‘Fringe Benefit Tax’–ambiguities and doubts resolved

276 ITR (Jour.) p.1 (Part – 2)

-S.K. Tyagi

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.

At the outset, I am constrained to state that the provisions contained in Chapter XII-H, have not been properly drafted. These provisions suffer from a number of ambiguities and genuine doubts, as regards their correct interpretation.

I have studied the aforesaid provisions in-depth and thereafter, tried to explain the various ambiguities therein and clarify genuine doubts about the correct interpretation thereof. I have also tried to deal with the implications of the FBT on the other provisions of the Act. All the aforesaid aspects relating to FBT are discussed as follows.

1. Brief sketch of the provisions of Chapter XII-H

(i) Fringe Benefit Tax (FBT) is to be levied on the **‘employer’** in respect of fringe benefits provided or deemed to be provided by the employer to his employees during any financial year beginning from 1.4.2005.

(ii) The word, ‘e*mployer*’ is defined to mean-

(a) company

(b) firm

(c) an association of persons or a body of individuals whether incorporated or not, but excluding a fund / trust / institution, eligible for exemption under Section 10 (23C) or registered under Section 12AA of the Act.

(d) a local authority; and

(e) every artificial juridical person, not falling within any of the preceding sub-clauses.

Thus individuals and HUFs are excluded from the definition of ‘e*mployer’* and hence they are not liable to pay FBT.

(iii) The rate of FBT is 30% (plus applicable surcharge and education cess) on the value of fringe benefits (FB)

(iv) FBT is in addition to income-tax.

(v) FBT is payable by the employer, even if no income-tax is payable by him on his total income.

(vi) FB is defined to mean-

any consideration for employment provided by way of-

(a) any privilege, service, facility or amenity, directly or indirectly, provided by an employer, whether by way of reimbursement or otherwise.

(b) any free or concessional ticket provided for private journeys of the employees and their family members, and

(c) employer's contribution to an approved superannuation fund for employees.

(vii) Besides, there are number of deemed fringe benefits (DFBs). Fringe benefit shall be deemed to have been provided by the employer to his employees, if any expenditure is incurred or payment is made for specified purposes such as entertainment, hospitality, gifts, conference, scholarships, etc.

(viii) '*Fringe benefit'* does not include perquisites on which tax has already been paid or is payable by the employees.

(ix) FBT is to be computed on presumptive basis

(x) Then, there are usual procedural requirements for the filing of return in respect of FBs, assessment and payment of tax in respect thereof.

2. Purpose of 'Fringe Benefit Tax'

The avowed purpose of FBT is to tax benefits that are usually enjoyed collectively by the employees and cannot be attributed to individual employees.

The purpose of FBT, as explained by the Finance Minister in his speech, while introducing the Finance Bill, 2005, and Explanatory Memorandum to the Finance Bill, 2005, is as follows:-

(i) Finance Minister's Speech

I have looked into the present system of taxing perquisites and I have found that many perquisites are disguised as fringe benefits, and escape tax. Neither the employer nor the employee pays any tax on these benefits which are certainly of considerable material value. At present, where the benefits are fully attributable to the employee, they are taxed in the hands of the employee; that position will continue. In addition, I now propose that where the benefits are usually enjoyed collectively by the employees and cannot be attributed to individual employees, they shall be taxed in the hands of the employer. However, transport services for workers and staff and canteen services in an office or factory will be outside the tax net. The tax is not a new tax, although I am obliged to call it by a new name, namely, Fringe Benefit Tax. The rate will be 30 per cent on an appropriately defined base. [273 ITR(St.) p.56].

(ii) Explanatory Memorandum to the Finance Bill, 2005

The taxation of perquisites or fringe benefits provided by an employer to his employees, in addition to the cash salary or wages paid, is subject to varying treatment in different countries. These benefits are either taxed in the hands of the employees themselves or the value of such benefits is subject to a 'fringe benefit tax' in the hands of the employer. The rationale for levying a fringe benefit tax on the

employer lies in the inherent difficulty in isolating the 'personal element' where there is collective enjoyment of such 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 includes, in partial measure, a 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*. [Emphasis provided]

Therefore, it is proposed to adopt a two pronged approach for the taxation of fringe benefits under the Income-Tax Act. Perquisites which can be directly attributed to the employees will continue to be taxed in their hands in accordance with the existing provisions of Section 17(2) of the Income-Tax Act and subject to the method of valuation outlined in Rule 3 of the Income-Tax Rules. In cases, where attribution of the personal benefit poses problems, or for some reasons, it is not feasible to tax the benefits in the hands of the employee, it is proposed to levy a separate tax known as the fringe benefit tax on the employer on the value of such benefits provided or deemed to have been provided to the employees

-.[273 ITR (St.)pp.196 & 197]

(iii) Finance Minister's speech while introducing amendments to Finance Bill,2005, on May 2,2005

'*Therefore, by the presumptive tax method what we are trying to do* **is to tax that part which is clearly a perquisite, clearly a benefit but which is going untaxed both in the hands** *of the employer and the employee'* [Emphasis provided] [144 Taxman (St.) p.121]

(iv) Finance Minister's speech relating to amendments to the Finance Bill, 2005, on 5.5.2005

'We have excluded a number of benefits which accrue to us. For example, canteen expenditure has been excluded, transport and travelling has been excluded. Even under the fringe benefit, as amended by Lok Sabha, we have taken care to exclude what I realized would be legitimate business expenditure and perhaps not amenable to the categorization, fringe benefit. What has been included is 'fringe benefit.'

Thus, FBT is being introduced in order to tax that part of expenditure incurred by the employer, which is clearly a perquisite or a benefit for the employees, but which is going untaxed both in the hands of the employer and the employee. Besides, the expenditure in question is apparently incurred for the purposes of the business of the employer but the same is considered to include, in a partial measure, a benefit of personal nature for the employees.

It may, therefore, be concluded that only that expenditure will fall within the ambit of FBT which results in some kind of a personal benefit or gain for the employees. All other expenses will remain outside the purview of FBT.

3. Charge of 'Fringe Benefit Tax' (FBT)

Section 115WA is the charging section for FBT. This is, therefore, the most important Section of Chapter XII-H of the Act. Section 115WA reads as follows:-

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S.115WA

(1) In addition to the income-tax charged under this Act, there shall be charged for every assessment year commencing on or after the 1st day of April, 2006, additional income-tax (in this Act referred to as fringe benefit tax) in respect of the fringe benefits provided or deemed to have been provided by an employer to his employees during the previous year at the rate of thirty per cent on the value of such fringe benefits.

(2) Notwithstanding that no income-tax is payable by an employer on his total income computed in accordance with the provisions of this Act, the tax on fringe benefits shall be payable by such employer.

It may be seen from the aforesaid Section 115WA(1) that FBT is an additional income-tax in respect of the fringe benefits provided or deemed to have been provided by an employer to his employees during the previous year, at the rate of 30% on the value of such fringe benefits.

Thus, it is quite clear that FBT is a tax on the fringe benefits provided or deemed to have been provided by an employer to his employees. **It clearly indicates that FBT will not cover any expenditure, which does not involve any benefit to the employees**.

It is a settled position in law that in case of a conflict between the charging section and other related section, the provisions of the charging section will override the provisions of the other related section. Similarly, in case of an ambiguity in other provisions, the provisions of charging section may be used as a torch light in order to enlighten us about the gray areas in the other provisions.

4. Fringe Benefits(FB)- Section 115WB(1)

The term 'Fringe Benefits' has been defined in Section 115WB. Sub-section (1) defines the term 'Fringe Benefits' simpliciter, whereas sub-section (2) defines the term 'Deemed Fringe Benefits'(DFB). The various aspects in this regard are as follows:-

I. Direct Fringe Benefits

The term '*fringe benefits*' has been defined in S.115WB(1) of the Act, which is reproduced as follows:-

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S.115WB

(1) For the purposes of this Chapter, "fringe benefits" means any consideration for employment provided by way of—

(a)any privilege, service, facility or amenity, directly or indirectly, provided by an employer, whether by way of reimbursement or otherwise, to his employees (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.

The different categories of the '*fringe benefits'* as per the aforesaid definition and the valuation, as laid down under Section 115WC (1), may be tabulated as follows:-

Sr.No.	Fringe Benefit	Taxable value of the benefit
1	Any privilege, service, facility or amenity, directly or indirectly, provided by an employer to employees / former employees, whether by way of reimbursement or otherwise	No specific provision
2	Free or concessional tickets provided for private journeys	As provided by the employer to the general public as reduced by any amount paid/recovered. [Section 115WC(1)(a)]
3	Employer's contributions to an approved superannuation fund	Actual expense. [Section 115WC(1)(b)]

Meaning of the term 'consideration for employment'

According to Section 115WB(1), the term 'Fringe Benefits' means "*any consideration for employment……..".* It indicates that the word '*consideration'* refers to some profit or benefit out of employment provided by way of the specified categories laid down under Section 115WB(1) of the Act.

It also indicates that only that expenditure which includes some profit or benefit for the employees, may be brought within the purview of FBT.

The aforesaid three categories of benefit may be discussed as follows:-

(a) Privilege, service, facility or amenity, etc.- Section 115WB(1)(a)

According to Section 115WB(1)(a), any consideration for employment provided by an employer by way of, privilege, service, facility or amenity, is regarded as '*fringe benefit*', whether it is provided by way of reimbursement or otherwise. Thus, reimbursements are also covered if they fall within the purview of '*Privilege, service, facility or amenity'*. It may also be stated here that the privilege, service, etc. may be provided directly or indirectly to the employees or former employees.

A perusal of the provisions of Section 115WB will reveal that Section 115WB(1)(a) is a residual clause. All those items of '*fringe benefits*', which do not fall under other clauses of Section 115WB(1) or Section 115WB(2), shall be taxable '*fringe benefits*', only if they satisfy the definition given in Section 115WB(1)(a).

While the basis of valuation has been provided for all 'fringe benefits' falling under clauses (b) and (c) of Section 115WB(1) and all items of expenditure deemed to be 'fringe benefits' under Section 115WB(2), no basis of valuation has been provided for 'fringe benefits', covered under clause (a) of Section 115WB(1).

In view of the aforesaid reasons, any privilege, service, facility or amenity covered by Section 115WB(1)(a) will not be chargeable to FBT, as no computation formula has been prescribed for the same. This view is based on the following judgements:-

(i) CIT Vs. B.C. Srinivasa Shetty [1981] 128 ITR 294 (S.C.)

(ii) CWT Vs. Dr. Karan Singh [1993] 200 ITR 614 (S.C.)

(iii) CIT Vs. B.R. Constructions [1993] 202 ITR 222 (A.P.) (FB)

(b) Free or concessional tickets provided by the employer-Section 115WB(1)(b)

Any free or concessional ticket provided by the employer for private journeys of the employees and their family members is regarded as a FB as per Section 115WB(1)(b). In this context, the valuation of the benefit under this clause, is laid down under Section 115WC(1)(a), reads as follows:-

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115WC.

(1) For the purpose of this Chapter, the value of fringe benefits shall be the aggregate of the following, namely:—

*(*a*) cost at which the benefits referred to in clause (*b*) of sub-section (1) of section 115WB, is provided by the employer to the general public as reduced by the amount, if any, paid by, or recovered from, his employee or employees:*

Provided *that in a case where the expenses of the nature referred to in clause (*b*) of sub-section (1) of section 115WB are included in any other clause of sub-section (2) of the said section, the total expenses included under such other clause shall be*

reduced by the amount of expenditure referred to in the said clause (b) *for computing the value of fringe benefits;*

From the aforesaid provisions of Section 115WC(1)(a), it may be seen that the value of fringe benefits under Section 115WB(b)is based on the cost at which the benefit is provided by the employer to the public. It means that it contemplates only an employer who provides tickets to the public. In other words, unless the employer is engaged in public transport such as bus services, airlines, etc., the clause will not apply and other employers who are not engaged in such a business, cannot be regarded as having provided free or concessional tickets.

Whether Leave Travel Assistance (LTA) is covered

A question that may arise here is whether the provision of LTA may be regarded as free or concessional ticket by the employer within the meaning of Section 115WB(1)(b) of the Act. In this context, the valuation of the benefit, as already discussed, will have to be considered. As already pointed out, this sub-clause will not apply to employers other than those engaged in public transportation.

(c)Any contribution to an Approved Superannuation fund – Section 115WB(1)(c)

Any contribution by the employer to an Approved Superannuation fund for the employees is regarded as FB, as per Section 115WB(1)(c) of the Act.

Contributions to an unapproved superannuation fund are not covered under this clause.

It may be seen here that clause (c) of Section 115WB(1), brings to charge the benefit which is directly identifiable *qua* an individual employee. This is against the avowed objective that the FB charge is in respect of collective benefits enjoyed by the employees. This aspect of the FBT is totally unfair.

II. Deemed Fringe Benefits (DFBs) and value thereof – Section 115WB(2),r.w.s. 115WC

Fringe benefits are deemed to be provided by the employer to his employees, if the employer has, in the course of his business and profession, incurred any expenditure or made any payment for the purposes enumerated under Section 115WB(2) of the Act.

Fringe benefits shall be deemed to have been provided, if the following conditions are satisfied:

(i) the employer has incurred any expenditure or made any payment for certain specified purposes

(ii) such expenditure is incurred or payment is made by the employer in the course of his business or profession or any activity, whether or not such activity is carried on with the object of deriving income, profits or gains

(iii) such expenditure is incurred or payment is made for certain purposes specified in clauses (A) to (P) of Section 115WB(2), of the Act. These clauses enumerate the nature of expenditure or the payments, which are deemed to be fringe benefits.

(iv) Section 115WC(1) provides the value of fringe benefits, as enumerated in the aforesaid clauses (A) to (P) of Section 115WB(2) of the Act.

(v) Section 115WC(2) provides exceptions or reduced value in respect of fringe benefits.

The deemed fringe benefits in the aforesaid clauses (A) to (P) are discussed in detail, hereinafter.

5. Scope of Fringe Benefits as laid down under Section 115WB of the Act

This is the most important part of this Article. Here, we have to consider the scope of the '*deemed fringe benefits*', as laid down under Section 115WB of the Act. For a number of reasons to be discussed hereinafter, no part of the expenditure, where from the employee does not derive any personal benefit or gain, can be treated as deemed DFB. 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 expenditure for providing FB or DFB. This conclusion is based on the following reasoning:-

(i) As per the provisions of charging S.115WA(1) of the Act, there shall be charged additional income-tax referred to as FBT in respect of the FBs provided or deemed to have been provided by an employer to his employees.

This means that any expenditure which involves no personal benefit or gain for the employees, will not fall within the mischief of Section 115WA(1) of the Act. Thus, any expenditure incurred on persons other than employees, for the legitimate business purposes, will not be covered within the purview of fringe benefits or deemed fringe benefits as laid down under Section 115WB of the Act.

(ii) As per Section 115WB(1), for the purposes of Chapter XII-H, '*fringe benefits*' means any consideration for employment, provided by way of……etc.

This provision also clearly indicates that expenditure in question must be in consideration for employment and not otherwise.

(iii) Under Section 115WB(3), the privilege, service, facility or amenity does not include perquisites in respect of which tax is paid or payable by the employee.

It means that any expenditure which is taxed or taxable in the hands of the employee by way of perquisites, will not fall within the purview of the privilege, service, etc.

(iv) In order to find the legislative intent or ascertain the purpose behind the legislation, the speech made by the Finance Minister or the Mover of the Bill, can be taken into consideration, in view of the following judgements:-

(a) *Kerala State Industrial Development Corporation Ltd. Vs. CIT [2003] 259 ITR 51 (S.C.)*

(b) *Sole Trustee Loka Shikshana Trust Vs. CIT [1975] 101 ITR 234 (S.C.)*

(c) *K.P. Verghese Vs. I.T.O. [1981] 131 ITR 597 (S.C.)*

The Finance Minister in his speech while introducing the Finance Bill, 2005, has stated-

'In addition I now propose that where the benefits are usually enjoyed collectively by the employees and cannot be attributed to individual employees, they shall be taxed in the hands of the employer'.

The aforesaid part of the speech of the Finance Minister clearly proves that the intent is to tax the benefits to the employees and therefore, the provision has to be interpreted to reflect the legislative intent and not to tax any expenditure on non-employees, which does not result in any personal benefit or gain to the employees.

(v) In case of doubt or difficulties, the Explanatory Memorandum to the Finance Bill, may be used to ascertain the intention of the Legislature, as laid down in *M. Rangaswamy Vs. CWT [1996] 221 ITR 39 (Mad.)*

In the Explanatory Memorandum to the Finance Bill, 2005, it is stated-

(a) 'This is so specially where the expenditure incurred by the employer is ostensibly for purposes of the business, but includes, **in partial measure***, a benefit of a personal nature'.* [Emphasis added]

(b)'In cases where the attribution of personal benefit poses problems, or for some reasons, it is not feasible to tax the benefits in the hands of the employees, it is proposed to levy a separate tax known as the fringe benefit tax on the employer on the value of such benefits provided or deemed to have been provided to the employees'.

-[273 ITR (St.)pp.196, 197]

Thus, the FBT is proposed to be levied on the benefits to the employees and therefore, the DFBs cannot include expenditure on non-employees, which does not result in any benefit or gain to the employees.

(vi) The Finance Minister in his speech in the Parliament on 2.5.2005, has stated:

'FBT is a presumptive tax. As I said in my Budget speech, there are a large number of allowances, perquisites which are given, which go untaxed.....Therefore, by the presumptive tax method what we are trying to do is to tax that part which is clearly a perquisite, clearly a benefit but which is going untaxed both in the hands of the employer and employee'. [144 Taxman (St.)p. 121]

(vii) As is already clear, the very purpose of the provisions of Chapter XII-H, is to tax the untaxed FBs to the employees. To adopt a contrary view may result in a very heavy and unjust levy on the employer. It may result in the taxation of disproportionately high expenditure on non-employees, which does not involve any benefit or gain to the employees.

For example, if expenditure on use of hotel, boarding and lodging facilities is incurred only on customers and not on any of the employees, at all, then treatment of such an expenditure as a DFB will be totally unjust and absurd, because no benefit therefrom accrues to the employees.

There may be a case of a person who has no employees at all. For example, a partnership firm may be run by the partners themselves without the aid of any employee. It would, therefore, be

totally unjust and absurd to levy any FBT on the so called DFBs, which do not involve any benefit or gain for the employees of the firm.

(viii) Besides, deeming provisions are required to be construed strictly as laid down in *CIT Vs. Khimji Nershi [1992] 194 ITR 192 (Bom.).* Therefore, the provisions relating to DFBs must be strictly construed to cover only those expenses, which involve any benefit or gain for the employees.

(ix) In addition, along with the introduction of FBT provisions-

(a) Section 17(2)(vi) has been amended with effect from AY2006-07, so as to provide that FBs chargeable to FBT under Chapter XII-H, will not be included as the income of employees by way of perquisite,

(b) Rule 3 of the Income-Tax Rules, 1962, has been amended in order to exempt certain perquisites from taxation.

(x) In this context, the answer to a question by the Finance Minister in an interview to 'Economic Times on 2.3.2005, is quite relevant. The relevant part of the interview is as follows:-

Q. The industry is looking for an assurance from you that no legitimate business expenses are taxed.

A. That I have made clear. My speech said only perquisites which are disguised as fringe benefits will be taxed. No legitimate business expenditure will be taxed.

Therefore, no part of the expenditure, wherefrom the employee does not derive any personal benefit or gain, 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 FBs or DFBs.

6. Whether apportionment of expenditure is permissible

In case of composite expenditure i.e. expenditure jointly incurred on the employees as well as customers, etc., the total expenditure will have to be apportioned to ascertain the expenditure attributable to the employees and charge FBT on the same.

In this context, it has to be understood that the FBT has been introduced in the Income-Tax Act, in order to tax that **part of expenditure** which is clearly a benefit or gain for the employees but which is not taxed either in the hands of the employees or the employer. For example, if after a business meeting with a customer, few employees also join the lunch or dinner arranged for the customer and his associates. Basically, the expenditure on lunch or dinner in respect of the employees, is also an expenditure for the purpose of the business of the employer and the same was allowed as such so far. It is now considered that the expenditure incurred on lunch or dinner of the employees partly involves a personal benefit or gain for the employees. What part of such expenditure is attributable to such personal benefit or gain of the employees, is to be computed on presumptive basis. For instance, if such expenditure on lunch or dinner is Rs.1,000, and there are two persons on behalf of the customer and two employees. In such a

situation expenditure on the lunch or dinner of the employees would be 50% of Rs.1,000 i.e. Rs.500. Then on presumptive basis the personal benefit or gain of the employees is computed at 20% of Rs.500, i.e. Rs.100. On the amount of Rs.100, additional tax by way of FBT @ 30% is to be charged in the hands of the employer. Thus, the FBT, payable by the employer would be Rs.30 plus surcharge and education cess.

Therefore, any composite expenditure, will have to be apportioned in order to ascertain the expenditure, which involves a personal benefit or gain for the employees. In support of such apportionment of the aforesaid expenses, reliance may be placed on the following judgements:

(i) CIT Vs. Mysore Minerals Ltd. [1986] 162 ITR 562 (Karn.)

(ii) CIT Vs. Expo Machinery Ltd. [1993] 190 ITR 576 (Del.)

7. Brief discussion about the various Deemed Fringe Benefits (DFBs)

There are 16 categories of DFBs, as laid down under Section 115WB(2), in clauses (A) to (P). The aforesaid DFBs are briefly discussed as follows:-

(i) Expenditure on entertainment – Section 115WB(2)(A)

The word '*entertainment'* has not been defined in 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.*

(ii) Expenditure on hospitality – Section 115 WB(2)(B)

This entry regards any expenditure, as DFB, which is incurred on the provision of hospitality by way of food, beverages, etc. but does not include:

(a) expenditure on food or beverages in office or factory, and

(b) expenditure on paid vouchers which are not transferable and usable only at eating joints or outlets.

Regarding payment for food through paid vouchers, it may be noted that these vouchers are not transferable and they can be used only at eating joints or outlets. Besides, the following points may also be noted in this context.

(a) 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 eating joint or outlet.

(b) 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.

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

(d) It is not essential that the employer should acquire paid vouchers issued by an intermediate agency. It would also be all right, if the employer has got a direct arrangement with a eating

joint or outlet, whereby the employer incurs expenditure on non-transferable paid vouchers issued by the eating joint or outlet, distributes them amongst the employees and the employees then utilize such vouchers.

(iii) Expenditure on conference- Section 115 WB(2)(C)

This entry deems any expenditure on conference as a DFB. However, fees for participation by the employees in any conference shall not be regarded as DFB.

As per Explanation, for this purpose an expenditure on conveyance, tour and travel (including foreign travel), on hotel or boarding and lodging in connection with any conference shall be deemed to be an expenditure incurred for the purposes of conference.

A conference could be for training or conference for some other purposes e.g. sales, strategy, marketing, etc. Any expenditure on training conference would be deemed to be a FB under this entry, as there is a '*benefit*' for the employee, on account of his training. However, expenditure on other conferences for sales, marketing, etc. may not be covered under this clause, as there is no benefit involved therein, for the employees.

It may also be noted that **general meeting** cannot be considered as a conference.

(iv) Expenditure on sales promotion including publicity – Section 115 WB(2)(D)

It may be seen from Section 115WB(2)(D) that following expenditures on advertisement shall not be regarded as sales promotion or publicity.

(a) Expenditure (including rental) on advertisement in any print(including journals, catalogues or price lists) or electronic media or transport system;
(b) Expenditure on holding of, or participation in, any press conference, business convention, fair or exhibition;
(c) Expenditure on sponsorship of any sports event or any event organized by any Government agency or trade association or body;
(d) Expenditure on publication of any notice required to be published under law or by an order of court or tribunal, in any print or electronic media;
(e) 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
(f) Payment to any advertising agency for (a) to (e) above.

From the various judicial precedents and circulars of the CBDT, it may be gathered that price discounts and commissions to dealers, cannot be subjected to FBT.

(v) Expenditure on employees' welfare – 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. [Please also see discussion, hereinafter]

(vi) Expenditure on conveyance, tours & travel(including foreign travel)- Section 115WB(2)(F)

This clause deems expenditure on conveyance, tours and travel, including foreign travel, as FB expenditure.

In this context, it may be noted that the FB provisions are meant to apply only to such expenditure, which results in a benefit or gain to an employee. Expenditure on conveyance wholly and exclusively in the performance of official duties, does not result in any benefit to an employee and therefore, such expenditure cannot be regarded as conveyance expenditure for the purpose of this clause.

Similarly expenditure on tours and travels exclusively for official duties, cannot be covered under this clause. Perhaps, in case an employee extends his official tour, for some personal reason, the expenditure thereon, may fall under this clause.

(vii) Expenditure on use of hotel, boarding and lodging facilities – Section 115WB(2)(G)

This clause deems expenditure on the use of hotel, boarding and lodging facilities as FB expenditure.

It may be noted here that expenditure on hotel, boarding and lodging for the purposes of a conference will fall under clause (C)of Section 115WB(2) of the Act.

(viii)Expenditure on repairs, running and maintenance of motor cars – Section 115WB(2)(H)

According to this clause the following expenditure on motor cars is deemed to be a fringe benefit.

(a) repairs
(b) running
(c) fuel
(d) maintenance, and
(e) depreciation

In this context, the following points may be noted-

(a) The words used in this clause are '*motor cars*' and not '*motor vehicles'*. Therefore, expenditure on vehicles other than motor cars, viz. buses, coaches, lorries, trucks, etc. will not be covered under this clause.
(b) Though normally an expenditure is not to be distinguished as capital or revenue, for the purpose of Section 115WB(2),this clause expressly covers only the expenditure of revenue nature.
(c) In many cases, a motor car may be used for official as well as personal purposes. Log books may be maintained in order to ascertain the expenditure for personal purposes of the employees. Otherwise, the Assessing Officer would be entitled to estimate a reasonable percentage of the total cost.
(d) This clause 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.
(e) From the language of this clause it is quite clear that driver's salary, being classified as '*wages',* will not be covered under this clause.

(ix) Expenditure on repairs, running and maintenance of aircrafts – Section 115WB(2)(I)

Under this clause, expenditure on repair, running (including fuel), maintenance of aircrafts and the amount of depreciation thereon, are deemed as a FB. Thus, this entry covers the following expenditure on aircrafts.

(a) repairs

(b) running

(c) fuel

(d) maintenance, and

(e) depreciation

All other points, as applicable to the aforesaid clause (H), will apply to clause (I) also, as the case may be.

(x) Expenditure on use of telephone other than expenditure on leased lines – Section 115WB(2)(J)

As per this entry, expenditure on use of telephone (including mobile phone), other than expenditure on leased telephone lines, is deemed to be a fringe benefit.

In this context, the following points may be noted-

(a) the expenditure to be covered under this clause is to be restricted to the expenditure on telephones, resulting in a benefit or advantage to the employees.

(b) the language of this clause indicates that cost of the telephone or mobile instrument is not covered thereunder. Similarly, cost of installation will also not be covered.

(xi) Expenditure on maintenance of guest house – Section 115WB(2)(K)

This entry deems expenditure on maintenance of any accommodation in the nature of guest house, other than accommodation used for training, as a fringe benefit.

In this context, the following points may be noted:-

(a) 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 the trainees. The expenditure on such guest houses will not be covered under this clause.

(b) Depreciation on guest house is not included as part of the expenditure deemed to be a fringe benefit.

(xii) Expenditure on festival celebrations – Section 115WB (2)(L)

This clause deems expenditure on festival celebrations as a fringe benefit.

As explained earlier, the expenditure covered under this clause also, is to be restricted to the expenditure on employees e.g. feast, hampers to employees, etc. but it will not include general expenditure such as lighting, decoration, etc.

(xiii)Expenditure on use of health club and similar facilities – Section 115WB(2)(M)

This clause deems expenditure on the use of health club and similar facilities as a fringe benefit.

Clause (I) of Section 115WB(2) in the original Finance Bill, 2005, read as under:-

(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) as-

(M) *'Use of health club and similar facilities'*.

It may, thus, be seen that the word 'sports' has been omitted. It would, therefore, mean that expenditure on use of sports facilities is not intended to be treated as a fringe benefit.

The expression *'Health club and similar other facilities'* is not defined in the Act. The health club may mean any establishment including a hotel or resort, providing health and fitness services.

The expression '*Other facilities'* may include fitness centers, health saloons, gymnasium, massage centers, slimming centers and aerobic centers, etc.

(xiv) Expenditure on use of any other club facilities – Section 115WB(2)(N)

This clause deems expenditure on the use of any other club facilities as 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.

(xv) Expenditure on gifts – Section 115WB(2)(O)

As per this clause, expenditure on gifts is regarded as a fringe benefit.

Keeping in view the context, only gifts to the employees, would be covered under this clause. Gifts to customers and other persons, will not be covered under this clause.

The word '*gift'* has not been defined in the Act. 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 donee and accepted by or on behalf of the donee.*

In this context, we may also look into the definition of the word '*gift'* under Section 2(xii) of the erstwhile Gift Tax Act, 1958. Under the aforesaid section '*Gift'* means-

'The transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or money's worth and includes the transfer or conversion of any property referred to in Section 4, deemed to be a gift under that section.'

The expression 'gift' for F.B.T. purposes, can not, however, include deemed gifts covered under Section 4 of the Gift Tax Act, 1958.

(xvi)Expenditure on scholarships – Section 115WB(2)(P)

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. Aiyer, the word '*Scholarship'* means – *Maintenance for a scholar or a student.*

8. Chargeable perquisites, as per Section 115WB(3)

Section 115WB(3) provides that for the purposes of sub-section (1), the privilege, service, facility or amenity, does not include perquisites in respect of which tax is paid or payable by the employee. It indicates that the aforesaid provisions will not apply to deemed FBs, as specified under sub-section (2) of Section 115WB of the Act.

Therefore, the employer will be liable to pay FBT on any deemed FB, even if it is excluded by Section 115WB(3).

However, in this context, there may be another better view. As per this view, the expenditure on taxable perquisites is to be reduced from the deemed FB expenditure under Section 115WB(2). The earlier clause regarding privilege, service, etc. does not have any independent method for computation and therefore, it may be regarded as an explanatory clause regarding the scope of DFB provisions under Section 115WB(2) also. In such a case, the exclusion as provided under Section 115WB(3) should also apply to DFB provisions.

9. Treatment of exempt perquisites and allowances vis-à-vis FBT

In this context, there may be other relevant queries, which need to be addressed. These queries are whether various allowances allowed to employees and other exempt perquisites are covered under Chapter XII-H, of the Act. Such items may be listed as follows:-

(i)	Leave Travel Assistance	- Section 10(5), r.w.r. 2B
(ii)	House Rent Allowance	- Section 10 (13A), r.w.r. 2A
(iii)	Conveyance Allowance	-Section 10 (14)(i), r.w.r.2BB(1)

(iv) Transport Allowance - Section 10(14)(ii), r.w.r.2BB(2)

(v) Expenditure on medical treatment - Proviso to Section 17(2)(vi),r.w.r. 3A

(vi) Transport services for workers and staff - Explanation to S.17(2)(iii)

In order to answer the aforesaid queries, first, we will have to look at the very purpose of the charge of FBT. This may be gauged from the speech of the Finance Minister, while introducing the Finance Bill, 2005, as well as amendments thereto, as also Explanatory Memorandum to Finance Bill, 2005. The aforesaid speeches and Memorandum have already been discussed. At this stage, it will suffice, if only the relevant parts thereof, are referred to. The same are as follows:-

(i) Finance Minister's Speech while introducing the Finance Bill 2005 [273 ITR(St.)p.56]

'In addition, I now propose that where the benefits are usually enjoyed collectively by the employees and cannot be attributed to individual employees, they shall be taxed in the hands of the employer'.

The aforesaid part of the Finance Minister's speech clearly indicates that any specific allowance to an employee or other such specific benefit, will not be covered under Chapter XII-H.

(ii) Explanatory Memorandum [273 ITR (St.) pp.196,197]

'Perquisites which can be directly attributed to the employees will continue to be taxed in their hands in accordance with the existing provisions of Section 17(2) of the Act.'

(iii) Finance Minister's speech while introducing amendments to Finance Bill, 2005 [144 Taxman (St.)p.121]

'Therefore, by the presumptive tax method, what we are trying to do is to tax that part which is clearly a perquisite, clearly a benefit, but which is going untaxed both in the hands of the employer and the employee'.

In the light of the aforesaid declarations and explanation, regarding the legislative intent behind the newly inserted Chapter XII-H, it may be safely concluded that allowances and other perquisites which are specifically covered or exempted under other provisions of the Income-tax Act, will not fall within the ambit of FBT.

Besides, another very important point in this context is that Chapter XII-H, has been introduced in order to tax the hitherto untaxed perquisites and not to tax the specific allowances and exempted perquisites to the employees.

It may also be stated here that Chapter XII-H, has not been introduced in order to bring to tax those items which have been specifically exempted under other provisions of the Act.

The aforesaid queries are now answered in the light of the aforesaid discussion, as follows:-

(i) Leave Travel Assistance (LTA)

LTA is specifically exempt under Section 10(5) of the Act. Otherwise also, at times a part of the LTA may be taxed, if the requisite conditions are not fulfilled.

Therefore, LTA is totally out of the purview of FBT.

(ii) House Rent Allowance (HRA)

In view of the reasons given for LTA, HRA is also outside the purview of FBT.

(iii) Conveyance Allowance

For the aforesaid reasons in (i), conveyance allowance is also out of the purview of FBT.

(iv) Transport Allowance

Transport allowance also is out of the purview of FBT, in view of the reasoning in aforesaid clause (i).

(v) Expenditure on medical treatment

Expenditure on medical treatment is exempt, vide proviso to Section 17(2)(vi) of the Act. Therefore, it will also not fall within the ambit of FBT.

(vi) Transport services for workers and staff – Explanation to Section 17(2)(iii)

As per Explanation to Section 17(2)(iii), the use of any vehicle by a company or an employer for journey by the assessee from his residence, to office or other place of work, or from such office or place to his residence, cannot be regarded as a benefit or amenity granted or provided to him free of cost or at a concessional rate, for the purposes of this sub-clause.

Thus, the expenditure on transport for workers and staff for commutation between office and residence has been specifically exempted from income-tax.

Besides, in this context, the relevant part of the Finance Minister's speech, 273 ITR(St.)p.56, may also be referred. The same is as follows-

'*However, transport services for workers and staff and canteen services in office or factory will be outside the tax net'*.

The Finance Minister has reiterated the aforesaid exclusions from the FBT in his speech relating to the amendments to Finance Bill, 2005, on 5.5.2005, 145 Taxman (St.) p.30. The relevant part thereof, is reproduced as follows:-

'*We have excluded a number of benefits which accrue to us. For example, canteen expenditure has been excluded, transport and travelling has been excluded'*.

In view of the aforesaid reasons, the transport services provided to the workers and staff for commutation between residence and office will be outside the purview of FBT.

10.Conclusion

From the aforesaid discussion, it is quite clear that FBT is intended to apply to only those expenditures, which result in any benefit or gain for the employees. All other expenditures will remain outside the purview of FBT.

The Employers, Accountants and Tax-Advisors, may make use of the aforesaid guidelines for the computation of fringe benefits, deemed fringe benefits and fringe benefit tax.

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