IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI GEORGE GEORGE K., VICE PRESIDENT
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No.1075/Bang/2023
Assessment year : 2016-17

Manipal Hospitals (Dwarka) Pvt. Ltd., (Before merger known as 'Manipal Hospitals (Jaipur Pvt. Ltd.), 98/2, The Annexe, Rustom Bagh Hal, Airport Road, Bengaluru – 560 052. **PAN: AAJCM 0449F**	Vs.	The Assistant Commissioner of Income Tax, Circle 2(3)(1), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri S.K. Tulsiyan, Advocate
Respondent by	:	Shri V. Parithivel, Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	31.01.2024
Date of Pronouncement	:	31.01.2024

O R D E R

Per Laxmi Prasad Sahu, Accountant Member

This appeal is filed by the assessee against the DIN & Order No.ITBA/NFAC/S/250/2021-22/1038118029(1) dated24.12.2021 of the CIT(Appeals), National Faceless Appeal Centre, Delhi [NFAC], for the AY 2016-17.

2. The only issue raised in this appeal is regarding the disallowance of Rs.17,05,381 u/s. 40A(2) of the Act being 50% of the

total back office charges of Rs.34,10,763 paid to group consultant MEMGIIPL.

3. At the outset, the appeal is time barred by 660 days. Petition for condonation of delay along with affidavit 25.10.2023 has been filed by the assessee stating that the official incharge of the company due to her confinement stage was irregular in office and went on long continuous leave and the impugned order of the CIT(A) was not downloaded from ITBA portal and placed before appropriate authority of the company. While the company was preparing for fits return for AY 2023-24, the accountant of the company came to know of the appellate order uploaded in the ITBA portal. Immediately the tax consultant was consulted and the appeal came to be filed on 13.12.2023 before the Tribunal. The ld. AR submitted that the delay was unintentional, bonafide and for reasonable cause and prayed for condonation of delay. Reliance was placed on the Hon'ble Supreme Court judgment in the case of Collector, Land Acquisition v. Mst. Katiji & Ors., 167 ITR 471 (SC).

4. After hearing the rival submissions, we note that there was sufficient cause for delay in filing the appeal and condone the delay of 660 days.

5. The assessee is a private limited company engaged in the business of running hospitals and filed return of income for the AY 2016-17 on 17.10.2016 declaring a loss of Rs.53,99,72,875. The assessee entered into a service agreement with MEMG International

India Pvt. Ltd. [MEMGIIPL] for provision of various services in the nature of fund management, financial and accounting, auditing, brand royalty, administration etc. and paid Rs.34,10,763 as back-office charges to MEMGIIPL. The payment is calculated at 0.5% of the revenue of the assessee for mediation with banks and other institutions for facilitation of loans etc.

6. The AO noted that the assessee is having a separate and sound set up for legal, audit and financial works/requirements and incurring huge amounts under these costs. Banks & financial institutions disburse loans individually to group companies and not to the groups as a whole. Banks give loans at rates at par with the market rates and hence no further efforts is actually needed by the holding company. Therefore the AO was not convinced with the explanation of the assessee and disallowed 50% of the amount u/s. 40A(2) of the Act. The AO rejected the assessee's submission that similar disallowance in the case of assessee group concerns in the case of Manipal Health Systems Pvt. Ltd. in ITA Nos.1667/Bang/2016 was deleted by the ITAT on the ground that the matter was pending in appeal before the High Court.

7. On appeal before the CIT(Appeals), the assessee submitted that the AO has not brought any instance or comparable case to show that the payment was excessive or unreasonable and the AO has not determined the fair market value of such services. There is no loss of revenue as payee has shown the income. The issue has been decided in

favour of assessee in group case . The CIT(Appeals) rejected the submissions of the assessee and observed that payment is made to a group concern, exact services has not been stated by the assessee and the work of facilitation of bank has not been substantiated with evidence. He noted that ordinarily intra-group services need to be benchmarked on the basis of cost incurred by the service provider, whereas the payment has been made as a fixed percentage of the revenue received by the assessee which does not have relationship with the services received. Accordingly, the CIT(Appeals) dismissed the appeal of the assessee. Aggrieved, the assessee is in appeal before the Tribunal.

8. The ld. AR submitted that the assessee is one of the many companies which are under the holding company MEMGIIPL which in turn represents the entire group when it negotiates with various banks. When large volumes of loans/business is assured to the banks with group corporate guarantee, banks are more comfortable to lend money to individual company. The loan syndication fees that is generally paid in the market is around 2 to 5% of the loan disbursed. In comparison, MEMGIIPL is charging fees on the total turnover as per the terms of service agreement with its subsidiaries which is reasonable for various services rendered as per agreement. Further, the assessee was a loss making company for the current assessment year and benefitted greatly from using the Manipal logo which cannot be quantified in revenue terms. It is not illogical to pay an amount to MEMGIIPL qua the service agreement entered into which is at 0.5% of its total turnover.

The AO has not justified the disallowance by bringing on record any instance of comparable case to show that payment was excessive or unreasonable and not been able to show how the same constituted fair market value of the services. The AO has merely proceeded on the basis that the assessee had its own independent set up for such services and did not require services of MEMGIIPL. Further no such addition has made in the hands of the assessee for the erstwhile or succeeding assessment years i.e., 2015-16, 2016-17 & 2017-18 and a contrary view cannot be taken for the current AY 2016-17. The ld. AR further submitted that the decision of the ITAT on similar issue in the case of assessee's group concern, Manipal Health System Systems Pvt. Ltd. in ITA No.1667/Bang/2016 for AY 2009-10 dated 27.6.2018 has been upheld by the Hon'ble High Court of Karnataka in ITA No.817 of 2018 dated 12.10.2023. He also submitted that the nature of services rendered by the above group concern and the assessee company with MEMGIIPL are the same. Therefore it was submitted that the disallowance u/s. 40A(2) is to be deleted.

9. The ld. DR relied on the orders of lower authorities.

10. After hearing both the sides, perusing the entire material on record and the orders of the lower authorities, we note that similar issue came up for consideration before the Tribunal in the case of assessee's group case viz., Manipal Health System Systems Pvt. Ltd. in ITA No.1667/Bang/2016 for AY 2009-10 dated 27.6.2018 and it was decided in favour of the assessee by holding as under:-

"9. Having carefully examined the orders of lower authority in the light of rival submissions we find that this service agreement was executed on 1.4.2009, according to which assessee was required to pay 0.5 % of the total turnover as fees for the services rendered by the holding company MEMG International India Pvt. Ltd. The services envisaged in this agreement are as under:

Fund management and financial services
Accounting and Auditing services
Treasury operations (Direct and Indirect) Advisory Services
Management and Advisory Services
Secretariat and Legal Services
Project Feasibility & Implementation
Real Estate & Facilities Services
Human Resources Development
Quality & Information Technology Services
Central Processing
Brand Royalty
Brand Royalty — JVs
Marketing, PR and Road Shows

10. On perusal of the record, we also find that AO was not consistent in restricting the disallowances during the assessment year 2009-10 to 2011-12. In assessment year 2009-10, 2010-11 he made a disallowance of 33% of the total claim and in the impugned assessment year he made a disallowance of 50% without assigning any reasons. Whereas the assessee has placed substantial material on record to establish that various services were rendered by MEMGIIPL. We have also carefully perused the judgement referred to by the assessee and we find that it has been repeatedly held through various judicial pronouncements that the onus is on the AO to bring on record the comparable cases to prove that payment made by the assessee is in excess of fair market value and hence the same in his opinion is found to be excessive or unreasonable. It was also held that provisions of section 40A(2) are not automatic and can be called into play only if the AO establishes that expenditure incurred is in fact in excess of fair market value. In the case of CIT Vs. Modi Revlon (Pvt.) Ltd., (supra), the Hon'ble Delhi High Court has held that in order to determine whether the payment is not sustainable, the AO has to first return a finding that payment made is excessive,

under section 40A(2) of the Act. If it is found to be so, that AO has to determine what constitutes the fair market value of the services rendered and disallow the difference between what is claimed and what is such value determined fair market value. In the case of the DCIT Vs. Institute of planning and Management Pvt. Ltd., (supra) it was held that if incurring of expenses had not been doubted, there should be some evidence on the basis of which action of the AO would be held to be justified to show that expenses are unreasonable or excessive. In the case of DCIT Vs. Microtex Separators Ltd., (supra) the jurisdictional High Court has held that so long as there is no intention to evade tax and so long as the commission is not shocking, the said commission has to be accepted particularly in the light of the wordings of the section 40A(2) of the Act.

11. Having carefully examined the orders of the authority below in the light of these judicial pronouncements and the arguments advanced by the parties, we find that AO has not doubted the payment made by the assessee to MEMGIIPL on account of services rendered by them. But he has made the disallowance of its part without assigning any reason. He has not brought any comparable case to demonstrate that the payment made by the appellant is in excessive. Therefore, we are of the view that without bringing any cogent material on record to demonstrate that the payment made by the appellant is in excessive no disallowance can be made; more so in the light of the fact that both the companies are assessed to Income tax at maximum marginal rate. In the light of these facts, we are of the view that the disallowance made by the AO is not proper and accordingly we set aside the order of the CIT(A) and delete the additions in this regard."

11. The above decision of the Tribunal in the case of Manipal Health Enterprises Pvt. Ltd. (supra) has been confirmed by the Hon'ble High Court of Karnataka in ITA No.817 of 2018 dated 12.10.2023 and it is held as under:-

"12. The ITAT has rightly held that the AO has not doubted the payment nor held the payment as excessive even though in terms

> of Section 40A (2) only 'legitimate needs of the business' is allowable as expenditure. Thus there is no material on record to support AO's opinion. Therefore, we find no error in the order passed by the ITAT."

12. In the present case also, the assessee has entered into agreement dated 01.04.2015 with MEMGIIPL (page 78 of PB) and Annexure-I to the agreement states the services offered and the schedule of fees @ 0.5% of total income. The AO has not brought any material on record to show that the payment made by the assessee to MEMGIIPL is unreasonable and excessive and has made disallowance on adhoc basis. merely stating that the order of the ITAT in group case has not been accepted by the revenue. The AO has observed that the assessee may have benefitted from the bulk or centralized purchasing done though MEMGIIPL, but it does not justify the entire payment. Once it is accepted by the AO that the assessee is benefited through MEMGIIPL, no adhoc disallowance is called for.. Respectfully following the above decisions, we delete the disallowance of Rs.17,05,381 u/s. 40A(2) of the Act.

13. In the result, the appeal by the assessee is allowed.

Pronounced in the open court on this 31st day of January, 2024.

Sd/-	Sd/-
(GEORGE GEORGE K.)	(LAXMI PRASAD SAHU)
VICE PRESIDENT	ACCOUNTANT MEMBER

Bangalore,
Dated, the 31st January, 2024.
/*Desai S Murthy /*

Copy to:
1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.