

Assistant Commissioner of Income Vs. Capt. K.P. Singh

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Jun-23-2006

Reported in : (2007)107ITD82(Mum.)

Judge : G Gupta, P Kumar

Appellant : Assistant Commissioner of Income

Respondent : Capt. K.P. Singh

Judgement :

1. The short issue requiring our adjudication in this case is whether or not the allowances received by the assessee while he is abroad in connection with the flying duties, are exempt under Section 10(14)(i) of the IT Act, 1961, and if these are held to be exempt, to what extent exemption under Section 10(14)(i) can be granted in the absence of actual evidence of expenditure incurred by the assessee. The assessee is a commercial pilot working in Air India Ltd. The assessment year involved in this appeal is 1997-98 and the assessment order in question is framed under Section 143(3) r/w Section 147(a) of the Act.

2. The factual matrix giving rise to this litigation before us is like this. The assessee before us is a commercial pilot working for Air India Ltd, On 30th June, 1997, the assessee filed his IT return for the asst. yr. 1997-98 declaring income of Rs. 29,45,670. This return was processed under Section 143(1)(a) of the Act, and the income so returned by the assessee was duly accepted. Subsequently, however, the AO noticed that the assessee had claimed a deduction of Rs. 3,82,184 under

Section 10(14) and the same was not considered by the employer at the time of deducting tax at source. In other words, this claim of deduction of Rs. 3,82,184 was over and above the exemption granted by the employer, while estimating income chargeable to tax, for the purpose of computing TDS. It was in this backdrop that the case of the assessee was reopened and the assessee was called upon to substantiate the claim of exemption of Rs. 3,82,184. During the course of the ensuing assessment proceedings, the AO took note of assessee's contention that the employer only provides for hotel and breakfast, during assessee's stay abroad, and rest of the expenses are to be borne out of the allowances granted by the employer. It was also noted that several allowances have been merged into a consolidated flying allowance, and thus, a portion of the allowance so paid everyday represents daily allowance for meals and other expenses incurred by the assessee on account of absence from normal place of duty. The AO was, however, of the view that in the light of the Tribunal's judgment in the case of Capt. Harminder Singh v. ITO (1997) 58 TTJ (Del) 253 : (1997) 62 ITD 78 (Del) and in the light of Notification Nos. SO 144(E) dt. 21st Feb., 1989 and SO 467(E) dt. 1st July, 1992, exemption has to be allowed under Section 10(14)(ii) and upto the extent of Rs. 3,000 per month. Accordingly, the AO restricted the exemption to the extent of Rs. 30,000, though it should have been even as per this line of reasoning, Rs. 36,000 computed by taking Rs. 3,000 per month under Section 10(14)(ii). Exemption was declined on the balance amount, and the income was thus assessed at Rs. 32,97,850. Aggrieved by the stand so taken by the AO, assessee carried the matter in appeal before the CIT(A).

3. In appeal, the CIT(A) took the view that so far as the allowances in respect of flights in India is concerned, the AO was indeed justified in holding that the exemption is to be granted under Section 10(14)(ii) and is to restricted to Rs. 3,000 per month. However, as regards the exemption in respect of the same allowances, so far as international flights are concerned, the CIT(A) was of the view that the provisions of Section 10(14)(i) will come into play. In coming to this conclusion, the CIT(A) was also guided by observations made by the Delhi Bench of the Tribunal, in the case of Capt. V.K. Verma v. ITO and vice versa (ITA No. 5876/Del/1996 and ITA No. 1493/Del/1997). The CIT(A) thereafter proceeded to observe as follows: Since Section 10(14)(ii) r/w Rule 2BB covers only the situation

where the allowances are received in India, therefore, the allowances received for flights operated outside India are to be brought within the scope of Section 10(14)(i) of the IT Act. The said section has not prescribed any limit and has further limited the deduction to the extent such allowances are actually incurred for the purpose. Therefore, I hold that the appellant is entitled to relief under Section 10(14)(i) of the IT Act and the expenses claimed by the appellant should have been incurred abroad and will have to be allowed under Section 10(14)(i) of the IT Act.

Having so upheld the contention of the assessee in principle, however, the CIT(A) observed that the assessee has not been able to furnish the copies of bills and vouchers for the actual expenses incurred abroad on lunch, dinner and other daily expenses. As to assessee's contention that it was not possible to keep meticulous record of all such expenditure, the CIT(A) added that "I am unable to agree with the contention of the appellant for the simple reason that the expenditure has been claimed by the appellant on actual basis and therefore, it is the duty of the appellant to prove the expenditure by leading necessary evidence". A copy of dinner bill showing expenditure of US \$ 40 on a single dinner was rejected by the CIT(A) on the ground that it did not pertain to the relevant previous year. The CIT(A) then concluded that in the absence of any other evidence of actual expenditure, the assessee should be entitled to deduction to the extent of 50 per cent of allowances received, or Rs. 50,000- whichever is less. In the impugned order passed by the CIT(A), thus, it has been held that the allowances are exempt under Section 10(14)(i) of the Act, but in the absence of evidence of actual expenditure, the CIT(A) has restricted the exemption to 50 per cent of the allowances granted to the assessee or Rs. 50,000-whichever is less. None of the parties is satisfied with this order. Revenue is aggrieved of CIT(A)'s "allowing the allowances for flights received for flights abroad, operated outside India, under Section 10(14)(i) on estimate basis for want of proof of expenses actually incurred which was not at all considered at the time of original assessment by the AO". Assessee's grievance, on the other hand, is that his claim for exemption should be allowed in entirety which he has claimed @ US \$ 75 per day when he goes on duties outside India, and @ Rs. 600 per day when he is outside his base in India.

4. We have heard the rival contentions, perused the material on record and. duly considered factual matrix of the case as also the applicable legal position.

5. One of the documents cited before us, during the course of this hearing, was a revision order under Section 264 dt. 30th May, 2003, in the case of Capt U.A. Joglekar passed by the very CIT who has signed the authorisation memo dt. 2nd July, 2003 for filing of this appeal before us. In this revision order, the CIT has, inter alia, observed as follows: ...The assessee has, in this case, moved a petition under Section 264 for the asst. yr. 1994-95 with regard to claim of exemption under Section 10(14)(i) of the IT Act. It was contended that this claim has not been allowed by the AO in the course of the assessment. The assessee's claim relates to the exemption under Section 10(14)(i) read with notification made therein in respect of various allowances received while operating international flights.

These allowances are received in local currency at the foreign station and, therefore, covered by the provisions of Section 10(14)(i) and notification issued thereunder. Clause (b) of relevant Notification No. S.O. 143(E), dt. 21st Feb., 1989 reads as under: 'any allowance, whether granted on tour or for the period of journey in connection with transfer, to meet the ordinary daily charges incurred by an employee on account of absence from its normal place of duty.' As per this notification, while deliberating on this issue, concurring with the view of my predecessor in a similar order... in the case of Ms. Shailaja Ramamurthy, I am of the opinion that the allowances paid outside the country, to the employees of Indian Airlines are within the scope of Section 10(14)(i) and accordingly, in the absence of the evidence, 50 per cent of the expenditure so incurred should be allowed as deduction, limited to Rs. 50,000....

6. The revision order dt. 24th May, 2002 passed by his predecessor, which has been referred to and concurred with in this order, is also relevant in this context. The said order reads as follows: The assessee has, in this case, moved a petition under Section 264 for the asst. yrs. 1995-96 and 1996-97 with regard to claim of exemption under Section 10(14)(i) of the IT Act. It was contended that this claim has not been allowed by the AO in the course of assessments. A reference in this connection was made by the Authorised Representative earlier on seeking

clarification pertaining to the claim under Section 10(14)(i). The CIT(A), while deliberating on this issue, had also opined that the allowances paid outside the country to the employees of Indian Airlines are within scope of Section 10(14)(i). Accordingly, an instruction of advisory nature was issued to the AOs stating that in the absence of evidence, 50 per cent of the expenditure so incurred should be allowed limited to Rs. 50,000. It would be significant to state that AOs in New Delhi have allowed the claim by restricting it to 60 per cent of the foreign allowance. Relevant portion of my instruction dt. 14th March, 2002 is cited below: 1 am of the opinion that in the cases pertaining to this charge, we may allow expenditure of 50 per cent which appears to be reasonable.

This will only be with regard to the allowance paid on food, beverage, telephone and transportation. The claim of exemption will not be applicable for any other allowances which cannot be construed as falling within the ambit of Section 10(14)(i) as these are not paid to meet ordinary daily charges incurred by the employee on account of absence from his normal place of duty. This expenditure should, however, be limited to Rs. 50,000 only.' Further the AOs should substitute the allowance incorporated in the assessment order with the allowances indicated by Indian Airlines authorities, if required, and should also substitute salary as per Form No. 16 as against the estimated salary.

Accordingly, the AO is directed to allow the assessee's claim under Section 10(14)(i) as per the above instruction.

7. It is thus clear that the Revenue itself has taken a stand that so far as international flights are concerned, the provisions of exemption under Section 10(14)(i) are applicable, and that the assessee pilot is entitled to exemption under Section 10(14)(i) in respect of the same.

The very CIT who challenges the impugned order, passed by the CIT(A) holding that the assessee is entitled to exemption under Section 10(14)(i) in respect of allowances received for international flights, has himself allowed the same exemption. It is difficult to reconcile between CIT's giving the relief of exemption under Section 10(14)(i), by exercising his revision powers under Section 264, and the same CIT's authorising filing of an appeal against a CIT(A) granting absolutely

identical relief by way of appellate order. Union of India and Ors. v. Kaumudini Narayan Dalai and Anr. , Hon'ble Supreme Court had an occasion to consider whether it is open to Revenue to accept a judgment in the case of one assessee, and appeal against the identical judgment in the case of another. Their Lordships held that such a differential treatment on the same set of facts was not permissible in law, and observed that, "it is not open to Revenue to accept the judgment in the case of the assessee in that case and challenge its correctness in the case of another assessee, without just cause". The same view was reiterated by the Hon'ble Supreme Court in the case of Berger Paints India Ltd. v. CIT , and followed by the Hon'ble Delhi High Courts in the cases of CWT v. R.K.K.R. Industries (P) Ltd. .

When it is not possible for the Revenue to challenge an order of the appellate authority in one case and when it has accepted identical order of the appellate authority in another case, it cannot at all be open to the Revenue to challenge the order of the appellate authority on an issue on which relief has been given by CIT himself, in other cases, by way of exercising revision jurisdiction in other cases. For this reason alone, the grievance raised by the Revenue is not maintainable in law and deserves to be rejected in limine.

9. There are, however, other reasons for rejecting Revenue's grievance on merits as well.

10. It is important to appreciate that the sole and immediate reason of rejecting assessee's claim for exemption under Section 10(14)(i) is Revenue's reliance on applicability of Section 10(14)(ii) r/w Notification Nos. SO 144(E) dt 21st Feb., 1989 and SO 487(E) dt. 1st July, 1992, as also Tribunal's judgment in the case of Capt. Harminder Singh (supra), The fact that AO has, without any application of mind, blindly followed Tribunal's judgment in the case of Capt. Harminder Singh (supra), is also evident from AO's allowing exemption under Section 10(14)(ii) only to the extent of Rs. 30,000 for the year, whereas, even as per applicable limit for the relevant previous year, that is at the rate of Rs. 3,000, the correct figure should have been Rs. 36,000. The apparent reason is that in Capt. Harminder Singh's case (supra), Tribunal had allowed exemption to the extent of Rs. 30,000 but then

the assessment year involved in that case was 1993-94, and, for the relevant previous year, the applicable limit was Rs. 1,000 per month till June, and for the rest of nine months the applicable limit was enhanced to Rs. 3,000 per month. That is how, i.e. Rs. 1,000 multiplied with 3 plus Rs. 3,000 multiplied with 9, the figure of Rs. 30,000 applied for the asst. yr. 1993-94. Yet, the AO has adopted the same for the asst. yr. 1997-98 also. As for the reliance on Notification Nos. SO 144(E) dt. 21st Feb., 1989 and SO 487(E) dt. 1st July, 1992, these notifications ceased to be relevant after amendment of Section 10(14) w.e.f. 1st July, 1995. These things, as we pointed out, only show how thoughtlessly the impugned assessment order is passed. It is also important to bear in mind the fact that in Capt.

Harinder Singh's case (*supra*), the assessee was working on domestic sectors and it was for this reason that the Tribunal came to the conclusion that old Notification No. SO 144(E), as it was then in force, applied. This notification admittedly applies to "whole of India" only, and not beyond that. The exemption under Section 10(14)(ii) is thus, even as per the Revenue, available only in India and not outside India. In the present case, the exemption under Section 10(14)(i) has been declined only on the ground that exemption under Section 10(14)(ii) is available. Therefore, even going by the logic of the AO, exemption under Section 10(14)(i) cannot be declined because, assessee, while flying on international sectors, cannot be allowed exemption under Section 10(14)(ii). This stand, even after taking note of Tribunal's decision in the case of Capt. Harinder Singh (*supra*), has not only been approved by another coordinate Bench of the Tribunal in the case of Capt V.K. Verma (*supra*) but has also been followed by the CIT in exercise of his revision jurisdiction by issuing orders under Section 264 and in exercise of his supervisory jurisdiction by issuing administrative instructions. The very foundation of Revenue's arguments in support of non-applicability of Section 10(14)(i) is thus devoid of any legally sustainable basis.

11. The assessee, though working for an international carrier, operates on the domestic flights. The question then arises whether exemption under Section 10(14)(i) is available in respect of the same allowances when the assessee has to stay in a place, outside his place of posting, in India. This takes us to an even

more fundamental question and that is to what extent applicability of exemption under Section 10(14)(ii) as was upheld by a co-ordinate Bench of this Tribunal in the case of Capt Harminder Singh (supra) is now good in law, particularly after Tribunal's subsequent order in the case of Capt V.K. Verma (supra) and in the light of the stand being taken by the AOs and the Administrative CITs in the cases of the pilots. It is interesting to note that the Tribunal in Capt V.K. Verma's case (supra), whose employer was the same as of Capt. Harminder Singh, and the Revenue authorities have consistently held that to the extent the allowances are not covered by Section 10(14)(ii), the same are to be treated as subject-matter of exemption under Section 10(14)(i). In Capt Verma's case (supra), a coordinate Bench of this Tribunal, vide order dt 22nd Aug., 2001, observed that: On careful perusal of the record, we find force in the contentions of the assessee that the facts of the impugned case are not identical to that of Harminder Singh's case. As such the principle laid down in that case is not strictly applicable to the instant case. It is also obvious from Tribunal's order in Harminder Singh's case that Tribunal did not have occasion to examine the issue of exemption of allowance under Section 10(14)(i) of the Act, if the assessee is on flying duty abroad. Though the assessee has emphatically argued that its claims are covered under Section 10(14)(i), we are of the view that since lower authorities have not applied their mind to this aspect, this matter should go back to the AO for its re-examination in the light of assessee's contentions and various notifications of the Board and relevant provisions of law.

Accordingly, we set aside the order of the CIT(A) and restore the matter to the file of the AO ' for re-examination in the terms indicated above.

12. This order has been accepted by the Revenue. In fact, when the matter was thus restored to the file of the AO, the AO finalized the assessment on 20th Feb., 2002, by observing, inter alia, as follows: As per the directions of the Tribunal, the case was taken up for hearing. The counsel of the assessee has filed written submissions in this regard. He has also filed a copy of the order dt. 19th Dec, 2001 passed by CIT(A)-XXVII, Mumbai, in the case of Neeta Kulkarni in Appeal No. CIT-XXVII/ITO Wd. II(3)/96/2001-02. It was contended by the Authorised Representative that the CIT(A), in the above order, has held that the allowances

paid while operating international flights are covered by exemption under Section 10(14)(i) r/w Notification No. SO 143(E) dt. 28th Feb., 1989 subject to verification of expenses actually incurred by the assessee while operating international flights.

The assessee's Authorised Representative has also filed a detailed note stating that Indian Airlines employer, provides accommodation at foreign stations to the assessee on bread and breakfast basis.

These are paid in local currency at foreign stations to meet out other expenditure on meals, refreshments, tea, transportation, telephone and other incidental expenses. It was claimed that these foreign allowances are in the nature of reimbursements and have been spent while performing official duties. The Authorised Representative has further relied upon Instruction No. 1107, dt. 5th Oct., 1977 and letter dt. 30th March, 1990 issued by the CBDT in support of his contention that these allowances are exempt under Section 10(14)(i).

I have considered the submissions of the Authorised Representative and details filed by him. I have also gone through the order of the CIT(A), Mumbai, referred to above. Though the assessee has claimed that the allowances received by him have been spent for the purpose for which it were given, the assessee could not provide any supporting material/vouchers to substantiate his claim in this regard. Keeping in view the nature of expenditure to be incurred at foreign station, facilities provided by the employer and the amount of foreign allowance paid to the assessee,... I consider it reasonable to take 60 per cent of the foreign allowances as having been actually incurred and allow exemption under Section 10(14)(i) r/w Notification No. 143(E)....

It is thus clear that even as per the Revenue authorities, the claim of exemption is allowable under Section 10(14)(i) though only to the extent of 60 per cent in respect of allowances granted for the purpose of visits abroad in connection with the flying duties. The nature of allowances is admittedly the same for domestic and international visits, only the quantum of allowance and currency of allowance varies.

That is a significant departure from Revenue's stand that the allowances cannot be said to be in the nature of allowances eligible for exemption under Section 10(14)(i) at all. The Revenue having taken the stand that the nature of allowances is such that it can be partly exempted under Section 10(14)(i) when assessee visits abroad and when the exemption under Section 10(14)(ii) is, therefore, unavailable, it cannot be open to Revenue to now argue that provisions of Section 10(14)(i) cannot be attracted at all in respect of the identical allowances for visiting Indian stations. To that extent, the principle laid down by the Tribunal in Haiminder Singh's case (supra) has been modified by the Tribunal in the subsequent decisions, such as in the case of Capt. V.K. Verma (supra), and even by the Revenue authorities in the assessments of other assesseees. Once the Revenue itself accepts that the nature of allowances is covered by Section 10(14)(i) r/w Notification No. 143(E), though in connection with flights abroad, the only surviving reason for rejection of claim under Section 10(14)(i) in respect of domestic allowances is specific provision of Section 10(14)(ii) governing the exemption in respect of domestic allowances.

13. A plain reading of the revision orders passed under Section 264 and administrative instructions issued by the Administrative CIT also shows that to the extent exemption under Section 10(14)(ii) is not available in respect of the allowances, the field officers have considered the same allowances in respect of "food, beverage, telephone and transportation", as eligible for exemption under Section 10(14)(i). The only reason for rejecting the exemption under Section 10(14)(i) thus is availability of exemption under Section 10(14)(ii) in respect of those allowances. This surviving reason for rejection of claim of exemption under Section 10(14)(i), however, rests on the fallacious assumption that the provisions of Section 10(14)(i) and Section 10(14)(ii) do not operate in mutually exclusive fields.

14. We consider it necessary to reproduce the provisions of Section 10(14)(i), which are as follows: 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: (i) any such special allowance or benefit, not being in the nature of a perquisite within the meaning of Clause (2) of Section 17, specifically granted to

meet expenses wholly, necessarily and exclusively incurred in the performance of the duties of an office or employment of profit, as may be prescribed, to the extent to which such expenses are actually incurred for that purpose; (ii) any such allowance granted to the assessee either to meet his personal expenses at the place where duties of his office or employment of profit are ordinarily performed by him or at the place where he ordinarily resides, or to compensate him for the increased cost of living, as may be prescribed and to the extent may be prescribed: Provided that nothing in Sub-clause (ii) shall apply to any allowance in the nature of personal allowance granted to the assessee to remunerate or compensate him for performing duties of a special nature relating to his office or employment unless such allowance is related to the place of his posting or residence.

15. We also consider it appropriate to reproduce the part of Rule 2BB under which the allowances paid for going abroad in connection with flying duties are exempted by the Revenue and under which the allowances paid for going to other places inside India are exempted by the Revenue: "Rule 2BB-(1) For the purposes of Sub-clause (i) of Clause (14) of Section 10, prescribed allowances, by whatever name called, shall be the following, namely; (b) any allowance, whether granted on tour or for the period of journey in connection with transfer, to meet the ordinary daily charges incurred by an employee on account of absence from his normal place of duty; (2) For the purposes of Sub-clause (ii) of Clause 14 of Section 10, the prescribed allowances, by whatever name called, and the extent thereof shall be following, namely:SI No.Name of allowance Place at which Extent to which4.

Any allowance granted to an Whole of India 70 per cent of such employee working in any allowance upto a transport system, to meet maximum of Rupees his personal expenditure 3,000 per month 16. An analysis of Section 10(14)(i) r/w Rule 2BB(1)(b) indicates that essential ingredients of an allowance eligible for exemption under that section are as follows: -the allowance or benefit should be specifically granted to meet expenses wholly, necessarily and exclusively incurred in connection with the duties of an office or employment of profit; -the allowance or benefit should not 'be in the nature of a perquisite as defined under Section 17(2) of the Act; -the exemption of allowance is restricted to the extent to which such

expenses are actually incurred for that purpose; -the allowance should be to meet ordinary daily charges on account of absence from normal place of duty.

17. As for the nature of allowances which are exempt under Section 10(14)(ii), in terms of plain words of the statutory provisions under that section, the following conditions are required to be satisfied; -the allowance should be granted to meet personal expenses of the assessee or to compensate him for the increased cost of living; -in case the allowance is granted to meet personal expenses of the assessee, the allowance should be to meet his personal expenses: (a) at the place where the duties of office or employment of profit are ordinarily performed, or - Once the above conditions, as laid down under the statute are satisfied, the exemption is available in respect of the allowance granted to an assessee working in any transport system and to meet personal expenses of such assessee during the course of 'running of such transport from one place to another'; -the exemption of allowance is to the extent the allowance is prescribed at 70 per cent of the allowance upto a maximum of Rs. 3,000 per month so far as year before us is concerned.

18. It is thus clear that so far as eligibility for exemption under Section 10(14)(i) r/w Rule 2BB(1)(b) is concerned, it has nothing to do with the place which assessee is to visit in the course of duties. The exemption under this section cannot be declined on the ground that the assessee was to visit places outside his normal place of duty in India, and not abroad. Whether an assessee is in India or is outside India, as long as allowance is granted to meet ordinary daily charges on account of absence from normal place of duty, the same is eligible for exemption under Section 10(14)(i) r/w Rule 2BB(1)(b)-of course subject to actual use condition but that is not relevant in the present context. Therefore, the normal interpretation of this provision, as accepted by the Revenue, is that if an employee is posted in Mumbai and he travels to, say, London, the allowance that the assessee is granted to meet his ordinary daily charges, such as say on meals, beverages, refreshments, toiletries, etc. on account of his absence from Mumbai, the same is eligible for exemption under Section 10(14)(i) r/w Rule 2BB(1)(b). The Revenue also, therefore, accepts that allowances are specifically granted to meet expenses wholly, necessarily and exclusively incurred in connection with the

duties of an office, and are not in the nature of perquisite under Section 17(2) of the Act, because without satisfying these conditions, the exemption under Section 10(14)(i) could not have been granted at all in respect of the allowances. However, it is also important to appreciate that Rule 2BB(1)(b) does not make a distinction between domestic destinations and foreign destinations. Therefore, once the Revenue accepts that the allowances are granted to meet ordinary daily charges on account of absence from normal place of duty when assessee goes on flying duties abroad, it cannot be open to Revenue to contend that so far as allowances to visit domestic destinations are concerned, the eligibility of exemption under Section 10(14)(i) is not available. The exemption under Section 10(14)(i) has, however, been denied apparently on the ground that the exemption under Section 10(14)(ii) r/w Rule 2BB(2)(iv) is available in respect of such allowances.

19. Section 10(14)(ii) r/w Rule 2BB(2)(iv), on the other hand, deals with the allowances which are granted to meet (a) increased cost of living; or to meet (b) personal expenses at the place where duties of office are performed or where the assessee ordinarily resides. An allowance can either be for personal expenses or for official expenses; it cannot be for official expenses as also for personal expenses at the same time. Therefore, once it is stand of the Revenue that the allowances are granted to "meet expenses wholly, necessarily and exclusively incurred in connection with the duties of an office" since exemption under Section 10(14)(i) r/w Rule 2BB(1)(b) has been granted in respect of such allowances by the AO himself and by the CIT, by way of revision orders under Section 264, in respect of allowances in connection with flying duties abroad, merely because the places covered by the assessee in some of such visits are inside India, it cannot be said that the allowances are not granted to "meet expenses wholly, necessarily and exclusively incurred in connection with the duties of an office". The purpose of the allowances remains the same and if destination that the assessee visits makes any difference to the allowances, such difference is only in terms of quantum of allowance and the currency in which it is paid. These factors, by any stretch of logic, cannot have any bearing on the eligibility for exemption under Section 10(14)(i). The very basis of denying exemption under Section 10(14)(i), therefore, is no longer sustainable in law.

20. When the allowances are admittedly granted wholly, necessarily and exclusively for official purposes, there cannot be any occasion to invoke Section 10(14)(ii), the scope of which is confined to expenses to meet increased cost of living or to meet personal expenses at the place where duties of office are performed or where the assessee resides. The expression 'place where the duties of his office or employment of profit are performed' appearing in Section 10(14)(ii) of the Act refers to a geographical location, i.e., city, State, or the region, where the employee is posted, as is also evident from column 3 of Rule 2BB(2) which refers to geographical locations such as cities, States, altitude of the place where an employee is posted, and sea distance from Indian land, i.e., continental shelf and exclusive economic zone, where the assessee is posted in offshore installations.

Therefore, it is the place of posting, which can be a geographical location in the present context, which is required to be treated as the place where duties of office are to be performed. The question of expenses to meet which the allowances are given, becomes relevant only when the pilot steps out of the aircraft and stays in a place other than the place of his posting, and, therefore, these expenses cannot be said to be incurred during the performance of the duties or during the course of taking an aircraft from one place to another. A commercial pilot, in the course of performance of his duties, has to stay at various places not for performance of duties but in connection with performance of his duties. For example, if a Mumbai based commercial pilot has to stay in New Delhi overnight before he resumes or starts his flying duties on flights originating from there, he is to be treated as on tour to New Delhi in connection with his duties of office. The duties of his office include flying an aircraft, and he files the aircraft at New Delhi also, but then his overnight stay in New Delhi cannot be said to be for flying an aircraft but can only be in connection with flying an aircraft. The allowances granted to the assessee are not for being in New Delhi while flying the aircraft but for staying in New Delhi to enable him to fly from New Delhi.

Therefore, the allowances cannot be said to be for the purposes of meeting personal expenses at the place where duties of office are performed. It is also not the Revenue's case that the allowances are granted to meet personal expenses

where the assessee normally resides, because the question of these allowances comes into play only when the assessee goes out of the place where he normally resides. The allowances cannot, therefore, be said to have been granted for the purpose of meeting personal expenses at the place where the assessee resides or where the duties of office are performed. As for an allowance to meet increased cost of living, it can only refer to an allowance to supplement the cost of living and not to an allowance which is to meet the costs of ordinary daily charges on account (of absence) from normal place of duty. The cost of living, in any event, is only relevant for the place where the duties are normally performed, and not to the places where a person has to go in connection with performance of his duties. A 'place of duty', as we have discussed above, refers to a geographical location and, therefore, not an aircraft which cannot be stationary and has to move from place to place. It is also not in dispute that a daily allowance, though computed at hourly rate, is being paid to the assessee, and, for this reason also, Rule 2BB(2)(iv) has no application in the cases where daily allowance is paid. Last few words of this entry are "provided such employee is not in receipt of daily allowance". For all these reasons, the provisions of Section 10(14)(ii) and also of Rule 2BB(2)(iv) are not applicable on the facts of this case.

21. The line of distinction between an allowance to meet expenses wholly, necessarily and exclusively for the performance of duties, though prima facie of a personal nature, and an allowance to meet personal expenses simpliciter is very significant. Take for example, an allowance to meet the costs of transfer, packing or transportation of personal effects on transfer of an employee. Such an allowance, on the face of it, appears to be an allowance to meet personal expenses of an employee but since his transfer is in connection with the duties of an office, the same is treated as having been granted to meet the expenses wholly, necessarily and exclusively incurred in connection with the duties of an office and an "allowance granted to meet the cost of travel on tour or transfer" appearing in Rule 2BB(1)(a) and Explanation to the said rule categorically so clarifies. In contrast to this example, let us take the case of remote locality allowance paid to an employee who is posted in Nicobar Island. This allowance is covered by Rule 2BB(2) to the extent of Rs. 1,300 per month, but there is no condition attached about the use of this allowance. Once an employee is posted in

Nicobar Island, such a posting of the employee, by itself, entitles him the allowance and this is to meet the personal expenses of the employee. This allowance is therefore to meet personal expenses at the place of posting, as is the mandate of Section 10(14)(ii). However, when the same employee travels back to mainland in connection with his duties and he gets an allowance to meet his ordinary daily charges on account of absence from normal place of duty, he will be entitled to exemption under Section 10(14)(i) in respect of such allowance. In both the situations, allowance is to meet the personal expenses because, after all, ordinary daily charges are also personal expenses in nature but then personal expenses at the place of duty and personal expenses, necessitated by same in the case employee travels outside the place where he is posted and he gets an allowance to meet the costs of boarding and lodging, which is undoubtedly a personal expense in nature, the allowance so granted is treated as an (allowance) to meet the ordinary daily charges incurred by an employee on account of absence from normal place of duty and thus "wholly, necessarily and exclusively incurred in connection with the duties of an office or employment of profit". Therefore, an allowance granted to a commercial pilot to meet his cost of meals, beverages, telephone and laundry, etc.

cannot be said to be for the purpose of meeting the increased cost of living as it is to meet the costs of ordinary daily charges on account of absence from normal place of duty. It is thus clear that the provisions of Section 10(14)(ii) r/w Rule 2BB(2)(iv) have no application in case the allowances are found to be covered by the provisions of Section 10(14)(i) r/w Rule 2BB(1)(b), and vice versa.

These two sections operate in mutually exclusive areas inasmuch as application of one of the sections is to the exclusion of the other section. In other words, Revenue having accepted the allowances granted to the assessee are covered by Section 10(14)(i), there is no room to invoke the provisions of Section 10(14)(ii). It is materially different from the case of Capt. Harinder Singh (*supra*) wherein there was a categorical finding by the Tribunal that the allowances in question are not covered by the provisions of Section 10(14)(i) r/w Notification No.143(E) which is in *pari materia* with Rule 2BB(1)(a) and (b), but that is no longer the case as Revenue itself has allowed exemption under Section 10(14)(i) r/w Rule 2BB(1)(b)

in respect of identical allowances. To that extent, the legal position, on the facts of the case before us and in the light of developments which have been taken note of hereinabove is that the exemption under Section 10(14)(i) is also available for allowances granted to the assessee in respect of tours of the assessee to domestic destinations as well, and that Section 10(14)(ii) cannot be said to have any application in respect of such allowances.

22. For the reasons set out above, we are of the considered view that, in principle, provisions of Section 10(14)(i) will apply to the allowances received by the assessee for tours to places inside as also outside India, and the assessee will, accordingly, be eligible for exemption under Section 10(14)(i) r/w Rule 2BB(1)(b) in respect of such allowances.

23. The next question then arises as to what is the extent to which exemption of allowances, in the absence of any evidence for actual use of allowance for the purpose for which such allowances are granted, can be granted under Section 10(14)(i). Learned CIT(A) has allowed exemption to the extent of 50 per cent of allowances or Rs. 50,000, whichever is lower. It is difficult to comprehend as to how the quantum of allowance can determine the amount actually spent by the employee, in fact, it is the other way round. It is understandable that actual expenditure by the employees influences the quantum of allowance fixed by the employer, but not vice versa. The ceiling of exemption to the extent of 50 per cent of allowances is, therefore, devoid of any rationale. Similarly, the monetary ceiling of Rs. 50,000 per annum on the exemption of allowances under Section 10(14)(i) is even more unfounded. That would be equating expenditure incurred by an employee who is on tour for, say, 180 days with someone who has been on tour for, say, 8 days. The basis for adopting this figure of Rs. 50,000 is also far from clear, and appears to be arbitrary. The quantum of exemption of allowances, as decided by the CIT(A), therefore, does not meet our approval.

24. The issue regarding extent to which exemption can be granted in the absence of evidence of actual expenditure, also came up before a co-ordinate Bench of this Tribunal in the case of one Madanlal Mohanlal Narang, an employee of the Shipping Corporation of India. In the said order dt. 21st April, 2006, reported as

Madanlal Mohanlal Narang v. Asstt. CIT (2006) 101 TTJ (Mumbai) 1005, the Tribunal, inter alia, observed as follows: 6. We find that the basic reason of declining the exemption claimed by the assessee is that the authorities below are not satisfied about evidence of the assessee having actually spent the amount of allowance for the purposes for which the same were granted. A lot of emphasis is laid on the fact that Section 10(14)(i) provides any allowance for the purpose of meeting expenses wholly, necessarily and exclusively incurred for the purpose of official duties, as may be prescribed, but the exemption is available only 'to the extent to which such expenses are actually incurred for that purposes'. The AO has disallowed the exemption only on the basis that there were insufficient proof for the expenses having been actually incurred.

In appeal, the CIT(A) has also held that the appellant has not produced evidence regarding actual use of the allowances for the purpose for which the same were granted. Unlike the requirements of Section 10(14)(ii) which provide for exemption of a prescribed allowance to the extent 'prescribed', under Section 10(14)(i) exemption is indeed confined to the extent to which an exempt allowance is actually spent for the purposes for which such allowance is granted. In other words, 'actual use' of an allowance is one of the conditions precedent for exemption under Section 10(14)(i). This is in sharp contrast with the exemption provisions of Section 10(14)(ii) under which even the quantum of exemption is to be prescribed by the Rules. Having taken note of this significant distinction, however, we much also appreciate the background in which this actual use condition was brought in the statute and true connotations thereof in the context of Section 10(14)(i).

7. The expression 'to the extent to which such expenses are actually incurred', as finds place in Section 10(14)(i), is not new to the IT Act. It was first introduced, w.e.f. 1st April, 1955, in Section 4(3)(vi) of the Indian IT Act, 1922 which dealt with the exemption of allowances to the salaried employees. This amendment was made in the backdrop of Hon'ble Bombay High Court's judgment in the case of *Tejaji Frasaram Kharawalla v. CIT* (1948) 16 ITR 260 (Born) wherein their Lordships had held that exemption under Section 4(3)(vi) was available even if portion of the allowance was not consumed and stood as surplus in the hands of

the employees. Subsequently, though this decision was reversed by the Hon'ble Supreme Court in the case of CIT v. Tejaji Frsaram Kharawalla Ltd. not before Section 4(3)(vi) was amended, w.e.f. 1st April, 1955, by Finance Act, 1955. This amendment, it appears, resulted in considerable apprehension amongst the salaried employees as to how can they be expected to maintain meticulous details and evidence of expenditure incurred by them for the actual usage of allowance. To allay these apprehensions, the CBDT on 1st Aug., 1955, issued a circular which is reproduced below for ready reference: 'Special allowance or benefit being reasonable and not disproportionately high-No details of expenses actually incurred need be asked for the purpose of granting exemption under Section 4(3)(vi) of 1922 Act.

The exemption under Section 4(3)(vi) in respect of any special allowance or benefit will be available from the asst. yr. 1955-56 only to the extent of the sanctioned amounts. Generally speaking, where the specific allowances are reasonable with reference to the nature of the duties performed by the assessee and are not disproportionately high compared to the salary received by him, no attempt will ordinarily be made to call for details of the expenses actually incurred by him with a view to disentitling him to some extent from the exemption. An enquiry will, of course, be justified and will be made in cases where the allowances are prima facie unreasonably high.' It is, therefore, clear that even as the provisions were amended so as to allow the exemption of allowance only to the extent the allowances were used for the purposes for which the same were granted, even this amendment did not vest the AO's powers to call for details of actual expenditure unless, generally speaking, the allowances are unreasonably high vis-a-vis salaries of the assessee or with reference to the nature of duties performed by the assessee.

8. The above circular was undoubtedly issued under the IT Act, 1922 but then all the circulars issued under Section 1922 Act do not cease to hold good in law Section 297(2)(k) specifically provides that notwithstanding the repeal of IT Act, 1922, amongst other things, any instructions issued under any provisions of the repealed Act shall, so far as not inconsistent with the corresponding provisions of IT Act, 1961, deemed to have been issued under the corresponding provisions of

the new Act, and shall continue to remain in force accordingly. In other words, to the extent the legal provisions of 1922 Act and 1961 Act are in pari materia, circulars and instructions issued under the 1922 Act will also hold good. The circular in view of the provisions of Section 297(2)(k) still holds good and continues to be in force. The expression used, i.e., 'to the extent to which such expenses are actually incurred' being absolutely identical in both the Acts, the provisions of the above circular, in our humble understanding, apply under the 1961 Act as well.

9. In the light of the aforesaid circular it is not open to the Revenue to call for the details of expenses actually incurred unless the specific allowances are disproportionately high compared to the salary received by him or unreasonable with reference to the nature of the duties performed by the assessee. It is, however, not the case of the Revenue that the allowance granted to the assessee was unreasonable or excessive having regard to the salary of the assessee or the legitimate minimum requirement for the purpose for which the allowances were granted. We have also noted that the quantum of these allowances is prima facie reasonable vis-a-vis salary of the assessee and the purposes for which the allowances were given....

It is thus clear that unless the quantum of allowances in respect of which exemption under Section 10(14)(i) is claimed is found to be excessive or unreasonable, there cannot be any occasion for the AO to call for the actual evidence of expenditure.

25. To demonstrate what can be considered reasonable allowance, learned Counsel for the assessee has invited our attention to a copy of the Circular No. Q/FD/695/1/90 dt. 28th March, 1995 issued by the Government of India (Ministry of External Affairs) which sets out the rate at which a Government servant is entitled to daily allowance when he travels to various countries. The rate at which daily allowance is granted to the Government servants for some of the countries is as follows: Australia US\$75 Kenya US\$50 Austria US\$68 Korea US\$70 Bahrain US \$51 Kuwait US\$74 Canada US\$54 Malaysia US\$50 China US\$68 Mauritius US\$50 Germany US\$75 Russian Federation US\$75 Hong Kong US\$75 Switzerland US\$58 Ethiopia US\$50 UAE US\$61 Indonesia US\$60 UK US\$75

Japan US\$75 USA US\$75 These daily allowances are over and above the hotel charges and local conveyance expenses which are allowed on actual expense basis in the approved list of hotels, but wherever breakfast is included in the hotel tariff, the daily allowance is reduced by 10 per cent. On the strength of this Government circular, learned Counsel contends that the allowance at the rate of US \$ 75 is reasonable. It is, therefore, argued that to the extent of US \$ 75 per day, the allowance granted to the assessee can be treated as a daily allowance to meet ordinary daily charges on account of absence from normal place of duty.

26. Learned Departmental Representative vehemently contends that even if the allowance is granted at the rates prescribed by the Government, a person getting such an allowance is under an obligation to maintain record about evidences of expenses having been actually incurred. In the absence of evidence of allowance having actually been spent, according to the learned Departmental Representative, exemption under Section 10(14)(i) in respect of the same will not be admissible. That contention, for the reasons set out by a coordinate Bench of this Tribunal in the case of Madanlal Mohanlal Narang (supra), cannot be accepted. The allowances fixed by the Government of India cannot be said to be excessive or unreasonable vis-a-vis salaries of the employees or the purposes for which the allowances are granted, and, therefore, it cannot be open to the AO to demand evidence of actual expenditure in respect of such allowances or in respect of similar allowances, to the persons drawing comparable salaries, of the same quantum. Keeping in view the nature of job in aviation sector, as also keeping in mind the fact that aviation crew is generally required to stay in premium five-star hotels where costs are high, we are of the considered view that the daily allowance at the rates prescribed for the Government employees which ranges between US \$ 50 to US \$ 75 per day (minus 10 per cent for the breakfast which is provided to the assessee by the airline employer), to meet the costs of meals, beverages and other incidental expenses, cannot be said to be excessive or unreasonable allowance. To that extent, we accept the contention of the assessee. We direct the AO to accordingly grant exemption under Section 10(14)(i) to the allowances, by adopting daily rates so fixed by the Government of India as the maximum permissible rate eligible for exemption under Section 10(14)(i) without production of evidence of actual expenditure, out of the

consolidated flying allowances received by the assessee. In case, however, the allowance actually received by the assessee for a particular day is less than the daily allowances fixed by the Government of India, the exemption will be restricted to the actual allowance received by the assessee.

27. In order that the above directions can be given effect (to) by the AO, the assessee shall provide for the details of stay abroad in connection with the performance of duties of his office, and compute the exempt portion of daily allowance at the rates specified in the Government circular referred to above. Upon furnishing of these details by the assessee, the AO shall grant exemption under Section 10(14)(i) in respect of the allowances in the terms indicated above.

28. We now come to the quantum of allowance to be treated as exempt under Section 10(14)(i) in respect of allowances granted to the assessee to meet ordinary daily charges during the period he is away from his base station but is in India.

29. The assessee has contended that a sum of Rs. 600 per day in respect of the above is fair and reasonable. No material has been brought on record by any of the authorities below to establish, or even indicate, that this quantum of allowance is excessive or unreasonable. We agree with learned Counsel's contention that having regard to high prices of meals and other incidental expenses at the places the airline crew members are required to stay in, a sum of Rs. 600 per day is hardly enough to meet the costs of two meals. We, therefore, see no reason to reject the claim of the assessee. We direct the AO to accordingly grant exemption under Section 10(14)(i) to the allowances, by adopting daily rates so fixed by the Government of India as the maximum permissible rate eligible for exemption under Section 10(14)(i) without production of evidence of actual expenditure, out of the consolidated flying allowances received by the assessee. In case, however, the allowance actually received by the assessee for a particular day of stay in India, outside the place of posting, is less than Rs. 600 per day, the exemption will be restricted to the amount of actual allowance received. In order that the above directions can be given effect to by the AO, the assessee shall provide for and substantiate the details of stay in India outside the place of posting, in connection

with the performance of duties of his office and compute the exempt portion of daily allowance at the rate of Rs. 600 per day as discussed above. Upon furnishing of these details by the assessee, the AO shall grant exemption under Section 10(14)(i) in respect of the allowances in the terms indicated above.

30. For the reasons set out above, we uphold the contentions of the assessee in the terms indicated above. The matter will, however, go back to the file of the AO for the limited purposes of quantification of relief in terms of our observations in the foregoing paras.

31. To Sum up appeal of the Revenue is dismissed and the cross-objections filed by the assessee are allowed in the terms indicated above. It was so announced in the open Court.

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