. **Ground No.2** The assessee has challenged the order passed by the Learned CIT(A) in confirming disallowance u/s 40A(2)(b) of the Act of Rs.2,65,40,195/- considering it as diversion of income to CCCPL and from CCCPL to CCCPL's director.

5. During the course of assessment proceeding, it was found that the assessee has claimed payment of Rs.2,65,10,492/- to CCCPL as research fees in support of which the assessee provided a copy of Memorandum of Understanding (MOU) entered into by and between the two corporate companies i.e. the assessee and the CCCPL. It further appears from the said MOU that CCCPL would render and conduct all their Health care and Clinical research services and engagements at CIMS. Upon verification of balance sheet and Profit and Loss account of CCCPL for A.Y. 2012-13 it was found that CCCPL has no asset for research work, neither has debited any research expenditure. The assessee, however, sought to justify such payment as reasonable only on the basis of the MOU. When the assessee was directed to clarify as to how the research work for which payment has been claimed to have been made by the assessee and that too for its business activity, following explanation was rendered by and under a letter dated 21.02.2015 by the assessee:

> *"It is to be noted that assessee has paid Rs.26510492/- to Clinical Care Consultant Pvt. Ltd. for service received from CCCPL regarding research expense. Research expense is paid as per service mentioned in MOU rendered by Clinical Care Consultant Pvt. Ltd. Copy of MOU is enclosed as per Annexure-2. The above payment is included in the payment of professional fees Rs. 175097905/- reported in audit report u/s. 44B. The breakup of professional fees is as under:*

Professional fees to Consultant (CCCPL)	
Clinical Care Doctor's Payment	*148587413*

Clinical Care Doctor's Research Payment,	*26510492*
	175097905

The summarization rendered by the assessee was not found acceptable and therefore entire expenditure to the tune of Rs. 2,65,40,195/- was disallowed by the Learned AO which was in turn confirmed by the Learned CIT(A). Hence, the instant appeal before us.

6. At the time of hearing of the instant appeal, the Learned Senior Counsel appearing for the assessee reiterated the submissions of the assessee before us. In terms of the service mentioned in the MOU entered into by the two Corporate Companies the payment for research expenses has been paid by the assessee. On this aspect he further relied upon the judgments passed by the Jurisdictional High Court in the matter of Hemato Oncology Clinic (Ahmedabad) (P.) Ltd. reported in 93 taxmann.com 272 (Ahd). On the other hand, Learned DR submitted before us that the MOU does not have any legal sanctity since the same has been documented on a plain paper not even notarized. He further relied upon the order passed by the authorities below.

7. We have heard the respective parties, we have perused the relevant materials available on record. It appears from the records that in spite of repeated direction issued by the authorities below the assessee has failed to justify its claim by supporting evidence so as to establish that actual research work was involved in the CCCPL. The Learned AO while disallowing the claim of the assessee observed as follows:

> *"1. From the MOU furnished by the assessee, it can be seen that the same is prepared only on plain paper which cannot be considered as having any legal binding on both the parties. Further, the MOU does*

not clarify the type of research work it would undertake. It may be pertinent to point out here that the assessee has entered into other MOU with CCCPL on the same date i.e. 02/08/2010 to carry out certain other health care services, the same has already been discussed in the issue of disallowance of diversion of income. The only difference the present MOU is certain words are included to add "clinical research services". The duties of CCCPL in the research as per the agreement is as per 4(a) of agreement is as under:

> *4(a) CCCPL will fie providing Clinical research, services-,to CIMS and would be performing technical testing or analysis of newly developed drugs, devices, including vaccines as would be required on the walk-in patients of CIMS as well as on the patients who are referred to CIMS by professional Working under CCCPL or by any other physician haying no association to CCCPL or CIMS*
>
> *The following would be the duties of CIMs under the agreement;*
>
> *a) CIMS would provide various facilities without restriction of use to CCCPL and its affiliated persons;*
> *a. Operation Theatre Complex/Cathlab rooms*
> *b. Patient Rooms*
> *c. Intensive Care Units*
> *d. Critical Care Units*
> *e. Outpatient consulting room*
> *f. The pathology department*
> *g. The radiology department*
> *h. The Ambulance and Transport Services*
> *i. The Pharmacy*
> *j. Various other services that are installed in the premise of CIMS."*

2. From the duties assigned to CCCPL, it can be seen that there is no research work involved therein. It is very interesting to note that how the CCCPL can analyze and develop new drugs without holding a valid license. The assessee failed to provide any documentary proof to prove that CCCPL is competent to carry out any research work as provided in the MOU. It also failed to provide that the CCCPL has any manpower to carry out any such research work. Further, the detail of infrastructure provided by CIMS to CCCPL under the so-called agreement does not include any machinery or equipment through which *it can carry out any research work. Apart from the above, it is also verified from the balance sheet of CCCPL and it is found that the CCCPL has not show assets much less research equipment. From the above it is crystal clear that so-called agreement entered into only a device to divert the income of one entity to another.*"

Before the Learned CIT(A) the assessee submitted as follows:

"4.2. The submission of the appellant before the CIT(A) is as under:

1. Vide 3(b) on page no 8 to 10 of the assessment order, the learned assessing officer has disallowed the Research payment of Rs. 2,65,10,492/- made to Clinical Care Consultants Pvt. Ltd in pursuant to the Memorandum of Understanding dated 02/08/2010. During the year under consideration the assessee has earned research income of Rs.4,17,26,830/- from the various pharmaceutical companies on various research projects given by them. The clinical trials are given to the qualified doctors. The assessee being a hospital possesses necessary infrastructure facilities for carry out the research activities. CCCPL have manpower in the form of professional doctors having a research projects in their names. The gross receipts from research projects are received by the assessee. The assessee has entered into MOU with the CCCPL for providing professional doctors for research work. In consideration the assessee has given 65% of the fees income for research work to CCCPL after deducting tax at source.

2. The findings of the learned assessing officer for disallowing research fees paid to CCCPL are as under:

(i) From the MOU, it can be seen that the CCCPL will render and conduct all their health care and clinical research services and engagement at CIMS.

(ii) On verification of the balance sheet and profit & loss account of CCCPL for assessment year 2012-13, it is seen that CCCPL neither has any assets/facilities for research work nor has debited any research expenditure.

(iii) The MOU is prepared only on plain paper which can not be considered as having any legal binding on both the parties.

(iv) The MOU does not clarify the type of research work it would undertake.

(v) From the duties assigned to CCCPL it can be seen that there is no research work involved therein.

(vi) How the CCCPL can analyze and develop new drugs without holding a valid license?

(vii) The assessee failed to provide any documentary proof to prove that CCCPL is competent to carry out research work as provided in MOU.

(ix) The assessee failed to provide that the CCCPL has any manpower to carry out any such research work.

(i) The details of infrastructure provided by the assessee to CCCPL under so-called agreement do not include any machinery or equipment through which it can carry out any research work.

(ii) It is crystal clear that so-called agreement entered into is only device to divert the income of one entity to another.

3. In this regard the assessee has to submit as under:

(i) The assessee has necessary infrastructure facilities to carry out research work. The pharmaceutical company who manufactures drugs has to get clinical trial of the new drugs after obtaining necessary license/permit. Those companies are appointing doctors as a principal investigator and assigning the work of research or clinical trial. The doctors have formed a company namely CCCPL for the purpose of carrying on medical profession in group. Therefore, the research work received by the individual doctors have been carried out by them at the hospital of the assessee and directed to make payment for the professional services rendered by doctors to CCCPL.

(ii) In view of above CCCPL is not require any machinery or equipment for research work. All the research related infrastructure facilities has been provided by the assessee.

(iii) The MOU is not any legal document which requires any legal formalities. But it the receding of the understanding between the two persons agreed by them. Except those parties, no body has any interest in the said documents.

(iv) As per procedure of clinical trial the pharmaceutical company who require the research of new drugs has to obtain license for the purpose. Therefore, CCCPL has not to hold any license for research work carried out by it.

(v) The CCCPL having the team of professional doctors to carry out research work and the said professional doctors have carried out

the research work in the hospital of the assessee and for that the payment has been made to CCCPL.

(vi) *From the profit & loss account of the CCCPL it is proved that against the payment received from the assessee in respect of research work, the CCCPL has made payment of professional fees to doctors. For the research work the CCCPL has not employed permanent employees. But it has hired the professional doctors to carry out research work at CIMS Hospital Pvt Limited.*

(vii) *The assessee's infrastructure i.e. operation theatre, cath labs, patient rooms, Intensive care units, Critical care units, pathology laboratory, radiology department and the patients admitted for research etc are used for research work.*

4. The so called agreement is not for diversion of the income. The assessee having huge carried forward losses of Rs. 51,79,33,611/- u/s 35AD available for set off against the current year's income. Therefore, non- payment of research fees to CCCPL would have resulted in the more set off of actual losses and non payment of taxes by the CCCPL and in turn doctors. Therefore, as a result of payment of research fees the department had got taxes from the CCCPL and doctors declaring the income received from the assessee and from the CCCPL respectively.

5. The learned assessing officer has taxed the entire research income, though the assessee has provided only infrastructure for research work. The assessee being an in-natural person, not able to carry out the research work without the professional doctors. For research work, the assessee is supposed to pay for professional services. As stated above the doctors have provided the professional services under the banner of CCCPL. ..Therefore, the payment of research work to CCCPL is justified. In immediate preceding year similar payment has been made by the assessee to CCCPL has been accepted by the department and no addition has been made in this regard in the assessment order passed u/s 143(3) of the Income Tax Act, 1961 .

6. The assessee relies on the recent decision of the Honourable Gujarat High Court in case of Commissioner of Income Tax vs. Gujarat Gas Financial Services Limited reported at (2015) 233 Taxman 0532. Copy of the said case law is enclosed herewith. (Refer Page no 93 to 101 of the paper book.) The Honourable Gujarat High Court has held

> *that, Assessee Company as well as parent company, both are assessed to income tax at the maximum marginal rate and, therefore it cannot be said that the service charge was paid to the assessee company at an unreasonable rate to evade tax.*
>
> *7. In the case of the assessee, due to carried forward losses, tax is paid on book profit u/s 115JB of the Income Tax Act, 1961 whereas the CCCPL and the doctors are liable to tax at maximum marginal tax. Therefore, so called diversion of income has not for any evasion of tax liability by the assessee. The payment has been made for services received by the assessee.*

8. The Learned CIT(A) in appeal rejected the case of the assessee with the following observations:

> *"4.3. I have gone through the facts and the submission of the appellant carefully. In the assessment order A.O. has observed that the appellant has paid Rs, 2,65,40,195/- to CCCPL (Clinical Care Consultants Pvt. Ltd) as research fees. Further, it is seen that CCCPL will render and conduct all their health care and clinical research services and engagements at CIMS, but after verification of balance sheet & P &L A/c. of CCCPL it is found that neither has any assets/facilities for research work nor has debited an research expenditure. Thereafter, MOD furnished by the appellant on plain paper, which cannot be considered and which does not clarify the type of research work. Further, It pertinent to note that appellant has entered into other MOU with CCCPL on the san date to carry out certain other health care services. Further, the appellant has failed provide any documentary proof and any manpower in respect of that CCCPL .competent to carry out any research work as provided in the MOU. Apart from above, after verified the balance sheet of CCCPL, it is found that CCCPL has not shown any assets research equipment. In view of the above, the appellant claim for expenditure of Rs. 2,65,40,195/- in respect of research expense is disallowed and added to the total income.*
>
> *On the other hand appellant has argued that the appellant being a hospital possesses necessary infrastructure facilities to carry out the research activities and CCCPL have manpower in the form of professional doctors having a research projects in their names. Further, the appellant has contended that assesses has entered into MOU with*

the CCCPL for providing professional doctors for research work. The appellant has given 65% of the fees income for research work to CCCPL after deducting tax at source. Further, appellant has submitted that appellant has necessary infrastructure facilities to carry out research work and doctors have formed a company namely CCCPL for the purpose of carrying on medical profession in group. Therefore, the research work received by the individual doctors have been carried out by them at the hospital of the assesses and directed to make payment for the professional services rendered by doctors to CCCPL. In view of above CCCPL does not require any machinery or equipment for research work. Further, the appellant has contended that CCCPL having the team of professional doctors to carry out research work and the said professional doctors have carried out the research work in the hospital of the assesses and for that the payment has been made to CCCPL. Apart from the above, from the P & L A/c. of the CCCPL it is seen that against the payment received from the appellant in respect of research work, the CCCPL has made payment of professional fees to doctors. For the research work the CCCPL has not employed permanent employees. But it has hired the professional doctors to carry out research work at CIMS Hospital Pvt. Limited. The appellant has relied on the decision of Hon'ble Gujarat High Court in case of Commissioner of Income Tax vs. Gujarat Gas Financial Services Limited.

4.4. After going through the facts of the case, it is seen that CIMS has claimed to have paid Rs. 2,65,40,195/- to CCCIPL as research fees. A careful perusal of the so-called MOU, it can be seen that the CCCPL will render and conduct all their health care and clinical research services and engagements at CIMS. However, on verification of Sheet & P&L A/c of CCCPL for the A. Y-2012-13, it is seen that CCCPL neither has any assets/facilities for research work nor has debited any research expenditure. Whereas the appellant has vehemently put up that appellant has submitted that appellant has necessary infrastructure facilities to carry out research work and doctors have formed a company namely CCCPL for the purpose of carrying on medical profession in group. Therefore, the research work received by the individual doctors have been carried out by them at the hospital of the assessee and directed to make payment for the professional services rendered by doctors to CCCPL In view of above CCCPL does not require any machinery or equipment for research work. For the research work the CCCPL has not employed permanent employees. But it has hired the professional doctors to carry out research work at

CIMS Hospital Pvt. Limited. I am not convinced with the arguments of the appellant for the reason and find merit in the findings of the A.O. The findings are as under:-

i) From the MOU, it can be seen that the CCCPL will render and conduct all their health care and clinical research services and engagement at CIMS. On verification of the balance sheet and profit & loss account of CCCPL for assessment year 2012-13, it is seen that CCCPL neither has any assets/facilities for research work nor has debited any research expenditure. This type of situation is very unique and does not leave any confusion as what is the intention of the appellant company.

(ii) The MOU is prepared only on plain paper which cannot be considered as having any legal binding on both the parties. This is technical aspect and even at the time of appellate proceedings, the appellant did not have any answer.

(iii) The MOU does not clarify the type of research work it would undertake. This is quite vague and leaves much confusion as to what research to be undertaken.

(iv) From the duties assigned to CCCPL it can be seen that there is no research work involved therein. Nothing except the routine readings have been submitted by the appellant. For this work large scale of payment is not required.

(v) How the CCCPL can analyze and develop new drugs without holding a valid license? The CCCPL does not have license to produce the new drugs.

(vi) The assessee failed to provide any documentary proof to prove that CCCPL is competent to carry out research work as provided in MOU.

(vii) The assessee failed to provide that the CCCPL has any manpower to carry out any such research work. It is to be noted that the appellant has submitted that the Doctors from CIMS only have conducted the so-called research work.

(ix) The details of infrastructure provided by the assessee to CCCPL under so-called agreement do not include any machinery or equipment

through which it can carry out any research work. This is basic requirement which the company does not have to carry out the research work.

The above findings clearly point to the fact that the appellant has used this as a device to reduce the tax incidence of the appellant company by entering into MOU with CCCPL. The case law cited by the appellant company is on different note and the facts of the appellant case are entirely different from the case of Gujarat Gas Financial Services Limited. However, the CCCPL neither has incurred any expenses related to research work nor has any assets to justify services rendered as research work. As such, the expenses debited by the assessee as a research expenditure paid to CCCPL appears to be only paper entry/bogus without being any actual service rendered by the CCCPL. In view of the above, the appellant claim for expenditure of Rs.2,65,10,195/- in respect of research expense disallowed and added to the total income by the A.O. is confirmed. ***The ground! of the appellant is dismissed.”***

9. It appears from the finding of the Learned CIT(A) that the authorities below has not been provided with any documentary proof that CCCPL is having any manpower to carry out any research work as mentioned in the Memorandum of Understanding. The MOU further does not specify the type of research work it would undertake. Documentary proof that CCCPL is competent to carry out research work as specified by MOU has been failed to be submitted by the assessee. It was further found that no asset has been shown by the CCCPL in their balance sheet for research equipment though the MOU particularly envisaged that CCCPL would render and conduct all their health care and clinical research services and engagement at CIMS. Thus in the absence of necessary infrastructure facilities to carry out research work, the authority below has declined to accept such expenditure towards clinical research work rendered by CCCPL and, therefore, the Learned CIT(A) observed that the appellant has used this mode to reduce tax incidence in the appellant company by entering into MOU of CCCPL unequivocally.

We have also carefully considered the judgment passed by the Jurisdictional High Court in the matter of Hemato Oncology Clinic (Ahmedabad) (P.) Ltd. but we are afraid, we cannot accept the submissions made by the Learned Senior Counsel appearing for the assessee. We find that the fact of the instant case is entirely different from the fact available in the judgment passed by the Jurisdictional High Court. Thus this has no manner of application to the case in hand before us.

Taking into consideration the entire aspect of the matter, we find that in the absence of any expenses shown by CCCPL incurred for research work or any assets to justify services rendered as research work, the order passed by the Learned CIT(A) is just and proper and without any ambiguity in disallowing the impugned expenditure of Rs.2,65,40,195/- debited by the assessee as research expenditure, paid to CCCPL, treating the same as paper entry and/or bogus. Hence, assessee's this ground of appeal is **dismissed.**

10. **Ground No.3:** The assessee has challenged the confirmation of disallowance made u/s 14A of the Act of Rs.35,825/-.

11. It appears from the records that the assessee has already disallowed an amount of Rs.5,500/- u/s 14A of the Act in the statement of income. According to the Learned AO the worked out was not correct and as per the correct working the disallowance should have been Rs.41325/- as against Rs.5,500/-, hence the difference of Rs.35,825/- has been added to the total income of the assessee, which was in turn confirmed by the first appellate authority. Thus impugned before us.

12. We find that the infirmity in calculating the suo moto disallowance as made by the assessee has not been pointed out by the Learned AO. Neither the same has been taken into consideration by the first appellate authority. It is a clear position of law that the provision of section 14A r.w.r. 8D requires that to make the disallowance the books of accounts are to be considered. In the instant case, the books of accounts has not been referred by the authorities below and therefore it can be inferred that no satisfaction was recorded in terms of section 14A r.w.r. 8D of the Act. Hence we reverse the addition made by the Revenue and further direct the Learned AO to delete the said disallowance. In the result, assessee's ground of appeal is **allowed.**

13. **Ground No.4** Admittedly this ground of appeal is covered against the assessee by and under a judgment pronounced by the Jurisdictional High Court in the case of GSRTC Ltd. reported in 366 ITR 170 (Guj.). Since PF/ESIC contribution u/s 2(24)(x) of the Act of Rs.1,34,863/- has been paid by the assessee even beyond the grace time, prescribed by the concerned Act, the same has been disallowed by the authorities below.

14. At the time of hearing of the instant appeal, the Learned Sr. Counsel appearing for the assessee fairly submitted before us that the issue has been decided against the assessee and hence we confirm the order passed by the authorities below. Thus this ground of appeal preferred by the assessee is **dismissed.**

15. **Ground No.5** The assessee has challenged the adjudication of the disallowance under section 14A while computing book profit u/s 115JB of the Act by the Revenue.

16. This additional ground has been agitated by the assessee though before the first appellate authority the same has not been adjudicated and hence the same has been raised before us.

17. The disallowance of section 14A while computing book profit u/s 115JB has been challenged by the assessee. In this regard, the assessee also relied upon the judgment passed by the Special Bench of Delhi ITAT.

18. We have heard the rival contentions of both the parties and perused the materials available on record. The AO in the instant case has made the disallowance u/s 14A r.w.r. 8D of the Income Tax Rules for Rs. 35825/- while determining the income under normal computation of income. Further, the AO while determining the income under Minimum Alternate Tax (MAT) as per the provisions of section 115JB of the Act, has added the disallowance made under the normal computation of Income under section 14A r.w.r. 8D of Income Tax Rule for Rs. 35825/- in pursuance to the clause (f) of explanation 1 to section 115JB of the Act.

However, we note that in the recent judgment passed by the Special Bench of Hon'ble Delhi Tribunal in the case of ACIT vs. Vireet Investment Pvt. Ltd. reported in 82 Taxmann.com 415 has held that the disallowances made u/s 14A r.w.r. 8D cannot be the subject matter of disallowances while determining the net profit u/s 115JB of the Act, The relevant portion of the said order is reproduced hereinbelow:

> *"In view of above discussion, the computation under clause (f) of Explanation 1 to section 115JB(2), is to be made "without resorting to the computation as contemplated under section 14A, read with rule 8D of the Income-tax Rules, 1962. "*

The ratio laid down by the Hon'ble Tribunal is squarely applicable to the facts of the case in hand. Thus it can be concluded that the disallowance made under section 14A r.w.r. 8D cannot be resorted while determining the expenses as mentioned under clause (f) to explanation 1 to section 115JB of the Act. Hence we delete such addition.

19. In the result, assessee's appeal in ITA No.3213/Ahd/2016 is partly allowed.

20. **<u>ITA No. 3299/Ahd/2016 for A.Y. 2012-13 :</u>** Revenue has filed following grounds of appeals:

> *"That the Learned CIT(A) erred in law and on facts in deleting the addition of Rs.3,75,36,923/- made u/s 40A(2)(b) of the I.T. Act on account of professional fees."*

21. The assessee company a multispecialty hospital accredited by National Accreditation Board for Hospital & Health Care Providers and National Accreditation Board for Testing & Calibration Laboratories, filed its return of income through electronic media on 29.09.2012 declaring total income at Rs.10,20,000/- for A.Y. 2012-13 where total receipt of Rs.87,28,26,274/- was shown and net profit of Rs.3,26,36,457/- was declared which was processed u/s 143(1) of the Act. Subsequently, upon scrutiny relevant notice u/s 143(2) dated 12.08.2013 was issued followed by a detailed questionnaire along with the notice u/s 142(1) dated 28.07.2014 due to change of jurisdiction.

22. During the course of assessment proceeding, it was observed that the assessee has debited a sum of Rs.25,83,45,108/- as professional fees to

consultant. It was further observed from the details mentioned at Clause-18 of Form No.3CD that out of the said amount a sum of Rs.17,50,97,905/- was paid to Clinical Care Consultant Pvt. Ltd. (hereinafter referred as 'CCCPL') a concern covered u/s 40A(2)(b) of the Act. Notice u/s 142(1) dated 13.08.2014 was served upon the assessee directing to furnish the details of professional fees and consultant charges paid to the persons covered u/s 40A(2)(b) of the Act. In response whereof by and under a letter dated 18.02.2015 the following details were furnished:

CCCPL Income	Assessment Year 2012-13
(I) Operative Income CIMS	
IPD – CIMS	125600331
OPD – CIMS	16195123
Project Fees	0
Visiting Fees	4131343
Total (I)…….	145926797
(II) Fees Income – Research	
Research Income received from CIMS	26510495
Total (II)………..	26510495
(III) Other Hospital Fees	
Sterling	1864902
Other Hospital Fees	601300
Total (III)………..	2466202
Total (I+II+III) …………..	174903494
CIMS Exp. in CIMS P&L	
Professional fees to consultants	
Clinical Care Doctor's payments	148587413
Clinical Doctor's Research Payment	26510492
	175097905

Diff.	194411
Justification	Due to discount Given by Doctor we have deducted directly from Doctors Payment by debiting income

23. Upon perusal of the said explanation rendered by the assessee, the Learned AO was of the opinion that certain payments were being made to the doctors directly by the assessee, though, the bills may have been raised by the directors in favour of the CCCPL. The following are relevant to be mentioned:

(i). The Company namely CCCPL is registered and running its activities from the same address as that of CIMS; CCCPL has no separate office or working place.

(ii) The directors of both the companies i.e. CIMS and CCCPL are the same.

(iii) As per memorandum of understanding dated 02.08.2010, the CCCPL will render and conduct all their healthcare and clinical research services and engagements at CIMS.

(iv) and also will render and conduct all their professional and clinical services and engagements at CIMS.

The Learned AO was of the opinion that though the CCCPL will render and conduct healthcare, professional, clinical research and clinical services for which the assessee will pay necessary fees as agreed upon. But the MOU relied upon by the assessee is silent on such remunerations payable by CIMS for such services rendered by the professional of CCCPL. Therefore, according to the Learned AO, the memorandum has been prepared as a tool to divert the income from one entity to another to reduce tax incidence. Though this is a joint venture of two corporate entities the aspect of income sharing is lacking in the MOUs. He also made an observation that both the memorandum of understanding were signed by Dr. Milan Chag for and on behalf of CIMS and

Dr. Anish Chandarana for and on behalf of CCCPL who are the common directors of both the companies. Further that, the MOU made on a plain paper instead of stamp paper; neither the same was notarized. The Learned AO, therefore, questioned the huge payment of Rs.17.50 crore to CCCPL. It was further observed that though the assessee has debited an amount of Rs.2,65,10,495/- on research expenditure which were again paid to CCCPL, the said CCCPL neither has incurred any expenses related to research work nor has any asset to justify services rendered as research work. Thus such expenditure is nothing but a paper entry without being any actual service rendered by the CCCPL. The said professional fees paid by the assessee to CCCPL was finally ploughed to the doctors who are the common directors to the both the companies who in turn again after claiming various expenses finally offered income for taxation at a lower amount.

It appears from the records that the assessee has shown professional fees payment of Rs.17,50,97,905/- to CCCPL who in turn has shown such fees of Rs.13,52,54,296/- to the common directors, who ultimately after claiming various expenses declared income of Rs.9,25,19,477/- on which tax was paid. The assessee has shown expenses of Rs. 17,50,97,905/- as processional fees paid to CCCPL who in turn shown income of only 17,49,039/- i.e. 10% of receipt claiming 90% as expenditure. He, therefore, came to an observation that there is a leakage of Rs.3,75,36,923/- as avoidance of tax. Upon analyzing the entire record the Learned AO made the following observations:

(iii) The payment of Professional fees to the CCCPL is diversion of income.
(iv) In sub 1 on page no. 3 of the Assessment Order it is noted that some payments are being made to doctors directly by the assessee though the bills may have been raised by the doctors in favour of CCCPL.

(v) The directors of both the companies i.e. CIMS & CCCPL are the same.

(vi) The CCCPL is registered and running its activities from the same address as that of CIMS. That means CCCPL has no site office or working place, it is carrying on its activities in the same premises where the CIMS has already its clinic.

(vii) The MOU dated. 02/08/2010 between assessee and the CCCPL is silent on remuneration payable by CIMS for the services rendered by the professionals of CCCPL which clearly shows that the MOU is prepared as a tool to divert the income from one entity to another to reduce the tax incidence.

(viii) In the MOU the income sharing condition is lacking.

(ix) The MOU has been signed by Dr. Milan Chag for and on behalf of CIMS and Dr. Anish Chandarana for and behalf of CCCPL who are common directors of CIMS & CCCPL

(x) The MOU is made in a plain paper and not even on a stamp paper or even not notarized.

24. Apart from that it was further observed that the MOU does not include any machinery or equipment through which it can carry out any research work. Neither it is available from the Balance Sheet of the CCCPL that it has shown any asset much less research equipment. No infrastructure to carry out any clinical research has been found in CCCPL, neither the same has been provided by the CIMS. Ultimately, the Learned AO opined that the entire payment was an arrangement to reduce the assessee's real income and thus the assessee's claim for expenditure of Rs. 2,65,10,495/- in the garb of research expenses was disallowed and added to the total income of the assessee. The total income of disallowance was worked out at Rs. 6,40,47,418/- (3,75,36,923 + 2,65,10,495). In appeal, the professional fees to the tune of Rs. 3,75,36,923 disallowed u/s 40A(2)(b) was reversed by the Learned CIT(A).

The revenue has challenged such deletion of disallowance made u/s 40A(2)(b) by the Learned CIT(A) before us.

25. At the time of hearing of the instant appeal, the Learned Senior Counsel appearing for the assessee submitted before us that it is the case of the appellant that since there was sufficient carried forward loss u/s 35AD in respect of A.Y. 2011-12, there was no requirement of diverting the income to evade payment of tax by the appellant. When both the assessee and CCCPL are corporate assessee and are paying 30% tax, there is no tax benefit to the assessee to transfer profit to CCCPL. In fact the directors and employees were also assessed to tax at the highest rate of 30% and thus the entire issue is revenue neutral. The question of making higher payment to the director under CCCPL has also sought to be justified by the Learned Senior Counsel appearing for the assessee by relying upon the judgment passed by the Co-ordinate Bench in the matter of ITO-vs-Hemato Oncology Clinic (Ahmedabad) (P) Ltd, reported in (2018) 93 taxmann.com 272. According to him, services of professional doctor was not comparable with any other doctor of a similar line because of various factors including the skills, competency, experience.

On the other hand, Learned DR vehemently argued before us that the entire modus operandi including the preparation of memorandum of understanding is nothing but a tool to divert the income from one entity to another to reduce the tax incidence. It was also pointed out by the Learned DR that the memorandum of agreement which is the basis of payment of professional fees and research fees to the doctors of CCCPL is not even a notarized documents neither it is prepared on the stamp paper. Further that, the CCCPL has mainly debited expenditure towards professional fees paid to doctors who are common doctors of both the companies as also submitted by the departmental representative before us. He, therefore, relied upon the order passed by the Learned AO.

26. We have heard the rival submissions, perused the relevant materials available on record. It appears that before the first appellate authority, the assessee submitted the following:

> *(i) The assessee company is engaged in the specified business i.e. building and - operating a new hospital having 100 beds for patients. The hospital commenced in the previous year relevant to assessment year 2011-12. Therefore, the assessee is entitled to the deduction in respect of expenditure on specified business as per provisions of section 35AD of the Income Tax Act, 1961. Accordingly, the assessee has filed its return of income declaring loss of Rs. 51,79,33,611/- in respect of specified business for assessment year 2011-12. The copy of statement of total income and the assessment order passed u/s 143(3) of the IT. Act, 1961 for assessment year 2011-12 is enclosed herewith. (Refer Page no 62 to 72 of the paper book.) In short the assessee have carried forward losses of Rs. 51,79,33,611/- in respect of deduction u/s 35AD of the Income Tax Act, 1961. As per provisions of section 73A of the Income Tax Act, 1961the loss computed in respect of any specified business referred to in section 35AD can be set off against the profit of the specified business and any unabsorbed loss is to be carried forward and set off against profit of the specified business in succeeding assessment year. Therefore, in view of carried forward losses in respect of specified business, the assessee is not liable to tax under the normal provisions of the tax and the assessee is not required to divert the income to evade payment of tax. On the contrary, the CCCPL and the doctors have paid income tax on the professional fees received from the assessee and the CCCPL. Therefore, the finding of the learned assessing officer in respect of diversion of income by assessee to evade payment of tax is totally incorrect.*
>
> *(ii) The assessee has not made any payment directly to the doctors. The assessee company has deducted the discounts given to patients on the instruction of the doctors from the professional fees payable to the CCCPL. The assessee has made such deductions from the professional fees payable to doctors through CCCPL as the discount to patients not borne by the assessee but it is to be deducted from the concerned doctor's payments. It may be noted that such deduction does not mean*

that the assessee has made direct payment to doctors as understood by the learned assessing officer.

(iii) It is submitted that the CCCPL is the company formed by the group of doctors for the purpose of doing the medical profession as a group. The CCCPL have group of doctors and the assessee have hired the services of the group of doctors from the CCCPL for its Hospital. The doctors have to render the medical services to the patients coming to the Hospital of the assessee. The said doctors are not giving their services to any other hospital. Therefore, they do not require any other place for rendering services.

5. The MOU dated. 02/08/2010 between assessee and the CCCPL is only the simple understanding between the assessee and the CCCPL which has been put in writing. The copy of said MOU is enclosed herewith (Refer Page no 73 to 78 of the paper book.) This MOU is not any legal document. Therefore, it has been entered on the plain paper and no stamp paper is used. Further the MOU has been signed by Dr Milan Chag on behalf of the assessee and by Dr. Anish Chandarana on behalf of the CCCPL. The learned assessing officer himself has noted the directors of both companies are common. The MOU is not silent on remuneration payable by CIMS for the services rendered by the professionals of CCCPL. The same is mentioned in clause 5 under the heading payment terms and conditions. The relevant portion is reproduced here below:

"The Payment to which CCCPL will be entitled to will be based on the rate that will be mutually decided by both the parties. The rate would be determined based on the collections made by CIMS from patients, type of procedure performed and nature of treatment that is availed by the patients at CIMS.

The payment shall be made after considering the data maintained by CIMS as mentioned in point e) of graph 2 above. The rates as would be decided mutually are subject to revision on a timely basis as would be agreed by both the parties."

On the basis of the same MOU payments had been made in immediate preceding year which has been accepted by then assessing officer while passing assessment order u/s 143(3) of the Income Tax Act, 1961. ***Therefore, it is not correct that the MOU is prepared as a tool to divert the income from one entity to another to reduce the tax incidence.***

6. The disallowance has been made u/s 40A(2)(b) of the Income Tax Act, 1961. As per provisions of said section the assessing officer should have opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the services for which payment is made or the legitimate needs of the business of the assessee or the benefits derived by or accruing to the assessee. Therefore, for determining the excessive or unreasonable expenditure, the learned assessing officer has to consider the following:

(a) Fair market value of the professional services received by the assessee,

(b) legitimate needs of the business of the assessee

(c) benefits derived by or accruing to the assessee

7. From the assessment order it appears that there are no such findings arrived at by the learned assessing officer. On page no 5 of the assessment order the learned assessing officer has merely listed the payment made by CCPL to the common directors of CIMS & CCCPL and other professionals. It is submitted that the learned assessing officer has compared only the payments made. He has not compared the other factors which affect the quantum of professional fees paid i.e. the qualification of the doctors, nature of services rendered, time given to attend the hospital, numbers of "patients examined or treated, nature of treatment given to patients, revenue received from patients etc. Further, it may be noted that the doctor's service being of a personal nature it differs from person to person. There are no findings that the payment made is excessive considering the legitimate business needs of the assessee and the benefits derived or accruing to the assessee. The assessee submits that the assessee has set up a hospital having more than 100 beds for patients. In the hospital the assessee is providing healthcare services. Only hospital infrastructure is not able to provide the healthcare service to patients. For providing healthcare service by using hospital infrastructure, services of doctors are must. Therefore, the payment to CCCPL for doctor's service is for legitimate need of business of the assessee. By entering into MOU with CCCPL the assessee has got assured medical services without any interruption & hurdle and is able to provide healthcare service to patients. The following chart shows the expenditure incurred on professional fees and the revenue earned there from.

Professional fees to CCCPL	*Expenditure Rs.(A)*	*Income Rs.(B)*	*% (A)/(B)*100*
Clinical Care Doctor's services to patients	*148587413*	*797960248*	*18.62*
Clinical care Doctor's Research Payment	*26510492*	*41726830*	*63.53*
	175097905	*839687078*	

8. Thus the assessee has incurred 18.62% revenue on the doctor's services from CCCPL. As compared to the income earned by the assessee from the payment of relevant expenditure the quantum of expenditure is quite reasonable. The learned assessing officer has worked out disallowance to the extent of income not taxed in the hands of the director doctors due to expenditure incurred by the CCCPL and doctors for earning the income. It may be noted that the assessment of the CCCPL has been made u/s 143(3) and the payment to doctors have been accepted as reasonable and no disallowance has been made by invoking provisions of section 40A(2)(b). The copy of assessment order of the CCCPL is enclosed herewith. (Refer Page no 88 to 90 of the paper book.) Further in case of most of doctors, the assessments are made under section 143(3) and the expenditure claimed by them has been accepted by the respective Assessing Officers. In other words the learned Assessing Officer has disallowed the payment of professional fees to the CCCPL to the extent of expenditure which have been accepted/ allowed in case of the doctors by their respective Assessing Officer.

9. The learned Assessing Officer has framed .the assessment order on going through the case record of the CCCPL and doctors. The observations made by the learned Assessing Officer have not been disclosed to the assessee during the course of assessment proceedings or no show cause notice in this regard was issued. The submission made vide letter dated 4th March, 2015 has not been considered in the assessment order. The said letter was personally handed over by the authorized representative of the assessee to the learned Assessing Officer. Copy of the said letter is enclosed here with. ***(Refer Page no 91 to 92 of the paper book.)*** *Thus the learned Assessing Officer failed to provide sufficient opportunity to the assessee.*

10. It is also to be noted that in CCCPL and the assessee both corporate assessee and are paying tax @ 30% and there is no tax benefit to the assessee to transfer profit to CCCPL. Further the assessee has huge carried forward loss u/s 35AD in respect of assessment year 2011-12. Therefore, it is in the interest of the assessee to declare higher income and get set off of the unabsorbed loss u/s 35AD. In other words, had the assessee not paid professional fees to CCCP then it could have set off of the carried forward losses and on the other hand CCPL/doctors could have saved taxes. The assessee relies on the recent decision on ***Honourable Gujarat High Court in case of CiT vs. Gujarat Gas Financial Services Ltd, reported at 233 Taxman 0532 (2015).***

- *Assessee Company as well as parent company, both is assessed to income tax at the maximum marginal rate and, therefore it cannot be said that the service charge was paid by the assessee company at unreasonable rate to evade income tax.*

- *Where the revenue had allowed deduction of service charges from the income to the income tax of the assessee in the preceding year then in absence of any material change, claim of service charges under section 40(A) cannot be disallowed.*

- *The circular dated 06.07.1968 is concerned, it makes clear that provisions under section 40A(2) and particularly with regard to the transaction between the relatives and associates was concerned, the same shall be treated as bona fide case unless the officer finds it that one of them was trying to evade payment of tax.*

27. While allowing the claim of the assessee towards professional fees paid to the doctors to the tune of Rs.3,75,36,923/- the following relevant observation was made by the Learned CIT(A):

"3.3. I have gone through the facts and the submission of the appellant carefully. In the assessment order A. O has observed that a sum of Rs.17,50,97,905/- was paid to Clinical Care Consultant Pvt. Ltd. (CCCPL), a concern covered u/s. 40A(2)(b) of the Act. The appellant has provided the copy of the MOU between CCCPL and the appellant. A careful perusal of the so-called MOUs entered into between CIMS and CCCPL, it is seen by the A.O. that both the documents are signed by Dr. Milan Chag for and on behalf

of CIMS and Dr. Anish Chandarana for and on behalf of CCCPL who are common directors of CIMS and CCCPL Further, it is seen that the MOUs are made in a plain paper not even on a stamp paper or even notarized.

A.O. has noticed that CIMS has debited Rs.17,50,97,905/- as professional fees paid to CCCPL mainly under two heads (1) Professional Fees of Rs. 14,17,87, 410/- and (2) Research Expenses of Rs. 2,65,1 0.495/-. CCCPL in its return of income filed for the F.Y-2012-13 has debited Rs.16,89,42,973/- as payments to professionals as professional fees which includes Rs.13,52,54,296/-. Further, verification of return of income filed by the individual directors, for the F.Y.- 2012-13 and from the details, it is found that the total income offered by said common directors in their respective return of income is only at Rs.9,25,19,447/- as against total payments shown by CIMS towards professional fees at Rs. 14,1 7,87,410/-. Thus, there is leakage of Rs. 3,75,36,923/- as avoidance of tax. It is also important to mention here that, on perusal of Form No. 3CD, clause 18, filed along with the return of income by the assesses, it is seen that very nominal sum has been paid to other Doctors namely (a) Dr. Sneha Sax/- Rs. 1,28,900/-, (b) Dr. Prawn Chandarana Rs. 13,53,970/- (c) Dr. Manisha Shah- Rs. 15,85,060/-. So even a plain reading can observe that, just to cover the huge payments to Doctors/Directors under professional fees, the assessee has made payments u/s. 40A(2)(b) to CCCPL

3.4. *The appellant has submitted that the assessee company is engaged in the specified business i.e. building and operating a new hospital having 100 beds for patients. The hospital commenced in the previous year relevant to assessment year 2011-12. Accordingly, the assessee has filed its return of income declaring loss of Rs. 51,79,33,611/- in respect of specified business for assessment year 2011-12. Therefore, in view of carried forward losses in respect of specified business, the assessee is not liable to tax under the normal provisions of the tax and the assessee is not required to divert the income to evade payment of tax. On the contrary, the CCCPL and the doctors have paid income tax on the professional fees received from the assessee and the CCCPL It is submitted that the assessing officer has compared only the payments made. He has not compared the other factors which affect the quantum of professional fees paid i.e. the qualification of the doctors, nature of services rendered, time given to attend the hospital, numbers of patients examined or treated, nature of treatment given to patients, revenue received from patients etc.*

The appellant has submitted that the assessment of the CCCPL has been made u/s 143(3) and the payment to doctors have been accepted as reasonable and no disallowance has been made by invoking provisions of section 40A(2)(b). The copy of assessment order of the CCCPL is enclosed *herewith.* ***(Refer Page no 88 to 90 of the paper book.)*** *Further in case of most of doctors, the assessments are made under section 143(3) and the expenditure claimed by them has been accepted by the respective Assessing Officers. In other words the learned Assessing Officer has disallowed the payment of professional fees to the CCCPL to the extent of expenditure which have been accepted/allowed in case of the doctors by their respective Assessing Officer. It is also to be noted that in CCCPL and the assesses both corporate assesses and are paying tax @30% and there is no tax benefit to the assessee to transfer profit to CCCPL Further the assessee has huge carried forward loss u/s 35AD in respect of assessment year 2011-12. Therefore, it is in the interest of the assessee to declare higher income and get set off of the unabsorbed loss u/s 35AD. In other words, had the assessee not paid professional fees to CCCP then it could have set off of the carried forward losses and on the other hand CCPL/doctors could have saved taxes. The assessee relies on the recent decision on* ***Honourable Gujarat High Court in case of CIT vs. Gujarat Gas Financial Services Ltd, reported at 233 Taxman 0532 (2015).***

3.5. From the facts of the case, it is seen that the A.O. has made disallowance under Section 40A(2)(b)of the Act for Rs. 3,75,36,923/- in respect of professional fees, verification of return of income filed by the individual directors, for the F.Y.-2012-13 and details as complied above in the assessment order(supra), it is found that the total income offered by said common directors in their respective return of income is only at Rs. 9,25,19,447/- as against total payments shown by CIMS towards professional fees at Rs. 14,17,87,410/-. Thus, there is leakage of Rs. 3,75,36,923/- as avoidance of tax. The appellant has submitted that it has sufficient loss carried forward so there is not required to divert the income to evade payment of tax. It is also to be noted that in CCCPL and the assessee both corporate assessee and are paying tax @30% and there is no tax benefit to the assessee to transfer profit to CCCPL. This substantiates that both Appellant company as well as its Directors and employees were assessed to tax at the highest rate of 30% and hence, this entire issue is revenue neutral. Accordingly, even on the grounds of revenue neutrality, disallowing the income in hands of the Appellant Company when it was already taxed in the hands of directors and employees would tantamount to double taxation. The appellant has also submitted the reconciliation of professional fees paid to the Doctors. But the reconciliation is no complete and does show the correct figure as have been received by the Doctors from the CCCPL as under:

CIMS hospital Private Limited
Assessment year 2012-13
Statement of reconciliation of professional fees paid by the CCCPL and professional fees received by doctors on cash basis.

Sr.No.	Name of Doctor	Payments of professional fees from CCCPL F.Y. 2011-12	Less: Professional fees of March 2012 accounted by doctors in subsequent year	Add: Professional fees of March 2011 accounted by doctors in current year	Professional fees in Doctor's individual account as per cash system of accounting	Gross professional fees received as per account of doctors	Net profit & gain from business & profession as per STI	Income from other sources	House property/loss	Long term/short term capital gain	Gross total Income as per return
		{A}	{B}	{C}	D={A-B+C}	{E}	{F}	{G}	{H}	{I}	J={F+G+H+I}
1	Dr. Ajay Naik	14,567,748	2,482,849	1,466,980	13,551,879	13,863,071	12,373,787	19,333	(150,000)	(179,600)	12,243,120
2	Dr. Anish Chandarana	16,454,475	3,028,776	1,486,747	14,912,446	16,029,158	12,326,713	426,383	-	-	12,753,096
3	Dr. Hemang Baxi	16,189,634	2,792,391	1,530,340	14,927,583	16,355,150	14,448,406	247,738	(150,000)	-	14,546,144
4	Dr. Keyur Parikh	26,895,706	5,026,237	3,179,540	25,049,009	25,964,331	15,753,288	(551,884)	403,200	1,370,254	16,974,858
5	Dr. Milan Chag	20,855,844	3,478,425	2,058,998	19,436,417	21,338,531	19,890,431	465,233	-	-	20,355,664
6	Dr. Satya Gupta	10,487,465	2,251,670	1,243,868	9,479,663	9,540,432	6,664,561	14,782	(134,226)	-	6,545,117
7	Dr. Urmil Shah	13,211,465	2,365,637	1,304,727	12,150,555	12,949,119	11,462,757	46,132	(71,013)		11,437,876
8	Dr. Dhiren Shah	11,394,063	2,135,094	-	9,258,969	9,642,736	8,413,450	112,556	4,509		8,530,515
	Total	130,056,400	23,561,079	12,271,200	118,766,521	125,682,528	101,333,393	780,273	(97,530)	1,190,654	103,386,390

From the reconciliation it is seen that the difference pointed out by the AO is due to the various deduction claimed by the Doctors in their respective Returns of Income. All of them have credited the salary of the month of March 2012 in April 2013 which is accounted in the AY 2013-14. The avoidance of tax by the Doctors is not noticed in this case and on this point. It is seen that ***Hon'ble Gujarat High Court in case of CIT vs. Gujarat Gas Financial Services Ltd, reported at 233 Taxman 0532 (2015) has held*** *that Assessee Company as well as parent company, both is assessed to income tax at the maximum marginal rate and, therefore it cannot be said that the service charge was paid by the assessee company at unreasonable rate to evade income tax. Further, Appellant's case is also covered by judgment of jurisdictional Hon'ble Gujarat High Court in the case PWS* ***Engineers Limited v/s DCIT (Tax Appeal No. 209 of 2015)*** *wherein it was held on grounds of revenue neutrality if once the income is being charged in the hands of the directors in the highest tax bracket, taxing the same in the hands of the company would amount to double taxation.*

The Appellant has submitted acknowledgment of return of income for AY 2012-13 of the two directors and other Doctors. It is evident from the same that all the employees/directors have paid taxes in the highest tax bracket of 30 percent This substantiates that both Appellant company as well as its Directors and employees were assessed to tax at the highest rate of 30% and hence, this entire issue is revenue neutral. Accordingly, even on the grounds of revenue neutrality, disallowing the income in hands of the Appellant Company when it was already taxed in the hands of directors and employees would tantamount to double taxation. Hence, based on the facts of the case and the various judicial precedents cited by the Appellant, the AO is *directed to delete Rs. 3,75,36,923/-. The A.O. is directed to give relief accordingly.* ***The ground of the appeal is allowed.”***

28. It appears that the ground of Revenue neutrality has been take into consideration mainly by the Learned CIT(A) and therefore relied upon the judgment passed by the Jurisdictional High Court in the matter of CIT-vs-Gujarat Gas Financial Services Ltd. reported in 233 Taxman 0532 (2015) wherein it has been held that when both the assessees are assessed the income tax at a maximum marginal rate, it cannot be said that the service charge paid by the assessee company was at unreasonable rate to evade income tax and thus deleted the addition of Rs.3,75,36,923/-. We also carefully considered the judgment passed by the Jurisdictional High Court in the matter of PWS Engineers Limited-vs-DCIT in Tax Appeal No.209 of 2015 wherein it was held that if once the income is being charged in the hands of the directors in the highest tax bracket, taxing the same in the hands of the company would amount to double taxation. In the case in hand before us the employees and/or directors has paid their tax at the highest tax bracket of 30% and therefore entire issue is revenue neutral. We, therefore, find no justification in disallowing the income in the hands of the appellant company when it was already been taxed in the hands of the directors and employees which would tantamount to double taxation. We have further carefully considered the judgment of Hon’ble Tribunal in the matter of ITO-vs-Hemato Oncology Clinic (Ahmedabad) wherein it has been held that the Assessing Officer could not challenge payments made by assessee to 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. Hence taking into consideration the entire aspect of the matter, we find that the explanation of the assessee are quite reasonable and worth being accepted and we do not find any infirmity in the order passed by the Learned CIT(A) in the present facts and circumstances

of the case in deleting the disallowance of Rs. 3,75,36,923/- applying the ratio laid down by the Jurisdictional High Court as discussed above so as to warrant interference.

Thus the order is in affirmative i.e. in favour of the assessee and against the revenue. Thus Revenue's appeal is, therefore, **dismissed.**

29. In the combined result, assessee's appeal is partly allowed and revenue's appeal is dismissed.

This Order pronounced in Open Court on 05/09/2019

Sd/-	Sd/-
(PRAMOD KUMAR)	(Ms. MADHUMITA ROY)
VICE PRESIDENT	**JUDICIAL MEMBER**

Ahmedabad; Dated 05/09/2019
PritiYadav, Sr.PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-1, Ahmedabad.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad