$~23 to 25 and 29

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

\+ **ITA 323/2012**

CIT ..... Appellant

Through: Ms. Rashmi Chopra, Advocate

versus

TELSUO MITERA ..... Respondent

Through: None.

\+ **ITA 325/2012**

CIT ..... Appellant

Through: Ms. Rashmi Chopra, Advocate

versus

ISAO SAKAI ..... Respondent

Through: None

\+ **ITA 326/2012**

CIT ..... Appellant

Through: Ms. Rashmi Chopra, Advocate

versus

YOSHIMI KAMANO ..... Respondent

Through: None

\+ **ITA 343/2012**

CIT ..... Appellant

Through: Ms. Rashmi Chopra, Advocate

versus

YUJI HORIKAWA ..... Respondent

Through: None

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

SANJIV KHANNA, J.: (ORAL)

The revenue has preferred these appeals under Section 260A of the Income Tax Act, 1961 ('Act', for short) in the case of Telsuo Mitera, Isao Sakai Yoshimi Kamano and Yuji Horikawa. These appeals pertain to the assessment year 2006-07. As a similar issue arises for consideration, we are disposing of these appeals by this common order.

2. The question/issue raised in the present appeal is whether the tax paid by the employer (Japan Airlines International Company Limited) is a "perquisite" within the meaning of Section 17(2) and, therefore, in terms of Rule 3 of the Income Tax Rules, 1962 (for short, Rules) cannot be taken into consideration for computing value of the perquisite "rent free accommodation".

3. Relevant portion of Rule 3 and the Explanation thereto applicable with effect from 01.04.2001: -

> "3. Valuation of perquisites.—*For the purpose of computing the income chargeable under the head "Salaries", the value of perquisites provided by the employer directly or indirectly to the assessee (hereinafter referred to as employee) or to any member of his household by reason of his employment*

shall be determined in accordance with the following sub-rules, namely:—

xxx xxx xxx

(6) The value of any benefit or amenity resulting from the provision by an employer, who is not liable to pay fringe benefit tax under Chapter XII-H of the Income-tax Act and is engaged in the carriage of passengers or goods to any employee or to any member of his household for personal or private journey free of cost or at concessional fare, in any conveyance owned, leased or made available by any other arrangement by such employer for the purpose of transport of passengers or goods shall be taken to be the value at which such benefit or amenity is offered by such employer to the public as reduced by the amount, if any, paid by or recovered from the employee for such benefit or amenity :

Provided *that nothing contained in this sub-rule shall apply to the employees of an airline or the railways.*

xxx xxx xxx

(9) This rule shall come into force with effect from the 1st day of April, 2001:

Provided *that the employee may, at his option, compute the value of all perquisites made available to him or any member of his household for the period beginning on 1st day of April, 2001 and ending on 30th day of September, 2001 in accordance with the Rules as they stood prior to this amendment:*

Provided further *that for an employee being an employee of an airline, the provisions of sub-rule (6)*

shall come into force with effect from the 1st day of April, 2002.

Explanation.—For the purposes of this rule—

(i) "accommodation" includes a house, flat, farm house or part thereof, or accommodation in a hotel, motel, service apartment, guest house, caravan, mobile home, ship or other floating structure;

(ii) "entertainment" includes hospitality of any kind and also, expenditure on business gifts other than free samples of the employers own product with the aim of advertising to the general public;

(iii) "hotel" includes licensed accommodation in the nature of motel, service apartment or guest house;

(iv) "member of household" shall include—

(a) spouse(s)

(b) children and their spouses

(c) parents

(d) servants and dependants;

(v) "remote area", for purposes of proviso to this sub-rule means an area that is located at least 40 kilometres away from a town having a population not exceeding 20,000 based on latest published all-India census;

(vi) "salary" includes the pay, allowances, bonus or commission payable monthly or otherwise or any monetary payment, by whatever name called from one or more employers, as the case may be, but does not include the following, namely:—

(a) dearness allowance or dearness pay unless it enters into the computation of superannuation or retirement benefits of the employee concerned;

(b) employer's contribution to the provident fund account of the employee;

(c) allowances which are exempted from payment of tax;

(d) the value of perquisites specified in clause (2) of section 17 of the Income-tax Act;

(e) any payment or expenditure specifically excluded under proviso to sub-clause (iii) of clause (2) or proviso to clause (2) of section 17;

(vii) "maximum outstanding monthly balance" means the aggregate outstanding balance for each loan as on the last day of each month.'

(emphasis supplied)

4. Clause (vi)(d) of Rule 3 states that the term 'salary' for the purpose of Rule 3 would not include the value of perquisites specified in Section 17(2) of the Act.

5. The short question, therefore, is whether the tax component paid by the employer towards and as income tax, when an employee is entitled to tax free salary, is a perquisite within the meaning of Section 17(2) of the Act.

6. The term "salary" has been defined in Section 17 of the Act so as to include wages, any annuity pension, gratuity, fee commission, perquisites

or profits in lieu of or in addition to any salary or wages etc. Clause (iv) of Section 17(1) reads as under: -

> *"**17.** 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;*
>
> *(v) any advance of salary;*
>
> *(va) any payment received by an employee in respect of any period of leave not availed of by him;*
>
> *(vi) the annual accretion to the balance at the credit of an employee participating in a recognised provident fund, to the extent to which it is chargeable to tax under rule 6 of Part A of the Fourth Schedule;*
> *(vii) the aggregate of all sums that are comprised in the transferred balance as referred to in sub-rule (2) of rule 11 of Part A of the Fourth Schedule of an employee participating in a recognised provident fund, to the extent to which it is chargeable to tax under sub-rule (4) thereof; and*
> *(viii) the contribution made by the Central Government or any other employer in the previous*

year, to the account of an employee under a pension scheme referred to in section 80CCD"

(emphasis supplied)

7. A careful reading of the clause (iv) exposits that perquisites and profits in lieu of or in addition to "salary" and wages, have been treated as a part of salary. This becomes clear when we refer to the definition of the term "perquisites" in Section 17(2) of the Act, which is reproduced below:

(2) "perquisite" includes—

(i) the value of rent-free accommodation provided to the assessee by his employer;

(ii) the value of any concession in the matter of rent respecting any accommodation provided to the assessee by his employer;

xxx xxx xxx

(iiia) [***]

(iv) <u>any sum paid by the employer in respect of any obligation which, but for such payment, would have been payable by the assessee</u>;

(v) any sum payable by the employer, whether directly or through a fund, other than a recognised provident fund or an approved superannuation fund or a Deposit-linked Insurance Fund established under section 3G of the Coal Mines Provident Fund and Miscellaneous Provisions Act, 1948 (46 of 1948), or, as the case may be, section 6C of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952)], to effect an assurance on the life of the assessee or to effect a contract for an annuity; [***]

(vi) the value of any specified security or sweat equity shares allotted or transferred, directly or indirectly, by the employer, or former employer, free of cost or at concessional rate to the assessee.

xxx xxx xxx

(vii) the amount of any contribution to an approved superannuation fund by the employer in respect of the assessee, to the extent it exceeds one lakh rupees; and

(viii) the value of any other fringe benefit or amenity as may be prescribed:]

***Provided further** that for the assessment year beginning on the 1st day of April, 2002, nothing contained in this clause shall apply to any employee whose income under the head "Salaries" (whether due from, or paid or allowed by, one or more employers) exclusive of the value of all perquisites not provided for by way of monetary payment, does not exceed one lakh rupees.*

(emphasis supplied)

8. A reading of Sub-clause (i) to (vii) would indicate that the term perquisites has been defined in an inclusive and expansive manner in the sub-clauses. Sub-clause (iv), which has been underlined, states that any sum paid by the employer in respect of any obligation which, but for such payment, would have been payable by the assessee, i.e., the employee, is treated and regarded as a perquisite.

9. The term “Perquisites” was explained in **Arun Kumar and Ors. Vs. Union of India (UOI) and Ors. (2007) 1 SCC 732** to mean: -

> *“18. It is thus clear that the definition of the term 'perquisite' covers various items mentioned therein. It is also clear that the definition is inclusive in nature and not exhaustive.*
>
> *19. According to Bouvier's Law Dictionary, the expression 'perquisite' in a most limited sense means "something gained by a place or office beyond the regular salary or fee".*
>
> *20. Oxford English Dictionary defines 'perquisite' as "any casual emolument, fee or profit attached to an office or position in addition to a salary or wages".*
>
> *21. According to Webster's New International Dictionary, 'perquisite' is "a gain or profit incidentally made from employment in addition to regular salary or wages, especially one of a kind expected or promised".*
>
> *22. 'Perquisite' is thus a privilege, gain or profit incidental to an employment in addition to regular salary or wages.*
>
> *23. As observed by the House of Lords in Owen v. Pook (1969) 74 ITR 147 (HL), 'perquisite' has a known normal meaning, namely, a personal advantage. The word would not apply to a mere reimbursement of a necessary disbursement. In Rendell v. Went, (1964) 2 All ER 464 (HL), the House held that any benefit or advantage, having a money value, which the holder of an office under the company derives from the company's spending on his behalf will come under the term 'perquisite'.*
>
> *24. Indian Courts have also held that 'perquisite' is a benefit or an advantage received by the holder of an office over and*

above his salary. The benefit received by an employee is incidental to employment in excess of or in addition to the salary."

10. A reading of the aforesaid paragraphs would indicate that a distinction has been drawn between the term "perquisite" and "wages". The former means a benefit and an advantage received in addition to or over and above what is paid as wages and salary. It is something extra, in addition to, and other than wages/pay.

11. In Black's Law Dictionary, the word "perquisite" has been defined as under:-

*"**Perquisites** – Emoluments, privileges, fringe benefits, or other incidental profits or benefits attaching to an office or employment position in addition to regular salary or wages. Shortened term "Perks" is used with reference to such extraordinary benefits afforded to business executives (e.g. free cars, club memberships, insurance, etc.) See also Fringe benefits."*

12. The term "wages" or salary may acquire different interpretations and meanings depending upon the legislative intent and the definition clause in the enactment in question. In the present case, however, we are concerned with Rule 3, which specifically draws and makes a distinction between 'perquisites' covered by Section 17(2) in contradiction to the word "wages" etc. mentioned and treated as a part of salary in other clauses of Section 17(1)'. What is covered by Section 17(2) has to be

excluded from "salary" for the purpose of ascertaining the perquisite value of rent free accommodation in view of the specific language of Rule 3, Explanation Clause (vi)(d). Explanation to Rule 3 clause (vi), no doubt includes monitory benefit under the term "salary" for the purpose of Rule 3 but by specific stipulation excludes the value of perquisites specified in Section 17(2) of the Act. What is included and has been treated as perquisites under Section 17(2) of the Act cannot be added and treated as monetary benefit because of specific exclusion.

13. Payment of income tax by the employer on behalf of an employee, is payment of an obligation payable by the employee. It will be covered by Section 17(2)(iv). An employee who has taxable income as an assessee is liable to pay tax. His income is chargeable to tax. It is the obligation of the employee as an assessee to pay income tax. In the present case, it is this obligation which is being discharged and paid by the employer. Therefore, it would fall within the ambit of Section 17(2)(iv). This has been the accepted legal position. The Delhi High court in **Frank Beaton v. Commissioner of Income Tax** [1985] 156 ITR 16, has observed that payment of tax by the employer is a perquisite under Section 17(1)(iv). Ranganathan, J. (as His Lordship then was), specifically referred to section 17(2) (iv) and had held as under:-

> *"The assessee is an employee and the income in question is chargeable to tax in his hands under the head " Salaries ". Section 17(1)(iv) of the Act includes, within the scope of the*

charge imposed by this section " perquisites " in lieu of, or in addition to, any salary. Section 17(2) defines "perquisites" to include, inter alia, "(iv) any sum paid by the employer in respect of any obligation which, but for such payment, would have been payable by the assessee ".

It, therefore, follows that, if the employer pays any income-tax, the obligation to pay which lies on the employees, the amount of any income tax so paid will be assessable in the hands of the employee-assessee as part of his salary income. The provision may raise a further question regarding the year in which the perquisite income will become assessable, an aspect touched upon in Sciandra v. CIT [1979] 118 ITR 675 (Cal), but it may not be necessary to deal with that aspect for the purposes of the present case."

14. In ***T.P.S Scott v. Commissioner of Income Tax*** [1998] 232 ITR 475 (Del) reference was made to Section 15 and 17(1)(iv) and sub-clause (iv) of Clause (2) to Section 17 and it was observed as under:

"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 section 15 vide section 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.

In the view taken hereinabove, we are fortified by two English decisions i.e, North British Railway Co. v. Scott [1922] 8 TC 332 (HL) and Hartland v. Diggines [1926] 10 TC 247 (HL). Both these decisions have been followed by two High Courts in India, i.e., the Bombay High Court in CIT v. H. D. Dennis [1982] 135 ITR 1 and the Madras High Court in CIT v. I. G. Mackintosh [1975] 99 ITR 419. 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."

15. In the said cases, the question raised was regarding payment of tax free salary and whether the tax component paid by the employer, which was a perquisite, should be grossed up and included for computation of income tax payable. Being a perquisite, it was held that the tax paid should be added for the purpose of computation of income under the head "salary".

16. In Kanga and Palhkivala IXth Edition Vol.-I at page 578-579, it has

been observed that payment of tax by an employer should be regarded and treated as a perquisite under Section 17(2)(iv) of the Act.

17. The assessing officer in the assessment order has referred to the provisions of tax deduction at source and observed that the employer was liable and under an obligation to deduct tax at source, and therefore the tax component was not a "perquisite" within the meaning of Section 17(2)(iv) of the Act. The said reasoning is fallacious because we are not concerned with the provision of tax deduction at source in Chapter XVIIB. The said Chapter incorporates provisions including deeming clauses to ensure deduction and collection of tax at source. Obligation and liability to pay the income tax arises because of the charging section. Every assessee is liable to pay income tax on the income chargeable to tax. TDS provisions relate to and prescribe one of the modes of collection of tax. It is with this objective that duties or "obligations" are imposed on the payer. This does not override or disturb the primary "obligation" imposed by the charging section read with the computation provisions. Further, we are specifically concerned with Section 17(1) and 17(2) of the Act. Rule 3 in clear terms excludes "perquisite" stated/ mentioned/ covered by Section 17(2) for the purposes of calculating perquisite value of "rent free accommodation".

18. Learned counsel for the appellant has relied upon decision dated 03.06.2011 in ITA No.486/2008 and connected matters in ***Mitsubishi***

Corporation v. Commissioner of Income Tax and Anr. The said decision pertains to assessment years 1996-97, 1997-98 and 1998-99. In the said decision it has been held that perquisites in the form of tax free salary are a part of the gross salary under Section 17(1) of the Act. The Bench held as under:

> "*15. Next, it is to be examined as to whether in the instant case, the issue involved was debatable requiring interpretation of the relevant provisions? Law on this aspect has been settled by plethora of judgments. Such an issue came up before the Supreme Court in* ***Emit Webber (supra)*** *in the following terms:*
>
> *"6. The facts found by the Tribunal thus show that the assessee-appellant was paid certain salary free of tax but that the tax payable in that behalf was to be and was in fact-paid by Ballarpur. The assessment was made upon the assessee directly. The question is whether the said tax component paid by Ballarpur can be included within the income of the assessee. The first contention of the learned Counsel for the assessee is that the amount paid by Ballarpur by way of tax cannot be treated as 'income' of assessee at all. His second contention is that the assessee did not receive the said amount and, therefore, it cannot constitute his income. Indeed, the learned Counsel sought to argue that Ballarpur was under no obligation to pay the said tax amount relating to the salary amount received by the assessee. We find it difficult to agree with the learned Counsel.*
>
> *7. 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 loss 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."

16. Even the Bombay High Court had occasion to deal with this issue in the case of ***Commissioner of Income Tax Vs. H.D. and Others [135 ITR 1]****. Perusal of that judgment would show that two questions were referred to for the opinion of the High Court by the Tribunal and Question No.(1) was as under:*

"1. Whether, on the facts and in the circumstances of the case, the amount of tax borne by the employer, including tax on tax, on behalf of the employee, constitutes 'salary' as defined in explanation (2) to rule 3 of the I.T. Rules, 1962, for the purpose of determining the value of rent perquisite in terms of section 17 of the I.T. Act, 1961?"

17. The High Court took note of Sections 15 to 17 of the Act as well as Rule 3 of the Income Tax Rules and from the reading of these provisions, it concluded that definition of "salary" in Rule 3 is an inclusive one and therefore, it is not restricted to what is included in the said definition. The device of inclusive definition is employed by the Legislature with a view to enlarge the meaning of the ordinary words and hence the rule of interpretation of such definition adopted by the Courts is to read the word defined so as to enlarge its meaning and not to restrict it to the works included in its inclusive part unless the context otherwise requires. The interpretation sought to be placed by the learned counsel for the assessee was not accepted giving the following reasons:

"Firstly, we have already pointed out that the definition is inclusive and it is a well-settled rule of interpretation of inclusive definition that it is not controlled or confined to the words or expressions which are included in the said definition. On the contrary, it is intended to enlarge the scope of the concept which is sought to be defined. Secondly, the purpose of r. 3 is to lay down the mode of valuation of the perquisite for the purpose of computing the income chargeable under the head "Salaries" under s. 15 of the Act. The definition of the word "salary" given in s. 17, as the section itself shows, is for the purposes of ss. 15 and 16 of the Act. It is, therefore, legitimate to presume that the Legislature did not intend to give a different meaning to the

word "salary" in r. 3 from that given in s. 17 of the Act. Therefore, the two definitions will have to be construed as co-extensive in their scope except so far as there is an express exclusion of some of the payments which otherwise go with the word "salary". Thirdly, the purpose of giving a separate definition of salary in r. 3 appears to be to exclude certain kinds of payments which are otherwise covered by the word "salary". This is obvious from the fact that the definition of salary given in the said rule excludes from its ambit only certain allowances, viz., dearness allowance or dearness pay, unless it enters into the computation of superannuation or retirement benefits of the employee; employer's contribution to the provident fund account of the assessee and allowances which are exempted from the payment of tax"

18. Even this jurisdictional High Court had considered the identical issue way back in the year 1998 in ***T.P.S. Scott (supra)****. In that case, the assessees were employees of the British Council which having functioned till 1992, merged thereafter in the British High Commission with effect from March 10, 1992. The relevant accounting period in respect of these assessee was 01.04.1991 to 09.03.1992. The tax liability of the asessees referable to this period was paid by the British High Commission on 29.03.1992, in India. The assessees contended that the tax was paid by the British High Commission, which was not the employer of the assessees during the relevant accounting period and therefore the said payment made by the British High Commission could not be deemed to be a "perquisite" in terms of Section 17(2)(iv) of the Act and therefore, could not be included in the gross salary of the assessees. The assessees also contended that the salaries were paid in sterling in the United Kingdom and, therefore, there was no obligation on the British Council to deduct tax at source in*

respect of the salary payment made to these employees during the relevant period.

19. This contention of the assessee did not find favour with this Court. Following the judgment of Bombay High Court in ***H.D. Dennis (supra)*** *and that of the Madras High Court in the case of* ***Commissioner of Income Tax Vs. Mackintosh [1975] 99 ITR 419****, the Court held that the income tax paid by the employer on behalf of the employee as a part of salary of the assessee in a word "salary" would be in its natural import comprehend within it taxes paid on behalf of the employees.*

20. In view of the aforesaid clear dicta which cover the field, it is too naïve on the part of the assessee to argue that the issue was contentious or debatable in nature. By showing that the issue has been admitted adjudication as a substantial question of law in some appeals by this Court are pending in this Court, the assessee cannot come out of the clear mandate of the aforesaid judgments. The admission of certain appeals may be on the basis of certain facts appearing in those cases. Even otherwise, when we find that the issue which is involved in the instant appeals was the same on which the aforesaid pronouncements existed at the time when the AO invoked its powers under Section 154 of the Act. It can clearly be treated as mistake in law which has been corrected."

(emphasis supplied)

19. Accordingly, under the then applicable Rule 3 value of perquisite "rent free accommodation" has to be calculated. The underlined portions above support and affirm our findings. We only record that Rule 3 has undergone change/ amendment with effect from 01.04.2001 and as per

the amended Rule, perquisite under Section 17(2) has to be excluded for the purpose of computing perquisite value of "rent free accommodation". We clarify that we have not examined and interpreted Section 10(10CC) of the Act. We have examined and interpreted Rule 3 after it was amended w.e.f. 1.4.2001.

20. In view of the aforesaid, we do not find that any substantial question of law arises for consideration.

The appeals stand dismissed.

SANJIV KHANNA, J

R.V.EASWAR, J

MAY 17, 2012
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