

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "D", MUMBAI**

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER**

**ITA Nos.2608 & 2609/M/2019
Assessment Years: 2013-14 & 2014-15**

M/s. Quantum Advisors Pvt. Ltd., 6 th Floor, Hoeschst House, Nariman Point, Mumbai – 400 021 PAN: AAACQ0281C	Vs.	ACIT, Circle - 1(3)(1), Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Niraj Sheth, A.R.
Revenue by : Shri Bharat Andhale, D.R. &
Shri S.N. Kabra, D.R.

Date of Hearing : 08.10.2021
Date of Pronouncement : 10.11.2021

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the orders even dated 06.02.2019 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment years 2013-14 & 2014-15.

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2. The issue raised in ground No.1 is against the confirmation of disallowance of Rs.2,31,25,134/- by Ld. CIT(A) as made by the AO on account of payment made by the assessee to quantum asset management company by way of research fee.

3. At the outset, the Ld. Counsel of the assessee submitted that the issue is squarely covered by the decision of the co-ordinate Bench of the Tribunal in assessee's own case in ITA No.3418/M/2015 A.Y. 2011-12 & ITA No.3989/M/2017 A.Y. 2012-13. The Ld. A.R. therefore prayed that the issue may kindly be decided following the said decision of the co-ordinate Benches of the Tribunal in assessee's own case.

4. The Ld. D.R., on the other hand, fairly conceded that the issue has been decided as stated by the Ld. A.R., however, relied heavily on the orders of authorities below.

5. After hearing both the parties and perusing the material on record including the decisions of the co-ordinate Benches of the Tribunal in assessee's own case in ITA No.3418/M/2015 A.Y. 2011-12 & ITA No.3989/M/2017 A.Y. 2012-13, we find that the issue is squarely covered in favour of the assessee. The operative part of the decision in ITA No.3989/M/2017 A.Y. 2012-13 is reproduced as under:

"4. We have heard the rival submissions of the parties and carefully gone through the material on record in the light of the rival submissions of the parties. The grievance of the assessee is that the Ld. CIT(A) has wrongly confirmed the disallowance of Rs.2,39,18,400/- made out of the total amount of Rs. 2,99,18,400/- paid towards research fees by the assessee to its group company Quantum Asset Management Company Pvt. Ltd. (QAMC) during the previous year. We notice that the AO has made the said disallowance u/s 40A of the [Act](#) merely on the ground that the payment made to the group company for research work is excessive and does not commensurate with the cost of services rendered and further the payment has been made by the assessee only with an intention to enrich the other group company. It is not the case of the revenue that the fees were not at all paid by the assessee. However, in the opinion of the authorities below, the fees are not reasonable and the same has been paid in order to enrich the subsidiary company of the assessee. As has been pointed out by the Ld. counsel for the assessee, the Hon'ble Bombay High Court in the case of [CIT vs. Indo Saudi Services \(Travel\) Pvt. Ltd.](#) (supra) has dismissed the appeal of the revenue challenging the action of the ITAT in allowing incentive commission paid to its sister concern which was more than the commission paid to other sub agents inter alia for the reason that revenue is not in a position to point out as to

how the assessee evaded payment of tax by making payment of higher commission to its sister concern. The findings of the Hon'ble Court are as under:-

"4. We have heard the learned advocates appearing for both sides. We have also perused the order passed by the Tribunal dated 21st Oct. 1992 which is impugned by the Revenue in the present appeals. We find that the following facts were established before the Tribunal and the same have been accepted by the Revenue even before us.

(i) That the assessee apart from paying handling charges @ 9 1/2 per cent to its sister concern, have paid handling charges at the same rate to other agents Viz. M/s A.K. Travels, M/s Om Travels and M/s Jet Age Travels.

(ii) For asst. yrs. 1986-87 and 1987-88 the assessee had paid the handling charges paid were considered to be reasonable by the appellant.

(iii) For asst. yrs. 1989-90 and 1990-91 the assessee had reduced the payment of handling charge to 9 1/2 per cent to its sister concern. The AO has considered the payment of commission to the sister concern in the asst. yr 1989-90 and allowed the claim after due scrutiny. For asst. yr. 1990-91 also the claim of the assessee @ 9 1/2 per cent has been allowed though the same has not been dealt with by the AO specifically in the order.

(iv) For asst. yrs. 1993-94 and 1994-95 the assessment has been made by the AO under [section 143](#) (3) and handling charges paid to the sister concern @ 9.5 per cent have been considered to be reasonable and allowed.

(v) The sister concern of the assessee M/s Middle East International is also assessed to tax and income assessed for the asst. yr. 1991-92 is Rs. 9,38,510 and for asst. yr. 1992-93 is Rs. 14,65,880 and the said assessment orders have been placed on record.

(vi) Under the CBDT Circular No. 6-P, dated 6th July, 1968 it is stated that no disallowance is to be made under [section 40A\(2\)](#) in respect of the payments made to the relatives and sister concerns where there is no attempt to evade tax.

5. In view of the aforesaid submitted facts we are of the view that the Tribunal was correct in coming to the conclusion that the CIT (A) was wrong in disallowing half per cent commission paid to the sister concern of the assessee during the asst. yrs. 1991- 92 and 1992-93. The learned advocate appearing for the appellant was also not in a position to point out how the assessee evaded payment of tax by alleged payment of higher commission to its sister concern since the sister concern was also paying tax at higher rate and copies of the assessment orders of the sister concern were taken on record by the Tribunal.

6. We, therefore, answer the above question of law raised in these appeals in affirmative and dismiss the above appeals filed by the appellant. There will, however, be no order as to costs."

5. In the present case, the assessee has brought on record the facts that the subsidiary company QAMC generated an aggregate income of Rs. 13,13,72,237/- by way of research fees during the previous year, which includes the fees of Rs.

2,99,18,400/- paid by the assessee. QAMC has offered the entire amount of research fees, to tax and paid the same rate of tax as was applicable to the assessee. On the other hand, the revenue has failed to point out as to how the assessee evaded payment of tax by making unreasonable payment to its subsidiary for research services. Further, as has been held by the Hon'ble Bombay High Court in the case of [CIT vs. Vs. Dempo & Company Pvt. Ltd.](#) (supra), only a Director of a company, partner of a firm or member of the association or any family or any relative of such Director, partner or member is a related person under sub- clause (ii) of clause (b) of sub-section (2) of [section 40](#). A subsidiary company of the assessee is not a related person within the meaning of [section 40A](#) (2), the provisions of [section 40A\(2\)](#) do not attract in the present case. Since, the issue involved in the present case are similar to the issue involved in the aforesaid case, it can safely be concluded that the provisions of [section 40A\(2\)](#) do not apply in the present case."

6 Since the facts before us are materially same as involved in the A.Y. 2012-13, we, therefore respectfully following the same, set aside the order of Ld. CIT(A) and direct the AO to delete the addition. Ground No.1 is accordingly allowed.

7. The issue raised in ground No.2 is against the confirmation of disallowance of Rs.2,38,01,852/- by Ld. CIT(A) as made by the AO towards marketing and distribution fees paid to QIEF Management LLC.

8. The Ld. Counsel of the assessee stated that the issue is squarely covered by the decision of the co-ordinate Bench of the Tribunal in ITA No.3418/M/2015 A.Y. 2011-12 wherein a similar issue has been raised in ground No.1.1 which has been decided by the co-ordinate Bench of the Tribunal in favour of the assessee. The Ld. A.R. therefore prayed that the issue may kindly be decided following the said decision of the co-ordinate Bench of the Tribunal.

9. The Ld. D.R., on the other hand, relied on the order of authorities below.

10. We have heard the rival submissions and perused the material on record including the decision of the co-ordinate Bench of the Tribunal in ITA No.3418/M/2015 A.Y. 2011-12 (supra) and observed that similar issue has been decided by the co-ordinate Bench of the Tribunal in ITA No.3418/M/2015 A.Y. 2011-12 in favour of the assessee. The operative part is reproduced is as under:

“7. We have carefully considered the rival submissions. Pertinently, the dispute before us pertains to the allowability of expenditure incurred by the assessee on fee paid to QIEF for marketing support services. The Assessing Officer as well as the CIT(A) have found it expedient to disallow the expenditure, albeit on different grounds. The Assessing Officer disallowed it on the ground that the requisite tax was not deducted at source and hence such expenditure was to be disallowed under section 40(a)(i) of the Act. This position did not find favour with the CIT(A) as according to him tax was not required to be deducted at source on the impugned amount, as it was not liable to be taxed in India in the hands of QIEF. On this aspect of the matter, there is no appeal preferred by the Revenue and, therefore, such finding of CIT(A) has attained finality. Therefore, we proceed to examine the basis on which the CIT(A) has sustained the disallowance. As per the CIT(A) the expenditure does not qualify for deduction under section 37(1) of the Act. Shorn of other aspects of section 37(1) of the Act, what has been invoked by the CIT(A) in the present case is that the impugned expenditure cannot be considered to have been incurred 'wholly and exclusively for the purposes of the business' of the assessee company. The efficacy of such a conclusion is required to be judged having regard to the reasons advanced by the CIT(A), which we do hereinafter.

7.1 On the issue of availability of infrastructure with QJEF, in our view, the CIT(A) has merely brushed aside the material and evidence which the assessee sought to put-forth before him. In Para 1.13(a) of the order, the CIT(A) observes that assessee had failed to show the infrastructure available with QJEF to render services to assessee-company. Such an observation by the CIT(A) is a bland assertion because the material which was before him, and which has also been placed in the Paper Book filed before us, clearly shows that it is not a case where QJEF could be said to be a concern without adequate infrastructure and ability to render services to assessee. The Annual Accounts of the said concern, copies of which have been placed in the Paper Book, clearly show that QJEF is a concern which is carrying on regular activities in the field of management of investors, etc. and it was having a subsidiary in USA. Notably, assessee is engaged in providing investment management services to International Institutional clients such as sovereign funds, pension fund, etc. in relation to their investment exposures in India-listed securities. Ostensibly, such institutional clients would require appropriate and diligent evaluation of their Investment Manager and for that purpose assessee had undertaken marketing efforts through QIEF. In terms of the agreement with QIEF, the said concern was tasked to look for potential opportunities and to market the

capabilities and experience of the assessee-company on India-focused investment options. In fact, at Page-339 of the Paper Book, a list of clients have been placed, who were referred to the assessee by QIEF and at the time of hearing it was explained that more than 90% of assessee's revenues have been earned from the clients referred by QIEF. From the submissions of the assessee made to the lower authorities, it is seen that assessee has consistently explained that QIEF was marketing assessee's services to prospective institutional investors such as sovereign funds, pension funds, etc. in Europe, Middle East and Asia and also to private sector institutional clients in USA. In our considered opinion, the assertions which have been made by the assessee before the lower authorities as well as before us are borne out of record inasmuch as assessee has earned income through clients referred by QIEF, which is not disputed. Much has been made out by the CIT(A) that mere existence of an agreement between assessee and QIEF would not ipso-facto lead to the allowability of the impugned expenditure. In absolute terms, we have no quarrel with the said proposition advanced by the CIT(A) but the onus in the present case was on him to establish on the basis of evidence and material that the actual state of affairs was contrary to the agreement. In fact, the agreement between assessee and QIEF has been acted upon inasmuch as assessee has earned business thereupon and in return assessee made payments for the services rendered by the payee. In our considered opinion, having regard to the material and evidence on record, the CIT(A) has sought to disregard the agreement on a mere hypothetical basis, without any factual support.

7.2 Before parting, we may mention two more aspects which were before the CIT(A) . In the course of the assessment proceedings, the only objection of the Assessing Officer was based on non-deduction of tax at source and in so far as the issue of section 37(1) of the Act was concerned, the Assessing Officer had no objection. It was only during the appellate proceedings that the CIT(A) show caused the assessee-company on the aspect of section 37(1) of the Act. It is seen from the record that during the appellate proceedings, CIT(A) called for a remand report from the Assessing Officer on the issue of allowability of the expenditure under section 37(1), which was not a point raised in the assessment order. In such remand report, the Assessing Officer observed that the impugned expenditure was incurred during the course of normal business activity by the assessee and hence deductible under section 37(1) of the Act. Thus, impliedly the Assessing Officer reiterated the stand taken in the assessment order on the issue of section 37(1) of the Act. Second aspect which needs mentions is the assessment made by the Assessing Officer under section 143(3) of the Act for the assessment year 2012-13, wherein a portion of the marketing support fee paid to QIEF was disallowed by invoking section 40A(2)(b) of the Act. As per the CIT(A), the aforesaid two aspects reflected that the Assessing Officer was contradicting his own position taken in the assessment for assessment year 2012-13 by accepting that the expenditure was deductible under section 37(1) of the Act in the remand report. It appears that for the aforesaid reason, the CIT(A) disregarded the stand of the Assessing Officer in the remand report and proceeded to examine afresh the issue of allowability under section 37(1) of the Act.

7.3 In our considered opinion, the stand of the CIT(A) is misdirected and is based on a wrong perspective. In fact, the invoking of section 40A(2)(b) of the Act

to disallow a portion of the expenditure in assessment year 2012-13 does not lend any support to the inference of the CIT(A) that the expenditure has not been made wholly and exclusively for the purpose of assessee's business because what is envisaged by section 40A(2)(b) is to disallow an expenditure which is found to be unreasonable or excessive in relation to its market value. Invoking of section 40A(2)(b) of the Act to disallow a portion of the expenditure is an altogether different dimension than invoking section 37(1) of the Act to say that the expenditure is not laid out wholly and exclusively for the purposes of business. In fact, under such a situation, it was all the more onerous on the part of the CIT(A) to demonstrate as to why the entire expenditure was disallowable under section 37(1) of the Act, having regard to the stand of the Assessing Officer in the remand report as well as in the assessment for assessment year 2012-13. The said burden, in our view, has not been discharged by the CIT(A) in the present case and, therefore, we are unable to acquiesce to the same. As a consequence, we hereby set-aside the order of the CIT(A) on this aspect and direct the Assessing Officer to delete the addition of Rs.3,26,05,268/- representing payment made to QIEF for marketing support services. Thus, on this aspect assessee succeeds.

11. Since the facts before us are materially same as involved in the A.Y. 2011-12, we, therefore respectfully following the same, set aside the order of Ld. CIT(A) and direct the AO to delete the addition. Ground No.2 is accordingly allowed.

12. The assessee has also raised an additional ground in respect of education cess which has not been claimed before the authorities below. In additional ground, the appellant has raised an additional claim of expenditure on account of education cess payable on the income tax which was not claimed in the return of income and was being claimed for the 1st time before the Tribunal by way of this additional ground of appeal. As regards admission of additional ground of appeal and the claim raised therein, the ld. AR submitted that the same is a purely a legal issue and all the facts are available on records and no new facts are to be brought on record for adjudicating the present issue. In view of the above, the ld AR prayed that the additional ground of appeal may kindly be admitted. In defense of his arguments the ld AR relied on the following decisions:

- i) National Thermal Power Corporation Ltd. Vs. CIT {229 ITR 383(SC)}
- ii) Jute Corporation of India Ltd. Vs CIT {187 ITR 688 (SC)}
- iii) Ahmedabad Electricity Co Ltd Vs CIT {199 ITR 351(Bom)}
- iv) CIT Vs Pruthvi Brokers & shareholders {349 ITR 336(Bom)}

13 As regards merits of the case, it is submitted that the education cess paid/ payable on tax on total income is a deductible expenditure under the head '*income from business and profession*' as the same is not disallowable u/s 40(a)(ii) of the Act. This view is fortified by the decision of Hon'ble Bombay High Court in the case of Sesa Goa Ltd. v. JCIT [423 ITR 426(Bom)]. In view of the above, it is prayed that the claim of deduction of education cess payable on tax on total income be kindly allowed as expenditure to the appellant.

14. Per contra the ld DR strongly opposed the additional ground on the plea that the issue was neither raised before the AO nor before the ld CIT(A) and is being raised for the first time before the tribunal. The ld DR therefore prayed that the same may kindly be dismissed. The ld DR alternative prayed that without prejudice to the first contention, the issue may be restored to the file of the AO to take a decision after verification of facts.

15. We have heard the ld. authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, and have also considered the judicial pronouncements that have been relied upon by them in context of the issue in hand. Undisputedly the issue of claim of

education cess was claimed for the first time before us. The issue being purely legal and also covered by the jurisdictional high court in favour of the assessee. In our opinion all the facts qua this issue are available on records and no new facts or independent verification of facts are required. Moreover the assessee can raise the legal issue at any appellate stage even if not raised before the authorities below. Besides the issue is squarely covered by the decisions of the Apex Court as well as Jurisdictional High Courts relied by the Ld. A.R. as stated above. Therefore we are inclined to admit the same for adjudication.

16. We find that the issue raised in the additional ground is squarely covered by the recent order of the Hon'ble High Court of Bombay in the case of Sesa Goa Limited vs. Joint Commissioner of Income-tax (2020) 107 CCH 375 (Bom). However, as the aforementioned claim had been raised by the assessee for the very first time before us, we, therefore, in all fairness restore the matter to the file of the A.O for considering the said claim of the assessee in the backdrop of our observations recorded hereinabove, though, subject to verification of the factual position as had been claimed by the assessee before us. The additional Ground is allowed for statistical purposes in terms of our observations recorded hereinabove.

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17. The issue raised in ground No.1 is identical to one as decided by us in ground No.2 in ITA No.2608//M/2019 (supra) wherein we have allowed the ground in favour of the assessee. Hence, our decision on ground No.2 in ITA No.2608//M/2019

(supra) would mutatis mutandis apply to the ground No.1 of this appeal as well and consequently ground No.1 is allowed.

18. The assessee has also raised additional ground praying before the Bench that deduction in respect of education cess on income tax may be allowed. The issue raised in the additional ground is identical to one as decided by us in additional ground in ITA No.2608/M/2019 (supra) wherein we have allowed the ground in favour of the assessee for statistical purposes. Hence, our decision on additional ground in ITA No.2608//M/2019 (supra) would mutatis mutandis apply to the additional ground of this appeal as well. Accordingly, additional ground is allowed for statistical purposes.

19. In the result, both the appeals of the assessee are allowed for statistical purposes.

Order pronounced in the open court on 10.11.2021.

**Sd/-
(Amarjit Singh)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 10.11.2021.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.