

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, AHMEDABAD**

**BEFORE DR. BRR KUMAR, VICE PRESIDENT &
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER**

I.T.A. No.1213/Ahd/2024
(Assessment Year: 2009-10)

Virbala Kiritkumar Patel, 44, Meghdoot Society, Karelibaug Vadodara-390018	Vs.	Deputy Commissioner of Income Tax, Circle-5, Baroda (Present Jurisdiction Circle2(1)(1), Vadodara)
[PAN No.ADFPP0275Q]		
(Appellant)	..	(Respondent)

Appellant by :	Shri Biren Shah, A.R.
Respondent by:	Shri B. P. Srivastava, Sr. DR

Date of Hearing	18.06.2025
Date of Pronouncement	23.06.2025

ORDER

PER SIDDHARTHA NAUTIYAL - JUDICIAL MEMBER:

This appeal has been filed by the Assessee against the order passed by the Ld. Commissioner of Income Tax (Appeal), (in short “Ld. CIT(A)”), National Faceless Appeal Centre (in short “NFAC”), Delhi vide order dated 07.02.2024 passed for A.Y. 2009-10.

2. At the outset, we observe that the appeal is time barred by 64 days. The assessee filed an Affidavit dated 06.06.2024 where the assessee submitted that the accountant of the assessee handled all the notices and the order passed by Ld. CIT(A), received on email had mistakenly been overlooked, causing delay of 64 days in filing of the present appeal. The Counsel for the assessee submitted that there was no mala fide intention in the delay in the filing of the present appeal and hence the same may be

kindly condoned. Looking into the contents of Affidavit filed by the assessee, the delay is hereby condoned, in the interest of justice.

3. The Assessee has taken the following grounds of appeal:-

“1. In law and on the facts and in the circumstances of the case, the order passed u/s 250 of the Act by Ld. CIT (A) is arbitrary, erroneous, contrary to the provisions of law and on facts.

2. In law and in the facts and circumstances of the appellant's case, the Ld. CIT(A) has grossly erred in upholding addition made on account of disallowance of expenses under section 40A(2)(b) amounting to Rs. 56,67,984/-.

2.1 In law and in the facts and circumstances of the case of the Appellant, the Ld. CIT(A) has erred in restricting expenses on account of consultation fees paid to MPPL to 20% of the proportionate sale value of the land and upheld disallowance of expense amounting to Rs. 50,75,784/-.

2.2 In law and in the facts and circumstances of the case of the Appellant, the Ld. CIT(A) has erred in upholding disallowance of expenses on account of development expenses paid to M/s. Chetan Builders amounting to Rs. 5,92,200/-.

3. In law and in the facts and circumstances of the case of the Appellant, the Ld. CIT(A) has grossly erred in upholding the disallowance of Rs. 56,67,984/- under section 40A(2)(b) of the Income Tax Act even though it is a settled law that in cases of revenue-neutrality no adverse inference may be drawn as per the provisions of 40A(2)(b).

4. The appellant craves leave to add to alter, amend and/or withdraw any ground or grounds of appeal either before or during the course of hearing of the appeal.”

4. The brief facts of the case are that the assessee is an individual and is engaged in the business of building and land development. During the course of assessment proceedings, the Assessing Officer observed that the assessee had paid consultancy charges to M/s. Mangala Properties Pvt. Ltd. (in short “MPPL”) amounting to Rs. 1,57,00,000/-. The Assessing Officer observed that M/s. Mangala Properties Pvt. Ltd. (in short “MPPL”) was a related party and the Assessing Officer asked the assessee to provide justification

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alongwith supporting evidences that such payment towards consultancy charges was not excessive. After taking the submission of the assessee on record, the Assessing Officer was of the view that the assessee could not provide the rationale behind the quantification of consulting charges paid to MPPL. The assessee submitted that it had entered into an agreement with MPPL to provide consultancy services in relation to sale of two lands, which were sold for a total consideration of Rs.5,33,21,000/-. This consultancy charges were paid for providing various services like measurement of land, appointment of architech/structural engineer and decide their fees and payments, to prepare lay out and building plants etc. However, the Assessing Officer was of the view that by taking a proportionate amount based on the area, consultancy charges of Rs. 1,57,00,000/- paid on these two lands which were sold, for an amount of Rs. 5,31,21,080/- (@ 29.55% of the total sale consideration) was highly excessive. Accordingly, the Assessing Officer restricted the consultancy charges to 20% of the value of land sold and disallowed the balance amount of Rs. 50,75,784/- and added the same to the income of the assessee.

4.1 Further, the Assessing Officer noted that the assessee had paid an amount of Rs. 29,61,000/- to M/s. Chetan Builders as development charges, which was again a related party. On perusal of bills produced by the assessee, the Assessing Officer observed that the assessee had made excessive payment to it's related party for carrying out work of cleaning of land, fencing, construction work of quarters for labourers etc. The Assessing Officer was of the view that the assessee could not provide any logical explanation for this excessive payment. Accordingly, the Assessing Officer disallowed 20%

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of the payment made to M/s. Chetan Builders and added a sum of Rs. 5,92,000/- to the total income of the assessee.

5. In appeal, Ld. CIT(A) confirmed the additions made by the Assessing Officer with the following observations:

“5.4.3 Thus, the argument of the appellant that the burden of proof is on the assessing officer is contrary to the propositions of law laid down by the decision above.

*5.4.4 In light of the above discussion, I find that the appellant has made no attempt to justify the reasonableness of the payments before me and/or any authority at any stage, when deciding the matter on the applicability of section 40(A)(2)(b) of the act, for payments made on account on consultancy and development charges. In view of this failure on part of the appellant, I hold the addition of Rs.50,75,784/- and Rs.5,92,200/- u/s 40(a)(2)(b) as valid, and grounds 7 to 9 are **dismissed**.”*

6. The assessee is in appeal before us against the aforesaid additions confirmed by Ld. CIT(A). Before us, the Counsel for the assessee submitted that so far as payment made to M/s. MPPL is concerned, the Assessing Officer has arbitrarily disallowed a sum of Rs. 50,75,784/- without any evidence of excessiveness of payment and without ascertaining any fair market value for the services availed by the assessee. Secondly, the Counsel for the assessee submitted that even on facts, the Assessing Officer has incorrectly noted that a sum of Rs. 1,57,30,400/- was paid to M/s. MMPL for providing consultancy services, without appreciating the fact that only a sum of Rs. 1,40,00,000/- was paid towards consultancy charges and a sum of Rs. 17,13,400/- was towards services tax liability. The Counsel for the assessee further submitted that before invoking the provision of Section 40(A)(2)(b) of the act, the Assessing Officer must first establish excessiveness, which was not done in the instant case. With regards to payments made to M/s. Chetan Builders, the Counsel for the assessee submitted that the disallowance of Rs.

5,92,200/- was arbitrarily and without bringing on record any comparable cases to demonstrate that excessive payment was made by the assessee to its related parties.

7. In response, Ld. D.R. placed reliance on the observations made by the Assessing Officer and Ld. CIT(A) in their respective orders.

8. On going through the facts of the case we observe that in the instant case, the Assessing Officer has shifted onus of proving the excessiveness of payments completely on the assessee. Further, on perusal of the order passed by the Assessing Officer, we note that the Assessing Officer has not placed on record any comparable cases to demonstrate as to how the payments made by the assessee to these parties was excessive, keeping in view the fair market value of these services.

9. In the case of **Commissioner of Income-tax-III vs. Ashok J. Patel [2014] 43 taxmann.com 227 (Gujarat)/[2014] 225 Taxman 79 (Gujarat) (Mag.)[02-12-2013]**, the assessee made payment to persons specified under section 40A(2)(b) of the Act. The 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. In 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. In further appeal, the Gujarat High Court

held that since onus was on Assessing Officer and Assessing Officer had failed to discharge said onus, disallowance was unsustainable in law.

10. In the case of **Commissioner of Income-tax vs. Johnson & Johnson Ltd.** [2017] 80 taxmann.com 337 (Bombay)/[2017] 297 CTR 480 (Bombay)[07-03-2017], the High Court held that where no attempt was made by Revenue to establish that professional fees paid to advocate firm was excessive, there was no discharge of burden by Revenue under section 40A(2)(b), and, hence, no disallowance could be made on such payment.

11. In the case of **Nat Steel Equipment (P.) Ltd. vs. Deputy Commissioner of Income-tax, Mumbai** [2018] 95 taxmann.com 159 (Mumbai)/[2018] 171 ITD 482 (Mumbai)[13-06-2018], the ITAT held that where Assessing Officer made disallowance under section 40A(2)(a) without placing on record any material which could prove that payments made by assessee were excessive or unreasonable, having regard to fair market value of services for which same were made or keeping in view legitimate needs of business of assessee or benefit derived by or accruing to assessee therefrom, said disallowance could not be sustained.

12. In the case of **Principal Commissioner of Income-tax vs. Future First Info Services (P.) Ltd.** [2022] 145 taxmann.com 35 (Delhi)/[2023] 290 Taxman 490 (Delhi)/[2022] 447 ITR 299 (Delhi)[14-07-2022], the High Court held that where Assessing Officer made additions towards remuneration paid by assessee-company to its director for rendering services without giving any cogent reason to conclude that remuneration paid was not

commensurate with market value of services, since such high remuneration paid to company's director was accepted by Assessing Officer during scrutiny assessment in subsequent assessment years, impugned additions made under section 40A(2) were to be deleted.

13. In the case of **Jagdamba Rollers Flour Mill Ltd. vs. Assistant Commissioner of Income-tax, Cir. 1(2), Raipur [2009] 117 ITD 260 (Nagpur) (TM)/[2009] 121 TTJ 761 (Nagpur) (TM)[27-10-2008]**, the ITAT held that as per section 40A(2)(a), Assessing Officer is required to make inquiry to ascertain whether payment is excessive or unreasonable having regard to fair market value of services. Therefore, since Assessing Officer, instead of making enquiry to ascertain whether payment was excessive or unreasonable having regard to fair market value of services rendered, made enquiry in a different direction, i.e., whether increase in salary as compared to salary paid last year was justified on facts or not, it could be said that provisions of section 40A(2)(a) were not applied correctly by Assessing Officer and, accordingly, payment could not be treated as excessive or unreasonable.

14. In the case of **IKEA Trading (India) (P.) Ltd. vs. Deputy Commissioner of Income Tax, Circle 11(1), New Delhi [2021] 123 taxmann.com 129 (Delhi - Trib.)/[2020] 83 ITR(T) 415 (Delhi - Trib.)/[2021] 186 ITD 473 (Delhi - Trib.)[30-06-2020]**, the ITAT held that where Assessing Officer had not brought any comparable case to demonstrate that payments made by assessee to directors were excessive/unreasonable, Commissioner (Appeals) had rightly deleted addition.

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15. Looking into the judicial precedents on the subject which have held that the initial onus is on the Assessing Officer to assess fair market price and give comparable instances and looking into the instant facts, where no such exercise was done by the Assessing Officer and no attempt was made by the Assessing Officer to establish that the professional fees paid by the assessee to the concerned parties was excessive, we are of the considered view that there was no discharge of burden by the Revenue under Section 40(A)(2)(b) of the Act and hence, no disallowance is called for in the instant case.

16. In the result, the appeal of the assessee is allowed.

This Order pronounced in Open Court on

23/06/2025

Sd/-
(DR. BRR KUMAR)
VICE PRESIDENT

Ahmedabad; Dated 23/06/2025

TANMAY, Sr. PS

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आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
 आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad