CASE NO.:
Appeal (civil) 3270 of 2003

PETITIONER:
ARUN KUMAR & OTHERS

RESPONDENT:
UNION OF INDIA & ORS.

DATE OF JUDGMENT: 15/09/2006

BENCH:
Y.K. SABHARWAL, C.K. THAKKER & P.K. BALASUBRAMANYAN

JUDGMENT:
J U D G M E N T
WITH
TRANSFERRED CASES (C) Nos. 101 AND 102 of 2006

C.K. THAKKER, J.

In Civil Appeal as well as in Transferred Cases, the appellants have challenged validity of Rule 3 of the Income Tax Rules, 1962, as amended by the Income Tax (Twenty-second) Amendment Rules, 2001, (hereinafter referred to as 'the Rules') which amended the method of computing valuation of perquisites under Section 17(2) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'). According to the appellants, amended Rule 3 is inconsistent with the parent Act and also ultra vires Article 14 of the Constitution.

To understand the controversy raised in the present proceedings, relevant factual background in Civil Appeal No. 3270 of 2003 may be stated;

The appellants were employed as officers/ executives by Tata Iron & Steel Co. Ltd. ('TISCO' for short). According to the appellants, usually public sector undertakings provide housing facilities or grant house rent allowance in lieu of accommodation to their employees. Normally, house rent allowance is granted where public sector enterprises are unable to provide housing accommodation to their employees. Such situations arise when officers/executives are posted in cities or metropolitan offices of the enterprises where company accommodation is either not available or available to a limited extent. For the purpose of accommodating its employees, TISCO has constructed several residential bungalows/ flats/ quarters/ accommodations in the township of Jamshedpur and around its plants. They were allotted to its employees as also to other agencies including employees of the Central Government and State Government who were either transferred or posted in Jamshedpur. TISCO used to fix annual licence fees of each such accommodation at the rate of 5% of the capital cost/expenditure of the bungalows/flats/quarters.

On September 25, 2001, the Central Board of Direct Taxes (CBDT) issued Notification, No. S.O. 940 (E) in the exercise of power under Section 295 read with sub-section (2) of Section 17 and sub-section (2C) of Section 192 of the Act by which Rule 3 had been amended. The substituted rule revised the method of

computing valuation of perquisites in the matter of rental accommodation provided by employers to their employees.

It was stated that pursuant to the amendment in Rule 3, Respondent NO. 4 (TISCO) issued a letter dated October 25, 2001 informing all its employees about amended Rule 3 in respect of valuation of perquisite which were to be added to the salary of the employees for taxing purposes.

Aggrieved by the above action, the appellants herein filed Writ Petition No. 2835 of 2002 in the High Court of Jharkhand at Ranchi for the following reliefs;

(i) For issuance of an appropriate writ(s)/ order(s)/direction(s) in the nature of certiorari quashing the notification No. S.O. 940 (E) dated 25.09.2001 whereby and whereunder Rule 3 of the Income Tax Rules has been amended by the Government of India, Ministry of Finance, Department of Revenue (Central Board of Direct Taxes) and to hold and declare it as ultra vires the Income Tax Act.

(ii) For issuance of a further appropriate writ/ order/ direction, including writ of mandamus directing the Respondents, particularly Respondent Nos. 3 and 4, not to implement the provisions of the aforesaid amended Rule during the pendency of the writ petition, AND/OR

(iii) Pass any other order(s)/direction(s) as Your Lordship may deem fit and proper in the facts and circumstances of the case.

It was contended by the employees before the High Court that Rule 3 as amended in 2001 conferred arbitrary and unfettered powers on the Revenue and was ultra vires the Act. It was also urged that the computation-method was neither based on intelligible differentia nor had any nexus with the object sought to be achieved and thus ultra vires Article 14 of the Constitution.

A counter-affidavit was filed by the Revenue stating that the Finance Minister in his Budget Speech had outlined that "the value of perquisites, benefits or amenities shall be determined on the basis of their cost to the employer except in respect of house and cars where different criteria would be adopted for simplicity". It was stated that in adopting and applying Rule 3 as it existed prior to the impugned amendment, there being three classes of employees, the Revenue was facing difficulties with respect to various matters including the determination of the fair market value of the property which was found very cumbersome. Moreover, it did not take into account high rent in the metro towns. It has been averred in the reply-affidavit that the estimation of fair rent had been the subject-matter of litigation at various levels mainly on account of the fact that legislation with respect to rents being State subject differed from State to State. The value of fair rent could not be determined as the standard rent was not uniform in all municipal areas. It was accordingly decided to simplify and rationalize the procedure for determining the perquisite value and accordingly as per the impugned rules, the employees have been divided only in two categories.

The Revenue had also explained in the counter the

rationale for the distinction between Government employees and other employees. It has been stated that for purposes of the valuation of the perquisites relating to accommodation, the employees have been classified under the impugned amended rule into two categories, namely, (i) Government (Central and State) employees and (ii) others. To maintain continuity and equity with their remuneration and a variety of other benefits available in other sectors, the earlier system of valuation of perquisites relating to accommodation on the basis of rent payable as per rules framed by the Government has been retained for Central and State Government employees. For others, that is, employees belonging to private as well as public sector undertakings, it has been decided that the valuation of the perquisites relating to accommodation should be 10 per cent or 7.5 per cent of the salary as the case may be. As per the assertion of the respondents, this was decided in keeping with the recommendation of the expert group constituted to rationalize and simplify income-tax laws.

Observing that the classification between cities with population of less than four lakhs and others with more than four lakhs as reasonable and rational, the High Court upheld the validity of Rule 3. According to the Court "for rationalizing and simplifying the procedure, the Board brought about the impugned notification" which could not be held unreasonable from any yardstick or parameter. The said decision is reported as Tata Workers' Union & Anr. v. Union of India & Ors., (2002) 256 ITR 725.

A similar question was raised before the High Court of Calcutta in Coal Mines Officers' Association of India & Anr. v. Union of India & Ors., (2004) 266 ITR 429. Taking note of the language of Rule 3 prior to amendment in 2001 and after the amendment, a single Judge held that after 2001, there was no scope for determination of 'fair rental value'. The concept of fair rental value on the basis of the normal rent or on the basis of market rent available in the locality or on the basis of the municipal valuation has been done away with. It was also held that the rule devised the method and basis of ascertaining the value of concession in the matter of rent which could not be declared arbitrary or ultra vires. The Court was also of the view that the difference between the Government employees and other employees was not violative of Article 14 of the Constitution.

The correctness of the decisions of the High Courts of Jharkhand and Calcutta has been questioned in the present matters.

We have heard the learned counsel for the parties.

Mr. Harish Salve, Senior Advocate appearing for the appellants raised several contentions. He urged that the condition precedent for exercise of power under Section 17 (2) of the Act read with Rule 3 of the Rules is that it must be a "perquisite" within the meaning of the Act. Clause (ii) of sub-section (2) of Section 17 can be attracted provided there is "concession" in the matter of rent respecting any accommodation provided by the employer to his employee. If there is no "concession", sine qua non or condition precedent is absent and there is no 'perquisite' as well. Since there is no concession in the instant case, Section 17 (2) (ii) of the Act would not apply nor Rule 3 of the Rules is attracted and no liability has arisen. It was alternatively urged that old Rule 3, prior to its amendment in 2001, made available a

'window' by providing that in cases where assessee claimed and the Assessing Officer was satisfied that there was no 'concession', the assessee was not liable to pay tax. The rule as amended in 2001 has taken away the right of the assessee to claim that there was no concession as envisaged by Section 17 (2) (ii) and hence Rule 3 had no application. Similarly, it took away the power of the Assessing Officer to hold that there was no 'concession', even if he is 'satisfied' about the absence of 'concession'. 'Concession' is the "jurisdictional fact" for the exercise of power under the Act and in absence thereof, the authority cannot impose taxing liability. It was also submitted that in Rule 3, the Court may apply the concept of audi alteram partem and observance of natural justice by a process of 'reading down'. By such process, Rule 3 can be saved from vice of arbitrariness and unreasonableness. If such a process is expressly or impliedly prohibited, the rule becomes arbitrary and ultra vires Articles 14 and 19 of the Constitution. According to Mr. Salve, the parent Act imposes an obligation on the assessee to deduct tax at source from the salary of his employee provided that the employer has extended accommodation to his employee at a concessional rate. Rule 3 merely provides mode, method or manner of calculation of liability and is thus a "machinery" provision. The liability, according to the learned counsel, must be fixed by a competent Legislature under the statute i.e. under Section 17(2)(ii) of the Act and only after such liability is fixed, the question of computation thereof will arise which can be done by machinery provision i.e. under Rule 3 of the Rules. Rule 3, which is a child legislation, delegated legislation or subordinate legislation cannot impose liability on the employer to deduct tax or on the employee to pay tax holding that the concessional rent was 'perquisite' within the meaning of Section 17 (2) (ii) of the Act. That is the exclusive domain of the Legislature. Since there was no 'concession', Rule 3 has no application.

It was also submitted that the argument on behalf of the Revenue that such a course had been adopted by fixing flat rates because of "practical difficulties" of the Revenue in calculating the amount of rent and in dealing with individual cases is not only irrelevant and immaterial but is illegal, unlawful and without power or authority of law. The counsel fairly stated that as a rough and ready test, the procedure laid down in Rule 3 for fixing rent on the basis of population may not be objectionable but it is only when it is proved that there is a concession in the matter of rent respecting any accommodation provided by the employer to the employee that such method can be applied. He, however, contended that even in such cases, there must be a provision allowing or permitting the assessee to contend that there is no concession.

Mr. Dhankar, Senior Advocate appearing for one of the petitioners, adopted the arguments of Mr. Salve. He, however, additionally contended that a distinction sought to be made between employees of the Government on one hand and employees of Companies, Corporations or other Undertakings on the other hand, is artificial and irrational, neither based on intelligible differentia nor has it any nexus to the object to be achieved. Difference of payment while considering 'perquisite' between the two classes would thus be

arbitrary, discriminatory and ultra vires Article 14 of the Constitution.

Mr. Parasaran, learned Additional Solicitor General appearing on behalf of the Revenue supported the decisions impugned in the present proceedings. He submitted that the Rules prior to 2001 were based on "fair rental value of the accommodation". In view of the said concept, it provided an opportunity to the assessee, if he claimed to satisfy the Assessing Officer that the sum arrived at on the basis of Rule 3, as it then stood, did not exceed such 'fair rental value of the accommodation' and hence could not be said to be 'perquisite' within the meaning of Section 17 (2) (ii) of the Act. The concept of fair rental value of the accommodation has been given the go by in view of practical difficulties realized by Revenue. Under the amended rule of 2001, "fair rent", "market rent" "standard rent", "reasonable rent" etc., has no relevance at all. Keeping in view the ground reality and rent usually charged in cities having population exceeding four lacs and in other cities, the rule has been amended. It is a relevant and germane consideration which can neither be termed arbitrary nor unreasonable, nor violative of the provisions of the Constitution. According to Mr. Parasaran, ultimately it was a policy decision taken by the authority as to how calculation of perquisite should be made. Prior to 2001 one policy was accepted by the Government. The said policy was subsequently changed and now, new policy has been deviced. In such policy matters, normally, a court of law would not interfere unless the policy is totally arbitrary or unreasonable. It was also submitted that the amended rule was challenged by employers and assessees and several High Courts upheld the validity thereof. According to Mr. Parasaran, considering all relevant facts, it was decided by Revenue that providing accommodation at less than 10% of salary in cities having population exceeding four lakhs and 7.5% of salary in other cities would be deemed to be "concession" in the matter of rent respecting such accommodation provided to the employees by the employer. In the light of such decision, Rule 3 cannot be held ultra vires either the parent Act or the Constitution. He further submitted that if this Court comes to the conclusion that "concession" in the matter of rent is a condition precedent for the exercise of power under Section 17 (2) (ii) of the Act and only thereafter the machinery provision of Rule 3 would apply, the Court may invoke the doctrine of 'reading down' holding it intra vires and constitutional by extending an opportunity to assessee to satisfy the Assessing Officer that there was no 'concession'. Regarding discrimination between employees of Government and employees of Companies, Corporations and other Undertakings, he submitted that it is a valid classification and it has been based on intelligible differentia. It also seeks to achieve an object by considering the position of two sets of employees. Such a provision cannot be struck down as infringing Article 14 of the Constitution.

Before we proceed to consider the rival contentions of the parties, it may be appropriate if we refer to the relevant provisions of the Act, the Rules and important decisions on the point. Section 17 of the Act defines 'salary', 'perquisite' and 'profits in lieu of salary'. Relevant part of the said section reads thus\027

17. For the purposes of sections 15 and 16 and of this section.\027

(1) \005\005

(2) 'perquisite' includes\027

(i) the value of rent-free accommodation provided to the assessee by his employer;

(ii) the value of any concession in the matter of rent respecting any accommodation provided to the assessee by his employer.

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It is thus clear that the definition of the term 'perquisite' covers various items mentioned therein. It is also clear that the definition is inclusive in nature and not exhaustive.

According to Bouvier's Law Dictionary, the expression 'perquisite' in a most limited sense means "something gained by a place or office beyond the regular salary or fee".

Oxford English Dictionary defines 'perquisite' as "any casual emolument, fee or profit attached to an office or position in addition to a salary or wages".

According to Webster's New International Dictionary, 'perquisite' is "a gain or profit incidentally made from employment in addition to regular salary or wages, especially one of a kind expected or promised".

'Perquisite' is thus a privilege, gain or profit incidental to an employment in addition to regular salary or wages.

As observed by the House of Lords in Owen v. Pook, (1969) 74 ITR 147 (HL), 'perquisite' has a known normal meaning, namely, a personal advantage. The word would not apply to a mere reimbursement of a necessary disbursement. In Rendell v. Went, (1964) 2 All ER 464 (HL), the House held that any benefit or advantage, having a money value, which the holder of an office under the company derives from the company's spending on his behalf will come under the term 'perquisite'.

Indian Courts have also held that 'perquisite' is a benefit or an advantage received by the holder of an office over and above his salary. The benefit received by an employee is incidental to employment in excess of or in addition to the salary.

Section 295 of the Act enables the Board [as defined in clause (12) of Section 2 as 'Central Board of Direct Taxes' (CBDT) constituted under the Central Boards of Revenue Act, 1963] to make rules for carrying out the purposes of the Act.

The relevant part reads thus;

"295. Power to make Rules. (1) The Board may subject to the control of the Central Government, by notification in the Gazette of India, make rules for the whole or any part of India for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide all or any of the following matters;

(a) \005
(b) \005
(c) the determination of the value of any

perquisite chargeable to tax under this Act in such manner and on such basis as appears to the Board to be proper and reasonable."

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Sub-section (2C) of Section 192 of the Act enacts that a person responsible for paying any income chargeable under the head "Salaries" shall furnish to the person to whom such payment is made a statement giving correct and complete particulars of perquisites or profits in lieu of salary provided to him and the value thereof in such form and manner as may be prescribed.

In exercise of the power conferred by Section 295 of the Act, the Board framed rules known as the Income Tax Rules, 1962. Rule 3 lays down the method for computing valuation of perquisite. Before the amendment in 2001, relevant part of the said rule read as under\027

Valuation of perquisites.

3. For the purpose of computing the income chargeable under the head "Salaries" the value of the perquisites (not provided for by way of monetary payment to the assessee) mentioned below shall be determined in accordance with the following clauses, namely:\027

(a) The value of rent-free residential accommodation shall be determined on the basis provided hereunder, namely:\027

(i) where the accommodation is provided\027

(A) by Government to a person holding an office or post in connection with the affairs of the Union or of a State;

(B) by a body or undertaking under the control of Government to any officer of Government whose services have been lent to that body or undertaking (the accommodation itself having been allotted to it by Government), an amount equal to\027

(1) if the accommodation is unfurnished, the rent which has been or would have been determined as payable by such person or officer in accordance with the rules framed by Government for allotment of residences to its officers;

(2) if the accommodation is furnished, an amount calculated in accordance with sub-clause (i)(1) plus [10 per cent] per annum, of the original cost of the furniture (including television sets, radio sets, refrigerators, other household appliances and air-conditioning plant or equipment) or if such furniture is hired from a third party, the actual hire charges payable therefore;]

Provided that\027

(1) where the fair rental value of the accommodation is in excess of 20 per cent of the assessee’s salary, the value of perquisite

shall be taken to be 10 per cent of the salary increased by a sum equal to the amount by which the fair rental value exceeds 20 per cent of the salary; so, however, that the Assessing Officer may, having regard to the nature of the accommodation, determine the sum by which10 per cent of the salary is to be increased, as a percentage (not exceeding 100 per cent) of the amount by which the fair rental value exceeds 20 per cent of the salary;

(2) where the assessee claims, and the Assessing Officer is satisfied that the sum arrived at on the basis provided above exceeds the fair rental value of the accommodation, the value of the perquisite to the assessee shall be limited to such fair rental value;

(b) The value of residential accommodation provided at a concessional rent shall be determined as the sum by which the value computed in accordance with clause (a), as if the accommodation were provided free of rent, exceeds the rent actually payable by the assessee for the period of his occupation during the relevant previous year.

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By the Income Tax (Twenty-second Amendment) Rules, 2001, Rule 3 was amended and the relevant part reads thus\027

"3. Valuation of perquisites:

For the purpose of computing the income chargeable under the head 'salaries', the value of perquisites provided by the employer directly or indirectly to the assessee (hereinafter referred to as 'employee') or to any member of his household by reason of his employment shall be determined in accordance with the following sub-rule, namely\027

(1) The value of residential accommodation provided by the employer during the previous year shall be determined on the basis provided in the Table below\027

Sl.
No.
Circumstances
Where
accommodation is
unfurnished
Where
accommodation
is furnished
(1)
(2)
(3)
(4)
(1)
Where the
accommodation is
provided by the Central
Government or any
State Government to the
employees either
holding office or post in

connection with the affairs of the Union of or such State or serving with any body or undertaking under the control of such Government on deputation

Licence fee determined by the Central Government or any State Government in respect of accommodation in accordance with the rules framed by such Government as reduced by the rent actually paid by the employees.

The value of perquisite as determined under column (3) and increased by 10% per annum of the cost of furniture (including television sets, radio sets, refrigerators, other household appliances, air conditioning plant or equipment) or if such furniture is hired from a third party, the actual hire charges payable for the same as reduced by any charges paid or payable for the same by the employee during the previous year.

(2) Where the accommodation is provided by any other employer and

(a) where the accommodation is owned by employer, or

	(b) where the accommodation is taken on lease or rent by the employer.	(i) 10% of salary in cities having population exceeding 4 lakhs as per 1991 census; (ii) 75% salary in other cities, in respect of the period during which the said accommodation was occupied by the employee during the previous year as reduced by the rent, if any, actually paid by the employee.
		Actual amount of lease rental paid or payable by the employer or 10% of salary whichever is lower as reduced by the rent, if any, actually paid by the employee.
	The value of perquisite as determined under column (3) and increased by 10% per annum of the cost of furniture (including television sets, radio sets, refrigerators, other household appliances, air conditioning plant or equipment or other similar appliances or gadgets) or if such furniture is hired from a third party, by the actual hire charges payable for the same as reduced by any charges paid or payable for the same by the employee during the previous year.	
(3)	Where the accommodation is provided by the	

employer specified in serial number (1) or (2) above in a hotel (except where the employee is provided such accommodation for a period not exceeding in aggregate 15 days on his transfer from one place to another)
Not applicable
24% of salary paid or payable for the previous year or the actual charges paid or payable to such hotel, which is lower, for the period during which such accommodation is provided as reduced by the rent, if any, actually paid or payable by the employee:

Provided that nothing contained in this sub-rule would be applicable to any accommodation located in a 'remote area' provided to an employee working at a Mining site or an onshore oil exploration site, or a project execution site or an accommodation provided in an offshore site of similar nature;

Provided further that where on account of his transfer from one place to another, the employee is provided with accommodation at the new place of posting while retaining the accommodation at the other place, the value of perquisite shall be determined with reference to only one such accommodation which has the lower value with reference to the Table above for a period not exceeding 90 days and thereafter the value of perquisite shall be charged for both such accommodation in accordance with the Table.

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Rule 3, before the amendment as also after the amendment of 2001 came up for consideration before various High Courts as well before this Court in some cases. The learned counsel for the parties invited our attention to those decisions.

Mr. Salve for the appellants placed heavy reliance on a decision of the Division Bench of the High Court of Madhya Pradesh in Officers' Association, Bhilai Steel Plant v. Union of India & Others, (1983) 139 ITR 937. In that case, a petition was filed in the High Court by the Officers' Association, Bhilai Steel Plant and Divisional Manager (Construction). The Divisional Manager was in occupation of a quarter the rent of which was Rs.100/- per month. The rent was fixed as the standard rent under Rule 45A of the Fundamental Rules which had been applied to the officers. In deducting income tax at source under Section 192 of the Act, the management

was treating the difference between the 1/10th of the salary of the employee and the rent paid by him as perquisite. It was contended by the petitioners that merely because the rent paid by an officer was less than 1/10th of his salary, the difference could not be treated as perquisite and tax could not be deducted at source on that footing. A prayer was, therefore, made that the authorities be restrained from treating the difference between 10 per cent of the salary and the rent actually paid as 'perquisite' for the purposes of deduction of income tax at source.

The Income Tax Authorities denied of having issued any circular or instruction to the Management for treating difference between 10% of the salary and the rent paid as 'perquisite but maintained that that was the correct legal position.

The High Court was, therefore, called upon to decide whether the provisions of Section 17(2)(ii) read with Rule 3 of the Rules would be applicable and whether tax was required to be deducted at source treating the difference as 'perquisite', as contended by the Revenue. The Court conceded that sub-section (2) of Section 17 defined 'perquisite' and sub-clause (ii) included within its ambit the "value of any concession in the matter of rent respecting any accommodation provided to the assessee by his employer", but it was "any concession in the matter of rent" which was covered by that clause.

The Court stated;

The object of s. 3 is the determination of the value of the perquisite chargeable to tax. The rule operates at the stage when a finding is reached that the employee is in receipt of any perquisite as defined in s. 17(2). The rule cannot be used to determine whether the officer is really in receipt of any perquisite. The rule applies only for determining the value of the perquisite when the fact of receipt of perquisite is otherwise established. Rule 3(a) deals with the case when the employee is in occupation of rent-free residential accommodation. If the fact that the employee is in occupation of rent-free accommodation is established, the value thereof would be calculated by applying the method provided in rule 3(a). Similarly rule 3(b) applies when the employee is in occupation of residential accommodation at a concessional rent. If it is established that the employee is in fact in occupation of an accommodation at a concessional rent, the value thereof would be calculated in the manner provided in this rule. The effect of the rule in taking the value of rent-free unfurnished accommodation at 10 per cent is not to lay down that the moment it is found that an employee is paying less than 10 per cent of his salary as rent it must be deemed that he has been provided accommodation at a concessional rent.

(emphasis supplied)

The Court went on to consider that the question was whether an employee was in occupation of an accommodation at a concessional rate, that is, whether the employee had received any concession which could be termed as 'perquisite' and gave the answer that it would depend upon two factors; (i) the normal rent for accommodation in occupation of the employee; and (ii)

rent actually paid by the employee. If the rent paid by the employee is normal rent of accommodation in his occupation, it cannot be said that he is receiving any concession in the matter of rent even though the rent paid by him is less than 10 per cent of his salary.

The Court then made the following pertinent observations\027

\005.there is no deeming clause in the definition of "perquisite" contained in s.17(2) that once it is established that an employee is paying rent less than 10 per cent of his salary it must be deemed that he is receiving a concession in the matter of rent and no such deeming clause can be inferred from r.3. Indeed, if r. 3 were to be so construed, it will go beyond the rule making power conferred by s. 295(2) and would become invalid. (emphasis supplied)

In Indian Bank Officers' Association & Ors. v. Indian Bank & Ors., (1994) 209 ITR 72, a single Judge of the High Court of Calcutta again considered a similar question. There accommodation was provided by a nationalized bank to its employees. Petitioners who were employees of the Bank were paying rent in accordance with the standard rent fixed by Regulations of the Bank. All other employees similarly situated as petitioners were also paying rent in the same manner and to the same extent. The High Court held that in the circumstances no 'concession' could be said to have been enjoyed by the petitioners within the meaning of Section 17(2)(ii) of the Act and no tax was deductible on notional perquisite value of accommodation under Rule 3 of the Rules. The Court observed that the question of concession should be determined with reference to the nature of accommodation provided, the normal rent payable in respect of such accommodation by other employees similarly situated and the actual rent paid by the employee concerned.

Reiterating the principle laid down by the High Court of Madhya Pradesh in Officers' Association, Bhilai Steel Plant, the Court observed that what Rule 3 stated was valuation of perquisites and the manner of computation thereof provided it was a concession or perquisite. The rule, however, did not seek to fix any liability which had not been created by Section 17(2) of the Act.

According to the Court, the question of perquisite must be determined first and only thereafter the question of computing the value of such perquisite would arise. One cannot put cart before the horse. By following the method of valuation provided, the income tax authorities cannot determine the existence of perquisite. It can be done only under Section 17(2) of the Act. "The rule cannot be permitted to be read in a manner beyond the powers conferred under the substantive provisions of the Act." (emphasis supplied)

It appears that the matter was taken up by way of intra-court appeal before the Division Bench and the Division Bench in Income Tax Officers v. All India Vijaya Bank Officers' Association, (1997) 225 ITR 37, confirmed the view taken by the learned single Judge by dismissing the appeal.

In Steel Executives Association v. Rashtriya Ispat Nigam Ltd., (2000) 241 ITR 20, again an identical question arose before the High Court of Andhra Pradesh.

There accommodation was provided by the employer to the employees and the question that came up for consideration before the High Court was whether it was perquisite within the meaning of the Act and the Rules and whether the employer was required to deduct tax at source. The Court relying upon the decision in Officers' Association, Bhilai Steel Plant and Indian Bank Officers' Association held that the provision would apply only in cases where the rent was paid at concessional charges. If the rent was not concessional, department could not ask employer to deduct tax at source treating standard rent as concessional rent and such an action could not be said to be legal or lawful. The Court observed that reading the provision carefully, it was clear that it provided only for valuation of perquisite if the residential accommodation was provided at a concessional rate.

The Court stated;

Therefore, it is necessary for the Revenue to first establish that the rent charged is a concessional rent before it can be said that there is a perquisite and thereafter, such a perquisite will be valued as the difference between the actual rent paid and 10 per cent of the salary. What has happened in this case is that the Revenue has put the cart before the horse and assumed that there is a concession because the rent charged is less than 10 per cent of the salary. (emphasis supplied)

The Court noted the submission on behalf of the Revenue that there was really a concession because the Income Tax Officer had material to indicate that the fair market value of the accommodation provided was much more than 10 per cent of the salary. But, the Court negatived the contention and said;

We are unable to accept that material as indicating any concession because in a situation where the employer constructs a large number of residential accommodation for its employees in a particular location suitable for its convenience, the fair market rent of such accommodation cannot be determined with reference to the rent of any other kind of accommodation available in the town even if it happens to be nearby. The regular residences in a town have their own environment which cannot be compared with a tenement provided by the employer for locating the employee because the employee has no choice in accepting that accommodation. There are several other reasons germane to the employment and the needs of the employer to keep the employees available and satisfy its own needs which go into the determination of the rent of the accommodation.

The Court also referred to its earlier decision in P.V. Rajagopal v. Union of India, (1998) 233 ITR 678 and observed that department could not coerce the employer to deduct tax at source of an amount which was in dispute as a perquisite by the employer.

Mr. Parasaran, on the other hand, submitted that several High Courts upheld the validity of Rule 3 by approving the method adopted by the Revenue for fixation of perquisite under the said rule. Decisions of two High Courts i.e. the High Court of Jharkhand and the High Court of Judicature at Calcutta are before us. The High Court of Jharkhand, as already observed earlier, upheld the validity of Rule 3 observing that the

amendment was brought out as a consequence of Budget Speech of the Finance Minister in Parliament. Moreover, the decision was taken on the recommendation of Expert Group constituted to rationalize and simplify Income Tax laws.

Mr. Parasaran also referred to Coal Mines Officers' Association of India wherein the High Court of Calcutta again considered the scope of the expression "concession" in the matter of rent under Section 17 (2) (ii) of the Act. There also, it was contended on behalf of the employees that since there was no "concession" in the matter of rent, it should not be termed as perquisite under Section 17 (2) (ii) of the Act. It was argued that whether or not there was concession, must be decided first. For the said purpose, it was required to be determined as to what would be the rent and if the accommodation is provided by the employer to an employee at a rate lower than such rent, it would be treated as 'concession' under Section 17 (2) (ii) of the Act and has to be calculated under Rule 3 of the Rules. The Court, however, indicated that previous decisions dealt with Rule 3 as it then stood which laid down a totally different method than the one which has been prescribed after the amendment in 2001.

The Court then stated\027

The present rule, thus, does not address exclusively to devise the method and basis of ascertaining the value of rent-free accommodation; it also addresses to devise explicitly the method and basis of ascertaining the value of concession in the matter of rent. While, however, doing so it made the value of concession explicit, which was implied in the previous rule. While devising the same it has categorized two types of employees. The first of them are pure Government employees and the second of them are all other employees. In addition to that, it categorized two types of accommodation- one provided by the Government and the other provided by all others. In so far as the Government employees, who have been provided Government accommodations, are concerned, the rule says that the value of rent-free accommodation as perquisites would be the licence fee determined by the Government in accordance with the rules and the value of the concession would be the difference between such licence fee and the amount of rent paid by the employees. In so far as other employees, who have been provided accommodations by their respective employers, are concerned, the rule says that the value of rent-free accommodation would be ten per cent of the salary if the accommodations are in certain cities and if the accommodations are in other cities, 7.5 per cent of the salary and nothing else. The rule further provides that in relation to other employees, the value of the concession would be the difference between 10 per cent or 7.5 per cent of the salary, as the case may be, and the amount of rent actually paid. There is no scope for determination of fair rental value. The concept of fair rental value either on the basis of the normal rent or on the basis of the market rent available in the locality or on the basis of the municipal valuation has been done away with.

The Court proceeded to state that the rent comparable with market would always be higher than the fair or standardized rent. Since the new rule does not provide for 'fair rent', 'normal rent' or 'standard rent', none of the said concepts would be attracted or applied. The Court finally concluded;\027"In the normal circumstances, the pure, simple and grammatical sense of the language used by the Legislature is the best way of understanding what the Legislature intended. If the Legislature intended that the meaning of the word 'rent' as used in sub-clause (ii) of clause (2) of Section 17 of the Act would be as has been set out above, the Legislature could have used the same in the section itself. \005The Legislature brought sub-clause (ii) in clause (2) of Section 17 of the Act after introducing sub-clause (i) of clause (2) of Section 17 of the Act. These two sub-clauses should not be read in isolation. They were intended to be read together and if read together, it makes it abundantly clear, and as was done previously as well as done presently, that the Legislature intended to value the rent-free accommodation for the purpose of arriving at the value of the concession by making a simple calculation of the difference between the value of rent-free accommodation and the rent actually paid."

Our attention was also invited by Mr. Parasaran to BHEL Employees Association v. Union of India, (2003) 261 ITR 15 (Kant). It related to fringe benefits and amenities as perquisites. The Court held that provision to treat fringe benefits as perquisites in the light of Section 17 (2)(vi) read with Rule 3 of the Rules can neither be held ultra vires the Constitution nor Rule 3 can be struck down on the ground that there was excessive delegation of power by the Legislature to the Executive.

Reference was also made to a decision of the High Court of Madras in BHEL Executive/Officers Association & Another v. Dy. Commissioner of Income Tax & Another, (2004) 264 ITR 390. One of the arguments raised on behalf of the employees was that the distinction on the basis of size of population had no rationale and Rule 3 as amended in 2001 was ultra vires. The argument was negatived.

Mr. Parasaran also relied on an order dated September 1, 2004 passed by the Division Bench of the High Court of Madhya Pradesh in All India State Bank of Indore Officers' Co-ordination Committee & Ors. v. Central Board of Direct Taxes & Ors., (2004) 186 CTR 649 (MP). In that case, the attention of the Court was invited to Officers' Association, Bhilai Steel Plant followed by the High Courts of Calcutta and Andhra Pradesh and decisions taking contrary view by the High Courts of Rajasthan and Karnataka. Considering conflicting views, the Court referred the matter to a larger Bench.

The grievance of the appellants is that the amended Rule 3 does not provide for giving an opportunity to the assessee to convince the Assessing Officer that no "concession" was shown by the employer to the employee in respect of accommodation provided. Mr. Salve submitted that the rule will apply and the liability to deduct tax will arise only if 'concession' is shown in the matter of rent respecting any accommodation and it is "perquisite" under the Act, the authority must come to the conclusion that Section 17 (2) (ii) is attracted. Absence of any provision enabling the assessee to show to the Assessing Officer that it was not a 'concession'

and, therefore, 'perquisite' within the meaning of Section 17 (2) (ii) of the Act would make Rule 3 ultra vires and unconstitutional. In such a situation, a court of law may not adopt literal interpretation of a provision of law but by applying "reading down" formula, sustain the validity thereof invoking the principles of natural justice.

The doctrine of 'reading down' is well-known in the field of Constitutional Law. Colin Howard in his well-known work "Australian Federal Constitutional Law" states;

Reading down puts into operation the principle that so far as it is reasonably possible to do so, legislation should be construed as being within power. It has the practical effect that where an Act is expressed in language of a generality which makes it capable, if read literally, of applying to matters beyond the relevant legislative power, the Court will construe it in a more limited sense so as to keep it within power.

As observed by this Court in Commissioner of Sales Tax, Madhya Pradesh & Others v. Radhakrishnan & Ors., (1979) 2 SCC 249, in considering the validity of a statute the presumption is always in favour of constitutionality and the burden is upon the person who attacks it to show that there has been transgression of constitutional principles. For sustaining the constitutionality of an Act, a court may take into consideration matters of common knowledge, reports, preamble, history of the times, object of the legislation and all other facts which are relevant. It must always be presumed that the Legislature understands and correctly appreciates the need of its own people and that discrimination, if any, is based on adequate grounds and considerations. It is also well-settled that courts will be justified in giving a liberal interpretation in order to avoid constitutional invalidity. A provision conferring very wide and expansive powers on authority can be construed in conformity with legislative intent of exercise of power within constitutional limitations. Where a statute is silent or is inarticulate, the court would attempt to transmulate the inarticulate and adopt a construction which would lean towards constitutionality albeit without departing from the material of which the law is woven. These principles have given rise to rule of 'reading down' the provisions if it becomes necessary to uphold the validity of the law.

In several cases, courts have invoked and applied the doctrine of 'reading down' and upheld the constitutional validity of the Act,

In Olga Tellis v Bombay Municipal Corporation, (1985) 3 SCC 545 : AIR 1986 SC 180 : 1985 Supp (2) SCR 51, the Supreme Court was called upon to decide constitutional validity of Section 314 of the Bombay Municipal Corporation Act, 1888 which empowered the Commissioner to demolish illegal construction without notice. It was contended that the provision was arbitrary, unreasonable and violative of natural justice. Holding the provision intra vires and 'reading' the doctrine of audi alteram partem therein, the Court stated;

"Considered in its proper perspective, section 314 is in the nature of an enabling provision and not of a compulsive character. It enables the Commissioner, in appropriate cases, to dispense with previous notice to persons who are likely to be

affected by the proposed action. It does not require and, cannot be read to mean that, in total disregard of the relevant circumstances pertaining to a given situation, the Commissioner must cause the removal of an encroachment without issuing previous notice. The primary rule of construction is that the language of the law must receive its plain and natural meaning. What section 314 provides is that the Commissioner may, without notice, cause an encroachment to be removed. It does not command that the Commissioner shall, without notice, cause an encroachment to be removed. Putting it differently, section 314 confers on the Commissioner the discretion to cause an encroachment to be removed with or without notice. That discretion has to be exercised in a reasonable manner so as to comply with the constitutional mandate that the procedure accompanying the performance of a public act must be fair and reasonable. We must lean in favour of this interpretation because it helps sustain the validity of the law. Reading section 314 as containing a command not to issue notice before the removal of an encroachment will make the law invalid."

(emphasis supplied)

In Salem Advocate Bar Association v. Union of India (2005) 6 SCC 344, this Court had an occasion to consider the constitutional validity of certain amendments in Order 17 of the Code of Civil Procedure, 1908 effected by the Code of Civil Procedure (Amendment) Act, 1999 relating to adjournments. One of the amendments provided that no adjournment shall be granted more than three times to a party during a trial. Though it was an express provision, this Court observed that there may be extreme cases or exceptional circumstances beyond the control of the party which may compel him to seek adjournment. Serious ailment, accident, sudden hospitalization, earth quake, rioting, tsunami etc., are either vis major or unforeseen eventualities which may compel a party to ask for an adjournment. Literal interpretation may make the provision arbitrary, unreasonable and ultra vires. The Court, therefore, stated that "to save the proviso to Order 17, Rule 1, from the vice of Article 14 of the Constitution, it is necessary to read it down so as not to take it away the discretion of the Court in the extreme hard cases".

But it is equally well settled that if the provision of law is explicitly clear, language unambiguous and interpretation leaves no room for more than one construction, it has to be read as it is. In that case, the provision of law has to be tested on the touchstone of the relevant provisions of law or of the Constitution and it is not open to a Court to invoke the doctrine of "reading down" with a view to save the statute from declaring it ultra vires by carrying it to the point of 'perverting the purposes of the statute'.

Thus, in Minerva Mills Limited v. Union of India, (1980) 3 SCC 625, validity of Article 31C of the Constitution as amended by the Constitution (42nd Amendment) Act, 1976 conferring immunity from challenge of laws giving effect to directive principles in Part IV of the Constitution was questioned in this Court. It was submitted on behalf of the Union of India that the

Court may apply the principle of "reading down" by restricting the challenge to only such laws which would not violate "basic structure" of the Constitution. Negativing the contention and speaking for the majority, Chandrachud, CJ said; "If the Parliament has manifested a clear intention to exercise an unlimited power, it is impermissible to read down the amplitude of that power so as to make it limited. The principle of reading down cannot be invoked or applied in opposition to the clear intention of the legislature. We suppose that in the history of the constitutional law, no constitutional amendment has ever been read down to mean the exact opposite of what it says and intends. In fact, to accept the argument that we should read down Article 31C, so as to make it conform to the ratio of the majority decision in Kesavananda Bharati is to destroy the avowed purpose of Article 31C as indicated by the very heading "Saving of certain laws" under which Articles 31A, 31B and 31C are grouped. Since the amendment to Article 31C was unquestionably made with a view to empowering the legislatures to pass laws of a particular description even if those laws violate the discipline of Articles 14 and 19, it seems to us impossible to hold that we should still save Article 31C from the challenge of unconstitutionality by reading into that Article words which destroy the rationale of that Article and an intendment which is plainly contrary to its proclaimed purpose."
(emphasis supplied)

Similarly in Delhi Transport Corporation v. D.T.C. Mazdoor Congress & Others, (1991) Supp 1 SCC 600, the validity and vires of Regulation 9(b) of the Delhi Road Transport Authority (Conditions of Appointment and Service) Regulations, 1952 relating to 'termination of service' was challenged. It provided for termination of service of permanent employees of the Corporation on one month's notice or pay in lieu of notice without any enquiry whatsoever. The provision was challenged, being ultra vires the Constitution, violative of principles of natural justice and inconsistent with Section 23 of the Contract Act, 1872. One of the questions raised before this Court was whether it would be open to a court of law to apply the formula of 'reading down' and save the provision by importing natural justice into it. The majority (4:1) held the provision ultra vires and unconstitutional by describing it as "Henry VIII clause" and refusing to apply the doctrine of 'reading down'. It held that the language of the Regulation was clear, unambiguous and explicit and it was not permissible for the Court to read down something not intended by the Regulations. The doctrine of reading down may be applied if the statute is silent, ambiguous or allows more than one interpretation. But where it is express and clearly mandates to take certain actions, the function of the Court is to interpret it plainly and declare intra vires or ultra vires without adding, altering or subtracting anything therein.

As we have already indicated earlier, Rule 3 prior to its amendment in 2001 was totally different. It dealt with the method of calculation of concession keeping in view the concept of "fair rental value". In the light of the principle and phraseology in Rule 3, the rule making authority provided an opportunity to the assessee to satisfy the Assessing Officer that the rent sought to be recovered from the employee could not be said to be

'concession' as it was 'fair rent', 'reasonable rent', 'market rent' or 'standard rent'. When the rule is amended and the concept of "fair rental value" has been done away with and the only method which has been adopted is to calculate the rent on the basis of population of the city in question, it cannot be successfully contended that the intention of the rule making authority was to afford an opportunity to the assessee to convince the Assessing Officer that the rent recovered by the employer from his employee was not in the nature of concession. Nor a court of law would, by interpretative process, grant such opportunity to the assessee so as to enable him to convince the Assessing Officer that the rent fixed was not covered by Section 17(2)(ii) of the Act and therefore was not a 'perquisite'. We are, therefore, unable to accept the argument of Mr. Salve and allow import of the principles of natural justice in Rule 3.

The question, therefore, is whether such a provision is ultra vires Article 14 of the Constitution. Though there is no direct decision of this Court on the point, some High Courts have considered the question. In BHEL Employees Association v. Union of India, (2003) 261 ITR 15 (Kar), validity of amended Rule 3 was challenged. In that case, however, the Court was concerned with fringe benefits (which stand altogether on a different footing). But the argument was that there was excessive delegation of power by the Legislature to the Executive and the provision was, therefore, ultra vires the parent Act as also violative of Article 14 of the Constitution.

Considering several cases on the point, the Court held that Section 295 of the Act conferred power to frame Rules on a high functionary i.e. Central Board of Direct Taxes (CBDT), subject to the control of Central Government. It was also observed that the Board consisted of very high functionaries of the Government of India who were expected to have deep knowledge about the policy as envisaged for imposition of tax in the country. When power was conferred on such Expert Body and after considering the relevant aspects, it took a decision, it could not be said to be unlawful or unwarranted. The legislative policy had been reflected in Section 17 of the Act and the Rule Making Authority, merely implemented the said policy on the basis of essential legislative functions performed by Parliament. The Court, therefore, negatived the contention of excessive delegation. Any difficulty or hardship in an individual case or to a particular person would not make the Rule ultra vires or unconstitutional.

A similar view was taken by the High Court of Rajasthan in Aditya Cement Staff Club v. Union of India, (2004) 266 ITR 70.

In the impugned order, the High Court of Jharkhand held the classification between cities with population of less than four lakhs and more than four lakhs as reasonable classification. It was, therefore, held that the rule did not suffer from vice of arbitrariness. Likewise, the High Court of Calcutta, in the order impugned in two matters upheld the validity of the rule observing, inter alia, that while ascertaining the concession, the rule addresses itself to relevant and germane considerations and such a provision cannot be held arbitrary or ultra vires.

In our opinion, the submission of Mr. Parasaran,

learned Additional Solicitor General deserves to be accepted that when the concept of "fair rent", "market rent", "reasonable rent" or "standard rent" is no more relevant or germane in deciding the question, it was open to the Legislature to empower the rule making authority to provide the method for calculation of "concession". We are further of the view that the criterion which was adopted by the rule making authority in treating cities having population of less than four lakhs and more than four lakhs cannot be said to be arbitrary or unreasonable and fixation of rent on the basis of population of city cannot be interfered with in exercise of power of judicial review. The said argument, therefore, has no substance and cannot be upheld.

But in our opinion, the fundamental question of applicability of Section 17 (2) of the Act still remains. It cannot be gainsaid that Section 17 (2) would apply only if there is 'perquisite'. Indisputably, the definition of 'perquisite' is inclusive in nature and takes within its sweep several matters enumerated in clauses (i) to (vii). Section 17 (2) (ii) declares that the value of any "concession" in the matter of rent respecting any accommodation provided to the employee by his employer would be "perquisite". Nevertheless it must be a "concession" in the matter of rent respecting any accommodation provided by the employer to his employee.

The word "concession" has neither been defined in the Act nor in the Rules. According to Concise Oxford English Dictionary, "concession" is "a thing that is conceded"; "a gesture made in recognition of a demand or prevailing standard", "a reduction in price for a certain category of person". It is "a grant; ordinarily applied to a grant of specific privileges by Government, a special privilege granted by a Government, Corporation or other authority" (P.R. Aiyer; "Advanced Law Lexicon", 2005; Vol. 1; p. 944). It is "an act of yielding or conceding as to a demand or argument; something conceded; usually employing a demand; claim or request"; "a thing yielded", "a grant". [Indian Aluminium Co. Ltd. v. Thane Municipal Corporation; (1992) Supp 1 SCC 480] "Concession" is a form of "privilege" [V. Pechimethu v. Gowrammal, (2001) 7 SCC 617].

It is, therefore, clear that before Section 17(2)(ii) can be invoked or pressed into service and before calculation of concession as per Rule 3 is made, the authority exercising power must come to a positive conclusion that it is a concession. 'Concession', in our judgment is, thus a foundational, fundamental or jurisdictional fact.

A "jurisdictional fact" is a fact which must exist before a Court, Tribunal or an Authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a Court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not posses.

In Halsbury's Laws of England, it has been stated;

"Where the jurisdiction of a tribunal is

dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue; but that ruling is not conclusive".

The existence of jurisdictional fact is thus sine qua non or condition precedent for the exercise of power by a court of limited jurisdiction.

In Raja Anand Brahma Shah v. State of U.P. & Ors., AIR 1967 SC 1081 : (1967) 1 SCR 362, sub-section (1) of Section 17 of the Land Acquisition Act, 1894 enabled the State Government to empower Collector to take possession of 'any waste or arable land' needed for public purpose even in absence of award. The possession of the land belonged to the appellant had been taken away in the purported exercise of power under Section 17(1) of the Act. The appellant objected against the action inter alia contending that the land was mainly used for ploughing and for raising crops and was not 'waste land', unfit for cultivation or habitation. It was urged that since the jurisdiction of the authority depended upon a preliminary finding of fact that the land was 'waste land', the High Court was entitled in a proceeding for a certiorari to determine whether or not the finding of fact was correct.

Upholding the contention and declaring the direction of the State Government ultra vires, this Court stated;

"In our opinion, the condition imposed by s. 17(1) is a condition upon which the jurisdiction of the State Government depends and it is obvious that by wrongly deciding the question as to the character of the land the State Government cannot give itself jurisdiction to give a direction to the Collector to take possession of the land under s. 17(1) of the Act. It is well-established that where the jurisdiction of an administrative authority depends upon a preliminary finding of fact the High Court is entitled, in a proceeding of writ of certiorari to determine, upon its independent judgment, whether or not that finding of fact is correct". (emphasis supplied)

In State of M.P. & Ors. v. D.K. Jadav, AIR 1968 SC 1186 : (1968) 2 SCR 823, the relevant statute abolished all jagirs including lands, forests, trees, tanks, wells etc., and vested them in the State. It, however, stated that all tanks, wells and buildings on 'occupied land' were excluded from the provisions of the statute. This Court held that the question whether the tanks, wells etc., were on 'occupied land' or on 'unoccupied land' was a jurisdictional fact and on ascertainment of that fact, the jurisdiction of the authority would depend.

The Court relied upon a decision in White & Collins v. Minister of Health (1939) 2 KB 838 : 108 LJ KB 768, wherein a question debated was whether the court had jurisdiction to review the finding of administrative

authority on a question of fact. The relevant Act enabled the local authority to acquire land compulsorily for housing of working classes. But it was expressly provided that no land could be acquired which at the date of compulsory purchase formed part of park, garden or pleasure-ground. An order of compulsory purchase was made which was challenged by the owner contending that the land was a part of park. The Minister directed public inquiry and on the basis of the report submitted, confirmed the order.
Interfering with the finding of the Minister and setting aside the order, the Court of Appeal stated;
"The first and the most important matter to bear in mind is that the jurisdiction to make the order is dependent on a finding of fact; for, unless the land can be held not to be part of a park or not to be required for amenity or convenience, there is no jurisdiction in the borough council to make, or in the Minister to confirm, the order. In such a case it seems almost self-evident that the Court which has to consider whether there is jurisdiction to make or confirm the order must be entitled to review the vital finding on which the existence of the jurisdiction relied upon depends. If this were not so, the right to apply to the Court would be illusory."
[See also Rex v. Shoredich Assessment Committee; (1910) 2 KB 859 : 80 LJ KB 185].

A question under the Income Tax Act, 1922 arose in Raza Textiles Ltd. v. Income Tax Officer, Rampur, (1973) 1 SCC 633 : AIR 1973 SC 1362. In that case, the ITO directed X to pay certain amount of tax rejecting the contention of X that he was not a non-resident firm. The Tribunal confirmed the order. A single Judge of the High Court of Allahabad held X as non-resident firm and not liable to deduct tax at source. The Division Bench, however, set aside the order observing that "ITO had jurisdiction to decide the question either way. It cannot be said that the Officer assumed jurisdiction by a wrong decision on this question of residence". X approached this Court.
Allowing the appeal and setting aside the order of the Division Bench, this Court stated;
"The Appellate Bench appears to have been under the impression that the Income-tax Officer was the sole judge of the fact whether the firm in question was resident or non-resident. This conclusion, in our opinion, is wholly wrong. No authority, much less a quasi-judicial authority, can confer jurisdiction on itself by deciding a jurisdictional fact wrongly The question whether the jurisdictional fact has been rightly decided or not is a question that is open for examination by the High Court in an application for a writ of certiorari. If the High Court comes to the conclusion, as the learned single Judge has done in this case, that the Income-tax Officer had clutched at the jurisdiction by deciding a jurisdictional fact erroneously, then the assesses was entitled for the writ of certiorari prayed for by him. It is incomprehensible to think that a quasi-

judicial authority like the Income-tax Officer can erroneously decide a jurisdictional fact and thereafter proceed to impose a levy on a citizen." (emphasis supplied)

From the above decisions, it is clear that existence of 'jurisdictional fact' is sine qua non for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once the authority has jurisdiction in the matter on existence of 'jurisdictional fact', it can decide the 'fact in issue' or 'adjudicatory fact'. A wrong decision on 'fact in issue' or on 'adjudicatory fact' would not make the decision of the authority without jurisdiction or vulnerable provided essential or fundamental fact as to existence of jurisdiction is present.

In our opinion, the submission of Mr. Salve is well founded and deserves to be accepted that "concession" under clause (ii) of sub-section (2) of Section 17 of the Act is a 'jurisdictional fact'. It is only when there is a 'concession' in the matter of rent respecting any accommodation provided by an employer to his employee that the mode, method or manner as to how such concession can be computed arises. In other words, concession is a 'jurisdictional fact'; method of fixation of amount is 'fact in issue' or 'adjudicatory fact'. If the assessee contends that there is no 'concession', the authority has to decide the said question and record a finding as to whether there is 'concession' and the case is covered by Section 17 (2) (ii) of the Act. Only thereafter the authority may proceed to calculate the liability of the assessee under the Rules. In our considered opinion, therefore, in spite of the legal position that Rule 3 is intra vires, valid and is not inconsistent with the provisions of the parent Act under Section 17 (2) (ii) of the Act, it is still open to the assessee to contend that there is no 'concession' in the matter of accommodation provided by the employer to the employee and hence the case did not fall within the mischief of Section 17 (2) (ii) of the Act.

There is yet another aspect of the matter which is important and having a bearing on the question. We have extracted Section 17(2)(ii) in the earlier part of the judgment. It does not contain any 'deeming clause' that once it is established that an employee is paying rent less than 10 per cent of his salary in cities having population of four lakhs or 7.5 per cent in other cities, it should be deemed to be a 'concession' within the meaning of the Act and such employee must be deemed to receive a 'concession' in the form of 'perquisite' in the payment of rent. An employer may provide residential accommodation to his employees for several reasons. It is also possible that for making available staff quarters/ colonies/accommodations, State Governments or Central Government may provide land to Public Sector Undertakings/ Companies/ Corporations at a concessional rate imposing appropriate conditions including amount of rent, if any, to be recovered by the employer. Mr. Salve also invited our attention to certain decisions wherein it had been held that residential facility provided by the employer to the employee was not held 'perquisite' within the meaning of Income Tax laws. Mr. Salve placed reliance on a decision in Alexander Tenant v. Robert Smith, 1892 AC 150 (HL).

There, the appellant who was an agent for the Bank of Scotland at Montrose, had been granted accommodation by his employer as part and parcel of his duty. The House of Lords held that he was bound as part of his duty as agent to live in the bank house as the nature of the employment required that he should live in his master's dwelling house or business-premises instead of occupying a separate residence of his own. According to the Court, "such an occupation could not be regarded as part of appellant's income". He occupied the bank house as a part of his duty. It was observed that the situation could not be distinguished from that of the Master of a Ship who was spared the cost of house rent while afloat. "His cabin, does not, on that account become a part of his income". (emphasis supplied)

In Tyrer v. Smart, (1978) 1 All ER 1089 : (1978) 1 WLR 415; a private company offered preferential right to purchase shares to its employees below market price and the question before the Court was whether it could constitute a taxable benefit or amenity. The Court of Appeal reiterated the principle laid down in Alexander Tenant and held that if something is done by an employer to attract employees to encourage their loyalty, it could not be regarded as reward for the services rendered and could not become a taxable perquisite. A benefit or facility which furthers commercial interest of the employer would not per se become perquisite. Such facility of accommodation furthers commercial interest of the employer by having satisfactory work force which but for such accommodation, would not have been available. In such cases, e.g. doctors/ superintendents/ rectors/ professors/ teachers/ Grihpatis/ Grihmatas, etc. to stay in the accommodation provided by the employer may be more a 'compulsion' than a 'concession'.

Mr. Salve also submitted that in such cases, it is for the authorities, seeking to tax the subject, to establish the taxing liability and it is not for the subject to prove that his case is covered by an exception. As observed in Hochstrasser v. Mayes, 1960 AC 376 (HL), "it is not enough for the Crown to establish that the employee would not have received the sum on which tax is claimed had he not been an employee. The Court must be satisfied that the service agreement was the causa causans and not merely the causa sine qua non of the receipt of the profit". (emphasis supplied)

The counsel also submitted that the object of Rule 3 is to extend relief to employees and keeping in view the said purpose, it has to be interpreted liberally. In support of the submission, reliance was placed on a three Judge Bench decision of this Court in CIT, Bombay v. British Bank of Middle East, (2001) 8 SCC 36. The question for determination of this Court related to expenditure incurred by an employer on facility of car provided to an employee for private use.

Interpreting Section 40-A (5) of the Act and Rule 3 of the Rules and highlighting the object underlying in enacting both the provisions, one of us (Y.K. Sabharwal, J. as His Lordship then was) stated that "Section 40-A (5) and Rule 3 operate in different fields and apply to different set of assessees. The provision of the Act was enacted to provide for ceiling on expenditure on employees. The object of the Rule is to give relief to the employees. Applying Rule 3 for the purpose of determining the deduction in relation to the assessment

of the employer would be doing violence to and ignoring the legislative intent evident in Section 40-A (5)".

We are, however, not inclined to enter into larger question as in our view, it is not necessary in the light of statutory provision relating to 'concession' in the matter of rent respecting any accommodation' in Section 17(2)(ii) of the Act. We are of the view that Rule 3 would apply only to those cases where 'concession' has been shown by an employer in favour of an employee in the matter of rent respecting accommodation. Thus, whereas 'charging provision' is found in the Act of Parliament [Section 17(2)(ii)], 'machinary component' is in the subordinate legislation (Rule 3). The latter will apply only after liability is created under the former. Unless the liability arises under Section 17(2)(ii) of the Act, Rule 3 has no application and the method of valuation for calculating concessional benefits cannot be resorted to.

Mr. Dhankar, who appeared for federation of employees, invited our attention to "Report of the Pay Revision Committee for Public Sector Executives", published by the Government of India in October, 1998. Taking into account the crucial and pivotal role played by Public Sector Undertakings and considering their importance in the light of the fact that it is a limb of Government and "State" within the meaning of Article 12 of the Constitution, the Government of India had constituted a Committee headed by Hon'ble Mr. Justice S. Mohan (Retd.). The Committee considered various issues including issues as to pay scales, perquisites etc., of employees of Public Sector Undertakings. The counsel referred to various recommendations made by the Committee and submitted that different treatment shown by the authorities to employees of Government and employees of Public Sector Undertakings is arbitrary, discriminatory and unreasonable being violative of Articles 14, 16 and 19 of the Constitution. He, therefore, submitted that the benefits extended to Government employees ought to have been extended to employees of Public Sector Undertakings as well.

We are unable to uphold the argument. As already indicated earlier, the High Court of Calcutta in the impugned order considered the question and held classification between Government employees and employees of Companies, Corporations and other Public Undertakings as reasonable. Though the doctrine of equity has no place in taxing statutes, an attempt has been made by the rule making authority to introduce equity by keeping in view the ground reality. According to the High Court, it cannot be disputed that in the sphere of income, Government employees are far below to the employees of Companies, Corporations and other Undertakings. The benefits which have been provided to employees of Corporations, Companies and other Undertakings are much more than the benefits extended to Government employees. If on the basis of the factual scenario, a classification is made between two classes of employees, it cannot be struck down as ultra vires.

It is no doubt true that Article 14 guarantees equality before the law and confers equal protection of laws. It is also true that it prohibits the State from denying persons or class of persons equal treatment provided they are equals and are similarly situated. But, it is equally well established that Article 14 seeks to

prevent or prohibit a person or class of persons from being singled out from others situated similarly. If two persons or two classes are not similarly situated or circumstanced, they cannot be treated similarly. To put it differently, Article 14 prohibits dissimilar treatment to similarly situated persons, but does not prohibit classification of persons not similarly situated, provided such classification is based on intelligible differentia and is otherwise legal, valid and permissible.

Very recently in Confederation of Ex-Servicemen Associations & Ors. v. Union of India & Ors. decided on August 22, 2006, the Constitution Bench had an occasion to consider a similar question. Referring to State of West Bengal v. Anwar Ali Sarkar & Another, (1952 SCR 284 : AIR 1952 SC 75) and several other cases, one of us (C.K. Thakker, J.) observed that "it is clear that every classification to be legal, valid and permissible, must fulfill the twin-test, namely;

(i) the classification must be founded on an intelligible differentia which must distinguish persons or things that are grouped together from others leaving out or left out; and

(ii) such a differentia must have rational nexus to the object sought to be achieved by the statute or legislation in question".

In our opinion, distinction sought to be made by the rule making authority between employees of the Central Government as well as State Governments and other employees i.e., employees of Companies, Corporations and other Undertakings is reasonable classification based on intelligible differentia. It has also rational nexus to the object sought to be achieved. Rule 3 takes into account service conditions of employees of Government vis-‘-vis employees of Corporations, Companies and other Undertakings and prescribes method of calculating value of all perquisites. Such a provision, in our considered opinion, cannot be held ultra vires Article 14 of the Constitution.

Even under the Constitution, such a distinction has been upheld in several cases by this Court. Article 311 of the Constitution confers certain benefits which are not available to employees of Corporations, Companies and other Undertakings. It was contended on behalf of those employees that such Corporations, Companies and Undertakings were covered by the definition "State" within the meaning of Article 12 of the Constitution and they also must be granted all the benefits which had been granted to employees of the Government. The contention was, however, negatived by this Court holding that application of Part XIV of the Constitution would be limited to Services under the Union and the States and not to other employees [vide S.L. Agarwal v. General Manager, Hindustan Steel Ltd; (1970) 1 SCC 177 : (1970) 3 SCR 363; Ajit Kumar Nag v. General Manager, Indian Oil Corporation Ltd., (2005) 7 SCC 764]. We, therefore, see no substance in the argument that the impugned provision differentiating employees of Government and employees of Companies, Corporations and other Undertakings is arbitrary and objectionable.

For the foregoing reasons, we hold that though Rule 3 of the Rules cannot be held arbitrary, discriminatory or ultra vires Article 14 of the Constitution nor inconsistent with the parent Act [Section 17(2)(ii)], it is in the nature

of 'machinery-provision' and applies only to the cases of 'concession' in the matter of rent respecting any accommodation provided by an employer to his employees. Whether or not Parliament could have in the exercise of legislative power created a 'deeming fiction' as to concession in the matter of rent in certain circumstances (for which we express no final opinion), no such deeming provision is found in the Act. It is, therefore, open to the assessee to contend that there is no 'concession' in the matter of accommodation provided by the employer to the employees and the case is not covered by Section 17 (2) (ii) of the Act.

For the foregoing reasons, Civil Appeal No. 3270 of 2003 is partly allowed to the extent indicated above.

In view of our order passed in Civil Appeal No. 3270 of 2003, Transferred Cases Nos. 101 & 102 of 2006 stand disposed of.

In the facts and circumstances of the case, there shall be no order as to costs.