

Daily allowances paid to outbound employees held taxable as perquisites: HC

Summary

The Andhra Pradesh High Court (HC,) in a recent decision¹, has held that allowances paid to employees deputed overseas were taxable as perquisite under the provisions² of the Income-tax Act, 1961 (the Act). The allowances were held to be paid towards meeting the high cost of accommodation and other personal expenditure at the place of deputation and not towards expenses actually incurred in connection with the performance of duties which are exempt³ under the Act.

Facts of the case

- The employer is engaged in the business of software development and had sent employees on deputation to its UK branch office.
- Certain lump sum allowances were paid to the deputed employees to meet the boarding and lodging expenses in the UK. The employer did not withhold tax at source on such allowances under the belief that the allowances were exempt under the Act.
- The tax officer held the allowances to be in the nature of 'perquisites' and raised a demand for non-deduction of tax at source on such allowances. The tax officer also levied interest for non-deduction of tax at source.
- The Commissioner (appeals) and the ITAT upheld tax officer's order on non-deduction of tax at source on allowances paid to deputed employees.
- Aggrieved by the order of ITAT, the employer preferred an appeal before the HC.

¹ M/s. Sun Outsourcing Solutions Pvt. Limited vs. The Commissioner of Income Tax (Appeal-V) – CIT(A) TS-643-HC-2017(AP)]

² Section 17(2)

³ Section 10(14)(i) read with Rule 2BB (1)

Employer's contention

- Lump sum allowance paid to the deputed employees were in the nature of daily allowances to meet expenses incurred wholly, necessarily and exclusively while on travel abroad for work.
- Such allowances are not included under the definition of 'perquisite' and are exempt under the Act.
- The employer was of the bona-fide belief that the allowances were not subject to withholding tax under the Act. Accordingly, no interest should be levied for non-deduction of tax.

Revenue's contention

- The deputed employees were ordinary residents who were sent to work in the UK in connection with the employer's business being carried on in India. Hence, the allowances received were taxable in India.
- The lump sum payment did not fall within the exception provided under the Act and hence, would be treated as perquisite liable to tax deduction at source.
- The allowances granted to meet expenses incurred wholly, necessarily and exclusively in the performance of duties would be exempt only to the extent such expenses are actually incurred. However, the employer did not provide any logbook, vouchers, etc. to substantiate the expenses actually incurred by the deputed employees.

HC's ruling

- The HC, relying on other rulings⁴, laid down the following principles:
 - Any personal advantage derived from payment, will be treated as perquisite;
 - A mere reimbursement or necessary disbursement, is not a perquisite;
 - Allowances necessitated by the high cost of living in big cities and not granted with reference to the nature of duties but exclusively with reference to the place of posting, is not exempt under the Act; and
 - To claim exemption under the Act, an allowance should have been specifically granted wholly in the performance of duties.
- The HC noted that no evidence was maintained by the employer to substantiate that such expenses were actually incurred in the performance of the duties and such

⁴ Gujarat HC in case of S.G. Pgnatale, 1969 74 ITR 147, Bellien Michael Andresmant, Zdziz-law-Skakuz V. CIT

payments were made as reimbursements. Accordingly, the HC held that the lump-sum payment made by employer to the employees deputed overseas to meet the high cost towards accommodation and other personal expenditure will not be treated as an exempt allowance. Hence, the employer was bound to withhold tax on such payments.

- The employer's contention of bona-fide impression for not withholding tax at source was dismissed on the ground that levy of interest⁵ under the Act does not hinge upon any requirements such as good faith, willful default, etc. The HC held that the interest levy would be automatically attracted even in bona-fide cases.

Our comments

The ruling by the HC reiterates that payments in the nature of daily allowances paid to employees needs a careful analysis, including review of the employer's policies and documentation. Also, the employers should be able to demonstrate evidence of actual expenses incurred by the employees in the performance of the duties and ensure that no personal advantage is derived by the employees from such allowances.



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⁵ Under section 201(1A) of the Act