

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 1st DAY OF APRIL 2016

PRESENT

THE HON'BLE MR. JUSTICE JAYANT PATEL

AND

THE HON'BLE MRS. JUSTICE B.V.NAGARATHNA

ITA. No.653/2015

C/W

ITA.NOs.654 AND 655/2015

BETWEEN:

1. THE COMMISSIONER OF
INCOME-TAX, TDS,
NO.59, HMT BHAVAN,
4TH FLOOR, BELLARY ROAD,
GANGANAGAR, BANGALORE – 560 032.
2. THE INCOME-TAX OFFICER(TDS),
WAR-18(2), NO.59, HMT BHAVAN,
4TH FLOOR, BELLARY ROAD,
GANGANAGAR,
BANGALORE – 560 032.

... APPELLANTS COMMON

(BY SRI.K.V.ARAVIND, STANDING COUNSEL)

AND:

M/S.SYMPHONY MARKETING
SOLUTIONS INDIA PVT.LTD.,
BLOCK B, SALARPURIA SOFTZONE,
BELLANDUR VILLAGE, VARTHUR HOBLI,
BANGALORE – 560 032.
PAN:AAKCS 6235N.

... RESPONDENT COMMON

THESE ITAS ARE FILED UNDER SECTION 260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED:24/07/2015 PASSED IN ITA NOS.874/BANG/2014, 1252/BANG/2014 AND 1586/BANG/2014 RESPECTIVELY, FOR THE ASSESSMENT YEARS 2009-2010, 2010-11 AND 2011-2012 RESPECTIVELY, PRAYING TO 1. FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED ABOVE. 2. ALLOW THE APPEALS AND SET ASIDE THE ORDERS PASSED BY THE ITAT, BENGALURU IN ITA NOS.874/BANG/2014,1252/BANG/2014 AND 1586/BANG/2014 RESPECTIVELY DATD:24/07/2015 CONFIRMING THE ORDER OF THE APPELLATE COMMISSIONER AND CONFIRM THE ORDER PASSED BY THE INCOME TAX OFFICER(TDS), WARD-18(2), BENGALURU.

THESE APPEALS COMING ON FOR ADMISSION THIS DAY, **JAYANT PATEL J.** DELIVERED THE FOLLOWING:

J U D G M E N T

All these appeals are preferred by the Revenue by raising following substantial questions of law:-

“1.Whether on the facts and in the circumstances of the case, the Tribunal is right in law in relying on the circulars No.33 (LXXX-VI-5) dated 01/08/1955 and No.Q/FD/695/1/90 dt:11/11/1996 issued by Ministry of External Affairs when these circulars are not applicable in toto to the present case and do not fall into the category of

the allowances covered under these circulars?”

2. “Whether on the facts and in the circumstances of the case the Tribunal is right in law in relying on the decision of the Tribunal, Kolkata bench in the case of Saptarshi Ghosh?”

3. “Whether on the facts and in the circumstances of the case the Tribunal is right in law in holding that per-diem allowance paid to the employees as a part of the salary is not liable to TDS under section 192?”

2. We have heard Mr.K.V. Aravind, learned counsel appearing for the appellants.

3. We may record that the Tribunal in the impugned order while considering aforesaid aspect has observed at paragraphs 4.3.1 to 4.3.3 as under:-

“4.3.1 We have heard the rival submissions and perused and carefully considered the material on record; including the judicial pronouncements and Govt. of India Circulars cited and referred to. The facts of the matter in respect of payment of per diem by the assessee to its employees traveling for business/official trips to USA and Europe @ \$ 50 and \$ 75 respectively to cover actual expenses of meals, travel, laundry and other miscellaneous expenses etc. are not disputed and the contrasting views of both the assessee and the Assessing Officer thereon; as to the same being reasonable and exempt under Section 10(14) of the Act or liable to deduction of tax under section 192 of the Act have been laid out briefly at paras 2.1 to 2.3 of this order (supra).

4.3.2. We find that the learned CIT (Appeals)’s in their impugned orders had considered the decisions of the ITAT, Kolkata Bench in the case of Saptarshi Ghosh (supra) and decision of the Mumbai Bench of the ITAT in the case of Madanlal Mohanlal Narang(supra) wherein it was held that it is not open to Revenue to call for details of expenditure incurred unless the per diem

allowance paid is disproportionately high compared to the salary received or with regard to the duties performed by the employee. In the context, the learned CIT(Appeals)'s also examined the Circular No.Q/FD/695/1/90 dt.11.11.1996 and Circular No.Q/FD/695/2/2000 dt/21.9.2010 issued by Ministry of External Affairs, Govt. of India and came to the conclusion that the per diem allowance of \$ 50 to \$ 75 paid by the assessee to its employees on official trips to USA and Europe to be reasonable and that the same would be covered as exempt under Section 10(14) of the Act. In the impugned order for Assessment Year 2009-10 dated.25.9.2014, the last of the impugned orders to be passes, the learned CIT(Appeals) held as under at 3 to 5 as under:-

“3.0 I have carefully considered the facts, the appellant's submissions and perused the impugned order. I agree with the argument of Id. A.R. that the per diem allowance paid to its employees qualifies for exemption under Section 10(14)(i) of the Act r.w. Rule 2BB(1). Clause (b) of Rule 2BB(1) refers to any allowance to meet the ordinary daily charges incurred by an employee on account of absence from normal place of duty. There is no monetary limit prescribed and hence unless such allowance is said to be fictitious or

abnormally high or otherwise taxable in the hands of the employee, no liability could be fastened under Section 192 on the employer to deduct tax on such allowance. Moreover, it is also not possible to collate bills for every minuscule expenses and mere non-collation of bills in support of amount expenses cannot prevail over the fact of incurring such expenses. It is found that the Assessing Officer has not gone through the CBDT Circular wherein it is clarified that where specific allowances are reasonable with reference to the nature of the duties performed by the employee and are not disproportionately high compared to the salary received by him, no attempt will ordinarily be made to call for details of expenses actually incurred by him with a view to disentitling him to some extent from the exemption.

3.1 Useful reference could also be made to the following decisions:

1. CIT Vs.L&TLtd(2009)313 ITR 1(SCO
2. CIT Vs.ITI Ltd(2009)221 CTR 1(SC)609
3. CIT Vs.Gostino Mario & Others 241 ITR 312(SC)
4. CIT Vs.Micro Land Ltd.(2010)323 ITR 670 (Karnataka)

To the question as to whether assessee-employer is bound to collect and verify proof of journey and actual expenditure incurred for section 10(5) before granting exemption under that provision, it was held by the Hon'ble Courts that there is no such requirement in the law. The provision of section 10(14) and 10(5)

are somewhat pari material, in the sense that proviso to section 10(5) also puts a ceiling that such allowance shall not exceed the actual expenditure. In any case, the allowance cannot be denied exemption under section 10(14) and assessee-employer said to be in default for failure to deduct tax on the ground of absence of proof of such actual expenses on food, travel, laundry incurred by the employees, while performing duties in a foreign country.

3.2 In view of the above reasons, also accepted in case of appellant for Assessment year 2011-12 (appellate order dated 17.10.2013) where it was held that the per diem allowance is reasonable at \$ 50 to \$ 75 for the US and Europe, and would be covered under Section 10(14). The appellant could not be said to be in default within the meaning of section 201(1) for not including such attempt allowance for the purpose of section 192. The Assessing Officer is directed to exclude such amounts of per diem allowances from the amounts liable to TDS under Section 192. Appellate Grounds of appeal (No.1.1 to 1.4) on the issue are allowed.

4. The other ground (No.2) of appeal raised is with regard to levying of interest under Section 201(1A), amounting to Rs.12,93,117 relating to default under Section 201(1) rws 192. Since, the assessee has been held to be not in default under section 201(1) with regard to the per diem allowances paid the interest under Section 201(1A) is also held to be not chargeable, and hence deleted.

5. As a result, the appeal is allowed.”

4.3.3 Before us, except for raising the grounds of appeal and supporting the views of the Assessing Officer, which are not tenable in the light of the judicial pronouncements of the Tribunal and the Circulars of Ministry of External Affairs, Govt. of India referred to above, Revenue has not been able to controvert the findings in the impugned orders of the learned CIT (Appeals)’s. Following the decision of the Hon’ble ITAT, Kolkata Bench in the case of Saptarshi Ghosh (supra) wherein it has been held that there is no requirement for the assessee-employer to collect and verify the proof of journey, actual expenditure incurred in respect of per diem allowance and further that it is not open to revenue to call for details of expenditure unless the allowances are highly disproportionate or unreasonable to the salary received or nature of duties performed. We also concur with the findings of the learned CIT(Appeals) that, in the light of the circulars issued by the Ministry of External Affairs, Govt. of India dated 11.1996 and 21.9.2010(supra), the per diem allowance of \$ 50 to \$ 75 paid to employees on their official trips to USA and Europe are

reasonable and would be exempt under Section 10(4) of the Act. In this view of the matter, we uphold the decisions of the learned CIT(Appeals), that since the assessee has been held to be not in default under Section 201(1) of the Act with regard to per diem allowances paid, interest under Section 201(A) of the act is also consequently not chargeable. Consequently, the Grounds at S.Nos. 1 to 4 raised by Revenue are rejected for all three Assessment Years 2009-10 to 2011-12.”

4. The aforesaid shows that the Tribunal has followed its earlier judicial pronouncement of Kolkata Bench and has also considered circulars issued by the Ministry of Extental Affairs, Government of India instructing that if the amount which is stated to have been paid as per diem allowance was not highly disproportionate or not unreasonable, the further verification of the actual expenditure is not to be considered. The resultant effect is that the amount is to be treated as by way of reimbursement of expenses.

5. Mr. Aravind, learned counsel appearing for the appellant, raised the contention that as per Section 17(1)(iv) of the Income Tax Act, 1961, ('the Act' for short) the amount would fall in the category of perquisites in addition to the salary or wages and therefore, the TDS was deductible. However, when he was confronted with the nature of the amount as to whether such amount is taxable or not, he submitted that as per Section 10(14) if it is by way of reimbursement, such amount would not be taxable. But it is his submission, the payment made cannot be treated as reimbursement because it is paid without verification of the expenses already incurred by the employee concerned.

6. Section 10(14) of the Act reads as under:-

(14)(i) any such special allowance or benefit, not being in the nature of a perquisite within the meaning of clause(2) of section 17, specifically granted to meet expenses wholly, necessarily and

exclusively incurred in the performance of the duties of an office or employment of profit, [as may be prescribed], to the extent to which such expenses are actually incurred for that purpose;

(ii) any such allowance granted to the assessee either to meet his personal expenses at the place where the duties of his office or employment of profit are ordinarily performed by him or at the place where he ordinarily resides, or to compensate him for the increased cost of living, [as may be prescribed and to the extent as may be prescribed].:]

[Provided] that nothing in sub-clause(ii) shall apply to any allowance in the nature of personal allowance granted to the assessee to remunerate or compensate him for performing duties of a special nature relating to his office or employment unless such allowance is related to the place of his posting or residence;]

The aforesaid shows that if any allowance or benefit not being in the nature of perquisite is granted to meet the

expenses wholly, necessarily or exclusively incurred in performance of duties, to the extent to which such expenses are actually incurred would fall in the said category. It is the case of the assessee that the payment was not made as an allowance on par with the perquisites, but the case of the assessee was that the payment was made to meet the expenses incurred. When the payment is made to meet the expenses incurred and when not taxable under Section 10(14) of the Act merely because the actual expenses were not verified, the character or nature of the payment would not be changed so as to include under Section 17(2) of the Act. On the aspects of verification, the Tribunal has relied upon not only its own decision but has further relied upon the circular issued by the Ministry.

7. In view of the above, we do not find, any substantial question of law, would arise for

consideration, as canvassed. Hence, all the appeals are dismissed.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

*alb/-.