

(1992) 10 PAT CK 0012
In the Patna High Court
Case No : Taxation Case Nos. 56 to 59 of 1980

Commissioner of Income Tax

APPELLANT

Vs

J.G. Keshwani

RESPONDENT

Date of Decision : 29-10-1992

Acts Referred:

Citation : (1992) 10 PAT CK 0012

Judgement

G.C. Bharuka, J.—These references made u/s 256(1) of the Income Tax Act, 1961 (hereinafter to be referred to as "the Act" only), involved the following question of law :

"Whether, on the facts and in the circumstances of the case, the Tribunal has rightly held that the amount of deferred annuity policy purchased by the employer company is not assessable in the hands of the assessee for each of the assessment years 1972-73, 1973-74, 1974-75 and 1975-76 ?"

2. In these cases, the Tribunal, in view of the common facts and the question involved for the aforementioned four assessment years, has sent a consolidated statement of fact and, accordingly, all the four reference applications are being disposed of by a common judgment.

3. The assessee, Shri J.G. Keshwani, is an executive director of the Indian Tube Co. Ltd., a public limited company, governed by the provisions of the Companies Act, 1956. According to the terms of his appointment as modified by the resolution passed at the general meeting of the company held on December 28, 1970, the assessee, in addition to his monthly payment, was also entitled to receive a commission at the rate of 0.2% of the net profits of the company computed in the manner laid down under the Companies Act subject to a maximum of Rs. 30,000 per annum or 50% of the salary, whichever was less. The terms of appointment of the assessee were approved by the Department of Company Affairs, Government of India. Later on, by a resolution at the general meeting of the company held on January 25, 1972, the original terms of employment of the assessee were varied. The said resolution dated January 25,

1972, is as follows :

"That, in partial modification of the resolution passed at the extraordinary general meeting of the company held on 28th December, 1970, the company hereby approves the variation of the terms of remuneration payable to Mr. J.G. Keshwani to the extent that in lieu of the commission thereby approved an amount not exceeding 0.2% of the net profits of the company computed in the manner laid down in Section 309(5) of the Companies Act, 1956, subject to a maximum of Rs. 30,000 per annum or 50% of his annual salary whichever is less as reduced by the company's contribution to the company's superannuation fund of which he is a member, be expended by the company every year towards purchase of deferred annuity policies from the Life Insurance Corporation of India on the life of Mr. J.G. Keshwani so as to provide for the payment of an annuity to Mr. J.G. Keshwani for his life and upon his death to his dependants, such payment to commence from the date of his retirement from the company or from the date of his death, as the case may be, provided always that no benefit shall be due to Mr. J.G. Keshwani or his dependants, as the case may be, nor shall Mr. J.G. Keshwani or his dependants be entitled to any benefit or have any right, lien or interest under the aforesaid policies until his retirement from the company or his death whichever shall first occur."

4. Subsequent to the passing of the said resolution, the company, under an impression that the above-quoted resolution purports to bring about a variation in the terms of remuneration payable to the assessee, filed an application before the Central Government for its approval as provided under the provisions of the Companies Act. The relevant part of the said application, as noticed by the Income Tax Officer, in the assessment order is in the following terms :

"The company in its application to the Central Government for such approval of what it understood as variation of remuneration, inter alia, stated. . . . The existing remuneration of Mr. J.G. Keshwani is varied to the extent that the company should utilise the amount payable to Mr. J.G. Keshwani, a wholetime director by way of commission at the rate of 0.2% of the net profits of the company."

5. The Central Government, on receiving the said application and after going through the contents thereof felt that the aforesaid arrangement did not amount to either an increase in the remuneration payable to the assessee or any variation in respect thereof and, as such, replied in the following terms :

"The approval of the Central Government is not required for the mode of payment of commission to the managing director or wholetime director and it is open to your company to make the payment of commission in whatever manner you like."

6. During the previous years pertaining to each of the assessment years in question, the company had spent Rs. 20,000 in purchasing deferred annuity policies from the Life Insurance Corporation of India as envisaged under the

resolution referred to above. During the assessment proceedings, the assessee claimed that the said amount spent by the company is not liable to be assessed in his hands as a part of his income since that cannot amount to any income accrued to him. But the Income Tax Officer added the same to his income by holding that the amount spent by the company in purchasing the deferred annuity policies for the benefit of the assessee was merely a change in the mode of payment of commission which was payable to the assessee under the terms of his employment as a director. Aggrieved by the said order, the assessee preferred an appeal to the Appellate Assistant Commissioner, who took the view that the amount in question spent by the company cannot be deemed to have accrued to him as income in the years in question since the assessee would be entitled to receive the benefits under the policies only in future years and, as such, he deleted the addition. Against this appellate order, the Department preferred an appeal to the Tribunal but the same was rejected on the ground that on somewhat identical facts in the case of *Shri R.H. Modi v. ITO* (I. T. A. No. 926 (Pat) of 1976-77) it had been held that such amount does not form part of the remuneration paid by the company to the director.

7. Mr. Vidyarthi, learned counsel appearing for the Department, has submitted that in view of the facts and circumstances of this case, the amount spent by the company was nothing but commission paid to the assessee, which was spent in a substituted mode and, therefore, the expenditure by the company was a part of the remuneration received or accrued to the assessee and thus the same was liable to be assessed to Income Tax. His further submission was that, as held by the Income Tax Officer on a true construction of the resolution dated January 25, 1972, and the background under which the same was passed, the only reasonable inference could be that it was a colourable device adopted at the instance of the assessee to avoid Income Tax and if the transactions are construed in their true perspective, they clearly reveal that the amounts are nothing but the amounts of commission receivable by the assessee.

8. Mr. K.D. Charterjee, learned counsel appearing for the assessee, has submitted that the Tribunal has not committed any error of law in accepting the assertions of the assessee. According to him, manifestly the assessee gets no interest in the accounting year in respect of the amount for which the policies were purchased and the amounts spent were in lieu of commission hitherto payable and not out of the amount of the commission payable to the assessee. By referring to the various standard dictionaries, he submitted that "in lieu of" means--"in place of", "instead of", "in substitution for". He further submitted that if, as a matter of fact, which has not been disputed before the Tribunal, the amount in question has been spent by the company for purchasing deferred annuity policies for the benefit of the assessee, then in view of the judgment of the Supreme Court in the case of *Commissioner of Income Tax, Kerala and Coimbatore Vs. L.W. Russel*, , the amounts are not assessable in the hands of the assessee as "perquisite". In support of his contentions, learned counsel has also placed reliance on the decisions in the case of *Commissioner of Income Tax Vs.*

Tata Oil Mills Co. Ltd., , and in the case of Commissioner of Income Tax, West Bengal-II, Calcutta Vs. Hindustan Housing and Land Development Trust Ltd., .

9. Section 309 of the Companies Act provides for remuneration to directors and Sub-section (3) thereof, inter alia, provides that a director who is either in the whole-time employment of the company or a managing director may be paid remuneration either by way of a monthly payment or at a specified percentage of the net profit of the company or partly by one way and partly by the other. In view of Clause (d) of the Explanation to Section 198 of the Companies Act, "remuneration" payable to a director includes any expenditure incurred by the company to effect any insurance on the life of, or to provide any pension, annuity or gratuity for, directors or his spouse or child. Therefore, in view of the provisions contained under the Companies Act which govern the transactions of the company in question, the amount in question forms part of the remuneration paid to the assessee.

10. The relevant provisions of the Act as they stood at the relevant time may first be noticed.

11. Section 15. Salaries.--The following income shall be chargeable to Income Tax under the head "Salaries"-

(a) any salary due from an employer or a former employer to an assessee in the previous year, whether paid or not ;

(b) any salary paid or allowed to him in the previous year by or on behalf of an employer or a former employer though not due or before it became, due to him ; . . ."

"Section 17.--"Salary", "perquisite" and "profits in lieu of salary" defined.--For the purposes of Sections 15 and 16 and of this section,--

(1) "Salary" includes-

(i) wages ;

(ii) any annuity or pension ;

(iii) any gratuity ;

(iv) any fees, commissions, perquisites or profits in lieu of or in addition to any salary or wages ; . . .

(2) "perquisite" includes-- . . .

(v) any sum payable by the employer, whether directly or through a fund, other than a recognised provident fund or an approved superannuation fund, to effect an assurance on the life of the assessee or to effect a contract for an annuity."

12. From a plain reading of the aforesaid provisions, it is clear that any sum payable by the employer to effect a contract for annuity is a perquisite and forms

part of the salary and in view of Section 15(b), if such amount is paid, though it may not be due to the employee, it would be deemed to be salary for the purpose of assessing Income Tax under the Act. No provision under the Act provides that such amount can be taxed in the hands of the employee only if it accrues to him in the sense that he acquired a vested right therein. The Legislature, in its wisdom, by creating a fiction has declared the amount in question to be a part of the assessable income of the employee and it has to be given due effect.

13. In the case of Commissioner of Income Tax, Kerala and Coimbatore Vs. L.W. Russel, , a similar question as involved in the present cases arising under the Indian Income Tax Act, 1922 (hereinafter to be referred to as "the old Act" only), fell for consideration before the Supreme Court. Their Lordships, on consideration of the relevant provisions contained under the old Act took the view that the amount spent by the company cannot be taxed in the hands of the employee as salary. The relevant provisions, which were under the consideration in that case, were as under (at page 96) :

"Section 7(1).--The tax shall be payable by an assessee under the head "Salaries" in respect of any salary or wages, any annuity, pension or gratuity, and any fees, commissions, perquisites, or profits in lieu of, or in addition to, any salary or wages, which are allowed to him by or are due to him, whether paid or not, from, or are paid by or on behalf of ... a company ..."

Explanation 1.--For the purposes of this section "perquisite" includes-- . . .

(v) any sum payable by the employer, whether directly or through a fund to which the provisions of Chapters IXA and IXB do not apply, to effect an assurance on the life of the assessee or in respect of a contract of annuity on the life of the assessee."

14. On an interpretation of the aforesaid provisions, it was held by the Supreme Court as below (at page 96) :

"A combined reading of the substantive part of Section 7(1) and Clause (v) of Explanation I thereto makes it clear that if a sum of money is allowed to the employee by or is due to him from or is paid to enable the latter to effect an insurance on his life, the said sum would be a perquisite within the meaning of Section 7(1) of the Act and, therefore, would be exigible to tax. But before such sum becomes so exigible, it shall either be paid to the employee or allowed to him by or due to him from the employer. So far as the expression "paid" is concerned, there is no difficulty, for it takes in every receipt by the employee from the employer whether it was due to him or not. The expression "due" followed by the qualifying clause "whether paid or not" shows that there shall be an obligation on the part of the employer to pay that amount and a right on the employee to claim the same. The expression "allowed", it is said, is of a wider connotation and any credit made in the employer's account is covered thereby. The word "allowed" was introduced in the Section by the Finance Act of 1955.

The said expression in the legal terminology is equivalent to "fixed, taken into account, set apart, granted". It takes in perquisites given in cash or in kind or in money or money's worth and also amenities which are not convertible into money. It implies that a right is conferred on the employee in respect of those perquisites. One cannot be said to allow a perquisite to an employee if the employee has no right to the same. It cannot apply to contingent payments to which the employee has no right till the contingency occurs. In short, the employee must have a vested right therein."

15. Therefore, their Lordships have held the amount in dispute as non-taxable keeping in view the language employed in the relevant provisions of the old Act. In this case, it was not held as an absolute proposition of law that sums payable by the employer to effect an insurance on the life of the assessee or to effect a contract for annuity can never be declared by the Legislature to form part of his income during the year it is spent. The provisions of Section 15 read with Sections 17(1)(iv) and 17(2)(v) of the Act are materially different from Section 7(1) of the old Act. The words and phrases which were the subject-matter of interpretation before the Supreme Court leading to the law laid down by them have not been retained by the Legislature in the relevant provisions of the Act as is clear from Sections 15 and 17 thereof. Section 15 of the Act now clearly provides that any salary which fictionally includes any sum payable by the employer to effect a contract for annuity allowed to the assessee though not due to him, shall also be chargeable to Income Tax under the head "Salaries". Therefore, if the employer provided a certain amount to effect a contract for annuity for the benefit of the employee, then irrespective of the fact whether such benefit was due to the employee in the previous year or not, they will form part of his taxable income under the Act.

16. So far as the decision of the Bombay High Court in the case of Commissioner of Income Tax Vs. Tata Oil Mills Co. Ltd., is concerned, it is no authority for the present purpose. While considering the provisions of Section 40A(5) and the Explanation thereto, their Lordships have made certain observations without addressing themselves to the provisions of the Act, which are being considered in the present case. The other decision in the case of Commissioner of Income Tax, West Bengal-II, Calcutta Vs. Hindustan Housing and Land Development Trust Ltd., , relied on by Mr. Chatterji deals with an entirely different situation and is of no assistance in the present case.

17. Keeping in view the discussions made above, I am of the opinion that the amount in question is liable to be assessed under the head "Salaries" in the hands of the assessee.

18. Accordingly, the question referred to this court is being answered in the negative, i.e., against the assessee and in favour of the Department. However, there shall be no order as to costs.

19. Let a copy of this judgment be transmitted to the Assistant Registrar of the

Income Tax Appellate Tribunal, "A" Bench, Patna.

Aftab Alam, J.

20. I agree.