

Excess salary paid to MD in contravention of limit provided under co. Act was taxable as income: ITAT

Summary – The Chennai ITAT in a recent case of Nate Nandha, (the Assessee) held that Excessive salary paid to assessee, Managing Director of a company, in contravention to provision of Companies Act was to be construed as income of assessee provided same was not recovered from assessee by its company and allowed to remain with him

Facts

- The assessee was the Managing Director of company, MBDL. Initially, the assessee received a salary of Rs. 1.37 crores. As per the companies Act the salary of Managing Director should not exceed the ceiling of 5 per cent of the net profits of the company for the year ended 31-3-2009. Accordingly, MBDL revised the salary of the assessee at Rs. 27.76 lakhs which was disclosed by the assessee to the department by way of revised return.
- The Assessing Officer found that the assessee received Rs. 1.37 crores from the company and the salary was revised as per the company law only after the financial year was completed. The Assessing Officer found that as per Form 26AS statement, the receipt was shown as Rs. 1.37 crores. Hence, the difference between Rs. 1.37 crores and the amount of Rs. 27.76 lakhs disclosed as income from salary was added as income of the assessee towards income from salary.
- On appeal, the Commissioner (Appeals) held that salary which was paid to the assessee was not recovered by the company and it was allowed to remain with the assessee, thus, in the absence of recovery by the company, even if the amount was paid contrary to the provisions of the Companies Act, it had to be construed as income of the assessee.
- On second appeal:

Held

- In view of the provisions of section 5, 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 Rs. 1.37 crores, 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 per cent of the net profits of the company. The question arises for consideration is whether the so-called excess payment of Rs. 1.09 crores would form part of taxable income of the assessee.

- Even though 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 Commissioner (Appeals) or even before the Tribunal, mere oral claim that the amount was adjusted by way of books entry cannot be accepted at this stage. Merely because the payment was contrary to the provisions of the 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 Commissioner (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.