Practical guidelines for the preparation of return and payment of fringe benefit tax

285 ITR (Jour.) p.1 (Part-3)

The Finance Act, 2005, has inserted in the Income-Tax Act, 1961(the Act), a new Chapter XII-H. This Chapter deals with a new tax known as, '*Fringe Benefit Tax*' (FBT) and it contains Sections 115W to 115WL. Chapter XII-H has come into effect from 1.4.2006 viz. assessment year (AY) 2006-07, relevant to the financial year (FY) 2005-06.

Writ petitions were filed in a number of High Courts against the constitutional validity of fringe benefit tax (FBT) and stay against the FBT was granted by almost all the High Courts. Thereafter, all writ petitions pending in the various High Courts were transferred to the Supreme Court and the matter is still pending before the Supreme Court.

There are lot of ambiguities in the provisions of FBT. Therefore, the tax-payers were expecting that the Explanatory Notes in respect of the aforesaid provisions issued by the Central Board of Direct Taxes (CBDT), would clear up the uncertainties and ambiguities, etc. in the provisions of FBT. The CBDT issued Circular No.8/2005, dated 29.8.2005, by way of Explanatory Notes on FBT. However, the aforesaid Circular, instead of bringing about a modicum of clarity in the aforesaid provisions, has created further confusion in respect thereof.

We were expecting appropriate amendments by the Finance Act, 2006, in relation to the provisions of FBT, particularly the deemed fringe benefits (DFB) under section 115WB(2). However, our hopes are totally belied, as except minor changes here and there, the basic structure of the provisions of Chapter XII-H, remains unchanged.

At present, the aforesaid Circular of the CBDT continues to be operative, as no changes have been brought about in respect thereof. There are so many absurdities in the answers to a number of questions in the aforesaid Circular. The major absurdities are, however, to be found in the interpretation of deemed fringe benefits (DFB), as contemplated under section 115WB(2) of the Act and in respect of items of income, which are specifically exempt in the hands of the employees.

The main absurdity is that the computation of deemed fringe benefits, as contemplated under Section 115WB(2) has gone totally beyond the purpose or object for which FBT has been incorporated in the Act. Even the expenditure which is incurred in respect of persons other than the employees, has been held to be liable to FBT as per the aforesaid Circular. This was never the object or purpose of enacting the

provisions of FBT. Besides, the items of income like conveyance allowance, reimbursement of medical expenses upto Rs.15,000, etc., which have been specifically exempted from tax in the hands of the employees, have also been held to be liable to FBT. Again this was never the object or purpose of the provisions of FBT.

In the light of the aforesaid reasons, it becomes very difficult for an assessee to compute fringe benefits, deemed fringe benefits and tax chargeable in respect thereof. One has, therefore, to take a practical approach in this regard. In view of the aforesaid reasons, it would be advisable to pay tax in respect of ambiguous provisions relating to deemed fringe benefits, but in the return of FBT, claims should be made that such payments or expenses cannot be treated as deemed fringe benefits.

As regards those deemed fringe benefits, which are totally absurd and where the assessee has a very strong case, it is advisable not to pay FBT in respect thereof.

Keeping in view the aforesaid approach, certain practical guidelines are offered in regard to computation of fringe benefits and deemed fringe benefits, hereinafter.

I. Definition of fringe benefits – Section 115WB

Fringe benefits are defined under section 115WB. Fringe benefits proper are defined under section 115WB(1), whereas the deemed fringe benefits are listed under section 115WB(2) of the Act.

1. Fringe benefits – Section 115WB(1)

According to section 115WB(1), fringe benefits mean any consideration for employment provided by way of-

(a) any privilege, service, facility or amenity, directly or indirectly, provided by the employer, whether by way of reimbursement or otherwise, to his employee (including former employee or employees);

(b) any free or concessional ticket provided by the employer for private journeys of his employees or their family members; and

(c) any contribution by the employer to an approved superannuation fund for employees.

From the aforesaid provisions, it may be seen that section 115WB(1)(a) defines fringe benefits as, any consideration for employment provided by way of any privilege, service, facility or amenity, directly or indirectly, whether by way of reimbursement or otherwise.

Value of fringe benefits in Section 115WB(1)(a) is not provided

Section 115WC provides the value of fringe benefits. However, no corresponding value has been given for the fringe benefits covered under section 115WB(1)(a). In view of the aforesaid reasons, the effective fringe benefits will be only those provided in clauses (b) and (c) of section 115WB(1), viz.

(i) Free concessional ticket for private journeys of his employees and for the members of their families.

(ii) Contribution by an employer to approved superannuation fund for employees.
Vide substitution of section 115WC(1)(b) by Finance Act, 2006, with effect from 1.4.2007, the amount of contribution to approved superannuation fund in Section 115WB(1)(c) will be the one which exceeds Rs.1.00 lakh in respect of each employee.

2. Deemed fringe benefits – Section 115WB(2)

As per section 115WB(2), fringe benefits shall be deemed to have been provided by an employer to the employee, if the following conditions are satisfied:-

(i) The expenditure comes within the four corners of the meaning of fringe benefits given under section 115WB(1).

(ii) The employer has incurred such expenditure or made payment for such expenditure for the purpose of any of the 17 items given in section 115WB(2).

(iii)The employer has incurred these expenses in the course of his business or profession. Alternatively, the employer has incurred these expenses in the course of any activity whether or not such activity is carried on with the object of generating income, profits, or gains.

If these conditions are satisfied, it will be assumed that the aforesaid benefits are provided by the employer to its employees.

The 17 items of expenditure, which are deemed as fringe benefits, as per clauses (A) to (Q) of Section 115WB(2), are as follows:-

(A)	Entertainment.
(B)	Provision of hospitality of every kind by the employer to any person, whether by way of provision of food or beverages or in any other manner whatsoever and whether or not such provision is made by reason of any express or implied contract or custom or usage of trade, but does not include (i) expenditure on, or payment for, food or beverages provided by the employer to his employees in office or factory; (ii) any expenditure on or payment through paid vouchers which are not transferable and usable only at eating joints or outlets.
(C)	Conference (other than fee for participation by the employees in any conference).
(D)	Sales promotion including publicity but excluding specified advertisement expenditure.
(E)	Employees' welfare.
(F)	Conveyance, tour and travel (including foreign travel) for the assessment year 2006-07.
	Conveyance from the assessment year 2007-08
(G)	Use of hotel, boarding and lodging facilities
(H)	Repair, running (including fuel), maintenance of motor cars and depreciation thereon.
(I)	Repair, running (including fuel), maintenance of aircrafts and depreciation thereon.
(J)	Use of telephones.
(K)	Maintenance of any accommodation in the nature of guest house other than accommodation used for training purposes.
(L)	Festival celebrations.
(M)	Use of health club and similar facilities.
(N)	Use of other club facilities.
(O)	Gifts
(P)	Scholarships
(Q)	Tour and travel (including foreign travel) from the assessment year 2007-08.

II. Perquisites in respect of which tax is paid or payable by the employees, are not liable to fringe benefit tax–S.115 WB(3)

As per section 115WB(3), for the purposes of Section 115WB(1), the privilege, service, facility or amenity, etc. does not include perquisites in respect of which tax is paid or payable by the employee. The perquisites in respect of which tax is paid or payable by an employee may broadly fall in the following two categories:-

(i) When tax on perquisite is actually paid or payable by an employee., e.g. rent-free accommodation, as per Section 17 (2)(i).

(ii) When tax on perquisite is not payable in view of specific exemption under the Act, e.g. provision of medical facilities, transport allowance, etc.

It may be stated here that as regards the exempted perquisites, tax would have been payable by the employees in respect thereof, but for the specific exemptions provided under the Act.

III. Any special allowance or fixed allowance is not liable to FBT

Any special or fixed allowance cannot be treated as fringe benefit, because it cannot be termed as '*perquisites*'. The other reason for this proposition is that such allowance is part of the salary package and liable to tax in the hands of the employees.

It may be further stated in this context that if a special / fixed allowance is exempt under any of the provisions of the Act, then also it cannot be treated as fringe benefits. The examples of such allowances are as follows:-

(i) Leave Travel Allowance – exempt under section 10(5) r.w. rule 2B.
(ii) House Rent Allowance – exempt under section (13A) r.w. rule 2A
(iii) Conveyance Allowance – exempt under section 10(14)(i) r.w. rule 2BB(1)
(iv) Transport Allowance – exempt under section 10(14) (ii) r.w. rules 2BB(2)

In respect of Leave Travel Allowance, we may refer to the answer to question No.44 of Circular No.8/2005, dated 29.8.2005. As per the aforesaid answer, the value of any Leave Travel Allowance or Concession received by an employee normally falls within the meaning of '*Salary*' as defined under section 17(1) of the Act. This benefit is taxable under the head '*Salaries*', subject to the exemption under section 10(5) of the Act. Accordingly, it would not be liable to FBT.

The aforesaid logic will also apply to conveyance allowance which is subject to exemption under section 10(14)(i) of the Act. The same logic will also apply to all other such allowances.

IV. Certain relevant aspects in regard to deemed fringe benefits

In respect of expenses covered under section 115WB(2), the following points may be noted.

(i) Whether the expenses result into any benefit to the employees or not is not a consideration

As per the provisions of section 115WB(2), the value of the deemed fringe benefits is computed on presumptive basis. However, as per my Article- '*Absurdities in CBDT Circular on FBT'* published in 278 ITR (Jour.) 61, no part of the expenditure which does not result into any personal gain or benefit to the employees, can be subjected to FBT. Thus, any expenditure which is incurred by the employer for legitimate business purposes from which the employees do not derive any personal benefit or gain, cannot be treated as an expenditure incurred for providing deemed fringe benefits.

In this respect, from practical point of view, it would be advisable to compute deemed fringe benefits on presumptive basis as per section 115 WB(2), but a claim for non-inclusion of such expenses as fringe benefits, may be made in the return of fringe benefits.

(ii) Payment of advance towards expenses to be incurred in future, is not included in fringe benefits

FBT would be payable in the year in which the expenditure is incurred. Therefore, FBT would not be chargeable on payment of advance towards expenses to be incurred in future. In other words, expenditure would be considered on due basis and not on payment basis. This view is supported by answer to question No.18 of the aforesaid Circular of the CBDT.

(iii)Only share of expenses in the case of cost sharing agreement with group companies, will be liable to fringe benefit tax in the hands of the assessee company

In this regard, we may refer to answer to question No.33 of the aforesaid Circular. As per the aforesaid answer, the share of each group companies in the total expenditure, will be the expenditure incurred by the respective company, though the payment is made by one company. Hence, the company making the payment shall be liable to FBT only in respect of its share of such expenditure. Similarly, other group companies will be liable to FBT in respect of their shares.

(iv) Expenditure disallowed under section 37(1) will not be liable to fringe benefit tax

As regards disallowance of expenses made by the Assessing Officer under section 37(1) of the Act, we may refer to answer to question No.35 of the aforesaid Circular. As per the

aforesaid answer, any expenditure that is not allowable as a deduction under section 37(1), would not be liable to FBT.

V. Discussion about various deemed fringe benefits, as per clauses (A) to (Q) of Section 115WB(2)

The deemed fringe benefits have been listed under section 115WB(2). There are 17 clauses viz. clauses (A) to (Q) under section 115WB(2), which deal with various types of expenses incurred by the employer in the case of his business or profession, etc. The aforesaid expenses under clauses (A) to (Q) are dealt with as follows:-

1. Entertainment – Section 115WB (2)(A)

The word '*Entertainment*' has not been defined under the Act. Ordinarily entertainment connotes something which may be beneficial for the mental or physical well being but is not essential or indispensable for human existence. For example an ordinary meal is essential or indispensable for human existence and therefore, the same is not entertainment. As per Compact Oxford Dictionary, '*Entertainment*', means – '*amusement, distraction, diversion, enjoyment, fun, nightlife, pastime, play, pleasures, recreation, sport*'.

As per answer to question No.49 of the aforesaid Circular, the meaning of the word '*Entertainment*' in section 115WB(2)(A), is of wide import. It includes all expenditure in connection with *exhibition, performance, amusement, game or sport,* for affording some sort of amusement and gratification.

Fixed entertainment allowance being a part of pay package, is not liable to FBT.

Value of fringe benefits

20 per cent of entertainment expenditure incurred or paid by the employer during the previous year is the value of fringe benefits by virtue of section 115WC(1)(c).

2. Hospitality of every kind – Section 115WB(2)(B)

As per section WB(2)(B), the following fringe benefits are deemed to have been provided to employees—

"*Provision of hospitality of every kind by the employer to any person, whether by way of provision of food or beverages or in any other manner whatsovever and whether or not such provision is made by reason of an express or implied contract or custom or usage of trade but does not include—*

(i) expenditure on, or payment for, food or beverages provided by the employer to his employees in office or factory;

(ii) any expenditure on or payment through paid vouchers which are not transferable and usable only at eating joints or outlets".

Meaning of 'Hospitality'

Hospitality according to Webster's New Twentieth Century Dictionary means '……..*the act, practice or quality of receiving and entertaining strangers or guests in a friendly and generous way'*. It is, therefore, an act, practice, or quality of entertaining strangers or guests in a kind and generous way.

Expenditure on or payment through paid vouchers

As per section 115WB(2)(i), it does not include any expenditure on or payment through paid vouchers, which are not transferable and useable only at eating joints or outlets.

In this regard, the following points may be noted.

(i) There is no requirement that paid vouchers should be given only to employees or should be used for purchasing meals only. They may be used to purchase any edible item.

(ii) Expenditure on maintaining canteen in office / factory by the employer is not liable to FBT.

(iii) Expenditure on payment to a contractor, who maintains / runs a canteen in office / factory is also not liable to FBT.

(iv) Expenditure incurred on food or beverages procured by the employer from outside for providing to his employees in office or factory is not liable to FBT.

(v) An eating joint or outlet does not mean a regular restaurant, etc. Any place which offers food or edible items or beverages for human consumption, will qualify as an eating joint or outlet.

(vi) No monetary limit has been prescribed in respect of the value of such paid vouchers. Therefore, expenditure on paid vouchers will not attract FBT, irrespective of the cost per meal.

(vii) There is no condition that such food vouchers must be made use of, during office hours only.

However, if an employer reimburses to the employee expenditure on food or beverages consumed by the employee in the office, such reimbursement will be liable to FBT.

It is, therefore, advisable that whenever food or beverages is ordered from a restaurant or a hotel for providing to the employees, the payment in respect thereof, should be directly

made by the employer to the restaurant or hotel. In such a situation, the expenditure on the food or beverages so procured, will not be liable to FBT. In other words, reimbursement of bill for the expenditure on food or beverages incurred by the employee should be avoided.

Value of fringe benefits

Value of fringe benefits is as follows:-

Activities undertaken by employer	Value of fringe benefits (as a % of expenditure)	
	Assessment year 2006-07	Assessment year 2007-08 onwards
Employer engaged in the business of hotel	5 per cent	5 per cent
Employer engaged in the business of carriage of passengers or goods by aircraft / ship	20 per cent	5 per cent
Any other employer	20 per cent	20 per cent

3. Conference expenses – Section 115WB(2)(C)

As per section 115WB(2)(C), any expenditure on conference is deemed to be fringe benefits. However, the fees for participation by employees in any conference are not liable to FBT.

The conference expenses include expenditure on conveyance, tour, domestic travel, foreign travel, boarding and lodging in connection with any conference.

Meaning of the word 'Conference'

Conference means a formal meeting for discussion or debate. According to Concise Oxford Dictionary, it means *colloquium, congress, consultation, convention, council, deliberation, discussion, forum, meeting, seminar, symposium*. A general meeting, however, cannot be considered as conference.

As per answer to question No.56 of the aforesaid Circular, any expenditure incurred for the purposes of conference is liable FBT, irrespective of whether the conference is of agents or dealers or development advisors or any other persons. Thus, as per the aforesaid Circular, the expenditure incurred on the conference of agents or dealers or development advisors is liable to FBT.

The aforesaid interpretation on the provisions of section 115WB(2)(C) is totally incorrect. As already explained, any expenditure incurred on persons other than employees will fall outside the purview of FBT.

In view of the aforesaid reasons, as a practical guideline, pay FBT as per the aforesaid Circular, but claim such expenditure as not liable to FBT in the return of fringe benefits.

Value of fringe benefits

20 per cent of expenditure on conference as discussed before will be the value of fringe benefits.

4. Sales promotion including publicity – Section 115WB (2) (D)

As per section 115WB(2)(D), any expenditure on sales promotion including publicity, with certain exceptions, will be deemed as fringe benefits.

For the sake of ready reference, section 115WB(2)(D) is reproduced as follows:-

---

Fringe benefits.

115WB

(2) The fringe benefits shall be deemed to have been provided by the employer to his employees, if the employer has, in the course of his business or profession (including any activity whether or not such activity is carried on with the object of deriving income, profits or gains) incurred any expense on, or made any payment for, the following purposes, namely:—

(*D*) *sales promotion including publicity:*

Provided *that any expenditure on advertisement,—*

*(*i*) being the expenditure (including rental) on advertisement of any form in any print (including journals, catalogues or price lists) or electronic media or transport system;*

*(*ii*) being the expenditure on the holding of, or the participation in, any press conference or business convention, fair or exhibition;*

*(*iii*) being the expenditure on sponsorship of any sports event or any other event organised by any Government agency or trade association or body;*

*(*iv*) being the expenditure on the publication in any print or electronic media of any notice required to be published by or under any law or by an order of a court or tribunal;*

(v) being the expenditure on advertisement by way of signs, art work, painting, banners, awnings, direct mail, electric spectaculars, kiosks, hoardings, bill boards or by way of such other medium of advertisement; and

(vi) being the expenditure by way of payment to any advertising agency for the purposes of clauses (i) to (v) above,

shall not be considered as expenditure on sales promotion including publicity;

The following clauses (*vii*) and (*viii*) shall be inserted after clause (*vi*) of proviso to clause (*D*) of sub-section (2) of section 115WB by the Finance Act, 2006, w.e.f. 1-4-2007 :

(vii) being the expenditure on distribution of free samples of medicines or of medical equipment, to doctors; and

(viii) being the expenditure by way of payment to any person of repute for promoting the sale of goods or services of the business of the employer,

---

In view of the proviso to section 115WB(2)(D), the following expenses are not included in the expression '*Sales promotion including publicity*':-

(i) Expenditure (including rental) on advertisement of any form in any print (including journals, catalogues or price lists) or electronic media or transport system.

(ii) Expenditure on the holding of, or the participation in, any press conference or business convention, fair or exhibition.

(iii) Expenditure on sponsorship of any sports event or any other event organized by any Government agency or trade association or body.

(iv) Expenditure on the publication in any print or electronic media of any notice required to be published by or under any law or by an order of a court or tribunal.

(v) Expenditure on advertisement by way of signs, art work, painting, banners, awnings, direct mail, electric spectaculars, kiosks, hoardings, bill boards or by way of such other medium of advertisement.

(vi) Expenditure by way of payment to any advertising agency for the above purposes.

(vii) Expenditure on distribution of free samples of medicines or of medical equipment, to doctors. (applicable from the assessment year 2007-08 onwards).

(viii) Expenditure by way of payment to any person of repute for promoting the sale of goods or services of the business of the employer (applicable from the assessment year 2007-08 onwards).

The expressions '*Sales promotion*' and '*Publicity*', have not been defined in the Act. It may be

broadly stated that '*Sales promotion*' necessarily involves an element of advertisement and publicity. In this connection, following points may be noted:-

(i) The cost incurred to sell the products will not fall within the purview of '*Sales promotion*'— *CIT Vs. The Statesman Ltd. [1992] 198 ITR 582 (Cal.)*

(ii) Trade discounts and commission in respect of individual sales in the normal course of business on commercial terms either directly to the customers or through its wholesale and other dealers, cannot be regarded as sales promotion – *CIT Vs. Tuticorin Alkali Chemicals & Fertilisers [2003] 261 ITR 80 (Mad.)*

Similarly, offering a discount on the price, in effect, is only an instance on the sale of the company's product at a lower price and the same cannot be regarded as an expenditure on sales promotion – *CIT Vs. India Pistons Ltd. [2001] 250 ITR 279 (Mad.)*

(iii) Awards / rewards granted to selling agents to motivate them for better performance are also not covered under sales promotion. This view was expressed in *CIT Vs. Santosh Agencies [1994] 210 ITR 78 (Cal.).*

It was also held in this case that the special discount to dealers as well as meeting their foreign tour expenses are selling expenses incurred in the ordinary course of business and no part of such expenditure will fall under sales promotion.

In this context, the aforesaid Circular of the CBDT is very relevant. As per the aforesaid Circular the following expenses are not subject to FBT.

(i) Brokerage and selling commission paid for selling goods (answer to question No.58)

(ii) Expenditure relating to salesman appointed by the distributors for companies' products reimbursed to distributors through credit notes (answer to question No.59)

(iii) Sales discount to wholesalers / customers or bonus points to customers (answer to question No.60)

(iv) Expenditure on incentives given to distributors for meeting quantity targets (answer to question No.61)

(v) Expenditure on product marketing to an outside agency (answer to question No.62)

It may be noted in this context that expenditure on product market research carried on by the employer through its own employees will be subject to FBT, as per answer to question No.62 of the aforesaid Circular.

As a result of the aforesaid discussion, the following expenses are covered under sales promotion.

(i) Expenditure on free samples of products distributed to trade or consumers (answer to question No.64)

From the AY 2007-08, however, expenditure on distribution of free samples of medicines or medical equipment to doctors is not covered under sales promotion.

(ii) Expenditure on free offers with products such as freebies like tattoos, cricket cards or similar products to trade or consumers, as per answer to question No.66 of the aforesaid Circular.

(iii) Expenditure on product marketing research carried on by the employer through its own employees, as per answer to question No.62 of the aforesaid Circular.

(iv) Expenditure on gifts to customers including gifts under trade scheme or for promotion of products to distributors / retailers.

Value of fringe benefits

20 per cent of expenditure on sales promotion including publicity, will be the value of fringe benefits.

5. Employees' welfare expenses – Section 115WB(2)(E)

The term '*employees' welfare'* is not defined in the Act. As per Explanation to this entry, any expenditure incurred or payment made to fulfil any statutory obligation or mitigate occupational hazards or provide first aid facilities in the hospital or dispensary run by the employer, shall not be considered as expenditure for employees' welfare.

As per Compact Oxford Dictionary, the word '*welfare*' means – *the health, happiness and fortunes of a person or a group.*

On a perusal of the aforesaid clause (E), the following expenses may be regarded as employees' welfare expenses.

(a) employer's contribution to Provident Fund

(b) employer's contribution to Superannuation Fund

(c) employer's contribution to Gratuity Fund

(d) employer's contribution to any other Fund for the welfare of the employee e.g. E.S.I.

In this context, it may be noted that employer's contribution to Approved Superannuation Fund is already covered under clause (c) of Section 115WB(1) of the Act. Therefore, it may be concluded that, as the Approved Superannuation Fund, is expressly covered under clause (c) of Section 115WB(1), it implies that there is no legislative intent to subject contributions to other employees' welfare funds (Provident Fund, Gratuity, ESI, etc.) to FBT. This interpretation is based on the rule that express mention of one, implies exclusion of the others.

Medical Expenses

Expenses on medical treatment of employees are certainly employees' welfare expenditure. Such expenditure is not considered as a perquisite, if the conditions under proviso to Section 17(2) are satisfied. In this context, it may be noted that the intention is to tax FBs which escape taxation and not to tax perquisites which are expressly exempt. Thus, the benefit under proviso to Section 17(2) in respect of medical expendiure for the employees will not be covered under this entry.

Value of fringe benefits

20 per cent of expenditure on employee's welfare is the value of fringe benefits.

6. Conveyance – Section 115WB(2)(F)

As per section 115WB(2)(F), any expenditure incurred on conveyance is deemed to be a fringe benefit.

Meaning of the term 'Conveyance'

The term '*Conveyance*' has not been defined in the Act. In common parlance, conveyance is a means of transport. It is an instrument of transportation from one place to another. Transport may be defined as a means to carry people or goods from one place to another by road, water or air.

As per Advanced Law Lexicon by P.R. Aiyar, Page 1050, '*Conveyance*' means a vehicle, vessel, aircraft or any other means of transport including any animal.

It is significant to note in this context that under Section 115WB(2)(H), expenditure on repair, running (including fuel), maintenance of motor-cars and the amount of appreciation thereon, is deemed to be a fringe benefit. Thus, there is a specific provision under section 115WB(2) covering expenses on motor-cars. It may also be noted here that motor-cars are also vehicles and means of transport.

As per answer to question No.85 of the aforesaid Circular, delivery / display vans, trucks / lorries, ambulance and tractors are not motor-cars. Therefore, expenditure on the running, repair and maintenance of such vehicles is not liable to FBT. It may thus be noted that under the specific provisions of section 115WB(2)(H), expenditure on motor-cars alone is covered within its scope. In other words, expenditure on vehicles other than motor-cars is not covered under section 115WB(2)(H).

From the aforesaid discussion, it is evident that as regards the vehicles, expenditure on cars alone is expressly covered under section WB(2)(H). It implies that there is no legislative intent

to subject expenditure on other vehicles to FBT. This interpretation is based on the rule that express mention of one implies exclusion of the others.

From the aforesaid discussion, it is quite clear that clause (F) of section 115WB(2) relating to expenditure on conveyance is infructuous. Therefore, any expenditure on the repair, running (including fuel) maintenance of vehicles other than motor-cars viz. two-wheelers, jeeps, etc. will fall outside the purview of FBT.

Value of fringe benefits

Value of fringe benefits given in the table is as follows:-

Nature of business of the employer	Value of fringe benefits (as a % of expenditure)
Employer engaged in the business of construction	5 per cent
Employer engaged in the business of manufacture or production of pharmaceuticals.	5 per cent
Employer engaged in the business of manufacture or production of computer software.	5 per cent
Any other employer	20 per cent

Note:- The aforesaid chart is provided for the sake of completeness of the Note, though it does not serve any purpose, as clause(F) is found to be infructuous.

7. **Use of hotel, boarding and lodging facilities – Section 115WB(2)(G)**

As per section 115WB(2)(G), expenses on use of hotel, boarding and lodging facilities are deemed to be fringe benefits.

Sometimes, expenditure for meeting lodging and boarding is paid as a daily allowance in place of actual expenditure. Such daily allowance is exempt under section 10(14) of the Act. Therefore, it should not be liable to fringe benefit tax.

However, as per answer to question No.79 of the aforesaid Circular, such expenditure is subject to fringe benefit tax in the hands of the employer.

In view of the aforesaid reasons, as a practical guideline, it is advisable to pay FBT on such daily allowance meant for lodging and boarding but claim the same as not liable to FBT in the return of fringe benefit tax.

Value of fringe benefits

Value of fringe benefits is as follows:-

Activities undertaken by employer	Value of fringe benefits(as a % of expenditure)	
	Assessment year 2006-07	Assessment year 2007-08 onwards
Employer engaged in the business of manufacture or production of pharmaceuticals	5 per cent	5 per cent
Employer engaged in the business of manufacture or production of computer software.	5 per cent	5 per cent
Employer engaged in the business of carriage of passengers or goods by aircraft / ship	20 per cent	5 per cent
Any other employer	20 per cent	20 per cent

8. Repair, running, maintenance of motor-cars – Section 115WB(2)(H)

As per section 115WB(2)(H), expenditure on repair, running, fuel, maintenance of motor-car, depreciation thereon, is deemed to be fringe benefits.

What is motor-car?

It includes motor-cars and not other motor-vehicles. Therefore, as per answer to question No.85 of the aforesaid Circular, it does not include buses, coaches, trucks, tempos, three-wheelers, two-wheelers, bikes, scooters, delivery vans, display vans, lorries, ambulances and tractors. Therefore, expenditure on vehicle other than cars is not liable to FBT.

Expenditure on car-hire is not included

As per Explanation to erstwhile section 37(2B), expenditure on running and maintenance of motor-cars includes expenditure on hire charges for engaging cars plied for hire and conveyance paid to employees.

There is no such explanation in section 115WB(2)(H) of the Act. In the absence of any such explanation, the aforesaid expenditure will not be covered within the scope of clause (H) of section 115WB(2).

However, as per answer to question No.82 of the aforesaid Circular, expenditure by way of taking motor-car on hire or lease is covered under the aforesaid clause (H).

In my opinion the view expressed in the aforesaid Circular may be ignored.

Driver's salary is also not included

From the language of the aforesaid clause (H), it may be concluded that drivers' salary being classified as '*Wages*', will not be covered under this clause. This view is supported by the

judgement of Madras High Court in the case of *CIT Vs. Sholinger Textiles Ltd. [1999] 240 ITR 908 (Mad.)*

Only cars owned by the employer are covered

The aforesaid clause (H) uses the words '*and the amount of depreciation thereon*'. The context in which the aforesaid phrase has been used, indicates that the repairs, etc. in respect of motor-cars owned by the employer are only covered.

Value of fringe benefits

Value of fringe benefits as given in the table is as follows:-

Activities undertaken by employer	Value of fringe benefits(as a % if expenditure)
In the case of employer engaged in the business of carriage of passengers / goods by motor car	5 per cent
In the case of any other employer	20 per cent

Note:- The lower rate of 5 per cent is applicable only in the case of any employer who is engaged in the business of carriage of goods / passengers by motor car. Companies providing taxi services will be eligible for the lower valuation rate of 5 per cent. Employers engaged in the business of carriage of goods by trucks or carriage of passengers by bus cannot take the benefit of lower valuation of 5 per cent.

9. **Repair, running, maintenance of aircraft – Section 115WB(2)(I)**

As per section 115WB(2)(I), expenditure on repair, running, fuel, maintenance of air-craft and depreciation thereon, is deemed to be fringe benefits.

All the aforesaid discussion relating to the aforesaid clause (H) will apply to clause (I), *mutatis mutandis.*

Value of fringe benefits

Activities undertaken by employer	Value of fringe benefits(as a % of expenditure)
In the case of employer engaged in the business of carriage of passengers/goods by aircraft.	0 per cent
In the case of any other employer	20 per cent

10. **Telephone expenses – Section 115WB(2)(J)**

As per Section 115WB(2)(J), expenditure on telephones including mobile phones is deemed as fringe benefits.

However, expenditure on leased telephone lines is not included under the aforesaid clause(J).

It may be noted in this context that the language of this clause indicates that cost of the telephone or mobile instruments is not covered thereunder. Similarly, cost of installation will also not be covered.

Value of fringe benefits

20 per cent of the aforesaid expenditure is the value of the fringe benefit.

11. Maintenance of Guest House – Section 115WB(2)(K)

As per section 115WB(2)(K), expenditure on any accommodation in the nature of guest house other than accommodation used for training purposes, is deemed to be a fringe benefit.

Meaning of 'Guest house'

The term '*Guest house*' has not been defined under section 115WB(2). It has also not been defined anywhere else under the Act. Before 1997, it was defined under section 37(5) for the purpose of calculating disallowance under section 37(4). The definition under section 37(5) was inserted after an adverse ruling by the Madras High Court in the case of *CIT Vs. Aruna Sugar Ltd. [1980] 123 ITR 619 (Mad.)*. As no definition of '*Guest house*' has been provided under these provisions, the ruling of Madras High Court in the aforesaid case will be applicable.

It was held by the Hon.High Court in the aforesaid judgement that employees and directors are not strangers so as to be treated as guests. Therefore, unless the '*Guest house*' is intended for use by a complete stranger, it will not fall within section 115WB(2)(K).

As a result, any expenditure on the maintenance of '*Guest house*' meant for the use of the employees / directors will not fall under section 115WB(2)(K).

It may also be noted here that depreciation on '*Guest house*' is not included as part of the expenditure deemed to be a fringe benefit, because where the Legislature has intended to subject the amount of depreciation on any capital asset to FBT, it has specifically provided for it, as in section 115WB(2)(H) / (I). This view is also confirmed by answer to question No.94 of the aforesaid CBDT Circular.

In this context, it may also be noted that the phrase '*other than accommodation used for training purposes*', indicates that if a '*Guest house*' is used for training purposes, the expenditure thereon, will not be subjected to FBT. A number of institutions like nationalized banks have Staff Training Colleges or Centres which have their own '*Guest house*' for accommodating trainees. The expenditure on such guest houses will not be covered under this clause.

From the aforesaid discussion about the definition of the term '*Guest house*', it may be seen that in the light of the aforesaid judgement of the Madras High Court, any expenditure on the maintenance of the '*Guest house*' meant for the employees or its directors, will not be covered under section 115WB(2)(K). It may also be noted here that as per aforesaid Circular of the CBDT, all kinds of expenses incurred on the maintenance of the '*Guest House*' are covered under the present clause (K). However, a Circular of the CBDT is not binding on the assessees / tax-payers, if the instructions or directions contained therein are prejudicial to the assessees / tax-payers, as per the provisions of section 119(2) of the Act. This view is also supported by the judgement of the Madras High Court in the case of *Madura Coats Vs. Dy.CIT [2005] 195 CTR 138 (Mad.)*

In the light of the aforesaid discussion, any expenditure on the maintenance of a '*Guest house*' meant only for employees / directors, should not be treated as fringe benefits and no fringe benefit tax need be paid in respect thereof. As practical guideline, a specific note may be provided in the return of fringe benefits in this regard.

Value of fringe benefits

20 per cent of the aforesaid expenditure is the value of fringe benefits.

12. Festival celebrations – Section 115WB(2)(L)

As per section 115WB(2)(L), any expenditure on festival celebration will be deemed as fringe benefits.

Meaning of 'Festival'

Festival is defined as a day or time of religious or other celebration, marked by feasting, ceremonies or other observances. It can also be defined as a period or programme of festive activities, cultural events or entertainment. Any expenditure on such activities will be covered under section 115WB(2)(L), regardless of the fact whether the beneficiaries are employees or other persons.

It may be noted that the amount under this clause is to be restricted to the expenditure on feast, gift hampers, etc. But it will not include general expenditure such as lighting, decoration, etc.

It may be further noted that expenditure on celebration of Independence Day and Republic Day will not be liable to fringe benefit tax, because they are not '*Festivals*; as normally understood, as per answer to question No.95 of the aforesaid Circular.

Value of fringe benefits

50 per cent of the aforesaid expenditure is the value of fringe benefits.

13. Use of health-club and similar facilities – Section 115WB(2)(M)

As per section 115WB(2)(M), any expenditure on use of health-club and similar facilities is deemed to be fringe benefits.

Meaning of the expression 'Health-club and similar other facilities'

The expressions *'Health-club and similar other facilities*' have not been defined. Generally, it means service for physical well being such as sauna and steam bath, Turkish bath, solarium, spas, reducing or slimming saloons, gymnasium, yoga, meditation, massage or any similar service.

It may be noted in this context that depreciation on club building is not included as per answer to question No.86 of the aforesaid Circular.

Other important points

It may be noted here that clause (I) of section 115WB(2) in the original Finance Bill, 2005, read as follows:-

"(I)*Use of Health-Club, Sports and similar facilities*"

However, in the Finance Act, 2005, as finally passed this has been incorporated in clause (M) after excluding the word '*Sports*'. It may thus be concluded that expenditure on use of sports facilities is not intended to be treated as fringe benefit.

Value of fringe benefits

50 per cent of the aforesaid expenditure is the value of fringe benefits.

14. Use of any other club facilities – Section 115WB(2)(N)

As per section 115WB(2)(N), any expenditure on use of any other Club facilities is deemed to be a fringe benefit.

The term '*club'* is not defined in the Act. As per Concise Oxford Dictionary, Ninth Edition, the word '*club'* means – *An association of persons united by a common interest, usually meeting periodically for a shared activity, like tennis club, yacht club, etc; an organization or premises offering members social amenities, meals and temporary residence, etc.'*

From the language used in this clause, it may be concluded that this clause covers only expenditure on use of club facilities, i.e. the direct expenditure for actual use of club facilities.

This clause does not cover the initial expenditure on **corporate membership** of a club. When such fees are paid, they are paid for acquisition of club membership, which is a right and not for the use of club facilities.

Value of fringe benefits

50 per cent of the aforesaid expenditure is the value of the fringe benefits.

15. Gifts – Section 115WB(2)(O)

As per section 115WB(2)(O), any expenditure on gifts is regarded as fringe benefits.

Meaning of 'Gift'

The word '*Gift*' has not been defined. As per section 122 of the Transfer of Property Act, '*Gift*'- is a transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person called the donor to another called the donee and accepted by or on behalf of the donee.

One essential requirement of '*Gift*' is that it should be without any direct or indirect consideration. .[Answer to question No.97 of the aforesaid Circular.]

In this regard a very important and significant point is that there cannot be a gift made by a business organization either to the employees or customers, because there is always an indirect consideration behind any such gift.

A gift, in real terms, can only be made out of natural love and affection to a relative. There is no such element present in the so called gifts given by a business organization to its employees / customers. Therefore, in my view the aforesaid clause (O) of section 115WB(2) is infructuous.

As a practical guideline pay FBT on the value of such gifts but claim the same as not liable to FBT in the return of fringe benefits.

Value of fringe benefits

50 per cent of the aforesaid expenditure is the value of the fringe benefits.

16. Scholarships – Section 115WB(2)(P)

As per section 115WB(2)(P), any expenditure on Scholarships is deemed as a fringe benefit.

What is a Scholarship?

This entry deems expenditure on scholarships as a fringe benefit.

The Finance Bill, 2005, as originally introduced considered scholarship to children of employees as a fringe benefit. However, the Finance Act, as finally passed, has omitted reference to children. Therefore, scholarship to employees or others, shall also be regarded as a deemed fringe benefit.

The term '*Scholarship'* has not been defined in the Act.

As per Concise Oxford Dictionary, the word '*Scholarship'* means- *A payment from the funds of a school, university, local government, etc. to maintain a student in full-time education awarded on the basis of scholarly achievement.*

As per the Law Lexicon by P.R. Aiyar, the word '*Scholarship'* means – *Maintenance for a scholar or a student.*

It may be noted in this context that Scholarships to employees or the members of their family shall be regarded as fringe benefit.

Value of fringe benefits

50 per cent of the aforesaid expenditure is the value of the fringe benefits.

17. Tour and Travel including foreign travel – Section 115WB(2)(Q)

Originally the expenditure on '*Tour and travel including foreign travel*' was a part of clause (F) of section 115WB(2). However, vide Finance Act, 2006, with effect from 1.4.2007, the aforesaid expenditure has been deleted from clause (F) and incorporated under a separate clause (Q).

Meaning of the words 'Tour' and 'Travel'

'*Tour*' means a journey for pleasure in which several places are visited or a short trip to view or inspect something.

'*Travel*' means to pass from place to place, whether for pleasure, instruction, business or health, and the length of the journey does not destroy the character of the occupation.

Value of fringe benefits

The value of the aforesaid fringe benefits as per newly inserted clause (e) of section 115WC(1) will be five per cent of such expenditure. From the aforesaid return of fringe benefits at 5 per cent, it may be seen that-

(i) Being a part of deemed fringe benefit any expenditure on tour and travel including foreign travel will not be taxable in the hands of the employees.

(ii) As the value of deemed fringe benefit is very low at 5 per cent, it is advised that maximum expenditure must be incurred under these heads.

VI. BPOs and Call Centres, etc. are entitled to preferential treatment under section 115WC(2)(d)

As per answer to question No.105 of the aforesaid Circular, I.T. enabled services do not fall within the scope of the term '*Computer software*' for the purposes of section 115WC of the Act.

I have countered the aforesaid view expressed in the Circular, vide my Article

– '*Business Processing Offices and Call Centres: Impact of levy of Fringe Benefit Tax–278 ITR(Jour.) p.25 (Part-1)*'

The aforesaid Article contains detailed discussion on the relevant provisions of the Act, Notifications issued by the CBDT and case-law and after discussion of all the relevant aspects, it has been concluded-

(i) The clarification issued by the CBDT, vide answer to Question No.105 of Circular No.8/2005, is absolutely incorrect.

(ii) The term '*Computer software*', as contemplated under Section 115WC(2)(d) of the Act, includes within its scope all IT enabled products and services such as BPOs and Call Centres, etc.

(iii) The value of fringe benefits in respect of the business of manufacture or production of '*Computer software*' relating to clauses (F) and (G) of Section 115WB(2), shall be taken at 5 per cent instead of 20 per cent, and

(iv) The aforesaid clarification issued by the CBDT is not, at all, binding on the assessee / tax-payer.

VII. Conclusion

I have discussed all the relevant aspects in relation to FBT,including the relevant Circular No.8/2005, dated, 29.8.2005.

I have provided therein, practical guidelines for the purpose of payment of FBT and preparation of return of fringe benefit tax for the AY 2006-07.

The same may be followed, accordingly.

Pune (S.K. Tyagi)

1.6.2006

S. K. TYAGI
M.Sc., LL.B., **Advocate**
Ex-Indian Revenue Service
Income-Tax Advisor

☎ Office : (020) 2613 3012
Fax : (020) 2612 1131
Residence : (020) 2665 2444
E-mail : sktyagidt@sify.com

Flat No.2, (First Floor)
Gurudatta Avenue
Popular Heights Road
Koregaon Park
PUNE - 411 001