

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "ई" मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI
BEFORE S/SHRI B.R.BASKARAN, AM AND AMARJIT SINGH, JM

आयकर अपील सं./I.T.A. No.5376/Mum/2011
And I.T.A. No.4121/Mum/2014
(निर्धारण वर्ष / Assessment Year: 2008-09 and 2010-11)

Edwise Consultants Pvt.Ltd., JER Mahal, Opp. Metro Cinema, Dhobi Talav, Mumbai-400002	बनाम/ Vs.	Dy. Commissioner of Income Tax, 4(3), Room No.649, 6 th floor, Aayakar Bhavan, M K Road, Mumbai-400020.
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No.594/Mum/2013
(निर्धारण वर्ष / Assessment Year: 2009-10)

Edwise Consultants Pvt.Ltd., JER Mahal, Opp. Metro Cinema, Dhobi Talav, Mumbai-400002	बनाम/ Vs.	Addl. Commissioner of Income Tax, 4(3),Room No.635, 6 th floor, Aayakar Bhavan, M K Road, Mumbai-400020.
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN. :AAACR2363N

अपीलार्थी ओर से / Appellant by	Shri Rajiv Khandelwal
प्रत्यर्थी की ओर से/Revenue by	ShriSujit Bangar

सुनवाई की तारीख / Date of Hearing : 27.08.2015
घोषणा की तारीख /Date of Pronouncement: 14.10.2015

आदेश / O R D E R

Per B R Baskaran, AM:

The assessee has filed these appeals relating to assessment years 2008-09 to 2010-11 challenging the orders passed by Ld CIT(A)-8, Mumbai. Since the issues urged in these appeals are identical in nature,

they were heard together and are being disposed of by this common order, for the sake of convenience.

2. In all the three years, the assessee is aggrieved by the decision of Ld CIT(A) rendered on the following issues:-

- (a) Disallowance of incentive paid to directors.
- (b) Disallowance of depreciation.

3. The assessee company is in the business of providing educational consultancy and also assists the students in overseas education. The assessee paid incentives to its three directors and the aggregate amount of incentive paid during the three years under consideration are given below:-

Assessment year	Amount
2008-09	45,00,000
2009-10	45,00,000
2010-11	64,00,000

The three directors to whom incentives were paid are Shri Assan Sukhwani, Shri Sushil Sukhwani and Shri Ajay Sukhwani. During the course of assessment proceedings relating to AY 2008-09, the Assessing officer noticed that the identical payments made in assessment year 2007-08 had been disallowed u/s 40A(2)(a) of the Act and the same was also confirmed by Ld CIT(A). Hence the assessing officer disallowed the above said claim in AY 2008-09 and by following the said order, the AO disallowed the identical claims made in assessment years 2009-10 and 2010-11 also. The Ld CIT(A) also confirmed the said disallowances in all the three assessment years by following his order passed for assessment year 2007-08. It is pertinent to note that Tribunal had partially confirmed the disallowance in assessment year 2010-11.

4. The assessing officer noticed that the assessee had purchased vehicles in the name of its directors and claimed depreciation thereon. Though the said vehicles were accounted as the assets of the assessee company, the AO disallowed the depreciation claim on the reasoning that the assessee cannot be considered to be the legal owner of the vehicles. The Ld CIT(A) also confirmed the said disallowance in all the three years under consideration. It is pertinent to note that the Tribunal also confirmed the disallowance of depreciation made in AY 2007-08.

5. We shall take up the first issue relating to disallowance made u/s 40A(2)(a) of the Act. In assessment year 2008-09, the assessee paid incentives to its three directors aggregating to Rs.45.00 lakhs. Since the identical incentive payments made to the directors in the immediately preceding year was disallowed, the assessing officer asked to the assessee to justify the payments made in the year relevant to AY 2008-09. Even though the assessee gave justification, yet the same was not acceptable to the assessing officer. Hence the AO disallowed the claim with the following observations:-

"I have gone through the contentions of the assessee. The assessee has more or less put forth the same contention as in the assessment proceedings for AY 2007-08. As held in the assessment order for AY 2007-08 the directors are not employees but rather body of employers and they run the business in the name of the company who in turn are entitled to the profits of the company. The payment made to them is not the liability incurred by the assessee company which it was required to meet wholly and exclusively for the purposes of business. The Hon CIT(A) has held that when there was no payment in earlier three years, then the need for payment of incentive to the three directors was not necessitated by the legitimate needs of the assessee's business that can be said to have been arisen during the current year. For the AY 2008-09, the payment of incentive is increased to Rs.45,00,000/-. The assessee has not given any basis or the market value of the services rendered by the directors to justify the incentive paid to them. The facts remaining the same as for the AY 2007-08, the

payment of Rs.45,00,000/- is treated as excessive and added back to the income of the assessee u/s 40A(2)(b) of the I.T. Act.”

A careful perusal of the observations made by the AO would show that the assessing officer has discussed about the necessity of paying incentive to the directors. He has further assumed that the assessee company and the directors are one and the same and he has entertained the said presumption without bringing any material to lift the corporate veil. On the contrary, after making above said observations, he has assessed the income of the assessee company in its hands only, meaning thereby, he has also recognized the fact that the assessee company and its directors are different persons under the Income tax Act. Thus, we notice that the assessing officer has not examined the impugned payment of incentive in terms of conditions prescribed in sec. 40A(2)(a) of the Act.

6. 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.”

7. The Hon’ble Kolkatta Special bench of ITAT had an occasion to examine the provisions of sec. 40A(2)(a) of the Act in the case of JCIT Vs. ITC Ltd (112 ITD 57)(Kol) and it has been held as under:-

“89. A plain reading of the provisions contained in section 40A(2)(a) makes it clear that it would be applicable only if the following conditions are satisfied:-

(i) where the assessee incurs any expenditure;

- (ii) the payment for such expenditure is to be made to any person referred to in clause (b) of this sub-section;
- (iii) the assessing officer is of the opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facility for which the payment is made.

90. All the above conditions must be satisfied so as to apply the provisions of Section 40A(2)(a). So far as the facts of the case under consideration before us are that there is no dispute that the assessee has incurred the expenditure and the payment has been made to a person referred to in Clause (b). The only dispute is whether the payment for such expenditure is excessive or unreasonable having regard to the fair market value of the goods. In this regard, we agree with the submission of the Id. D.R. that whether the payment is excessive or unreasonable is to be examined in each year and merely because in the preceding year the addition was deleted by the ITAT would not be sufficient to delete the addition in subsequent year, because the payment may be reasonable in one year and it may be unreasonable or excessive in other year."

8. We have noticed earlier that the assessing officer has not examined the claim of the assessee in terms of the mandatory conditions prescribed u/s 40A(2)(a) of the Act. The Ld CIT(A) has also confirmed the disallowance made in all these three years by following his order for AY 2007-08.

9. In the instant case, there is no dispute that the directors of the assessee fall in the category of related persons prescribed in sec. 40A(2)(b) of the Act. Hence the payments made to them can be examined by the assessing officer u/s 40A(2)(a) of the Act. It is also pertinent to note that the disallowance prescribed in section 40A(2)(a) of the Act is not absolute disallowance, but subject to the satisfaction of the conditions prescribed in that section. Further what is required to be

disallowed is the portion of the expenditure which is considered to be excessive or unreasonable.

10. We notice that the assessee has offered following explanations during the course of assessment proceedings relating to AY 2008-09 in order to justify the payment of incentives to the directors.

“ As regards to your query why incentives paid to directors should not be disallowed we submit as under :

“The Assessee is a Private Limited Company (hereinafter referred to as the Company) engaged in the business of assisting students in overseas education and providing guidance for higher education in various countries such as UK, Australia, Canada, New Zealand and U.SA.

As the Company is engaged in service sector qualified and experienced personnel is required to manage the affairs of the Company. The Company has appointed three directors who are responsible for managing the affairs of the Company. They provide services which vary from taking vital decisions concerned with the affairs of the Company to managing the day to day operations of the Company. The directors are compensated by the Company for the services rendered by them. Note on services rendered by the directors along with supporting documents to prove the actual rendering of services is enclosed for your perusal (**Annexure I**).

All the directors are whole time directors of the Company and devote their time only to the business of the Company. This can be evident from their return of Income as they do not have any other Income except the remuneration and incentive received from the Company. Incentives & remuneration paid to the directors are reflected in their individual return as a salary only and no expenses is claimed out of incentives paid to directors. All the Directors are well educated and in fact two of them are MBA from reputed university of Australia/ Switzerland. Note on job Profile of the directors along with copy of their return of income is enclosed for your perusal. (**Annexure II**) .

The services provided by the directors during the year for the "business operations of the company has increased the gross receipts to Rs. 14,68,96,531 for the year ended 31 March 2008 from Rs.10,38,42,783 for the year ended 31 March 2007 and the net profit to Rs. 6,33,71,196 for the year ended 31 March 2008 which is approximately 35% more than the net profit of Rs.4,69,70,264 earned for the year ended 31 March 2007. It is pertinent to note

that the directors dedicated efforts to develop the business has led to consistent growth in the gross receipts as well as net profits of the Company. To compensate the directors for their remarkable contributions towards the growth of the Company during the year Rs.18,12,500/- is paid towards remuneration and Rs.45,00,000/- is paid towards incentives to the directors in lieu of their services received during the year. The incentives paid to the directors are authorized by the resolution of board of directors as regards to the said payment.

We would like to state here that all the directors put in their best efforts to establish the business of the company and in initial years, when the business was being set up, they have sacrificed their earnings by taking very less salary compared to what is prevalent in market with only intuition to strengthen the company's financial position. It was thought prudent to pay incentives to all staff including directors over and above salary/remuneration/bonus when company got better cash flow & liquidity & became financially stable. The Company's Accounts of last 4 years itself speaks of the director's efforts and achievement to qualify for the reward in form of incentives. We would like to enclose the salary paid to the remaining executives & staff. (Annexure III)

Presently the demand for qualified and experienced managerial personnel has gone up in the market and it is difficult for the companies in the industry to locate such personnel and avail their services to develop the business of the Company. The role of the managerial personnel is to generate the business for the Assessee Company as well as to execute the operations in a timely manner. Due to the acute competition in the market the Companies pay adequate remuneration in the form of salary, commission and incentives to managerial personnel who are responsible for business development in the competitive market. In the present case the Company has remunerated the directors in the form of salary and incentives for developing the business as well as operating the day to day affairs of the business.

Considering the nature of services rendered by the directors, high demand for managerial personnel and acute competition in the market the remuneration paid to the whole time directors of the Company is reasonable and-not excessive.

Without prejudice to above it is submitted that the directors to whom incentives is paid are also taxed under the same tax bracket as the company pays tax i.e. @30% and considering the fact that they have been paid incentive for excellent performance of the company, the payments made are bonafide and not merely device to reduce tax

liability & there is no evasion payment of tax by the Company by alleged payment of higher incentives to its directors. Further jurisdictional Bombay High Court in case of CIT V/s **INDO SAUDI SERVICES (TRAVEL) (P.) LTD.** 310 ITR 306 (Bom)

“Under the CBDT Circular No. 6-P, dated 6th July, 1968 it is stated that no disallowance is to be made under section 40A(2) in respect of the payments made to the relatives and sister concerns where there is no attempt to evade tax. The Tribunal was correct in coming to the conclusion that the CIT(A) was wrong in disallowing half per cent commission paid to the sister concern of the assessee during the asst. yrs.1991-92 and 1992-93. The advocate appearing for the Revenue was also not in a position to point out how the assessee evaded payment of tax by alleged payment of higher commission to its sister concern since the sister concern was also paying tax at higher rate and copies of the assessment orders of the sister concern were taken on record by the Tribunal.”

In our case as the directors are also paying tax at a same higher rate the decision of Bombay High Court is totally applicable to our case and thus no disallowance is called for .

The Madras High Court in case of CIT V/s **NEPC India Ltd.** (2008) 303 ITE 271 (Mad) held that :

“What 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 thereunder. 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.”

Conclusion

Considering the nature of responsibilities and the work handled by the directors the amount paid towards remuneration including incentives to all the directors is much lower than the remuneration paid to managerial personnel across the industry in various sectors handling responsibilities and having job profile similar to the directors of Assessee company. Therefore, based on the above facts and the

judicial decisions the remuneration inclusive of incentive paid to directors is reasonable justified and not excessive.

Note on nature of services rendered by the Directors :

There are three Directors in the company Ms. Assan H Sukhwani, Mr. Sushil A Sukhwani and Ajay A Sukhwani. Each one of them is working full time for conducting business of Edwise Consultants Pvt Ltd, while attending day to day working of the company they do the follows :

1. Meet the students and monitor their needs for selection of universities, admissions, bank loan, visas, accommodation, etc to assist them totally for their enrolment in foreign universities.
2. Supervise and oversee the total operations of counsellors who are giving the counselling to the students for their overseas education studies.
3. Coordination with bankers for student loan and their foreign exchange requirements.
 4. Continuous interactions and email correspondence with various universities for seats available in various courses, status of offer and admission, list of students registered. **Annexure No. 1**
 5. Many universities visit their office-for conducting interviews for which they advertise in the newspaper, invite students to visit their office to meet the foreign university faculties & international officers. They supervise total operation of telecallers to inform & invite interested students to come for interviews. In their office they have to make arrangements for large number of students appearing for interviews & get them proper time slots. **Annexure no.2**
 6. Frequently visit overseas universities to meet their international officers, faculties and update ourselves with the latest syllabus, program, fee structure and other updates at the universities and familiarize ourselves with the university campuses, living arrangements for the students to give proper information to the interested students. **Annexure no.3**
 7. Organizing training for the counsellors & other staff members with the universities and organize their trips for familiarization of university campuses & other arrangements. **Annexure no.4**
 8. Organizing Education fairs in different cities and arranging students interview with-the universities for their spot admissions and getting waiver of application fee. During the

year they organized & participated in the fairs such as ISE Event Management 2007, Global Events & Expositions, Affairs, Times Boutique Fair, Admaark Inc-Nagpur 8th Career Fair, Indus Fairs & Events. ABec Ltd, AAAOE Chennai, Midday Education Fair, Career Fair '07, New Zealand Education Fair 07. **Annexure no.5**

9. Approach Schools & Colleges to get tie ups with them to arrange seminars about various courses available in different overseas colleges & universities, in different Countries. During the year they had put up stalls at HR College, N.M College, Rizvi College; Sophia College Kaledoscope 07, Atharva College, SIES, SNTD College, Bhavan's College, R.D. National College, Mumbai St. Xaviers College, Sydnem College, Datta Meghe Tech Festival; Saboo Siddik College of Engineering at their annual festivals.

10. They organize pre departure seminars at all cities before students leave country to join the course at overseas universities. These pre departure programs are conducted at Nehru Centre at Mumbai & similar prime locations at other cities. In these programs they educate students about teething problem they may encounter overseas. They familiarize them about countries they are visiting, their campuses, their transportation & other important information. They invite Visa Officers from Consulate, Bank Staff offering Loan, foreign exchange and opening bank account before landing at university campuses, Mobile Vendors to carry the mobile, SIM card for overseas countries, Insurance companies to give them Travel insurance and medical insurance while living there, Airlines who offers them concessional tickets and extra baggage without excess baggage charges. During the year Citi Bank, Centurion Bank of Punjab, Matrix Cellular Services participated in their pre departure programs. **Annexure no.6**

11. They themselves do the media jobs such as designing & releasing the ads in the news paper, print their color brochures & leaflets, give articles in the news paper. They have succeeded in getting attractive discounted rates from Media. **Annexure no. 7**

12. Looking after marketing and business promotion of the company to get growth every year.

13. Travel to branches frequently to monitor and to look after the total operation of the business including students counseling, recruitment of staff and their needs to run branches smoothly. **Annexure no. 8**

14. All the Bills and payments are checked, verified and initialled by them before making payments to staff, suppliers and vendors. **Annexure no.9**

15. They recruit staff by releasing advertisement in the news papers or with tie up with recruitment & placement agencies. They conduct interviews for selecting suitable candidates for the jobs. **Annexure no.10.**

16. All the banking operations and signing of all cheques are done by them only. **Annexure 11.**

17: All universities billing for students enrolled is done by them.

Annexure no.12

They have not appointed any HR Manager, Media & Event Manager, Marketing & Business Development Manager, Finance Manager, Administrative Manager as all these administrative & executive jobs are performed by Assan Sukhwani, Sushil Sukhwani, Ajay Sukhwani with assistance of Punita Sukhwani, Anita Sukhwani & Preeti Sukhwani for which they have been paid for."

11. In the above said reply, the assessee has enclosed the details about education and job responsibilities of the three directors. For the sake of convenience, we extract below the same:-

"JOB PROFILE OF DIRECTOS AND OTHERS OF EDWISE CONSULTANTS PVT.LTD.

ASAN SUKHWANI

- Assan Sukhwani is Diploma holder in Electronic Engineering and had opportunity to work with Tata Institute of Fundamental Research for 2 years and at London for 2 year. He has extensive experience in Electronics goods for household and industry, computer training, watch assembling industry and overseas education recruitment. He has total work experience in India and overseas for about 49 years and is actively involved in day to day business of Right Fin Cap Pvt. Ltd with following responsibilities.
- Incharge of Accounting, Banking & Finance
- Office Administration & Control for smooth functioning
- Monitoring Branches for their needs
- All property related matters i.e. Purchase, leasing, payment of property & municipal taxes and maintenance ..
- HR, Personnel, Provident Fund, ESIC, Professional Tax, Service Tax and other related matters.
- Furniture, Fixtures & Air conditioning for HO & Branches

- Travelling to branches for supervising and overseeing for smooth functioning.

SUSHIL SUKHWANI

- He has graduated from University of Mumbai and has done his Masters in Business Administration from Australia with high grades. He managed 3 Aptech Computer training centers with high enrolments and collections. Simultaneously, he started overseas education consultancy to enroll students for universities overseas. He has taken the following responsibilities.
 - Incharge for USA & Canadian Universities for their tie ups.
 - Regularly travels to USA, Canada, France for interaction and for new tie ups with universities.
 - Travels to branches to meet their needs, recruiting new staff, getting them proper computer equipments and its smooth functioning
 - Controls full media and ad campaigns, world education fairs of edwise in all cities
 - Development & implementation of ecrm software to function students enquiries and enrollment and data online.
 - Website designing and maintenance.
 - Internet marketing through google.
 - Telemarketing like BPO centre.
 - Assisting students for education loan from the banks
 - Updating himself with visa requirements for various countries and assisting students to ensure issuance of visa to students with above 95% success.

AJAY SUKHWANI

- He has graduated from University of Mumbai and has done his Masters in business Administration from Switzerland with high grades. He assisted his brother in managing 3 Aptech training centers. He has taken the following responsibilities.
 - He is incharge of UK, Australia and New Zealand universities.
- He travels regularly to UK and other overseas countries for tie ups with new universities, updating himself with new course materials, fee structures and other universities related information.
- He travels to branches and focuses on training of counselors for providing proper and update info to the students of the branches
- He is incharge of database and collects database at HO & branches from the schools; colleges and other educational institutions.

- He organizes and arranges interviews of universities whenever universities international officers and their faculties are visiting India to conduct one to one interviews of students for their selection.
- He assist students to get bank loans and help them with full procedure to get their for their studies in UK, Australia & New Zealand.
- Assist students to get visa for UK, Australia & New Zealand smoothly”

From the above said details, it can be noticed that all the three directors have taken full responsibility and are also in direct charge of all the operations of the business. It is also pertinent to note that the company has not appointed any senior executives in key areas of operation, i.e., it has not appointed HR manager, Media & Event manager, Marketing & Business Development Manager, Finance Manager, Administrative Manager.

12. Thus we notice that all the three directors are fully in charge of all the operations and further they possess required qualification and experience to carry out all the operations. The Ld A.R submitted that the operations of the company has consistently grown up under the management of the directors and in support of the same, he brought to our notice following facts.

Edwise Consultants Pvt Ltd.

Income tax assessment years 2008-09, 2009-10 and 2010-11
(Previous years ended 31st March, 2008, 2009 and 2010, resp)
ITA No.5376/Mum/2011, 594/Mum/2013 and 4121/Mum/2014, resp

	Assessment years			
	2007-08	2008-09	2009-10	2010-11
Gross income from operation	10,88,29,138	15,10,95,082	19,04,69,854	25,28,78,841
Y-o-Y increase				
Net profit	4,69,70,264	6,33,71,196	8,09,18,668	11,19,99,632

Percentage of net profit to gross receipts	43	42	42	44
Y-o-Y increase	71	39	26	33
Number of universities added	62	48	37	42
Branches opened	Ahmedabad Vizag Coimbatore Cochin	Hyderabad Kolkata Delhi	Chennai Malad, Mumbai Surat Thane	

The above said facts relating to the growth of the company, in our view, vindicate the claim of the assessee that all the company has grown under the leadership of all the three directors.

13. Under section 40A(2)(a) of the Act, the assessing officer is required to find out as to whether the payment made to the persons referred to in section 40A(2)(b) is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by accruing to the assessee there from.

14. In the instant case, it is already noted that the key personnels have not been appointed and all the three directors are in charge of all the operations, meaning thereby, there was legitimate need for the business of the assessee company to employ qualified and experienced persons to carry out its business operations relating to educational consultancy and the said need was fulfilled by the three directors. Hence the payment made to them was for legitimate business needs of the assessee company. The financial and operational results listed out in the paragraph 12 (supra) shows that the assessee company has derived benefit from the payment made to the directors.

15. The next important question that arises is as to whether the payments so made were excessive or unreasonable having regard to the fair market value of the services for which the payment was made. In the instant case, we have earlier noticed that the assessing officer has disallowed the incentives given to the directors only for the reason that similar payments made in the earlier years had been disallowed. We have further noticed that the assessing officer has also observed that the directors are not employees but rather body of employers and they run the business in the name of the company who in turn are entitled to the profits of the company. It is well settled principle that a limited company is a legal person and it is a separate and distinct entity, different from its share holders. The directors are the persons selected from amongst the share holders to run the business of the company. Under the Income tax Act as well as under the Common law, a company is considered as a body corporate with perpetual succession and it can hold the properties on its own. Further it can sue any person and it can also be sued. However, as stated earlier, the corporate veil of a company can be lifted under certain circumstances, in which case, the profits shall be assessed in the hands of the real owner. In the instant case, the corporate veil of the assessee company has not been lifted. In fact, the assessing officer has assessed the income of the assessee company in its hand only. It is well settled proposition that neither the share holders nor the directors can lay their claim over the profits of the company. The directors are entitled to receive remuneration for the services rendered by them to the company and the share holders can expect only dividend on the shares held by them. Hence the observations of the AO that the directors are entitled to the profits of the company are incorrect.

16. The AO has also observed that the payment made to the directors is not the liability incurred by the assessee company which it was required to meet wholly and exclusively for the purpose of business. It is pertinent to note that the salary paid to the directors has been fully allowed by the assessing officer and he has disallowed only the incentives paid to them. The said action of the assessing officer is contradictory to the observation made by him. We have earlier noticed that the payment is made to the directors having regard to the services rendered by them to the company. Hence, the assessing officer should have examined the payments having regard to the fair market value of services rendered.

17. We notice that the assessing officer did not examine the aspect of fair market value of services at all. He has simply disallowed the incentive payments for the reason that similar payment was disallowed in assessment year 2007-08. In the case of ITC Ltd (supra), the Special bench of Kolkatta ITAT has held as under:-

“... In this regard, the revenue rightly submitted that whether the payment was excessive or unreasonable was to be examined in each year and merely because in the preceding year the addition was deleted by the Tribunal, it would not be sufficient to delete the addition in subsequent year, because the payment may be reasonable in one year and it may be unreasonable or excessive in other years.”

Hence, the question as to whether the payment is excessive or unreasonable has to be examined every year and one should not mechanically follow the decision taken on the very same issue in the preceding years.

18. In AY 2010-11, the Ld CIT(A) has followed the decision rendered by the co-ordinate bench in assessee's own case in AY 2007-08. We have gone through the said order of the Tribunal and we notice that the

Tribunal has noticed that two of the directors have been given only incentive of Rs.10.00 lakhs each and they have not been paid salary. Only one of the directors was paid both salary of Rs.3.60 lakhs and incentive of Rs.10.00 lakhs. Hence the Tribunal has restricted the amount to be allowed in respect of the other two directors also to the extent of salary paid to the third director, meaning thereby the incentive claim was partly allowed by the Tribunal. Hence, the Ld CIT(A) was incorrect in presuming that the entire incentive claim was disallowed by the Tribunal.

19. Further, the Special bench of the Kolkatta Tribunal has held in the case of ITC Ltd (supra) that the question of applicability of the provisions of sec. 40A(2)(a) should be examined every year in the prevailing facts and hence the decision given by the Tribunal in earlier years under the facts prevailing in that year does not have binding effect. In AY 2007-08, the Tribunal expressed the view that two of the directors, who have not been paid incentive, have not received any salary and they have received salary and professional income from other companies. However, in the years under consideration, all the three directors have been paid salary and they have received remuneration mainly from the assessee company only. This fact also distinguishes the case of the years under consideration from AY 2007-08.

20. We have earlier noticed that all the directors are in charge of the entire operations of the assessee company and the financial/operational results of the company are growing every year. Hence, on that count alone, the salary and incentive paid to the directors could be justified and could not be found fault with, without bringing the fair market value of services. In our view, the financial and operational results, justify the payments made to the directors. At this juncture, it is pertinent to refer to

the binding decision rendered by the Hon'ble jurisdictional Bombay High Court in the case of CIT Vs. Indo Saudi Services (Travel) (P) Ltd (2009)(310 ITR 306), wherein the Hon'ble Bombay High Court referred to the Circular issued by CBDT with regard to sec. 40A(2)(a) as under:-

“Under the CBDT Circular No. 6-P, dated 6th July, 1968 it is stated that no disallowance is to be made under section 40A(2) in respect of payments made to relatives and sister concerns where there is no attempt to evade tax.”

In the case before the Bombay High Court, the revenue was not in a position to show as to how the assessee therein evaded payment of tax by alleged payment made to its sister concern, since the sister concern was also paying tax at higher rate and hence the disallowance made u/s 40A(2)(a) was deleted. We further notice that the Hon'ble Bombay High Court has expressed identical view in the case of V.S. Dempo & Co. (P) Ltd (336 ITR 209) also. The Hon'ble Punjab & Haryana High Court has also expressed similar view in the case of CIT Vs. Siya Ram Garg (HUF) (2011)(237 CTR 321).

21. We notice that in the instant cases also, identical position is obtaining, i.e., the directors are also paying tax at higher rate in all the three years under consideration. The Total income declared by the three directors is tabulated below, for the sake of convenience:-

Name	AY-2008-09	AY-2009-10	AY-2010-11
a. Assan H Sukhawani	Rs.in Lakhs 28.69	Rs.in Lakhs 29.57	Rs.in Lakhs 40.95
b. Sushil Sukhwani	34.04	40.47	63.21
c. Ajay Sukhawani	32.57	38.85	52.12

The income declared by all the three directors show that the incentive received by them in respective years has suffered tax at the higher rate of taxation, i.e., equivalent to the tax rate applicable to the assessee company. Hence there is merit in the contentions of the assessee that there was no attempt to evade tax. Hence, in our view, the decision rendered by the Hon'ble Bombay High Court in the case of Indo Saudi Services (Travel) (P) Ltd (supra) squarely applies to the facts of the instant case. Hence, on this count also, the disallowance made u/s 40A(2)(a) is liable to be deleted in all the three years.

22. In view of the foregoing discussions, we are of the view that there is no justification on the part of Ld CIT(A) in confirming the disallowance made u/s 40A(2)(a) of the Act. Accordingly, we set aside the orders passed by Ld CIT(A) on this issue in all the three years and direct the assessing officer to delete the impugned addition made in all the three years.

23. The next issue relates to the disallowance of depreciation. The assessing officer disallowed the depreciation claim made on the cars only for the reason that the vehicles stood in the name of the directors and hence the assessee cannot be considered to be the legal owner. The Ld A.R submitted that the funds for purchase of cars were provided by the assessee company and the vehicles have been accounted as the assets of the assessee company only. He further submitted that the registration is only a formality and the same would not disentitle the assessee from claiming depreciation, even if it is registered in the name of its directors. In this regard, he placed reliance on the following case law:-

- (a) Poddar cements Ltd (226 ITR 625)
- (b) ITO Vs. Electro Ferro Alloys Ltd (2012)(13 ITR (Tri) 594

- (c) CIT Vs. Aravali Finlease Ltd (2012)9341 ITR 282)(Guj)
- (d) CIT Vs. Basti Sugar Mills Co. Ltd (2002)(257 ITR 88)(Delhi)

24. On the contrary, the Ld D.R submitted that the co-ordinate bench of Tribunal has confirmed identical disallowance made in the assessee's own case in AY 2007-08.

25. We have heard the parties on this issue and perused the record. We notice that the Hon'ble Gujarat High Court has considered identical issue in the case of Aravali finlease Ltd (supra) and has taken the decision that the depreciation is allowable in the hands of the company, even if it is registered in the name of its director provided that the vehicle is used for the purpose of business of company and income derived there from was shown as income of the company. In the instant case there is no dispute with regard to the fact that the vehicles are used for the purpose of business of the assessee company. In the case of Basti Sugar Mills Co. Ltd (supra), the Hon'ble Delhi High Court approved the decision of the Tribunal in holding that, since vehicle is a movable asset, the registration as required in the case of transfer of immovable property is not a condition precedent for legal ownership. In the instant case, the funds for purchase of vehicles have been provided by the assessee company and they have been shown as assets of the assessee company. Hence, in our view, the assessee company should be considered as owner for all practical purposes and hence it is entitled for depreciation. In view of the direct decision of Hon'ble Gujarat High Court is available on this issue, we prefer to follow the same to that rendered by the Tribunal in the assessee's own case for AY 2007-08. Accordingly, we set aside the order of Ld CIT(A) on this issue and direct the AO to allow depreciation on vehicles.

26. In the result, all the three appeals filed by the assessee are allowed.
Pronounced accordingly on 14th Oct, 2015.

घोषणा खुले न्यायालय में दिनांक: 14th Oct, 2015 को की गई ।

Sd

(AMARJIT SINGH)
JUDICIAL MEMBER

sd

(B.R. BASKARAN)
ACCOUNTANT MEMBER

मुंबई Mumbai: 14th Oct, 2015.

व.नि.स./ SRL , Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

True copy

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai