

**In the Income-Tax Appellate Tribunal,  
Amritsar Bench, Amritsar**

**Before : Shri Laliet Kumar, Judicial Member And  
Dr. Mitha Lal Meena, Accountant Member**

**ITA Nos.65/Asr/2017 & 169/Asr/2018  
Assessment Year's 2013-14 & 2014-15**

<b>Bright Enterprises Pvt. Ltd.</b> MBD House, railway Road <b>Jhalandhar</b> <b>PAN:AAACB9469K</b> <b>(Appellant)</b>	V.S.	<b>DCIT Central Circle - II</b> <b>Jhalandhar</b>  <b>(Respondent)</b>
--	------	---

<b>Appellant by</b>	Sh. Sudhir Sehgal, Adv.
<b>Respondent by</b>	Smt. Jatindra Kaur, DR.

<b>Date of Hearing</b>	09.07.2021
<b>Date of Pronouncement</b>	16.08.2021

**ORDER**

**Per Laliet Kumar, J.M.**

These are the two appeals filed by the Assesse for the assessment years 2013-14 and 2014-15 for the following grounds:-

**Grounds in ITA no 65/2017**

1. That the Ld. CIT(A) has erred in partly confirming the disallowance of professional expenses u/s 40A(2)(b) of the Income Tax Act, 1961 ("the Act")

on estimation basis @ 20% being Rs. 12,08,496/- out of the total expenditure of Rs. 60,42,461/- claimed by the appellant.

2. That the Ld. CIT(A) has erred in confirming the part disallowance only on presumption basis & estimation and without any material/ evidence on record to substantiate that any excess payments have been made by the appellant to its sister concern namely M/s Oxbridge International Pvt. Ltd.
3. That the Appellant craves leave to add or amend the grounds of appeal before the appeal is finally heard or disposed off.

**ITA No. 169/ASR/2018 for AY 2014-15**

1. That the Ld CIT(A)-5, Ludhiana has erred in partly confirming the disallowance of professional expenses u/s 40A(2)(b) of the Income Tax Act, 1961 (the Act) on estimation basis @20% being Rs 20,22,480/- out of the total expenditure of Rs 1,01,12,400/- claimed by the appellant.
2. That the Ld CIT(A) has erred in confirming the part disallowance only on presumption basis and estimation and without any material/evidence on record to substantiate that any excess payments have been made by the appellant to its sister concern namely M/s Oxbridge International Pvt. Ltd.
3. Notwithstanding the above said ground of appeal, the adhoc disallowance of expenses u/s 40A(2)(b) is unwarranted while accepting the books of accounts and method of accounting followed

by the assessee and no defects have been found and neither there is invoking of proviso to section 145 and, therefore, the applicability of section 40A(2)(b) is not proper.

4. That the appellant craves leave to add or amend the grounds of appeal before the appeal is finally heard or disposed off.

### **Brief Facts**

1. The Assessing Officer while framing the assessment had disallowed expenses paid by the Assessee towards consultancy and technical services to M/s Oxbridge International Private Limited, sister concern of the Assessee under Section 40A(2) of the Income Tax Act. During the assessment proceedings it was the contention of the Assessee that on account of taking the skilled and technical services of M/s Oxbridge International Private Limited, the expenditure on repair to building and plant and machinery have been reduced from Rs.3.53 Crore to Rs.2 Crore for the assessment year 2013-14. Thus, by engaging the services, there was a substantial reduction of cost of the assessee company. It was further submitted that M/s Oxbridge International Private Limited is a separate assessee and is subjected to filing of return and is having separate profit & loss account. It was further submitted that the invoices raised by M/s Oxbridge International Private Limited were subjected to deduction of TDS and Service Tax which were deducted and deposited with the Treasury.
2. However, the Assessing Officer was not satisfied to the reasoning given by the assessee. The Assessing Officer has observed that the assessee has entered in a contract with the sister concern having no experience in the

field which is clear from the comparison of the revenue from operation, employee benefit expenses and other expenses for the financial years 2012-13 and 2013-14. Lastly, it was concluded that the assessee is not entitled to any deduction of the expenses paid to M/s Oxbridge International Private Limited by invoking the provision of Section 40A(2).

3. Feeling aggrieved by the Order passed by the Assessing Officer, the assessee preferred the appeal before the CIT Appeal. The CIT Appeal vide impugned order dated 30.11.2016 for the assessment year 2013-14 and Order dated 29.01.2018 for the assessment year 2014-15 have partly granted the relief and have confirmed the disallowance at the rate of 20% of the total expenses paid to M/s Oxbridge International Private Limited. Thus, for the assessment year 2013-14, the CIT Appeal had sustained the addition of Rs.12,08,496/- for the assessment year 2013-14 and Rs.20,22,480/- for the assessment year 2014-15. For the sake of brevity, we are reproducing hereinbelow the order for the assessment year 2014-15 passed by the CIT Appeal. Para 4.4 of CIT(A) order provides as under:-

Grounds of appeal no. 5(a), (b), (c) & (d) pertains to disallowance of Rs 1,01,12,400/- u/s 40A(2)(b) of the Act, on account of advice and consultancy charges paid to M/s Oxbridge International Pvt. Ltd. The AO mentioned that the chart of payments made to persons specified u/s 40A(2)(b) reveals that the assessee has made a payment of Rs 1,01,12,400/- to the sister concern M/s Oxbridge International Pvt Ltd on account of consultancy charges. The assessee was asked to produce the bills and purpose of this payment. In response the assessee provided the consultancy agreement with the said concern and submitted that M/s Oxbridge International Pvt. Ltd has provided various types of advice and consultancy to Hotel at Noida. As per the assessee during the year under consideration, all types of repairing and installation work relating to Civil as well Engineering was got done on their advice and under their

supervision/monitoring. It was further submitted that the said company have a complete team of engineers and other technical staff. The assessee received proper bills after charging of service tax and even TDS was deducted and deposited at the time of making the payment. The AO noted that bills have been raised in lumpsum in last date of months from October to March. The AO observed that M/s Oxbridge International Pvt Ltd has got only Rs 90,00,000/- as its receipts in the current year from the assessee only and it has no other business operations during the year. It is further noticed that the concern M/s Oxbridge International Pvt Ltd had no receipts in the AY 2012-13 and had no business operations. On the basis of the above facts, the AO was of the view that the assessee concern has booked a bogus expense to a sister concern to evade taxation. The expense of Rs. 1,01,12,400/- paid to M/s Oxbridge International Pvt. Ltd was disallowed by the AO and added back to the income of the assessee u/s 40A(2)(b) of the income tax Act, 1961.

The facts of the case, the basis of addition/disallowance made by the AO and the arguments of the AR during the appellate proceedings have been considered. The AR has argued that exactly the same issue arose during AY 2013-14 which was decided in first appeal vide order dated 30.11.2016 in Appeal no. 01/IT/CIT(A)-5/Ldh/2016-17 wherein after considering the entire facts the disallowance has been restricted to 20% of the total expenses under this head. The relevant portion of the order dated 30.11.2016 is reproduced below:

*“The AR has submitted that the services rendered by M/s Oxbridge International Pvt. Ltd are covered by the contract between the assessee and the said company and the existence or authenticity of the contract has not been doubted by the AO. The service provider M/s Oxbridge International Pvt. Ltd is a separate entity and an assessee under income tax Act therefore existence and identity cannot be doubted. The assessee paid service charged and TDS has been duly deducted and deposited with the Government and Service Tax has been duly charged by them on the invoices and the same have been paid on timely basis. As per AR the profile of the employees of M/s Oxbridge International Pvt Ltd and their existence has not been doubted, the nature of assistance offered and the services rendered by it to the assessee are not suspicious. The AR further argued that there is no finding by the AO that sum paid to is an excessive*

or unreasonable and even if any party other than the sister concern was engaged for same nature of work then also the same expenditure must have been incurred by the assessee. It is argued by the AR that the AO has applied the provisions of Section 40A(2)(b) for making the disallowance, therefore, it has to be presumed that the AO was satisfied that the expenditure is incurred for the purpose of business, the only doubt **raised by the AO for making disallowance of whole of the amount is that the assessee company and M/s Oxbridge International Pvt Ltd are related to each other and whole of the expenditure is declared doubtful and bogus.** As per AR this is not a correct interpretation of section 40A(2)(b) and the disallowance has been made purely on the basis of presumption. The AR has strongly argued that by the availing the service of sister concern, the repair expenditure **has been reduced from Rs 3.52 crore during last year to Rs 2 crores during the year under consideration.** The AR drew attention to provisions of Section 40A(2)(b) which has been invoked by the AO for making the disallowance and submitted that the section is applicable in respect of any expenditure for which payment has been made to specified person which is considered excessive or unreasonable having regard to the fair market value of goods, services of facilities provided. The AR argued that disallowance of whole of the amount cannot be made u/s 40A(2)(b) **as the AO has not doubted the expenditure as the party to whom the payments have been made is identifiable and not a bogus entity.** The other contention of the AR is that these days the services are mostly outsourced for the purpose of carrying on business in efficient/effective manner. It is argued that the payments have been made by cheque and debited under the head 'Repair and Maintenance expenses' for maintaining the super structure, other machinery in the shape of Air conditioning system, elevators, building, water treatment plant and this expenditure was must for carrying on the business of the assessee and the AO cannot sit over judgment of the assessee as to how the business is to be run and from whom the services are to be hired. The AR has relied upon some case laws in support that the assessee is free to run its business as per business acumen and the department cannot dictate its term as to how to carry out the business and whom to hire for services. The contentions raised by the AO for making the

*disallowance have been replied point wise by the AR and in the end submitted that had the assessee not taken the services of this company than some other person had to be employed for day to day monitoring of this work and to look after the keep up of building and then also the expenditure would have been allowable. As per AR, in order to have independent control over the works, the services of the company were taken for which expenditure deserves to be allowed.*

*On consideration of all the facts and circumstances of the case the argument of the AR are found acceptable that whole of the expenditure cannot be disallowed by invoking the provision of Section 40A(2)(b) which provides that so much of the expenditure as is considered by the AO to be excessive or unreasonable shall not be allowed as a deduction having regard to the fair market value of goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him there from. In the present case it is not doubted that these services were required by the assessee as these were legitimate requirement in the line of business of the assessee. The only ground for disallowance in this case can be whether the expenditure was unreasonable and more than the fair market value of the services or facilities provided by the sister concern. In this regard there is nothing on record to show that the rate charged by the sister concern was more than the prevailing market rate for these services or the services were available at a lower price from an independent/non-related service provider. Therefore, even it is assumed that the rate charged by the sister concern was more than the market price, then also only the excess amount can be disallowed u/s 40A(2)(b). On the other hand the AR has submitted that the expenditure under the head has gone down from Rs 3.52 crores during last year to Rs 2.0 crores during the year under consideration, after entering into agreement with the sister concern. There appears merit in the contention of the AR that by any stretch of imagination it cannot be said that no expenditure was incurred by the assessee, warranting disallowance of the whole of the amount of Rs 60,42,461/-. There is further merit in the arguments of the AR that increase of employees benefit expenses in the hands of M/s Oxbridge International Pvt LTd, as observed by the AO has no relevance while deciding the*

*allowability the expenditure in the hands of the assessee. If the AO was of the view that the sister concern has been engaged with a view to reduced the tax liability then, as per section 40A(2)(b), a part of the expenses considered as excess over the prevailing the market rate only could be disallowed. However in this case there is nothing on record about the fair market value of the services received by the assessee from its sister concern. Nothing has been mentioned by the AO in this regard nor the AR has stated anything regarding this. Therefore only an estimation can be made in the matter. Since the AO has doubted the payment because these are made to sister concern, but the fair market value of the services is not mentioned however the AR submitted that all the details about the payment have been proved by the assessee. Therefore in the circumstances the ends of justice would be met if disallowance of only a part of the expenses, which can reasonably be considered as excessive over and above the market price, paid to the sister concern is made instead of the disallowance of the whole of the amount. After considering all the aspect of the case including the argument of the AR that expenses have gone down, it would be reasonable to disallow 20% of the expenses and as already mentioned an estimation has to be resorted to as the fair market value of the expenses is not known in this case. Thus the disallowance to the extent of Rs 12,08,496/- is confirmed and the appellant gets a relief of the balance amount.”*

The facts of the year under consideration are identical to the facts for AY 2013-14, therefore, for the reasons mentioned in the order dated 30.11.2016, reproduced above, the disallowance is restricted to 20% of the expenses during the year (total expenses amounting to Rs 1,01,12,400/-) which comes to Rs 20,22,480/-. Therefore the addition/disallowance to the extent of Rs 20,22,480/- is confirmed and the appellant gets the relief of the balance amount.

4. The Ld. AR for the Assessee before us had made the elaborate submissions in support of the grounds raised before us. Firstly, it was submitted that the Revenue had filed the Appeal against the order passed by the CIT Appeal for the assessment year 2013-14. However, the said

Appeal was dismissed by the Tribunal on account of low tax effect vide Order dated 22.08.2019. Secondly, it was submitted that for the assessment year 2015-16, the order under 143(1) was passed by the Assessing Officer and the similar expenditure paid to M/s Oxbridge International Private Limited have been accepted. He had also drawn our attention to the assessment order passed for the assessment years 2017-18 and 2018-19 whereby the Assessing Officer himself had accepted the expenditure incurred by the Assessee by paying it to M/s Oxbridge International Private Limited and no additions were made.

5. On merit the Ld. AR for the Assessee submitted that for the purpose of invoking Section 40A(2) it is essential for the Assessing Officer or CIT Appeal to bring out any evidence showing excessive expenditure incurred by the Assessee by paying to the sister concern vis-à-vis to the third party. It was submitted that no comparable instance of any third party rendering the similar services was brought on record to show that the expenditure incurred by the Assessee was excessive. It was further submitted that the Assessee's books of accounts have not been rejected by the Assessing Officer and therefore the disallowance of the expenditure cannot be made by the Assessing Officer.
6. Per contra, the Ld. DR for the Revenue submitted that the order passed by the Lower Authority was in accordance with law and no interference is required at the level of the Tribunal.

7. We have heard the rival contention of the parties and perused the material available on record. Section 40A(2) provides as under:

“Section 40A Expenses or payments not deductible in certain circumstances.

(2)(a) Where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person<sup>47</sup> referred to in clause (b) of this sub-section, and the <sup>48</sup>[Assessing] Officer is of opinion that such **expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities** for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction :

<sup>49</sup>[**Provided** that no disallowance, on account of any expenditure being excessive or unreasonable having regard to the fair market value, shall be made in respect of a specified domestic transaction referred to in section 92BA, if such transaction is at arm's length price as defined in clause (ii) of section 92F.]

(b) The persons referred to in clause (a) are the following, namely :—

(i) where the assessee is an individual any relative of the assessee;

(ii) where the assessee is a company, any director of the company, partner of the firm, or firm, association of persons or member of the association or family, or any relative of Hindu undivided family such director, partner or member;

(iii) any individual who has a substantial interest in the business or profession of the assessee, or any relative of such individual;

(iv) a company, firm, association of persons or Hindu undivided family having a substantial interest in the business or profession of the assessee or any director, partner or member of such company, firm, association or family, or any relative of such director, partner or member <sup>50</sup>[or any other company carrying on business or profession in which the first mentioned company has substantial interest];

(v) a company, firm, association of persons or Hindu undivided family of which a director, partner or member, as the case may be, has a substantial interest in the business or profession of the assessee; or any director, partner or member of such company, firm, association or family or any relative of such director, partner or member;

(vi) any person who carries on a business or profession,—

(A) where the assessee being an individual, or any relative of such assessee, has a substantial interest in the business or profession of that person; or

(B) where the assessee being a company, firm, association of persons or Hindu undivided family, or any director of such company, partner of such firm or member of the association or family, or any relative of such director, partner or member, has a substantial interest in the business or profession of that person.

*Explanation.*—For the purposes of this sub-section, a person shall be deemed to have a substantial interest in a business or profession, if,—

- (a) in a case where the business or profession is carried on by a company, such person is, at any time during the previous year, the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) carrying not less than twenty per cent of the voting power; and
- (b) in any other case, such person is, at any time during the previous year, beneficially entitled to not less than twenty per cent of the profits of such business or profession.”

8. From the reading it is clear

- (i) From the reading from Section 40A(2), it is clear that the Assesse incurred any expenditure in respect of which the payment has been made.
- (ii) Such expenditure is excessive or unreasonable having regard to the fair market value of goods, services or facilities.
- (iii) The Assessing Officer may disallow any such excessive or unreasonable expenditure.

9. It is essential for the Assessing Officer to brought on record that the expenditure incurred by the Assesse was either excessive or unreasonable, having regard to the market value.

10. If we look into the order passed by the Assessing Officer and partly confirmed by the CIT Appeal, we come to the conclusion that this essential aspect has been missed by both the Authorities. The CIT Appeal had wrongly and in a pro rata manner, had sustained the 20% of the expenditure claimed by the Assesse. There was no reason for coming to the conclusion for sustaining 20% of the disallowance. No fair market value of the services or goods has been brought on record by the Lower Authorities.

11. It is undisputed that the Assessing Officer had allowed the similar expenditure for the assessment years 2015-16, 2017-18 and 2018-19. Further, we are of the opinion that in the absence of any comparable instance of rendering the similar services/supply of goods, it would not be permissible to disallow the expenditure under Section 40A(2). As the needful was not done by the Lower Authorities and on adhoc/estimate basis, the CIT Appeal has restricted the disallowance upto 20%. In these peculiar facts and circumstances when the comparable fair market value have not been brought on record by the Lower Authorities, we further grant the benefit of another 10% to the Assesse. Thus, we restrict the disallowance upto 10% of the expenditure claimed by the Assesse by making the payment of M/s Oxbridge International Private Limited for both the assessment years. In the result, both the Appeals are partly allowed.

Accordingly, this ground of appeal is partly allowed.

**Sd/-**  
**(Dr. Mitha Lal Meena)**  
**Accountant Member**

**Sd/-**  
**(Laliet Kumar)**  
**Judicial member**

Copy of order forwarded to:

- |                                 |                    |
|---------------------------------|--------------------|
| (1) The appellant               | (2) The respondent |
| (3) Commissioner                | (4) CIT(A)         |
| (5) Departmental Representative | (6) Guard File     |

By order

Sr. Private Secretary  
Income Tax Appellate Tribunal  
Agra Bench, Agra