
(1979) 12 DEL CK 0029

In the Delhi High Court

Case No : Income-tax Reference No. 47 of 1970

Commissioner of Income Tax

APPELLANT

Vs

Gian Singh Kalsi

RESPONDENT

Date of Decision : 18-12-1979

Acts Referred:

Citation : (1980) 123 ITR 373

Hon'ble Judges : S. Ranganathan, J; D.R. Khanna, J

Bench : Division Bench

Advocate : M.L. Verma, for the Appellant; H.R. Puri, for the Respondent

Judgement

D.R. Khanna, J.—These two references pertain to the assessments of Gian Singh Kalsi, an individual, for assessment years 1961-62 and 1962-63. They have been moved by the Commissioner of Income Tax in the following circumstances :

2. The assessed was the managing director of the Kalsi Tyre Rethreading Factory Pvt. Ltd. (hereinafter referred to as " the company "), during the relevant years, having been appointed so by the board of directors on August 25, 1960. This resolution was to the following effect:

"It was felt necessary to have a managing director for running the day to day administration of the company. After discussion it was unanimously resolved that Mr. Gian Singh Kalsi be and is hereby appointed as managing director of the company and the question of his remuneration shall be taken up later,"

3. The articles of this company also provided that the directors might be allowed any amount either as salary or as commission on net profits or otherwise as was settled by the board of directors. This company was a closely held company in which the assessed and the members of his family were substantially interested.

4. Although there was no formal resolution of the board determining the amount of salary which was to be paid to the assessed, an amount of Rs. 2,000 per month was started to be paid to him from May 15, 1960. Entries about these

payments were duly made in the account books of the company and also credited in the account of the assessed. The assessed too started withdrawing that salary, and there are observations by the I.T. authorities that he was meeting part of his household expenses from those withdrawals.

5. In the returns for the assessment years 1961-62 and 1962-63, which the assessed filed with respect to his incomes, he disclosed the amounts of these salaries and sought assessments thereon. Revised returns were subsequently also filed and there too, the salary incomes were duly owned.

6. On July 12, 1962, the directors of the company passed a resolution to the following effect:

" It was noted that Mr. Gian Singh Kalsi had charged a remuneration @ Rs. 2,000 per month for the whole of the year 1961. There was no resolution of the board of directors and the amount charged in the accounts was without any authority. The matter was discussed. It was also noted that at no time the directors had decided to fix his remuneration. It was the understanding given to the board that he would not charge any remuneration until the company is in a position to make some profits. He was requested to continue as managing director of the company without any remuneration until such time as the company improves. In the interest of the company Mr. Gian Singh Kalsi agreed not to press for his remuneration and it was decided that the entry which was passed in the accounts should be reversed. It was further resolved to pay him Rs. 2,000 p.m. as remuneration with effect from 1-1-1962."

7. Accordingly the account of the assessed with the company was debited with the amounts which the assessed had withdrawn and which were credited to his account. The assessed then filed further revised returns in which he excluded the salary incomes so drawn.

8. The ITO, however, treated the amounts of those salary incomes as part of the assessed's assessable incomes. Their surrender later to the company, it was held, could not obliterate the accrual and receipt earlier by the assessed of those amounts during the relevant years. These decisions were upheld in the appeals by the AAC. He observed that in the accounts of both the company and the assessed, the payments of the salary amounts had been duly contemporaneously recorded. These circumstances, he observed, showed that it could not be that the other directors of the company were unaware of the salary amounts drawn by the assessed or they were not approving those withdrawals. Furthermore, when the assessed was utilising the salary amounts for meeting his personal and household expenses, it was assumed that the family members must have known that the assessed was enjoying those salary amounts. The assessed's own conduct also abundantly made it clear that he owned the salary incomes as belonging to him and disclosed them in the two returns which were initially filed. Any surrender of those amounts subsequently long after the previous years, it was held, could not eliminate the accrual and enjoyment of the salaries by the

assessed. This belated surrender was considered to be more as a sort of an advantage in the matter of the Income Tax assessment so far as the company was concerned, inasmuch as it was not having taxable income in those years.

9. As regards the narration in the resolution dated July 12, 1962, that there was an understanding given to the board that the assessed would not charge any remuneration until the company was in a position to make some profits, it was held that this was not borne out at all from the earlier resolution which had been passed on August 25, 1960.

10. In second appeals, however, the Appellate Tribunal deleted the amounts of those salaries from the incomes of the assessed for these years. It was observed that the fact that the assessed had withdrawn certain amounts or that certain amounts were credited did not create an enforceable right in his favor. What he received must be taken as borrowings against anticipated right which did not materialise. Reliance in this regard was placed upon the decision of the Supreme Court in the case of Commissioner of Income Tax, Bombay City I Vs. Shoorji Vallabhdas and Co., wherein it was observed that if income does not result at all, there cannot be a tax, even though in bookkeeping an entry is made about a hypothetical income which does not materialise. However, where income has in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient even though given up, the tax may be payable. The Tribunal observed that the reversal entries in the company's account were made when its accounts for the year 1962 were still open.

11. It is in these circumstances that the Tribunal has at the instance of revenue referred to this court the following question for opinion, for the assessment year 1961-62:

" Whether, on the facts and in the circumstances of the case, the amount of Rs. 21,000 could be included in the assessed's total income as income under the head " salary " ? "

12. In the second reference, the question referred is to the same effect except that the amount mentioned is Rs. 18,000 instead of Rs. 21,000.

13. From the side of the revenue, it has been vigorously contended that the facts of the present case amply bear out that the assessed was throughout allowed a monthly salary amount of Rs. 2,000 by the company during these years. This was not only because the articles of association permitted such salary, but the resolution dated August 25, 1960 of the board of directors also envisaged a provision of salary. The contemporaneous conduct of the assessed as also the company covering a period of about two years further showed that the salary of Rs. 2,000 per month was started to be allowed to the assessed and regular entries in this direction were made in the account books of the company and the assessed. The latter too treated the receipts as his salary income and duly disclosed them in the returns which were filed. Once those salary amounts had accrued and had been actually realised by the assessed, any subsequent

surrender by him in favor of the company, it has been urged, could not obliterate the assessability of that income in the hands of the assessed. It has been pleaded that the resolution dated August 25, 1960, had the effect of conceding that the assessed was entitled to salary. Only the quantum thereof was left over to be determined later. Moreover, the fact that all the directors and other family members were aware of the withdrawal of the salary amounts by the assessed from the funds of the company, it is pleaded, brought out clear approval on their part of this action. Now that it has been found that the company had suffered losses in the present years it has been considered advantageous to withdraw the salary paid to the assessed and it is this which has motivated the present action.

14. From the side of the assessed, on the other hand, it has been pleaded that till the board of directors formally passed a resolution fixing the salary of the assessed, it was illegal on his part to have started drawing salary. The resolution of August 25, 1960, it is pointed out, had not in a definite manner held that he was to be allowed salary and ii" so how much. Rather the question of his remuneration was left over to be taken up later. Having once found that the assessed was unlawfully withdrawing the so called salary amounts, the company later asserted and obtained them back. In the circumstances, it was urged that there was no question of accrual or receipt of any income by the assessed.

15. We have heard the parties and given our utmost consideration to all the circumstances. It is apparent from the narration of facts above, that for a continuous period of about two years the assessed was drawing a monthly salary of Rs. 2,000 from the company, and the latter's accounts were being debited by these amounts. In turn, the assessed's accounts were as well being credited with the said amounts. That apart, the assessed was as well making withdrawals of those amounts and utilising them in partly meeting his household expenses. The fact that he had little misgivings that all those amounts constituted his legitimate remuneration was further amply borne out from the returns which he filed in which he entirely owned those amounts and sought their assessments as salaries in his hand. This contemporaneous conduct for a considerable length of period cannot be lightly ignored. Any subsequent withdrawal of those amounts by the company from him or their surrender by him in favor of the company could not obliterate the accrual and receipt of those amounts by him in those years. Had the assessments of the assessed followed soon after the filing of those returns, the salary amounts would have been assessed in his hand as such. Simply because those assessments were delayed and the company too considered it appropriate to withdraw those amounts, it could not make any significant difference in the treatment of those amounts as his salary incomes.

16. Thus the Supreme Court has in clear terms in the case of Commissioner of Income Tax, Bombay City I Vs. Shoorji Vallabhdas and Co., , held that where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. The Madras High Court also in K.R. Kothandaraman Vs.

Commissioner of Income Tax, Madras, treated salary income enjoyed by the managing director of a company as belonging to him in spite of the fact that in a subsequent year the board of directors decided to retrospectively stop payments of salary on the ground that the company was not making any profit. In this case, however, originally the board of directors had in fact passed a resolution for payment of salary to the managing director but had sought to withdraw that later after the close of a particular year.

17. The resolution dated July 12, 1962, which the board of directors of the present company passed, as aforesaid, was after the close of the previous years relevant to assessment years 1961-62 and 1962-63, No attempt in this resolution was made to withdraw the salary so far as the same concerned the year 1960. The narration next in it that there was an understanding that the salary would not be allowed to the managing director in case the company did not make profits, was not mentioned at all in the earlier resolution dated August 25, 1960. This resolution purporting to justify the withdrawal of salary already enjoyed by the managing director, Therefore, had to be treated as a mere after-thought.

18. The nature of the constitution of the company, it being a closely held family concern, and the course of events as to how salary was being credited to the assessed and even withdrawn by him, show that the other directors were well aware of what was happening and they were plainly acquiescing in that. The account books of the company must have been closed after each year, and the withdrawal of the salary amounts by the assessed from the funds of the company could be treated to have been approved by the directors and the shareholders.

19. It is correct that there was no formal resolution sanctioning payment of salary of Rs. 2,000 per month to the managing director. However, in the context of the articles of association of the company which permitted such salary, the resolution dated August 25, 1960, which also recognised that the matter relating to remuneration would be taken up later, the consistent conduct of the company in paying every month the salary amounts to the managing director and the tacit approval of the other directors of this course did lend it the cloak of regularity. No manifest illegality on this score, Therefore, could be in the circumstances imputed. As regards the observation of the learned Tribunal that the withdrawals could be treated as mere borrowings, was never the case of the assessed or the company at any stage.

20. In the totality of these circumstances, we are of opinion that the amounts of salary in these years actually accrued to the assessed and he did receive them as well. The questions referred are answered in the affirmative and in favor of the revenue. Looking at the circumstances of the cases, no order as to costs.