

(1978) 06 CAL CK 0049

In the Calcutta High Court

Case No : Income-tax Reference No. 325 of 1974

N. Sciandra

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 06-06-1978

Acts Referred:

Income Tax Act, 1961 — Section 15, 16, 17

Citation : (1979) 118 ITR 675 : (1979) 1 TAXMAN 11

Hon'ble Judges : Dipak Kumar Sen, J;C.K. Banerji, J

Bench : Division Bench

Advocate : Debi Pal, for the Appellant;B.L. Pal, for the Respondent

Judgement

Sen, J.—The facts found and/or admitted in these proceedings are shortly as follows :

The Fertilizer Corporation of India, a Government of India undertaking incorporated under the Companies Act, 1956 (hereinafter referred to as "the Corporation"), embarked on a project designated Durgapur Fertilizer Project, where it was decided to erect an ammonia plant in Durgapur, West Bengal. With that object the Corporation entered into agreements in writing with two Italian technical concerns, namely, Montecatini Edition S.P.A., Milano (Italy) and Ansaldo S.P.A., Genova (Italy) (hereinafter referred to as "Ansaldo"), inter alia, for obtaining technical know-how and guidance and for supply of various technical equipments, machinery and instruments as also services of technical personnel. In the agreement by and between the Corporation and Ansaldo dated the 31st August, 1966, it was, inter alia, stipulated as follows :

"3.20.....Ansaldo would make available at the plant site competent technicians and manufacturers" specialist erectors for supervision of site fabrication and erection and commissioning of certain major equipment/ machinery.

.....Ansaldo would tentatively make available the following personnel:

Engineer 1

Technical Assistant 1

Foreman/Chief Erector 11

13

5.1. All prices and fees mentioned.....and fees mutually agreed upon would be free of any taxes and/or levies of any kind that might be levied by any Indian authority in respect of Ansaldo's activity and/or profits arising or accruing in or out of India as a result of the performance of Ansaldo's supplies and services under the contract, including any such taxes and/or levies of the kind that might be levied on the income of the foreign personnel assigned to the project in India. Should any of the aforementioned taxes and/or levies be assessed upon Ansaldo or its foreign personnel by any Indian authority under any existing or future Indian laws or regulations, the total cost of all such levies would be paid by the Corporation. Provided, however, that such liability of the Corporation to pay taxes of the aforementioned foreign personnel would only arise if the requisite exemption for payment of Income Tax asked for by Ansaldo but would not be granted by the Government of India under provisions of the Income Tax Act. The Corporation would render all possible assistance in the matter of obtaining such exemptions. However, all taxes, dues, customs duties and charges to be paid by Ansaldo in Italy as levied by the Italian Government authorities would be borne by Ansaldo. (Clause 1. Exhibit 2)

(a) The Corporation would pay to Ansaldo the following rates for each day of absence from the usual place of work in Italy of the Ansaldo personnel engaged in the work :

for a Chief Engineer 35,000 (thirty-five thousand) Italian lire plus 70 (seventy) rupees,

for an engineer or equivalent 29,800 (twenty-nine thousand and eight hundred) Italian lire plus 70 (seventy) rupees.

for a technical assistant 21,000 (twenty-one thousand) Italian lire plus 60 (sixty) rupees.

for a foreman or chief erector 21,000 (twenty-one thousand) Italian lire plus 55 (fifty-five) rupees.

The payment of the rupee portion shall commence from the date of arrival in India to and inclusive of the date of departure from India.

(b) Provide at site free of charge furnished residential accommodation with air-conditioning; the scale of furnishing will be agreed upon mutually. (Clause 4. Exhibit 2)

(c) The parties would determine, for each month, the estimated amounts, in Italian and in Indian currencies, due to Ansaldo under the above provision. The

estimated monthly amounts so calculated would be paid to Ansaldo before the first day of each month as advance payments against the cost and expenses to be incurred by Ansaldo. Full settlement of the payments received and bills issued would be made within one month after the end of the work. Payments would be made in Italian lire in Geneva (Italy) for the Italian lire portion and in rupees, as Ansaldo will direct each time, in India for the rupees portion. (Clause 7. Exhibit 2)

(d) The Corporation would render all possible assistance in obtaining the appropriate exemption from any Indian tax, which might be levied on Ansaldo's foreign personnel stationed at site in India in connection with the contract. In case such exemption for payment of tax asked for by Ansaldo would not be granted by the Government of India under the provisions of Income Tax Act, the taxes would be to the account of the Corporation.

2.6. For the services of the personnel referred to in 3.20 which would include both the personnel of Ansaldo and their sub-contractors and of any third party who would be entrusted by Ansaldo with performance of any of their obligations under the contract, the Corporation would comply with the above terms and conditions."

2. Pursuant to the aforesaid, Ansaldo deputed N. Sciandra, the assessee, an Italian technician, to work on the said project. The assessee reached India for the assignment on the 4th March, 1969. His engagement was approved by the Government of India u/s 10(6)(vii) of the I.T. Act, 1961, initially for a period of 15 months. Such approval was later extended by another 10 months.

3. In the assessment year 1971-72, the relevant previous year ending on 31st March, 1971, the assessee was assessed to Income Tax. Two certificates, respectively, dated the 25th September and the 14th November, 1970, issued by the Corporation certifying that the assessee had been engaged by the Corporation in connection with the Durgapur Fertilizer Project and also certifying his remuneration were filed in the assessment proceedings. The certificate dated the 14th November, 1970, was, inter alia, as follows :

"Certified that Mr. N. Sciandra, a foreign engineer from Italy, has been engaged by us in connection with the erection and supervision of Durgapur Fertilizer Project, since 5-3-69 to 12-12-70 (the probable date of his departure from India) is as under....."

4. It was claimed that as the assessee's services were approved by the Government of India, his remuneration should be totally exempt from Income Tax. The ITO, however, found from the records that the assessee had previously resided in India from the 22nd August, 1961, to the 1st March, 1967, working with one Neyveli Lignite Corporation Ltd. at Neyveli, South Arcot District, and, therefore, had been a resident of India in the four financial years preceding his arrival in this country on the 4th March, 1969, for the project in the instant case. It was also found that eight years had passed since the date of his first arrival in India on the 2nd August, 1961, before the commencement of relevant financial

year 1970-71. The ITO, accordingly, held that the assessee was not entitled to the exemption claimed.

5. In computing the income of the assessee, the ITO found that all taxes were payable by the employer under the agreement and that the employer had already paid the entire stipulated remuneration to the assessee without any deduction of tax. The total income of the assessee was computed as consisting of (a) payments made in Italian lire ; (b) payment of daily allowance paid in India as per certificate ; and (c) perquisites, being rent-free furnished accommodation together with refrigerator and air-conditioner and also tax to be borne by the employer treated as perquisite in the hands of the employee. The last was valued at Rs. 27,17,496.

6. Being aggrieved by this assessment the assessee preferred an appeal to the AAC. It was contended in the appeal that there was no agreement between the Corporation and Ansaldo stipulating payment of a tax-free salary and the ITO was not justified in adding an amount of Rs. 27,17,496, representing tax payable by the Corporation by applying Section 17(2)(iv) of the I.T. Act, 1961, to determine, the total income of the assessee. It was contended further that this amount in any event could not be a perquisite in the nature of an amount paid by the employer on behalf of the employee within the meaning of the said Section 17(2)(iv). The AAC, however, upheld the computation of the ITO, inter alia, on the ground that u/s 15(a) of the Act the expression "salary" included any salary due from an employer or a former employer in the previous year, whether paid or not and, therefore, a perquisite due would also be part of the taxable salary.

7. The assessee preferred a further appeal to the Tribunal. It was inter alia, contended on behalf of the assessee in the appeal that the Corporation had not agreed to pay salary to the assessee free of tax. What was liable to be added to the salary was the tax on the amount which was to be borne by the Corporation on account of tax. Construing the agreement, the Tribunal held that the Corporation had agreed to pay and bear the tax on salary of all foreign personnel deputed in the project if exemption from tax could not be obtained. The Corporation, therefore, in effect agreed to pay all such foreign personnel a tax-free salary. Following a decision of the Mysore High Court in Tokyo Shibaura Electric Co. Ltd. (By Agents Radio and Electricals Mfg. Co. Ltd., Mysore) Vs. Commissioner of Income Tax, Mysore, , the Tribunal held that grossing up of the salary of the assessee was justified.

8. It was also contended before the Tribunal that under the agreement the Corporation was to make all payments to Ansaldo and not to the assessee who had no enforceable right against the Corporation. The assessee was not a salaried employee of the Corporation. The revenue, relying on the certificates granted by the Corporation, referred to earlier, contended that the assessee must be deemed to be a salaried employee of the Corporation.

9. The Tribunal held that though under the agreement payment was to be made by the Corporation to Ansaldo, the payment on account of the services of the foreign technicians was in fact the salary for services of such technicians working in India. The assessee had earned income under the head "Salary" and it was immaterial whether he was paid salary pursuant to an agreement between the Corporation and his Italian employers. The assessee had received salary and allowance for services rendered in India. The Tribunal, accordingly, upheld the assessment and dismissed the appeal.

10. On an application by the assessee u/s 256(1) of the I.T. Act, 1961, the Tribunal has drawn up a statement of case and has referred the following questions for the opinion of this court as questions of law arising from its order:

1. "Whether, on the facts and in the circumstances, the Tribunal was right in holding that the amount of Italian lire 16,043,283 (equivalent to Rs. 1,95,543) paid abroad to the Italian Company by the Fertiliser Corporation of India as per agreement in connection with the deputation of the assessee for services in India was an amount legally due or paid to the assessee as salary and could accordingly be treated as the assessee's salary income liable to be taxed in India ?"

2. Whether, on the facts and in the circumstances, the Tribunal was justified in holding that the daily allowance of Rs. 70 per day paid to the assessee was not exempt from tax u/s 10(14) of the Income- tax Act, 1961?

3. In any event, whether the Tribunal was right in rejecting the assessee's claim that there could be no grossing up of income on tax basis in the present case and that the Income Tax Officer erred in law in treating the sum of Rs. 27,17,496 as perquisite" taxable in the hands of the assessee ?

4. Whether the Tribunal was right in rejecting the assessee's claim that in case the tax payable by the Fertiliser Corporation of India on his income in India is treated as perquisite, the value of such perquisite should in law be limited to the amount of tax actually paid during the relevant previous year ?

5. Whether, on the facts and in the circumstances, the assessee was not at all liable to be taxed in India ?"

11. Dr. Debi Pal, learned counsel for the assessee, pressed for answers to questions Nos. 3 and 4 only and his submissions rested on the said two questions. He contended that there could be no grossing up of the assessee's income on a tax-on-tax basis inasmuch as the amount which was agreed to be reimbursed by the Corporation to Ansaldo on account of tax payable by the assessee was not a perquisite within the meaning of Section 17 of the I.T. Act, 1961. He submitted further that a perquisite within the meaning of the said section would be an amount paid by an employer in respect of obligations of the employee resulting in a monetary liability of the employee. In the instant case, the relationship between the assessee and the Corporation was not that of

employer and employee. He contended further that, in any event, in the year in question no payment at all had been made by the Corporation on account of tax liability of the assessee and, therefore, the same could not be added to the salary of the assessee as a perquisite in the relevant year.

12. Dr. Pal next contended that salary had to be computed under Sections 15, 16 and 17 of the I.T. Act, 1961, and the scheme of the said sections did not envisage nor permitted grossing up as had been done in the instant case. Lastly, he submitted that the decision of the Mysore High Court in *Tokyo Shibaura Electric Co. Ltd. (By Agents Radio and Electricals Mfg. Co. Ltd., Mysore) Vs. Commissioner of Income Tax, Mysore*, was in respect of a stipulated net royalty and not salary. The said decision was clearly distinguishable on facts from the instant case.

13. Mr. B. L. Pal, learned counsel for the revenue, contended on the other hand that all along the matter had proceeded on the basis that the assessee was an employee of the Corporation and that it was the Corporation which was paying the salary and perquisites in respect of services rendered by the assessee in India. This position was borne out by the certificates issued by the Corporation where it was clearly admitted that the assessee had been engaged by the Corporation in the said project. Mr. Pal contended further that under Clause 5 of the agreement between the parties it was specifically stipulated that the Corporation was under an obligation to provide a tax-free salary to the foreign personnel engaged in the project. Payment had been made by the Corporation on account of the services of the assessee accordingly and the return showed that the assessee had received the net amount without any deduction of tax. The assessee in fact had been paid a tax-free net income and the law was settled that in such a case the income had to be computed by grossing up. Lastly, Mr. Pal reiterated that even amounts payable on behalf of the employee by the employer could be assessed as a perquisite and included in the salary as the entire salary could be taxed u/s 15, whether due or paid.

14. A number of decisions were cited by Mr. Pal in support of his contentions which are considered hereinafter.

(a) *North British Railway Company v. Scott* [1922] 8 TC 332. This is a decision of the House of Lords and the question before the House was as follows :

"Whether the sum paid by the Appellants as Income Tax in respect of the salaries of their officers, and not deducted from the salaries paid to such officers, is part of the officers' income for Income Tax purposes?"

15. Mr. Pal relied on the observations of Lord Dunedin and Lord Atkinson in their respective judgments as follows : (pp. 337, 340)

"A test case was taken. The Special Commissioners assessed the Income Tax by taking, first, the sum of the agreed salary of the official and adding thereto the amount of Income Tax which had been paid by the Company on behalf of the

official in the previous year, and then calculating the Income Tax on the aggregate of those two sums. This they claim to do each year in succession."

"The sums paid by the company to satisfy the debts which those officers respectively owed to the revenue remain part of the profits and gains those officers derive from the offices they respectively hold, and are liable to be assessed to Income Tax just as the amount of the Income Tax deducted by a railway company from the dividends it pays its shareholders is part of the income of those shareholders."

(b) *Hartland v. Diggings* [1926] 10 T.C. 247. This is also another decision of the House of Lords. The facts were that in accordance with the practice of the employer, an employee was paid the Income Tax in respect of his salary and this amount was allowed as a deduction in computing the employer's profits. It was held that, notwithstanding the absence of any contract, the tax paid by the employer in respect of the employee's salary was an emolument which accrued to the employee by virtue of his office and was rightly included in the latter's assessment. Warrington L.J. observed in his judgment (p. 259):

"It seems to me that what is to be added to the salary for the purpose of Income Tax is not some notional sum agreed between the company and the Revenue, nor the tax paid in a previous year, or anything like that; it is the actual sum which, in the actual year of assessment, would be payable by the servant but for the interposition of the employer. It is that which is to be added to the salary as part of the profits derived from his income."

(c) (1952) 21 ITR 558 . The facts in this case were "that the assessee was the director in charge of the company publishing the well-known law journal, All India Reporter. It was agreed between the company and the assessee, inter alia, that the assessee at the termination of his services, for any cause, would be paid a sum equal to three years' salary as compensation. The company while terminating the services of the assessee made a payment of Rs. 85,000 against a receipt of the assessee recording, inter alia, that the company had agreed to pay Income Tax, super-tax, etc., on the total amount of compensation and in case any tax would be recovered from the assessee, the company would indemnify the assessee for the same. The revenue recovered from the company a sum of Rs. 39,361 as tax and included in the assessee's income a sum of Rs. 1,24,361 made up of Rs. 85,000 paid directly to the assessee and Rs. 39,361 paid by the company to the Income Tax department. The assessee claimed tax exemption in respect of the said Rs. 39,361. The Tribunal referred the following question to the High Court:

"Whether, in the circumstances of the case, the sum of Rs. 1,24,361 was liable to be included in the assessable income of the assessee ?"

The question was answered in favour of the revenue. The decisions in *North British Railway Company* [1922] 8 TC 332 and *Hartland* [1926] 10 TC 247 were quoted with approval and followed by the Nagpur High Court.

(d) *IRC v. Cook* [1945] 26 TC 489. This is another decision of the House of Lords. The facts in this case were, inter alia, that a testatrix directed her trustees, out of the free annual income derived from her heritable properties, to pay an annuity of ?100 "free of all deductions including income tax". The trustees thereafter regularly in every year paid to the annuitant ?100 out of the income which had been charged to tax, giving her a certificate showing the gross amount of the payment, the amount of the tax deducted thereon and of the net payments made to her. The annuitant who had no other income, then claimed from the revenue authority a repayment in respect of the tax shown by the certificate to have been deducted. On receiving repayment, she handed over the amount received to the trustees. The revenue, who had come to learn that the repayments were being handed over to the trustees, contended alternatively that the ?100 paid annually to the annuitant was a payment of the annuity in full without deduction of Income Tax (in which case she would not be entitled to any repayment of tax), or that it was a payment of ?100 under deduction of tax but accompanied by a temporary advance of a sum equal to the tax deducted (in which case she would be entitled to repayment of tax on only ?100). It was held on these facts that the trustees were bound, in accordance with the directions of the testatrix, to pay to the annuitant ?100 without any deduction and were bound, under the revenue statutes, to account to the Inland Revenue, as they had already done, for Income Tax on the corresponding gross amount and, under the said statutes, this gross amount was the annuitant's income for the purpose of her claim for repayment of tax and, accordingly, she was entitled to the repayment which she had claimed.

(e) *Jaworski v. Institution of Polish Engineers in Great Britain Ltd.* [1950] 2 All ER 1191. This is a judgment of the Court of Appeal of England. The facts were that, under a service agreement, evidenced in writing, an employee of an association was entitled to receive his monthly salary "without any deductions and taxes, which will be borne by the association". The employers deducted Income Tax from his salary in accordance with the provisions of the Income Tax (Employments) Act, 1943 (c. 45), Section 1. On the ground that the deductions were contrary to the terms of his service agreement, the employee brought an action to recover the amounts deducted :

On construction, it was held that the agreement was one to pay net remuneration at the stated figure together with such sum as was necessary to leave that stated figure available to the employees after the association had borne the taxes referable to him, and, accordingly, the agreement was valid.

The following observations of Somervell L.J, were relied on by Mr. Pal (pp. 1193, 1194):

"It has been clearly established that, if appropriate words are used, a payer can so provide that the payee gets year by year a fixed sum. The payer covenants to pay a sum which after deduction of tax leaves the sum that it is desired should be available to the payee :..... The grammar is not, perhaps, quite clear. Is

"without" to be understood before taxes, etc., or is it to be read as providing for "₹ 20 and taxes"? However this may be, the words which, in our opinion, point to a gross sum are the later words "which will be borne by the association". We think one is entitled to have regard to the fact that this is not an instrument drawn by lawyers. We think it means--taking the ₹ 20 in the original agreement--"My remuneration is to be ₹20 plus whatever sum is necessary to leave that available to me after you have borne the taxes". As under the law the tax is suffered by deduction, it means such a sum as will after deduction leave ₹20."

(f) Tokyo Shibaura Electric Co. Ltd. (By Agents Radio and Electricals Mfg. Co. Ltd., Mysore) Vs. Commissioner of Income Tax, Mysore, . The facts in this case were that the assessee, a Japanese company, had entered into an agreement with its agent in India whereunder the latter undertook to manufacture in India service meters with the aid of the licence, technical information, data and experience of the assessee. As a consideration for the aforesaid the assessee was entitled under the said agreement to receive 3% of the net sales, billed in rupees by the agent, with an annual minimum royalty of 9,000 U.S. dollars payable in two equal half-yearly instalments of 4,500 U.S. dollars. It was agreed that the payments would be made to the assessee in Tokyo, Japan, in a currency acceptable to the Japanese Government without deduction for taxes or other charges assessed in India, which would be assumed by the agent.

In the assessment years 1953-54 to 1957-58, the ITO grossed up the royalties and assessed the Japanese company accordingly. On appeal, the AAC accepted the contentions of the assessee and held that the income of the non-resident company was the royalty plus the taxes paid or payable and not the grossed up amounts. On a further appeal, the Tribunal upheld the contentions of the revenue and held that the view taken by the ITO was correct and that the computation of the assessee's income should be by way of grossing up. The controversy finally came up before the Mysore High Court. After considering the agreement between the parties, the court applied the law as laid down in the case of *Jaworski* [1950] 2 All ER 1191 and also the law at pp. 561, 562 as stated in *Simond's Income Tax*, second edn., Vol. II at p. 710 and upheld the contentions of the revenue. It was quoted in the judgment as follows (p. 289):

"The computation of the gross amount of the remuneration varies according to the agreement or arrangement between the employer and the employee ; this will differ widely in detail. The simplest form would be one by which the employer paid the tax at the standard rate upon the net salary, in which case the employee would still be liable to tax on this additional emolument.

EXAMPLE :

₹

Salary 1,000

Tax thereon at 9s. 6d. 475

Gross emoluments 1,475

Tax at 9s. 6d. on ? 1,475 700-12-6

Less tax paid by employer 475-0-0

Tax to be paid by employee subject to personal allowances 225-12-6 = Tax on ? 475 at 9s. 6d.

Alternatively, the employer might contract to pay such sum as after deduction of tax at the standard rate of 9s. 6d. in the ? would leave a net tax-free salary of ? 1,000, i.e., gross emoluments of ? $1,000 \times 40/21 = ?1,905$. Tax on ? 1,905 at 9s. 6d. in the ? being ? 905 the sum of ? 1,000 net would be left after payment of tax on the gross emoluments including the sum paid in tax by the employer. In both these cases, the full benefits of personal and other allowances would accrue to the employee."

(g) *Ferguson v. IRC* [1969] 74 ITR 536. This is a decision of the House of Lords. The facts in this case were that in a deed of separation it was agreed by and between the husband and the wife, the assessee, that during the subsistence of the marriage the husband would advance to the wife ? 35 monthly free of Income Tax. From 1948 to 1958, the husband lived in Malaya while the wife living in Scotland regularly received the payments. On his return to the U.K. in 1958, the husband became assessable to Income Tax. The revenue sought to assess the payments made to the wife from the years 1955-56 to 1961-62. The Commissioner discharged all the assessments and the question which was stated was whether the words "free of income tax" in the agreement were not hit by the Income Tax Act and whether the said of ? 35 was the net amount after deduction of tax or the gross sum which had to be assessed. The House of Lords upheld the contentions of the assessee and held that the agreement should be construed as creating a liability on the part of the husband to pay the net sum coupled with an undertaking to take steps to ensure that the wife would not incur any liability to pay any tax in respect of the amounts received. The husband was legally bound to deduct tax and account for it.

(h) *Commissioner of Income Tax Vs. C.W. Steel (No. 1)*, . In this case, the Kerala High Court, following *North British Railway Company* [1922] 8 TC 332, held that the definition of salary in the Explanation to Rule 24A of the Indian I.T. Rules, 1922, was an inclusive definition. Therefore, the Income Tax paid by an employer on behalf of the employee was not salary as ordinarily understood but it formed part of the pay of the employee and had to be included in the amount of his salary for computing the value of rent-free accommodation.

(i) *Commissioner of Income Tax, Madras Vs. I.G. Mackintosh and Another.*, . This was cited for the following observations of the Madras High Court in construing the expression "include" in Section 17 of the I.T. Act, 1961 (p. 422) :

"Normally, the word "include" is employed by Parliament and legislatures in defining words for the purpose of enlarging the meaning of the ordinary words or

clearing any doubt that might arise in understanding the same. Therefore, the courts generally interpret it as enlarging the meaning of the word and do not restrict the meaning to the particular words that follow in the inclusive part of the definition unless the context otherwise merits. Thus, in *Dilworth v. Commissioner for Land & Income Tax* [1899] AC 99, Lord Watson observed :

"The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute ; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word "include" is susceptible of another construction which may become imperative if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to "mean and include", and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions".

In this judgment, the High Court also quoted with approval the law laid down in *North British Railway Company* [1922] 8 TC 332 and in *Hartland's case* [1926] 10 TC 247 and held that the Income Tax paid was part of the salary.

(j) An unreported judgment of this court in Income Tax Reference No. 497 of 1975 entitled *Satyanarayan Rungta Vs. Commissioner of Income Tax*, was also cited. Here a company had paid salary to its employee and had issued certificates showing that such salary was paid tax-free. The amount of such salary was computed by grossing up and assessment was made accordingly. On these facts, the computation and assessment were upheld by this court.

16. It appears to us that the controversy in this case relates solely to the computation of the salary of the assessee. The contention of the revenue is that such salary has to be computed by grossing up, i.e., by finding out notionally the gross income which would leave after payment of tax the net income as stipulated in the agreement. The contention on behalf of the assessee, on the other hand, has been that the computation of the salary of the assessee should be made by ascertaining first the actual amount paid to him and thereafter the amount which would be the tax payable on the actual amount has to be ascertained and the latter amount would also be a part of the salary.

17. To appreciate the merits of the respective contentions it is necessary to keep in view the following. The agreement between the Corporation and Ansaldo is not the agreement between the assessee and his employer. Under the agreement between the Corporation and Ansaldo, the Corporation was bound to pay to Ansaldo the tax payable by the assessee. Under clause 7 of Ex. 2 of the agreement such taxes would be to the account of the Corporation. No doubt in cl 5.1 of the agreement, it is recorded that "prices and fees mutually agreed upon are and shall be free of any taxes and/or levies including any such taxes and/or

levies of the kind that may be levied on the income of the foreign personnel assigned". But this clause relates to the payment by the Corporation to Ansaldo and does not govern payment of the assessee's salary by the latter's employer. The House of Lords in *North British Railway Company* [1922] 8 TC 332 and in *Hartland's case* [1926] 10 TC 247 laid down that where an employer pays Income Tax on behalf of an employee it will be deemed that the employee has received not only the amount paid to him but also the amount which has been paid on his behalf to the revenue authorities by way of tax. None of these decisions have laid down that in such cases there must be grossing up. In *Jaworski's case* [1950] 2 All ER 1191, it was held by the Court of Appeal on the facts of that case and on the construction of the agreement between the employer and the employee that the agreed remuneration of the employee was the net amount quoted plus whatever sum was necessary to leave the amount available to the employee if the employer has borne the tax. In none of the other English cases, the remuneration of the employee was computed in this fashion. In *Tokyo Shibaura Electric Co. Ltd. (By Agents Radio and Electricals Mfg. Co. Ltd., Mysore) Vs. Commissioner of Income Tax, Mysore*, , cited by the revenue, the Mysore High Court also noted that computation of the gross amount of the remuneration would vary according to the agreement or arrangement between the employer and the employee as to the payment of tax by the former on behalf of the latter and would differ widely in detail.

18. In the instant case, there is no finding that the assessee would be paid a tax-free salary by its employer or that the agreed remuneration was the net amount stipulated plus whatever sum as may be necessary to leave the net amount available to the employee after the employer has borne the tax.

19. In our view, if the tax paid by the employer is to be added to the salary of the employee as a perquisite u/s 17 of the I.T. Act, 1961, then it must fulfil the characteristics of a perquisite as laid down in the section. It has been clearly laid down in the section that such perquisite must be paid before it can be treated as a part of salary. In the instant case, the agreement only provides that the Corporation would help the assessee to claim total exemption of all taxes and if such attempt fails then the tax payable would be on the account of the Corporation. This liability of the Corporation for the tax levied would normally arise at a future date and, therefore, any amount paid or to be paid in future on such account cannot be treated as a perquisite paid in the relevant assessment year.

20. Learned counsel for the revenue has submitted that in the assessment other perquisites like rent-free accommodation, furniture and air-conditioner, though provided for by the Corporation, have been included in the assessment as perquisites. It was also submitted that if the Corporation was held not to be the employer of the assessee then other complications might arise in computation of the income. This contention of the revenue in our opinion cannot stand in the way of the assessee's contentions in respect of the tax which has been assessed

as a perquisite. There is no dispute on the other items. It was specifically contended on behalf of the assessee before the Tribunal that the assessee was not a salaried employee of the Corporation. The contentions of the revenue who relied on the certificates issued by the Corporation were that the assessee was or would be deemed to be an employee of the Corporation.

21. The agreement provided that all payments had to be made by the Corporation to the Italian company and that the Corporation had to pay to Ansaldo a stipulated amount on account of the services of the assessee. Apart from that the Tribunal has not found that there was a relationship of employer and employee between the assessee and the Corporation. The certificate issued by the Corporation does not specifically state that the assessee is an employee of the Corporation, All that it states is that the assessee had been engaged by the Corporation. The certificate does not also record as to from whom the remuneration is payable to the assessee. No deduction on account of the salary payable to the assessee was made by the Corporation nor did the ITO at any time ask the Corporation to explain why such deductions were not made. In the premises, it appears that a relationship of employer and employee has not been established between the Corporation and the assessee.

22. In any event, if it be held that it is the Corporation who is the employer of the assessee and not Ansaldo, the Italian company, then there is no agreement between the Corporation and the assessee that the assessee would be paid a tax-free salary.

23. For the reasons given above, the assessee succeeds in this reference. The questions referred Nos. 3 and 4 are both answered in the negative and in favour of the assessee. In the facts and circumstances, there will be no order as to costs.

Banerji, J.

I agree.