

**IN THE INCOME-TAX APPELLATE TRIBUNAL “E” BENCH MUMBAI
BEFORE SHRI G.S. PANNU, VICE PRESEIDENT AND
SHRI PAWAN SINGH JUDICIAL MEMBER**

ITA No. 7370/Mum/2017 (Assessment Year 2014-15)

Trimode Properties Pvt. Ltd. DGP House, 3 rd Floor, 88C, Old Prabhadevi Road, Mumbai-400025. PAN: AABCT2569F	Vs.	DCIT - 15(3)(1) Aayakar Bhavan, M.K. Road, Mumbai-400020.
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Appellant	Respondent
Appellant by	: Shri Nitesh Joshi & Shri Hitesh Trivedi (ARs)
Respondent by	: Shri D.G. Pansari & : Sh. Chaitanya Anjaria (Sr. DR)
Date of Hearing	: 15.07.2019
Date of Pronouncement	: 15 .07.2019

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee is directed against the orders of learned Commissioner of Income-tax [CIT(A)]-24, Mumbai dated 18.09.2017 for Assessment Year (AY) for 2014-15. The assessee has raised the following grounds of appeal:

1. The learned Commissioner of Income-tax (Appeals) erred in upholding the action of the Assessing Officer in making disallowance of a sum of Rs.37,87,500/-, being 50% of directors remuneration of Rs.75,75,000/-, under section 40A(2)(b) of the Act, by treating the same as excessive and not having been incurred wholly and exclusively for the purposes of its business.
2. (a) The appellant submits that the learned Commissioner of Income-tax (Appeals) erred in upholding the action of the Assessing Officer in disallowing depreciation claimed on motor car amounting to Rs.3,51,127/- being 50% of depreciation of Rs.7,02,253/- on the ground that motor car has been used for the personal purpose by the director.

The appellant submits that it being a corporate entity, there can be no disallowance for any allied personal uses of car.

(b) The appellant submits that the car was used wholly and exclusively for the purposes of its business and depreciation on the said car ought to have been allowed.

s3. The appellant submits that the learned Assessing Officer be directed:

i. to delete disallowance of a sum of Rs.37,87,500/- being 50% of directors' remuneration;

ii. to delete disallowance of a sum of Rs.3,51,127/- being 50% of depreciation on motor car amounting to and to modify the assessment in accordance with the provisions of the Act.

4. Each of the above grounds of appeal are independent and without prejudice to each other.

2. At the outset of the hearing the ld. AR for the assessee submits that both the grounds of appeal raised by the assessee are covered in favour of assessee and against the revenue by the decision of the Tribunal in assessee's own case for assessment year (AY) 2009-10 and 2012-13 in ITA No.(s) 3471/Mum/2012 & 4977/Mum/2016 dated 2.06.2019, the ld AR for the assessee also furnished the copy of the order of the Tribunal.
3. On the other hand the ld. DR for the revenue after going through the contents of the order of the Tribunal submits that each assessment year is separate and has to be decided on the facts of the case. The ld. DR further relied on the order of the lower authorities.
4. We have considered the rival submissions of the parties and considered the contentions of the ld. representatives of the parties and gone through the order of the lower authorities. We have seen that in AY 2008-09 &

2012-13 similar disallowance on account of directors remuneration as well as depreciation on motor car by assessing officer which was confirmed by Id. CIT(A). However, on appeal before Tribunal both the disallowance was deleted, vide order dated 2.06.2019. The relevant part of the order of the Tribunal on both the grounds of appeal are extracted below:

5. We have considered the rival submissions of the parties and perused the material available on record. During the assessment the Assessing Officer noted that the assessee has shown rental income of Rs. 5,37,82,500/- from subletting. The assessee claimed deduction of remuneration of two directors namely Dr. Gita Piramal of Rs. 36 lakhs and Ms. Aparana Piramal of Rs.15 lakhs. Further the assessee has provided rent free accommodation to Dr Gita Piramal, of which the assessee paid Rs.1.69 Crore. The perquisite value taxed in the hands of Director is merely of Rs.5,40,000/- only. The AO issued show cause notice dated 31.07.2011 to the assessee to establish the reasonable of the payments made to the persons. The AO recorded that the assessee not furnished reply. The assessee along with its letter dated 17.08.2011 furnished the details of the property let out and the dates of letting of the property in the following manner;

Sr.No.	Name of sub-tenant	Date of Sub-let	Rent pm(Rs.)
1	M/s. Kone Elevators P. Ltd	01.09.2005	3,73,750/-
2	M/s BP Ergo Ltd.	27.06.2005	14,00,00/-
3	M/s. Tata Motors Ltd.	01.01.2006	16,10,000/-
4	M/s Bajaj Alliance General Ins Co. Ltd.	24.04.2008	13,50,000/-

7. On perusal of the details furnished by the assessee, the AO took his view that three parties were already tenant on the date of appointment of Dr.

Gita Piramal as Director. The Role of Dr. Gita Piramal is not explained by the assessee. The business of the assessee is to let out property, during the previous year the assessee has sub-let only one property and remaining three property were already let-out, therefore such huge expenses is not justified. The AO treated the remuneration to Directors and rent free accommodation as excessive and unjustified and not wholly and exclusively for the purpose of business. The AO disallowed the 50% of Director's remuneration and on rent free accommodation.

8. The Id. CIT(A) confirmed the addition/disallowance holding that assessee could not explain the nature of service rendered by Dr. Gita Piramal. The renting of property does not require any specific skill and that Dr. Gita Piramal is Director in both the companies i.e. let out and to whom the property is let out. The free accommodation provided to Dr. Gita Piramal has gone up from Rs.68,19,194/- to Rs,1,69,20,000/- in this year. No such rent free accommodation is provided to Aparana Piramal. Further, Dr. Gita Piramal is Director in M/s BP Ergo Ltd, Kemp & Co but no such salary or rent free accommodation is provided from such entities. The area of qualification of Director in Furnishing and Fixtures, Media Management and not in property dealings. On the basis of his above referred observation the Id CIT(A) confirmed the disallowances on account of Directors remuneration as well as for rent free accommodation.

9. For appreciation the provisions of sec. 40A(2)(a) reads as under:-

"40A(2)(a) Where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person referred to in clause (b) of this sub-section, and the Assessing officer is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession or the benefit derived by or accruing to him there from, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction."

10. The Hon'ble jurisdictional Bombay High Court in the case of CIT Vs. Indo Saudi Services (Travel) (P) Ltd (supra), while referring the Circular issued by CBDT No. 6-P, dated 6th July, 1968 held that no disallowance is to be made under section 40(2)(a) in respect of payment made to related party where there is no attempted to evade the tax.

11. The Hon'ble Madras High Court in CIT V/s NEPC India Ltd. (2008) 303 ITR 271 (Mad) held that Section 40A(2)(a) contemplates is that there should be some material available before the Assessing Officer for invoking Section 40A(2)(a) to initiate action to disallow or refuse to deduct the excessive or unreasonable expenditure mentioned there under. But, at the same time, before taking any final decision by invoking the power under Section 40A(2)(a), either allowing or disallowing such expenditure incurred as excessive or unreasonable, such decision of the Assessing Officer should be based on reasons well- founded, which are judiciously acceptable.
12. Now turning to the facts of the present case, there is no dispute that the assessee debited expenses on account of salary of the two Directors and expenses of rent free accommodation of one Director. Further, there is no dispute that both the person for whom the assessee has shown expenses are persons referred in section 40A(2)(b) of the Act. The issue for our adjudication is whether the payments so made on account of salary and the rent free accommodation are excessive or unreasonable having regards to the fair market value of the services for which the payments are made. In our view the disallowance under section 40A(2)(a) is not absolute, but subject to the satisfaction of the conditions provided in that section. Further, what is required to be disallowed is the excessive or unreasonable. We have noted that the AO has simply disallowed the 50% of the salary paid to the Directors and 50% of rent paid for the accommodation of one director holding that the assessee has sub-let only one property and remaining three property were already let-out, therefore such huge expenses is not justified. The AO has not brought any contrary material to prove that the payments made were excessive or unreasonable. No such disallowance was made by AO in earlier AY's i.e. in AY 2006-07, 2007-08 & 2008-09 as well as subsequent year i.e. in AY 2011-12 on similar set of facts.
13. The Id. AR of the assessee vehemently argued before us that the object of section 40A(2) is to prevent diversion of income and to evade the tax. It was canvassed that the assessee as well as the Directors are taxed at the marginal rate; therefore, there is no tax evasion. This fact is not in dispute that the assessee as well as the Directors of the assessee to whom the payments of salary were paid is taxed at marginal rate. The Hon'ble Bombay High Court in CIT Vs V.S Dempo and Co. P.Ltd (supra) held that the assessee as well as its subsidiary were in the same tax bracket and paid the same rate of tax was a fact which assumed importance. Admittedly it was not a case of tax evasion. We are also in agreement with

the submissions of the Id. AR for the assessee that the subsection (2) of section 40A to check the evasion of tax through excessive or unreasonable payments to relative and associate and should not be applied in a manner which may cause hardship in bonafide cases. Admittedly the lower authorities have not identified any comparable salary and failed to establish that remuneration paid to directors were excessive, when it was allowed in earlier assessment years. Similarly, while making disallowance of 50% of salary of directors and rent of accommodation one of the director, the assessing officer as well as Id CIT(A) has not specified the justification of such disallowance. Considering the above factual and legal discussion, we are of the view that the lower authorities were not justified in making 50% of disallowance of salary of two directors and expenses of rent of accommodation of one of the director. Hence, we direct the AO to delete the disallowance. In the result the ground No. 1(a) to 1(c) are allowed.

14. Ground No. 2(a) &(b) relates to disallowance of depreciation claimed on motor car. The Id. AR for the assessee submits that the motor car is in the name of the assessee and was used for the purpose of the business by the director of the assessee. The AO disallowed depreciation by taking view that car is used for personal purpose of directors. All the conditions of section 37 are fulfilled. There was no justification in disallowing depreciation on motor car.
15. On the other hand the Id. DR for the revenue supported the order of the authorities below.
16. We have considered the rival submissions of the parties and have gone through the orders of the authorities below. The AO during the assessment took his view that the business of the assessee was already set-up and that the only activity undertaken by the assessee was subletting of the property. The car has no role for the purpose of the business of the assessee and accordingly disallowed the depreciation of Rs. 14,15,113/-. The Id CIT(A) confirmed the action of AO on the basis of his view taken for confirming the disallowance of rent of accommodation and salary of directors. We have noted the lower authorities have not disputed the car is under the ownership of assessee company. The assessee is corporate entity and there is no such personal element involved in such deduction. Moreover, on the basis of which the lower authorities based their action, has been set-aside by us. The deduction claimed by the assessee is not capital in nature. The lower authorities made the disallowance by adopting unjustifiable reasons. Hence, we direct the AO to allow the depreciation. In the result these grounds of appeal are allowed.

17. Ground No. 3 is repetition of earlier grounds of appeal, which we have already allowed, thus, this ground of appeal needs no specific adjudication.

18. In the result the appeal of the assessee is allowed.

ITA No.4977/M/2016 for AY 2012-13

19. Ground No. 1 relates to disallowance of directors remuneration. As recorded earlier this ground of appeal is identical to the ground No. 1(a) in appeal for AY 2009-10, which we have allowed. Therefore, following the principle of consistency this ground of appeal is allowed with similar direction.

20. Ground No. 2 relates to depreciation on motor car. This ground of appeal is identical to the ground No.2 of the appeal for AY 2009-10, which we have allowed. Therefore, following the principle of consistency this ground of appeal is allowed with similar direction.”

6. Considering the order of Tribunal in assessee’s own case on identical grounds of appeal and respectfully following the same the grounds of appeal raised by the assessee are allowed.

7. In the result the appeal of the assessee is allowed.

Order pronounced in the open court on 15th day of July 2019.

Sd/-

G.S. PANNU
VICE PRESEIDENT

Mumbai, Date: 15. 07.2019

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Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR “E” Bench, ITAT, Mumbai
6. Guard File

Sd/-

PAWAN SINGH
JUDICIAL MEMBER

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai