

**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**DELHI BENCH: 'E', NEW DELHI**  
**BEFORE SH. H.S. SIDHU, JUDICIAL MEMBER**  
**AND**  
**SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No. 2990 & 2991/DEL/2016  
Assessment Years: 2011-12 & 2012-13

DCIT, CIRCLE-5(1), NEW DELHI	Vs.	M/S BMR BUSINESS SOLUTIONS PVT. LTD., 22 <sup>ND</sup> FLOOR, BUILDING NO. 5, TOWER-A, DLF CYBER CITY, DLF PHASE-III, GURGAON-122022 (PAN: AABCE4046Q)
<b>(Appellant)</b>		<b>(Respondent)</b>

Department by	Ms. Pramita M. Biswas, CIT(DR)
Assessee by	Sh. Vishal Kalra, Adv. & Ms. Sumisha Myrgai, CA

**ORDER**

**PER H.S. SIHU, JM**

These 02 appeals are filed by the Revenue against the respective Orders passed by the Ld. CIT(A)-2, New Delhi relating to assessment years 2011-12 to 2012-13. Since common issue involved in these appeals are common and identical, except the difference in figures, hence, the appeals were heard together and are being disposed of by this common order for the sake of

convenience, by dealing with the facts of ITA No. 2990/Del/2016 (AY 2011-12) and the decision thereof will apply *mutatis mutandis* to other appeal i.e. ITA No. 2991/De/2016 (AY 2012-13). However, grounds of both the two appeals are reproduced hereunder:-

**ITA NO. 2990/DEL/2016 (AY 2011-12)**

The DCIT, Circle-5(1), New Delhi is hereby directed to file appeal in the above mentioned case before the ITAT, New Delhi on the following grounds of appeal.

- 1) On the basis of the facts and in the circumstances of the case and in law, the CIT(A) has erred in deleting an addition of Rs. 1,77,79,000/- on account of bonus paid to one of its Director, ignoring the fact that the provision of section 36(1)(ii) of the I.T. Act, 1961 which says that Bonus / Commission paid to an employee is not allowable as deduction if it could have been paid as profit or dividend.
- 2) The appellant craves leave for reserving the right to amend, modify, alter, add or forego any grounds of appeal at any time before or during the hearing of this appeal.

**ITA NO. 2991/DEL/2016 (AY 2012-13)**

The DCIT, Circle-5(1), New Delhi is hereby directed to file appeal in the above mentioned case before the ITAT, New Delhi on the following grounds of appeal.

1) On the basis of the facts and in the circumstances of the case and in law, the CIT(A) has erred in deleting an addition of Rs. 1,77,37,500/- on account of bonus paid to one of its Director, ignoring the fact that the provision of section 36(1)(ii) of the I.T. Act, 1961 which says that Bonus / Commission paid to an employee is not allowable as deduction if it could have been paid as profit or dividend.

2) The appellant craves leave for reserving the right to amend, modify, alter, add or forego any grounds of appeal at any time before or during the hearing of this appeal.

2. The brief facts of the case are that the assessee company filed its return electronically on 13.08.2010 declaring a loss of Rs. 1,13,07,173/- in the computation of total income. Subsequently, the return was processed u/s. 143(1) of the Income Tax Act, 1961

(in short "Act"). Notice u/s. 143(2) of the Act was served upon the assessee company selecting the case for scrutiny. Questionnaire was issued to the assessee alongwith the notice u/s. 142(1) of the Act, asking to submit the required information. In response to the same, the AR of the Assessee appeared from time to time and filed necessary details. The assessee company is engaged in the business of Management Consultancy Services. The AO observed that during the year under consideration the assessee company has paid salary and other allowances to its Directors as per the Board Resolutions. However, on perusal of 'Schedule-11' : Significant Accounting Policies Notes to Accounts' it was noticed that the 'bonus' paid to its one Director namely Sh. Sanjay Mehta of Rs. 1,77,79,000/- who is also major share holder in the co holding more than 10%. AO further noted that as per the provision of Section 36(1)(ii) bonus and or commission paid to an employee is allowable as deduction, if and only if, it is not payable as profit or dividend. AO further observed that the company had incurred a loss of Rs. 77,05,967/- during the relevant year as per P&L account of the assessee company. AO further noted that as per provisions of section 36(1)(ii) of the Act, profit or dividend should not be paid in the form of bonus. Since in this case, the assessee has reduced its income in the ITR by this amount of bonus. He further observed

that moreover, the assessee company has not justified as to what extra ordinary services have been given by the said Director for which bonus has been claimed and the same has resulted to the assessee company into less taxable income by this amount. Accordingly, query was put to the assessee as to why bonus of Rs. 1,77,79,000/- paid to Director not be disallowed since it could have been paid as dividend. In response to the same, assessee has submitted its reply, which was considered by the AO, but the same was not accepted by him. AO observed that the cases relied upon by the assessee are not applicable in the case of the assessee as the facts are different in the cases relied upon by the Assessee. During the year assessee has paid Rs. 1.27 crores as salary and Rs. 1.78 crores as bonus. The assessee has not corroborated the claim that the bonus was paid at par with other employees' base on the percentage of salary. It was further observed that assessee has not furnished any evidence for the performance of the Director enabling him to get the bonus much more than the salary and much more as compared to other employees. AO further noted that the allow ability of bonus / commission paid to an employee is based on the main section of 36(1)(ii). It is a well laid down law that where the language of the section is plain, clear and the unambiguous, it has to be understood in the sense, what it literally means. No

interpretations/outside meanings should be attached to it. In this case the provisions of section 36(1)(ii) of the Act simply says that bonus / commission paid to an employee is not allowable as deduction, if it could have been paid as profit or dividend. The assessee company could have paid the amount as profit / dividend instead of bonus / commission since the payment is being made to director of the company. However, in the instant case the assessee company has declared No Dividend. Hence, the contention of the assessee company was not acceptable. AO has referred view expressed by the Hon'ble Bombay High Court in Loyal Motor Service Co. Ltd. vs. CIT (1946), 14 ITR 647 as under:-

*"The restriction that such bonus or commission should not have been payable to employee as profits or dividend has been obviously designed to check, inter alia, private companies from avoiding tax by distributing their profits to their members as bonus or commission instead of dividend."*

2.1 AO further observed that in the instant case, the company is avoiding tax to the extent of 13.5% approx. as dividend distribution tax even after accepting the argument of the assessee that Directors are paying tax on bonus received by them, by resorting to such means. The contention of the assessee that the Ld. CIT(A) in

AY 2007-08 and 2009-10 has deleted the additions made was not accepted, as the Department has accepted the findings of the Ld. CIT(A) in AY 2007-08 and 2009-10 and filed further appeal. The issue not attained finality yet. Accordingly, the AO disallowed Rs. 1,77,79,000/- on account of 'bonus' and added the same to the income of the assessee vide order dated 21.03.2014 passed us/ 143(3) of the Act. Against the assessment order, the assessee appealed before the Ld. CIT(A), who vide his impugned order dated 29.02.2016 has deleted the addition in dispute by partly allowing the Appeal of the assessee. Aggrieved with the impugned order, Revenue is in appeal before the Tribunal.

3. Ld. CIT(DR) relied upon the order of the Assessing Officer and reiterated the contentions raised in the ground of appeal and stated that assessee has paid Rs. 1.27 crores as salary and Rs. 1.78 crores as bonus. the assessee has not corroborated the claim that the bonus was paid at par with other employees' base on the percentage of salary and further, the assessee has not furnished any evidence for the performance of the Director enabling him to other employees. She further stated that assessee company could have paid the amount as profit/ dividend instead of bonus / commission since the payment is being made to Directors of the Company. However, in the instant case the assessee company has

declared No Dividend. In view of above, she stated that the assessee company is avoiding tax to the extent of 13.5% approx. as dividend distribution tax even after accepting the argument of the assessee that Directors are paying tax on bonus received by them, by resorting to such means. Hence, the addition in dispute made by the AO may be confirmed by cancelling the order of the Ld. CIT(A). In support of her contention, she relied upon the she filed the Written Submission which read as under:-

*"In the above case, it is humbly submitted that the following decisions may be considered with regard to Section 36(1 )(ii) of I.T.Act:*

*i) Order of Special Bench, Hon'ble ITAT, Mumbai, in case of M/s Dalai & Broacha Stock Broking (P) Ltd.[2011] 131 ITD 36, in ITA No. 5792 (Mum) of 2009 (Copy enclosed) wherein payment to commission to Directors have been held to be lieu of Dividend and hence not deductible u/s 36(1)(ii).*

*ii) Order of Hon'ble ITAT Bench, Chandigarh, dtd. 09.12.2014 in case of Travelmatics(P) Ltd. Vs. Deptt. Of Income tax, in ITA No. 549/CHD/2010(Copy enclosed):- wherein*

*payment to commission to Directors have been held to be lieu of Dividend and hence not deductible u/s 36(1)(ii).*

*iii) Order of Hon'ble ITAT Bench, Delhi, dtd. 28.02.2019 in case of SRC Aviation (P) Ltd. Vs. ACIT, in ITA No. 1065/Del/2016 (Copy enclosed) wherein payment commission to Directors have been held to be lieu of Dividend and hence not deductible u/s. 36(1)(ii).*

*Further the following facts may also be considered:*

- Bonus is more than 100% of the salary.*
- No linkage between bonus paid and services supposedly rendered.*
- Board resolution says, quantum of bonus will depend on performance of the company. In these two years, income shown by the assessee is significantly lower than earlier years, while the % of bonus given is higher.*
- No evidence for any specific service rendered by him."*

4. On the other hand, Ld. Counsel for the assessee has relied upon the order of the Ld. CIT(A) and stated that he has passed a well reasoned order because similar circumstances prevailed in the case of the assessee in the earlier assessment years 2007-08, 2009-10 and 2010-11, wherein additions / disallowances made by the AO on this account were deleted by the First Appellate Authority vide order dated 30.4.2014 for assessment year 2010-11. Hence, he requested that the action of the Ld. CIT(A) in deleting the addition in dispute may be upheld. In support of his contention, he filed a Paper Book Vol. 2 containing pages 148 to 153 which is copy of order dated 1.10.2018 passed by the AO in assessee's own case for the assessment year 2009-10 pursuant to the order passed by the Delhi Bench of the ITAT; copy of the order dated 8.10.2018 passed by the AO in the assessee's own case for the assessment year 2010-11 pursuant to the order passed by the Delhi Bench of the Tribunal; copy of the order dated 2.2.2018 passed by the Tribunal in assessee's own case bearing ITA Nos. 6503/Del/2012 and 4141/Del/2014 for assessment years 2009-10 and 2010-11 and the chart depicting stand of the Department in assessee's case for various assessment years and relied upon the case law of ITAT, Delhi I (Third Member) decision in the case of Zuari Leasing &

Finance Corpn. Ltd. vs. ITO reported (2008) 112 ITD 205 (Delhi) TM.

5. We have heard both the parties and perused the records, Paper Book filed by the assessee; submissions of both the parties, case laws relied upon from both sides and especially the impugned order. We find that the assessee company filed its return of income declaring a loss of Rs. 1,13,07,173/-. The case of the assessee was selected for scrutiny. The assessee company engaged in the business of management consultancy services during the year under consideration. The AO in the assessment order was of the view that the amount of Rs. 1.78 crores paid by the assessee to its Director Mr. Sanjay Mehta, and claimed as bonus was not allowable in view of section 36(1)(ii) of the Act because the sum was actually payable as dividend. However, it has been observed by Hon'ble Courts that there are certain limitations and restrictions in the matter of payment of dividend and discretion of the company either to pay or not to pay dividend cannot be assumed. We find that the Assessing Officer has not brought any material on record to substantiate this allegation that the amount in question was actually payable as dividend. In fact, Mr. Sanjay Mehta was having only 11% shareholding in the assessee company and if Rs.1.78 crores had been paid as dividend (and not as bonus) to him, the assessee

would have had to distribute dividends to tune of Rs. 16.16 crores (1.78 x 100/11) whereas it was having loss of Rs. 1.17 crores during the year and accumulated profits of Rs.6 crores only. This is because, shareholding of Mr. Sanjay Mehta was 11% only and all the equity shareholders have equal rights. Mr. Sanjay Mehta is stated to be a Chartered Accountant by profession and a senior consultant with many years of experience. Assessee further submitted that bonus was a variable remuneration for professional services rendered and amount of bonus was decided by the Board prior to the commencement of the financial year i.e. vide Board Resolution dated 10th March, 2010. We further find that it was actually paid during the year, on 31st August, 2010 and 30th November, 2010 and not post closing of the year. No bonus / dividend was paid to the remaining major shareholders holding 89% equity.

5.1 We further note that also similar circumstances prevailed in the case of the assessee in the earlier assessment years, A.Ys. 2007-08, 2009-10 and 2010-11, wherein additions/disallowances made by the Assessing Officer on this account were deleted by the Ld. CIT(A). The relevant portion of the finding of the Ld. CIT(Appeals) in Appeal no. 106/13-14 vide order dated 30.04.2014

for A.Y. 2010-11 in the case of the assessee on similar issue is reproduced below:-

“5.2.11 Even otherwise also, this issue is covered by the decision of my predecessor CsIT(A) i.e. CIT (A)-VI, New Delhi, in Appeal No. 185/11-12 for A.Y. 2009-10 dated 30.10.2012 & CIT(A)-V1, New Delhi order in Appeal No. 237/09-10 for A.Y. 2007-08, dated 10.08.2010.

5.2.12 Further, as per the Board Resolution dated March 2, 2009, it was resolved that in terms of requirements of section 198, 269, 309 r.w.s 314 & other applicable provisions under the Companies & other applicable provisions under the Companies Act, 1956, Sh. Sanjay Mehta, Director of the company has been entitled to payment of inter alia, Directors Remuneration e.g. (i) Annual Compensation of Rs. 93,70,000/- to be paid by way of monthly fixed sum (including special allowance) (ii) bonus that might be determined by the Board to be paid as percentage of fixed compensation in one or more installments during the year, taking into account Company's performance from time to time

& prevailing market conditions, but not exceeding an amount of Rs. 2 crores. In terms of Board's Resolution only, Sh. Sanjay Mehta, one of the three employee director's was paid bonus of Rs. 1.97 crores, who had share capital of Rs. 1.1 lakhs, out of total capital of Rs. 10 lakhs i.e. 11% shareholding in the company. Therefore, bonus actually paid in installments i.e. Rs. 0.54 crores paid on August 31, 2009, Rs. 0.5 crores paid on November 30, 2009 & the balance Rs. 0.90 crores, paid on February 28, 2010, formed part of his overall remuneration. Since remuneration was also commensurate with his experience & market & have no bearing on shareholding, the disallowance made by the AO of Rs. 1,97,43,000/- is hereby directed to be deleted, as the AO has not contradicted the said clarifications. The appellant to get suitable relief accordingly."

3.2.3 For the reasons given in para 3.2.1 above and since there is no change in the facts vis-a-vis earlier years in which my predecessor CIT (Appeals) have allowed the claim of the appellant, and also reliance

on judgements of Hon'ble Courts on the issue as given in the submissions of the assessee company, the Assessing Officer is hereby directed to delete the disallowance made by him.

Ground No. 2 of the appeal is allowed.”

5.2 We further note from the Assessee's Paper Book Vol. 2 which is containing pages 148 to 153 having the copy of order dated 1.10.2018 passed by the AO in assessee's own case for the assessment year 2009-10 pursuant to the order passed by the Delhi Bench of the ITAT wherein the AO held that assessee was justified in making payment of bonus amounting to Rs. 2,35,00,000/- to Mr.Sanjay Mehta and the same was allowed as a deductible business expenditure; copy of the order dated 8.10.2018 passed by the AO in the assessee's own case for the assessment year 2010-11 pursuant to the order passed by the Delhi Bench of the Tribunal reveals that Sh. Sanjay Mehta had rendered services to the assessee company during the financial year 2009-10 relevant to assessment year 2010-11 and allowed the bonus payment of Rs. 1,97,43,000/- to him and allowed the same as deductible business expenditure; copy of the order dated 2.2.2018 passed by the Tribunal in assessee's own case bearing ITA Nos. 6503/Del/2012

and 4141/Del/2014 for assessment years 2009-10 and 2010-11 and the chart depicting stand of the Department in assessee's case for various assessment years and relied upon the case law of ITAT, Delhi I (Third Member) decision in the case of Zuari Leasing & Finance Corpn. Ltd. vs. ITO reported (2008) 112 ITD 205 (Delhi) TM. It is also noted from page no. 169 of the Paper Book Vol. 2 which is a Chart showing stand of the Department in various assessment years on this issue in dispute stipulates that in the assessment year 2007-08 bonus of Rs. 47,46,000/- paid to Mr. Sanjay Mehta allowed by the AO vide order dated 31.7.2017 pursuant to the order of the ITAT, Delhi Bench order dated 7.8.2012 and in the assessment year 2008-09 no addition was made by the Department and also the case was not picked for scrutiny assessment. Similarly, in the assessment years in dispute i.e. AY 2011-12 & 2012-13, the AO made the addition of Rs. 1,77,79,000/- and Rs. 1,77,37,500/- paid to Mr. Sanjay Mehta have already been deleted by the Ld. CIT(A) vide his impugned orders for which the Assessee is in appeal before the Tribunal. The case laws relied by both the parties do not support the case being distinguished on facts.

5.3 Keeping in view of the facts and circumstances of the case as explained above and adhering to the doctrine of Stare decisis, we do

not find any infirmity in the impugned orders of the Ld. CIT(A), hence, we uphold the action of the Ld. Commissioner of Income Tax(A) of deleting the additions in dispute and reject the grounds raised by the Revenue in both the appeals.

6. In the result, both the 02 appeals filed by the Revenue stand dismissed.

Order pronounced on 10-05-2019.

**Sd/-**

**[O.P. KANT]  
ACCOUNTANT MEMBER**

**Sd/-**

**[H.S. SIDHU]  
JUDICIAL MEMBER**

Date:10/05/2019

**SRBhatnagar**

**Copy forwarded to: -**

1. Appellant 2. Respondent 3. CIT 4.CIT (A) 5.  
DR, ITAT

TRUE COPY

By Order,

AR, ITAT, New Delhi