CIT can make sec. 264 revision even if there is a mistake on the part of assessee

Summary – The High Court of Gujarat in a recent case of Kamlesh K Singhal General Manager (MM)., (the Assessee) held that where impugned benefits were held to be fringe benefits and employer was taxed accordingly under Chapter XII-H, same benefit could not be included in income of employee treating it as a perquisite

Mistake in tax assessment, even if arises due to assessee's mistake, can be corrected by Commissioner in exercise of his revisional powers

Facts

- The assessee was employed as a General Manager by ONGC, India. ONGC reimbursed conveyance maintenance and repair expenditure (CMRE) and uniform allowance expenditure to the assessee.
- The Assessing Officer issued a notice on the ground that such payments were not reflected in the salary certificate issued by ONGC and no tax was deducted at source on them. The Assessing Officer added on 20 per cent of CMRE and 100 per cent on the uniform reimbursement expenses in the income of the assessee.
- On revision petition before the Commissioner, the assessee argued that the employer ONGC had treated the benefit as fringe benefit under section 115WA and had paid tax accordingly, which was accepted by the Assessing Officer. Thus, the assessee could not be asked to pay tax again because it would amount to double taxation. The Commissioner rejected the revision petition on the ground that the Commissioner in similar cases had confirmed similar disallowance.
- On petition before the High Court:

Held

- The FBT regime survived for a short-time. It was introduced under Chapter XII-H under the Finance Act, 2005 with effect from 1-4-2006.
- With dismantling of the FBT regime, relevant portion of sub-section (2) of section 17 has undergone a change. Clause (vi) thereof is replaced by clauses (vi), (vii) and (viii) with effect from 1-4-2010.
- It can thus be seen that before and after the FBT provisions, sub-section (2) of section 17 included within the meaning of term perquisite, the value of any other fringe benefit or amenity as may be prescribed. In other words, any fringe benefit or amenity which is prescribed under the rules would form part of the perquisite. During the period when the fringe benefit was being separately taxed under section 115WA, this definition of perquisite consciously referred to an exclusion providing that term 'perquisite' would include the value of any other fringe benefit or amenity as may be prescribed, excluding the fringe benefits chargeable to tax under Chapter XII-H. In plain terms therefore in case of fringe benefit chargeable to tax under Chapter XII-H, the same benefit would

not form part of a perquisite of an employee in terms of section 17(2). The statutory provisions were thus, so framed in a manner as to avoid the same benefit suffering the taxation at two ends. If a benefit paid by an employer to an employee is treated as a fringe benefit liable to tax under section 115WA, the employer alone shall suffer tax at a prescribed rate. Such benefit would not form part of the perquisite of the employee, subjecting him to further tax as additional income. The CBDT also in its Circular No. 9 of 2007, dated 20-12-2007, in response to a question whether the benefits arising on account of shares allotted or transferred under ESOP can be taxed as a perquisite under section 17 instead of being taxed as fringe benefit under Chapter XII-H at the option of employer, clarified that any fringe benefit liable to be taxed in the hands of the employer under Chapter XII-H cannot be taxed in the hands of the employee as perquisite under section 17. The employer, therefore, does not have an option to tax the benefit arising on account of share allotment as perquisite which is otherwise to be taxed as FBT.

- Under the instant circumstances, once a certain benefit is held to be a fringe benefit and the employer is taxed accordingly under Chapter XII-H, the same benefit cannot be included in the income of the employee treating it as a perquisite.
- While the department tried to tax the employee, it also questioned ONGC for not deducting tax at source on such payments. The Assessing Officer, held that the ONGC was required to deduct tax at source which it failed to do and therefore, disallowed the entire expenditure.
- A Division Bench of the High Court upheld the stand of the ONGC treating CMRE allowance paid to the employees as non-taxable income.
- In case of *CIT* v. *Oil & Natural Gas Corporation (India) Ltd.* [2015] 61 taxmann.com 105 (Guj.), referring to clause 6 of sub-section (2) of section 17, the Division bench of the High Court observed that the perquisites such as uniform allowance, *etc.*, do not include fringe benefit chargeable to tax under Chapter XII-H.
- In case of *CIT (TDS)* v. *Oil & Natural Gas Corporation (India) Ltd.* [2015] 54 taxmann.com 381/229 Taxman 415 (Guj.), once again the Court following the decision in earlier case held that the uniform allowance paid by the ONGC to its employees cannot be regarded as additional salary attracting the provisions of TDS.
- In case of *Oil & Natural Gas Corporation (India) Ltd.* (*supra*) the revenue has accepted the ONGC's treatment to payments of uniform allowance as fringe benefit and accepted tax from the employer on such basis in terms of Chapter XII-H, revenue now cannot change its stand and seek to tax the same amount in the hands of the employees which would be a clear case of double taxation.
- Thus, in the result, impugned order dated 22-9-2011 passed by the Commissioner is set aside. The disallowance of 20 per cent of the CMRE benefit and 100 per cent of the uniform allowance made in case of the petitioner by the Assessing Officer is reversed.