Garrick D'Silva vs Jt. Cit on 25 October, 2005

Equivalent citations: [2006]5SOT132(DELHI)

ORDER

1. In consequence of the difference of opinion between the learned Judicial Member and learned Accountant Member of the Division Bench, the Hon'ble President, Income Tax Appellate Tribunal has nominated me as Third Member of the Bench, on the following points of difference:

> 1. Whether deduction on account of housing norm and auto norm made by the employer from the base pay of the assessee in lieu of free housing and transport facility provided in India as per the terms of employment, falls within the definition of perquisite enshrined in section 17(2)(iii) of the Indian Income Tax Act and form part of the base pay and is exigible to tax ?
>
> 2. Whether a profit or benefit earned/acquired by the assessee on account of exercise of stock option, earlier granted, in terms of his employment on subsequent dates and its sale is a perquisite as per provisions of section 17(2) of the Indian Income Tax Act or capital gain ?

2. I have heard the parties and perused the records.

I will first take up the first point of dispute for consideration.

3. Though the facts of this case have been described by the learned Members of the Bench, I, for the sake of coherence, would like to refer to some of these facts, which are considered to be of relevance for a decision on the points, of dispute.

4. The assessee, an Australian citizen, was appointed as Managing Director and President by Whirlpool Corporation, USA (The terms and conditions of appointment are available on pages 27 to 29 of the paper book). As per the offer of appointment, the assessee was to join the US based company as an employee on an international assignment. In view of the same, the compensation, benefits and other working conditions of the assessee were covered by the company's U.S. expatriate policies. In respect of the residential accommodation, the terms of offer provided that the assessee would be entitled to company paid housing after deducting U.S. housing norm of about US Dollars 16,000. Likewise, the company provided free car facility (minor expenses whereof were to be paid by the assessee) after a car deduction of US Dollars 3,000 per year. The assessee failed the return of income on the basis of salary drawn by him in US Dollars. The tax was also to be paid by the company and, therefore, the assessee also included the tax paid by the assessee-company as part of his assessable salary.

5. There was a dispute about the conversion of US Dollars into Indian rupees. Whereas assessee had converted the salary at the average exchange rate, the assessing officer calculated the salary drawn

in Indian currency at the exchange rate prevalent on the date of payment. The issue relating to conversion has been decided by the Commissioner (Appeals) in favour of the revenue. This fact would be relevant in computation of the perquisite value at the rate of 10 per cent of the salary, if applicable. The assessee had also offered the perquisite value in respect of the free residential accommodation as well as free car provided to him in India. The assessee worked out the value of perquisite in respect of residential accommodation as under :

"Salary Rs.

1,16,92,572 Rent paid Rs.

7,80,000 10 per cent of salary Rs.

11,69,257 60 per cent of salary Rs.

70,15,543 Taxable value taken is actual rent paid, i.e. Rs. 7,80,000 being lower.

It is noteworthy that the assessee has calculated the salary of Rs. 1,16,92,570 on the following basis :

Net salary drawn Rs.

78,44,971 Tax paid by the employer Rs.

38,47,601 Rs.

1,16,92,570 10 per cent of the same has been taken at Rs.

11,69,257 The assessing officer has worked out the perquisite value of residential accommodation at Rs. 15,53,803 as under:-

Salary for the purpose of rule 3 Salary as per Appendix I Rs.

79,98,038.1 Add : Housing contribution Rs.

10,02,083.6 Auto Norm Rs.

1,10,505.0 Rs.

91,10,626.7 Add : Tax perquisite (as Computed in the Asst. order) Rs.

61,00,796 Total:

Rs.

1,52,11,423 10 per cent of above Rs.

15,21,142 60 per cent of the salary Rs.

91,26,854 "Fair rental value' Not ascertainable Perquisite value as per rule 3(a) Rs.

15,21,142 Add: Furniture provided: (10 per cent of cost) Rs.

32,661 Rs.

15,53,803 Less: Housing Contribution Rs.

10,02,084 i.e. Rs.

5,51,719"

It is evident from the above that the assessing officer has deducted Rs. 10,02,084 being the amount reduced from the salary of the assessee on account of housing norm from the perquisite value. The net perquisite value in regard to residential accommodation has thus been worked out at Rs. 5,51,719. On the other hand, the assessee has offered the perquisite value of the residential accommodation at Rs. 7,80,000 on the basis of actual rent paid by the employer. It may thus appear that the working made by the assessing officer is beneficial to the assessee insofar as the perquisite value assessed by the assessing officer is less than the perquisite value disclosed by the assessee. So, however, as a result of the working made by the assessing officer, the assessee has been asked to pay tax on the amount of Rs. 10,02,083, i.e. the amount reduced from assessee's gross salary on account of housing norm. Moreover, the said amount has also been taken into account in working out the salary received by the assessee for the purposes of computation of perquisite value at the rate of 10 per cent. Therefore, the real controversy involved in this appeal is as to whether the deduction made by the employer on account of housing norm is includible in the taxable salary of the assessee for intents and purposes including determination of perquisite value of the residential accommodation and free car facility. -

6. In respect of the car, the assessee had offered the value for taxation at Rs. 1,100 per month. On the other hand, the assessing officer calculated the perquisite value at Rs. 1, 10,505 under rule 3(c)(ii) but assessed it at Nil by giving credit for the reduction made by the employer in the salary of the assessee. The working is given by the assessing officer in para 5 of the assessment order which is reproduced hereunder :-

"5. Valuation of car with driver: The relevant clause in the employment contract and the discussion in paras 3.2 and 3.3 of this order make it very clear that the car has been provided by employer at a concessional rate after deduction of US Dollors 250

p.m. totally to US Dollars 3000 for full year. Recovery at the rate of 250US Dollars p.m. has been made from Appendix 1. Rule 3(c)(ii) lays down that the value of motor car provided by the employer for use by the assessee partly in performance of his duties and partly for his private or personal purposes shall be determined to be a sum equal to that part of the amount actually expended by the employer on the maintenance and running of the motorcar during the relevant previous year and including remuneration, if any, paid by the employer to the chauffeur which can be reasonably attributed to the use of the motor car by the assessee for his private or personal purposes; or where the motor car is used by his employer, the aggregate of such sum and of a sum equal to that part of the amount representing the normal wear and tear of the motor car which can reasonably be attributed to the user of motor car by the assessee for his private or personal purposes; however, that where a determination on the basis mentioned above presents difficulty, the value of the perquisite may be determined on the basis of the Table.

5.1 Details as under were ascertained from the assessee and Whirlpool Holdings India Ltd. through specific queries under section 131, which are on record;

(i) assessee was provided with one car; Mercedes Benz (purchased on 13-11-1995) (letter dated 22-8-2000 of AR).

(ii) Company did not maintain any log book. The car was provided exclusively to the assessee for his official as well as personal purposes. The car was not used as a pool car of the company (letter dated 13-9-2000 of the AR). Driver's salary was Rs. 5,000 per month

(iii) No depreciation on this car has been claimed by the assessee in its own assessment as it was a foreign car and in accordance with clause (a) of first proviso to section 32(1) of Income Tax Act. (letter dated 6-10-2000 of AR).

(iv) The Cost of import duty, registration charges and insurance of the Mercedes Benz was Rs. 16,80,903 paid by Whirlpool Holdings India Ltd. Cost of the car was borne by Whirlpool Corporation, USA and hence not supplied (letter dated 20-10-2000 of Whirlpool India Holdings Ltd. in response to summons under section 131). Rs. 1,13,307 and Rs. 70,869 has been incurred on petrol and maintenance expenses by Whirlpool India Holdings Ltd. on this Mercedes car during financial year 1997-98. There were 16 cars owned by the company during the year 1997-98.

The above facts show that the total expenditure on this car, which is exclusively for official and personal use by the Managing Director Mr. Garrick D'Silva is:

Petrol and maintenance expenses Rs.

1,84,176 Driver's salary Rs.

60,000 Rs.

2,44,176 In addition there would be wear and tear which can be estimated to be at least Rs. 3 lakhs per annum assuming straight line depreciation over 10 years. Since no log book is said to be maintained, it is not possible to work out the exact amount attributable to personal use. However, rule 3(c)(ii) requires a 'reasonable attribution' and not 'exact attribution'. In view of the fact that the assessee has agreed in the employment contract for a deduction of US Dollars 3000 per annum on a monthly basis it is clear that the benefit derived from this amenity can never be below this, i.e. Rs. 1,10,505 (see conversion in para 2 for auto norm). Considering the overall expenditure on this vehicle, this sum is only about 1/5th of the actual running, maintenance expenses and estimated wear and tear. There are total 16 cars with the employer and the assessee being M.D. of the employer company was definitely in a position to utilize any other car for official purposes as well. The reasonably attributable personal use can never be, therefore, less than Rs. 1,10,505.

5.2 The ARs on being asked to explain as to why the minimum perquisite value of the vehicle provided by the employer be not taken at US Dollars 3000 furnished their written submissions vide letter dated 20-9-2000. Their interpretation of rule 3(c)(ii) is that it does not leave the determination of perquisite value to the discretion of the assessing officer. Further US Dollars 3000 being deducted from salary is a hypothetical amount and not the actual expenditure of employer-company. This amount, according to ARs cannot be considered for the purposes of valuation of the perquisite of motor car provided by the employer.

5.3 As discussed in paras 5 and 5.1 what is required to be done under rule 3(c)(ii) is a reasonable attribution and there is no compulsion to adopt the Table, if such reasonable attribution is possible. In view of the figures in para 5.1 and the fact that this 'reasonable attribution' can never be less than the amount deducted from assessee's salary i.e. US Dollars 3000 or Rs. 1,10,505 (no prudent person would agree for a deduction which is more than the actual benefit), the value of the car plus driver perquisite provided by the employer, for the purposes of rule 3(c)(ii), is taken at Rs. 1,10,505. This is on the ground that it is the minimum amount that can be reasonable attributed' to the personal use. Assessee's case is covered by rule 3(c)(v), i.e. is allowed use of motorcar at a cost/ concession. The perquisite value in this case is as under :

Valuation done under rule 3(c)(ii) Rs. 1,10,505 Less: Amount deducted from Rs. 1,10,505 Assessee's salary Perquisite value Rs. Nil In this case the value under rule 3(c)(ii) has been taken to be equal to the amount recovered by the employer, i.e. the 'auto-norm'. However, if the value were taken at Rs. 13,200 as in the return, the perquisite value at a concessional rate under rule 3(c)(v) would still be 'nil'. This is due to the fact that no prudent person would agree for recovery from his salary at an amount higher than the benefit derived."

> As already pointed out, the Commissioner (Appeals) has upheld the order of the assessing officer in working out the perquisite value and in including the reductions made by the employer on account of auto norm and housing norm as part of the salary.
>
> 7. Whereas learned Counsel for the assessee sought to support the view expressed by the learned Accountant Member, the learned Departmental Representative sought to support the view expressed by the learned Judicial Member. At this stage I am tempted to say that the view expressed in regard to the first point of dispute appears to be attractive at first sight but it loses its lusture when one peeps deep into the employment agreement and the provisions of the Act.

It has been pointed out earlier that in this case the value of perquisites determined by the assessing officer in respect of free residential accommodation and free car facility provided to the assessee is less than the value disclosed by the assessee. Therefore, before I consider the correctness of the method adopted by the assessing officer in determining the perquisite value of rent-free accommodation and free car, it is more important to determine the component of salary for the purposes of taxation. The amount of salary, which has been paid to the assessee or to which the assessee is entitled to depend upon the contract between the assessee and the Whirlpool Corporation, USA.

8. In order to appreciate as to whether housing norm and auto norm reduction made by the company is includible in the taxable salary of the assessee, it will be relevant to refer to section 15 of the Income Tax Act, 1961. Section 15 reads as under :-

> "15. The following income shall be chargeable to income-tax under the head Salaries'-
>
> (a) Any salary due from an employer or a former employer to an assessee in the previous year, whether paid to not;
>
> (b) Any salary paid or allowed to him in the previous year by or on behalf of an employer or a former employer though not due or before it became due to him;
>
> (c) Any arrears of salary paid or allowed to him in the previous year by or on behalf of an employer or a former employer, if not charged to income-tax for any earlier previous year."

Section 17 of the Income Tax Act, 1961 defines 'salary'. The said definition is an inclusive definition and provides the salary to include wages, annuity, gratuity and any fees, commissions, perquisites or profits in lieu of or in addition to any salary or wages. Section 17(i) is quoted hereunder :

> '17. For the purposes of sections 15 and 16 and of this section.-
>
> 'Salary" includes-

(i) wages;

(ii) any annuity or pension;

(iii) any gratuity;

(iv) any fees, commissions, perquisites or profits in lieu of or in addition to any salary or wages;

(v) any advance of salary;

(va) any payment received by an employee in respect of any period of leave not availed of by him;

(vi) the annual accretion to the balance at the credit of an employee participating in a recognized provident fund, to the extent to which it is chargeable to tax under rule 6 Part A of the Fourth Schedule; and

(vii) the aggregate of all sums that are comprised in the transferred balance as referred to in sub-rule (2) of rule I I of Part A of the Fourth Schedule of an employee participating in a recognized provident fund, to the extent to which it is chargeable to tax under sub-rule (4) thereof;

(viii) the contribution made by the Central Government in the previous year, to the account of an employee under a pension scheme referred to in section 80CCD.'

9. In Stroud's Judicial Dictionary, Fourth Edition, the expression salary' is explained as "where the engagement is for a period is permanent or substantially permanent in character and is for other than manual or relatively unskilled labour, the remuneration is generally called a salary. In the case of Gestetner Duplicators (P) Ltd. v. CIT 117 ITR 1, Their Lordships of the Supreme Court held that in ordinary parlance, salary connotes remuneration or payment for work done or services rendered.

10. It may be pertinent to mention that the Whirlpool Corporation, USA is an employer-company in the case of the assessee. It has a tax equalization policy in respect of its employees assigned to overseas location. The policy is so designed that the employee is neither put to any disadvantage or advantage as a result of his posting outside USA in respect of payment of income-tax. The policy and scope being relevant is reproduced as under:-

'Policy & Scope:

When an employee is assigned to an overseas location, the company policy is designed so that the employee should pay a similar income-tax to that which he/she would have paid had the employee remained in the U.S. To achieve this objective, the company has adopted a tax equalization programme under which an employee's

compensation will be reduced by an amount similar to the tax he would have paid had he/she remained in the U.S. ("hypothetical tax") and the company will reimburse the employee for all U.S. and foreign taxes actually payable, In addition, to the extent the hypothetical tax is dissimilar, there is generally an offset relating to hypothetical housing.

This policy covers U.S. citizens who are transferred from the U.S. to a foreign post of assignment or from one foreign post of assignment to another. It also includes all income of U.S. citizens including company compensation and personal investment income.' It has been given in writing before me that the auto norm and housing norm of the company are in consonance with the above policy of the employer-company. It has further been stated that the assessee is not entitled to any free accommodation or free car on his posting in USA and accordingly deduction is being made from his salary to put him on par with the employees working in USA.

11. Proceeding on the basis that the assessee was not entitled to free accommodation or free car had he been posted in USA, the company having provided free accommodation and free car in India and reduced the salary of the assessee to put him at par with the employees working in USA. Therefore, there is no doubt in my mind that the intention of the employer to fix the basic salary at a higher level and then reducing the same on account of hypothetical tax, housing norm and auto norm etc. was for the purpose of equalization of pay and other facilities of the U.S. employees and the employees assigned to overseas location. It is also interesting to note that the assessing officer has not included the hypo-tax deduction made by the employer as part of salary of the assessee. The amount has been deducted on account of tax equalization policy and the assessing officer has rightly deducted the same from the gross salary but included the actual tax component paid by the employer-company as a perquisite for the purposes of determination of the salary received by the assessee. In my considered view, there is no reason for taking a different view in regard to deduction made on account of housing norm and auto norm. As pointed out earlier, the intention of the employer-company appears to be abundantly clear that there is no confusion on the assessee's right to receive the salary in USA after completion of the assignment in India or overseas location. It may be pertinent to mention that as per the terms and conditions of employment, the company had assured the asscssee that after completion of three years working in India, he would be considered for assignment outside India. In my considered view, the treatment given by the assessing officer to the deductions on account of housing norm and auto norm is not justified more so when different treatment has been given to the deductions on account of hypo-tax. In my view, deduction on account of hypo-tax and housing norm and auto norm deserves same treatment.

12. Apart from the facts stated above, another factor which assumes importance is that in the case of Whirlpool India Holdings Ltd. (the employer-company), the dispute was raised by the assessing officer for the purposes of provisions of sections 201 and 201 (1A) of the Income Tax Act, 1961 claiming that there was short-deduction of tax from the salary paid to the assessee. The assessing officer had invoked the aforementioned provisions of the Act in the case of Whirlpool India Holdings Ltd. on the ground that in working out the tax deductible at source, the deductions on account of hypo-tax in respect of housing norm and auto norm had not been included by the

company. A demand of Rs. 19,36,629 for the financial year 1999-2000 relevant to assessment year 2000-01 was created under sections 201 and 201(1A) accordingly in the name of Whirlpool India Holdings Ltd. vide order dated 28-2-2001 by the DCIT, TDS, Circle-XXVII, New Delhi.

13. When the matter came up before the Commissioner (Appeals)-XXX, New Delhi, he had called for the comments of the assessing officer on the written submissions filed by the assessee. The assessing officer vide his comments dated 26-11-2002 reported to the Commissioner (Appeals) that as per the facts on record, the hypo-tax, housing norm and auto norm have actually been reduced from the salary of expatriate employee under the tax equalization policy. It was also pointed out that since the above reduction finds mention in the pay slips issued to the expatriate employee, the TDS officer has wrongly concluded that these were actually disbursed to the employee and the assessing officer reported to the Commissioner (Appeals) that it appears to be a mistake. The Commissioner (Appeals) vide order dated 6-5-2003 accepted the appeal of the assessee and held that the company, namely, Whirlpool India Holdings Ltd., was not a defaulter in terms of sections 201 and 201(1A) of the Income Tax Act, 1961 with reference to the housing norm and auto norm. In other words, the opinion of Whirlpool India Holdings Ltd. that hypo-tax, housing norm and auto norm are actually reductions from the salary and, therefore, do not constitute part of the salary has been confirmed by the Commissioner (Appeals). I have been informed by the learned Counsel for the assessee that no appeal has been filed against the said decision of the Commissioner (Appeals) and that the order has become final. Therefore, the controversy at this stage appears to be unnecessary insofar as the department is not at liberty to take a different view in the case of the company and in the case of the assessee without assigning any reason. The principle is applicable in this case insofar as the revenue has accepted the view taken by the Commissioner (Appeals) in the case of the employer-company and, therefore,.,it would not be open to the department to take a different view in the case of the employee on the same issue. The observations of the Hon'ble Supreme Court in the case of Berger Paints India Ltd. v. CIT (2004) 266 ITR 99, may be relevant. These are as under :

> "If the revenue has not challenged the correctness of the law laid down by the High Court and has accepted it in the case of one assessee, then it is not open to the revenue to challenge its correotness in the case of other assessees, without just cause."

14. Another factor for deciding the issue is the treatment of perks in the form of residential accommodation and car facility in India. The assessing officer having held that deduction of pay on account of housing norm and auto norm was part of salary received for the purposes of taxation in India further held that the residential accommodation and car facility have been provided to the assessee at concessional rates. The assessing officer has accordingly calculated the perquisite value on the same basis. The question that requires to be considered is as to whether the perquisite value is to be determined on the basis of free residential accommodation and free car facilities or on the basis of such facilities having been provided at a concessional rate. It has been pointed out earlier that in this case, the value of perquisites determined by the assessing officer in respect of the residential accommodation and car facility provided to the assessee is less than the value disclosed by the assessee. So, however, the determination of the perquisite value of the aforementioned facilities is dependent on the treatment given to the reduction on account of housing norm and auto

norm. As per the terms of the contract of employment, copy of which is on record, it is abundantly clear that assessee is entitled to free residential accommodation and free car while posted in India. The provision of free residential accommodation and free car is with the condition of reduction in salary on the basis of norms of the company. The effect of the terms of the agreement are that assessee is entitled to free residential accommodation and free car facility in India to which he was not entitled to in USA. Since he was not entitled to free residential accommodation and free car facility had he worked in USA as per company's policy, it would entail the deduction in his salary to be calculated on the basis of norms of the company. Though the agreement provides for estimated reduction by US Dollars 16000, however, as per the certificate, more reduction has been made. For the free car facility, a reduction of salary is US Dollars 3000. As per the above terms and conditions of agreement of employment after the reduction of salary, assessee has been ensured free residential accommodation and free car facility in India. In my considered view, the fixation of salary at US Dollars 15000 per month to the assessee was for the purposes of employment in USA and the terms and conditions of the agreement clearly stipulates that the salary receivable by the assessee in India would be after reduction of hypo-tax, housing norm and auto norm. The agreement does not stipulate that assessee would be entitled to residential accommodation and car in India at concessional rates. On the other hand, the agreement makes it abundantly clear that the assessee would be entitled to rent-free accommodation and free car facility while in India. Therefore, the application of the rules for determination of the perquisite value on the basis of residential accommodation and car provided at concessional rates is not warranted. Rule 3(a) of the Income Tax Rules as applicable for the relevant assessment year provides for computation of perquisite value in respect of rentfree accommodation. On the other hand, rule 3(b), which has been applied by the assessing officer, provides as under :-

> '3. For the purpose of computing the income chargeable under the head "Salaries", the value of perquisites provided by the employer directly or indirectly to the assessee (hereinafter referred to as employee) or to any member of his household by reason of his employment shall be determined in accordance with the following sub-rules, namely:-
>
> (b) The value of residential accommodation provided at a concessional rent shall be determined as the sum by which the value computed in accordance with clause (a), as if the accommodation were provided free of rent, exceeds the rent actually payable by the assessee for the period of his occupation during the relevant previous year.' As a result of this decision, in my view, the assessing officer will be required to re-determine the perquisite value of free residential accommodation and free car facility provided to the assessee. The application of rule 3(c)(ii) and rule 3 by the assessing officer by treating the provision of residential accommodation and car facility as having been provided to the assessee at concessional rates is not justified insofar as in the terms of employment it has been clearly provided by the employer-company to the assessee that the latter would be entitled to free residential accommodation and free car facility in India. Since the assessee was not entitled to the free, residential accommodation and free car facility while working in USA, the deduction in salary has been provided. It is also pertinent to mention that the

> deduction on account of free residential accommodation is more than Rs. 10 lakhs as against the actual rent paid of Rs. 7,80,000. I am, therefore, of the considered view that the assessing officer was not justified in treating the deductions made from salary on account of housing norm and auto norm as part of the salary. I, therefore, agree with the view expressed by the learned Accountant Member in regard to this issue.

15. Now, I take up the second point of dispute involved in this appeal. The point of difference may be stated as under :

> "Whether a profit or benefit earned/acquired by the assessee on accotint of exercise of stock option, earlier granted, in terms of his employment on subsequent dates and its sale is a perquisite as per provisions of section 17(2) of the Indian Income Tax Act or capital gain ?"

The relevant facts relating to this issue are that during the course of assessment proceedings it was observed by the assessing officer that as per the employment contract of the assessee with Whirlpool Corporation, USA, the assessee was entitled to be nominated for stock options. The assessing officer, accordingly, made inquiries about the exercise of any stock option by the assessee in the previous year relevant to assessment year 1998-99. In response, the following information was furnished by the assessee in regard to grant, exercise and sale of stock options :

> S. No. Date of Grant Grant/Exer-cise Price in US $ Basis of Grant Exercise Price No. of stock options Date of exercise & sale Price at which sold in US $
>
> 1.

21-6-1994 53.38 Average of high & low price at New York Stock Exchange on the date of grant 11-3-1998

2. 15-8-1995 55.81

-do-

-do-

3. 18-6-1996 50.44

-do-

-do-

68.3125

4. 18-6-1996 40.44

-do-

12-3-1998 68.4375 From the details furnished by the assessee it was observed by the assessing officer that there was a difference between the sale price of shares and the purchase price, and that the assessee had not disclosed any perquisite value in respect of the gains on exercise of stock options. When asked to explain as to why the benefit derived by the assessee by exercise of stock option may not be assessed as a perquisite within the meaning of section 15 read with section 17 of the Act, it was claimed that the right to purchase the shares was granted to the assessee at the average of high and low price at New York Stock Exchange on the date of grant and, therefore, there was no difference between the grant price and the market price. Accordingly, there was no benefit derived by the assessee by the grant of stock options. It was pointed out that the profit derived by the assessee on the sale of shares granted to the assessee was on the sale of capital asset resulting in capital gains which in the case of the assessee was not taxable in India. The assessing officer rejected the claim of the assessee with reference to the provisions of sections 15, 17(1) and 17(2) of the Income Tax Act, 1961. The assessing officer referred to the decision of Bombay High Court in the case of CIT v. D.R. Phatak (1975) 99 ITR 14, and the decision of the, Authority for Advance Rulings in P. No. 15 of 1998, In re, (1999) 235 ITR 565, and held that the benefit flowing from the employment contract was a perquisite within the meaning of section 17(2)(iii) and taxable under the Act. The assessing officer further held that the value of perquisite was ascertainable only on the date the option was actually exercised by the assessee and since in this case the date of exercise of the option and the date of sale of shares coincided, the profit derived on the sale of shares was liable to tax. The assessing officer worked out the difference at Rs. 39,79,814 which was brought to tax.

16. On appeal, the Commissioner (Appeals) upheld the view of the assessing officer with particular reference to the Circular No. 710 of the CBDT and the decision of the Authority for Advance Rulings in P. No. 15 of 1998's case (supra).

17. On further appeal before the Tribunal, the learned Judicial Member upheld the view of the revenue authorities by relying upon the decision of the Authority for Advance Rulings in P. No. 15 of 1998 case (supra). It has been pointed out by the learned Judicial Member that the issue involved in this appeal was similar to the issue decided by the Authority For Advance Rulings in P. No. 15 of 1998s case (supra) and, therefore, the difference between the market price on the date of exercise of option and the price paid by the assessee was chargeable to tax. It has been held by the Learned Judicial Member that the assessee had acquired the shares in the year under appeal at concessional rate as a result of which a pecuniary benefit accrued to the assessee in the form of perquisite which is taxable under the head 'salary' under section 17(2)(iii) of the Income Tax Act, 1961.

18. The Learned Accountant Member has differed with the Learned Judicial Member mainly on the ground that the issue was covered by the decision of the House of Lords in the case of A bbot v. Philbin (Inspector of Taxes) (1962) 44 ITR 144, wherein it was held that taxable perk results at the time of grant and acceptance of the offer and not at the time the shares are acquired on exercise of the option accepted earlier. The Learned Accountant Member has expressed the view in para 31 of

his order on the ground that there was no question before the Advance Ruling Authority as to whether any part of the consideration received on sale of shares could be taken to fall within the head 'capital gains' and not 'salary'. The Learned Accountant Member has further held that in this case the difference between the cost at which the assessee has acquired the shares and the sale price is liable to capital gains tax.

19. Before me, it hardly needs to be mentioned that the Learned Counsel for the assessee sought to support the view expressed by the Learned Accountant Member and the Learned Departmental Representative, on the other hand, sought to support the view expressed by the Learned Judicial Member in regard to this issue.

20. I have given my thoughtful consideration to the rival contentions. The assessee derives income from salary and it is not disputed that it is by reason of his employment with Whirlpool Corporation, USA that the assessee is entitled to the stock options scheme. All employees of Whirlpool Corporation, USA are not entitled to stock options but the company through its human resources department provides the list of employees who are eligible to the grant of stock options from time to time. It is not in dispute that assessee was eligible to the stock options which were granted in the years 1994, 1995 and 1996. It will be relevant to refer to the scheme of stock options copy whereof is placed on record. As per the said scheme, the shares are granted to the selected employees as an incentive to promote continuity of management and increased incentive and personal interest in the welfare of the company. The plan objectives of the scheme are as under :-

> "Whirlpool Corporation shareholders and the Board of Directors adopted in 1989, 1996 and 1998 Omnibus Stock and Incentive Plans (the "Plans") to enable the Company to attract and retain superior talent and to link the interests of participating employees with the interests of the company's shareholders. It is the intent of the Plans to promote continuity of management and increased incentive and personal interest in the welfare of the company by those who are responsible for shaping and carrying out the long-range plans of the Company and securing its continued growth and financial success.
>
> To encourage such employees to secure or increase, on reasonable terms, their stock ownership in the company, the Board of Directors may, from time to time, award options to purchase shares of the company's stock. The exercise and retention of stock options is a way for you to share in the company's future growth. There are various methods to achieve stock ownership through the Plans."

The stock options as per the scheme are described in the scheme to represent the right to purchase the companying common stock at a future time at a price set at the time the option is granted. Option price is set at the time the Human Resources Committee approves the grant and is the average of the high and low market price for the day. As per the scheme, the value of stock option is described as under :

> "The company's stock options can be used as a valuable tool to build an estate either through direct purchase at exercise or through a process termed "swapping", where currently owned stock can be turned into the company to pay for option exercises. Because there are so many variables that may reflect your personal status, we encourage you to consult a financial planner or stock broker to review your personal financial strategies and how stock options may best fit into those strategies."

The methods of exercise options have also been given as under:-

> "To exercise an option means to buy a share of stock. There are various methods to achieve stock ownership through the Plan; payment with a personal check, by a wire transfer, a bank or broker loan, use of presently owned company common stock to exchange or "swap" for additional shares, or a short-term loan.
>
> Vested options may be exercised at any time by contacting the Stock Option Administrator at 800-446-2574, ext. 3973, or 616-923-3973. The option exercise cannot be processed until Whirlpool receives both payment and a completed exercise form. You may be required to pay taxes in addition to the option price, depending on the country you reside in. The Stock Option Administrator will calculate the amount of taxes due in addition to the option made. The exercise form may be faxed to the Administrator."

As is evident from the scheme of stock options, as indicated above, there are three stages for acquisition of the stock options - One is the eligibility, second is the grant of option and the third is the exercise of the option. Once the option is exercised by an employee, he acquires the shares at a predetermined price. There is a fourth stage in the scheme of stock option i.e. the sale of shares, which according to my understanding of the scheme, is not compulsory. The question that is involved in this appeal is the stage at which the benefit derived by the assessee by the stock option is taxable under the provisions of the Income Tax Act, 1961. As already pointed out, the Learned Accountant Member has referred to the decision of the House of Lords in the case of Abbott (supra), where. a similar issue had been decided by majority opinion in favour of the taxpayer. It will be relevant to point out that Lord Keith (of Avonholm) and Lord Denning had given a dissenting opinion in the aforementioned decision by the House of Lords, which is quoted hereunder :-

> "An option is not itself a perquisite or profit. It is on the exercise of the option that the benefit accrues and if capable of being valued in terms of money is assessable to tax."

This decision by the House of Lords have been taken notice of by the Authority for Advance Rulings in P. No. 15 of 1998 case (supra) wherein it has been held that the value of the benefit derived by the assessee at the time of exercise of stock option is liable to tax under section 17(2)(iii) of the Act in the year of excise of the option. The issue before the Authority for Advance Rulings was as to whether the benefit received by the employees of Indian company by exercise of option to purchase shares of the parents foreign company constitutes additional remuneration and perquisite taxable as income

from salary. The Hon'ble Authority for Advance Rulings held that the gain made by an employee after exercise of the stock option is taxable as salary. It has further been held that a foreign company selling its shares at concessional rate to the employees of its Indian subsidiary has to deduct tax at source under section 192 since the gain made by the employee after exercising the option would be taxable as salary. The Hon'ble Authority for Advance Rulings has taken the conscious decision on the basis of provisions of section 17(2)(iii) of the Act. The Learned Accountant Member has preferred to rely on the decision of the House of Lords in the case of Abbott (supra) and has not followed the decision of the Authority for Advance Rulings in P. No. 15 of 1998's case (supra) on the ground that the issue involved in this appeal was not before the said authority. In my considered view, as pointed out earlier, the issue involved in this appeal was before the Authority for Advance Rulings in P. No. 15 of 1998's case (supra), and a conscious decision has been taken to hold that the value of the benefit granted to the assessee by way of stock option is a valuable perquisite assessable with reference to exercise of the option on the basis of the difference in the market price on the said date with the price paid by the employee. In my considered view, the decision of the House of Lords though deserves utmost respect yet when there is a decision of Authority for Advance Rulings in P. No. 15 of 1998's case (supra), directly in respect of section 17(2)(iii) of the Income Tax Act, 1961, and even if one were to choose between the two decisions, the decision of the Authority for Advance Rulings shall have to be preferred to the decision of the House of Lords. Moreover, the provisions of the Income Tax Act, 1961 are not pari materia with those of provisions of United Kingdom. In any case, as pointed out earlier, it is not a matter of choice between the decision of the House of Lords and the decision of Authority for Advance Rulings insofar as the provisions of section 17(2)(iii) of the Income Tax Act, 1961 was not the subject-matter of decision before the House of Lords. On the contrary, the Hon'ble Authority for Advance Rulings has decided the issue relating to the taxability of the benefit derived by an employee in respect of the stock options on the basis of provisions of section 17(2)(iii) and, therefore, in my considered view, the decision of the Authority for Advance Rulings is required to be followed in preference to the decision of the House of Lords.

21. It is also pertinent to mention that the Finance Act, 1999 had inserted section 17(2)(iiia) to bring clarity about the taxability about the benefits arising to an employee as a result of allotment of shares under the Employees Stock Option Plan. The said section 17(2)(iiia) and Explanation below section 17(2)(iiia) was deleted by the Finance Act, 2000 with effect from 1-4-2001. There is an explanatory note by the CBDT vide Circular No. 794, dated 9-8-2000 reported in 245 ITR (Statutes) 21 in regard to the omission of section 17(2)(iiia) and insertion of proviso to section 17(2)(iii) as under :-

> "19. Taxation of securities received under Employees Stock Option Plan:-
>
> 19.1 The Finance Act, 1999, inserted certain provisions in the Act to bring clarity about the taxability of benefits arising to an employee as a result of allotment of shares under Employees Stock Option Plan. The existing provisions provide that the difference between market price on the date of exercise of the option and the price paid by the employee for acquiring the shares will be regarded as perquisites and the difference between the fair market value on the date of exercise of option and the actual sale price in the event of transfer of shares by the employee shall be regarded

as capital gains. (Emphasis supplied).

19.2 The Act makes a departure and provides that no perquisite shall be charged to tax in the hands of the employee in respect of benefits derived as a result of allotment of shares/debentures or warrants directly or indirectly under the employees stock option plan or scheme. This is sought to be done by deleting section 17(2)(iiia) and providing an Explanation below section 17(2)(iii). Sub-section (2B) in section 49 inserted by the Finance Act, 1999, has also been deleted. Under the amended provisions, such shares will only be subjected to capital gains tax at the time of sale by the employee. The difference between the consideration and the cost of acquisition will be regarded as the. amount of capital gains under normal provisions of law. However, the new provisions shall be applicable only in respect of options exercised or allotments made after 31-3-2000. The taxability of shares in respect of which option has been exercised by the employee prior to 31-3-2000, shall continue to be governed by the old provisions."

The above explanatory notes make it abundantly clear that the insertion of section 17(2)(iiia) by the Finance Act, 1999 was to bring clarity about the taxability of the benefits arising to an employee as a result of allotment of shares and, therefore, the insertion was clarificatory in nature. It has also been made abundantly clear that the omission of section 17(2)(iiia) will be applicable only in respect of options exercised or allotments made after 31-3-2000. In other words, the amendment made in section 17 does not go in favour of the assessee but the intention of the Legislature as explained by the CBDT is to the contrary. The intention of the Legislature not to tax the benefit with effect from 1-4-2000 being clear, such benefits are taxable as having accrued to any salaried employee before 1-4-2000. The very fact that section 17(2)(iiia) was inserted to bring clarity regarding the taxation of stock options also supports the view expressed by the Hon'ble Authority for Advance Rulings that the benefit accruing to the salaried employee on the date of exercise of the stock option was assessable to tax as a perquisite under section 17(2)(iii). Section 17(2)(iii) may be quoted hereunder for the sake of ready reference :

'17. For the purposes of sections 15 and 16 and of this section-

(1) 'Salary' includes-

(1) to (viii)** (2) "perquisite" includes-

(i) & (ii)**

(iii) the value of any benefit or amenity granted or provided free of cost or at concessional rate in any of the following cases-

(a) by a company to an employee who is a director thereof;

(b) by a company to an employee being a person who has a substantial interest in the company;

(c) by any employer (including a company) to an employee to whom the provisions of paragraphs (a) and (b) of this sub-clause do not apply and whose income under the head 'Salaries' (whether due from, or paid or allowed by, one or more employers), exclusive of the value of all benefits or amenities not provided for by way of monetary payment, exceeds fifty thousand rupees.

With effect from 1-4-2001 (to be ignored for the year under appeal):

Provided that nothing contained in this sub-clause shall apply to the value of any benefit provided by a company free of cost or at a concessional rate to its employees by way of allotment of shares, debentures or warrants directly or indirectly under any Employees 'Stock Option Plan or Scheme of the company offered to such employees in accordance with the guidelines issued in this behalf by the Central Government.'

22. It is pertinent to mention that stock options have been granted to the employees to derive benefit with the sole purpose of promoting continuity of management and increased incentive and personal interest in the welfare of the company. Section 17(2)(iii) brings the benefit derived by the employee within the ambit of perquisites taxable as income from salary. As per the scheme of stock options, the assessee is given the right to purchase stocks at pre-determined price. At the time of grant of the option, there is no benefit derived by the assessee insofar as the price fixed for the grant of shares is the average of the market price (high and low) for the day on the date of grant of the option. Therefore, no benefit in monetary terms is derived by the assessee on the date of grant of option. The employee has been given the right to exercise the option after one year and two years period but not exceeding ten years. When the assessee exercises the option, he pays the consideration for the acquisition of shares to the company at the price fixed at the time of the grant. In my view, this is the stage at which the benefit is derived by the assessee by way of difference in the pre-determined price and the market price. When the market price is higher and the assessee acquires the shares from the employer by reason of the terms of employment at a lesser value, the benefit given to the employee is by reason of his employment and such benefit is liable to tax under section 17(2)(iii) up to 31-3-2000. It may be pertinent to mention that assessee has the option of purchasing the shares after the expiry of one year from the date of grant. The assessee may acquire the shares at a particular time and may hold the shares in order to derive more benefits as a result of an appreciation of the value in the market. If the employee after exercising the option of purchasing the shares holds the same for a particular period, the gain on the sale of shares on subsequent dates will result in capital gain (difference between the sale price and price on the date of exercise of the option). The benefit accruing to the assessee on the date of exercise of the option would be taxed under section 17(2)(iii). (The difference between the price on the date of exercise of the option and the pre-determined price). The confusion that appears to be created in this case is that the date of exercise of the option and the date of sale is same and there is no difference between the price prevalent at the time of exercise of the option and the sale of shares. Therefore, there is no capital gain that accrues to the assessee on the sale of shares allotted to the assessee. The gain derived by

the assessee by exercise of option and not by the sale of shares is assessable as perquisite within the meaning of section 17(2)(iii).

23. A question which appears to be pertinent may arise as to with the omission of section 17(2)(iiia) with effect from 1-4-2001, the old provisions of the Act are restored and, therefore, if the interpretation of provisions of section 17(2)(iii) as advanced by the revenue is accepted, that would be against the intention of the Legislature insofar as the profits arising as a result of stock options are not intended to be taxed as a perquisite with effect from 1-4-2001. It is also the claim of the assessee in written submissions filed before the Tribunal that section 17(2)(iiia) having been incorporated by the Finance Act, 1999 with effect from 1-4-2000 and the same having been deleted by the Finance Act, 2000 with effect from 1-4-2001, the difference between the price at the time of exercise of the option and the grant price of shares are taxable only in the assessment year 2000-01 and not in earlier years. This contention of the assessee is not well-founded. Section 17(2)(iiia) was inserted by the Finance Act, 1999 which reads as under :

> '17(2) "Perquisite" includes-
>
> (i) the value of rent-free accommodation provided to the assesee by his employer;
>
> (ii) the value of any concession in the matter of rent respecting any accommodation provided to the assessee by his employer;
>
> (iii) the value of any benefit or amenity granted or provided free of cost or at concessional rate in any of the following cases-
>
> (a) by a company to an employee who is a director thereof;
>
> (b) by a company to an employee being a person who has a substantial interest in the company;
>
> (c) by any employer (including a company) to an employee to whom the provisions of paragraphs (a) and (b) of this sub-clause do not apply and whose income under the head "Salaries' (whether due from, or paid or allowed by, one or more employers), exclusive of the value of all benefits of amenities not provided for by way of monetary payment, exceeds fifty thousand rupees;

Explanation.-For the removal of doubts, it is hereby declared that the use of any vehicle provided by a company or an employer for journey by the assessee from the residence to his office or other place of work, or from such office or place to his residence, shall not be regarded as a benefit or amenity granted or provided to him free of cost or at concessional rate for the purposes of this sub-clause.

(iiia) the value of any specified security allotted or transferred, directly or indirectly, by any person free of cost or at concessional rate, to an individual who is or has been in employment of that person:

Provided that in a case where allotment or transfer of specified securities is made in pursuance of an option exercised by an individual, the value of the specified securities shall be taxable in the previous year in which such option is exercised by such individual.

Explanation.-For the purposes of this clause,-

(a) "cost" means the amount actually paid for acquiring specified securities and where no money has been paid, the cost shall be taken as nil,

(b) "specified security" means the securities as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and includes employees' stock option and sweat equity shares;

(c) "sweat equity shares" means equity shares issued by a company to its employees or directors at a discount or for consideration other than cash for providing know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called; and

(d) "value" means the difference between the fair market value and the cost for acquiring specified securities;' This provision was deleted by the Finance Act, 2000 with effect from 1-4-2001. It may appear that the law relating to taxability of stock option was incorporated only with effect from 1-4-2000 by insertion of section 17(2)(iiia). I have earlier quoted the explanatory notes of the CBDT to clarify that the section 17(2)(iii) was incorporated to bring clarity in the provisions relating to the taxability of stock option benefits. Moreover, a proviso has been added to section 17(2)(iii) with the omission of section 17(2)(iiia). If stock option were not taxable under section 17(2)(iii), there would have been no necessity of inserting a proviso to section 17(2)(iii) when the Legislature intended to exclude the same from the purview of taxation. The said proviso reads as under :

"Provided that nothing contained in this sub-clause shall apply to the value of any benefit provided by a company free of cost or at a concessional rate to its employees by way of allotment of shares, debentures or warrants directly or indirectly under any Employees 'Stock Option Plan or Scheme of the company offered to such employees in accordance with the guidelines issued in this behalf by the Central Government."

Thus the intention of the Legislature to grant exemption in respect of the benefit derived as a result of stock options provided by the company to its employees is manifestly clear to be applicable from 1-4-2001 i.e., the date from which the proviso to section 17(2)(iii) has been inserted. As pointed out earlier, section 17(2)(iiia) was inserted for the sake of clarity and therefore, with its omission, the taxability of stock option benefit did come out of the taxable net. That is why there was necessity of incorporating a proviso to section 17(2)(iii) to give effect to the Legislature intent of granting exemption in respect of such benefits. For the above stated reasons, I, therefore, agree with the view

expressed by the Learned Judicial Member that the revenue was justified in assessing the difference between the market price on the date of exercise of option and the price paid by the assessee for the acquisition of shares as a benefit assessable under the provisions of section 17(2)(iii).

24. In the final analysis, whereas I agree with the learned Accountant Member in regard to the first point of difference of option, I agree with the learned Judicial Member in regard to the second point of difference of option. I render my option as a Third Member on both these points of difference as under :

> 1st point of difference :
>
> The deduction on account of housing norm and auto norm made by the employer from the base pay of the assessee in lieu of free housing and transport facility provided in India as per the terms of employment is in fact are duction in the pay and, therefore, not liable to tax in India. The said reduction from the base pay a will also not from the base for determination of the perquisites.
>
> 2nd point of difference :
>
> That the profit/benefit (difference between the price of shares at the time of exercise of the option and the pre-determined price) derived by the assessee on account of exercise of stock options granted to the assessee in terms of his employment is liable to tax (as perquisite under section 17(1)(iii), of the Income Tax Act, 1961) and that there was no capital gain derived by the assessee on the sale of shares as the sale price and the price on the date of exercise of the option was same.

25. The matter may now be placed before the Regular Bench for passing an order in accordance with the majority opinion.