

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C" MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 1117/MUM/2019
Assessment Year: 2013-14**

Cigna Health Solutions India Pvt.
Ltd.,
Cabin No. 7.2, 7th floor, Boston
House, Suren Road, Chakala,
Andheri East, Mumbai-400093.
PAN No. AAEC3118J

Appellant

Vs. Income Tax Officer-12(1)(4),
Room No. 145A, Aayakar Bhavan,
M.K. Road, Churchgate
Mumbai-400020.

Respondent

**ITA No. 1650/MUM/2019
Assessment Year: 2013-14**

Income Tax Officer-12(1)(4),
Room No. 145A, 1st floor Aayakar
Bhavan, M.K. Road, Churchgate
Mumbai-400020.

Appellant

Vs. M/s Cigna Health Solutions Pvt. Ltd.,
Flat No. 1201, 12th floor, Nair House,
14A & 14B Road, Ahinsa Marg, Khar
(W), Mumbai-400052.

**PAN No. AAEC3118J
Respondent**

Assessee by : Mr. Madhur Agarwal, AR
Revenue by : Ms. Shreekala Pardeshi, DR

Date of Hearing : 19/11/2020
Date of pronouncement : 25/11/2020

ORDER

PER N.K. PRADHAN, A.M.

The captioned cross appeals - one by the assessee and other by the Revenue- are directed against the order of the Commissioner of Income Tax (Appeals)-20, Mumbai [in short CIT(A)] and arise out of the assessment

completed u/s 143(3) of the Income Tax Act 1961 (the 'Act'). As common issues are involved, we are proceeding to dispose them off by this consolidated order for the sake of convenience.

ITA No. 1117/MUM/2019
Assessment Year: 2013-14

2. The grounds of appeal filed by the assessee read as under :

On the facts and circumstances of the case and in law, the learned CIT(A) has:

1. erred in making an enhancement of income of Rs.2,53,95,925/- by disallowing an expenditure of Rs.54,65,476/- and adding an amount of Rs.1,99,30,449/- being mismatch in details.
2. violated the principles of natural justice by not giving an opportunity of being heard before making an enhancement under section 251 of the Act.
3. Disallowance of expenditure of Rs.54,65,476/-
 - i. erred in restricting the allowable expenditure to the extent of revenue from operations of Rs.22,08,686/-, thereby disallowing the excess expenditure of Rs.54,65,476/- without any cogent reasons;
 - ii. the learned CIT(A) ought to have considered the fact that the details of expenditure debited to the profit and loss account of Rs.76,74,162/- were provided during the course of assessment proceedings to the assessing officer; and
 - iii. without prejudice to the above, the learned CIT(A) has erroneously stated the amount of revenue from operations as Rs.22,08,686/- instead of Rs.24,08,686/-.
4. In making an addition of Rs.1,99,30,449/- being mismatch in Employee Benefit Expenses in the financial statements of 2 years
 - i. erred in making an addition of Rs.1,99,30,449/- on the basis that the amounts under the head "Employee Benefit Expense" as appearing in the previous year column [i.e. pertaining to Financial Year (FY) 2012-13] in the financial statement of FY 2013-14 differs vastly from the amounts appearing in financial statement of FY 2012-13, without appreciating that the said inconsistency in the financial statement is

merely on account of restatement/reclassification with no impact on profit and loss account.

5. erred in observing that the above expenses were not subject to statutory audit, which is factually incorrect.
6. erred in making an addition of Rs.18,545/- on the basis of the tax audit report submitted during the course of appellate proceedings, which has been rejected by the learned CIT(A) as not admissible under Rule 46A of the Income-tax Rules, 1962.
7. The learned CIT(A) has erred in initiating penalty proceedings under section 271(1)(c) of the Act in respect of the above additions.

3. Briefly stated, the facts of the case are that the assessee filed its return of income for the assessment year (AY) 2013-14 on 29.11.2013 declaring total loss of Rs.21,24,640/-. The assessee is engaged in providing market research in health insurance and healthcare service systems. It filed revised return to include net income of Rs.18,27,684/-, thereby declaring total loss of Rs.2,96,956/-. The Assessing Officer (AO) completed the assessment u/s 143(3) on 28.03.2016 by making an addition of Rs.3,68,97,011/- on account of service charges.

Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that *vide* order dated 31.12.2018, the Ld. CIT(A) directed the AO to delete the sum of Rs.3,66,00,060/- which was added as notional income. However, by his office letter dated 17.12.2018, the Ld. CIT(A) requested the assessee to explain the basis for debiting Rs.74,16,058/- out of the "other expenses" of Rs.9,95,10,344/- and Rs.2,58,104/- out of the Employee Benefit Expenses debited to its profit and loss account. Also he asked the assessee to explain why the expenditure debited to the profit and loss account should not be restricted to Rs.22,08,686/- being its "Revenue from Operations". On further

comparing the “Notes to the Financial Statements” for the year ending 31.03.2013 and 31.03.2014, he located the following difference :

Amount as per Financial statement for the y.e. 31.03.2013	Rs.8,87,40,774/-
Amount as per Financial statement for the y.e. 31.03.2014	Rs.6,88,10,325/-
Difference	Rs.1,99,30,449/-

On the basis of the above figures, the Ld. CIT(A) asked the assessee to show cause as to why the excess expenditure under the head “Other Expenses” shown for the financial year 2012-13 in the notes to the financial statements for the year ended 31.03.2014 should not be treated as its unexplained expenditure for the AY 2013-14. Also the Ld. CIT(A) noted that the assessee was not able to explain the basis for apportioning Rs.74,16,058/- out of the “Other Expenses” of Rs.9,95,10,344/- to its own business ; similarly, the assessee was not able to explain the basis for apportion Rs.2,58,104/- out of the Employees Benefit Expenses. Further, it is noted by him that the assessee failed to get its accounts audited u/s 44AB of the Act, even though its total receipts including the receipt from Cigna TTK was Rs.20,63,59,512/-.

Thereby restricting the expenditure relatable to the service income, the Ld. CIT(A) directed the AO to restrict the allowable expenditure to Rs.22,08,686/- ; to disallow expenditure of Rs.54,65,476/- (Rs.76,74,162/- minus Rs.22,08,686/-) out of the expenditure of Rs.76,74,162/- debited to the P&L account and to disallow Rs.18,545/- out of the expenses apportioned to the initial infrastructure development. Observing that the assessee failed to file any explanation regarding the above discrepancy, the Ld. CIT(A) came to a finding that the actual expenditure under the head “Employee Benefit Expense” was Rs.6,88,10,325/- and not Rs.8,87,40,774/- as claimed in Note 14 to the profit and loss account. Thereby, he disallowed

a sum of Rs.1,99,30,449/- out of expenses mentioned in Note 14 (Employee Benefit Expense). Thus the Ld. CIT(A) made an enhancement of the following amount :

1.	(Rs.54,65,476/- plus Rs.18,545/-)	Rs.54,84,021/-
2.		Rs.1,99,30,449/-
	Total	Rs.2,54,14,470/-

4. Before us, the Ld. counsel for the assessee submits that the notice dated 17.12.2018 issued by the Ld. CIT(A) to the assessee mentions the following :

“Sub : Appeal No. - CIT (A), Mumbai- 20/10143/2016-17 for the Assessment Year 2013-14 regarding.

The above noted appeal against the order u/s 143(3) of Income Tax Act preferred by you has been fixed for hearing on 27/12/2018 at 11:00 AM in my office.

You are requested to attend in person or through a representative. Your counsel should bring the power of attorney while attending the appellate proceedings, if not filed so far. Attendance is not necessary if you wish that the appeal may be decided on the basis of your written submissions which may be furnished on or before the said date.

Please also send your written MUMBAI.CIT.APL20@INCOMETAX.GOV.IN”

Drawing our attention to the above show cause notice it is stated by the Ld. counsel that the Ld. CIT(A) should have mentioned specifically the proposal for enhancement of Rs.2,54,14,470/-, which he has not done. In this context, reference is made by him to provisions of sub-section 2 to section 251 of the Act.

4.1 Further, it is explained by him that the said notice dated 17.12.2018 was issued to an old address of the assessee and because of that the assessee was not able to comply to the said notice.

4.2 The Ld. counsel further submits in respect of enhancement of income by Rs.54,65,476/- that the break-up of the expenditure was provided to the AO during the course of assessment proceedings *vide* submission dated 18.12.2015 ; the amount of revenue from operations has been erroneously stated in the order as Rs.22,08,686/- instead of Rs.24,08,686/-.

Also it is explained in respect of enhancement of income by Rs.1,99,30,449/- relating to Employee Benefit Expenses that the so-called inconsistency in the financial statement is merely on account of restatement/reclassification of expenses in the schedules to the profit and loss accounts with no impact on the profit and loss account ; the fact that the amounts in the financial statement are regrouped/reclassified has been mentioned in the Note 27 of the financial statement of FY 2013-14; further for the year ended 31.03.2013 Cigna TTK had incurred total expenditure of Rs.76,74,162/- and net loss of Rs.33,70,356/- ; the aforesaid amounts as appearing in the previous year column (i.e. pertaining to FY 2012-13) of the audited financial statements of 31.03.2014 is the same as amounts appearing in the audited financial statements of 31.03.2013 and accordingly the difference in the amount of Employee Benefit Expenses between the two financial statement is merely on account of restatement.

Regarding interest on late payment of TDS, it is stated by the Ld. counsel that enhancement of income by Rs.18,545/- has been done on the basis of tax audit report submitted during the course of appellate

proceedings, whereas the said report has been rejected by the Ld. CIT(A) as not admissible under Rule 46A of the Income Tax Rules, 1962.

5. On the other hand, the Ld. Departmental Representative (DR) explains that the Ld. CIT(A) has rightly directed the AO to enhance the income of the assessee by Rs.2,54,14,470/-.

6. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

In the rectification application filed before the Ld. CIT(A) on 23.05.2019, the assessee has stated the following :

“a) Non-receipt of notice issued under section 251 of the Act

- On perusal of the Order, it is observed that your goodself has enhanced the income for non-furnishing of response as requested vide notice dated 17 December 2018 issued under section 251(2) of the Act requesting to explain why the enhancement should not be made.
- In this regard, we note that the said notice dated 17 December 2018 was issued to an old address of CHSI (i.e. Flat No. 1201, 12th Floor, Nair House, 14A Road, Ahinsa Marg, 14B Road, Khar West, Mumbai - 400052).
- It would be pertinent to note that, CHSI had changed its registered office address and updated the same in the income-tax database vide PAN rectification application dated 4 February 2016 (Copy of the application filed reflecting the updated address is enclosed as Annexure 4). The updated address of CHSI as per the application is as under:

401/402, Raheja Titanium,
Western Express Highway,
Goregaon East, Mumbai - 400063

The same was also intimated to the AO vide letter dated 3 December 2015. Copy of the said letter is enclosed as Annexure 5. The aforesaid

address was also mentioned in Form 35 in which the appeal was preferred before your goodself. Further, the e-mail id mentioned in the Form 35 was vishal.jain2@cigna.com but the notice was sent to the email id bakul.palekar@cignattk.in. Copy of the Form 35 is enclosed as Annexure 6.

- As the notice dated 17 December 2018 was not received by CHSI on the aforesaid address, CHSI was not able to comply with the said notice: Further, the Order as well as the notice dated 17 December 2018 were downloaded by CHSI later when it had logged on to the web portal of Indian Revenue Authorities (IRA) for tax related work.
- Without prejudice to the above, we wish to state that the notice dated 17 December 2018 as downloaded from the web portal of the IRA only stated that the next hearing was scheduled on 27 December 2018. The notice neither states the details required by your goodself nor the fact that an enhancement was proposed in the case of CHSI. Copy of the said notice downloaded from the web portal of IRA is enclosed as Annexure 7).”

6.1 Thus it is clear that the notice dated 17.12.2018 was issued by the Ld. CIT(A) to an old address of the assessee thereby the assessee could not comply with the said notice.

Considering the above facts, we set aside the order of the Ld. CIT(A) on enhancement and restore the matter to him to make an order afresh after giving reasonable opportunity of being heard to the assessee. We direct the assessee to file the relevant accounts/documents/evidence before the Ld. CIT(A).

7. In the result the appeal filed by the assessee is allowed for statistical purposes.

ITA No. 1650/MUM/2019
Assessment Year: 2013-14

8. The grounds of appeal filed by the Revenue read as under :

1. Whether on the facts and circumstances of the case, Ld. CIT(A) was justified in deleting the addition of Rs.3,68,97,011/- at the rate 20% of expenses incurred by the assessee for services rendered to M/s Cigna TTK during the year.
2. Whether on the facts and circumstances of the case, Ld. CIT(A) was justified in accepting the claim of the assessee that there was no profit element involved in a transaction wherein the assessee had provided a highly technical and professional services to the other party, that too by utilizing its own funds.
3. Whether on the facts and circumstances of the case, Ld. CIT(A) was justified in not appreciating the fact that the functions so performed by the assessee company involved not only highly technical and professional skill but also the expertise of its directors etc, which cannot be believed to have been carried out without charging any professional fees or service charges.
4. Whether on the facts and circumstances of the case, Ld. CIT(A) was justified in not discussing and deliberating upon the various issues involved in the assessment as evident from para No.4.4.1 of the appellate order.
5. The appellant prays that the order of the Ld. CIT(A) on the grounds be set aside and that of the Assessing Officer be restored.

9. In the assessment order dated 28.03.2016, the AO considered the profit embedded in the development infrastructure for M/s Cigna TTK as income of the assessee. Observing that the assessee has incurred expenditure of Rs.18,44,85,058/- for services rendered to M/s Cigna TTK during the year, the AO estimated the services charges @ 20% of

Rs.18,44,85,058/- which comes to Rs.3,68,97,011/- and made an addition of it to the total income of the assessee.

In appeal, the Ld. CIT(A) deleted the above addition on the ground that there is no provision for including notional income in the total income of the assessee.

10. Before us, the Ld. DR submits that it is not notional income and the AO has rightly estimated the service charges @ 20% of Rs.18,44,85,058/- which comes to Rs.3,68,97,011/-. Further elaborating that the case of the assessee is not audited u/s 44AB of the Act in the statutory time limit, the Ld. DR explains that the addition of Rs.3,68,97,011/- made by the AO be restored.

11. On the other hand, the Ld. counsel for the assessee submits that the principle of income does not include notional income is well settled by the decision in *CIT v. Calcutta Discount Co. Ltd.* (1973) 91 ITR 8 (SC) and *CIT v. A. Raman & Co.* (1968) 67 ITR 11 (SC).

Referring to the facts in the in the instant case that the assessee and Cigna TTK did not qualify as persons covered u/s 40A(2)(b) of the Act during FY 2012-13, it is stated that the transfer pricing provisions are not applicable.

12. We have heard the rival submissions and perused the relevant materials on record. Giving that the assessee received development cost for developing and transferring the initial infrastructure to Cigna TTK, the transaction is not expenditure in the hands of the assessee. For the assessee (the recipient of the amount) the provisions of specified domestic transaction would not be applicable.

Further we find that (i) the vendor agreement between the assessee and Cigna TTK has been entered at cost and no income has been earned by the assessee, (ii) there is neither any evidence nor allegation that assessee has received any consideration over and above to what is mentioned in the aforesaid agreement.

In *Calcutta Discount Co. Ltd.* (supra), the assessee company transferred certain shares held by it to its subsidiary company at loss than their book value. Though the ITO had not found that the assessee has made secret profits, he held that the assessee must be deemed to have made a profit amounting to the difference between the market price of the shares and their book value. The Hon'ble Supreme Court held that when one trader transfers his goods to another trader at a price less than the market price, the taxing authority cannot take into consideration, the market price of those goods, ignoring the real price fetched. Unless the officer was able to come to the conclusion, on the material before him, that the assessee had really made profits in the transaction, it was not permissible for him to add any fictional income to the assessee's return. In the absence of any evidence to show either that the sales were sham transactions or that the market prices were in fact paid by the purchasers, the mere fact that the goods were sold at a concessional rate to benefit the purchasers at the expense of the company would not entitle the income-tax department to assess the difference between the market price and the price paid by the purchasers, as profit of the company.

12.1 In view of the above factual scenario and position of law we affirm the order of the Ld. CIT(A) deleting the addition of Rs. 3,68,97,011/-made by the AO.

12.2 In the result, the appeal filed by the Revenue is dismissed.

13. To sum up, the appeal filed by the assessee is allowed for the statistical purposes, whereas the appeal filed by the Revenue is dismissed.

Order pronounced in the Open Court on 25/11/2020.

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 25/11/2020.

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asst. Registrar)
ITAT, Mumbai