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

Reserved on: 08.07.2013
Decided on: 31.07.2013

\+ **ITA 441/2003**

YOSHIO KUBO ..... Appellant

versus

COMMISSIONER OF INCOME TAX ..... Respondent

\+ **ITA 379/2007**

THE COMMISSIONER OF INCOME TAX XVI ....Appellant

versus

SH. SASHI MUKUNDAN ..... Respondent

\+ **ITA 387/2008**

THE COMMISSIONER OF INCOME TAX XVI ...Appellant

versus

MR. SHORT DONALD ..... Respondent

\+ **ITA 212/2009**

THE COMMISSIONER OF INCOME TAX ……Appellant

versus

MR. FUMIO GOTO ..... Respondent

\+ **ITA 15/2010**

THE COMMISSIONER OF INCOME TAX-XIV

.....Appellant

versus

MR. DUNCAN ETHERINGTION ..... Respondent

\+ **ITA 351/2010**

THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant

versus

SH. YASHIMITSU ZAUTSU ..... Respondent

\+ **ITA 408/2010**

THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant

versus

SH. IKUJU YABUKI ..... Respondent

\+ **ITA 450/2010**

THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant
versus
SHRI TOSHIHORU SUNAHARA ..... Respondent

\+ **ITA 534/2010**

THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant
versus
SOJITZ CORPORATION AS AGENT ..... Respondent

\+ **ITA 635/2010**

THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant
versus
SH. YASHIMITSU ZAUTSU ..... Respondent

\+ **ITA 1354/2010**

THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant
versus
SH. JASWINDER SINGH ..... Respondent

\+ **ITA 1556/2010**

THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant
versus
MR. MOHAMMAD RAUFF NABI BAX ..... Respondent

\+ **ITA 1561/2010**

THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant
versus
MR. MOHAMMAD RAUFF NABI BAX ..... Respondent

\+ **ITA 370/2011**

THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant
versus
GORAM WESTERBERG ..... Respondent

\+ **ITA 1557/2010**

THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant
versus
MR. JOHN TRIPLETT ..... Respondent

\+ **REV. PET. 708/2011 IN ITA 1369/2010**
THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant
versus
SH. FUMIO GOTO ..... Respondent

\+ **ITA 761/2005**
THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant
versus
MR. K.P.HOSTELLEY ..... Respondent

\+ **ITA 798/2005**
THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant
versus
MR. YOSHIO KUBO ..... Respondent

\+ **ITA 800/2005**
THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant
versus
MR. YOSHIO KUBO ..... Respondent

\+ **ITA 680/2007**
THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant
versus
SH. MOHAN RAI ..... Respondent

\+ **ITA 681/2007**
THE COMMISSIONER OF INCOME TAX XVI ..... Appellant
versus
SH. MOHAN RAI ..... Respondent

\+ **ITA 1215/2008**
COMMISSIONER OF INCOME TAX DELHI XIV ..... Appellant

versus

MR. GHORAYEB EMILE, C/O AIR FRANCE ..... Respondent

\+ **ITA 494/2010**

THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant

versus

SH. HIROYASU KITADA ..... Respondent

\+ **ITA 508/2010**

THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant

versus

SH. HIROYASU KITADA ..... Respondent

\+ **ITA 577/2010**

THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant

versus

MR. SCOTT R BAYMAN ..... Respondent

\+ **ITA 631/2010**

THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant

versus

SH. VENKAT RAO SHRIDHAR ..... Respondent

\+ **ITA 699/2010**

THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant

versus

MR. JEROME SUDAN ..... Respondent

\+ **ITA 1912/2010**

THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant

versus

SH. PANKAJ SHAH ..... Respondent

\+ **ITA 528/2011**

THE COMMISSIONER OF INCOME TAX-XVI ..... Appellant

versus

SH. MARCH FRANCOIS JEAN SOULACROUP ..... Respondent

…..Appearance

Through: Mr. Rajiv Tyagi with Mr. Ajay Kumar, Mr. Gyanendra Sharma and Ms. Renu Narula, Advocates, for respondent in ITA 379/07.

Mr. Pawan Sharma with Ms. Madhavi Swaroop, Advocates, in ITA 15/2010.

Mr. Piyush Kaushik, Advocate, in ITA 450/10 & ITA 534/10.

Ms. Amita Kalkal Chaudhary, Proxy for Mr. Naresh Kaushik, Advocate, in ITA 1354/10.

Mr. S. Ganesh, Sr. Advocate with Mr. Pawan Sharma, Ms. Madhavi Swaroop, Ms. Roohina Dua and Ms. Preeti Goel, Advocates, in ITA 577/10.

Mr. Satyen Sethi with Mr. Arta Trana Panda, Advocates, in ITA 1912/10.

Ms. Shreya Verma, Advocate, for Respondent in ITA 681/07 & ITA 1215/08.

Mr. Salil Kapoor, Mr. Vikas Jain, Mr. Manomeet Dalal and Ms. Preity Goel, Advocates, for Respondents in ITA 212/09, ITA 1556/10, 1561/10, 1369/10, 370/11, 494/10, 508/10 and ITA 631/10.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S. RAVINDRA BHAT

%

1. This common judgment disposes a bunch of appeals in which the court had framed several questions of law. The important questions pertain to the applicability of Section 10 (10CC) of the Income Tax Act; others are whether mandatory social security and medical insurance or benefits paid in the country of the assessee, are

taxable. Apart from these, other questions too require consideration and answer.

Question No. 1: Are amounts paid towards income tax by the employer on behalf of the assessee non-monetary perquisites, and do they consequently fall within the scope of Section 10 (10CC) of the Act.

The present issue arises for consideration in ITA Nos. 1990/2010; 450/2012, 534/2010; 1556/2010; 1557/2010; 494/2010; 508/2010; 577/2010; 631/2010; 1912/2010; 528/2011; 212/2009; 15/2010; 408/2010; 528/2011; 351/2010; 635/2010; 1354/2010; 1561/2010; 1912/2010.

Contentions of the revenue

2. This question arises in the above appeals preferred by the Revenue. The assessee in all the cases were recipients or beneficiaries of what can be termed as "tax-free" or "tax paid income", i.e. the tax arising out of the income earned by them from their non-resident but taxable employers, was borne by the latter.

3. The assessees contended that by virtue of Section 10(10CC), introduced and brought into force in the Statute with effect from 01.04.2002 by the Finance Act, 2003, they were not liable to pay tax on such amounts which constituted the income tax component paid by the employers. It was contended successfully on their behalf before the Income Tax Appellate Tribunal (ITAT) that such amounts fell outside the purview of taxation by virtue of Section 10CC and could not be regarded as "monetary payment" and, therefore, treated as

perquisites under Section 17(2) of the Act. The Revenue questions the decision and the logic underlying the Tribunal's determination on this aspect.

4. It is contended on behalf of the Revenue by Ms. Rashmi Chopra that the entire scheme of the Act and the interplay between various provisions have to be taken into consideration rather than an appreciation of Section 10(10CC) alone. Elaborating on this, it was urged that for this purpose, the Court would have to consider the provisions under Section 17(2); Section 40A(5); Section 192(1A), Section 195, Section 195(1A) and Section 198. On an overall consideration of these provisions, it was contended, leave no room for doubt that the taxes brought by the employers are in fact monetary payments, the benefit of which can be claimed by the employee for the purpose of computation of income and payment of tax – as a perquisite.

5. It was emphasized that the definition of perquisite under Section 17(2) is inclusive and extends to diverse manner of concessions or benefits which the employee indirectly enjoys. It was submitted that the Parliament was aware of Section 17(2)(iv), which included all manner of liabilities, such as donations *"payable"* by the assessee yet it chose to restrict the operation of Section 10(10CC) only to the extent of its overriding Section 200 of the Companies Act. In this context, it was further submitted that the element of income tax is in the nature of personal obligation; it was submitted that such personal obligation would necessarily have to be borne by the employee. By private arrangement in individual cases, it might be

borne by the employer. Nevertheless, its character as a perquisite does not get extinguished by the mere introduction of Section 10(10CC). If the intention was otherwise, the Parliament would well have amended Section 17(2)(iv). Learned counsel emphasized that the matter could be looked at from yet another angle. Section 10(10CC) operated in an entirely different field in that it could be said to apply in those cases where the employer receives a benefit not through a monetary payment, but by way of reimbursement of the tax body. In other words, if the tax is actually included in the salary, paid to the employee, that would still amount to a monetary payment. Learned counsel highlighted that under the scheme of the Act, Section 17(2) was placed after Section 10(10CC). It has to be construed along with Sections 15 and 16. Section 15 highlights that whether a salary is paid or not, as long as it bear the character of salary due, it is deemed to be such. The only deductions permissible from this class of income are those provided under Section 16(2)(iii). Section 17(4) inclusively brings within the sweep of "salary" perquisites which is specifically defined under Section 17(2).

6. Learned counsel placed reliance upon the decision reported as *Emil Webber v. Commissioner of Income Tax, V&M, Nagpur AIR 1993 SC 1466 (200 ITR 483)* and that of Mysore High Court in *Tokyo Shibaura Electric Company Ltd. v. Commissioner of Income-Tax, Mysore* 1964 (52) ITR 283 (Kar). It was emphasized that wherever such income is paid by the employer on behalf of the employee, it is a mandatory payment in discharge of his obligation which would otherwise have been exclusively borne by him or her and

consequently taxable as "salary" by virtue of Section 17(2).

7. It was submitted that in *Emil Webber (supra)*, the Supreme Court had occasion to deal with the identical question, i.e. whether payment of an amount by the employer in order to discharge the employees' incomes' obligation was income under the head of "salary" and whether such payment amounted to "perquisite". The Supreme Court had, on that occasion, stated as follows:

> *"7……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."*

8. Similarly, the observations of the High Court in *Tokyo Shibaura Electric Company Ltd. (supra)* were relied upon:

> *"15. The royalty due to the assessee has to be paid at Tokyo. Further, in view of clause D the same should be paid without deduction for taxes or other charges assessed in India, which shall be assumed by REMCO. To put those words in the language of Somervell L.J. in Jaworski v. Institution of Polish Engineers in Great Britain Ltd.* (1951) 1 KB 768*, the remuneration is to be "x" plus "whatever sum is necessary to leave that available to me after you have borne the taxes." As under the law, the tax is suffered by deduction, it means such a sum as will after deduction leave "x".*
>
> *16. Distinction between tax-free income and the "xx" income on which tax should be paid by the employer is well brought out in Simon's Income Tax, second edition, vol. 11, at page 710. This is what is stated therein:*
>
> *"Where remuneration is paid to an employee free of income tax or the employer pays his employee's income tax, the gross emoluments of the employee must be arrived at by adding the amount to the tax paid by the employer to the net payment. This was established by North British Rail Co. v. Scott,[1923] AC 37 where the company had contracted to bear the income tax in question and Hartland v. Diggines,[1926] AC 289 where there was no such contract, the arrangement being simply customary."*
>
> *17. In Jaworski v. Institution of Polish Engineers in Great Britain Ltd.(supra) there was a service agreement to pay the employee a salary of Pounds 20 nett per month "without any deductions and taxes, which will be borne by the association." The employers deducted tax from the salary under section 1 of the Income Tax (Employments) Act, 1943, and the employee brought an action to recover the amounts deducted on the ground that the deductions were in breach of his service agreement. It was held by*

> *the Court of Appeal, reversing the decision of Finnemore J. in the court below, that on construction, the agreement was one to pay net remuneration at the stated figure together with such sum as was necessary to leave that figure available to the employee after the association had borne the taxes referable to him, and that, accordingly, the agreement was valid. Though it was not necessary to decide the point the court also expressed the view that the agreement was not void by reason of its infringing the general rule 28(2) since it was doubtful whether salary or other remuneration for services assessable under Schedule E were "annual payments" within the meaning of the rule."*

9. Learned counsel submitted that the definition of "income" is not exhaustive, and all manner of receipts or entitlements are covered within the phrase. It was argued that therefore, as long as "perquisite" is widely defined and in an inclusive manner, with the phraseology adopted under Section 17 (2) (v), the amounts paid towards tax by the employer are included within the term perquisite. Reliance was placed, on the judgment reported as *Boeing v Commissioner of Income Tax* 250 ITR 667 (Mad) where the court emphasized that

> *"If the amount so received is not an amount which is excluded from the ambit of income under the Act, such receipt would constitute income. The fact that the amount was given to the recipient without any demand for the same by the recipient, or without any legal obligation on the part of the donor to make the payment, would not make any difference."*

Counsel also relied on the ruling of the Bombay High Court, in *Commissioner of Income Tax v H.D. Dennis* 1982 (135) ITR 1 (Bom), where the Court, relying on two English decisions, (North

British Railway Company v. Scott [1922] 8 TC 332 (HL) and *Hartland v. Diggines* [1926] 10 TC 247 (HL), held that:

> *"It was emphasised in this case that in effect what the employee has received is the money paid into his hands plus the immunity, i.e. the immunity from paying the tax. The substance of the matter was that the salary paid to the employee is not all that he received. He had received, in addition, money's worth to the extent of the sum which was paid in respect of that salary to the revenue. With respect, we are in complete agreement with the view expressed in the said decisions and are of the view that the income-tax paid on behalf of the employee would be a part of the salary of the employee by the mere connotation of the expression "salary". There is also no reason why the tax so paid by the employer would not amount to an allowance even if it is held that it did not form part of his salary, and admittedly the said rule does not exclude from the definition of salary the allowance of the kind paid in the present case. For all these reasons, we are satisfied that Shri Munim is not entitled to succeed in his contention that the definition of the word "salary" contained in r. 3 does not include tax paid by the employer in the present case. We are fortified in the view we are taking by two decisions viz., one of the Kerala High Court in CIT v. C. W. Steel (No. 1) [1972] 86 ITR 817, and the other of the Madras High Court in CIT v. Mackintosh [1975] 99 ITR 419. In both the cases, the very same question fell for consideration, viz., whether the income-tax paid by the employer was salary for the purposes of finding out the value of the rent-free accommodation given to the employee. Both the courts have answered the issue in favour of the revenue and against the assessee. The Madras High Court in its judgment has approved of the ratio of the decision of the Kerala High Court. We are respectfully in agreement with the decisions of both the courts on the said point. We are, therefore, satisfied that the revenue is entitled to*

succeed on the first question and the answer to the question will have to be given in its favour and against the assessee."

10. It was argued that Section 192(1A) obliges every employer to deduct, at the time of payment of salary incomes on the amount payable. Section 192(1A) grants relief only to the extent of exclusion of perquisite which is not provided for by way of monetary relief from the burden of obligation under Section 192(1). This is further reinforced by Section 195A which clearly states that tax chargeable on any income is to be borne by the person by whom it is payable for the purpose of deduction of tax by the employer.

Assessee's contentions

11. Learned counsel for the assessee relied on the Memorandum explaining provisions introduced in Finance Bill, 2002 with reference to new Clause 10(10CC) which was to the following effect:

*"**Scheme for taxation of perquisites simplified with employer given option to pay tax on behalf of employees***

64.1 Under the existing provisions of Section 192 of the Income-tax Act, 1961, an employer is required to deduct tax at source on income under the head "salaries", inclusive of the value of perquisites. In case, such tax is paid by an employer on behalf of an employee, the same being in the nature of an obligation which, but for such payment, would have been payable by the employee, is considered a perquisite, and is chargeable to tax."

64.2 The Finance Act, 2002 provides for a new scheme of taxation of perquisites, wherein an employer has been given an option to pay tax on the whole or part-

value of perquisite (not provided for by way of monetary payments), on behalf of an employee, without making any deduction from the income of the employee.

64.3 To bring into effect this new scheme, a new Clause (10CC) has been inserted in Section 10, to exempt the amount of tax actually paid by an employer, at his option, on the income in the nature of a perquisite, (not provided for by way of monetary payment) on behalf of an employee, from being included in perquisites.

64.4 Such tax paid by the employer shall not be treated as an allowable expenditure in the hands of the employer under Section 40 of the Income-tax Act, 1961.

64.5 The amendments will take effect from Ist April, 2003 and will, accordingly, apply in relation to the assessment year 2003-04 and subsequent years.

64.6 Necessary changes in various provisions of Chapter-XVII relating to collection and recovery of taxes have been made to give effect to the new scheme. Amendment in Section 192 has also been made, so as to provide that an employer shall have an option to pay tax on behalf of an employee, without making any deduction from his income, on the income in the nature of perquisites, (not provided for by way of monetary payment). The employer shall, also continue to have the option to deduct the tax on whole or part of such income."

12. Learned Senior counsel for the assessee, Shri S. Ganesh, and other counsel, i.e Shri Rakesh Gupta, and Shri Salil Kapoor emphasized the phraseology of Section 10(10CC) and argued that the expressions calling for interpretation are *"a perquisite, not provided for by way of monetary payment"*. Likewise, what are *"provided for by way of"* has to be construed by the Court. Payment of tax by

employer -on behalf of the employee is a perquisite. However, the precise controversy is whether it is in the shape of monetary payment to the employee. Counsel submit that the term *"provided for"* means to keep something ready, in order to perform or do it. Under Section 10(10CC) the monetary payment should be provided for the employee. It should be employee who is provided for by way of monetary payment within the meaning of Clause (2) of Section 17. In other words, payment of actual money to the employee (and not the equivalent of that, or the money's worth) is what the legislature contemplated by provision of by way of monetary payment. If some benefit is directly or indirectly received by the assessee which has money's worth, it is not a "monetary payment".

13. It was further submitted that the distinction between a provision by way of monetary payment on the one hand, and provision not by way of monetary payment, on the other cannot be overlooked. The provision under consideration only excludes from exemption "perquisites" involving payment of money directly to the employees for a specific amenity or benefit. The Legislature wanted to exempt non-monetary perquisites allowed to the employee by the employer under the provision.

14. Assessee's Counsel further submit that Section 10(10CC) when read other provisions to which simultaneous amendments were made by the Legislature, i.e Section 40 (1) (c) (v) clarify that the revenue's position is incorrect. It was argued that the value of perquisites,

otherwise deductible in the hands of the employer (subject to conditions) has been restricted, to the extent of payment of tax.

15. It was highlighted by counsel that the interpretation pressed upon by the revenue cannot be accepted, as it would amount to rendering Section 10 (10CC) meaningless. It was argued that each perquisite, paid for by the employer (even if not paid by the employee) would become a monetary perquisite. Thus, residential house belonging to the employer and provided to the employee -for his residence, - would be treated as a monetary perquisite. This would render Section 10 (10CC) a surplus age. That consequence cannot be adopted by the Court which should strive to give meaning to each provision.

16. It was submitted that the legislative history of Section 17 (2) (iv) read with Section 40A (5) and Section 40 (1) (a) (v) has to be taken into consideration in totality. Counsel submitted that what were excluded from deduction were payments made by the employer, but not the cash actually paid to the employee, which fell within the definition of "perquisite" and was therefore taxed in his hands, subjects to specified limits. However, such payments did not suffer taxation and were deductible as business expenditure. On the other hand if payments were made directly by the employer-assessee, those were non-deductible and were subject to taxation. This pattern was taken into consideration, by the corresponding change to Section 40 (a) (v) which rendered amounts paid by the employer towards income tax obligation (and covered under Section 10 (10CC)) non-deductible

in the hands of the employer. Counsel relied on the decision reported as *Commissioner of Income Tax v Mafatlal Gangabai* 219 (ITR) 643 (SC).

The provisions

17. As is apparent from the above discussion, the question which squarely falls for consideration is whether the income tax paid (to discharge the tax obligation of the employee, on his behalf) is a monetary perquisite or not. The question arises because of the interplay between Section 10 (10CC) – newly introduced by the amendment of 2002, and Section 17 (2) (c) (iv). For a proper appreciation of the controversy which calls for decision, the relevant provisions which have to be considered for the purpose of this judgment, are extracted below. Section 10 (10CC) states that:

> *"10. In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included*
>
> *XXXXXX XXXXXX XXXXXX*
>
> *(10CC) in the case of an employee being an individual deriving income in the nature of a perquisite, not provided for by way of monetary payment, within the meaning of Clause (2) of Section 17, the tax on such income actually paid by his employer, at the option of the employer, on behalf of such employee, notwithstanding anything contained in Section 200 of the Companies Act, 1956 (1 of 1956).*

Section 17(2) defines 'perquisite' in an inclusive manner, setting out different kinds of benefits that are treated as perquisites and added to

the salary income of the assessee. Clause (iv), which important and reads as follows:

> *"(iv) any sum paid by the employer in respect of any obligation which but for such payment, would have been payable by the assessee."*

Section 40, which lists out the deduction disentitlements of an assessee (who would, but for such bar, have possibly claimed them as deductible business expenses) reads, to the extent it is relevant, as follows:

*"**Section 40 - Amounts not deductible***

> *Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession", –*
>
> *(a) in the case of any assessee –*
>
> *[(v) any tax actually paid by an employer referred to in clause (10CC) of section 10:]"*

Analysis and Findings

18. Till 31-3-1972, Section 40(a) (v) was in force and from 1-4-1972, 40-A (5) came into force in its place. Both provisions were substantially similar. Section 40(a)(v) was preceded by Section 40(c)(iii) which was applicable only to companies. That (Section 40(c)(iii)) was introduced by Finance Act, 1973 with effect from 1-4-1963, read as follows:

"40. Amounts not deductible.-Notwithstanding anything to the contrary in Sections 30 to 39, the following amounts shall not be deducted in computing the income chargeable under the head 'profits and gains of business or profession'-

(c) in the case of any company-

(iii)any expenditure incurred after the 29th day of February, 1964, which results directly or indirectly in the provision of any benefit or amenity or perquisite, whether convertible into money or not, to an employee (including any sum paid by the company in respect of any obligation which but for such payment would have been payable by such employee), to the extent such expenditure exceeds one-fifth of the amount of salary payable to the employee for any period of his employment after the aforesaid date:

Provided that in computing the aforesaid expenditure any payment by way of gratuity or the value of any travel concession or assistance referred to in clause (5) of Section 10 or passage moneys or the value of any free or concessional passage referred to in sub-clause (i) or any payment of tax referred to in sub-clause (vii) of clause (6) of that section or any sum referred to in clause (vii) of sub-section (1) of Section 17 or in clause (v) of sub-section (2) of that section or the amount of any compensation referred to in clause (i) or any payment referred to in clause (ii) of sub-section (3) of that section or any payment referred to in clause (iv) or clause (v) or any expenditure referred to in clause (ix) of subsection (1) of Section 36 shall not be taken into account."

Through Finance Act, 1968, sub-clause (iii) to Section 40 (c) was deleted; instead, sub-clause (v) was introduced to Section 40 (a). That, as introduced by the said Finance Act, read as follows:

> *"40. Amounts not deductible.-Notwithstanding anything to the contrary in Sections 30 to 39, the following amounts shall not be deducted ,in computing the income chargeable under the head 'profits and gains of business or profession'-*
>
> *(a) in the case of any assessee-*
>
> *(v)any expenditure which results directly or indirectly in the provision of any benefit or amenity or perquisite, whether convertible into money or not, to an employee (including any sum paid by the assessee in respect of any obligation which, but for such payment, would have been payable by such employee) or any expenditure or allowance in respect of any assets of the assessee used by such employee either wholly or partly for his own purposes or benefit, to the extent such expenditure or allowance exceeds one-fifth of the amount of salary payable to the employee, or an amount calculated at the rate of one thousand rupees for each month or part thereof comprised in the period of his employment during the previous year, whichever is less."*

This provision applied to all assessees. By virtue of the first proviso, the clause did not apply where the income chargeable under the head 'salaries' of the employee concerned was Rs 7500 or less. Explanation (II) imported the same meaning to 'salary' as was assigned to it in Rule 2(h) of Part A of the IVth Schedule to the Act.

19. From 1-4-1972, Section 40-A(5) was introduced; it substituted Section 40(a)(v). It read as follows:

> ***" 40-A. Expenses or payments not deductible in certain circumstances.-***
>
> *(5)(a) Where the assessee-*

> *(i) incurs any expenditure which results directly or indirectly in the payment of any salary to an employee or a former employee, or (ii)incurs any expenditure which results directly or indirectly in the provision of any perquisite (whether convertible into money or not) to an employee or incurs directly or indirectly any expenditure or is entitled to any allowance in respect of an asset of the assessee used by an employee either wholly or partly for his own purposes or benefit, then, subject to the provisions of clause (b), so much of such expenditure or allowance as is in excess of the limit specified in respect thereof in clause (c) shall not be allowed as a deduction:"*

The sub-section was amended later in certain respects and was omitted altogether by Direct Tax Laws (Amendment) Act, 1987 with effect from 1-4- 1989.

20. The real debate here is whether the tax paid – on behalf of the employee, by the employer is a perquisite and if it is not, whether it is to be excluded from the definition of income, by virtue of Section 10 (10CC). The latter provision operates, and applies in the following terms:

(a) to an individual deriving income

(b) in the nature of a perquisite, not provided for by way of monetary payment, (within the meaning of Clause (2) of Section 17)

(c) (in respect of) the tax on "such" income <u>actually paid</u> by his employer,

(d) at the option of the employer, on <u>behalf of such employee</u>,

(e) Notwithstanding anything contained in Section 200 of the Companies Act, 1956 (1 of 1956).

A plain reading of the above provision would reveal that if the perquisite that is "not provided for by way of monetary payment" – under Section 17 (2), the tax paid on such income would be excluded from the calculation of income altogether; it would not be deemed a perquisite.

21. Section 10 (5B) had earlier granted a somewhat similar exemption in respect of payment of amounts by employers in discharge of their employees' income tax liabilities. It enabled an individual who fulfilled the conditions of that provision, to exclude, in the computation of his total income, the tax paid by the employer on the salaries paid to him for a period not exceeding 48 months from the date of his arrival in India. The individual claiming the exemption had to satisfy the following requirements

(i) He had to be a technician as defined in the Explanation ;

(ii) He had to be in the employment of one of the several entities set out in the clause or in any business carried on in India ;

(iii) He should not have been resident in India in any of the four financial years immediately preceding the financial year in which he arrived in India; and

(iv) The tax on his salary income should have been paid by the employer.

Section 10(5B) had been inserted by the Finance Act, 1993, with effect from April 1, 1994. Yet, this category of exemption had been in

the tax statutes all along. In the Indian Income-tax Act, 1922, the exemption was provided by Section 4(3)(xiva) inserted with effect from April 1, 1955, and it was continued in the 1961 Act in Sections 10(6)(vi), (vii), (viia)(I) and (viia)(II). Though the provision underwent several modifications as to the definition of "technician" as well as the quantum and period for which the exemption was available, the basic requirement that the technician must have been employed in a business carried on in India existed right from the beginning. Therefore, the contention of the revenue about the inherent implausibility of excluding amounts paid towards tax liability –which are personal to the employee-assessee, stands negated. There is nothing abhorrent in excluding such amounts paid – on behalf of the employee assessee, from the definition of tax.

22. Section 17 (2) outlines various perquisites, such as:

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. Specified employees are company directors, employees with substantial interest in the company and any other employee whose salary income exclusive of non-monetary benefits and amenities exceeds Rs. 50,000/-.

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

4) Any sum payable by the employer, directly or through a fund for assurance on life of the employee or to effect contract for an annuity.

However, sums payable to recognised provident funds or approved superannuation funds, and certain other specified funds are exempt.

5) Value of any other fringe benefit as prescribed (excluding fringe benefits subjected to the Fringe Benefit Tax).

Besides rent-free or concessional rent accommodation, other perquisites taxable in the hands of the employee include provision of services of domestic employees, supply of amenities, for household consumption, free or concessional educational facilities for any member of the employee's household, interest free or concessional loan, and benefits resulting from the use of any movable asset.

23. Section 17 (2) has not undergone any substantial change by the amendment of 2002. The only change is in the introduction of Section 10 (10CC) which states that tax actually paid by the employer to discharge an employee's obligation "not amounting to a monetary benefit" would not be included as the employees' income. If seen from the context of Section 17 (2), and the previous history to that provision, as well as the pre existing provision of Section 10 (5B) – and the interpretation placed on Section 17 (2) read with other provisions which disallow payments made on behalf of the employee, by the employer, so long as the benefit is not expressed in monetary terms in the hands of the employee, in the sense that it is not funded as part of the salary, but paid in discharge of the obligation, of any sort, either contractual (i.e. rent, services, etc availed of by the employee) or legal (tax) directly by the employer, *it should not be treated as a monetary benefit.* The reason for this is that Section 10 (10CC) is neutral about the kind of benefit availed by the employee. The

decisions of the Supreme Court, on Section 40(1) (c) and Section 40A are, in the context of the expressions *"any expenditure which results… in the provision of any benefit or amenity or perquisite"* read with *"whether convertible into money or not."* have received a liberal interpretation. In *Mafatlal Gangabai (supra)* it was held that:

> *"6. On a consideration of both the points of view, we are inclined to agree with the submission of the learned Counsel for the assessees. The language employed in the sub-clause is not capable of taking within its ambit cash payments made to the employees by the assessee. These cash payments will, of course, be treated as salary paid to the employees and will be subject to the limits/ceiling, if any, in that behalf. But they cannot be brought within the purview of the words "any expenditure which results directly or indirectly in the provision of any benefit or amenity or perquisite" -- more so because of the following words "whether convertible into money or not.*
>
> *7. Now, coming to Section 40A(5), the position is no different. It would, however, be appropriate to point out the distinction between Section 40(a)(v) and Section 40A(5). We shall refer to the former provision as "sub-clause " and the latter provision as "sub-section ". The sub-section is wider in its scope and application than the sub-clause. Sub-clause (i) of Clause (a) of Sub-section (5) deals with "any expenditure which results directly or indirectly in the payment of any salary to an employee or a former employee". Sub-clause. (i) of Clause (c) of Sub-section (5) deals with "any expenditure which results directly or indirectly in the payment of any salary to an employee or a former employee". Sub-clause (i) of clause (c) of Sub-section (5) sets out the limits/ceilings on such expenditure while Clause (a) of Expln. 2 appended to the sub-section defines the expression "salary " for the purposes of this sub-section. These features were absent in Sub-clause (v) of Section 40(a). Now, coming to Sub-*

clause (ii) of Clause (a) of Sub-section (5) which corresponds to Section 40(a)(v) it uses only one expression "perquisite " as against Section 40(a) (v) which spoke of "benefit of amenity or perquisite, but this is no real distinction because the definition of "perquisite: in Clause (b) of Expln. (2) to the sub-section takes in both benefits and amenities. The said definition also includes, inter alia, "payment by the assessee of any sum in respect of any obligation which but for such payment, would have been payable by the employee"- words which are found in the main limb of Section 40(a) (v) but which are missing in the main limb of Sub-clause (ii) of Clause (a) of Sub-section (5). Thus, except for certain structural changes, Section 40A(5)(a)(ii) and Section 40(a)(v) are similar in all material aspects. It, therefore, follows that what we have said with respect to Section 40(a)(v) applies equally to Section 40A(5)(a)(ii).

8. There still remain the words "including any sum paid by the assessee in respect of any obligation which but for such payment would have been payable by such employee" in Section 40(a)(v) and similar words found in Section 40A(5)(a) (ii) as well, i.e., in Sub-clause (iv) of the definition of "perquisite " in Clause (b) of Expln. 2 to Sub-section (5). What do they mean? The said words contemplate a situation where the assessee makes a payment (in cash) in respect of an obligation -obligation of the employee - which would have been payable by the employee if it is not paid by the assessee. The payment by the assessee contemplated by these words is not evidently a payment to the employee but to a third party, no doubt, on account of the employee. Sub-clause (v) of the definition of "perquisite" in Clause (b) of Expln. 2 to Sub-section (5) also refers to cash payment but that too is not to the employee, though undoubtedly for his benefit.

9. For the above reasons, we hold that cash payments by an assessee to his/its employees do not fall within the ambit of Section 40(a)(v) or Section 40A(5)(a)(ii), as the

> *case may be. We disagree with the opinion of the Kerala High Court in Commonwealth trust Ltd. (supra) and agree with the other High Courts which have taken a view according with our view, viz., CIT v. Mysore Commercial Union Ltd. , CIT v. Shriram Refrigeraiton industries Ltd."*

In *V.M. Salgaocar & Bros. Pvt. Ltd. vs. Commissioner Of Income Tax* 2000 (243) ITR 383 (SC) the Court had to deal with the benefit of concessional rate of interest extended to the employee. The Court held as follows:

> *"It would be evident from a perusal of Sub-section (5) that it contemplates disallowance of certain expenditure incurred by the assesses which it claims as a deduction. Certain ceilings are fixed in the case of such expenditure. The assessee's contention is that it has not incurred any expenditure by giving the loans to its employees at a concessional rate of interest and, therefore, the said provision has no application. On the other hand, learned standing counsel for the Revenue says that if this money had not been lent to the employees at a concessional rate of interest, it would have earned interest at a higher rate had it been put in fixed deposit in a bank. But, this argument involves importing a fiction into Sub-section (5) of Section 40A of the Act. We must assume that this money, if not lent to the employees, would have been put in a fixed deposit or would have been invested in some other profitable manner and then say that the difference amount should be disallowed. We do not think that the language of Sub-section (5) of Section 40A of the Act provides for or permits such a course. Sub-section (5) applies where an assessee claims a certain deduction saying that he has spent that money in providing, directly or indirectly, either as salary to an employee or in the provision of perquisite to an employee. Only then do the ceilings prescribed in the said Sub-section come into*

play. It is true that in some cases this facility may be abused. We know public corporations like banks lending money to their own employees at practically no interest, say for example, one or two per cent, interest per annum, whereas those very banks lend to people at rates of interest ranging from 13% to 19% per annum. But the remedy for that must lie elsewhere, either in the proper control of the public corporations or in the amendment of the Income-tax Act, as the case may be. As the provision of law of Section 40A(5) of the Act now stands, it is not possible to answer the said question in the manner suggested by the Department. Accordingly, we answer question in the affirmative, i.e., in favour of the assessee and against the Revenue."

24. Parliament was aware of the pre-existing law, and therefore, stepped in to clarify that only a monetary benefit directly in the hands of the employee as a payment by the employer would be excluded from Section 10 (10CC). This may be in the form of any benefit to pay rent, or discharge any manner of obligation, tax not excluded. This intention is manifest from the expression "tax" on such income actually paid. To construe this newly introduced provision in any other manner would be to defeat Parliamentary intent. Section 40(a)(v) fortifies the interpretation of this court in providing that while calculating income of the employer, the tax paid by the employer on non-monetary perquisites is not deductible. This provision too was introduced in 2002. The logic of excluding – as a non monetary perquisite – amounts paid to discharge obligations of the employee, from the meaning of income, by virtue of Section 10 (10CC) is that now, with the introduction of Section 40 (c) (v), such amounts are not

deductible in the employer's hands – a situation which did not exist when the above judgments were rendered.

25. In the light of the above discussion, it is held that amounts paid directly by the employer to discharge its employees' income tax liability do not fall within the excluded category of monetary benefits "payable" to the employee; they fall within the included category, under Section 10 (10CC) as amounts paid directly as taxes. Correspondingly, they cannot now be claimed as deductions by virtue of Section 40 (c) (v). The revenue's appeals on this aspect have to fail.

Point No. 2. Social security, pension and medical insurance contributions

26. This issue arises for consideration in ITA Nos. 441/2003; 761/2005; 798/2005; 800/2005; 379/2007; 1215/2008; 450/2010; 680/2007; 681/2007; 577/2010; 528/2011 and 370/2011 .

27. The revenue is in appeal on this score. In all the cases, the foreign employer had made contributions in compliance with legal requirements in the country of its incorporation, towards social security benefits of the employee. These employees were seconded to India to serve in the Indian subsidiary, or assist in the Indian operations of the foreign company. The revenue sought to bring to tax such social security contributions, contending that they were for the benefit of the employee, and vested in the latter. In all the cases before the Court, the revenue had unsuccessfully contended that the amounts paid by the employer to the social security funds- admittedly in accordance with the laws and regulations governing the country of its

incorporation fell within the description of *"sum payable by the employer, whether directly or through a fund, ...to effect, an assurance on the life of the assessee or to effect a contract for an annuity."* It was also argued that to fall outside the mischief of the provision, the contribution had to be to a *"recognized 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)…"* The revenue further argues that since the contributions did not match the description of the excluded category, they were covered by the main provision of Section 17 (2) (v) and taxable as part of the salary.

28. It is argued by Mr. Deepak Chopra for the revenue that there is a significant difference between the language of the old Income Tax Act (of 1922) and the present one. Highlighting that the old Act made no distinction between approved and unapproved funds, it was argued that such a differentiation has been made under the 1961 Act. Therefore, all that the Court should satisfy itself is whether the employer contributes to a superannuation or annuity fund; if it is approved, it is not deemed a perquisite. Otherwise, it is part of taxable salary.

29. It was submitted that the term salary has wide connotation; according to the Random House Dictionary of the English language "salary" has been defined as

> *"A fixed compensation periodically paid to a person by regular work or services specially work other than that of manual, mechanical or mental kinds. It has been described as synonymous to pay."*

Likewise *Webster English International Dictionary* defines perquisite as:—

> *"A gain or profit incidentally made from employment in addition to regular salary or wages especially one of a kind expected or promised".*

The *Oxford Dictionary* gives perquisite its meaning as:—

> *"A casual emolument, fee or profit attached to an office or position in addition to salary or wages."*

The *Random House Dictionary of English Language* says 'perquisite' to be :—

> *"An incidental emolument fee or profit over and above fixed income, salary or wages. Also called perk, [perq]".*

Central to the theme of a perquisite is the idea that the employer pays to, or for the benefit of the employee amount(s) which would inure to the latter's exclusive benefit or advantage. Such being the case, the amounts are said to have vested in the employee, irrespective of when they have to be paid. In this context, counsel relied on the meaning of *"Annuity"* in the Shorter Oxford Dictionary i.e., *"an investment of money, entitling the investor to receive a series of equal annual payments, made up of both principal and interest"*. He contended that the Supreme Court referred to and relied upon the above definition of *"annuity"* given in the Oxford Dictionary. According to the Supreme Court, "an annuity is a certain sum of money payable yearly either as

a personal obligation of the grantor or out of property". The hallmark of an annuity, is (1) it is money; (2) paid annually; and (3) in fixed sum. Counsel referred to a decision of the Supreme Court in *CWT v. P.K. Banerjee* [1980] 125 ITR 641.

30. The revenue thus argues that welfare insurance schemes and social security schemes to which the employers contribute on account of the employee, are nothing but an annuity. It also relies on Section 198 (4) of the Companies Act. Counsel submits that the decision of the Supreme Court in *Commissioner Of Income-Tax v L. W. Russel* AIR 1965 AIR SC 49 which was relied upon by the ITAT to hold in favour of the assesees in all these cases, cannot be considered binding in view of the change in the wording of the statute. It was submitted that undue importance cannot be attached upon the test indicated in that decision, i.e. whether the payment "vests" in the employee. What is determinative, submitted the revenue's counsel, is the purpose or objective of the expenditure. Taking a cue from the decision reported as *Karamchari Union v Union of India* (243 ITR 143). Counsel placed reliance on the term "vested interest" in Black's Law Dictionary to say that even that term comprehends deferred enjoyment of an advantage or benefit. The definition of the term "vested right" in Blakck's Law Dictionary is as follows:

> *"A present right or title to a thing which carries with it an existing right of alienation even though the right to possessing or enjoyment may be postponed to some uncertain time in the future as distinguished from a future right which may never materialise or ripen into title and it matters not for how long or for what length of time the future possession or right of enjoyment may be*

> *postponed....* ***It is not the uncertainty of enjoyment in the future but the uncertainty of the right of enjoyment which makes a difference between a vested and contingent interest****..."*

Further reliance is placed upon Black's Law dictionary and the definition "vested right" which *inter alia*, is as follows:

> *"... Immediate or fixed right to present or future enjoyment and one that does not depend on an extent that is uncertain."*

It is therefore argued that since there is no uncertainty of the right to enjoyment of the ultimate benefits which accrue to the employee-assessee, the contributions by their employers to Social Security and medical insurance benefits in fact inured or vested in them immediately even though the occasion or event for their enjoyment was postponed.

31. The revenue relied on the judgment of a Division Bench of the Patna High Court in *Commissioner of Income Tax v J.G. Keswani* (202 ITR 391), where after noticing *L.W. Russel* the High Court held that in view of the new provisions, the observations of the Supreme Court and the observations regarding annuity policies not vesting any advantage that fell within the definition of "perquisites" was held to be inapplicable, in the following terms:

> *"Therefore, their Lordships have held the amount in dispute as non-taxable keeping in view the language employed in the relevant provisions of the old Act. In this case, it was not held as an absolute proposition of law that sums payable by the employer to effect an insurance on the life of the assessee or to effect a contract for annuity can never be declared by the Legislature to form part of his income during the year it is spent. The*

provisions of Section 15 read with Sections 17(1)(iv) and 17(2) (v) of the Act are materially different from Section 7(1) of the old Act. The words and phrases which were the subject-matter of interpretation before the Supreme Court leading to the law laid down by them have not been retained by the Legislature in the relevant provisions of the Act as is clear from Sections 15 and 17 thereof. Section 15 of the Act now clearly provides that any salary which fictionally includes any sum payable by the employer to effect a contract for annuity allowed to the assessee though not due to him, shall also be chargeable to income-tax under the head "Salaries". Therefore, if the employer provided a certain amount to effect a contract for annuity for the benefit of the employee, then irrespective of the fact whether such benefit was due to the employee in the previous year or not, they will form part of his taxable income under the Act."

32. Counsel for the assessees on the other hand, argued that the revenue's submissions are without merit. It is contended that the nature of payment in question in each of the cases, whether it is for coverage of social security benefits, in compliance with the foreign holding company's laws for such social security, or medical benefits, did not make any difference. It was submitted that these were involuntary payments (in the case of social security) and could not confer benefit in *praesenti* to the employee, but did so in the event of loss of employment due to invalidity on account of ill health, before the attainment of 65 years, or death, and in the case of medical benefit, on the happening of an event, i.e. illness or any other incident which entitles the flow of benefits.

33. Counsel emphasized that even after the new Act, of 1961, courts in India have been following *L.W. Russel;* the decisions reported as *Commissioner of Income Tax v J. N. Vats* 1999 (240) ITR 101 (Bom), *J.H.Doshi v Commissioner of Income Tax* 1995 (212) ITR 211 (Bom) and *Commissioner of Income Tax v Nandkishore Sakarlal* 208 (1994) ITR 14 (Guj) were relied on.

34. It was argued by the assesses that the revenue did not establish from the record, through any supporting material, that any benefit or advantage either pecuniary, or capable of expression in monetary terms accrued during the year in question, to say that the contribution to the social security or medical benefits fund, was not contingent, or that it "vested" in law.

The provision

Section 17(2)(v) of the Income Tax Act provides as under :

> *"For the purposes of sections 15 and 16 and of this section (1) :*
>
> *(2) perquisite includes*
>
> *(i) to (iv)***
>
> *(v) any sum payable by the employer, whether directly or through a fund, other than a recognized 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."*

Section 7 (1) was the pre-existing provision under the Indian Income Tax Act, 1922; it read as follows:

> *"Section 7(1)-The tax shall be payable by an assessee under the head "salaries" in respect of any salary or wages, any annuity, pension or gratuity, and any fees, commissions, perquisites or profits in lieu of, 'or in addition to, any salary or wages, which are allowed to him by or are due to him, whether paid or not, from, or are paid by or on behalf of..... a company.....*
>
> *Explanation I-*
>
> *For the purpose of this section perquisite includes-*
>
> *(v) any sum payable by the employer, whether directly or through a fund to which the pro. visions of Chapters IX-A and IX-B do notapply, to effect an assurance on the life of the assessee or in respect 'of a contract of annuity on the life of the assessees."*

In *L.W. Russel,* the Supreme Court observed that:

> *"Now let us look at the provisions of s. 7(1) of the Act in order to ascertain whether such a contingent right is hit by the said provisions. The material part of the section reads: -*
>
> > *"Section 7(1)-The tax shall be payable by an assessee under the head "salaries" in respect of any salary or wages, any annuity, pension or gratuity, and any fees, commissions, perquisites or profits in lieu of, 'or in addition to, any salary or wages, which are allowed to him by or are due to him, whether paid or not, from, or are paid by or on behalf of..... a company.....*
> >
> > *Explanation I-For the purpose of this section perquisite includes-*

> *(v) any sum payable by the employer, whether directly or through a fund to which the provisions of Chapters IX-A and IX-B do not apply, to effect an assurance on the life of the assessee or in respect 'of a contract of annuity on the life of the assessees."*

This section imposes a tax on the remuneration of an employee. It presupposes the existence of the relationship if employer and employee. The present case is sought to be brought under the head "perquisites in lieu of, or in addition to, any salary or wages, which are allowed to him by or are due to him, whether paid or not, from, or are paid by or on behalf of a company". The expression "perquisites" is defined in the Oxford Dictionary as "casual emoluments. fee or profit attached to an office or position in addition to salary or wages". Explanation 1 to s. 7(1) of the Act gives an inclusive definition. Clause (v) thereof includes within the meaning of "perquisites" any sum payable by the employer, whether directly or through a fund to which the provisions of Chs. IX-A and IX-B do not apply, to effect an assurance on the life of the assessee or in respect of a contract for an annuity on the life of the assessee. A combined reading of the substantive part of s. 7(1) and cl. (v) of Expl. 1 thereto makes it clear that if a sum of money is allowed to the employee by or is due to him from or is paid to enable the latter to effect an insurance on his life, the said sum would be a perquisite within the meaning of s. 7(1) of the Act and, therefore, would be eligible to tax. But before such sum becomes so exigible, it shall either be paid to the employee or allowed to him by or due to him from the employer. So far as the expression "paid" is concerned, there is no difficulty, for it takes in every receipt by the employee from the employer whether it was due to him or not. The expression "due" followed by the qualifying clause "whether paid or not" shows that there shall be an obligation on the part of the employer to pay that amount and a right on the employee to claim the same. The

expression "allowed", it is said, is of a wider connotation and any credit made in the employer's account is covered thereby. The word "allowed" was introduced in the section by the Finance Act of 1955. The said expression in the legal terminology is equivalent to "fixed, taken into account, set apart, granted". It takes in perquisites given in cash or in kind or in money or money's worth and also amenities which are not convertible into money. It implies that a eight is conferred on the employee in respect of those perquisites. One cannot be said to allow a perquisite to an employee if the employee has no right to the same. It cannot apply to contingent payments to which the employee has no right till the contingency occurs. In short, the employee must have a vested right therein. If that be the interpretation of s. 7(1) of the Act, it is. not possible to hold that the amounts paid by the Society to the Trustees to be administered by them in accordance with the rules framed under the Scheme are perquisites allowed to the respondent or due to him. Till he reaches the age of superannuation, the amounts vest in the Trustees and the beneficiary under the trust can be ascertained only on the happening of one or other of the contingencies provided for under the trust deed. On the happening of one contingency, the employer becomes the beneficiary, and on the happening of another contingency, the employee becomes the beneficiary…"

35. In the case of *Yoshio Kubo,* one of the appeals in the present batch, the assessee employee was a Japanese national, and an official of M/s Sony Corporation of Japan. He was deputed to work in M/s Sony India Ltd. The welfare pension scheme in that case contained the following elements:

(a) The contribution was covered by the welfare pension law enacted by the Government of Japan;

(b) Establishments and concerns with at least five employees had to register with the pension fund authorities and both the employer and the employee were required to contribute to the pension insurance scheme;

(c) The monthly contribution of both the employer and the employees were to be deposited with the National Bank of Japan;

(d) The benefit from the scheme took the form of annuity payment until death and the individual employees were eligible to receive the first tier of benefits from the welfare pension plan only on attaining the age of 65 and not prior to it.;

(e) The contribution of the employer was not refundable.

36. The Tribunal held, after noticing the nature of the scheme that before attaining the age of 65 or before death, neither the assessee nor his survivors were entitled to get any benefit from the scheme and at the most the employee only had a contingent right which cannot attract Section 17(2)(v) of the Act. The Tribunal also noticed the salient features of the welfare insurance scheme and held that any benefit actually obtained or received by the assessee under the scheme during the relevant previous year will have to be assessed as per provisions of Section 17(2)(v) of the Act. In all other respects, the decision otherwise was that the assessee did not get any vested right in such contributions when they were actually made. This reasoning was adopted by the Tribunal in several other cases, some of which are before this court in the present batch of appeals.

37. In *CIT v. Lala Shri Dhar* (1972) 84 NR 192 (Del))this Court was concerned with contributions made by the employers under policies of personal accident taken out by them for protecting themselves against the liability for payment of compensation to their employees. It was held by the Court that the decision to take the policy was of the company, which paid the premium, that the assessee himself did not want to take out the insurance. If the company had stopped paying the premium, the assessee would not have continued the same from year-to-year and, therefore, the contribution paid by the company to keep the policy alive could not be considered as a perquisite in the hands of the employee.

38. In the present case, the assessee does not acquire any vested right over the payment at the time of contribution. With regard to the insurance plans, the CIT(A) had held that the contributions are made to benefit the employer and to protect him from loss of employment, sickness, death, accident, etc. of the employee and that the policies themselves are contingent in nature, the benefit under' which would depend on whether the contingency takes place or not.

39. This court is of the opinion that the revenue's contentions are insubstantial and meritless. The assessee does not- in any appeal, get a vested right at the time of contribution to the fund by the employer. The amount standing to the credit of the pension fund account, social security or medical or health insurance would continue to remain invested till the assessee becomes entitled to receive it. In the case of medical benefit, the revenue could not support its contentions by

citing any provision in any policy or scheme which is the subject matter of these appeals, which entitle The vesting right to receive the amount under the scheme or plan did not occur. This court is also of the opinion that the judgment of the Supreme Court in *L.W. Russel* applies. There, it was held that one cannot be said to allow a perquisite to an employee if the employee has no right to the same. It cannot apply to contingent payments to which the employee has no right till the contingency occurs. The employee must have a vested right in the amount. In this context, it would be useful to recollect the decision of this court in *CIT v. Mehar Singh Sampuran Singh Chawla* (1973) 90 ITR 219 (Del) where it was held that the contribution made by the employee towards a fund established for the welfare of the employees would not be deemed to be a perquisite in the hands of the employees concerned as they do not acquire a vested right in the sum contributed by the employer.

40. The reliance placed by the revenue on the judgment of the Patna High Court case of *J.G. Keshwani*(supra) is misplaced as the facts of that case were entirely different. There, the assessee held employment as director of the company and in terms of the compensation package, he was entitled to receive commission as a percentage of the net profits in terms prescribed under the Companies Act subject to a maximum ceiling. Subsequently, the terms of the appointment of the assessee were varied and the company instead of paying commission decided to purchase deferred policies from the Life Insurance Corporation on the life of assessee. An terms of the

annuity plan, the annuity payment would commence from the date of retirement. The assessing officer had held that the arrangement was merely a change in the mode of payment of the commission to the assessee. The High Court observed that the amount contributed towards annuity plan had already accrued to the assessee in the year under consideration. It was merely that instead of paying the amount as commission, the same was contributed by the company for acquiring the annuity plan for the employee. The High Court, apparently was influenced by the fact that the sum contributed by the company towards annuity plan was due to the employee concerned and merely, a changed method of payment was being introduced through the annuity. It was a colourable device adopted at the instance of the assessee, who is deemed to have derived a vested interest in the amount so contributed by the company.

41. As far as the submission with regard to change in the phraseology of the provision is concerned, the argument seems facially persuasive. However, like in the case of the present provision, which removes from the inclusive sweep of the term "perquisite" certain kinds of payments – into approved annuity funds, or schemes under the Employees Provident Fund Act, the previous provision (Section 7 (1) (v)) too excluded from the sweep of the definition of perquisite, amounts paid into schemes described under Schedules IXA and IXB. Contextually, the setting for the decision in *L.W. Russel* was no different from the provision in the present Act. The Supreme Court spelt out a wider and fundamental principle, i.e. when the amount

does not result in a direct present benefit to the employee, who does not enjoy it, but assures him a future benefit, in the event of contingency, the payment made by the employer, does not vest in the employee. This Court is of the opinion that the new Act does not make any significant departure from this aspect.

42. In view of the above discussion, it is held that the revenue's appeals have to fail; amounts paid by employers to pension, or social security funds, or for medical benefits, are not perquisites within the meaning of the expression, under Section 17 (1) (v) and therefore, the amounts paid by the employer in that regard are not taxable in the hands of the employee-assessee.

Point No. 3: Whether taxes are to be excluded while computing the perquisite value of rent free accommodation provided to an employee, in view of Rule 3 of the Income Tax Rules, 1962

43. It was submitted on behalf of the assessees during the hearing and not disputed by the revenue, that this issue was decided and covered by the decision in *Commissioner of Income Tax v Telsuo Mitera,* decided on 17-5-2012, in ITA 323/2010. In that decision, the following question arose for consideration:

> *"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".*

The court recollected a previous decision in *Commissioner of Income Tax v H.D. & Co* 135 ITR 1, where it was held that Section 17 (2) and Rule 3 had to be considered co-extensively and that the purpose of having a separate definition was to exclude certain types of payment which are otherwise covered by the expression "salary". It was accordingly ruled that in view of the definition of salary in Rule 3, especially Rule 3 (vi) and the exclusions, the question had to be answered against the revenue. In view of the judgment of this court, - in *Telsuo Mitera,* the question is answered against the revenue and in favour of the assessee.

Question No. 4: Hypothetical Tax

44. This question arises in ITA Nos. 387/2008, 15/2010, 699/2010 and 1912/2010. In these cases the total salary received by the assessee in India included tax payable at the applicable rates. In terms of the employer's equalization policy the assessees were entitled to reimbursement of the tax payable. Consequently, the assessees computed the salary income at the total amount, i.e the salary payable, as well as the tax component included in the salary which coincided with the income declared. The assessees had paid tax on the total amount (i.e the salary admissible and the tax component received), and entitled to reimbursement of tax of a portion of the excess amount; the balance was borne out of the salary income received by the assessees in India. The findings of the authorities below is that the assessee, in the computation had added a larger amount as income and deducted a portion of it from the income, when in fact the said smaller

amount was not received from the employer but paid out of the salary amount received in India. Though the assessee had paid larger amount, as tax, yet they were entitled to reimbursement from the assesses, as the salary income had to be enhanced by a part of the amount (not the whole) paid as tax.

45. This court notices that the issue stands covered by a decision of the Bombay High Court *Commissioner of Income Tax v Jaydev H. Raja* [2012]211TAXMAN188(Bom). In *Commissioner of Income Tax v Dr. Percy Batlivala* (ITA 1308/2008, decided on 16th December, 2009) a Division Bench of the Court noted the concept of hypothetical tax as one where the employee of a multinational company, seconded to serve in India, is assured a net salary amount equivalent to what is earned by him abroad. The assessee paid a certain amount of tax in US dollars upon the salary earned in the United states. The employer after deducting tax, calculated the net amount receivable by the assessee; it then considered how much tax would be payable by the assessee on the income earned in India. As the amount payable as tax in India was lower, it (also called hypothetical tax) was not given to the assessee, thus assuring that the net amount received by him was in accordance with the prior agreement. In other words, hypothetical tax denotes the sum of money withheld by the employer to fulfill a commitment of paying a particular net salary. The Court, after considering the materials, concluded that so long as the assessee paid tax on actual salary received, could not be saddled with the hypothetical tax amount.

46. In the present cases too, the employers had assured a certain net salary; the assessees were paid that; they suffered tax on that salary. The question of their paying more, therefore, would not arise. The *ratio* in *Dr. Percy Batlivala* applies to the fact situation in these cases. The Court, while following the decision, holds this question of law, in favour of the assessee.

Question No. 5: Grossing up under Section 195-A

47. The Finance Act 2002 sought to simplify the scheme for taxation of perquisites and gave the employer the option to pay taxes on the whole or part value of perquisites (excluding those provided for by way of monetary payment) without any deduction from the income of the employee. Simultaneously, the tax paid on such non-monetary perquisites was exempted in the hands of the employee by virtue of the newly introduced Section 10 (10CC). The question is whether such tax is to be subject to multiple stage grossing-up process under Section 195A of the Act, which provides that in case under an agreement or arrangement the tax on income is to be borne by the person by whom income is payable, the income would need to be increased to such amount as would after deduction of tax be equal to the net amount payable.

48. The controversy which the court has to resolve (in ITA Nos. 1556/2010, 1557/2010; 494/2010; 508/2010; 631/2010; 699/2010; 351/2010; 1354/2010 & 1912/2010) is whether the tax liability on salary borne by the employer is a monetary perquisite or a non-monetary perquisite. Whether it needs to go through the multiple stage

grossing up process under Section 195A or is it eligible for exemption under Section 10 (10CC) of the Act applicable to non-monetary perquisites. The tax authorities were of the opinion that tax borne by the employer is a monetary perquisite and therefore further tax thereon should be added to the salary by a multiple stage grossing up process. Additionally, the tax on other perquisites are also sought to be grossed up. The relevant provisions are extracted below.

> *"Salary.*
>
> *192. (1) Any person responsible for paying any income chargeable under the head "Salaries" shall, at the time of payment, deduct income-tax [61][***] on the amount payable at the average rate of income-tax [62][***] computed on the basis of the rates in force for the financial year in which the payment is made, on the estimated income of the assessee under this head for that financial year*
>
> *(1A) Without prejudice to the provisions contained in sub-section (1), the person responsible for paying any income in the nature of a perquisite which is not provided for by way of monetary payment, referred to in clause (2) of Section 17, may pay, at his option, tax on the whole or part of such income without making any deduction therefrom at the time when such tax was otherwise deductible under the provisions of sub-section (1).*
>
> **********
>
> **********
>
> *Income payable "net of tax"*
>
> *195A. In a case other than that referred to in sub-section (1A) of Section 192, where under an agreement] or other arrangement, the tax chargeable on any income referred*

> *to in the foregoing provisions of this Chapter is to be borne by the person by whom the income is payable, then, for the purposes of deduction of tax under those provisions such income shall be increased to such amount as would, after deduction of tax thereon at the rates in force for the financial year in which such income is payable, be equal to the net amount payable under such agreement or arrangement."*

49. This court has discussed and concluded, in its answer to Point No. 1 that what is not exempt under Section 10 (10CC) is perquisite in the shape of monetary payment to the employee. If it is a payment to a third party like payment of taxes to the government, it would be exempt under Section 10 (10CC). Likewise, the phraseology of that provision, to the extent it alludes to Section 17 (2) is wide. If any perquisite other than a monetary benefit is granted, that provision (Section 10 (10CC) operates. If this scheme is understood in its proper perspective, it is evident, from Section 192 (1A) that a person (employer) responsible for making payment of a non-monetary perquisite, *"may pay, at his option, tax on the whole or part of such income without making any deduction therefrom at the time when such tax was otherwise deductible under the provisions of sub-section (1)."* This, like Section 10 (10CC) was inserted in 2002; so also was Section 195A.

50. The Tribunal has in the present cases, held that tax paid by the employer on behalf of the employee is a non-monetary perquisite. In other words, taxes paid by the employer can be added only once in the salary of the employee. Thereafter, tax on such perquisites is not to be added again. The problem can be explained illustratively. If the salary

of an employee is Rs 100 and the tax liability thereon at the rate of 30% is Rs. 30, in case the employer agrees to bear the tax liability, the total tax to be paid by the employer would be Rs 39 (30% of Rs 130). This Court is of the opinion that whenever tax is deposited in respect of a non-monetary perquisite, the provision of Section 10 (10CC) applies, thus excluding multiple stage grossing up. The purpose and intent of introducing the amendment to Section 10 (10CC) was to exclude the element of income – which would have arisen otherwise, as a perquisite, and as part of salary. Once that stood excluded, and option was given to the employer under Section 192 (1A) to honour the agreement with the employee, Parliament could not have intended its inclusion in any other form, even for the purpose of deduction at source. Doing so would defeat the intent behind Section 10 (10CC). This court, therefore, answers the question in favour of the assessee and against the revenue.

Question No. 6: Assessability of TDS refunds received by the employee

51. This question arises in the revenue's appeals, ITA 1912/2010 and ITA 731/2010. The assesses, non-residents, were, during the relevant period employed by foreign Companies and paid salary in foreign currency. They were also deputed to work in India for some time, during which they received various perquisites, including rent, household utilities, payment of domestic staff, driver etc. The assesses received salary in foreign exchange. They claimed that tax paid on his salary were non-monetary perquisites which could not be brought to

tax, under Section 10 (10CC) of the Act. Certain refunds were payable in respect of the TDS amounts deposited with the income tax authorities, by the assessee's employers. These excess amount, according to the Assessing Officer, were not exempt under Section 10(5B) but were taxable income of the assessee, as "disguised perquisites". The assessees contended that refund issued in their name could not be treated as a perquisite, as neither any benefit accrued to him nor was any amenity was provided to him. The amount of tax was deposited by the employer and, therefore, refund issued in this case belonged to the employer. It was urged that the assessee had written to the Income tax department to issue the refund directly to the employer. However, refund was issued in the name of the employees. The AO's rejected this and added back the said refund amounts; the appeal against this order succeeded. The matter was ultimately decided in favour of the assessee by the Tribunal.

52. The revenue urges that that the exemption under Section 10(5B) could be availed by the assessee only to the extent of amount actually chargeable on the income. Thus, amounts which was paid over and above the amount due were not exempt under Section 10(5B) and were taxable under Section 17(2)(iv) of the Income-tax Act as a perquisite. Therefore, refund granted to the assessee was taxable income of the assessee. Once amount had gone to the coffers of the assessee and thereafter what the assessee did with the amount, was irrelevant for taxation purposes. That was only application of income and could not be the character of the receipt. The refund allowed was

accordingly charged to tax in the re-assessments. The assessee, on the other hand, argues that the benefit of the amounts paid cannot be availed of by the assessee, whose terms of contract do not envision such payments. The amounts are the property of the employer, who can claim and recover them, by way of adjustment or any other method, during the subsistence, or even after the employer employee relationship.

53. This court is of opinion that the assessee's arguments have force. The employer, in terms of its arrangement with the employee, had to pay the income-tax due on the latter's income for services rendered. The employer could not have paid to the State any amount in excess of what was due as tax on salary. But, the employer, mistakenly paid to the State, excess amounts which were refunded, but instead, to the assessee.

54. In this case, it is clear that the amount was not paid to the employee or due to him, from the employer, according to the terms of the contract governing the relationship. It was paid to the Government, over and above the tax due on the salary. It was not for benefit of the assessee. It never, therefore, bore the characteristic of salary or perquisite. Till assessment was made, the amount could not be refunded to the assessee. The revenue's position overlooks that all receipts are not taxable receipts. Before a receipt is brought to tax, the nature and character of the receipt in the hands of the recipient has to be considered. Every receipt or monetary advantage or benefit in the hands of its recipient is not taxable unless it is established to be due

to him. If the amount is not due, the recipient- in this case, the employee is obliged to pay back the sum to the person, to whom it belongs. A perquisite or such amount, to be taxed, should be received under a legal or equitable claim, even contingent. The receipt of money or property which one is obliged to return or repay to the rightful owner, as in the case of a loan or credit, cannot be taken as a benefit or a perquisite. The amounts paid in excess by the employer, and refunded to the employee never belonged to the latter; he cannot be therefore taxed. The question of law is therefore, answered against the revenue, and in favour of the assessees.

Question No 7: Legal expenses incurred

55. This question arises in ITA 441/2003. In the said appeal, the other main issue was regarding taxability of the amount paid towards income tax liability of the employee, by the employer. That has been answered in favour of the assessee in respect of Point No.1

56. The surviving question relates to the liability of the assesse in respect of the sum of Rs. 2,21,000/-. This sum was paid by M/s Sony India, the assessee's employer to Price Water House towards consultancy fees in respect of tax related matters. The AO asked the assessee why the sum should not be treated as a perquisite; he resisted, saying that the amount was paid to the accountancy firm towards various services; Rs. 90,000/- was paid for preparation of return for three years and the balance was paid towards representation in appeals, rectification, and seeking interim orders, etc. The AO rejected the assessee's claim reasoning that the assessee had the

primary liability to pay tax. He could not get the benefit of tax consultancy fee as expenditure. The Appellate Commissioner and ITAT granted partial relief to the assessee.

57. The assessee's counsel contends that he was not compelled to contract with the firm nor get any benefit from it. It was the obligation of the employer to secure the tax benefits, and ensure that proper returns were filed. It hired PWC and secured its services for its comfort. The revenue, on the other hand, contends that the employee was beneficiary of the services of the accountant firm; even though the employer hired its services, the party which derived advantage was the employee. Consequently, the amount paid as fee was to be brought to tax as a perquisite.

58. The primary liability to pay tax in this case was borne by the employer; it clearly fell within the definition of a non-monetary advantage. That the company, as part of its policy, sought advice from a consultancy firm which was paid for its services. That the benefit of these ultimately enured to the assessee, cannot mean that it formed part of his income as "perquisite". Here what the revenue seeks to do is to dictate that though part of the payment to the consultant might be justified under the particular circumstances, yet, the expense claimed should be taxed partly as the assessee's income. The revenue, it is often said, cannot place itself in the armchair of the assessee and determine what he should do to conduct his business. That the assessee was beneficiary to his employer's policy of consulting tax experts for filing income tax returns as appears to have been the

prevailing practice of his employer, in respect of other employees as well, would not transform the expense borne by the employer into income in the assessee's hands. This question is accordingly answered in favour of the assessee and against the revenue.

59. In the light of the above findings, all references have to be and are answered against the revenue and in favour of the assessees. The appeals are disposed of accordingly. No costs.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

JULY 31, 2013