

आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'B' BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं

श्री ए. मोहन अलंकामणी, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.278/Chny/2017

निर्धारण वर्ष / Assessment Year : 2009-10

Shri Nate Nandha,
C/o Shri J. Prabhakar,
Chartered Accountant,
245, T.T.K. Road,
Residency Apartments,
Alwarpet, Chennai - 600 018.

v. The Assistant Commissioner of
Income Tax,
Non-Corporate Circle -3,
Chennai - 600 034.

PAN : AACPN 7263 L

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri J. Prabhakar, CA

प्रत्यर्थी की ओर से/Respondent by : Shri Asish Tripathy, JCIT

सुनवाई की तारीख/Date of Hearing : 24.05.2018

घोषणा की तारीख/Date of Pronouncement : 08.06.2018

आदेश /O R D E R

PER N.R.S. GANESAN, JUDICIAL MEMBER:

This appeal of the assessee is directed against the order of the Commissioner of Income Tax (Appeals) -4, Chennai, dated 25.10.2016 and pertains to assessment year 2009-10.

2. There was a delay of 4 days in filing this appeal by the assessee. The assessee has filed a petition for condonation of delay. We have heard the Ld. representative for the assessee and the Ld. D.R. We find that there was sufficient cause for not filing the appeal before the stipulated time. Therefore, we condone the delay and admit the appeal.

3. The only issue arises for consideration is with regard to addition of ₹1,09,78,005/- under the head "Income from Salary".

4. Shri J. Prabhakar, the Ld. representative for the assessee, submitted that the assessee is the Managing Director of M/s Mohan Breweries And Distilleries Limited. According to the Ld. representative, the assessee has disclosed ₹27,76,011/- towards salary from M/s Mohan Breweries And Distilleries Limited. According to the Ld. representative, initially, the assessee received a salary of ₹1,37,50,776/- which included perquisites of ₹17,50,776/-. TDS was also made besides PF contributions. As per the Companies Act, according to the Ld. representative, the salary of Managing Director shall not exceed the ceiling of 5% of the net profits of the company for the year ended 31.03.2009. Accordingly, the company M/s Mohan Breweries And Distilleries

Limited revised the salary of the assessee at ₹27,76,011/- which was disclosed to the Department by way of revised return.

5. Shri J. Prabhakar, the Ld. representative for the assessee, further submitted that in the original round of litigation, this Tribunal remitted back the matter to the file of the Assessing Officer. In the remand proceeding, according to the Ld. representative, the Assessing Officer found that the assessee received ₹1,37,52,396/- from the company and the salary was revised as per the company law only after the financial year was completed. According to the Ld. representative, the Assessing Officer also found that as per Form 26AS statement, the receipt was shown as ₹1,37,52,396/-. Hence, the difference between ₹1,37,52,396/- and the amount of ₹27,76,011/- disclosed as income from salary was added as income of the assessee towards income from salary. According to the Ld. representative, what was paid to the assessee is contrary to the provisions of Companies Act, therefore, that cannot be construed as income of the assessee. On a query from the Bench whether the company has initiated any recovery proceeding for excess amount paid to the assessee? The Ld. representative submitted that the

assessee has paid lot of money to the company, therefore, by way of book adjustment, the amount was recovered.

6. On the contrary, Shri Asish Tripathy, the Ld. Departmental Representative, submitted that the assessee admittedly received ₹1,37,52,396/-. Subsequently, according to the Ld. D.R., the assessee claimed that the company revised his salary in view of the provisions of the Companies Act which prohibits payment exceeding 5% of net profits of the company. According to the Ld. D.R., what was paid to the assessee was not recovered by the company and it was allowed to remain with the assessee. In the absence of recovery by the company, even if the amount is paid contrary to the provisions of Companies Act, according to the Ld. D.R., it has to be construed as income of the assessee, therefore, the CIT(Appeals) has rightly confirmed the order of the Assessing Officer.

7. We have considered the rival submissions on either side and perused the relevant material available on record. It is not in dispute that the assessee had received ₹1,37,50,396/- towards salary which included perquisites of ₹17,50,776/-. The assessee now claims that due to the provisions of Companies Act, the company revised the salary of Managing Director and fixed

₹27,76,011/- which included perquisites of ₹4,47,011/-. The question arises for consideration is whether the amount paid by the company in contravention of the provisions of the Companies Act as salary, would be income of the assessee under the Income-tax Act?

8. We have carefully gone through the provisions of Section 5 of the Income-tax Act, 1961, which reads as follows:-

SCOPE OF TOTAL INCOME

5. (1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which—

(a) is received or is deemed to be received in India in such year by or on behalf of such person ; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year ; or

(c) accrues or arises to him outside India during such year :

Provided that in the case of a person not ordinarily resident in India within the meaning of sub-section (6) of section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India.

(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which—

(a) is received or is deemed to be received in India in such year by or on behalf of such person ; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year.

Explanation 1.— Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance-sheet prepared in India.

Explanation 2.— For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have

accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India.

9. In view of the above, whatever money is received by the assessee from whatever source or accrues or arises shall form part of total income of previous year. It is also to be remembered that all the money received by the assessee cannot be treated as income. The assessee should have a legal right to retain the money received. In case the assessee received the money as a trustee with an obligation to return the same to some other person, then such kind of money received cannot be construed as income of the assessee at all. Therefore, when the assessee has received salary of ₹1,37,50,776/-, the assessee should have a legal right to retain the same. In this case, what was paid to the assessee is a salary in the capacity as Managing Director of the company. Therefore, at the time of payment, the assessee had all the right to retain the money. Subsequently, the company revised the salary on the basis of the provisions of Companies Act restricting the salary to 5% of the net profits of the company. The question arises for consideration is whether the so-called excess payment of ₹1,09,78,005/- would form part of taxable income of the assessee?

10. Even though the Ld. representative for the assessee claims that recovery adjustment was made in the books regarding excess payment, no material is available on record showing that the book entry has been made adjusting the amount in the company account. Since the required material was not filed either before the Assessing Officer or before the CIT(Appeals) or even before this Tribunal, mere oral claim that the amount was adjusted by way of book entry cannot be accepted at this stage. Merely because the payment was contrary to the provisions of Companies Act, this Tribunal is of the considered opinion that the Income-tax Act, being a special provision, the Companies Act cannot override the Income-tax Act. In other words, the Income-tax Act will override the Companies Act. Even the illegal payment or the payment received by the assessee contrary to the provisions of Companies Act by way of salary has to be assessed as income in the assessee's hands provided the same was not recovered by the company. In the absence of any details or material to support the claim of recovery or adjustment in the books with regard to excess payment of salary, this Tribunal is of the considered opinion that the CIT(Appeals) has rightly confirmed the order of the Assessing Officer. Therefore, this Tribunal do not

find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

11. In the result, the appeal filed by the assessee stands dismissed.

Order pronounced on 8th June, 2018 at Chennai.

sd/-

(ए. मोहन अलंकामणी)

(A. Mohan Alankamony)

लेखा सदस्य/Accountant Member

चेन्नई/Chennai,

दिनांक/Dated, the 8th June, 2018.

Kri.

sd/-

(एन.आर.एस. गणेशन)

(N.R.S. Ganesan)

न्यायिक सदस्य/Judicial Member

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)-4, Chennai-34
4. Principal CIT-5, Chennai.
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.