

IN THE INCOME TAX APPELLATE TRIBUNAL  
“SMC A” BENCH : BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA No.2607/Bang/2018
Assessment year : 2013-14

Candor Business Solutions P. Ltd., Unit C-2, Pentaabase, No.5, Basappa Road, Bengaluru – 560 027. <b>PAN: AACCC 6166C</b>	Vs.	The Income Tax Officer, Ward 2(1)(1), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri Ravish Rao, CA
Respondent by	:	Shri D. Kiran, Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	07.01.2019
Date of Pronouncement	:	09.01.2019

**ORDER**

This appeal by the assessee is against the order of the CIT(Appeals) dated 23.11.2016 for the assessment year 2013-14.

2. There is a delay of 571 days in filing this appeal. Originally application for condonation of delay along with affidavit has been filed wherein it was stated that there was a delay of 582 days. This was pointed out to the assessee's counsel. Accordingly he revised the condonation petition explaining the reason for delay in filing this appeal as follows:-

“AFFIDAVIT

I Smt. Umadevi S Y, aged 49 years, residing at Hampi Nagar, Bengaluru, do hereby swear on oath as under that

1. I am a Director of the Appellant Company, namely, **Candor Business Solutions Private Limited** and am well aware of the full facts of the case.
2. The Appellant Company filed its Return of Income under the provisions of Income Tax Act, 1961 (herein referred to as 'Act') for the Assessment Year 2013-14, Previous Year and Accounting Year being 2012-13, on 30-09-2013.
3. The above Return of Income was processed u/s 143(3) by the Income Tax Officer, Ward 2(1)(1), Bengaluru and passed an order vide order dated 30-06-2015.
4. In the above Assessment Order the Learned Income Tax Officer disallowed the expenditure claimed under the head salaries, which included bonus paid to Directors to the extent of Rs. 17,00,000/-, under section 36(1)(ii) of the Act.
5. The Appellant Company challenged the above disallowance before the Commissioner of Income Tax Appeals-2, Bengaluru who dismissed the Appeal vide order dated 23-11-2016.
6. This has resulted in taxation of Rs. 17,00,000/- at 30% in the hands of the Company and by virtue of this, the refund available to the Company was reduced by Rs 5,25,368/-.
7. The Directors of the Company, on the other hand, had included the bonus amount of Rs. 17, 00,000/- in their respective Income Tax Returns during the Assessment Year 2014-15 and paid taxes @30%.
8. The above situation resulted in taxation of the bonus amount of Rs. 17, 00,000/- TWICE, once, in the hands of the Company by disallowance and secondly in the hands of the Directors, as bonus under the head salary.

9. At this stage, the Directors were guided that, an amount that has already been taxed in the hands of the Company, by disallowing that, an item, not an allowable expenditure, the same cannot be taxed in the hands of the Directors as 'Bonus'. It is a well settled proposition of law that an amount can be taxed, only, ONCE and not TWICE. The above view was supported by the following judgments:

- Mrs. Bakhtawar B Dubash v DCIT, Central Mumbai 2009-TIOL-288-ITAT-MUM.
- SSKI Investor Services Pvt Ltd v DCIT, Central Mumbai [2009] 34 SOT 412 (ITAT [MUM]).

10. In view of the above guidance the Directors of the Company decided that they should file Revised Return for the Assessment Year 2014-15 and claim the refund of tax what they have paid against the bonus amount of Rs. 17,00,000/-.

11. In view of the above decision, the Company decided, at that moment, that the Company will not file an appeal against the order of Commissioner of Income Tax Appeals-2 who had dismissed the appeal.

12. Accordingly, the Directors of the Company prepared Revised Return for the Assessment Year 2013-14. Since the Revised Return becomes a delayed Return and it can be accepted, only, by the condonation of delay by the Principal Commissioner of Income Tax-2, Bengaluru, the Delay Condonation Application was also prepared. The above documents were submitted before the respective Authorities.

13. The Principal Commissioner of Income Tax-2, Bengaluru, however, dismissed the Delay Condonation Application as it is not maintainable before him.

14. The above situation put the Company in a dead lock. This made the Company to review the matters, once again, to proceed further in the matter. In the review the Directors decided to file an appeal against the order of Commissioner of Income Tax, Appeals-2, Bengaluru challenging the disallowance of bonus u/s 36(1)(ii) of the Act before the Income Tax Appellate Tribunal.

15. The Appellant has received the order of Principal Commissioner of Income Tax-2, Bengaluru rejecting the Delay Condonation Application.

16. Filing the Appeal before the Income Tax Appellate Tribunal, now, at this stage, results in **a delay of 571 days**.

17. The Appellant faithfully submits that the delay of 571 days in filing the appeal before Tribunal was due to the reasons narrated in the preceding paragraphs. No sooner the Principal Commissioner of Income Tax-2, Bengaluru rejected the application filed before him u/s 119 of the Act, the Appellant reviewed the whole matter, once again, and decided to come up before this Honorable Court, in appeal, without delaying further.

18. The appellant did not have any other mala fide intention in delaying the appeal.

19. The issue involved in the appeal is of very high importance, "whether an income can be taxed twice" "whether an income, already taxed by disallowance of expenditure, can be taxed in the hands of the Directors as income".

20. Submit the above the Appellant hereby humbly prays this Honorable Court the delay of 571 days in filing the appeal may kindly be condoned and the appeal may be admitted for the hearing.”

3. Accordingly the Id. AR requested for condonation of delay of 571 days in filing the appeal before this Tribunal.

4. On the other hand, the Id. DR has not put forth any serious objection condonation of delay.

5. I have heard both the parties with regard to condonation of delay. There was a delay of 571 days in filing the appeal before this Tribunal. The reasons stated by the assessee in its petition is that the assessee has been pursuing alternative remedy to get

relief. According to assessee, disallowance of Rs.17 lakhs has resulted in taxation in the hands of assessee company. In addition to this, the same amount was taxed in the hands of respective directors which resulted in taxation of a sum of Rs.17 lakhs twice i.e., once in the hands of the company by way of disallowance and again in the hands of directors as bonus under the head of salary. The assessee guided by legal professional that the said amount cannot be taxed twice. In view of this, the assessee filed a revised return of directors viz., Smt. Umadevi S.Y. and Ms. Namrata Shilpi for the AY 2013-14 on 15.02.2018. Thereafter the assessee filed petition for condonation of delay before the Pr. CIT-II on 16.02.2017 and 11.06.2018. However, the Pr.CIT-II, Bangalore has not condoned the delay in filing the revised return. In view of this, the assessee decided to file appeal against the order of CIT(Appeals) before this Tribunal and filed appeal before this Tribunal on 17.09.2018 which resulted in a delay of 571 days. In my opinion, the assessee pursuing alternative remedy has to be considered as good and sufficient reason for filing the appeal belatedly before this Tribunal. The expression "sufficient cause" should be interpreted to advance substantial justice. Therefore, the advancement of substantial justice is prime factor while considering the reasons for condonation of delay. In this case on hand, the issue that arises for consideration on merits is with regard to the allowability of bonus paid to the director

shareholders while computing income of the assessee. Admittedly, identical issue was considered by the Hon'ble Delhi High Court in the case of *AMD Metplast P. Ltd. V. DCIT 314 ITR 563 (Del)*, *CIT v. Career Launcher India Ltd., 358 ITR 179 (Del)* also in *Chryscapital Investment Advisors (India) P. Ltd. v. DCIT, 376 ITR 183 (Del)*, wherein it was held that bonus which was paid to the directors in their managerial capacity in accordance with the employment terms is to be allowed as a business deduction. Therefore, the issue raised by the assessee on merit stands squarely covered by the above judgments in favour of assessee. But there is a technical defect in the appeal since the appeal was not filed within the period of limitation.

6. The assessee filed an appeal stating that it was pursuing alternative remedy before the lower authorities. In support of the same, the assessee has filed documents in the form of condonation petition before Pr. CIT-II, Bangalore dated 16.02.2017 and 11.06.2018, copy of revised return of directors dated 15.02.2018. The revenue has not filed any counter affidavit to deny the facts brought on record by the assessee. Being so, in my opinion, when substantial justice and technical consideration are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have vested right for injustice being done because of non-deliberate delay. In the case on hand, the issue on merits of allowability of expenditure towards bonus in the

hands of assessee is covered in favour of assessee by the judgments cited supra. It is not the case of revenue that the assessee filed appeal belatedly deliberately. Therefore, I have to prefer substantial justice rather than technical consideration in deciding the issue. Therefore, I am inclined to condone the delay by placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Collector of Land Acquisition v. Mst. Katiji*, 167 ITR 471 (SC). Accordingly, I condone the delay and admit the appeal for adjudication.

7. Coming to the merits of the case, the assessee has raised lengthy grounds in this appeal which relates to disallowance of Rs.17 lakhs paid by the assessee as bonus to director shareholders of the assessee company u/s. 36(1)(iii) of the Act.

8. The Id. AR submitted that the lower authorities erred in facts in treating the aforesaid payment as dividend paid in the garb of bonus without appreciating the facts of the case. The nature of payments to director shareholders being the variable component of salaries was supported by the terms of employment between the assessee company and the director shareholders. The revenue authorities erred in construing that the language of Section 36(1)(ii) contemplates "payment of bonus or commission only to those who would not be in receipt of profits or dividend had if not been paid as bonus or

commission", thereby suggesting that the section prevents payment of bonus to shareholders who are rendering full time service to a Company. There was no guarantee or requirement for the assessee company to pay dividends for the year to the shareholders, hence it should not be claimed that the said amounts were paid as bonus instead of as dividends. The revenue authorities failed to appreciate that the facts of 2 judicial pronouncements *Subodhchandra Popatlal vs CIT, (1953)24 ITR 566 (Bom)* and *Laxmandas Sejram vs CIT (1964) 54 ITR 763 (Guj)* are not applicable to the case of the assessee. The assessee paid bonus to its Director shareholders under the obligation cast by their terms of appointment, which the lower authorities construed as bonus paid as "a gift, reward or premium granted voluntarily ..... as a matter of grace and without consideration or obligation". The revenue authorities erred in emphasizing that bonus has been paid to persons directly interested and controlling the interests of the assessee company, as the payment of bonus was in no way a sharing of profits of the Company but an acknowledgment of remuneration due towards services rendered to the assessee by persons responsible for the growth, profitability, branding and day to day functioning. It was further submitted that the assessee deducted taxes at source of Rs, 2,62,652/- from the amounts paid to the Director shareholders at the rate of 30.9% and that such bonus has also been included as income in the hands of the recipients



in their personal tax assessment. There was therefore no intention on the part of the assessee or the Director shareholders to evade tax. Since the amount has already been taxed in the hands of the company, by disallowing the same as not an allowable expenditure, the same cannot be added in the hands of the director. Reliance was placed on the decision of the ITAT Mumbai in the case of *Mrs Bakhtawar B Dubash v DCIT, Central Mumbai 2009-TIOL-288-ITAT-MUM*. It is well-settled legal proposition of taxation that no income should be tax doubled though the recipient is changed as held by the ITAT Mumbai Bench in the case of *SSKI Investor Services Pvt Ltd v DCIT, Central Mumbai 120091 34 SOT 412 (ITAT[MUM])*. The Id. AR further relied on the following decisions:-

- CIT v. Career Launcher India Ltd., 358 ITR 179 (Del)
- CIT vs. Convertech Equipments (P) Ltd., (2013) 081 DTR 0409
- Chryscapital Investment Advisors (India) P. Ltd. v. DCIT, 376 ITR 183 (Del)
- AMD Metplast P. Ltd. V. DCIT 314 ITR 563 (Del)

9. The Id. AR thus submitted that payment of bonus to director shareholders has been made according to terms of appointment of directors duly supported by Board Resolution and the payment of remuneration along with bonus paid to director shareholders is commensurate with the qualification and experience of the directors viz., Ms. Namrata Shilpi and Ms. Umadevi S.Y. It was submitted that these two persons actively

participated in the management of the company and facilitated the running of business of assessee firm on profitable line.

10. On the other hand, the Id. DR submitted that the AO has clearly brought on record that the 2 directors to whom the bonus has been paid are the share holders of the assessee company who hold the entire share holding of the company between them in equal ratio. Also, the assessee company has substantial profits. No specific case of payment of bonus in relation to any services rendered by the said directors has been brought on record even during the course of appeal. The AO has brought on record that out of Rs.18,65,605/- distributed as bonus, Rs.17,00,000/- constitutes the amount disbursed to the said 2 share holder directors, who in turn, constitute the entire share holding of the company and a paltry sum of Rs.1,65,605/- has been distributed among 10 other employees, showing that this amount is covered by the provision of Section 36(1)(ii) and not allowable. The claim of the assessee that taxes have been paid by the share holders treating the said payment as remuneration will not satisfy the default pointed out as the assessee would have paid 30% tax plus surcharge etc., plus dividend distribution tax @ 15% u/s 115-O, (as the said amount is simply a distribution of profits in the nature of dividend). Whereas, the individual directors have paid tax only at the slab rates applicable.

11. The Id. DR relied on the order of the Special Bench of ITAT Mumbai, in the case of *Dalal & Broacha Stock Broking (P) Ltd* vide order in ITA No.5792/MUM/2009 dated 22/6/2011, has held that such payments are not allowable u/s 36(1)(ii) read with Section 37(1).

12. We have heard both the parties and perused the material on record. In this case, bonus to the tune of Rs.17 lakhs has been paid to two director shareholders, viz., Ms. Namrata Shilpi and Ms. Umadevi S.Y., at Rs.8.5 lakhs each. This is authorized by the Board Resolution dated 12.04.2012 which is placed on record at page 33 of the PB. These two persons are duly qualified and experienced as follows:-

“Directors' profile (refer [www.ecandor.com](http://www.ecandor.com))

Umadevi S Y is a pioneer in the payroll outsourcing space and has over 23 years of experience in setting up and running HR & Accounting functions with a strong focus on Payroll & Statutory Compliance. Having spent over 10 years in the complex environment of BPL Ltd. her strong entrepreneurial spirit and deep insight on the potential opportunity encouraged her to set up her own firm in this space. She has been a part of the transition period of handling manual to computerized processes and is sought out by multiple payroll software companies to provide thought leadership in this space.

Uma has done her M.Com. & is a 1st Rank Holder and Gold Medalist in Business Taxation from Mysore University

N. Shilpi brings over 21 years of cross functional experience in Business Process Management, Quality Control, Knowledge Management, Business Development and Web Solutions across companies like LG, Star and Indiainfo. With her previous experience as Management Representative responsible for ISO

9001 for India info she brings a strong process focus to the organization, and has created a robust and consistent service delivery framework.

Namrata has graduated from Lady Shri Ram, Delhi University, has done her MBA from Spicer Memorial College Pune, Andrews University, Michigan.”

13. There is no dispute that these two directors participated in the day to day affairs of assessee company. As per Board Resolution, these directors are entitled for salary of Rs.7,87,500 per year in addition to Rs.8.5 lakhs bonus. The salary was paid monthly and the bonus was paid at the end of the year which is subject to tax. It was decided in the Board meeting that by adopting that mode of payment, there would be no liquidity problem to the assessee company. The lower authorities disallowed the said amount on the reason that these payments are not allowable u/s. 36(1)(ii) r.w.s. 37(1) of the Act, which was also supported by the order of Mumbai Special Bench in the case of *Dalal & Broacha Stock Broking (P) Ltd. (supra)*.

14. However, there are High Court decisions in the case of *CIT v. Career Launcher India Ltd. (supra)*, *Chryscapital Investment Advisors (India) P. Ltd. (supra)* and *AMD Metplast P. Ltd. (supra)* wherein it was held as follows:-

*Career Launcher India Ltd. (supra)*

Held, that it was not disputed regarding bonus (a) that the payment was supported by board resolutions, and (b) that none of the directors would have received a lesser amount of dividend than the bonus paid to them, having regard to their shareholding.

Further, the directors are full-time employees of the company receiving salary. They are all graduates from IIM, Bangalore. Taking all these facts into consideration, it would appear that the bonus was a reward for their work, in addition to the salary paid to them and was in no way related to their shareholding. It was deductible under section 36(1)(ii).

*Chryscapital Investment Advisors (India) P. Ltd. (supra)*

Held, that the bonuses paid to the two shareholder directors in the preceding two financial years were in the ratio of 60-65 per cent : 40-35 per cent even though their shareholding was 1:1. The balance-sheet of the assessee placed on record also indicated that the two shareholders also held directorial positions in the assessee. The deductions claimed by the assessee under section 36(1)(iii) of the Act in respect of the bonuses paid to its shareholder-employees was allowable.

*AMD Metplast P. Ltd. (supra)*

Held, allowing the appeal, that A was the managing director and in terms of the board resolution was entitled to receive commission for services rendered to the company. It was a term of employment on the basis of which he had rendered service. Accordingly, he was entitled to the amount. Commission was treated as a part and parcel of salary and tax had been deducted at source. A was liable to pay tax on both the salary component and the commission. The payment of dividend was made in terms of the Companies Act, 1956. The dividend had to be paid to all shareholders equally. This position could not be disputed by the Revenue. Dividend was a return on investment and not salary or part thereof.

15. In the present case, as discussed earlier, the partners are duly qualified and they have participated in the day to day affairs of the assessee company and payment of bonus is duly authorized by the Board Resolution. Taking all these facts into consideration, the bonus was paid in addition to salary as a

reward for services rendered by the two directors to the assessee company and it was in no way related to their share holdings in the assessee company. Further, it also cannot be considered as a dividend payment in disguise. Having regard to their qualification & experience and participation in the management of the assessee company, the payment of bonus has been made as part of salary in terms of Board Resolution which was linked to the services rendered by them. Accordingly, in my opinion, it should be allowed as a deduction while computing the income of the assessee. This issue was considered by the judgments cited *supra* as per which, when bonus has been paid to the directors for the services rendered and as part of a payment of employment which is to be allowed u/s. 36(1)(ii) of the Act. That being so, I find merit in the argument of the Id. AR and accordingly I direct the AO to allow the claim of assessee for payment of bonus as deduction while computing the income of assessee.

16. In the result, the appeal by the assessee is allowed.

Pronounced in the open court on this 9<sup>th</sup> day of January, 2019.

Sd/-

( CHANDRA POOJARI )  
ACCOUNTANT MEMBER

Bangalore,  
Dated, the 09<sup>th</sup> January, 2019.  
/ Desai Smurthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,  
ITAT, Bangalore.