



Statutory validity of Fringe Benefits Tax in India

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Abstract: This paper explains the statutory validity of FBT in India/challenges FBT in India. The need for introducing fringe benefits tax on the employer arose on account of the inherent difficulty in identifying the personal element' where there is collective enjoyment of certain perquisites, amenities & benefits and attributing the same directly to the employee. This is so especially where the expenditure incurred by the employer is ostensibly for purposes of the business but inherently includes, at least partially, the benefit of a personal nature. Moreover, in cases where the employer directly reimburses the employee for expenses incurred, it becomes difficult to effectively capture the true extent of the perquisite provided because of the problem of cash flow in the hands of the employer. In order to reduce likely litigation and make the provisions more effective, the following suggestion could be of some help: The rate of fringe benefit tax should be moderate e.g. 15% or at the most 20%. The provision should not apply where the employer employs less than 20 persons to avoid its application across the board. In case of separate disallowance out of the expense concerned in assessment to fringe benefit should not be taken to that extent.

Keywords: fringe benefit, statutory validity, income computed

Introduction

Fringe benefits" as a term was first used in 1943 by the National War Labour Board of United States of America during World War II, in the context of wage freeze not being applicable to such benefits (EBRI, 2002). The board was unable to allow direct wage increases, so in place of them it encouraged companies to grant indirect benefits. In the face of a very tight ingenious form of benefits to lure marginal workers, the expenses incurred were passed on to the Government as part of cost plus contract. In India, Fringe Benefits paid in the early years of industrial development consisted mainly of gratuitous payment made by employers to deserving employees. Here

also fringe benefits increased considerably during the 2nd World War.

In India, The taxation of perquisites or fringe benefits provided by an employer to his employees, in addition to the cash salary or wages paid, is fringe benefit tax. Any benefits or perks that employees (current or past) get as a result of their employment are to be taxed, but in this case in the hands of the employer. This includes employee compensation other than the wages, tips, health insurance, life insurance and pension plans. Fringe benefits as outlined in section 115WB of the Finance Bill, mean any privilege, service, facility or amenity directly or indirectly provided by an employer to his employees (including



former employees) by reason of their employment. They also include reimbursements, made by the employer either directly or indirectly to the employees for any purpose, contributions by the employer to an approved superannuation fund as well as any free or concessional tickets provided by the employer for private journeys undertaken by the employees or their family members.

Concept of Fringe Benefit tax: The Fringe Benefit tax is a tax to be paid by an employer in addition to the income tax payable for every assessment year starting from the assessment year 2006-07. The tax is to be paid in respect of the fringe benefits provided or deemed to have been provided by an employer to his employees. The liability to pay Fringe Benefit Tax shall be there even when there is no liability to pay income tax by an employer. Accordingly, all those who fall within the definition of employer shall be required to pay tax on the fringe benefits provided to the employees irrespective of the fact that income, which an employer is earning, is exempt under the Income Tax Act or there is a loss. Accordingly, those entities which are claiming exemption under Section 10 such as mutual funds, undertakings in free trade zone claiming exemption under Section 10A, export-oriented units claiming exemption under Section 10B or Section 10BA, shall be liable to pay Fringe Benefit Tax. The Fringe Benefit Tax is a liability of the tax of the employees to be borne by the employer. That is why even loss making entities and entities whose income is exempt shall also be required to pay Fringe Benefit

Rationale for Levy of Fringe Benefit tax: The need for introducing fringe benefits

tax on the employer arose on account of the inherent difficulty in identifying the personal element' where there is collective enjoyment of certain perquisites, amenities & benefits and attributing the same directly to the employee. This is so especially where the expenditure incurred by the employer is ostensibly for purposes of the business but inherently includes, at least partially, the benefit of a personal nature. Moreover, in cases where the employer directly reimburses the employee for expenses incurred, it becomes difficult to effectively capture the true extent of the perquisite provided because of the problem of cash flow in the hands of the employer.

Under the proposed provisions, fringe benefit tax is payable by an employer who is either an individual or a Hindu undivided family engaged in a business or profession; a company; a firm; an association of persons or a body of individuals; a local authority; or an artificial juridical person. The fringe benefit tax is payable by the employer even where he is not liable to pay Income-tax on his total income computed in accordance with the provisions of this Act.

Implications /Difficulties of Fringe Benefit tax

The apparent contradiction in legislative intent and proposed provision would lead to litigation.

The issues which need focus and deliberation are the following:-

It is an independent or additional tax with independent provision of filing the return, assessment, payment of tax. The chapter XII H is complete code for this.



The tax is impossible even where assessee does not have taxable income, but expenditure are incurred in course of business.

Even charitable institution carrying incidental business without profit motive will also be required to pay tax.

The tax rate is 30% irrespective of the level of remuneration of employees or income of assessee.

Purpose of expenditure i.e. entertainment, gift, conveyance etc. will cause a lot of litigation to explain their meanings.

The levy of tax may be even where the number of employees is one or more.

Where the expenditure is disallowed on the allegation of personal nature, this can again be taxed under this section.

Even where part of expenditure mentioned in section 115WB (2) is recovered, the deemed fringe benefit would be a proportion of gross amount debited in the books without allowing credit. In certain cases, the provisions may lead to encourage the incurring the expenditure out of books.

Statutory/ Constitutionality of Fringe Benefit Tax:

FBT is constitutionally valid as it has come into force by the powers conferred by Indian Constitution through the below Articles:

1. Article 39: Principles of policy to be followed by the state for securing economic justice- © to ensure, the economic system should not result in concentration of wealth and means of

production to the common detriment. Whereby, it's the duty of Centre to take steps for securing economic justice. This new measure is nothing but a step taken by the government as a functional form highlighted under the Article 39 of the constitution.

2. Article 265: No tax can be levied or collected except by authority of law. The Authority of law means the legislative competence of the legislature imposing the tax. In this case, the Finance Ministry as passed this legislation which has the absolute legislative competence to pass the law.

3. Article 14: The principle of classification is applied somewhat liberally in case of a taxing statutes. "Where the power to tax exist, the extend of the burden is a matter for discretion of the law makers". The evident indent and general operations the tax legislation is to adjust the burden with the fair and reasonable degree of equality.

4. Article 270: All taxes and duties referred to in the Union List except the duties and taxes referred to in Article 271 and any tax levied for the specific purposes under any law made by Parliament shall be distributed between the Union and the states.

5. Article 271: Centre could levy a surcharge on Income tax on non-agricultural income for its exclusive use without sharing with States.

Hence, Central Government -can levy Tax + Surcharge which is similar to levying Fringe Benefit tax, thereby, it is validated by the constitutional provision (i.e.) through Article 270 and 271



6. FBT is also constitutionally validated by applying the Schedule VII of Indian Constitution.

Entry 82- Taxes on income other than agricultural income can be levied by Central Government. Therefore, FBT is nothing but a tax on income. Entry 97- Any other matter not enumerated in List II or III including any tax not mentioned in either of those lists. " If however, no entry in any of these lists covers it, then it must be regarded as a matter not enumerated in any of the three lists. Then , it belongs exclusively to parliament under Entry 97 of the Union List as a topic of legislation". Wherefore, the Expenditure tax also falls in the Residuary Entry as there is no entry in any list under which it can fall. Hence, it is very clear from above constitutional provisions that FBT is a valid one.

Grounds Cited As an Argument against the Constitutionality/ Statutory/ of FBT

It is to be noted that the following grounds are being cited as an argument Fringe Benefit Tax is unconstitutional. Now, let us just analyse the provisions cited below:

1. FBT is termed as both arbitrary and discriminatory and is against Article 14 of our constitution. It should be noted that Article 14 strikes at arbitrariness and it should involve negation of equality. But FBT has exempted only the charitable institutions, individuals and Hindu undivided family as it satisfies the test of reasonableness and acts as a "right and just and a fair" provision.

2. FBT affects the employees trade and profession as elucidated under Article

19(1)(g)[10] read with Article 301[11] of the Indian Constitution. But this provision of constitution cannot be claimed as a ground as FBT is just a new tax that is enhanced upon the employees and will not have any sort of effect on their profession or employment or trade. This argument is of very weak parlance in nature.

3. The next that is claimed is that FBT is not a tax on income but on expenditure. But under Entry 97- "Any other matter not enumerated in List II or III including any tax not mentioned in either of those lists can be taxed". Therefore, the Expenditure tax comes under the purview of taxation and is constitutionally valid. Hence, FBT is a legislation made within the ambit of vested to the parliament under List I and List II of the Schedule VII.

Application of FBT – a dilemma:

FBT applies to non-resident employees of the Indian company: Indian company is liable to pay for non-resident. As the non-resident employees are none other than the employees who are deputed by the Indian company to go to foreign country. The deputed employees becomes non-resident but still they continue to be the employees of Indian company, therefore, non-resident employees comes within the ambit of employees for whom Indian company is liable to pay tax. This provision is introduced as a presumption tax so as not to avoid incentive accounting practices. There is a possibility of shift of classification of expenditure from one heads of account to another. Therefore, in order to avoid the leakage of tax and evasion of tax this FBT provision has come into play.



What are the changes that have come about in the recent years?

The Budget presented by the finance minister in July 2009, scrapped the FBT, giving sizeable relief to employers. However, companies are now waiting for a finance ministry notification on the abolition of the FBT and clarity

Conclusions

In order to reduce likely litigation and make the provisions more effective, the following suggestion could be of some help: The rate of fringe benefit tax should be moderate e.g. 15% or at the most 20%. The provision should not apply where the employer employs less than 20 persons to avoid its application across the board.

In case of separate disallowance out of the expense concerned in assessment to fringe benefit should not be taken to that extent. The recovery out of expenses should be reduced from the amount of fringe benefits. The proportion of expenses is to be regarded, as fringe benefit should be linked to the number of employees. Instead of an independent return, assessment order and other proceedings, it should be part of the same return, assessment order, appellate procedure etc. to avoid procedural and litigation cost.

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