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

BEFORE SHRI C.N. PRASAD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 2586/MUM/2019
Assessment Year: 2006-07

DCIT-14(2)(2), Room No. 461, 4th floor, Aayakar Bhavan, M.K. Road, Marine Lines, Mumbai-400 020.	**Vs.**	M/s Pfizer Products (India) Pvt. Ltd., The Capital, 1802/1901, Plot No. C-70, G Block, Bandra Kurla Complex, Bandra (E), Mumbai-400 051.
PAN No. AADCP 8985 B **Appellant**		**Respondent**

Revenue by	:	Ms. Shreekala Pardeshi, DR
Assessee by	:	Mr. Vishal Kalra, AR
Date of Hearing	:	11/02/2021
Date of Pronouncement	:	11/02/2021

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the Revenue. The relevant assessment year is 2006-07. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-22, Mumbai [in short 'CIT(A)'] and arises out of assessment completed u/s 143(3) r.w.s. 254 the Income Tax Act 1961, (the 'Act').

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

1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in holding that the payment of Cross Charge by the assessee to Pfizer Ltd. was in the nature of reimbursement of expenses, whereas as per

the cost sharing agreement, the payment was on estimate basis which cannot be regarded as reimbursement of quantifiable expenses?

2. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that the second proviso to section 40a(ia) inserted by Finance Act, 2012, shall be operative retrospectively and therefore the assessee shall not be treated as an assessee in default?
3. The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored.

3. Briefly stated, the facts of the case are that the assessee-company filed its return of income for the assessment year (AY) 2006-07 on 29.11.2006 declaring total income at Rs.13,73,49,521/-. The Assessing Officer (AO) disallowed expenses aggregating to Rs.15,37,60,922/- (gross) u/s 40a(ia) of the Act on the ground that the assessee failed to prove that the said payment of cross charges is mere reimbursement and therefore, the assessee was liable to deduct tax u/s 194C of the Act. In appeal, the Ld. CIT(A) confirmed the disallowance made by the AO. Aggrieved by the order of the Ld. CIT(A), the assessee filed an appeal before the ITAT wherein the Tribunal *vide* its order dated 31.10.2012 restored the matter to the file of the AO for fresh adjudication. During the course of proceedings in connection with the restored matter, the assessee was asked by the AO to show cause as to why disallowance u/s 40(a)(ia) of the Act should not be made as no tax has been deducted at source on the cross charges paid/payable u/s 194C of the Act. The assessee filed a reply *vide* letter dated 04.07.2014 and 05.02.2015 before the AO. However, the AO was not convinced with the said reply of the assessee and passed an order u/s 143(3) r.w.s 254 holding that TDS should have been deducted on the payment of cross charges made to Pfizer Ltd. and accordingly disallowed Rs.15,37,60,992/- u/s 40(a)(ia) of the Act.

4. In appeal, the Ld. CIT(A) observed that similar issue arose before the Tribunal in assessee's own case for AY 2009-10. Facts being identical, he followed the said order of the Tribunal and deleted the disallowance of Rs.15,37,60,992/- made by the AO.

5. Before us, the Ld. Departmental Representative (DR) relies on the order of the AO. On the other hand, the Ld. counsel for the assessee relies on the order of the Tribunal in assessee's own case for AY 2008-09 (ITA No. 6486/Mum/2012) and AY 2009-10 (ITA No. 1535/Mum/2015) and supports the order passed by the Ld. CIT(A).

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

We find that the assessee paid cross charges amounting to Rs.15,37,60,922/- to Pfizer Ltd. in terms of the cost sharing agreement dated 21.11.2003 ('original agreement') for sharing personnel cost and supplemental cost sharing agreement dated 13.12.2004 ('supplemental agreement') for sharing the common costs and expenses pertaining to marketing, promotion, sales distribution and administration and other charges. The amount of cross charges recovered/recoverable from Pfizer Ltd. towards shared services/facilities amounted to Rs.39,91,770/-, thus the net amount of cross charges paid to Pfizer Ltd. was Rs.14,97,69,152/-.

Admittedly, Pfizer Ltd. has deducted appropriate taxes before making payment to the shared employees in accordance with the provisions of section 192 of the Act and as stipulated in para 2.4 of the original agreement. The expenses under dispute represent reimbursement of amount incurred by shared employees while they are on business tours.

Shared employees can claim the said amount only after providing documentary evidence. Hence, such expenses are not liable for TDS.

In this regard, we brought to the attention of the Ld. DR the following certificate dated 30.06.2014 issued by Pfizer Ltd. *(Page 36 of the Paper Book)* :

"CERTIFICATE

Pfizer Limited having **PAN AAACP3334M** hereby certifies that:

a) Expenses charged to Pfizer Products India Private Limited ['Pfizer Products'] aggregating to Rs15,37,60,992/- during the year ended 31 March 2008 are purely in the nature of reimbursement of expenses incurred by Pfizer Limited ['Pfizer'] on behalf of Pfizer Products;
b) The said expenses are recovered on cost-to-cost basis without any mark-up;
c) Pfizer has already deducted tax at appropriate rate on payments made to the vendors/employees wherever applicable in accordance with provisions of the Income-tax Act, 1961, and
d) Pfizer has not claimed any deduction for the aforesaid expenses in the return of income filed for AY 2006-07.

This certificate is issued on the request of Pfizer Products and we hereby certify that information provided herein above is true and correct to our knowledge and belief and no part of it is false and nothing material has been concealed there from."

When asked by us to comment on the above, the Ld. DR does not dispute the contents of the certificate.

The disallowance u/s 40(a)(ia) of the Act is not warranted in view of the second proviso to section 40(a)(ia) of the Act r.w. first proviso to section 201(1) inserted vide Finance Act, 2012, provided the payee has (a)

furnished return of income u/s 139, (b) taken into account the stated sum for computing the income in the return of income and (c) has paid the tax due on the income returned and there is a certificate of a Chartered Accountant to that effect.

In the instant case, since all the conditions/requirements were complied with by the payee 'Pfizer Ltd.', the assessee cannot be considered as an assessee-in-default and therefore, disallowance u/s 40(a)(ia) is not warranted. In *CIT v. Ansal Land Mark Township (P.) Ltd*. [2015] 61 taxmann.com 45 (Del), *ACIT v. Gitanjali Exports Corporation Ltd*. [2017] 81 taxmann.com 452 (Mumbai) and *Mahindra & Mahindra Ltd. v. DCIT* [2019] 107 taxmann.com 134 (Mumbai), it is held that second proviso to section 40(a)(ia) is declaratory and curative in nature and has retrospective effect.

6.1 We may refer here to the order of the Tribunal in assessee's own case for AY 2009-10, wherein it is held that :

> "19. We have carefully considered the rival submissions. Factually speaking, in para 1.3.6 of his order, the CIT(A) has tabulated details of the expenditure of Rs.14,51,77,000/- which is under the heads 'staff cost', 'travelling', 'advertising & promotional expenses' and 'other miscellaneous expenses'. Thereafter, the CIT(A) has noted the nature of the expenses under each of the four heads. The cross charges have been incurred by the assessee in terms of a cost sharing agreement with M/s. Pfizer Ltd. In terms of the agreement with M/s. Pfizer Ltd., assessee was sharing services of certain employees and other facilities which belonged to M/s. Pfizer Ltd. The reimbursement of such expenses due or paid to M/s. Pfizer Ltd. amounts to Rs.14,51,77,000/- and has been included under the aforesaid expenditure heads in the account books of the assessee. Detailed explanation has been filed by the assessee for each of the heads of expenditure and a common point is that the same was on account of reimbursement towards the expenses incurred by M/s. Pfizer Ltd. for and on behalf of the assessee. The aforesaid factual assertions of the assessee have been accepted by the CIT(A) by

referring to the terms and conditions of the agreement with M/s. Pfizer Ltd. In para 1.3.2 of his order, the CIT(A) records the confirmation by M/s. Pfizer Ltd. that it had deducted tax at source at the appropriate rates on the payments made to outside vendors/employees wherever applicable and also the fact that M/s. Pfizer Ltd. has not claimed any deduction for the expenditure in question. As a consequence, the CIT(A) has proceeded to conclude that in the absence of any element of income embedded in the reimbursement of expenses to M/s. Pfizer Ltd., there was no requirement of deducting tax at source. Quite clearly, payments by way of reimbursement of expenses incurred on behalf of the payer cannot be construed as income chargeable to tax in the hands of the payee, a proposition which is approved by the Hon'ble Bombay High Court in the case of *CIT vs. Siemens Aktiongesellschaft (supra).* Moreover, in a similar situation, the Mumbai Bench of the Tribunal in the case of *Bayer Material Science Pvt. Ltd. vs. Addl CIT, (2012) 134 ITD 0582* has noted that where the cost sharing agreement envisaged exact reimbursal of the costs without any mark-up or margin, there was no element of income in the hands of the payee so as to require the payer to deduct tax at source. In our considered opinion, having regard to the fact-situation brought out by the CIT(A), which is not assailed, the ratio of the decision of the Mumbai Bench of the Tribunal in the case of *Bayer Material Science Pvt. Ltd. (supra)* as well as the reasoning approved by the Hon'ble Bombay High Court in the case of *CIT vs. Siemens Aktiongesellschaft (supra)* clearly supports the conclusion drawn by the CIT(A) that there was no default on the part of the assessee in not deducting tax at source on the impugned payments to M/s. Pfizer Ltd. In this view of the matter, we, therefore, find no reasons to interfere with the ultimate conclusion of the CIT(A) in setting-aside the disallowance made by the Assessing Officer by invoking Sec. 40(a)(ia) of the Act. Thus, on this aspect, Revenue fails in its appeal.

20. Before parting, we may also refer to another aspect noted by the CIT(A). The CIT(A) noted the second proviso to Sec. 40(a)(ia) of the Act inserted by the Finance Act, 2012 which prescribes that if an assessee fails to deduct tax at source, but is not deemed to be an assessee in default as per the first proviso to Sec. 201(1) of the Act, then, no disallowance u/s 40(a)(ia) of the Act is required

to be made in respect of such expenditure. The CIT(A) referred to the first proviso to Sec. 201(1) of the Act as inserted by the Finance Act, 2012 and noted that a person who has failed to deduct tax at source in respect of a sum paid shall not be treated as an assessee in default where the payee has (a) furnished return of income u/s 139; (b) taken into account the stated sum for computing the income in the return of income; and (c) paid the tax due on the income returned and there is a Certificate of a Chartered Accountant to this effect. The CIT(A) found that all the aforesaid features were complied by the payee, i.e. M/s. Pfizer Ltd. and thus, the first proviso to Sec. 201(1) of the Act stood complied, which implies that the assessee-company could not be considered as an assessee in default. On this basis also, he concluded that there was no question of making any disallowance u/s 40(a)(ia) of the Act in respect of the cross charges paid by the assessee to M/s. Pfizer Ltd. The aforesaid amendments were understood by the CIT(A) to be retrospective and applicable for the instant year also, following the ratio of the decision of the Rajkot Bench of the Tribunal in the case of *Gujarat Pipavav Port Ltd. vs. DCIT, TDS, (2014) 149 ITD 0023 (Rajkot)*. For the said reasons also, he has set-aside the invoking of Sec. 40(a)(ia) of the Act to make the impugned disallowance.

21. Notably, in the Grounds of appeal raised before us, there is no challenge to the aforesaid conclusion of the CIT(A). Consequently, even if the Revenue was to succeed on other pleas, in the absence of any challenge to the aforesaid conclusion by the CIT(A), the disallowance made by the Assessing Officer would not survive. Be that as it may, it is notable that the aforesaid proposition advanced by the CIT(A) is fully supported by the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Ansal Land Mark Township (P.) Ltd., ITA No. 160/2015 dated 26.08.2015*. The decision of the Mumbai Bench of the Tribunal in the case of *R.K.P. Company vs. ITO, ITA No. 106/RPR/2016 dated 24.06.2016* is also on the same lines and supports the conclusion drawn by the CIT(A).

22. Thus, considering the entirety of facts and circumstances of the case, we find no reason to interfere with the ultimate decision of the CIT(A) in deleting the

disallowance of Rs.14,51,77,000/- representing cross charges paid to M/s. Pfizer Ltd."

6.2 In view of the above factual scenario and position of law, we follow the above order of the Co-ordinate Bench in assessee's own case for AY 2009-10 and affirm the order of the Ld. CIT(A).

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

Order pronounced in the open Court on 11/02/2021.

Sd/-	Sd/-
(C.N. PRASAD)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 11/02/2021
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.

BY ORDER,

//True Copy//

(Dy./Assistant Registrar)
ITAT, Mumbai