IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.2479 OF 2018

Pr. Commissioner of Income-Tax-14, Mumbai
Aayakar Bhavan,
M. K. Road,
Mumbai – 400 020 … Appellant

Versus

Pfizer Products India Pvt. Ltd.
5, Patel Estate, Off S. V. Road,
Jogeshwari (W), Mumbai – 400 102.
PAN No. AADCP8985B …. Respondent

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Adv. Simran Hadi h/f Adv. Suresh Kumar, for the Appellant.
Adv. Paras Savla a/w Adv. Pratik Poddar, Adv. Harsh Shah and Adv. Rajnandini Shukla, for the Respondent.

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CORAM : M. S. KARNIK &
S. M. MODAK, JJ.

DATE : 12th MARCH, 2026

JUDGMENT (PER M. S. KARNIK, J.) :

1. The challenge in this appeal filed by the Revenue under Section 260A of the Income Tax Act, 1961 (“the said Act”, for short) is to the order dated 01.09.2017 passed by the Income Tax Appellate Tribunal, Mumbai, (“ITAT”, for short). The Tribunal dismissed the Revenue’s appeal and upheld the decision of Commissioner of Income Tax (Appeals) (“CIT(A)”, for short) rendered vide order dated 31.12.2014, deleting the disallowance

of cross charges of Rs.14,51,77,000/- undertaken under section 40(a)(ia) of the said Act for non-deduction of tax at source while filing the income tax returns for the Assessment Year 2009-10.

2. The appeal raises the following substantial questions of law :-

> "(i) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in confirming the decision of Ld. CIT(A), deleting the disallowances of cross charges of Rs.14,51,77,000/- for non-deduction of TDS u/s 40(a)(ia) holding that these charges represent mere reimbursement without appreciating the fact that these payments were made for rendering business auxiliary services through invoices inclusive of the service tax and therefore, includes profit component and thus cannot be said to be pure reimbursement charges not liable for deduction of TDS?
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> (ii) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT erred in confirming the decision of Ld. CIT(A), deleting the disallowances of cross charges of Rs. 14,51,77,000/- for non-deduction of TDS u/s 40(a)(ia) holding that these charges represent mere reimbursement without appreciating the fact that the assessee has stopped itself from taking a stand that these payments are mere reimbursement as it has taken a contrary stand before the service tax authority that the payments were made for providing business auxiliary services on which service tax has been paid?"

3. The facts in brief are as under :-

(i) The Assessee is a company incorporated under the provisions of the Companies Act, 1956 and is, *inter*

alia, engaged in the business of trading of pharmaceutical products.

(ii) The respondent–Assessee (Pfizer Products India Pvt. Ltd.) e-filed its return of income for the assessment year 2009–10, declaring a total income of Rs.19,62,50,782/- which was subject to a scrutiny assessment whereby the total income was assessed at Rs. 34,42,08,170/-

(iii) It was noticed that the discrepancy between the returned and assessed income primarily arose on account of disallowances made by the Assessing Officer ("AO", for short) under Sections 40(a)(ia) and 40(a)(i) of the Act, as well as unreconciled interest income reflected in the TDS certificates. Notably, the assessee had paid cross charges of ₹14,51,77,000/- to M/s. Pfizer Ltd., its sister concern, towards the use of "Field Force Facility" of M/s. Pfizer Ltd. for marketing and promotion of products which expenses, the assessee contended, represented the expenses reimbursed to M/s. Pfizer Ltd. It was further contended that the payments were merely in the nature of

reimbursement of expenses without any markup and therefore not liable to TDS and, in any case, M/s. Pfizer Ltd. had deducted the requisite TDS whenever required. However, the AO rejected this contention and disallowed the expenditure under Section 40(a)(ia) of the Act.

(iv) Aggrieved by the order of the AO, the Assessee preferred an appeal before the CIT(A). Vide order dated 31.12.2013, the CIT(A) partly allowed the appeal, holding that the invocation of Section 40(a)(ia) was not justified in respect of the payment made to M/s. Pfizer Ltd., as the same was in the nature of reimbursement of costs without any mark-up, in terms of the cost-sharing agreement between the Assessee and its sister concern.

(v) Aggrieved by the order of the CIT(A), the Revenue preferred an appeal before the ITAT. The ITAT concurred with the findings of the CIT(A) that the payment of Rs.14,51,77,000/- to M/s. Pfizer Ltd. was purely in the nature of reimbursement of expenses incurred under a cost-sharing agreement without any markup and therefore contained no income element and

that consequently, no disallowance under Section 40(a)(ia) was warranted. Furthermore, the ITAT also noted that the CIT(A) had relied on the amendments introduced by the Finance Act, 2012, namely the first proviso to Section 201(1) and the second proviso to Section 40(a)(ia), and had held them to be retrospective and applicable to the relevant assessment year, ruling that since the payee had filed its return, accounted for the income, and paid the due taxes, no disallowance under Section 40(a)(ia) could be made, which finding the ITAT concurred with. The appeal of the Revenue was thus dismissed by the ITAT vide order dated 01.09.2017.

(vi) The legality and validity of the order of the ITAT dated 01.09.2017 ("impugned order", for short) has been challenged before this Court on the afore-quoted substantial questions of law.

4. Mr. Suresh Kumar, learned counsel for the Appellant-Revenue submitted that the ITAT erred in confirming the order of the CIT(A), deleting the disallowance of the cross-charge of Rs.14,51,77,000/- without appreciating that the payments were

made for rendering business auxiliary services through invoices inclusive of service tax and, therefore, contained a profit component and could not be treated as being purely in the nature of reimbursement not liable for deduction of TDS and that the said stand was taken before the Service Tax Authority. Mr. Suresh Kumar invited our attention to the findings recorded by the AO. It is submitted that the findings of the AO are in consonance with the provisions of law and ought not to have been upheld by the CIT(A) and the ITAT.

5. *Per contra,* Mr. Paras S. Savla, learned counsel for the Respondent- Assessee advanced the following submissions:

(i) That the said cross-charge paid for having used field force facilities of M/s. Pfizer Ltd. was covered by the cost sharing agreement dated 21 November 2003 and a supplementary agreement dated 13 December 2004 between the Assessee and M/s. Pfizer Ltd., pursuant to which the Assessee merely reimbursed M/s. Pfizer Ltd. for expenses incurred towards personnel costs, travelling, advertising and promotion and miscellaneous expenses, without any markup and with no component of profit and

that the presumption of profit by the AO has been thus negated by the CIT(A) after considering the cost-sharing agreement and supplementary agreement between the Assessee and M/s. Pfizer Ltd, holding that TDS was thus not warranted.

(ii) That, levy of service tax cannot be a determining factor to ascertain the nature of any payment. When the payment itself does not constitute income, merely because service tax has been charged in compliance with the specific laws, the nature of the payment would not become income.

(iii) That, the service tax was levied on the reimbursements on a conservative basis, owing to the ambiguity surrounding levy of service tax on reimbursements, which has now been settled by the Hon'ble Supreme Court in **Union of India and another vs. Intercontinental Consultants and Technocrats Private Limited**[1] and **Gujarat State Fertilizers and Chemicals Ltd. vs. Commissioner of Central Excise**[2], holding that Service

1 (2018) 4 SCC 669.
2 (2017) 5 SCC 198.

Tax is not to be levied on reimbursements.

(iv) That, the Assessee had deducted TDS on the said reimbursement in the subsequent years on a without-prejudice basis and out of abundant caution, just to keep the claim alive.

(v) That, without prejudice, in view of the insertion of second proviso to section 40(a)(ia) by the Finance Act, 2012, which was made retrospectively applicable, no disallowance can be made where the payee has furnished its return of income, paid due tax and a Chartered Accountant's certificate to that effect has been furnished, which conditions stand satisfied in the Assessee's case, and thus the Assessee cannot be treated as assessee in default.

(vi) That, there is no loss of revenue as Pfizer Ltd. had already deducted TDS wherever applicable, while making payments to the third party vendors and employees. It is the stand of the Assessee that these facts are not disputed and the Revenue has not challenged the

finding of CIT (A) that no disallowance can be made on account of the retrospective applicability of the amendment brought about in Section 40(a)(ia) vide Finance Act, 2012.

6. Learned Counsel for the Respondent-Assessee relied on the following judgments in support of the arguments advanced:

(i) Commissioner of Income-tax vs. Siemens Aktiongesellschaft[3]

(ii) The Commissioner of Income Tax-3 vs. M/s. Emerson Process Management (India) Pvt. Ltd.[4]

(iii) The Pr. Commissioner of Income Tax-1 vs. Goldmansach (India) Finances Pvt. Ltd.[5]

(iv) Commissioner of Income Tax-1, Mumbai vs. IDFC Investment Advisors Ltd.[6]

(v) The Commissioner of Income Tax-6 vs. M/s. Ask Wealth Advisors Pvt. Ltd.[7]

(vi) Commissioner of Income-tax, TDS-2, Mumbai vs. Zee Entertainment Enterprises Ltd.[8]

(vii) Principal Commissioner of Income-tax vs. Morgan Stanley India Capital Pvt. Ltd.[9]

3 [2009] 177 Taxman 81 (Bombay)
4 ITXA No. 237 of 2012 (Bombay)
5 ITXA No. 1742 of 2016 (Bombay)
6 ITXA No. 968 of 2014 (Bombay)
7 ITXA No. 236 of 2015 (Bombay)
8 [2018] 92 taxmann.com 30 (Bombay)
9 [2025] 177 taxmann.com 699 (Bombay)

(viii) Pr. Commissioner of Income Tax-5 vs. Perfect Circle India Pvt. Ltd.[10]

(ix) Commissioner of Income-tax-1 vs. Ansal Land Mark Township (P.) Ltd.[11]

(x) Hindustan Coca Cola Beverage (P.) Ltd. vs. Commissioner of Income-tax.[12]

7. We have heard Mr. Suresh Kumar, learned counsel for the Appellant-Revenue and Mr. Paras Savla, learned counsel for the Respondent-Assessee. Having carefully perused the order passed by the CIT(A), for the reasons hereinafter recorded we are in respectful agreement with the view taken by the ITAT.

8. We find that a cross charge to the tune of Rs. 14,52,77,000/- was paid by the Assessee to its sister concern (M/s. Pfizer Ltd.). The CIT(A) in its order dated 31.12.2014 has recorded the details of the said expenditure in a tabular form, classifying the said expense under four heads, namely, 'staff cost', 'travelling', 'advertising and promotional expense' and 'other miscellaneous expenses'. It can be seen that the said expense has been incurred on account of a cost sharing agreement between the Assessee and the said sister concern, in terms of which the assessee

10 ITXA No. 707 of 2016 (Bombay)
11 [2015] 61 taxmann.com 45 (Delhi)
12 [2007] 163 Taxman 355 (SC)

was sharing services of certain employees and other facilities which belonged to M/s. Pfizer Ltd, the expense incurred on which totalled Rs.14,51,77,000/-, which had to be reimbursed to the said sister concern. The CIT(A), while rendering its finding on whether or not the payment of the said cross charge by the Assessee was in the nature of reimbursement of expense incurred in terms of the cost-sharing agreement, has duly perused the relevant clauses of the said agreement.

9. Moreover, as confirmed by M/s. Pfizer Ltd., it had deducted tax at source at appropriate rates on the payments made to third party vendors or employees wherever applicable. Moreso, M/s. Pfizer Ltd. has admittedly not claimed any deduction for having incurred the expenditure in question. This was the basis on which the CIT(A) came to a conclusion that in the absence of any element of income in the said payment of cross-charge without mark-up, there was no requirement of deducting tax at source. The said finding was upheld by the ITAT.

10. It is the contention of Revenue that the said transaction has an income-component, owing to the fact that service tax was charged on the same. Whether levy of service tax is a factor

determining the nature of the transaction, when the transaction itself is not in the nature of income, is the moot question. Learned Counsel on behalf of the Assessee submits that when the inherent nature of the payment itself is not income, mere levy of service tax would not change the nature of such a payment. The order passed by the ITAT quotes the relevant portion of the cost sharing agreement and the supplementary agreement. The payment of cross-charge by the Assessee to M/s. Pfizer Ltd. was pursuant to the said cost-sharing arrangement detailed in the agreement. The cost-sharing is on cost-to-cost basis, without any component of income and the said transaction is purely in the nature of reimbursement.

11. Moreover, the longstanding ambiguity pertaining to the levy of service tax on reimbursements was settled by the Hon'ble Supreme Court in *Union of India vs. Intercontinental Consultants and Technocrats Private Limited* (supra) and *Gujarat State Fertilizers and Chemicals Ltd. vs. Commissioner of Central Excise* (supra), wherein it is held that no service tax should be charged on reimbursement of expenses when no service element is involved. In *Union of India vs. Intercontinental Consultants and Technocrats*

Private Limited (supra), the Hon'ble Supreme Court observed thus:

> "26. In this hue, the expression "such" occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing "such" taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot be a part of that valuation as that amount is not calculated for providing such "taxable service". That according to us is the plain meaning which is to be attached to Section 67 (unamended i.e. prior to 1-5-2006) or after its amendment, with effect from 1-5-2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that the High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider "for such service" and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service."
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> (Emphasis Supplied)

12. Thus, the Hon'ble Supreme Court held that service tax can be levied only on the gross amount charged for the taxable service itself and that any additional amounts that are not directly charged for providing the taxable service cannot be included in the taxable value.

13. In light of the decision rendered by the Hon'ble Supreme Court in *Union of India and another vs. Intercontinental Consultants and Technocrats Private Limited* (supra) we are in agreement with the submission of learned counsel for the Assessee that, payment of service tax would not make the said transaction taxable, given

that the same is in the nature of reimbursement of expense incurred without markup, as has been established. Furthermore, in view of the amendment introduced vide Finance Act, 2012, we also agree with the submission of the Learned Counsel for the Assessee that the Assessee in the present case cannot be treated as an assessee in default.

14. Now let us discuss the amendment introduced to Section 40(a)(ia) and Section 201(1) vide the Finance act, 2012. Section 40(a)(ia), reads thus :

> "**Amounts not deductible.**
>
> 40. Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",—
>
> (a) in the case of any assessee—
> .....
>
> (ia) thirty per cent of any sum payable to a resident, on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139:
>
> Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, thirty per cent of such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid:
>
> Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be

> deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the payee referred to in the said proviso.
>
> Explanation.—For the purposes of this sub-clause,—
>
> (i) "commission or brokerage" shall have the same meaning as in clause (i) of the Explanation to section 194H;
>
> (ii) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;
>
> (iii) "professional services" shall have the same meaning as in clause (a) of the Explanation to section 194J;
>
> (iv) "work" shall have the same meaning as in Explanation III to section 194C;
>
> (v) "rent" shall have the same meaning as in clause (i) to the Explanation to section 194-I;
>
> (vi) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;"

15. The second proviso to section 40(a)(ia) was inserted by the Finance Act, 2012, with effect from 01.04.2013. The Delhi High Court in *Commissioner of Income-tax-1 vs. Ansal Land Mark Township (P.) Ltd.* (supra) discussed at length, the validity of retrospective applicability of *Commissioner of Income-tax-1 vs. Ansal Land Mark Township (P.) Ltd.* (supra) and observed thus :

> "9. It is seen that the second proviso to section 40(a)(ia) was inserted by the Finance Act, 2012, with effect from April 1, 2013. The effect of the said proviso is to introduce a legal fiction where an assessee fails to deduct tax in accordance with the provisions of Chapter XVII-B. Where such assessee is deemed not to be an assessee in default in terms of the first proviso to sub- section (1) of section 201 of the Act, then, in such event, "it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso".

10. It is pointed out by learned counsel for the Revenue that the first proviso to section 201(1) of the Act was inserted with effect from July 1, 2012. The said proviso reads as under:

> "Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident—
>
> (i) has furnished his return of income under section 139;
>
> (ii) has taken into account such sum for computing income in such return of income; and
>
> (iii) has paid the tax due on the income declared by him in such return of income,
>
> and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed."

11. The first proviso to section 201(1) of the Act has been inserted to benefit the assessee. It also states that where a person fails to deduct tax at source on the sum paid to a resident or on the sum credited to the account of a resident such person shall not be deemed to be an assessee in default in respect of such tax if such resident has furnished his return of income under section 139 of the Act. No doubt, there is a mandatory requirement under section 201 to deduct tax at source under certain contingencies but the intention of the Legislature is not to treat the assessee as a person in default subject to the fulfilment of the conditions as stipulated in the first proviso to section 201(1). The insertion of the second proviso to section 40(a)(ia) also requires to be viewed in the same manner. This again is a proviso intended to benefit the assessee. The effect of the legal fiction created thereby is to treat the assessee as a person not in default of deducting tax at source under certain contingencies.

12. Relevant to the case in hand, what is common to both the provisos to section 40(a)(ia) and section 201(1) of the Act is that the as long as the payee/resident (which in this case is APIL) has filed its return of income disclosing the payment received by and in which the income earned by it is embedded and has also paid tax on such income, the assessee would not be treated as a person in default. …"

(Emphasis Supplied)

16. Similarly, in *Pr. Commissioner of Income Tax-5 vs. Perfect Circle India Pvt. Ltd.* (supra), referring to *Commissioner of Income-tax-1 vs. Ansal Land Mark Township (P.) Ltd.* (supra), this Court observed thus :

> "2. It is not necessary to record background facts since the question of law raised by the Revenue is whether the second proviso to Section 40(a)(ia) of the Income Tax Act, 1961 ("the Act" for short) would have retrospective effect. We may notice that the said proviso was inserted w.e.f 1.4.2013 and in essence, it provides that where an assessee fails to deduct whole or any part of the tax at source but is not deemed to be an assessee in default under the first proviso to Section 201(1), then for the purpose of clause 40(a)(ia), it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the payee. The Revenue would content that the benefit of this proviso would be available to the assessee only prospectively w.e.f. 1.4.2013. Various Courts, however, have seen this proviso as beneficial to the assessee and curative in nature. The leading judgment on this point was of the Division Bench of Delhi Court in the case of CIT Vs. Ansal Land Mark Township P Ltd. The Court held that Section 40(a)(ia) is not a penalty and insertion of second proviso is declaratory and curative in nature and would have retrospective effect form 1.4.2005 i.e the date from the main proviso 40(a)(ia) itself was inserted. Several High Courts have adopted the same lines."

17. The upshot of the above afore-cited decisions is that, although the proviso was inserted by the Finance Act, 2012 with effect from 1 April 2013, the same was held to be beneficial, declaratory, and curative in nature. The proviso creates a legal fiction whereby if an assessee fails to deduct tax at source, but the

payee has furnished the return of income under Section 139, included the relevant income, and paid the due taxes, then the assessee shall be deemed to have deducted and paid such tax. This position aligns with the first proviso to Section 201(1), which provides that in such circumstances the payer shall not be treated as an assessee in default. The courts emphasized that the legislative intent is to avoid undue hardship and double taxation, and that Section 40(a)(ia) is not penal in nature. Consequently, the second proviso was held to operate retrospectively from 1st April 2005, i.e., the date on which Section 40(a)(ia) was originally introduced.

18. Thus, considering the above discussion, we are of the opinion and as rightly held by the ITAT as well as CIT(A), disallowance cannot be made in this case as:

(i) the payee has furnished its return of income,

(ii) the payee has paid due taxes, and

(iii) a Chartered Accountant's Certificate to that effect has been furnished.

19. Thus, the Assessee cannot be treated as an assessee in default and a categorical finding to that effect has been rendered

by the CIT(A), recording that the payee viz. M/s. Pfizer Ltd. had duly filed and considered the cross charges while filing the said return of income inasmuch as it has credited the same to profit and loss account. Further, Pfizer Ltd. had duly paid taxes and a certificate dated 15.11.2014 issued by Chartered Accountant S.K. Patodia & Associates was brought on record. This factual position is also undisputed.

20. In our considered opinion, in light of the above discussion, precedents relied upon and the material before us, it can be concluded that the cross-charge paid by the Assessee-Respondent in terms of the cost-sharing agreement between the Assessee and M/s. Pfizer Ltd, did not have any income/profit component embedded with it and the said transaction was purely in the nature of reimbursement of expenditure incurred by M/s. Pfizer Ltd without any markup and therefore is not liable to TDS.

21. We therefore do not find that the present appeal involves any substantial question of law. The appeal is dismissed.

(S. M. MODAK, J.) **(M. S. KARNIK, J.)**