

**(1992) 11 PAT CK 0023**  
**In the Patna High Court**  
**Case No : Tax Case No. 199 of 1981**

Commissioner of Income Tax

APPELLANT

Vs

Arthur Fuchs

RESPONDENT

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**Date of Decision :** 27-11-1992

**Acts Referred:**

**Citation :** (1992) 11 PAT CK 0023

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### **Judgement**

Aftab Alam, J.—Following the direction of this court on an application made by the Revenue u/s 256(2) of the Income Tax Act, 1961, the Income Tax Appellate Tribunal, Patna Bench, Patna, referred the following question of law for consideration by this court :

"Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that the amount of Rs. 23,040 received by the assessee as living allowance was exempt u/s 10(14) of the Income Tax Act, 1961 ?"

2. The facts of this case are brief and without any controversy. In the return for the assessment year 1978-79, the assessee, in addition to his salary, also showed a sum of Rs. 23,040 received by him from the Fertilizer Corporation of India Limited, Sindri (hereinafter referred to as "the F. C. I."), as living allowance at the rate of Rs. 120 per day. In respect of this amount he claimed exemption in terms of Section 10(14) of the Act. The assessee's claim in this regard was turned down by the Income Tax Officer. The assessment order was confirmed in appeal before the appellate authority. The Income Tax Appellate Tribunal, however, upheld the assessee's claim for exemption, set aside the orders of the Income Tax Officer and the appellate authority and directed deletion of the amount of Rs. 23,040 from the assessee's taxable income.

3. At the material time, the assessee was working with the F. C. I. pursuant to a contract entered into between the F. C. I. and a German firm which was referred to in the contract in question as "the contractor". The relevant terms of the contract obliged the F. C. I. to pay to the contractor the following daily rates :

D. M.--Rs. 500 (Five hundred) for the project manager,

D. M.--Rs. 470 ( Four hundred and seventy) for the engineer/chief erectors.

D. M.--Rs. 440 (Four hundred and forty) for erectors.

4. Over and above, the F. C. I. was to "pay to the contractor for the personnel delegated to India under this contract a subsistence allowance of Rs. 120 (one hundred and twenty only) per calendar day". It was stipulated in this regard that "payment of rupee portion shall commence from the date of arrival in India to and inclusive of the date of departure from India". It was further agreed that the F. C. I. and the contractor shall mutually agree to make reasonable adjustments in the subsistence allowance, as may be necessary due to increase in the cost of living in India.

5. It is to be noted that, though in terms of the contract the amount of Rs. 120 per day as subsistence allowance was to be paid to the contractor, in actual practice it was admittedly given to the assessee who was working with the F. C. I. as being one of the personnel delegated to India under the contract.

6. Mr. K.K. Vidyarthi, learned counsel for the Revenue, submitted that the so-called "subsistence allowance" being directly linked with the cost of living in India was clearly in the nature of dearness allowance and hence was a perquisite within the meaning of Section 17(2) of the Act which was specifically excluded from exemption in terms of Section 10(14).

7. Mr. Vishwa Mohan, learned counsel for the assessee, on the other hand, argued that it was in the nature of a special allowance for working in India away from his home country and was accordingly fully covered by Section 10(14) of the Act.

8. I do not find it necessary to decide whether or not the amount paid to the assessee was in the nature of dearness allowance or was otherwise in the nature of a perquisite as defined u/s 17(2) of the Act as I am of the opinion that this reference can be answered on another short question.

9. Section 10(14) of the Income Tax Act as it stood at the material time was as follows :

"(14) any special allowance or benefit, not being in the nature of an entertainment allowance or other perquisite within the meaning of Clause (2) of Section 17, specifically granted to meet expenses wholly, necessarily and exclusively incurred in the performance of the duties of an office or employment of profit, to the extent to which such expenses are actually incurred for that purpose."

10. The above quoted provision had its precursor in Clause (vi) of Section 4(3) of the 1922 Act which was as under :

"(vi) Any special allowance, benefit or perquisite specifically granted to meet

expenses wholly and necessarily incurred in the performance of the duties of an office or employment of profit."

11. Dealing with this provision, the Supreme Court in the case of Commissioner of Income Tax, Gujarat Vs. `Kharawalla Ltd., , held as follows (headnote) :

"To qualify for the exemption u/s 4(3)(vi), the allowance must be granted to meet expenses incurred or to be incurred wholly and necessarily in the performance of the duties of an office or employment of profit. But the purpose for which the allowance is granted is alone not determinative of the claim to exemption. Any surplus remaining in the hands of the grantee after meeting the expenses does not bear the character of the allowance for meeting expenses but for performing the duties of the office or employment, and would be taxable. This would be so even if the employer has disabled himself from demanding refund of the amount not expended for meeting the expenses incurred in. the performance of the duties of an office or employment of profit, and the surplus remaining in the hands of the grantee acquires for the purpose of the Income Tax Act the character of additional remuneration."

12. What the Supreme Court had laid down on a construction of the exemption provision in the 1922 Act has been explicitly incorporated in the provision contained in Section 10(14) of the Act (as it stood at the material time) wherein it is stated that the exemption will only be to the extent to which such expenses are actually incurred for that purpose.

13. In the instant case not an iota of evidence has been brought on record on behalf of the assessee to show that the whole or any part of the amount received by him as "living allowance" was spent to meet expenses wholly, necessarily and exclusively incurred in the performance of the duties of his office or employment.

14. A plain reading of the section makes it clear that one of the preconditions for the claim of exemption is that the allowance in question should have been specifically granted to meet expenses and the exemption is only to the extent such expenses were actually incurred. As noted above, there is no evidence worth the name to suggest that any part or whole of the amount in question represents the expenses actually incurred by the assessee. One of the necessary ingredients of Section 10(14) being absent in this case, the assessee, in my opinion, cannot claim any exemption in respect of the amount in question.

15. For the reasons stated above, I am of the opinion that the Tribunal erred in law in allowing the exemption as claimed by the assessee. The reference is accordingly answered in the negative, that is to say, in favour of the Revenue and against the assessee.

16. Let a copy of this order be sent to the Income Tax Appellate Tribunal.

G.C. Bharuka, J.

17. I agree.