IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI N. BARATHVAJA SANKAR, VICE PRESIDENT
AND SHRI N.V. VASUDEVAN, JUDICIAL MEMBER

ITA Nos.1390 & 1391/Bang/2012
Assessment years : 2007-08 & 2008-09

The Assistant Commissioner of Income Tax (TDS), Circle 16(2), Bangalore.	Vs.	M/s. Infosys BPO, Electronic City, Hosur Road, Bangalore – 560 076. **PAN: AACCP 4478N**
APPELLANT		RESPONDENT

Appellant by	:	Shri Etwa Munda, CIT-III(DR)
Respondent by	:	Shri H. Padamchand Khincha, C.A.

Date of hearing	:	21.06.2013
Date of Pronouncement	:	28.06.2013

O R D E R

Per Bench

These are appeals by the Revenue against the common order dated 23.8.2012 of CIT(A)-II, Bangalore, relating to A.Y. 07-08 & 08-09.

2. The Assessee is a company. It is engaged in the "Business of "Process Outsourcing" (BPO). A survey u/s.133A of the Income Tax Act, 1961 (the "Act") was conducted at the business premises of the Assessee.

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The salary structure of the employees of the Assessee was examined by the Officers carrying out Survey in the light of the obligations of the Assessee as employer to deduct tax at source at the time of making payment of salaries to its employees.

3. Section 192(1) of the Act casts an obligation on the part of person responsible for paying income chargeable under the head “salaries” to deduct tax at source, at the time of payment. Section 192 (1) of the Act reads as under:-

> “192. Salary.-(1) Any person responsible for paying any income chargeable under the head "Salaries" shall, at the time of payment, deduct income-tax on the amount payable at the average rate of income-tax computed on the basis of the rates in force for the financial year in which the payment is made on the estimated income of the assessee under this head for that financial year.”

4. A perusal of section 192 of the Act clearly indicates that the person responsible for paying any income chargeable under the head "Salaries" shall be liable to deduct income-tax at source at the time of payment of such salary. The items of income that are chargeable to tax under the head income from "Salaries" is laid down in Sec.15 to 17 of the Act. Sec. 15 of the Act provides that income described therein shall be chargeable to tax under the head "Salaries". The income described therein consists of salary from the employer or former employer falling in three categories. Sec.16 of the Act contains deductions to be made from salaries. Section 17 of the Act contains an inclusive definition of "salary" for purposes of Section 15,

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Section 16 and Section 17 of the Act which, along with other items, includes "perquisite" and these terms are also separately defined therein. Sec.17 of the Act, which defines "Salary", "perquisite" and "profits in lieu of salary" in so far as it is relevant to the present appeal reads thus:

> "For the purposes of sections 15 and 16 and of this section -
> (1) "Salary" includes-
>
> (i) to (iii)……
>
> (iv) any fees, commissions, perquisites or profits in lieu of or in addition to any salary or wages;
>
> (v) to (viii)…….
>
> (2) "perquisite" includes-
>
> (i) to (ii)……
>
> (iii) …..
>
> (iv) any sum paid by the employer in respect of any obligation which but for such payment, would have been payable by the assessee; and
>
> (v) to (vii)……
>
> Provided that nothing in this clause shall apply to,-
>
> (i) to (iv)…..
>
> (v) any sum paid by the employer in respect of any expenditure actually incurred by the employee on his medical treatment or treatment of any member of his family other than the treatment referred to in clauses (i) and (ii); so, however, that such sum does not exceed fifteen thousand rupees in the previous year.

(vi)…."

5. The dispute in these appeals are regarding the obligation of the Assessee to deduct tax at source on "Leave Travel Concession (LTC)" and "Medical reimbursement". It is not in dispute that the amounts paid as LTC and Medical Reimbursements are in the nature of perquisite falling with the definition of perquisites as given in sec.17(2) (iv) and (v) of the Act, respectively.

6. As far as Medical reimbursement is concerned, if the amount paid by an employer to the employee for medical treatment of the employee or his family is Rs.15,000 or less per annum, then the same will not be perquisite as laid down in Sec.17(2)(v) of the Act and therefore need not be considered as part of "salary" for the purpose of deducting tax at source at the time of payment by the employer to the employee. In other words, expenditure actually incurred on medical treatment to the extent of Rs.15,000/- is exempt and the remaining is taxable.

7. As far as "Leave Travel Concession is concerned, Section 10(5) of the Act lays down that any leave travel concession granted to an employee by the employer to the following extent shall not be included in the total income.

> "In the case of an individual, the value of any travel concession or assistance received by, or due to, him,—

(a) from his employer for himself and his family, in connection with his proceeding on leave to any place in India;

(b) from his employer or former employer for himself and his family, in connection with his proceeding to any place in India after retirement from service or after the termination of his service,

subject to such conditions as may be prescribed (including conditions as to number of journeys and the amount which shall be exempt per head) having regard to the travel concession or assistance granted to the employees of the Central Government;

Provided that the amount exempt under this clause shall in no case exceed the amount of expenses actually incurred for the purpose of such travel.

Explanation : For the purposes of this clause, "family", in relation to an individual, means—

(i) the spouse and children of the individual; and

(ii) the parents, brothers and sisters of the individual or any of them, wholly or mainly dependent on the individual;"

8. Rule 2B of the Income Tax Rules, 1962 (the 'Rules') lays down the conditions to be satisfied for the for the purpose of availing exemption under section 10(5) of the Act. It reads thus:

"(1) The amount exempted under clause (5) of section 10 in respect of the value of travel concession or assistance received by or due to the individual from his employer or former employer for himself and his family, in connection with his proceeding,—

(a) on leave to any place in India;

(b) to any place in India after retirement from service or after the termination of his service,

shall be the amount actually incurred on the performance of such travel subject to the following conditions, namely:—

(i) where the journey is performed on or after the 1st day of October, 1997, by air, an amount not exceeding the air economy fare of the National Carrier by the shortest route to the place of destination:

(ii) where places of origin of journey and destination are connected by rail and the journey is performed on or after the 1st day of October, 1997, by any mode of transport other than by air, an amount not exceeding the air-conditioned first class rail fare by the shortest route to the place of destination; and

(iii) where the places of origin of journey and destination or part thereof are not connected by rail and the journey is performed on or after the 1st day of October, 1997, between such places, the amount eligible for exemption shall be—

(A) where a recognised public transport system exists, an amount not exceeding the 1st class or deluxe class fare, as the case may be, on such transport by the shortest route to the place of destination; and

(B) where no recognised public transport system exists, an amount equivalent to the air-conditioned first class rail fare, for the distance of the journey by the shortest route, as if the journey had been performed by rail.

(2) The exemption referred to in sub-rule (1) shall be available to an individual in respect of two journeys performed in a block of four calendar years commencing from the calendar year 1986 :

Provided that nothing contained in this sub-rule shall apply to the benefit already availed of by the assessee in respect of any number of journeys performed before the 1st day of April, 1989 except to the extent that the journey or journeys so performed shall be taken into account for computing the limit of two journeys specified in this sub-rule.

(3) Where such travel concession or assistance is not availed of by the individual during any block of four calendar years, an amount in respect of the value of the travel concession or

> assistance, if any, first availed of by the individual during first calendar year of the immediately succeeding block of four calendar years shall be eligible for exemption.
>
> (4) The exemption referred to in sub-rule (1) shall not be available to more than two surviving children of an individual after 1st October, 1998 :
>
> Provided that this sub-rule shall not apply in respect of children born before 1st October, 1998, and also in case of multiple births after one child.
>
> Explanation : The amount in respect of the value of the travel concession or assistance referred to in this sub-rule shall not be taken into account in determining the eligibility of the amount in respect of the value of the travel concession or assistance in relation to the number of journeys under sub-rule (2)."

9. To the extent LTC is exempt as laid down in sec.10(15) of the Act, the same need not be included as income under the head "Salary" for the purpose of deducting tax at source.

10. The Assessee in the present case recruits employees under a contract of employment. The contract of employment details the consideration for employment. The total 'cost to company' or (CTC) as a result of the employment is agreed upon. CTC is the expenditure borne by the assessee in respect of each employee. Having determined the CTC, the employee is permitted to choose what would be the various components of his salary. For this purpose, a basket of allowances is made available for the employee to choose from. The maximum allowance for each such allowance is fixed by the Company.

11. The payments to employees of the assessee include a component towards medical expenditure. Towards this, employees are paid a sum every month. This sum, when paid is considered as part of taxable salary. If the employee submits proof of having incurred the expenditure towards medical treatment, the sum spent towards medical treatment or Rs. 15,000/-, whichever is less, is excluded from salary. The exclusion is on the basis of the proviso (iv) to section 17(2) of the Act. If the amount spent towards medical treatment is in excess of Rs. 15,000/- the excess (beyond Rs. 15,000) is considered not considered as a deduction. Effectively, the excess amount spent continues to remain taxable. If no proof of having incurred the expenditure towards the medical treatment is produced by the employee, the entire sum paid is considered as a perquisite. Tax under section 192 of the Act is deducted accordingly.

12. As far as LTC is concerned, the payment of salary by the Assessee to its employees every month includes a component towards leave travel. If the employee submits proof regarding utilization of the component towards leave travel and subject to the conditions laid down in Sec.10(5) of the Act read with Rule 2B of the Rules, the Assessee does not consider the leave travel to the extent exempt as salary for the purpose of deduction of tax at source.

13. **Annexure-I** to this order is a statement giving month wise details of amount paid towards medical expenditure and leave travel, amount for

which bills were submitted by the employees and the amount considered as "salary" for the purpose of deduction of tax at source.

14. The AO has in a very elaborate order running about 68 pages discussed various aspects and case laws relating to the relevant statutory provisions and ultimately concluded that the Assessee was an "Assessee in default" in respect of that portion of LTC and Medical Reimbursement paid to its employees which were considered as exempt and hence not treated as part of income under the head "Salaries" for the purpose of deducting tax at source. We have culled out the reasons for the AO to come to the above conclusion, which can be summarised as follows:

1. As far as LTC is concerned, Sec.10(5) of the Act refers to "Concession or Assistance" for leave travel. According to the AO, the Assessee was including in payments made every month a component towards leave travel. In other words, the payment was made irrespective of the status of the utilisation for the purpose of leave travel, which is not in the nature of a reimbursement. The point of time at which the payment to qualify to be called LTC should be at the time of incurring of the expenditure by the employee or after such expenditure is incurred, by way of reimbursement. Since the Assessee was paying LTC as a component of salary every month, without the employee having incurred expenditure, the same had to be considered as salary disbursement which is sought to be set off against expenditure incurred for leave travel and exemption claimed u/s.10(5) of the Act.

2. As far as medical reimbursement is concerned, the AO was of the similar view that what is contemplated by proviso (iv) to Sec.17(2) of the Act was any sum paid by the employer in respect of any expenditure "actually incurred" by the employee on his medical treatment or treatment of any member of his family. Since the Assessee was paying medical reimbursement as a component of the

> monthly payment to the employee and later claiming that it was not perquisite to the extent of Rs.15,000, the same had to be considered as salary and not exempt perquisite. The reasoning is the same that the payment should not precede the actually incurring of the expenses and it should be only by way of reimbursement.

15. The AO accordingly considered the Assessee as an "Assessee in default" u/s.201(1) of the Act, in respect of the portion of exemption claimed in the statement annexed to the order towards LTC and Medical reimbursement for the both the AY 07-08 & 08-09. The AO also levied interest u/s.201(1A) of the Act, on tax not deducted, from the date on which tax ought to have been deducted till the date on which the tax not deducted is paid over to the credit of the Government.

16. On appeal by the Assessee, the CIT(A) cancelled the order of the AO treating the Assessee as an "Assessee in default" u/s.201(1) of the Act and also levying interest u/s.201(1A) of the Act, holding that amount paid even as reimbursement ought to be considered as perquisite. In coming to the above conclusion, the CIT(A) relied on the Circular of the CBDT, viz., Circular No.603 dated 6.6.1991, wherein the CBDT has opined that the value of the perquisite arising by way of payment or reimbursement by an employer of expenditure on medical treated will not be included in the taxable salary of the employee. The following were the relevant observations of the CIT(A):-

> "3.6 The fact remains that, whenever an amount is paid, where either the employer has not availed of actual travel or has availed

of the allowance over and above the allowable exemption in the financial year and, therefore, is disentitled to the benefit of exemption, tax has been deducted at source. No instance has been brought on record by the AO that the employer has disbursed the amount without deduction of tax within the financial year in cases where the benefit is not backed by bills or in excess of amount allowable under the I.T. Act. The only case of the AO is that the intention of employer is to disburse the said sum irrespective of whether an exemption will be allowed to an employee or not and, therefore, it is simply an allowance and not a 'concession' or 'assistance' as envisaged in the I.T. Act.

3.7 In my view, the basic requirements of the I.T. Act read with the relevant rules are met i.e.

i) No disbursement not backed by bills/proof is treated is not taxable.

ii) No disbursement in excess of I.T. Rules has been treated as exempt during the financial year.

iii) Any excess/shortfall in TDS deducted month to month has been made good by the employer at the end of the financial year as per section 192(3).

3.8 The interpretation of the AO is too narrow and technical and in terms of a welfare measure allowed to employees across the salaried strata cannot be the correct interpretation. The appellant, an employer of tens of thousands of employees, has stated that it is taking into account 'salary' in terms of 'cost to company' as is the norm in the private sector and this merely does not mean that it is an allowance and not a reimbursement. The said benefit would clearly fit into the meaning of 'assistance' in sum and substance. As can be seen from the submissions made by the appellant, care has been taken by the employer to see that there is no irregularity in making payments under the LTA Scheme. In my opinion, the AO was not justified in treating the appellant as an 'assessee-in-default'. Hence, the demand raised and interest charged u/s 201(1) and 201(1A) are uncalled for and they are, therefore, cancelled."

4. MEDICAL REIMBURSEMENT

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4.3 I have carefully considered the appellant's submissions and perused the AO's order. The employees are paid up to Rs.15,000/- per annum split into monthly disbursements. This amount is treated as exempt under the provisions of I.T.Act only if supported by bills. Wherever bills are not provided the amount is treated as a taxable salary and tax is deducted during the financial year end.

4.4 On the facts of the case, I find that:

a) No instance has been brought on record to suggest that, in the case of any employee, the benefit or allowance has been allowed without TDS during the financial year if it is not backed by actual expenditure.

b) In such a case, the benefit provided clearly fits into the ambit of the exemption provided in the proviso to section 17(2) which says:

"(v) any sum paid by the employer in respect of any expenditure actually incurred by the employee on his medical treatment or treatment of any member of his family other than the treatment referred to in clauses (1) and (ii); so, however, that such sum does not exceed *fifteen thousand rupees, in the previous year;"

[increased from 'ten thousand rupees' with effect from 1/4/1999]

c) The Board's Circular No.603 dated 6/6/1991 reads as follows:

CIRCULAR No.603 dated 6.6.1991 (CLARI.)

"Non-inclusion of value of perquisite arising from expenditure on medical treatment incurred by employee on himself or on his spouse, children, etc. in certain cases

In suppression of Circular No. 376 dt. 6th Jan., 1984, Circular No. 445 dt. 31st Dec., 1985, Circular No. 481 dt. 20th Feb., 1987 and all other instructions on the subject, the Board have decided that the value of the perquisite arising by way of **payment or reimbursement** by an employer of expenditure on medical treatment incurred by his employee on himself

or on his spouse, children or parents, including the provision of free medical treatment or treatment at a concessional rate, will not be included in the taxable salary of the employee in the following cases:

(i) Where the medical treatment is availed at hospitals, clinics, etc., maintained by the employer;

(ii) Where the medical treatment is availed at hospitals maintained by the Government or local authorities or hospitals approved for the purposes of the Central Government Health Schedule or Central Medical Scheme (a list of such hospitals furnished by the Ministry of Health and family welfare on 11th April, 1991 is annexed).

(iii) Where the expenditure is on medical insurance premia;

(iv) Where the medical treatment is availed of from any doctor outside the institutions/schemes mentioned in (i) to (iii) above, an expenditure of upto Rs. 10,000 in a year, in the aggregate; and

(v) Where the medical treatment is availed of in a hospital outside India and the expenditure is incurred for treatment (including on travel and stay abroad in connection with such treatment) as also on travel and stay abroad of one attendant, to the extent permitted by the Reserve Bank of India, subject to the condition that the amount qualifying for such tax exemption would not include expenditure incurred on travel in the case of employees whose gross total income, as computed under the IT Act without considering the amount **paid or reimbursed** for expenditure in connection with medical treatment abroad, exceeds Rs. 1,00,000.

2. The contents of this circular will be applicable in relation to the assessment year 1991-92 and the subsequent years"

d) Moreover, in the present case, the amount of Rs.15,000/- per employee per annum is too small for any other interpretation.

4.5 It is clear, therefore, that in effect there is no infringement of the tax provisions allowable to the employees by the employer appellant. Merely because the same is taken into account at the beginning of the year or at the time of deciding his/her salary, which itself is in terms of cost to company, it cannot be said that it ceases to be a perquisite and, therefore, not entitled to exemption u/s 17(2). Perquisite in any case also forms part of taxable salary. The employer has clarified that, wherever the said disbursement is not backed by bills, it is liable to TDS and this liability is not denied or infringed.

4.6 Therefore, in my view, the view of the AO is a very narrow and technical interpretation and in respect of a welfare measure to the employees across the salaried strata it cannot be the correct interpretation."

17. Aggrieved by the order of the CIT(A), the revenue is in appeal before the Tribunal. The following are the grounds of appeal raised by the revenue (which is common for both the A.Y.):-

"1) The CIT(A) has erred in not according the AO an opportunity of being heard as envisaged u/s 250(1) and 250(2) of the I.T.Act.

2) The CIT(A) has erred in holding that no instance has been brought on record that an employee was conferred the benefit without TDS if it is not backed by actual expenditure.

3) The CIT(A) has erred in not appreciating the fact that the nature of income is to be determined at its source.

4) The CIT(A) has erred in not appreciating the fact that the application of funds cannot determine the nature of income.

5) The CIT(A) has erred in not appreciating the fact that an exemption granted or the application of funds cannot determine a type of income which is to be determined at source.

6) The CIT(A) has erred in holding that the perquisite also being a taxable income could constitute a part of cost to the company.

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7) The CIT(A) has erred in holding that the order was based on narrow and technical interpretation in respect of a welfare measure.

8) The CIT(A) has erred in holding that a component of the salary paid on month to month basis could form part of salary which would be exempt under proviso to section 17(2).

9) The CIT(A) has erred in being guided by the quantum of exemption granted per employee rather than the entitlement as per law.

10) The CIT(A) has erred in holding that a component of the salary paid on month to month basis could form part of salary which would be exempt under section 10(5).

11) The CIT(A) has erred in accepting the contention that a subsequent event of travel could determine an exemption.

12) The CIT(A) has erred in holding that an amount paid irrespective of whether employee had availed travel or not would not have any bearing on the exemption accorded by the employer.

13) The CIT(A) has erred in not appreciating the fact that the employer has itself not considered these amounts as perquisite in the Form 12BA issued to the employees.

14) The CIT(A) has erred in not taking cognizance of the fact that an employer cannot consider a disbursement as a perquisite only for the purpose of exemption, and not for the purposes of Form 12BA.

15) The CIT(A) has erred in not considering the fact that every contention of the deductor has been addressed elaborately while the AO’s contentions and findings have not been reasoned against.

16) The CIT(A) has erred in passing an order which allows employees who enjoy unintended benefits as per the existing provisions of law.

17) The CIT(A) has erred in not considering the distinctions drawn in respect of the judicial decisions relied upon by the deductor.

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> 18) The CIT(A) has erred in not considering the fact that the AO has studied the Board's Circulars and their applicability as evident from the order passed.
>
> 19) The CIT(A) has erred in not considering the fact that such exempted income was not admitted by the employee on the basis of the Form 16 and 12BA issued.
>
> 20) The CIT(A) has erred in not considering the fact that the provisions of Sec.191 also are not been followed due to such issue of erroneous certificates in Form 16 and 12BA.
>
> 21) The CIT(A) has erred in not considering the term "actually incurred" in the proviso to Sec.17(2) of the I.T. Act.
>
> 22) For these and other grounds that may be urged during the course of appeal, the order of the AO may be restored."

18. The learned DR reiterated the stand of the revenue as reflected in the grounds of appeal and relied on the order of the AO.

19. The learned counsel for the Assessee reiterated the stand of the Assessee as put forth before AO and CIT(A) and relied on the order of the CIT(A).

20. We have considered the rival submissions. We shall first see the sequence of events that lead to the passing of the order u/s.201(1) and 201(1A) of the Act. There was a Survey u/s.133A of the Act at the business premises of the Assessee on 5.10.2010. Based on the findings in the course of survey show cause notice dated 3.2.2011 was issued by the AO. The contents of this show cause notice throws light on the exact grievance of the AO and therefore the same is being reproduced.

"To

The Principal Officer,
M/s Infosys BPO Ltd.,
Electronics City, Hosur Road,
Bangalore-560 100

Sir,

Sub: Show cause notice u/s 201(1) in your case F.Y 2006-07 to 2010-11 – reg.

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A survey u/s 133A of the Income-tax Act was conducted at the premises of M/s Infosys Technologies, Hosur Road, Bangalore on 05.10.2010 to verify the compliance of TDS provisions. Based on the findings, the salary structure of the employees of M/s Infosys BPO was also examined. Based on the same issues, certain information was called for from your company relating to the receipt of pay and other allowances by your employees. It was noticed that the employees were in receipt of pay and other allowances. It was explained that 40% of the pay constituted allowances, the break-up of which was as per the option exercised by the employee. It was explained that the basket of allowances could be changed at any point of time by the employee. Evidently a fixed amount was entered by the employee against each of the allowances irrespective of the fact as to whether such expenditure was incurred by him or not. Such allowances admittedly, would constitute part of taxable salary and the employee ought to have been subjected to provision of section 192 on this entire amount. However, it has been explained that any bills produced subsequently has been accepted to be a reimbursement and has been excluded from the purview of section 192. Verification of the returns of income filed by the employee as well as the TDS certificate issued by you do not quantify this to be taxable income resulting in taxes not being deducted at source nor being offered for taxation by the employee.

As per the provisions of Income-tax Act, any allowance forms part of salary u/s 17 and such a component of salary is liable for taxation. The provision of section 10(5) provides for the benefit of the value of any travel concession or assistance in connection with his proceeding on leave. The allowance provided

by a company is a fixed monetary benefit which an employee is entitled to irrespective of the fact as to whether any leave is sanctioned or not. Such an allowance forms part of salary and is not a benefit or reimbursement provided in addition to salary. Therefore exemption u/s 10(5) provided to LTA cannot be justified and the entire allowance is to be brought to tax.

Year	Allowance	Exemption
F.Y 2006-07	2381842.77	2381842.77
F.Y. 2007-08	4294568.00	4294,568.00
F.Y. 2008-09	691129.00	691129.00
F.Y 2009-10	4897131.00	4897131.00
F.Y 2010-11	691129.00	691129.00
TOTAL		1,29,55,799.77*

* Amount on which tax is to be deducted.

Further the company is extending the benefit of Medical allowance, which forms 25% of basket of allowance and allowed exemption u/s 17(2) of IT Act on medical bills submitted by your employees upto a maximum of Rs.15000/- as perquisite exempt u/s 17(2). The employees are in receipt of medical allowance u/s 17(1) of IT Act and out of which they have considered the medical bills presented by employees as exemption u/s 17(2). Since any amount received u/s 17(1) do not constitute for exemption u/s 17(2), the claim of the employees had to be disallowed. This would not come under the purview of medical reimbursement as per the terms and conditions laid down in the Act. It is proposed to bring these amounts also to tax."

21. A perusal of the show cause notice clearly shows that the fact that bills/evidence to substantiate incurring of expenditure on medical treatment up to Rs.15,000/- and the availing of the LTC by the employees and the fulfilment of the conditions contemplated by Sec.10(5) of the Act for availing exemption by the employees so availing LTC, have not been disputed by the AO. The grievance of the AO appears to be that 40% of the pay to the employees constitutes allowance and that the allowance so given every

month is not earmarked for any particular purpose but the employee was free to use the allowance in any manner and later claim that the allowance was used for LTC or medical reimbursement. Therefore, according to the AO, at the time of payment the allowances would constitute part of salary and therefore even the allowances should be considered as part of salary for the purpose of deduction of tax at source. In other words, according to the AO, LTC and Medical reimbursement should be paid at the time the expenditure is incurred or after the expenditure is incurred by way of reimbursement and not at an earlier point of time. If it is so paid, then, according to the AO, even though the payment would not form part of taxable salary of an employee, the employer has to deduct tax at source treating it as part of salary. In support of the stand taken by the AO, she relies on the expression "actually incurred" in proviso (iv) to Sec.17(2) which allows exemption of medical reimbursement up to Rs.15000/- to an Assessee. As far as LTC is concerned, the AO relies on the expression "value of travel concession or assistance received by an employee in connection with his proceeding, –

> (a) on leave to any place in India;
> (b) to any place in India after retirement from service or after the termination of his service,
>
> shall be the amount **"actually incurred"** on the performance of such travel", found in Sec.10(5) of the Act.

22. The Assessee in this regard, among other things, relied on CBDT Circular No.603 dated 6.6.1991 extracted in the order of the CIT(A). The

AO has however held that the said circular does not help the case of the Assessee for the following reason:-

> "6.2.2.2 The circular evidently makes it clear that payment or reimbursement of expenses actually incurred for medical treatment is alone exempted from the purview of taxation. The circular at no point even remotely suggest that an allowance could be granted which if adequately evidence with medical bills could be reduced from the taxable salary of an employee. In fact the Board Circular concisely puts across the provisions of the statute which have been articulated at length in this order to drive home the fact that no application of fund could determine the taxability or exemption of any income let alone salary. Therefore, the Circular is in fact in support of the view taken and doesn't lend any credence to the arguments of the deductor.
>
> 6.2.2.3 In the instant case, the leave travel allowance is disbursed to an employee irrespective of the fact as to whether:
>
> a) the employee has any intention to proceed on leave or not
>
> b) the employee has any intention to travel or not
>
> c) the employee has already availed the benefit in the previous calendar year or financial year
>
> Therefore, undisputedly and admittedly the disbursement of leave travel allowance is a lump sum monetary benefit provided to the employee without any nexus to any of the statutory or prescribed conditions. The only precondition is that the employee ought to have opted for this allowance at the beginning of the Financial Year. The subsequent occurrence of an event of travel which may or may not occur and even if it occurs, may or may not fulfil the conditions such as once in two calendar years etc., would in no way alter the nature of payment that has been effected. Therefore, an allowance such as the one granted in the instant case would not be a concession or assistance. Therefore, the reliance placed on the Circular is misplaced and is in fact against the case of the deductor."

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23. The AO has also taken a stand that there is a difference between “Allowance” and “LTC and Medical Reimbursement”. An allowance according to the AO can be given in advance whereas LTC and medical reimbursement are not in the nature of allowance and therefore cannot be given like an allowance before they are incurred. The AO’s further case is that at the time of disbursement by the employer the same assumes the character of salary and its later application for purposes which are exempt will only be application of income and therefore accrual of income in the form of salary takes place on which tax had to be deducted at source.

24. To appreciate the stand taken by the AO, we have to look at the relevant provisions of Sec.192 of the Act in so far as the same is relevant for the present case.

> “192. Salary.-(1) Any person responsible for paying any income chargeable under the head "Salaries" shall, at the time of payment, deduct income-tax on the amount payable at the average rate of income-tax computed on the basis of the rates in force for the financial year in which the payment is made on the estimated income of the assessee under this head for that financial year
>
> (2)……
>
> (3) The person responsible for making the payment referred to in sub-section (1) or sub-section (1A) or sub-section (2) or sub-section (2A) or sub-section (2B)] may, at the time of making any deduction, increase or reduce the amount to be deducted under this section for the purpose of adjusting any excess or deficiency arising out of any previous deduction or failure to deduct during the financial year.”

25. Section 192(1) of the Act, requires tax to be deducted at average rate of income-tax in force on estimated income under the head salaries. The person making payment has to make an honest of income under the head salary payable by him to his employee at the time of payment. The person making the payment has to take into consideration various deductions permitted under the Act under Chapter VIA of the Act, as also exempt income under Sec.10 of the Act. Rebate available under sections 88 and 88B can be considered by the employer. Employer should obtain the proof of investment made by the employee and should not rely on simple declaration or oral assurance. Certain employees who are entitled to relief under section 89(1) can furnish the information in prescribed form to the employer, and in such cases employer can adjust the amount of TDS by allowing relief available under section 89. It is for the employer to prove the allowances and perquisites given to the employee are tax-free and not to be included in the salary.

26. It is no doubt true that TDS is to be made at the time of payment of salary and not on the basis of salary accrued. Sec.192(3) of the Act permits the employer to increase or reduce the amount of TDS for any excess or deficiency. We have already noticed that the fact that bills/evidence to substantiate incurring of expenditure on medical treatment up to Rs.15,000/- and the availing of the LTC by the employees and the fulfilment of the conditions contemplated by Sec.10(5) of the Act for availing exemption by the employees so availing LTC, have not been disputed by

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the AO. Even assuming the case of the AO, that at the time of payment the Assessee ought to have deducted tax at source, is sustainable; the Assessee on a review of the taxes deducted during the earlier months of the previous year is entitled to give effect to the deductions permissible under proviso (iv) to Sec.17(2) or exemption u/s.10(5) of the Act in the later months of the previous year. What has to be seen is the taxes to be deducted on income under the head 'salaries' as on the last date of the previous year. The case of the AO is that LTC and Medical reimbursement should be paid at the time the expenditure is incurred or after the expenditure is incurred by way of reimbursement and not at an earlier point of time. If it is so paid, then, even though the payment would not form part of taxable salary of an employee, the employer has to deduct tax at source treating it as part of salary, is contrary to the provisions of Sec.192(3) of the Act and cannot be sustained. The reliance placed by the AO on the expression "actually incurred" found in Sec.10(5) of the Act and proviso (iv) to Sec.17(2) of the Act, in our view cannot be sustained. In any event, the interpretation of the word "actually paid" is not relevant while ascertaining the quantum of tax that has to be deducted at source u/s.192 of the Act. As far as the Assessee is concerned, his obligation is only to make an "estimate" of the income under the head "salaries" and such estimate has to be a bonafide estimate.

27. The primary liability of the payee to pay tax remains. Section 191 confirms this. In a situation of honest difference of opinion, it is not the

deductor that is to be proceeded against but the payees of the sums. To reiterate, the payment towards medical expenditure and leave travel is made keeping in view the employee welfare. The exclusion in respect of payment towards medical expenditure and leave travel is considered after verifying the details and evidence furnished by the employees. No exemption is granted in the absence of details and/or evidence. The exemption in respect of medical expenditure is restricted to expenditure actually incurred by the employees, or Rs. 15,000/- whichever is lower. The exemption is granted even if the payment precedes the incurrence of expenditure. The requirements/conditions of section 10(5) and proviso to section 17(2) are meticulously followed before extending the deduction/ exemption to an employee. No tax can be recovered from the employer on account of short deduction of tax at source under section 192 if a bona fide estimate of salary taxable in the hands of the employee is made by the employer, is the ratio of the following decisions.

CIT vs. Nicholas Piramal India Ltd (2008) 299 ITR 0356 (BOMBAY);
CIT v. Semiconductor Complex Ltd [2007] 292 ITR 636 (P&H)
CIT vs. HCL Info System Ltd. [2006] 282 ITR 263 (Del)
CIT v Oil and Natural Gas Corporation Ltd [2002] 254 ITR 121 (Guj)
ITO v Gujarat Narmada Valley Fertilizers Co. Ltd [2001] 247 ITR 305 (Guj)
CIT v Nestle India Ltd (2000) 243 ITR 0435 (DEL)
Gwalior Rayon Silk Co. Ltd. v. CIT [1983] 140 ITR 832 (MP)
ITO v G. D. Goenka Public School (No. 2) [2008] 306 ITR (AT) 78 (Del)
Usha Martin Industries Ltd. V. ACIT (2004) 086 TTJ 0574 (KOL)
Nestle India Ltd. v. ACIT (1997) 61 ITD 444 (Del)

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Indian Airlines Ltd. v ACIT (1996) 59 ITD 353 (Mum)

28. In the present case, as already detailed, the exemption in respect of medical expenditure and leave travel is considered after collecting and verifying the details and evidence furnished by the employees. Policies and controls are in force to ensure that the requirements of rule 2B are fulfilled. The details filed before the TDS officer explains the policies adopted to fulfill the requirements of rule 2B and the process adopted in considering the exemption under section 10(5) and proviso to section 17(2). The assessee is a law abiding Company. Internal controls are in place to discharge the statutory obligation under section 192. Honest and bona fide estimate of taxable salary is made in the process of deducting tax at source under section 192. Every effort is made by the assessee to comply with the requirements of section 192. The assessee is not benefited by allowing employees to claim exemption. The order passed by the AO under section 201(1) & 201(1A) is therefore bad in law and rightly quashed by the CIT(A).

29. In the light of the admitted position that the conditions for grant of exemption u/s.10(5) of the Act to the employees in respect of LTC and also the fact that up to Rs.15,000 per employee medical reimbursement paid by the Assessee satisfies conditions contemplated by the proviso (iv) to Sec.17(2) of the Act, can the AO deny to the employee in their assessment, exemption u/s.10(5) or relief under the proviso to (iv) to Sec.17(2) of the Act? The answer admittedly is ‘no’, because the AO does not dispute non-

fulfilment of conditions for allowing exemption u/s.10(5) of the Act or proviso (iv) to Sec.17(2) of the Act. The liability of the person deducting tax at source cannot be greater than the liability of the person on whose behalf tax at source is deducted. The AO has ignored this aspect and has proceeded to pass the order u/s.201(1) and 201(1A) of the Act. His order was rightly held to be unsustainable by the CIT(A).

30. In the grounds of appeal raised by the revenue, we find that among other grounds there are grievances regarding lack of opportunity to the AO before CIT(A) and grounds challenging the finding that there is no dispute that the Assessee has satisfied itself that the employees were entitled to exemption u/s.10(5) as well as relief under proviso (iv) to Sec.17(2) of the Act. As far as lack of opportunity is concerned, we find that the CIT(A) has only called for break-up of the figures regarding medical reimbursement and LTC which was actually paid to employees and that which was considered not forming part of salary by the employee on production of evidence by the employee. In fact, the figures so given are the same figures on the basis of which the AO has passed order u/s.201(1) and 201(1A) of the Act. As far as the grievance regarding finding that there was no dispute that the Assessee has satisfied itself that the employees were entitled to exemption u/s.10(5) as well as relief under proviso (iv) to Sec.17(2) of the Act, we have already reproduced the show cause notice issued by the AO u/s.201(1) & 201(1A) of the Act, in which the AO has not

disputed these facts. In our view the relevant grounds have no basis and cannot be factually sustained.

31. Arguments were advanced that employees have filed their returns of income and offered to tax income under the head salaries received from the Assessee and therefore no order u/s.201(1) & 201(1A) of the Act can be passed against the Assessee. In this regard our attention was drawn to the following decisions:

> Hindustan Coco Cola Beverage Pvt.Ltd. Vs. CIT 293 ITR 226 (SC)
>
> CIT Vs. Eli Lilly & Co. 312 ITR 225 (SC)
>
> Decision of Hon'ble Karnataka High Court in the case of CIT Vs. Tata Elxsi ITA No.82 of 2003 dated 23.1.2008.

We have not examined the above argument for the reason that the assertion of the assessee in this regard has not been examined either by the AO or CIT(A).

32. For the reasons given above, we do not find any grounds to interfere with the order of the CIT(A). Consequently, these appeals by the Revenue are dismissed.

33. In the result, the appeals are dismissed.

Pronounced in the open court on this 28th day of June, 2013.

Sd/-	Sd/-
(N. BARATHVAJA SANKAR)	(N.V. VASUDEVAN)
Vice President	Judicial Member

Bangalore,
Dated, the 28th June, 2013.
Ds/-

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Senior Private Secretary
ITAT, Bangalore.

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ANNEXURE-I TO THE ORDER

Infosys BPO Limited - Details of amount paid to employees for medical expenditure and leave travel

ASSESSM YEAR 2007-08
PREVIO EAR 2006-07

Month	Medical expenditure				Leave travel					
	A Amount paid by Infosys BPO Rs.	B Bills submitted by employees for Rs.	C=B Exemption considered Rs.	A-B Amount on which TDS made Rs.	A Amount paid by Infosys BPO Rs.	B Bills submitted by employees for Rs.	C=B Exemption considered Rs.	A-B Amount on which TDS made Rs.	TDS on total estimated salary Rs.	Date of Payment of TDS
Apr-06	1,856,639	8,063	8,063	1,848,577	2,366,991	21,663	21,663	2,345,328	12,448,759	28-Apr-06
May-06	2,038,494	-	-	2,038,494	2,556,724	-	-	2,556,724	15,352,321	31-May-06
Jun-06	2,209,834	1,505	1,505	2,208,329	2,857,515	9,124	9,124	2,848,391	10,803,388	30-Jun-06
Jul-06	2,292,214	4,032	4,032	2,288,182	2,941,945	-	-	2,941,945	10,386,181	31-Jul-06
Aug-06	2,370,196	-	-	2,370,196	2,992,700	11,400	11,400	2,981,300	14,518,399	31-Aug-06
Sep-06	2,422,752	4,081	4,081	2,418,671	3,057,412	33,420	33,420	3,023,992	11,118,955	29-Sep-06
Oct-06	3,399,434	117,380	117,380	3,282,054	3,931,183	45,768	45,768	3,885,415	14,846,190	31-Oct-06
Nov-06	3,417,888	228,032	228,032	3,189,856	3,937,600	17,018	17,018	3,920,582	15,347,261	30-Nov-06
Dec-06	3,476,265	604,143	604,143	2,872,122	3,925,163	258,636	258,636	3,666,527	10,855,231	29-Dec-06
Jan-07	3,636,374	3,052,470	3,052,470	583,904	4,006,526	1,122,052	1,122,052	2,884,474	16,807,868	5-Feb-07
Feb-07	3,778,348	1,693,100	1,693,100	2,085,248	4,152,438	637,437	637,437	3,515,001	11,596,381	27-Feb-07
Mar-07	3,964,147	782,090	782,090	3,182,057	4,283,281	225,325	225,325	4,057,956	11,149,715	29-Mar-07
Total	34,862,585	6,494,896	6,494,896	28,367,689	41,009,478	2,381,843	2,381,843	38,627,635	155,230,649	

Infosys BPO Limited - Details of nt paid to employees for medical expen ure and leave travel

ASSESSMENT YEAR 2008-09
PREVIOUS YEAR 2007-08

Month	Medical expenditure				Leave travel					
	A Amount paid by Infosys BPO Rs.	B Bills submitted by employees for Rs.	C=B Exemption considered Rs.	A-B Amount on which TDS made Rs.	A Amount paid by Infosys BPO Rs.	B Bills submitted by employees for Rs.	C=B Exemption considered Rs.	A-B Amount on which TDS made Rs.	TDS on total estimated salary Rs.	Date of Payment of TDS
Apr-07	4,160,468	-	-	4,160,468	4,652,680		-	4,652,680	36,089,189	30-Apr-07
May-07	4,289,310	-	-	4,289,310	4,806,574		-	4,806,574	19,003,988	31-May-07
Jun-07	4,340,507	-	-	4,340,507	5,004,067		-	5,004,067	42,935,756	29-Jun-07
Jul-07	4,461,339	13,420	13,420	4,447,919	5,153,000	25,742	25,742	5,127,258	22,625,059	31-Jul-07
Aug-07	4,560,394	-	-	4,560,394	5,260,877	-	-	5,260,877	13,193,316	31-Aug-07
Sep-07	4,642,880	10,333	10,333	4,632,547	5,322,904	-	-	5,322,904	17,253,676	28-Sep-07
Oct-07	5,090,317	485,190	485,190	4,605,127	5,748,234	205,940	205,940	5,542,294	26,008,112	31-Oct-07
Nov-07	5,136,804	838,580	838,580	4,298,224	5,769,327	253,347	253,347	5,515,980	27,069,017	30-Nov-07
Dec-07	5,124,320	3,464,051	3,464,051	1,660,269	5,706,356	1,325,293	1,325,293	4,381,063	21,841,421	28-Dec-07
Jan-08	5,134,547	3,264,334	3,264,334	1,870,213	5,673,927	1,337,696	1,337,696	4,336,231	24,113,713	31-Jan-08
Feb-08	5,113,489	1,942,428	1,942,428	3,171,061	5,575,865	803,787	803,787	4,772,078	14,342,126	29-Feb-08
Mar-08	5,112,794	1,086,972	1,086,972	4,025,822	5,539,807	342,763	342,763	5,197,044	15,137,529	28-Mar-08
Total	57,167,169	11,105,309	11,105,309	46,061,860	64,213,618	4,294,568	4,294,568	59,919,050	279,612,902	