

IN THE INCOME TAX APPELLATE TRIBUNAL  
AHMEDABAD "B" BENCH

**Before: Smt. Annapurna Gupta, Accountant Member  
And Shri T.R. Senthil Kumar, Judicial Member**

**ITA No. 547/Ahd/2023  
Assessment Year 2015-16**

Apex Health Care Ltd. Plot No. 4710, GIDC Industrial Estate, Ankleshwar, Gujarat  <b>PAN: AAGCA2182A (Appellant)</b>	Vs	The ACIT, Circle-2, Bharuch Present Jurisdiction The DCIT, Central Circle-2, Vadodara <b>(Respondent)</b>
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**Assessee Represented: Ms. Urvashi Sodhan, A.R.  
Revenue Represented: Smt. Trupti Patel, Sr.D.R.**

Date of hearing : 04-03-2024  
Date of pronouncement : 05-04-2024

**आदेश/ORDER**

**PER : T.R. SENTHIL KUMAR, JUDICIAL MEMBER:-**

This appeal is filed by the Assessee as against the appellate order dated 21.06.2023 passed by the Commissioner of Income Tax (Appeals)-12, Ahmedabad arising out of the assessment order passed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment Year (A.Y) 2015-16.

2. The brief facts of the case is that the assessee is Private Limited Company engaged in the manufacture of Bulk Drugs and Pharmaceuticals products. For the Asst. Year 2015-16, the assessee filed

its Return of Income on 22.10.2015 declaring total income of Rs.64,38,250/-. The return was taken up for scrutiny assessment and made various disallowances. We are concerned only with three disallowances confirmed by the Ld. CIT(A) which are as follows:

- (i) Disallowance of Rs.44,89,985/- on job work charges paid to Chevron Pharma Pvt. Ltd.
- (ii) Disallowance of Rs.33,420/- on adhoc basis on the job work charges.
- (iii) Addition of duty drawback incentive of Rs.98,558/- which is offered for taxation on cash receipt basis in subsequent year.

2.1. The Assessing Officer found that the Director in M/s. Chevron Pharma Pvt Ltd. and that of the whole-time Director of the assessee company are related persons. The assessee paid Rs.92,67,600/- as job work charges for purchasing three chemicals to M/s. Chevron Pharma Pvt Ltd. On analyzes of the quantity-wise rates charged by M/s. Chevron Pharma Pvt Ltd for the production of specific items, the A.O. found different rates were charged for the same products at different times. For example, job work charges for conversion of Methyl Ester-I is Rs.75/kg. on 05.07.2014. However, the same product was charged at Rs.225/kg. on 12.01.2015 which is 300% increase in just six months duration. Therefore, a detailed show cause notice was issued as to why not disallow excess payment made to the sister concern invoking provisions of Section 40A(2)(b) of the Act.

2.2. In reply the assessee justified the increase by stating that on verification of the job work charges billed, it was much lesser than the cost incurred for doing job work. In view of the same, charges were revised from subsequent date and if the revision in the job work charges would not have been done on a later date, the sister concern would have incurred huge losses. The AO has not verified any comparable rates in the same trade to arrive at excessive payment made to sister concern, but just compared the rates of the sister concern alone at different period only. The assessee explained the bills raised against the sister concern for job work to produce three products are detailed as under:

Sr. No.	Date	Bill No	Quantity	Rate	Gross Amount	TDS	Net Amount
<b>Amino 5 methyl Thaizol</b>							
1	01-07-2014	JW-01/14-15	474	150	71100	1422	69678
5	01-09-2014	JW-05/14-15.	1652	150	247800	4956	242844
11	24-01-2015	JW-12/14-15	2700	450	1215000	24300	1190700
13	31-01-2015	JW-13/14-15	900	450	405000	8100	396900
15	10-02-2015	JW- 16/14-1 5	300	450	135000	2700	132300
<b>Bisphenol</b>							
7	02-12-2014	JW- 07/14-1 5	1478	450	665100	13302	651798
<b>Methyl Benzothiazinc Isopropyl Ester-(IE-II)</b>							
3	10-07-2014	JW- 03/14-15	3003	150	450450	9009	441441
4	27-07-2014	JW- 04/14-15	2721	150	408150	8163	399987
6	05-09-2014	JW- 06/14-15	2695	150	404250		396165
9	22-01-2015	JW- 10/14-15	3603	450	1170000	23400	1146600
10	23-01-2015	JW- 11/14-15	1040	450	468000	9360	458640
12	31-01-2015	JW- 14/14-15	520	450	234000	4680	229320
17	28-02-2015	JW- 18/14-15	2340	450	1053000	21060	1031940

Methyl Ester-1							
2	05-07-2014	JW-02/14-15	3811	75	285825	5717	280109
8	12-01-2015	JW-09/14-15	5652	225	1271700	25434	1246266
14	31-01-2015	JW-15/14-15	1407	225	316575	6332	310244
16	20-02-2015	JW-17/14-15	2074	225	466650	9333	457317
			35367		9267600	185352	9082248

2.3. The Ld AO found that the explanation offered by the assessee is not backed by any cogent credible evidence other than a self-created cost analysis, which is nothing but an afterthought. The plea that lower rate was leading to losses to the sister concern was not acceptable. The entire exercise is collusive and to reduce the tax liability by inflating expenses by the assessee. Therefore, the AO confirmed the addition of Rs.44,89,950/- by invoking provision of section 40A(2)(b) of the Act.

2.4. Further the AO found that the evidence related to the expenses on job work payments to M/s.Microtech are by way of handmade bills without GST, CST, VAT, which are not verifiable in nature and so the AO made an adhoc disallowance at an estimated amount of Rs.2/per kg and made disallowance of Rs.33,420/-.

2.5. On further verification of the profit & loss account, the assessee shown export incentives of Duty Drawback of Rs.1,64,890/= whereas as per the information available from export import summary data from CBEC, the assessee was sanctioned Duty Drawback of Rs.2,63,448/- thereby the difference of Rs.98,558/= was not shown as export incentive. Therefore the A.O. added the same to total income of the assessee.

3. Aggrieved against the assessment order, the assessee filed an appeal before the Commissioner of Income Tax [Appeals] who confirmed the additions made by the Assessing Officer.

4. Aggrieved against the same, the assessee is in appeal before us raising the following Ground of Appeal:

1. Ld. CIT(A) erred in law and on facts confirming disallowance made by the AO of Rs.44,89,985/- out of total job work charges of Rs. 92,67,500/- paid to M/s Chevron Pharma Pvt. Ltd under Sec. 40A(2)(b) of the Act.

2. Ld. CIT(A) erred in law and facts confirming disallowance not appreciating the submissions that appellant and sister concern both paying taxes at the same rate there was no revenue leakage & transaction was revenue neutral

3. Ld. CIT (A) erred in law and on facts confirming disallowance made by AO on ad hoc basis without any comparable rates paid in the market to conclude that excessive payment was made to the sister concern.

4. Ld. CIT (A) erred in law and on facts concurring with AO that the entire exercise to justify higher job work charges to sister concern was collusive and to reduce the tax liability by inflating the expenses of the appellant.

5. Ld. CIT (A) erred in law and on facts confirming disallowance made by AO of Rs.33,420/- on ad hoc estimation not considering submissions made but simply holding that a small disallowance is not excessive and is justifiable.

6. Ld. CIT (A) erred in law and on facts in not deleting but setting aside to AO the addition made of Rs.98,558/- duty draw back incentive though the same amount has been offered on cash receipt basis in the subsequent year.

7. Levy of interest u/s 234B, 234C & 234D of the Act is unjustified

8. Initiation of penalty proceedings u/s 271(1)(c) of the Act is unjustified.

4.1. Heard rival submissions and perused the materials available on record including Paper Book and Case Laws compilation filed by the assessee.

5. Regarding Ground Nos. 1 to 4 disallowance of Rs.44,89,985/- out of total job work charges of Rs.92,67,600/- paid to sister concern. The Ld. CIT(A) confirmed the above addition on the ground that the above increase was almost 300% of the rate charged during the earlier period, which is to reduce the tax liability by inflating expenses by the assessee. Both the Lower Authorities have not made any verification about the comparable job work rates of similar nature in the trade for the past or in the future period. Thus the Authorities failed to prove the onus of unreasonableness claimed by the assessee. In a similar circumstances the Hon'ble Jurisdictional High Court in the case of CIT Vs. Ashok J. Patel reported in [2014] 43 taxmann.com 227 deleted the additions made by the Assessing Officer having not made comparable study by observing as follows:

"I. Section 40A(2) of the Income-tax Act, 1961 - Business disallowance - Excessive or unreasonable payments (Onus to prove) - Assessment years 2005-06 and 2006-07 - Assessee made payment to persons specified under section 40A(2)(b) - Assessing Officer made addition by disallowing 5 per cent of total payment on ground that assessee had not produced any comparative market prices and had failed to produce any document regarding reasonableness of payment and further failed to reconcile difference in payment as per tax audit report and that as provided during assessment proceeding - On appeal, Commissioner (Appeals) and Tribunal held that It was for Assessing Officer to assess fair market price and give comparative instances - Since Assessing Officer had not done same, addition made by him was deleted - Whether since onus was on Assessing Officer and Assessing Officer had failed to discharge said onus, disallowance was unsustainable in law.

5.1. Similarly, the Co-ordinate Bench of the Delhi Tribunal in the case of IKEA Trading (India) Pvt. Ltd. Vs. DCIT reported in [2021] 123 taxmann.com 129 (Delhi-Trib.) held that where Assessing Officer had not brought any comparable case to demonstrate that payments made by assessee to directors were excessive or unreasonable, following CBDT Circular No. 6-P, dated 06.07.1968 which states that no disallowance is to be made under section 40A(2) of the Act in respect of payments made to relatives and sister concerns where there is no attempt to evade tax.

5.2. Similarly the Jurisdictional High Court in the case of PCIT Vs. Gujarat Gas Financial Services Ltd. reported in [2015] 60 taxmann.com 483 held that when the Revenue could not establish assessee evaded payment of tax, then invocation of section 40A(2) was not valid as follows:

“Section 40A(2) of the Income-tax Act, 1961 - Business disallowance - Excessive or unreasonable payments (Service charges) - a 100 per cent subsidiary company of 'G Ltd.', a Government company - 'G Ltd.' was in distributing through pipelines to its customers - entered Into an agreement with 'G Ltd.1 for providing services etc. to 'G Ltd.' - It was that company would pay certain sum for each connection - Said charges were claimed for deduction under section 37(1) which was allowed - Subsequently, Assessing Officer found that using some space of 'G Ltd.' - Assessing Officer initiated by exercising powers under section 40A(2) and deducted estimated rent of from charges - It was observed that assessee company as well as parent company, were to tax at maximum marginal rate and, therefore, it could not be said that service charge was paid to G at unreasonable rate to evade tax - Whether since revenue could not point out that assessee evaded payment of tax, invocation of section 40A(2) was not valid.

6. Respectfully following the above judicial precedents and the Lower Authorities failed to make comparative study of the job work charges with any third party, therefore A.O. is not correct in

making disallowance u/s. 40A(2)(b) of the Act. Thus the disallowance of Rs.44,89,995/- made by the Lower Authorities are hereby deleted. Thus Ground Nos. 1 to 4 raised by the assessee are hereby allowed.

7. Regarding Ground No. 5 disallowance of Rs.33,420 at Rs.2 per Kg for 16710 Kgs. on estimated basis on the job work carried out by M/s. Mictrotech. The Ld. Counsel submitted that M/s. Microtech had charged different rate for different job works done by it. The Assessing Officer has not understood the nature of job work and why different rates were charged by M/s. Microtech, but on adhoc basis simply noticed different arithmetical figures and made an adhoc disallowance at Rs.2 per Kg. Further the A.O. failed to note that the Goods and Service Tax (GST) came into effect from 01.04.2017 only and the job work is done by M/s. Microtech is not assessable to Value Added Tax (VAT) and Central Sales Tax (CST). Thus the Assessing Officer misconstrued the handwritten bills as not genuine having not charged with GST, VAT, CST, taxes. However the A.O. not doubted about the job works carried out by M/s. Microtech, therefore the addition is liable to be deleted.

8. We have perused the order passed by the Lower Authorities. The Ld. CIT(A) confirmed the disallowance only on the ground that the smallness of the disallowance which is not excessive. However the Assessing Officer has not justified the above disallowance with proper evidence, but only on misconception of the correct facts. Therefore the adhoc disallowance made by the Assessing Officer is

not sustainable in law. Therefore we direct the A.O. to delete the above disallowance.

9. Regarding Ground No. 6 addition of duty draw back incentive of Rs.98,558/-. The Ld. Counsel submitted that the assessee follows Mercantile System of Accounting and assessee offered the receipt of Rs.98,558/- in the subsequent year. Though Ld. CIT(A) directed the Assessing Officer to verify this issue and rectify the assessment accordingly. But however the Assessing Officer has not yet given effect the above appellate order. Therefore a direction be given to the Assessing Officer to verify the same and delete the addition.

10. The Ld. D.R. submitted that the assessee is not aggrieved by this issue and the Ld.CIT(A) already given relief to the assessee, hence this ground is liable to be dismissed. We find that the Ld. D.R. is correct in stating that the assessee is not aggrieved on this issue and there is already a direction given by Ld. CIT(A) to verify this issue and rectify the assessment accordingly. Therefore this ground raised by the assessee is hereby dismissed.

11. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 05-04-2024

**Sd/-**  
**(ANNAPURNA GUPTA)**  
**ACCOUNTANT MEMBER True Copy**  
**Ahmedabad : Dated 05/04/2024**

**Sd/-**  
**(T.R. SENTHIL KUMAR)**  
**JUDICIAL MEMBER**

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee

2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण,  
अहमदाबाद