

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI B BENCH, MUMBAI**

**[Coram: Pramod Kumar (Vice President),  
and Aby T Varkey (Judicial Member)]**

ITA No.: 1373/Mum/2020  
Assessment year: 2014-15

**Income Tax Officer-15(2)(2)  
Mumbai**

.....Appellant

**Vs.**

**Niche Health Options P. Ltd.,**  
301, R.R. Realty Tank Road, Opp. Dreams Mal,  
Bandup (W), Mumbai 400078 [PAN: AADCN0819L]

..... Respondent

**Appearances by:**

**Dr. Pratap Narayan Sharma** for the appellant  
**Nitesh Joshi** for the respondent

Date of concluding the hearing : 28/06/2022  
Date of pronouncing the order : 29/06/2022

**O R D E R**

**Per Pramod Kumar VP**

1. By of this appeal, filed by the Assessing Officer, call into question the correctness of the order dated 04<sup>th</sup> December 2019, passed by the learned CIT(A) in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2014-15.

2. Grievances raised by the Assessing Officer are as follows:

1. *“On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in allowing the ground of the assessee company by deleting the additions made of Rs. 2,46,00,000/- by way of disallowance of part of remuneration to the directors considering the same as excessive.”*

2. *“The appellant prays that the order of the CIT(A) on the leave directions be set aside and that of the assessing Officer be restored.”*

3. To adjudicate on this appeal, it is sufficient to take note of the fact that on an identical issue the CIT(A) had given relief in the assessment year 2013-14, vide his order 14th February 2017, and observed as follows:

2.4.1 Ground No. 1 is raised against the AO's action in making an addition of Rs. 2,46,00,000/- by way of disallowance of part of remuneration paid to the directors considering the same as excessive. The AO has noticed that the assessee has claimed an expenditure of Rs. 4,50,00,000/- for the year under consideration on account of Directors' remuneration as against Rs. 2,04,00,000/- for the immediate preceding year i.e. AY 2012-13. The said payment is covered by the provisions of section 40A(2)(b) of the IT Act. The assessing officer has called for the details and justification for directors' remuneration at an increased amount of Rs.2,46,00,000/- when compared to that of the immediate preceding year. The AR submitted the details and explanation for the related party expenditure saying that the appellant company was expecting the large turnover and the directors went for increase in remuneration commensurate with the turnover and efforts on the part and hence argued that the directors remuneration was justified. The explanation given by the AR was considered by the assessing officer to be not satisfactory as he observed that the turnover of the appellant company was not increased substantially during the year under consideration. The assessing officer has therefore considered that the increased remuneration of Rs.2,46,00,000/- to be excessive and disallowed the same under section 40A(2)(b) of the IT act.

2.4.2 During the appeal proceedings before me the learned AR objected to the AO's action in invoking the provisions of section 40A(2) (b) of the IT act and pleaded that the addition made has to be deleted. The learned AR in the written submissions has also referred to following case laws support of the arguments put forth by him.

1. CIT vs. Indo Saudi Services (Travel) P Ltd. (Bom-HC) (2009) 310 ITR 306
2. CIT vs. V.S. Dempo & Co. P Ltd. (2011) 244 CTR 102 (Bom-HC)
3. Edwise Consultants Pvt. Ltd. vs. DCIT, Mumbai & Edwise Consultants Pvt. Ltd. Vs Addl.CIT, Mumbai (MUMBAI - ITAT) (2016) 44 ITR (Trib.) 236.

2.43 The contentions and arguments

1. The turnover of the assessee during the year has been increased due to the efforts made by the directors.
2. The AO simply disallowed the remuneration without bringing any material on record justifying the enhanced remuneration was excessive.
3. There was no revenue loss as it was the case of tax neutrality.

2.4.4 The AR submitted the month wise turnover registered during the year under consideration which has been increased by about 2 cores from the preceding year. He has stated that the appellant company was anticipating a huge turnover and hence it was resolved increase the remuneration of the directors who are themselves medical professionals put in their best efforts for the business of the company. As there was a change in the government policy of banning surrogacy services foreign parents, the turnover could not register substantial increase as it was expected. It was informed that the government of India passed surrogacy law banning the foreign parents visiting on tourist visa and surrogate child. The local authority and police station conveyed the decision to the appellant company to refrain from entertaining foreigners visiting as tourists for getting surrogacy children. This development has taken place in the month of December 2012 which said to have affected the business of the appellant company drastically. According to him, even the increased to turnover of about Rs.2 crore, was due to the efforts made by the professional directors of the company fully devoting their time and professional skills for

*the activities/business of the company. He has also pointed out that intention of the appellant company could be understood by the quantum of advance tax payments for the first two quarters which according to him was substantial with that of the preceding year. The enhanced remuneration was stated to be approved by the board of directors of the company by a resolution passed. The AR has thus argued that the enhanced remuneration was justified and pleaded for deletion.*

*2.4.5 The next argument put forth by the AR is that the assessing officer has mechanically resorted to the disallowance by simply stating that the enhanced remuneration paid to the directors to be excessive. The learned AR has drawn the attention that the assessing officer did not justify the basis to conclude that how the remuneration was excessive and argued that the provisions of the section 40A(2)(b) say that the assessing officer has to form the opinion about the unreasonableness or excessive expenditure by taking into consideration the free market value of the services. In the case of the appellant, he argued that the assessing officer is failed to bring on record any comparable cases/instances to arrive at the decision that the expenditure claimed was excessive. The AR referred to some decisions of jurisdictional tribunal and also the apex court as per which the assessing officer before invoking the provisions of section 40A(2)(b), has to take into consideration the comparable instances or cogent evidence to demonstrate the expenditure to the related parties were excessive are unreasonable having regard to the free market value of services/sales of product. As the assessing officer failed to bring on record prove that the enhanced remuneration paid to the directors to be excessive, the addition made by him requested to be deleted.*

*2.4.6 The another proposition taken by the appellant ease with regard to the concept of tax neutrality. It was stated that the appellant company as well as the directors to whom the remuneration was paid were all in the same tax bracket and by paying enhanced remuneration there was no evasion of tax or defrauding the revenue. The appellant being a domestic company falls in 30% tax bracket so as the directors. The AR has stated that the directors have offered the said remuneration and the tax was duly paid at the rate of 30%. It is also mentioned that the TDS provisions were duly complied with while paying the remuneration to the directors. Hence it was argued there was no question of loss to the revenue and hence the addition made by the AO requested to be deleted. The AR has also relied on the judgments of the honorable Bombay High Court wherein the issue was decided in favour of the assessee.*

*2.4.7 The submissions and arguments made by the AR and also several decisions of the jurisdictional tribunal as well as the jurisdictional High Court relied upon by the appellant have been perused and considered. It is observed that the assessing officer has not made any effort to bring on record the relevant facts and the material to justify the unreasonableness/excessiveness of the remuneration paid to the directors -professionals of the appellant company. He has simply mentioned that the enhanced remuneration of Rs. 2,46,00,000/- was excessive and hence disallowed u/s. 40A(2)(b). The AO has also not considered the increase in the turnover of the appellant company during the year under consideration which has been brought on record by the AR. It is also considered that there is a force in the argument of the appellant company that the directors being qualified medical professionals had put in the best efforts and it cannot be ruled out that whatever the increase in the turnover was due to the efforts of the directors whom the enhanced remuneration was paid. It has been verified that the assessee company has duly complied with the tax deduction at source while making the payment of remuneration to the directors. It is also the case that the remuneration paid had suffered tax in the hands of the recipients at the same tax bracket that of the appellant company. There was no leakage of revenue as stated by the assessee. Considering the facts and circumstances and also the judicial decisions relied upon by the appellant, I am of the considered opinion that the addition made by*

*invoking the provisions of section 40A(2) (b) of the IT act is not made on strong footing and cannot sustain the test of appeal. The assessing officer is therefore directed to delete the addition made of Rs.2,46,00,000/-. This ground is allowed.*

4. This decision of the CIT(A) was accepted by the revenue authorities, and the matter rests at that. As stated by the learned counsel, and as we have also verified from our records, no appeal was filed against this decision of the CIT(A). Yet on the same issue, in this immediately following year, the Assessing Officer is in appeal before us. The question that we really need to consider is whether such a deviation from the past practice of not filing an appeal on this issue is permissible.

5. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of applicable legal position.

6. In the case of Union of India v. Kaumudini Narayan Dalal [2001] 249 ITR 2191, Hon'ble Supreme Court had an occasion to consider whether it is open to revenue to accept a judgment in the case of one assessee, and appeal, against the identical judgment in the case of another. Their Lordships held that such a differential treatment on the same set of facts was not permissible in law, and observed that, "it is not open to revenue to accept the judgment in the case of the assessee in that case and challenge its correctness in the case of another assessee, without just cause." The same view was reiterated by the Hon'ble Supreme Court in the case of Berger Paints India Ltd. v. CIT [2004] 266 ITR 992, and followed by the Hon'ble Delhi High Court in the cases of CWT v. R.K.K.R. International (P.) Ltd.[2005] 198 CTR 5673 and CIT v. Neo Poly Pack Pvt. Ltd. [2000] 245 ITR 4924. When it is not possible for the revenue to challenge an order of the appellate authority in one case and when it has accepted identical order of the appellate authority in another case, it cannot at all be open to the Assessing Officer to challenge the order of CIT(A) on an issue on which relief has been given by CIT(A), in an earlier year, which has been not been challenged in appeal by the Assessing Officer. It is not the case of the Assessing Officer that the earlier year's CIT(A)'s order was not challenged on account of low tax effect or any other technical reason. Once the stand of the CIT(A), on an issue, is accepted in one year, unless there are good and sufficient reason to take a different stand later, similar findings for a subsequent year cannot be challenged in further appeal either. For this reason alone, the grievance raised by the revenue is not maintainable in law and deserves to be rejected in *limine*.

7. In the result, the appeal is dismissed. Pronounced in the open court today on the 29<sup>th</sup> day of June, 2022.

**Sd/-**  
**Aby T Varkey**  
(Judicial Member)

**Sd/-**  
**Pramod Kumar**  
(Vice President)

**Mumbai, dated the 29<sup>th</sup> day of June, 2022**

*Copies to:*

<i>(1) The appellant</i>	<i>(2) The respondent</i>
<i>(3) CIT</i>	<i>(4) CIT(A)</i>
<i>(5) DR</i>	<i>(6) Guard File</i>

*By order*

*Assistant Registrar/ Sr PS  
Income Tax Appellate Tribunal  
Mumbai benches, Mumbai*