

NET-OF-TAX SALARY FOR EXPATRIATES IN INDIA

In a recent decision, the special bench of the Delhi Income-Tax Appellate Tribunal has ruled that tax paid by the employer on behalf of the employee is a "perquisite" and is not subject to multiple grossing up while computing the taxable income of the employee. This is a welcome ruling as far as those who employ expatriates on net-of-tax salary arrangements.

Section 10(10CC) introduced by the Finance Act 2002 provides that notwithstanding Section 200 of the Companies Act, 1956, tax paid by the employer on behalf of the employee on the perquisites, not provided for by way of monetary payment, shall not be included in the taxable income of the employee. The downside of such relief is that the employer is not eligible to claim corporate tax deduction for such tax paid by it.

It is pertinent to note that this relief is available only in respect of the tax paid by the employer on the perquisites which are "not provided for by way of a monetary payment". Now what constitutes a "monetary payment" vis-a-vis a "non monetary perquisite" has not been defined in the Income-Tax Act, 1961.

Expatriates coming into India and working in various companies are generally tax equalised i.e., the tax payable in India on their salary and perquisites is borne by the employer. This is to ensure that they remain tax neutral in respect of their Indian assignment. In other words, the expatriate employees are assured net-of-tax salary income. Consequently, their income is grossed up for determining the tax payable in India.

A dispute arose whether the tax paid by the employer is in the nature of perquisites. If yes, then whether it constitutes a "monetary payment" or is to be considered as a "non-monetary perquisite". Depending upon the position, the tax paid by the employer is added once to the taxable income or is subject to multiple grossing.

For example, if the employer agrees to pay INR 100 net-of-tax salary to the employee in India, the tax rate is 34%. Then, if such tax payment by the employer is considered to be a "non-monetary perquisite" then only INR 34 shall be added to the taxable income of the employee. Whereas if such tax payment by the employer is considered a "monetary payment" then INR 34 will be subject to multiple grossing up and INR 52 will be added in the taxable income of the employee such that after paying tax of 34% on INR 152, the employee receives INR 100 (approx) net of tax salary.

As is evident from the above, this issue assumes importance as there is substantial difference in the overall cost (remuneration and tax) for the employer and is particularly important in case of employers enjoying tax holiday or those having no taxable income/losses in India.