IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 2059 of 2012

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MR.JUSTICE A.J. SHASTRI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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KAMLESH K SINGHAL GENERAL MANAGER (MM)....Petitioner(s)

Versus

COMMISSIONER OF INCOME-TAX-III....Respondent(s)

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Appearance:

MR.BANDISH SOPARKAR, ADVOCATE for MRS SWATI SOPARKAR, ADVOCATE for the Petitioner(s) No. 1

MR KM PARIKH, ADVOCATE for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MR.JUSTICE A.J. SHASTRI

Date : 20/09/2016

ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. The petitioner has challenged an order dated 22.09.2011, passed by the Commissioner of Income Tax under section 264 of the Income Tax Act, 1961 ('the Act' for short). Brief facts are as under.

2. The petitioner is employed as a General Manager by Oil and Natural Gas Corporation of India ('ONGC' for short). For the assessment year 2007-08, the petitioner had filed the return of income on 29.06.2007, declaring total income of Rs.9,03,346/-. After once accepting such return, the Assessing Officer, issued notice under section 148 of the Act on the ground that the employer ONGC had reimbursed Conveyance Maintenance and Repair Expenditure ('CMRE' for short) and uniform allowance to the petitioner, which was not reflected in the salary certificate issued by the employer, nor ONGC had deducted tax at source on such amounts. Pursuant to such notice, the Assessing Officer passed the assessment order dated 10.12.2010, under section 143(3) of the Act read with section 147, levying tax on 20% of CMRE and 100% on

the uniform reimbursement expense. In fact, in this order, the Assessing Officer proceeded on the offer of the assessee to suffer such disallowance to the above extent. He accordingly added a sum of Rs.7720/- towards disallowance of CMRE amount and Rs.21,422/- towards uniform reimbursement.

3. The case of the petitioner is that on such benefits, the employer ONGC has paid fringe benefit in terms of section 115WA and that therefore, there was no liability for the employee to pay tax on such amounts as part of his salary. On such basis, the petitioner filed a revision petition before the Commissioner. Before the Commissioner, the petitioner raised multiple contentions including that the employer had treated the benefit as fringe benefit and paid tax accordingly. Once this is done, the employee cannot be asked to pay tax again, failing which, it will amount to double taxation. The petitioner relied on various CBDT circulars clarifying Fringe Benefit Tax ('FBT' for short) provisions and the case law on subject. The petitioner relied on the decision of this Court in case of ***S. R. Koshti v. Commissioner of Income-Tax,*** reported in ***[2005] 276 ITR 165,*** in which

it was observed that regardless of fact that whether the revised return was filed or not, once an assessee is in position to show that he has been over-assessed under the provisions of the Act, even if such over-assessment is as a result of the assessee's own mistake, the Commissioner of Income Tax has the power to correct such an assessment under section 264 of the Act.

4. The Commissioner however, rejected the revision petition on the short ground that the Commissioner of Income Tax in similar cases has confirmed 20% of CMRE disallowance and 100% of the uniform disallowance received by the employees. The Assessing Officer in the present case has merely followed such order.

5. It is this order that the petitioner has challenged in the present petition. Learned counsel for the petitioner submitted that once the ONGC had paid fringe benefit tax, the amount would not be taxable in the hands of the petitioner. The Revenue has not questioned the ONGC treating such benefit as a fringe benefit. Drawing our attention to the statutory provisions of the circulars of CBDT, counsel

submitted that the tax under FBT regime would exclude taxation under the normal provisions in the hands of the employees.

6. Our attention was drawn to various decisions rendered by this Court in case of ONGC where, in relation to similar payments, the Court had held that ONGC was not required to deduct tax at source since the amount in question did not form salary of the employee.

7. On the other hand, learned counsel Shri Parikh for the Revenue opposed the petition contending that the assessee had agreed before the Assessing Officer for disallowance. The assessee therefore could not have taken a different stand before the Commissioner. In any case, whether the perquisite in question was fringe benefit or not was never examined by any Court including in the decisions cited by the counsel in case of ONGC.

8. It is not in dispute that on the amounts in question, the ONGC had paid FBT in terms of section 115WA of the Act. Revenue has not questioned this stand of the ONGC in this respect and accepted the FBT

from the employer. We must, therefore, proceed on the basis that even as per the Revenue it was a fringe benefit for the purpose of section 115WA during the period when the FBT regime was in force. If that be so, immediate question would be, can the employee also be asked to pay tax on such amounts treating them as salary.

9. As is well known, the FBT regime survived for a short time. It was introduced under chapter XII-H under the Finance Act, 2005 with effect from 01.04.2006. Section 115W contained in chapter XII-H contained definitions. Section 115WA provided the charge of tax on fringe benefits and read as under:

> **Charge of fringe benefit tax.**
>
> **115WA.** (1) In addition to the income-tax charged under this Act, there shall be charged for every assessment year commencing on or after the 1st day of April, 2006, additional income-tax (in this Act referred to as fringe benefit tax) in respect of the fringe benefits provided or deemed to have been provided by an employer to his employees during the previous year at the rate of thirty percent on the value of such fringe benefits.
>
> (2) Notwithstanding that no income-tax is payable by an employer on his total income computed in accordance with the provisions of this Act, the tax on fringe benefits shall be payable by such employer.

Various fringe benefits were specified under section

115WB. Under sub-section (1) of section 115WA thus, in addition to income tax charged, an additional charge was created with effect from 01.04.2006 in form of fringe benefit tax in respect of fringe benefit provided or deemed to have been provided by the employer to the employees, which would be taxed at the rate of 30% of the value of such fringe benefits. Under sub-section (2) of section 115WA, such tax would be collected irrespective of the fact that no income tax was payable by the employer on the total income computed in accordance with the provisions of the Act. This provision thus made two major departures from the normal tax provision. First, the payer of fringe benefits was held responsible to pay tax at flat rate of 30% of the value of benefit and second such tax would be paid by the employer even if otherwise not liable to pay tax on the basis of normal computation of his income. The FBT is therefore, referred to as a surrogate tax.

10. Section 17 of the Act defines the term salary, perquisite etc. Sub-section (2) of section 17 which defines the term 'perquisite' is worded in inclusive fashion. Clause (vi) thereof prior to 01.04.2006 read

as under:

> *"(vi) the value of any other fringe benefit or amenity as may be prescribed."*

With the introduction of the FBT under chapter XII-H, this clause-(vi) of sub-section (2) of section 17 was amended with effect from 01.04.2006 and read as under:

> (vi) the value of any other fringe benefit or amenity (excluding the fringe benefits chargeable to tax under Chapter XII-H) as may be prescribed.

11. We may notice that with dismantling of the FBT regime, relevant portion of sub-section (2) of section 17 has undergone a change. Clause-(vi) thereof is replaced by clauses (vi), (vii) and (viii) with effect from 01.04.2010. Clause-(viii) in the present form reads as under:

> *"(viii) the value of any other fringe benefit or amenity as may be prescribed."*

12. It can thus be seen that before and after the FBT provisions, sub-section (2) of section 17 included within the meaning of term perquisite, the value of any other fringe benefit or amenity as may be prescribed. In other words, any fringe benefit or

amenity which is prescribed under the rules would form part of the perquisite. During the period when the fringe benefit was being separately taxed under section 115WA, this definition of perquisite consciously referred to an exclusion providing that term 'perquisite' would include the value of any other fringe benefit or amenity as may be prescribed, excluding the fringe benefits chargeable to tax under chapter XII-H. In plain terms therefore in case of fringe benefit chargeable to tax under chapter XII-H, the same benefit would not form part of a perquisite of an employee in terms of section 17(2) of the Act. The statutory provisions were thus, so framed in a manner as to avoid the same benefit suffering the taxation at two ends. If a benefit paid by an employer to an employee is treated as a fringe benefit liable to tax under section 115WA of the Act, the employer alone shall suffer tax at a prescribed rate. Such benefit would not form part of the perquisite of the employee, subjecting him to further tax as additional income. The CBDT also in its circular no.9 of 2007 dated 20.12.2007, in response to a question whether the benefits arising on account of shares alloted or transferred under ESOP can be taxed as a perquisite under section 17 of the Act instead of being taxed as fringe benefit under chapter XII-H at the option of employer, clarified that any fringe benefit liable to be taxed in the hands of the employer under chapter XII-H cannot be taxed in the hands of the employee as perquisite under section 17 of the Act. The employer, therefore, does not have an option to tax the benefit arising on account of share allotment as perquisite which is otherwise to be taxed as FBT.

13. Under the circumstances, once a certain benefit is held to be a fringe benefit and the employer is taxed accordingly under chapter XII-H of the Act, the same benefit cannot be included in the income of the employee treating it as a perquisite.

14. We may now notice the history of litigation concerning the employer ONGC in this respect. While the department tried to tax the employee, it also questioned ONGC for not deducting tax at source on such payments. The Assessing Officer, held that the ONGC was required to deduct tax at source which it

failed to do and therefore, disallowed the entire expenditure. This issue was carried in appeal by ONGC. The Commissioner of Income Tax (Appeals) passed a common order dated 15.04.2010 for the assessment years 2008-09 and 2009-10, in which, he held as under:

> *"… Thus he accepts that the FBT might be payable on such CMRE but it is liable to tax in the hands of the employees also. No specific provision is pointed cut in support of this argument of the A.O. The agreement of the assessee that when perquisites are subjected to FBT it is not taxable perquisites is further supported by the amendment in clause (vi) of section 17(2) which specifically provides that the perquisites / fringe benefits are to be included in salary except* ***those fringe benefits which are chargeable under Chapter XII H of the Act*** *i.e. the provisions related to Income-tax on fringe benefit as per section 115W to section 115WL. As the assessee has specifically shown that these two amounts i.e. CMRE and the reimbursement of cost of uniforms and washing expenses are included in the computation of fringe benefit tax return filed by the Co., the same is not liable to tax as income in the hands of employees. Accordingly, I hold that the assessee was not liable to deduct tax at source u/s.192 on such amounts. Accordingly, the order passed by the A.O. For these two years is quashed."*

15. This issue in one form or the other, reached the High Court in three separate proceedings. In case of ***Commissioner of Income-tax (TDS) v. Oil & Natural Gas Corporation (India) Ltd.,*** reported in ***[2013] 38***

taxmann.com 187 (Gujarat), (hereinafter to be referred to as 'ONGC-1'), a Division Bench of this Court confirmed the decision of the Tribunal, in which, the Tribunal had upheld the stand of the ONGC treating CMRE allowance paid to the employees as nontaxable income. It was also a case where the Revenue had questioned the ONGC for not deducting tax at source on such payments.

16. In case of ***Commissioner of Income-tax v. Oil & Natural Gas Corporation (India) Ltd.,*** reported in ***[2015] 61 taxmann.com 105 (Gujarat),*** (hereinafter to be referred to as 'ONGC-2'), a Division Bench considered the question whether the Tribunal was right in holding that the payment of uniform allowance to the employees by ONGC incurred FBT and failed to consider that the payment of uniform allowance was nothing but an additional salary. The Division Bench confirmed the decision of the Tribunal. Referring to clause-6 of sub-section (2) of section 17 of the Act, it was observed that the perquisites do not include fringe benefit chargeable to tax under chapter XII-H. It was concluded as under:

"20. We have gone through the provisions of

> *section XII H and benefits which are conferred under section 115WB(2)(E) of the Income Tax Act. While reading clause(E), the provisions of section 17(2)(vi) whether the payment made under FBT is excluded or not, in our view, it is excluded."*

17. In case of ***Commissioner of Income-tax (TDS) v. Oil & Natural Gas Corporation (India) Ltd.,*** reported in ***[2015] 54 taxmann.com 381 (Gujarat),*** (hereinafter to be referred to as 'ONGC-3'), once again the Court following the decision in case of ONGC-2 case held that the uniform allowance paid by the ONGC to its employees cannot be regarded as additional salary attracting the provisions of TDS.

18. Thus, this issue is sufficiently clear by above three judgments of this Court in case of ONGC-1. In case of ONGC-2, the Court also considered the Revenue's objection that the perquisite was not in the nature of fringe benefit, but an additional tax. Such contention was negated. In any case, the Revenue has accepted the ONGC's treatment to this payment as fringe benefit and accepted tax from the employer on such basis in terms of chapter-XII-H of the Act, Revenue now cannot change its stand and seek to tax the same amount in the hands of the employees which

would be a clear case of double taxation.

19. In case of ***S. R. Koshti*** (supra), Division Bench of this Court held that every assessment of tax even due to mistake of the assessee can be corrected in exercise of revisional powers by the Commissioner by making following observations:

> *"20. The position is, therefore, that, regardless of whether the revised return was filed or not, once an assessee is in a position to show that the assessee has been over-assessed under the provisions of the Act, regardless of whether the over-assessment is as a result of assessee's own mistake or otherwise, the Commissioner has the power to correct such an assessment under Section 264(1) of the Act. If the Commissioner refuses to give relief to the assessee, in such circumstances, he would be acting dehors the powers under the Act and the provisions of the Act and therefore, is duty bound to give relief to an assessee, where due, in accordance with the provisions of the Act.*

20. The last of the contentions of Shri Parikh that the petitioner having agreed before the Assessing Officer to a certain disallowance, cannot challenge the order by way of revision and is, therefore, must be turned down.

21. In the result, impugned order dated 22.09.2011

passed by the Commissioner is set aside. The disallowance of 20% of the CMRE benefit and 100% of the uniform allowance made in case of the petitioner by the Assessing Officer is reversed. The Assessing Officer shall pass a consequential order giving effect to this judgment. The petition is disposed of.

(AKIL KURESHI, J.)

(A.J. SHASTRI, J.)

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