IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C' DELHI
BEFORE SHRI C.L. SETHI AND SHRI K.G. BANSAL

ITA No. 1957(Del)/2011
Assessment year: 2006-07

MR. ISAO SAKAI,
C/o Japan Airlines Intl. Co. Ltd.
36, Chanderlok Building,
Janpath, New Delhi.
PAN: AYCPS7554H

Vs.

Joint Commissioner of Income tax, Range-42, New Delhi.

ITA No. 1958(Del)/2011
Assessment year: 2006-07

MR. YUJI HORIKAWA,
C/o Japan Airlines Intl. Co. Ltd.
36, Chanderlok Building,
Janpath, New Delhi.
PAN: ABRPH9028H

Vs.

Joint Commissioner of Income tax, Range-42, New Delhi.

ITA No. 1959(Del)/2011
Assessment year: 2006-07

MR. YOSHIMI KAMANO,
C/o Japan Airlines Intl. Co. Ltd.
36, Chanderlok Building,
Janpath, New Delhi.
PAN: AMGPK 9667F

Vs.

Joint Commissioner of Income tax, Range-42, New Delhi.

ITA No. 1960(Del)/2011
Assessment year: 2006-07

MR. TELSUO MITERA,
C/o Japan Airlines Intl. Co. Ltd.
36, Chanderlok Building,
Janpath, New Delhi.
PAN: AKJPM4853E

Vs.

Joint Commissioner of Income tax, Range-42, New Delhi.

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(Appellant) (Respondent)

Appellant by : Smt. Anjali Gupta, Advocate
Respondent by : Shri Salil Mishra, Sr. DR

Date of Hearing : 28.10.2011
Date of pronouncement : 04.11.2011

ORDER

PER BENCH

All these appeals involve a common ground-whether, the CIT(Appeals) erred in confirming the finding of the Assessing Officer that "salary" for the purpose of determining perquisite value of accommodation under Rule 3 includes the tax paid by the employer company? It may be mentioned that four grounds have been taken in each of the appeals and the question framed above represents the gist of the grounds. However, for the sake of completeness, the grounds taken in the appeal in case of Yuji Horikawa in ITA No. 1958(Del)/2011 are reproduced below:-

"1. The ld. CIT(A) erred in confirming:

(a) The assessable income at Rs. 35,32,971/- as against Rs. 31,20,482/- returned by the appellant.

(b) The perquisite value of concessional accommodation at Rs. 4,28,411/- as against Rs. 3,44,588/- returned by the appellant less rent recovered.

2. The ld. CIT(A) erred in confirming the conclusion of the Assessing Officer that :

(a) The tax paid by the employer is not a perquisite within the meaning of section 17(2)(iv).

(b) Salary for the purpose of determining the perquisite value of accommodation under Rule 3 will include the tax paid by the employer company.

3. The CIT(A) erred in not following the principle laid down by the Special Bench of the Delhi Tribunal in the case of RBF Rig Corporation & Others Vs. ACIT, 297 ITR (AT) 228."

2. The case of the ld. counsel for the assessee is that tax paid by the employer on behalf of the employee constitutes perquisite within the meaning of section 17(2)(iv) of the Income-tax Act, 1961 ('the Act' for short). In the case of RBF Rig Corporation LLC Vs. ACIT, (2008) 113 TTJ (Del) (FB) 143, it has been held that payment of tax on behalf of the employee at the option of the employer can only be treated as discharge of an obligation of the employee, which but for such payment would have been payable by the employee himself. Therefore, the amount of tax paid is a perquisite covered under section 17(2)(iv) of the Act. It is her further case that if the tax paid by the employer is perquisite, then the amount so paid by the employer cannot be included while computing "salary" under Rule 3 of the Income-tax Rules, 1962, for the purpose of ascertaining the perquisite value of accommodation supplied by the employer to the employee.

3. On the other hand, the ld. senior DR referred extensively to various paragraphs of the assessment order and argued that the word "obligation" used in the aforesaid provision does not include income-tax payment on behalf of the employee and such payment amounts to payment of salary in cash.

4. We may now discuss some of the cases relied upon by the rival parties.

4.1 In the case of T.P.S Scott & Others Vs. CIT, (1998) 232 ITR 475 (Del), the question before the Hon'ble High Court was-whether, on the facts and in the circumstances of the case, the amount of tax paid by British High Commission to the Indian Government on 29th March, 1992, is chargeable in the hands of the assessee under section 15 read with section 17(2)(iv)? The finding of the Hon'ble Court is that the income-tax paid by the employer on behalf of the employee is a part of the salary of the assessee and the word "salaries" would in its natural import will include in it the tax paid on behalf of the employee. The judgment does not really settle the matter at hand one way of the other. What is to be noted from the point of view of revenue is the finding that the word "salaries" in its

natural meaning includes tax paid on behalf of the employee. For the sake or ready reference, paragraph nos. 3 and 4 of the decision are reproduced below:-

"3. We may refer to the relevant statutory provisions. Section 15 sets out the income which shall be chargeable to income-tax under the head "salaries". Vide clause (b) thereof any salary paid or allowed to an employee 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 is an income chargeable to tax under the head "salaries". For the purpose of s. 15 vide s. 17(1)(Iv), perquisites are included in salary. Vide sub-clause (iv) of clause (2) of section 17 any sum paid by the employer in respect of any obligation which, but for such payment, would have been payable by the assessee, is included in "perquisites". The interpretation clause, i.e., section 2 of the Act, vide sub-clause (iii) of clause (24) thereof, includes the value of any perquisite or profit in lieu of salary taxable under clauses (2) and (3) of section 17, within the meaning of "income".

All these statutory provisions make it clear that an amount of tax which would have been payable by an employee-assessee, if paid by the employer on behalf of the assessee, is to be included in the perquisites amounting to salary rendering it liable to tax by being included in income.

4. In the view taken hereinabove, we are fortified by two English decisions, i.e., North British Railway Co. Vs. Scott (1922) 8 Tax Cases 332 (HL) and Hartland vs. Diggines (1926) 10 Tax Cases 247 (HL). Both these decisions have been followed by two High Courts in India, i.e., the Bombay High Court in CIT Vs. H.D. Dennis (1982) 26 CTR (Bom.) 107 : (1982) 135 ITR 1 (Bom): tc 58r. 443, AND THE Madras High Court in CIT vs. I.G. Mackintosh (1975) 99 ITR 419 (Mad.): TC 58R. 438. Both the High Courts have held that the

income-tax paid by the employer on behalf of the employee is a part of the salary of the assessee and the word "salaries" would in its natural import comprehend within it tax paid on behalf of the employee."

4.2 In the case of Emil Webber Vs. CIT, (1993) 200 ITR 483 (SC), the question before the Hon'ble Court was-whether, on the facts and in the circumstances of the case, the amount of tax paid by Ballarpur on behalf of the assessee in assessment years 1974-75 and 1975-76 is taxable under the head "other sources"? The Hon'ble Court observed that after looking into the matter from any angle, it is clear that the amount paid by way of tax on the salary received by the assessee can be treated as income of the assessee. However, it cannot be overlooked that the said amount is nothing but tax on the salary. By virtue of obligation undertaken by Ballarpur to pay tax on the salary of the assessee among others, it paid the said tax. Therefore, the payment is for and on behalf of the assessee and it is not a gratuitous payment. If the tax had not been paid by Ballarpur, the same would have to have been paid by the assessee. Therefore, it will be unrealistic to say that the said payment had no connection with the salary. Accordingly, the amount was held to be includible in the total income as "salary". According to us, this case also does not deal directly

with the question at hand. For the sake of ready reference, paragraph nos. 7, 8, 9 and 10 of the judgment are reproduced below:-

> *"The definition of 'income' in clause (24) of Section 2 of the Act is an inclusive definition. It adds several artificial categories to the concept of income but on that account the expression 'income' does not lose its natural connotation. Indeed, it is repeatedly said that it is difficult to define the expression 'income' in precise terms. Anything which can properly be described as income is taxable under the Act unless, of course, it is exempted under one or the other provision of the Act. It is from the said angle that we have to examine whether the amount paid by Ballarpur by way of tax on the salary amount received by the assessee can be treated as the income of the assessee. It cannot be overlooked that the said amount is nothing but a tax upon the salary received by the assessee. By virtue of the obligation undertaken by Ballarpur to pay tax on the salary received by the assessee among others, it paid the said tax. The said payment is, therefore, for and on behalf of the assessee. It is not a gratuitous payment. But for the said agreement and but for the said payment, the said tax amount would have been liable to be paid by the assessee himself He could not have received the salary which he did but for the said payment of tax. The obligation placed upon Ballarpur by virtue of Section 195 of the Income Tax Act cannot also be ignored in this context. It would be unrealistic to say that the said payment had no integral connection with the salary received by the assessee. We are, therefore, of the opinion that the High Court and the authorities under the Act were right in holding that the said tax amount is liable to be included in the income of the assessee during the said two assessment years.*
>
> *The question then arises under which head of income should the said income be placed. Inasmuch as the assessee is not an employee of Ballarpur, which made the payment, it cannot be brought within the purview of Section 17 of the Act. It must*

necessarily be placed under sub-section (1) of Section 56, 'income from other sources'. According to the said subsection, income of every kind which is not to be included from the total income under the Act shall be chargeable to income tax under the head 'income from other sources', if it is not chargeable to income tax under any of the other heads specified in Section 14, Items A to E. It is not the case of the assessee that any provision of the Act exempts the said income from the liability to tax.

The learned counsel for the assessee-appellant relied upon certain decisions in support of his contention. The first is the decision of this court in N.A. Modi v. S.A.L. Narayana Rao, 61 ITR 428 SC. An advocate was appointed as a Judge. He received certain income after his appointment as a Judge in lieu of the professional service rendered by him before his appointment. The question was whether the said amount is taxable. It was held that it was not (in view of the provisions of the Act as it then stood). The basis for the said decision is that the assessee therein cannot be said to be carrying on the profession of an advocate at the time he received the said income. We are unable to see how the said decision helps the assessee herein. Indeed, in the said decision this court emphasized that the question whether an income falls under one head or the other has to be decided according to the common notion of practical men, inasmuch as the Act does not provide any guidance in the matter. It was observed that the heads of income must be decided on the nature of income by applying practical common notions and not by reference to the assessee's treatment of income. The application of said test does not certainly help the assessee herein.

The second decision cited is of the Bombay High Court in CIT, Bombay v. Smt. T.P. Sidhwa, 133 ITR 840. The question was whether the income from property received by an assessee of which he is not the owner can be taxed as 'income from other sources'. It was held that it cannot be so taxed. We do not see any analogy between the facts and principle of that case and those of this case. Here the integral connection between the salary received by the assessee and the tax payable thereon, paid by Ballarpur in pursuance of a legal obligation, cannot be

overlooked. The third case cited is in Mrs. Sheela Kaushish v. C.I.T, Delhi, 131 I.T.R. 435(S.C). In this case, it was held that determination of annual value under Section 23 of the Income Tax Act, 1961 should be done by taking the standard rent as the basis even where the assessee is receiving rent higher than the standard rent. Again we must say, we see no relevance of the said principle of this case to the facts of this case."

4.3 In the case of RBF Rig Corporation LLC (supra), the question before the Special Bench was-whether, on the facts and in the circumstances of the case, tax paid by the employer on the income of the assessee is entitled to exemption u/s 10(10CC) of the Income-tax Act, 1961? The Tribunal came to the conclusion that it is not money which is paid to the assessee when taxes are paid on his behalf. It is discharge of his obligation, therefore, the payment fits within the wording of section 17(2)(iv). This decision is explicit that payment of tax on behalf of the employee by the employer is discharge of an obligation and, therefore, it is a perquisite. It is not a monetary payment or a monetary allowance etc. Certainly it is not a monetary payment to the assessee. The ld. DR tried to distinguish this case by mentioning that the decision is not in the context of Rule 3 but section 10(10CC). In any case, the employer is bound to deduct tax at source from the salary paid to an employee even if there is no private agreement between the employer and the employee that the tax on the salary will be borne by the former.

Therefore, payment of tax on behalf of an employee is nothing but payment of salary in cash as otherwise the amount would have been received by the employee in cash and paid to the Income Tax Department in cash. In this connection, heavy reliance has been paid on the decision in the case of TPS Scott & Others (supra). For the sake of ready reference, paragraph no. 17.1 of this decision is reproduced below:-

> *"17.1 It is not money, which is paid to the assessee when taxes are paid on his behalf. It is discharge of his obligation. The payment fully fits in the jacket of sub-clause (iv) of section 17(2) of the Act. It may be a monetary gain or monetary benefit or a monetary allowance but definitely it is not a monetary payment to the assessee. What is excluded in the clause is the perquisite in the shape of a monetary payment to the assessee. If it is a payment to a third person like payment of taxes to the Government, then such payment of taxes cannot be excluded under clause 10(10CC). The circular of the Board and provision of sub-section (1A) of section 192, sec., 40(a)(v) and section 195A fully support the claim of the assessee. We, therefore, hold that the taxes paid by the employer on behalf of the assessee is a perquisite within the meaning of section 17(2) of the IT Act, which is not provided by way of monetary payment. Therefore, there is no reason not to exclude such payment of taxes from the total income of the assessee. In other words, taxes paid by the employer can be added only once in the salary of the employee. Thereafter, tax on such perquisite is not to be added again. We, therefore, find substance in the contention advanced on behalf of learned counsel for the assessees and the interveners. The question referred to us is answered in favour of the assessee. The appeals of the assessees and interveners are allowed on this issue."*

4.4 It may be mentioned at this stage that the aforesaid decision was followed by "G" Bench of the Delhi Tribunal in the case of Transocean Offshore Deepwater Drilling Inc. Vs. DCIT, (2009) 34 SOT 323.

4.5 The issue raised in this case was directly dealt with by "E" Bench of Delhi Tribunal in the case of ACIT Vs. Makote Hoshizaki, (2009) 27 SOT 191 (Del). It has been held that after amendment in Rule 3 coming into force with effect from 01.04.2001, it is clear that for the purpose of determination of perquisite value of rent-free accommodation, the term "salary" will not include value of perquisite as specified in section 17(2) of the Act. Referring to the decision in the case of CIT Vs. H.D. Dennis, (1982) 135 ITR 1, it was further held that the definition given in Rule 3 is co-extensive given in section 17, except that there is an express exclusion therefrom of certain kinds of payments mentioned therein. This decision was rendered on 06.04.1981. However, sub-clause (d) of clause (vi) of the Explanation to Rule 3 became applicable with effect from 01.04.2001, which excludes the perquisites specified under section 17(2) of the Act. Since this rule specifically excludes perquisites specified in section 17(2) from the salary for the purpose of computation of perquisite, the tax paid on behalf of the employee by the

employer is not includible in "salary" for the purpose of computing the perquisite value of the accommodation supplied to the employee. For the sake of ready reference, the finding recorded in this decision in paragraph no. 11 is reproduced below:-

> *"11. Thus, on the comparison of definition of the word 'salary' before and after 01.04.2001, it is clear that for the purpose of determination of perquisite value of rent-free accommodation with effect from 01.04.2001, as provided in sub-clauses (d)& (e) of clause (vi), the term 'salary' will not include the value of perquisites as specified under section 17(2) of the Act or any payment or expenditure specifically excluded under proviso to sub-clause (iii) of clause (2) or proviso to clause (2) of section 17. No doubt the Assessing Officer relying on the decision of Hon'ble Bombay High Court in the case of H.D. Dennis (supra) has held that the definition given in rule 3 is a co-extensive with the definition given in section 17 except there was an express exclusion therefrom of kinds of payments mentioned. This decision was rendered on 6.4.1981. However, sub-clause (d) of clause (vi) of the Explanation applicable with effect from 1.4.2001 specifically excludes the perquisites specified under section 17(2) of the Act to be included in the salary for the purpose of determination of perquisite value under rule 3 of the Income-tax Rules, 1962. Thus, prior to 1.4.2001 as per the decision of Hon'ble Bombay High Court, the term "salary" included the perquisites under section 17(2)(iv) of the Act. The ratio of the decision rendered by Hon'ble Bombay High Court is still applicable to the extent it has been held that the definition given in rule 3 is co-extensive with the definition given in section 17 except so far as there is an express exclusion therefrom of the kinds of payments mentioned. Since sub-clause (d) of clause (vi) of Explanation to rule 3 specifically excludes perquisites specified in section 17(2) of the Act from salary for the purpose of computation of perquisites, in our considered opinion, in principle the salary will not include the tax paid by the employer for the purpose*

of determination of perquisite value of rent-free accommodation under rule 3 of the Income-tax Rules, 1962."

4.6 As the issue stands covered directly by the decision of a coordinate bench in the case of Makote Hoshizaki (supra), which is in the nature of a binding precedent, it is held that the tax paid by the employer on behalf of the employee is perquisite under section 17(2) of the Act and, therefore, not includible in 'salary' under Rule 3 for the purpose of computing the perquisite value of the accommodation supplied by the employer to the employee. The AO is directed to compute the perquisite value by following the aforesaid direction.

5. In the result, all the appeals are allowed.

Sd/- sd/-

(C.L. Sethi) (K.G.Bansal)
Judicial Member Accountant Member
SP Satia
Copy of the order forwarded to:-

Assessees-Mr. Isao Sakai, Mr. Yuju Horikawa, Mr. Yoshimi Kamano & Mr. Telsuo Mitera C/o M/s Japan Airlines Intl. Co. Ltd., New Delhi.
JCIT, Range-42, New Delhi.
CIT
CIT(A)
The DR, ITAT, New Delhi. Assistant Registrar.