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Allowance paid to employees deputed abroad for meeting personal expenses, taxable as perquisite; employer liable to deduct taxes: High Court

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Background / Facts

- M/s Sun Outsourcing Solutions Private Limited (Sun India / applicant), a private limited company having its office in Hyderabad and branch office at London, UK. (Sun UK) deputed employees from India to work in its branch office, besides employing non-resident Indians (NRIs) in UK.
- The employees continued to be on the payroll of Sun India and received salary in India. Boarding and lodging allowances were paid as a lump-sum in UK. The salary payments for the NRIs were paid in UK.
- Sun India continued to operate withholding taxes¹ on the salary paid in India. However, taxes were not withheld on allowances² paid in UK to employees and salary payments made to NRIs employed overseas.
- The Assessing Officer (AO) charged³ taxes on the allowances and salary payments made in UK besides levying interest thereon for assessment years 2000-01 to 2003-04.
- Aggrieved by the order of AO, applicant filed appeals before Commissioner of Income-tax, Hyderabad [CIT (A)] where the CIT (A) set aside the demand to the extent such demand was in relation to the salary payments made to NRIs.
- The CIT (A) upheld the orders of the AO with regard to the boarding and lodging allowances paid to resident⁴ employees with a direction to consider the particulars furnished/ to be furnished and applying appropriate rate of tax as applicable to different employees;
- The orders of the CIT(A) were challenged by the applicant before the Income-tax Appellate Tribunal, Hyderabad which dismissed the appeal;
- Aggrieved by the aforesaid decision of the Tribunal, the applicant filed petition(s) before the Andhra Pradesh High Court (Andhra Pradesh HC).

1 & 3. Section 192 of the Income-tax Act, 1961 (the Act);

2. Claimed exempt under section 10(14) of the Act

4. Section 6(1) of the Act read with Section 5(1)(c) of the Act

Issues for Consideration

- Whether the boarding and lodging allowances paid to employees deputed to UK constituted salaries liable to tax?
- Whether the allowance paid to employees deputed to UK fell within the provisions of Section 10(14)(i) and even if they were taxable, whether taxes need to be withheld on the same?
- Whether levy of interest for failure to deduct taxes was correct in law despite the fact that Sun India was under a bona fide impression that it was not liable to deduct tax on the said allowances?
- The applicant contended that withholding tax provisions do not apply to payments exempt u/s 10(14) of the Act and the applicant is not therefore obligated to deduct tax thereon.
- The applicant in support of his contentions placed reliance on various judicial precedents⁵ pronounced earlier and similar to the facts of this case.

5. (1980) 124 ITR 391 (Guj.); 1998 L.S. (A.P.) 672; (1986) 161 ITR 477 (Ker.); (2008) 298 ITR 250 (Raj).

Rival contentions

Revenue, on the other hand submitted as under:

- Total income of a resident⁶ individual under the provisions of the Act includes income from sources derived outside India also;
- Definition of perquisites⁷ under the Act is broad enough to take within its sweep any lump-sum payments made by the employer;
- To claim exemption of allowances paid to meet expenses, they should be wholly, necessarily and exclusively incurred in the performance of duties⁸ of an office or employment of profit to the extent such expenses are actually incurred; or
- Any allowance in the nature of personal allowance⁹ granted to the assessee to remunerate or compensate him for performing duties of special nature, unless such allowance relates to the place of posting or residence.

6. Section 6(1) of the Act read with Section 5(1)(c) of the Act

7. Definition of perquisite is covered under section 17(2) of the Act

8. Section 10(14)(i) of the Act

9. Section 10(14)(ii) of the Act

Ruling of the Andhra Pradesh High Court

Principles derived by the Andhra Pradesh HC basis the earlier decisions:

- Where any personal advantage is derived from payment, it falls within the definition of perquisite;
- A mere reimbursement or necessary disbursement does not fall within the explanation of perquisite;
- Any allowance paid to the assessee to meet his personal expenses at the place where the duties of his office are ordinarily performed is not exempt under the Act.
- For an allowance to be exempt, it should have specifically been granted wholly in performance of duties.

Ruling pronounced basis the facts

- Lump sum payments made to assignees confer additional advantage to meet the high cost towards accommodation and other personal expenditure. Such expenditure cannot be treated as having been incurred in connection with discharge of duties.
- In agreement with the findings of the CIT(A) listed below:
 - The assessee made lump-sum payment as allowances which included payments made to few employees after they returned to India and no evidence was available for the expenditure incurred by the employee;
 - Applicant did not obtain any details of expenditure incurred by employees in London against the lump-sum payments;
 - In absence of any log book or vouchers, there is no reimbursement of expenditure but lump-sum payments;

- Applicant is legally bound to deduct taxes in absence of any certificate¹⁰ obtained from employee so as to not to deduct tax or deduct tax at lower rate and exemption if valid, can be claimed by the employee on submission of necessary evidence before the tax officer.

10. Section 197 of the Act

Conclusion

This High Court ruling contradicts the principles laid down in the case of *Symphony Marketing Solutions India Pvt. Ltd.*¹¹ (and other Tribunal rulings) where it was held that verification of actual expenditure by the tax authorities is not required, subject to the allowance being reasonable and the employer satisfying themselves that all conditions for claiming exemption under the Act are satisfied.

The ruling has now placed the onus on the employer to prove that the payments are in the nature of reimbursements. This would necessitate a review of the documentation and process followed for disbursements of such payments by the employer.

11. [2017] 79 taxmann.com 425 (Karnataka HC)

Source: I.T.T.A. Nos. 211, 212, 213 and 214 of 2005; I.T.T.A. No. 211 of 2005 Dated 27th December 2017

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