

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE**

**BEFORE SHRI. CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No. 1359/Bang/2019
Assessment Year : 2012-13

The Deputy Commissioner of Income Tax, Circle – 1(1)(1), Bangalore.	Vs.	Smt. Viloo Zareer Morawala Patel, C/o. M/s. Avesthagen Ltd., Regus UB City Concorde, 15 th Floor, Vittal Mallya Road, Bangalore – 560 001. PAN: ABVPP2706J
APPELLANT		RESPONDENT

Assessee by	:	Shri S.V. Ravishankar, Advocate
Revenue by	:	Shri Sankar Ganesh K, JCIT DR

Date of Hearing	:	23-12-2021
Date of Pronouncement	:	07-03-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal filed by revenue against order dated 07/03/2019 passed by the Ld.CIT(A) for Assessment Year 2012-13 on following grounds of appeal:

“1. The order of the Learned CIT (Appeals), in so far as it is prejudicial to the interest of revenue, is opposed to law and the facts and circumstances of the case.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition to the extent of Rs. 3,42,60,261/- made by the Assessing Officer

under the head "income from salary" though the amount has accrued and has become due to the assessee though not paid.

3. For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the Ld. CIT (A) be reversed and that of the Assessing Officer be restored.

4. The appellant craves leave to add, to alter, to amend or delete any of the grounds that may be urged at the time of hearing of appeal."

2. Brief facts of the case are as under:

The assessee is in individual driving her income from salary and other sources. For year consideration, assessee filed a return of income on 30/09/2013, declaring total income of ₹ 19,707 under the head, "income from other sources".

The Ld.AO found that assessee received salary income of ₹ 3,72,00,008/-, which was not declared in the return of income dated to 30/09/2013. Accordingly, notice under section 148 was issued to assessee and the reasons recorded was also provided. The Ld.AO called upon assessee vide order sheet noting dated 11/03/2016 seeking explanation for not declaring the salary income of ₹ 3,72,00,008/-the return of income. In response to the said notice, the assessee submitted that she had not withdrawn the salary income of ₹ 3,72,00,008/-during the year under consideration and instead had earned only ₹ 19,707/-under the "Income from Other Sources". Assessee was accordingly asked to furnish complete details of the salary along with relevant ledger account, Form 16A etc.

3. The assessee relied on the auditors note to the financial statements pertaining to M/s. Avesthagen Ltd., in support of her contention no salary was received by assessee during the year

under consideration. The Ld.AO after considering the submissions was of the opinion that salary income of ₹ 3,71,80,301/- being chargeable to income tax has escaped assessment and hence the same was added in the hands of the assessee.

By the order of Ld.AO, assessee preferred appeal before the Ld. CIT(A) (A). The Ld. CIT(A) observed and held as under:

“2.2 As per the entries in Form 26AS, salary was paid to the appellant to the extent 229,20,040 for the months of October, November, December 2011 & January 2012 and TDS of Z 7,48,823 is shown to have been made on the same. And the Annual Report mentions that the salary 22,15,70,004 was paid to the appellant. It also a fact that the appellant has claimed the credit for the TDS amounting to Z 7,48,823 as appearing in the Form 26AS. The appellant is the Managing Director of the company M/s Avesthagen Ltd., from where she is drawing the Salary.

2.3 However, considering the fact that the appellant received the claim of TDS of Rs. 7,48,823, on payment of salary of Rs. 29,20,040 appearing in the Form 26AS uploaded by the Company M/s Avasthagen Ltd, the Assessing Officer is directed to assess Rs. 29,20,040 as salary income in the hands of the appellant. The balance amount receivable and accrued to the appellant, (as employee) has to be assessed in the hands of the appellant, as and when it is received.”

Aggrieved by the order of the Ld.CIT(A), assessee is in appeal before this *Tribunal*.

4. The only grievance of the revenue that arises out of the impugned order passed by the Ld.CIT(A) is that, whether the salary due can be taxed on the basis of it becoming due or it's being received whichever is earlier.

5. The Ld.DR submitted that the whole of the salary due to assessee in the relevant has been rightly taxed in the hands of assessee. He relied on the decision of *Hon'ble Delhi Tribunal* in

case of *Naveen Jain vs. DCIT* reported in (2007) 11 SOT 20. It is submitted by the Ld.DR that, where the salary has become due according to the contract of service, it should be regarded as income of the previous year in which it becomes due irrespective of whether it is paid or not. In any event, the Ld.DR submitted that, there is no prejudice caused to the assessee as the Ld.CIT(A) directed the Ld.AO to restrict the disallowance at ₹ 29,20,040/- on which TDS was deducted by the company at ₹ 7,48,823/- is not in accordance with law.

He thus supported the order passed by the Ld.AO.

6. On the contrary, the Ld.AR submitted that the Chartered Accountant, Italia & Associates, LLP, who audited the company (M/s. Avesthagen Ltd.), in which assessee is a managing director provided a certificate that assessee had not received any salary during the financial year relevant to assessment year under consideration. He submitted that the said certificate is placed page 17 of the paper book. Further he referred to page 18 of the paper book, wherein it is submitted that sum of ₹ 1,86,00,004/- which was in excess of the limits specified under Schedule XIII to the Companies Act, 1956 for financial year 2011-12 was reversed in the financial year 2015-16 and the same was reported under "Note 24" of the audited financials of the company as on 31/03/2016. He also referred to Note 26 of the audited financials of the company as on 31/03/2012, wherein it is recorded that the approval of the Central Government was still pending.

7. He has submitted that nothing was received by assessee as salary during the year under consideration which is certified by the auditors, and therefore no salary is taxable in the hands of

assessee for year under consideration. The Ld.AR placed reliance on the *decision of Hon'ble Ahmedabad Tribunal* in case of *Vrajeshwari B Prikh vs. ITO* reported in (2015) 61 taxmann.com 235 and *decision of Hon'ble Delhi Tribunal* in case of *Rajat Lal vs.DCIT* reported in (1998) 66 ITD 333.

We have perused the submissions advanced by both sides in light of records placed before us.

8. As per provisions of the Income-tax Act, 1961, income from salary is taxable in the hands of an employee as per the circumstances envisaged under section 15 of the Act:

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 or on behalf of an employer or a former employer though not due or before it became due to him;

(c) any arrears of salary paid or allowed to him in the previous year by or on behalf of an employer or former employer, if not charged to income tax for any earlier previous year.

Explanation 1: for removal of doubts it is hereby declared that where any salary paid in advance is included in the total income of any person or any previous year it shall not be included again in the total income of the person when the salary becomes due.

Explanation 2: any salary, bonus, commission on remuneration by whatever name called, due or received by, a partner of the firm from the firm shall not be regarded as "salary" for the purposes of this section"

9. From the above, it is clear that what is taxable under section 15 under the head salary is the amount that is "due", whether received or not. The sub section (b) also envisages that salary

‘paid or allowed’ to an employee whether ‘due or not’, is also taxable in a relevant previous year to the assessment year.

10. It is very clear from *Explanation 1* that, where any salary is paid in advance is assessed in the year of payment or, being allowed cannot be once again taxed in the year in which it has become due. Similarly, as per *Explanation 2*, an income that is assessed in the past on the basis of it becoming “due”, cannot be taxed again in the year of being ‘paid or allowed’.

11. We have perused the decisions relied by the Ld.AR and also the decision raised by the Ld.DR. All these decisions go on one principle that, what is due and payable for the assessee in a relevant year is taxable either on accrual basis or on receipt basis whichever is earlier.

11.1 In the present facts we know that, there are 2 components which is embedded in the income under the head salary to the assessee. One portion which is within the permissible limits of Schedule XIII to the Companies Act, 1956 and the 2nd part is the excess salary that is not yet received and pending approval from the Central Government. In our considered opinion going by the ratios laid down by the decisions relied upon by both sides, the amount that is due to the assessee within the permissible limits of Schedule XIII to the Companies Act, 1956 is liable to be taxed for the year under consideration on accrued basis. Therefore whether the assessee withdrew the salary or not is absolutely irrelevant as per the provisions u/s. 15 of the Act.

12. In the present facts of the case, neither the assessment records nor any of the submissions by the assessee reveals what is the salary that was payable to assessee which was within the

permissible limits as per Schedule XIII to the Companies Act, 1956 for year under consideration.

12.1 Referring to the Note 26 to the audited financial statements for year ended 31/03/2012 placed at page 35, we note that up to financial year ended 31/03/2012 the company has accrued remuneration payable to the managing director(assessee) of ₹ 3,72,00,008/- which is in excess of the limits specified under Schedule XIII to the Companies Act, 1956. Further it also reveals that, remuneration up to 31/03/2010 which was in excess of the specified limits as per Schedule XIII to the Companies Act, 1956, the company obtained the approval from the Central Government pertaining to the appointment from 01/01/2008 to 31/12/2010. It is also stated that, due to subsequent increase in the salary to the whole time director during financial year 2009-10, the excess salary was not approved by the Central Government and that the company reapplied, which was pending approval. Coupled with the note 26, if one reads the certificate issued by the auditors placed at page 18, it is clear that the excess salary over and above the limits specified under Schedule XIII to the Companies Act, 1956 was quantified at ₹ 1,86,00,004/-.

13. Based on the above what was actually due to assessee as salary for year under consideration is not determinable from the records. However going by Form 26 AS, it is evident that TDS u/s. 192 was deducted amounting to Rs.7,48,823/- on ₹ 29,20,040/- for the month of October 2011 January 2012 and December 2012. We note that the Ld.CIT(A) considered portion of amount which do not fall within the financial year relevant assessment year under consideration and therefore to the extent

of the TDS deducted on the amount pertaining to December 2012 cannot be considered for the relevant assessment.

14. Now coming to the 2nd portion of the excess salary which is pending approval, we note that in the year ended 31/03//2015, assessee waived of the remuneration accrued to her to the extent that is pending approval with the Central Government. That again does not mean that the central Government would dismiss the application of approval filed by the company. In our view as and when the approval is received, the accrual will relate back to the relevant year that it pertains to and accordingly will have to be taxable in the respective assessment year. But as the assessee has not yet received the right to accrue such excess salary for the relevant year under consideration at this juncture it needs to be verified if subsequently approval was given by the Central Government.

15. We direct the assessee to file all requisite details, the appointment letter and the bifurcation of increase in the salary during financial year 2009-10 which was pending approval with the Central Government. The application filed before the Central Government seeking approval of the excess remuneration and any approval given by the Central Government subsequently if any may also be filed before the Ld.AO.

16. The Ld.AO shall then verify all the details and compute the salary in the hands of assessee for relevant year under consideration based on the amount that is due and payable to assessee. In even the subsequent years the Central Government has granted permission on the excess salary that is treated as

advance by the company, the same shall be attributed to the relevant year on which tax ability shall be determined.

17. With the above directions we remand this issue back to the Ld.AO to consider the issue in accordance with law. Needless to say that proper opportunity of being heard must be granted to assist in accordance with law.

Accordingly, the grounds raised by revenue stands allowed for statistical purposes.

In the result appeal filed by revenue stands allowed for statistical purposes.

Order pronounced in open court on 07th March, 2022.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 07th March, 2022.
/MS /

Copy to:

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|---------------|------------------------|
| 1. Appellant | 4. CIT(A) |
| 2. Respondent | 5. DR, ITAT, Bangalore |
| 3. CIT | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore