

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

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER

I.T.A. No.258/Bang/2016 (Assessment Year : 2010-11)		
M/s. Jupiter Technologies Pvt. Ltd., No.67, 1 st A Main Road, S.T. Bed, Koramangala, Bangalore-560 034 PAN AAACJ 4137A	Vs.	Dy. Commissioner of Income Tax, Circle 4(1)(1), Bangalore.
Appellant		Respondent.

Appellant By : Shri S. Ramasubramanian, C.A. Respondent By : Smt. Renuka Devi, JCIT (D.R)
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Date of Hearing : 19.7.2016.

Date of Pronouncement : 11.8.2016.

O R D E R

Per Shri Vijay Pal Rao, J.M. :

This appeal by the assessee is directed against the order dt.14.12.2015 of the Commissioner of Income Tax (Appeals)-4, Bangalore for the Assessment Year 2010-11.

2. The assessee has raised the following grounds :

“1. That the order of the learned CIT (Appeals) in so far it is prejudicial to the interests of the appellant is bad and erroneous in law and against the facts and circumstances of the case.

2. That the learned CIT (Appeals) erred in law and on facts in holding that the salary of Rs.7,12,400 is hit by Section 40A(2) of the Act and a sum of Rs.3,52,400 has been rightly disallowed.

3. That the learned CIT (Appeals) erred in law and on facts in holding that the salary paid to the Director of the company is to be disallowed even though there is no tax avoidance and the order passed is contrary to by Circular No.6P issued in July, 1968.

4. That the learned CIT (Appeals) erred in law and on facts in upholding the addition of Rs.38,471 being the difference between the balances in the account of M/s. Kayen Print Services Pvt. Ltd. and the appellant.

5. That the learned CIT (Appeals) erred in law and on facts in upholding the addition of Rs.40,459 being the difference between the balances in the account of M/s. UPM Kymmene India Pvt. Ltd. and the appellant.

Each of the above grounds is without prejudice to one another and the appellant craves leave of the Hon'ble ITAT, Bangalore to add, delete, amend or otherwise modify one or more of the above grounds either before or at the time of hearing of this appeal.”

3. Ground No.1 is general in nature and does not require any specific adjudication.

4. Ground Nos.2 & 3 are regarding addition made on account of disallowance of salary paid to the Director by applying the provisions of Section 40A(2) of the Income Tax Act, 1961 (in short 'the Act').

5. **Mrs. Malati Kulkarni** is the Director of the company. During the course of assessment proceedings, the Assessing Officer noted that salary of Mrs. Malati Kulkarni in the earlier year was very low at Rs.2,40,000 per annum which has been increased to Rs.7,12,400. Accordingly, the Assessing Officer held that only a sum of Rs.3,60,000 can be allowed and balance sum of Rs.3,52,400 is to be disallowed under Section 40A(ii) of the Act. The assessee challenged the action of the Assessing Officer before the CIT (Appeals) but could not succeed.

6. Before the Tribunal the learned Authorised Representative has submitted that an identical issue has been considered in assessee's own case for the Assessment Year 2007-08 wherein the Tribunal has decided this issue in favour of the assessee and deleted the disallowance made by the Assessing Officer under Section 40A(2) of the Act.

7. On the other hand, the learned Departmental Representative has relied upon the orders of the authorities below and submitted that the Assessing Officer found that there is an abnormal income in the salary of one Director namely Mrs. Malati Kulkarni, therefore the Assessing Officer has rightly applied the provisions of Section 40A(2) of the Act when there is no similar increase in the other Directors salary.

8. Having considered the rival submissions and relevant material on record, at the outset it is noted that the Tribunal in assessee's own case for the Assessment Year 2007-08 vide order dt.6.11.2012 in ITA No.628/Bang/2011 has considered an identical issue in para 9.2 as under :

" 9.2 According to us, the authorities have not conducted proper enquiry to determine whether the remuneration paid to the directors is excessive or not having regard to the fair market value for the services rendered by the directors. The Tribunal in the case of Jagadamba Roller Flour Mills Ltd. v ACIT (316 ITR (AT) 422) (at page 432) had held that it is not correct to compare the current year salary with the salary in the earlier year. It was held by the Tribunal that the onus is on the Assessing Officer to bring the material on record to prove that the payment is excessive or unreasonable having regard to the fair market value. It was further held by the Tribunal that without determining the fair market value of the services, the disallowance under section 40A(2) cannot be made. The relevant finding of the Tribunal in the case cited supra reads as follows:-

"Undisputedly, the payment to the director falls under clause (b) of section 40A of the Act and, therefore, the Assessing Officer was duty bound to make enquiry whether such expenditure was excessive or unreasonable having regard to the fair market value of the services rendered. To that extent, I am in agreement with the observations of the learned Accountant Member. However, no enquiry was made by the Assessing Officer to ascertain whether the payment was excessive or unreasonable having regard to the fair market value of the services. On the other hand, the Assessing Officer made the enquiry in a different direction, i.e. whether the increase in the salary as compared to the salary paid to last year was justified on facts or not. Such enquiry, in my view, is not required to be made as per the provisions of section 40A(2)(a). The scope of enquiry under the above provision is with reference to the fair market value of the services rendered. In the absence of enquiry as contemplated by the provisions of section 40A(2)(a), no disallowance could have been made or sustained. The onus was on the Assessing Officer to bring the material on record to prove that the payment made by the assessee was excessive or unreasonable having regard to the fair market value of the services rendered. If some material/evidence is brought on record to indicate that payment appeared to be excessive or unreasonable then the onus would shift to the assessee to prove that the payment was not excessive or unreasonable. Since no enquiry as contemplated by the aforesaid provisions was made on this account, it cannot be said that the payment was excessive or unreasonable".

Further the Assessing Officer has disallowed the salary increase in the salary by invoking the provisions of Section 40A(2) which mandates that in case the Assessing Officer of the opinion that an expenditure is excessive or unreasonable having regard to Fair Market Value of goods; services or facilities for which the payment is made or legitimate need of the business or profession so much of the expenditure as was considered excessive or unreasonable salary shall not be allowed as a deduction. Thus once the Assessing Officer has to form an opinion that a particular expenditure is excessive or unreasonable. The formation of opinion should be based on having regard to the fair market value of the services or goods. However the Assessing Officer has not conducted such enquiry but disallowed the salary of the same director in the earlier year. It is pertinent to note that when the salary paid to the Director is still less than the salary paid to the other Directors during the year under consideration then the provisions of Section 40A(2) cannot be invoked. It may be a case that this particular Director was under paid in earlier year and just to bring the parity of the salary with the other Directors the salary of the Director was increased during this year. In view of the above facts as well as decision of this Tribunal in

assessee's own case (supra), the disallowance made by the Assessing Officer is not justified and the same is deleted.

9. Ground Nos.4 & 5 are regarding addition made on account of difference between the balances in the accounts of **M/s. Kayen Print Services Pvt. Ltd.** and **M/s. UPM Kymmene India Pvt. Ltd.**

10. I have heard the learned Authorised Representative as well as learned Departmental Representative and considered the relevant material on record. The Assessing Officer disallowed a sum of Rs.38,471 being unexplained difference of balance outstanding as per the confirmation of **M/s. Kayen Print Services Pvt. Ltd.** and further a sum of Rs.40,459 being unexplained difference in case of **UPM Kymmene India Pvt. Ltd.** The CIT (Appeals) confirmed the action of the Assessing Officer on the ground that the assessee has failed to furnish the relevant reconciliation and other details.

11. The learned Authorised Representative of the assessee has submitted that due to unavoidable circumstances the assessee could not furnish the reconciliation and the reasons for this difference in the balances however, the differences are only because of certain investments were not taken into account by the parties.

12. On the other hand, the Id. DR has relied upon the orders of the authorities below and submitted that despite sufficient opportunity the assessee did not furnish the relevant details and reconciliation of the differences in the balances.

13. It is manifest from the record that the assessee failed to explain the differences in the balance outstanding in the accounts of these two parties as per the confirmation of accounts by these parties. Before the Tribunal the assessee has explained the differences due to certain investments that were not taken into consideration by these parties however in the absence of the relevant evidence produced before the authorities below for their examination and verification this explanation of the assessee cannot be accepted at this stage. Accordingly, the Ground Nos.4 & 5 are dismissed.

14. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 11th day of Aug., 2016.

Sd/-

(VIJAY PAL RAO)
JUDICIAL MEMBER

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