* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON : 09.08.2012
DECIDED ON : 17.08.2012

\+ ITA 285/2003

SCOTT R.BAYMAN ..... Appellant

Through : Mr. S.Ganesh, Sr. Advocate with
Mr. Pawan Sharma, Ms. Madhavi Swaroop, Ms. Preeti Goel and Ms. Roohina Dua, Advocates

versus

COMMISSIONER OF INCOME TAX,DEL ..... Respondent

Through : Mr. Deepak Chopra, Sr. Standing Counsel with
Mr. Harpreet Singh Ajmani, Advocate

CORAM:

MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT
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1. The present appeal is directed against an order of Income Tax Appellate Tribunal (ITAT) dated 21.08.2012 in ITA No.1617/Del/97. The following question of law was framed for consideration in the present appeal on 30.07.2004.

> *"Whether the amount spent by the employer towards the repair of building would be covered by clauses (iii) & (iv) of Sub-Section 2 of Section 17 of the Income Tax Act, 1961?"*

2. The brief facts are that the assessee was the President and CEO of M/s GE International Operations Corp. Inc. (in short GEIOCI). He had filed a return of income on 30th June 1994; which was processed under Section 143(1)(a) at

Rs.39,27,839/-. He later filed a revised return disclosing his total income as Rs.84,74,828/-. He had filed a certificate of salary from his employer showing a total receipt of US $ 276442 as salary and furnished residential accommodation as well as other benefits. The Assessing Officer, during the course of proceedings, observed that for the year under consideration the assessee's employer had incurred expenses of Rs.50 lakhs towards repair and renovations of the residential accommodation occupied by him. To examine the matter further, a notice under Section 131 was issued to the assessee. In response to certain queries, the assessee's representative furnished answers. He had contended that his predecessor in the corporation had stayed longer than was expected and for that duration very little money was incurred by GE International Operations Corp. Inc. for maintaining the residence i.e. 4 Panchsheel Marg. When the assessee took over his position, it was difficult for him to find a residence comparable to what he was used to in United States, as a result of which the employer decided to extend the lease for the house which had been leased for the assessee's predecessor and upgrade the facilities befitting a person of his seniority and status. The employer GEIOCI approved this arrangement and accordingly paid about Rs.50 lakhs to M/s Framework Interiors for carrying out various works like electric wiring, plumbing, air-condition ducting, security fencing, guard rooms etc. With this amount some furniture etc. was also bought. The Assessing Officer held that the amount of Rs. 50,51,971/- was a perquisite in the hands of the assessee by virtue of Section 17 (2) (iv).

3. The reasoning of the Assessing Officer was that the expenses incurred by the employer was to suit the requirements of employee and that it had nothing to do with the performance of his duties for his office. The order of assessment rejected the contention that perquisite value if any could be calculated only on the basis of Rule 3 of the Income Tax Rules, it was held that if the expenses are

only towards repairs or maintenance they could have been taken as expenditure incurred in order to keep the house habitable. The Assessing Officer, thus, concluded that:

> *"Thus, looking to the fact that these expenses were incurred by the employer and these would have otherwise been payable by the assessee, they are a perquisite value in terms of Sec. 17 (2) (iv). Another important point to be noted is that the perquisite value in terms of Rule 3 is determinable only on the basis of the rent paid by the employer to the landlord and which has been determined as per the terms of lease agreement and, therefore, that cannot be further modified in view of the alleged case in the fair rental value. In subsequent years, the lease rent may be enhanced by the landlord but that will not be based on any modifications carried out by the landlord, as this has been paid by the lessee for modification in the building. An increase in the lease rent in the subsequent financial years will be attributable to the overall increase in the rent within Delhi and not because of these modifications. Accordingly, the expenses incurred on modifications will not form part of the lease rental, which has been determined separately as per the lease agreement. The sum of Rs.50,51,971 incurred accordingly is a perquisite in the hands of Mr. Scott Bayman from his employer and is being added to the income of the assessee as such."*

4. The assessee's appeal to the ITAT was rejected by the impugned order dated 24.12.1996. The Appellate Commissioner's reasoning proceeds on the following basis:

> *"If a renovation is person specific, then it is only that individual who uses it benefits. The lease is in the name of appellant and not in the name of the employer company. Appellant's predecessor was staying in the same premises earlier and if any normal repairs were required, the appellant was bound to ask the owner to carry out such normal repairs and replacement as the appellant is paying a rent as high as about Rs.2 lakhs per month (Rs.23.70 lacs per annum) to the owner of the premises. This rent has gone up to Rs. 5 lacs per month in later years. The definition of perquisite is wide enough to take into account any benefits granted by the employer whether by way of advance payment or by way of reimbursement for the facilities and benefits which an employer agrees to grant to its employees and the definition of perquisite as brought out is only an inclusive definition. Whether the payment is made in one year or two years, so long as the benefit is given and the expenditure is*

contracted to be paid, the perquisite resulting therefrom has to be taxed in that year. The appellant has not brought on record any evidence that only part of work was completed during the year. There is therefore no ground to interfere with the order of the Dy. Commissioner bringing to tax the perquisite on account of Rs.50 lakhs incurred by the employer for renovation and repairs to the rented premises, leased by the appellant."

5. The Tribunal was of the view that neither the Assessing Officer nor those of the Appellate Commissioner were in error in holding that the repairs and renovations constituted taxable perquisite in the hands of the employee. The Tribunal also upheld the view of the lower authorities that the lease was executed in favour of the assessee who, in fact, was the lessee. The Tribunal felt that having regard to the terms of the employment and the stipulations in the lease deed, the payment made towards renovation was primarily the assessee's obligation which was discharged by the employer and therefore, taxable in the appellant's hands.

Contentions of the Appellant

6. It is argued by the appellant, that the Tribunal fell into an error in upholding the contention of the Revenue that expenditure of Rs.50,51,977 was a perquisite without any sustainable reasoning. It is urged that the perquisite value of rent free accommodation under Section 17(2)(i) had been declared by the appellant in return of his income which was assessed. In these circumstances, the reference to Section 17(2)(i) was unwarranted because the assessee was under no obligation to incur the expenses on repairs and renovation or modification of rent free accommodation. Reliance is further placed on Clause 3 of the Service Contract in support of the submission that the employer had to provide the assessee with furnished accommodation including maintenance, security and services. The employer had to renovate and upgrade

the facilities upto the mark having regard to assessee's status in the company. Reliance is also placed upon Clause 11 of the lease deed between the assessee and the landlord which read as follows:

> *"11. That in consideration for payment of Rs.4,50,000 (option fee) the lessors agree that in the event Mr. Scott R. Bayman is for any reason transferred or leaves Delhi, then, in that event, his successor will continue the lease for the unexpired period of the lease. Such successor shall also be granted an option to enter into a new lease on terms to be mutually agreed."*

7. It is next contended that the method of working out rent free accommodation for the purpose of assessment in the hands of the employees has been provided by Rule 3 of the Income Tax Rules 1989. It is submitted that on a fair reading of Rule 3(a)(iii), the only amount which can be taken into consideration is that which is provided by the Rule. Counsel emphasized that if the value of that perquisite exceeds what is actually prescribed, the legislature has mandated a formula i.e. 10% of the salary of the individual increased by a sum equivalent to the amount by which the fair rental value of the accommodation exceeds 20% of the salary. In this case, the Assessing Officer had limited discretion, if at all, in calculating the fair market value and follow the mechanism of Rule3(a)(iii). However, he did not do so and proceeded to add the entire sum of Rs.40,41,977/- (the sum of Rs.10 lakhs having been charged and suitable amount, assessed as perquisite on account of furniture, provided by the employer).

8. Counsel for the Revenue submitted that the appeal is without merit and that the findings of the ITAT as well as the lower authorities need to be affirmed. Reliance was placed upon the assessee's terms of appointment as well as certain conditions in the lease deed to say that the assessee had undertaken the obligation of hiring accommodation. If he agreed to renovate the premises extensively, the value of the property would naturally get

enhanced. In any event, the obligation to renovate the lease hold property was that of the assessee which was discharged by the employer and therefore clearly fell within mischief of Section 17(2)(iv).

9. Learned counsel argued that a plain reading of Clauses 7 and 9 of the lease deed shows that the lessee could not have carried out any alternations without the consent of the lessor. Obviously the lessee i.e. the assessee in this case, carried out extensive repairs to suit his taste in agreement with the lessor and undertook to bear the expenses. It was this obligation that was discharged by the employer. By no stretch of imagination could it be excluded from the definition of "*perquisite".*

10. The learned counsel for the Revenue also relied upon the judgment of the Karnataka High Court in *CIT Vs. Motor Industries Co. Limited* 1988 173 ITR 374 in support of his submission. The relevant extract is as under:

> *"We are of the view that the entire approach made by the Tribunal is not sound. After all, each and every amount spent on buildings cannot be treated as spent on repairs. The term "repairs" has a special meaning. What is necessary for the upkeep and maintenance of a building which necessarily includes periodical colour/whitewashing and painting can undoubtedly be treated as repairs. But, the amounts lavishly or even unnecessarily spent just to satisfy the ego or the eccentricities of an employee cannot be treated as an amount spent on repairs. Bearing this and other relevant principles, the Tribunal had to decide the claim of the assessee on repairs which it had failed to do. We have, therefore, no alternative but to answer on the expenditure on repairs as above."*

11. Before analyzing the submissions of the parties it would be necessary to extract certain terms and conditions spelt out in the assessee's contract with his employer, pertaining to compensation and benefits. The relevant part reads as follows:

> *"a Your annual salary will be $ 200,000 and will be subject to periodically to the normal Company Review.*

b You will be provided with furnished accommodation, including maintenance, security and services at the Company's cost. Part of such official duties and meeting business associates, holding staff conferences, etc.

c The company will reimburse all utility costs including electricity, gas and water at your residence.

d You will be entitled, if appropriate, to education allowance for any eligible children.

e You will be provided with a telephone at your residence.

f You will be provided with a company car and driver for business and personal use, for which you will be liable for tax.

g. Medical expenses incurred for you and your dependents for health care services, including physicians and hospitalization expenses, will be reimbursed by the company in accordance with standard practice.

h. You will be entitled to 20 days of annual vacation during each year of service.

i. You will be eligible for those local holidays recognized by GEIOC, India.

j. The provisions of these benefits will be in accordance with GEIOC procedures and within any cost limits imposed by those procedures. "

12. In this case the assessee shifted into the premises 4, Panchsheel Marg, which before him, had been in occupation of his predecessor, Mr. Bradon. The assessee's contention that his predecessor had not renovated the premises and that in tune with his service conditions and the status that he enjoyed within his employer's organization, he was entitled to a certain standard of living has not been disputed. The lease deed concededly was between the assessee and the landlord of the premises. Apart from Clause 11 which was extracted previously in the judgment, the material conditions are embodied in clauses 7, 8 and 9.

13. Rule 3 of the Income Tax Rules as it existed at the relevant part of the Rule reads as follows:

> ***"R.3. Valuation of perquisites.*** *– For the purpose of computing the income chargeable under the head "Salaries" the value of the perquisites (not provided for by way of monetary payment to the*

assessee) mentioned below shall be determined in accordance with the following clauses, namely: -

[(a) The value of rent-free residential accommodation shall be determined on the basis provided hereunder, namely: -

{(i) where the accommodation is provided –

(A) by Government to a person holding an office or post in connection with the affairs of the Union or of State;

xxx xxx xxx xxx xxx

(iii) In any other case, --

(A) the value of rent-free residential accommodation which is not furnished shall ordinarily be a sum equal to 10 per cent of the salary due to the assessee in respect of the period during which the said accommodation was occupied by him during the previous year:

Provided that ---

(1) where the fair rental value of the accommodation is in excess of 20 per cent of the assessee's salary, the value of the perquisite shall be taken to be 10 per cent of the salary increased by a sum equal to the amount by which the fair rental value exceeds 20 per cent of the salary; so, however, that the [Assessing Officer] may, having regard to the nature of the accommodation, determine the sum by which 10 per cent of the salary is to be increased, as a percentage (not exceeding 100 per cent) of the amount by which the fair rental value exceeds 20 per cent of the salary;

(2) where the assessee claims, and the [Assessing Officer] is satisfied that the sum arrived at on the basis provided above exceeds the fair rental value of the accommodation, the value of the perquisite to the assessee shall be limited to such fair rental value;

(B) where the accommodation is furnished, the value of rent free residential accommodation shall be the aggregate of the following sums, namely: -

(1) the fair rental value of the accommodation arrived at in accordance with the provisions of sub-clause (iii) (A) as if the accommodation were not furnished; and

(2) the fair rent for the furniture (including television sets, radio sets, refrigerators, other household appliances and air-conditioning plant or equipment) calculated at [10 percent] per annum, of the original cost of such furniture of if such furniture is hired from a third party, the actual hire charges payable therefore."

14. In *Commissioner Of Income-Tax, vs L. W. Russel* AIR 1965 SC 49 the Supreme Court noticed that perquisites are *"causal emoluments, fee or profit attached to an office or position in addition to salary or wages"*. Essentially, they are non-cash benefits given by an employer to employees in addition to cash salary or wages. However, these may include cases where the employer reimburses expenses or pays for obligations incurred by the employee. The term is defined in the Section 17(2) of the Income-tax Act as including:

(1) Value of rent-free or concessional rent accommodation provided by the employer.

(2) Value of any benefit/amenity granted free or at concessional rate to specified employees etc.

(3) Any sum paid by employer in respect of an obligation, which was actually payable by the assessee.

15. "Salary" in Section 17 of the Act has been defined in an inclusive manner. So is the expression "perquisite". Now, in this case, concededly, the employer did not provide rent free accommodation. Therefore, the lower authorities did not include the value or cost of repairs under Section 17(1). The assessee was entitled to allowances; he hired the premises which he occupied. Those premises were occupied by his predecessor; it is contended that such official's stay was longer than anticipated, as a result of which the premises were not renovated. When the assessee came to India, he decided to occupy the same premises. At the same time, he needed to get them repaired and carry out extensive renovations to match the position he was employed in, and the life style he was used to in the United States. The lease deed in this case spelt out clearly that the lessor had the right to carry out major repair works. At the same time, it also clarified that in the event of the assessee moving out of India, his successor in office could occupy the premises.

16. A careful reading of the Lease Deed nowhere suggests that the assessee had agreed to an obligation to renovate the expenses. It would be useful, in this context, to recollect that of the original sum of Rs. 50.51 lakhs, Rs. 10 lakhs was spent towards furniture; the Assessing Officer took that into consideration while working out the value of furnished residence, for the purpose of calculating the tax liability. Having done so, the question is whether, he could have ignored the method of calculating a higher rent, or "fair" rent, after renovation of the premises. The other way of looking at the issue is whether the Income tax authorities could have deviated from the prescribed method of computing the value of the premises after renovation, by arriving at the fair rent, in the manner stipulated in Rule 3.

17. The maxim *expressio unis est exclusion atlerius* means that the express mention of one thing implies the exclusion of another. In *D.R. Venkatachalam & Ors vs Dy. Transport Commissioner* AIR 1977 SC 842 the Supreme Court held as follows:

> *"That rule says that an expressly laid, down mode of doing something necessarily implies a prohibition of doing it in any other way."*

This was explained in *Md.Alauddin Khan vs Karam Thamarjit Singh* (2010) 7 SCC 530 as follows:

> *"As the principle of statutory construction, Expressio Unius Est Exclusio Alterius states, the express inclusion of one thing is the exclusion of all others. In this case, the specific inclusion of a condition for filing a recriminatory petition under Section 97 of the Act, namely that a declaration that the election petitioner or any other candidate is the returned candidate should be filed, excludes its filing in all other cases. Simply put, Section 97 of the Act bars filing of a counter-claim by way of a recrimination petition when an election petition is filed without seeking for a declaration that the election petitioner or any other candidate is the returned candidate."*

The express provision of Rule 3 of the Valuation Rules – which elaborates various contingencies in relation to the perquisite of rent free accommodation, rules out the intention of Parliament to treat expense in relation to improvement, repairs or renovations, as falling within the meaning of "perquisite".

18. As regards Section 17 (2) (iv), the argument on behalf of the revenue that repairs and renovation expenses constituted an obligation of the employee/ assesse, which was borne by his employer, is meritless. The material extracts of the Lease Deed nowhere spell out any obligation to carry out repairs and renovations. Therefore, that provision cannot be made applicable.

19. In the present case, if the Assessing Officer had returned a finding that the premises were to be valued at market value (of the rental), in case it increased as a result of the renovations, the only prescribed mode was to apply the method indicated by Rule 3 (a) (iii) of the Valuation Rules. The AO could not have included the entire expenses, and spread it over a period of five years, for the purpose of saying that the whole of such expense constituted a perquisite.

20. In view of the above discussion, the Appeal has to succeed; the impugned order of the Tribunal is hereby set aside. The cost of repairs and renovation shall be deleted from the taxable income of the assessee. The appeal is accordingly allowed.

S. RAVINDRA BHAT, J.

R.V.EASWAR, J.

AUGUST 17, 2012