

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F", MUMBAI

BEFORE SHRI JASON P. BOAZ ACCOUNTANT MEMBER
AND SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

ITA No. 4804/MUM/2014
(Assessment Year : 2006-07)
ITA No. 4805/MUM/2014
(Assessment Year : 2007-08)

Flowers Valley Pvt. Ltd.,
Mittal Court, 132, B- Wing,
12th Floor, 223 Nariman Point,
Mumbai 400 021
PAN: AABCD 2181M
Vs.

... Appellant

The Income Tax Officer, Ward – 2(1)(3),
Aaykar Bhavan, M.K.Road,
Mumbai 400 020

..... Respondent

Appellant by : Shri Prakash Pandit
Respondent by : Ms. Anu Krishna Agarwal

Date of hearing : 08/08/2016
Date of pronouncement : 26/08/2016

ORDER

PER JASON P. BOAZ, A.M:

These appeals by the assessee are directed against the order of CIT(Appeals) -4, Mumbai, both dated 12/2/2013 for assessment years 2006-07 and 2007-08.

2. The facts of the case as emanate from the record, briefly, are as under:-

2.1 The assessee is a company engaged in farming and agriculture.

2.1.1 For assessment year 2006-07, the assessee furnished its return of fringe benefits on 25/11/2006 declaring the value of fringe benefits at 'Nil'. The assessment was completed under section 115WE(3) of the Income Tax Act, 1961 (in short 'the Act') vide order dated 11/12/2008, wherein the total value of fringe benefits was determined at 'Nil'. Subsequently, the Assessing Officer initiated re-assessment proceedings, on observing that the assessee had paid wages and salary to its employees and certain other expenditure aggregating to Rs.8,08,415/- incurred by the assessee on business promotions, conveyance, staff welfare, telephone and travelling expenses, which constitute fringe benefits provided to the employees as per section 115WA(2) of the Act were exigible to fringe benefit tax ('FBT')@ 20% thereof. The Assessing Officer issued notice under section. 115WH of the Act to the assessee in this regard, after recording reasons for re-opening the assessment. In response thereto, the assessee requested that the original return filed on 25/11/2006 be treated as filed in response to the notice under section. 115WH of the Act. The Assessing Officer proceeded to complete the re-assessment under section 115WG of the Act vide order dated 29/1/2013 and levied FBT @ 20% of the fringe benefits amounting to Rs.8,08,415/-.

2.1.2 For Assessment Year 2007-08, the assessee filed its return of fringe benefits on 6/10/2007 declaring the value of fringe benefits at 'Nil'. The return was processed under section 115WE of the Act on 11/09/2009. Subsequently, the Assessing Officer initiated re-assessment proceedings, on observing that the assessee had paid wages and salary to its employees and that certain other expenditures

were incurred by the assessee aggregating to Rs.9,09,554/- on business promotion, car, conveyance, staff welfare, telephone and travelling expenses which constitute fringe benefits provided to employees as per Section 115WA(2) of the Act were exigible to FBT @ 20% thereof. The Assessing Officer issued notice under section 115WH of the Act to the assessee in this regard, after recording reasons for re-opening the assessment. The assessment was completed under section. 115WG of the Act vide order dated 29/1/2013, wherein the Assessing Officer levied FBT @ 20% of the fringe benefits amounting to Rs.9,09,554/-.

2.2 In coming to decision in the aforesaid orders for both the assessment years 2006-07 and 2007-08, the Assessing Officer observed that as per the provisions of Sec.115WA(2), fringe benefits shall be deemed to have been provided by the employer to his employees in the course of his business irrespective of the fact that whether such activity was carried on with the object of deriving income and that FBT shall be payable by the employer even if no income tax is payable by him/it on his total income computed in accordance with the provisions of the Act. The Assessing Officer in this context, came to the view that in the case on hand, though the assessee had only agricultural income which was exempt from income-tax, even then the assessee is liable to FBT for fringe benefits provided by the assessee to its employees. In coming to this finding, the Assessing Officer placed reliance on the decision of the ITAT, Kolkata Bench in the case of Mcleod Russel India Ltd., in ITA No.289/K/2011 dated 25/05/2012, wherein it was held as under:-

“We have carefully considered the submissions of the Id. Representatives of the parties and orders of the authorities

below. We have also considered the relevant provisions, ie. Section 115WA, 115WB & 115 WE of the Income Tax Act. We observe that an employer assessee is liable to pay Fringe Benefit Tax under section 115WA of the Income Tax Act, in relation to Fringe Benefits provided by him to its employees. Sub-section (2) of section 115WA starts with an non obstante clause and states that notwithstanding that no income- tax is payable by an employer to its total income computed in accordance with the provisions of the Act, the tax on Fringe Benefits shall be payable by such an employer. Therefore, an employer is liable to pay Fringe Benefit Tax even when no income-tax is payable by an employer on his total income computed in accordance with the provisions of the Income Tax Act. Therefore, the contention of the Id. Authorized Representative for the assessee that value of Fringe Benefit should be computed by applying Rule 8 of Income Tax Rule has no merit as Fringe Benefit Tax is not payable on the income of an assessee but only Fringe Benefits provided by an employer to its employees. In view of the above, we agree with the Id. Departmental Representative that the contention of the Id. Authorized Representative for the assessee has no merit and accordingly, we uphold the order of the Id. CIT(A) by rejecting grounds of appeal taken by the assessee. Respectfully following the Tribunal's decision we reverse the order of err (A) and this issue of revenue's appeal is allowed."

3. Aggrieved by the orders under section 115WG of the Act dated 29/1/2013 for both assessment years 2006-07 and 2007-08, the assessee carried the matter in appeal before the Ld CIT(Appeals)-4, Mumbai. The Ld. CIT(A) vide separate orders dated 12/2/2013, dismissed the assessee's appeals.

4. The assessee, aggrieved by the impugned orders of the CIT(Appeals)-4, Mumbai dated 12/2/2013, has preferred these appeals raising similar/identical grounds which are extracted hereunder:-

4.1 For assessment year 2006-07:-

- 1. In the facts and circumstances of the case and in law, the Notice issued u/s.115WH r/w. section 115WG of the Income Tax Act, 1961, is void ab initio.*
- 2. The reasons given by CIT-(A) for confirming the AO.'s action of initiating Notice u/s. 115WH r/w. section 115WG of the Act is wrong, insufficient and contrary to facts and evidence on record.*
- 3. In the facts and circumstances of the case, the Notice issued u/s. 115WH r/w. section 115WG of the Act is void ab initio as the same is issued without obtaining satisfaction from Chief Commissioner or the Commissioner.*
- 4. In the facts and circumstances of the case, and in law, the learned CIT- (A) erred in confirming AO's action of imposing Fringe Benefit Tax of Rs. 3,00,149/- including interest of Rs. 1,35,232/- u/s. 115WJ(5) of the Income Tax Act, 1961.*
- 5. Reasons given by the learned CIT-(A) for confirming AO's action of imposing Fringe Benefit Tax of Rs. 3,00,149/- including interest of Rs. 1,35,232/- u/s. 115WJ(5) of the Income Tax Act, 1961, are wrong, insufficient and contrary to facts and evidence on record.*
- 6. Appellant craves leave to add, amend, alter, modify or omit any of the aforesaid Grounds of Appeal as occasion may arise of demand.*

4.2 For assessment year 2007-08:-

- 1. In the facts and circumstances of the case and in law, the Notice issued u/s.115WH r/w. section 115WG of the Income Tax Act, 1961, is void ab initio.*
- 2. The reasons given by CIT-(A) for confirming the AO.'s action of initiating Notice u/s. 115WH r/w. section 115WG of the Act is wrong, insufficient and contrary to facts and evidence on record.*
- 3. In the facts and circumstances of the case, the Notice issued u/s. 115WH r/w. section 115WG of the Act is void ab initio as the*

same is issued without obtaining satisfaction from Chief Commissioner or the Commissioner.

4. In the facts and circumstances of the case, and in law, the learned CIT- (A) erred in confirming AO's action of imposing Fringe Benefit Tax of Rs. 3,11,722/- including interest of Rs. 1,26,173/- u/s. 115WJ(5) of the Income Tax Act, 1961.

5. Reasons given by the learned CIT-(A) for confirming AO's action of imposing Fringe Benefit Tax of Rs. 3,11,722/- including interest of Rs. 1,26,173/ u/s. 115WJ(5) of the Income Tax Act, 1961, are wrong, insufficient and contrary to facts and evidence on record.

6. Appellant craves leave to add, amend, alter, modify or omit any of the aforesaid Grounds of Appeal as occasion may arise of demand.

5. **Grounds 1 to 3 and 6:**

5.1 At the outset, the Ld. Representative for the assessee submitted that the assessee is not pressing or urging the grounds raised at Sl.No.1 to 3 and 6 in these appeals. Since, grounds Nos.1 to 3 and 6 are not being pressed by the assessee in its appeals for assessment years' 2006-07 and 2007-08, these grounds are rendered infructuous and are accordingly dismissed.

6. **Grounds 5 & 5:-**

6.1 In these grounds (supra), the assessee assails the order of the Ld. CIT(A) in upholding the Assessing Officer's action in imposing FBT in the case on hand as being erroneous. The Ld. Representative for the assessee was heard in support of the grounds raised. Urging that the proposition that since the assessee's income comprised of only agricultural income that was exempt from Income Tax under section. 10 of the Act the Ld. Representative for the assessee contended that no

FBT was chargeable, since the expenditure incurred by the assessee in extending fringe benefits to its employees was solely for the purpose of its agricultural activities. In support of this proposition, the Id. AR for the assessee placed reliance on the ratio of the decision of the Hon'ble Calcutta High Court in the case of Apeejay Tea Ltd. vs. CIT and Another (2015) 370 ITR 775(Cal.); which it was submitted covered the question of whether FBT is imposable in a case where the income involved; i.e. agricultural income is itself exempt from tax; in favour of the assessee, as the provisions of Chapter-XII –H of the Act have to be read subject to Section-10 of the Act and anything to the contrary would result in agricultural income itself becoming liable to tax which is not permissible under section 10(1) of the Act.

6.2 Per contra, the Id. DR supported the orders of the authorities below.

6.3.1 We have heard the rival contentions and perused carefully considered the material on record; including the judicial decisions cited. The question before us for consideration in the case on hand is whether the assessee employer is liable to be charged with FBT, notwithstanding the fact that the assessee's income derived only from agriculture was exempt from income tax under section 10(1) of the Act.

6.3.2 According to the authorities below, as in the case on hand, in view of the provisions of Chapter XII-H dealing with FBT, even if the assessee has only agricultural income, FBT is attracted in respect of fringe benefits provided by the assessee employer to its employees, even though agricultural income is exempt from income, being an income that does not form part of total income. In support of this

proposition, the authorities below relied on the decision of the ITAT, Kolkatta Bench in the case of Mcleod Russel India Ltd.(supra), wherein it was held as under :-

"We have carefully considered the submissions of the Id. Representatives of the parties and orders of the authorities below. We have also considered the relevant provisions, ie. Section 115WA, 115WB & 115 WE of the Income Tax Act. We observe that an employer assessee is liable to pay Fringe Benefit Tax under section 115WA of the Income Tax Act, in relation to Fringe Benefits provided by him to its employees. Sub-section (2) of section 115WA starts with an non obstante clause and states that notwithstanding that no income- tax is payable by an employer to its total income computed in accordance with the provisions of the Act, the tax on Fringe Benefits shall be payable by such an employer. Therefore, an employer is liable to pay Fringe Benefit Tax even when no income-tax is payable by an employer on his total income computed in accordance with the provisions of the Income Tax Act. Therefore, the contention of the Id. Authorized Representative for the assessee that value of Fringe Benefit should be computed by applying Rule 8 of Income Tax Rule has no merit as Fringe Benefit Tax is not payable on the income of an assessee but only Fringe Benefits provided by an employer to its employees. In view of the above, we agree with the Id. Departmental Representative that the contention of the Id. Authorized Representative for the assessee has no merit and accordingly, we uphold the order of the Id. CIT(A) by rejecting grounds of appeal taken by the assessee. Respectfully following the Tribunal's decision we reverse the order of err (A) and this issue of revenue's appeal is allowed."

6.3.3. From a perusal of the decision of the Hon'ble Calcutta High Court in the case of Apeejay Tea Ltd. (supra), we find that in that case also this very same issue as in the case on hand had come up for consideration before the ITAT Kolkatta Bench and the Tribunal in its decision in ITA No.557/Kol/2010 had held, in favour of the revenue ; exactly as had

been held by them in the case relied on by Revenue i.e. Mcleod Russel India Ltd. (supra); the finding of which we have extracted at para 6.3.2 of this order (supra). The relevant finding in the case of Apeejay Tea Ltd. by Kolkatta ITAT (supra) at para-7 thereof is extracted hereunder for the sake of clarity :-

7. We have carefully considered the submissions of the learned representatives of the parties and the orders of the authorities below. We have also considered the relevant provisions, i.e., sections 115WA, 115WB and 115WE of the Income-tax Act. We observe that an employer assessee is liable to pay fringe benefit tax under section 115WA of the Income-tax Act in relation to fringe benefits provided by him to its employees, sub-section (2) of section 115WA starts with a non obstante clause and states that notwithstanding that no income-tax is payable by an employer to its total income computed in accordance with the provisions of the Act, the tax on fringe benefits shall be payable by such an employer. Therefore, an employer is liable to pay fringe benefit tax even when no income-tax is payable by an employer on his total income computed in accordance with the provisions of the Income-tax Act. Therefore, the contention of the learned authorised representative for the assessee that the value of fringe benefit should be computed by applying rule 8 of the Income-tax Rules has no merit as fringe benefit tax is not payable on the income of the assessee but only fringe benefits provided by an employer to its employees. In view of the above, we agree with the learned Departmental representative that the contention of the learned authorised representative for the assessee has no merit and, accordingly, we uphold the order of the learned Commissioner of Income-tax (Appeals) by rejecting the grounds of appeal taken by the assessee."

6.3.4 On appeal by the assessee, the Hon'ble High Court of Calcutta, in the case of Apeejay Tea Ltd. supra), reversed the above decision of the ITAT Kolkatta Bench in Apeejay Tea Ltd. (supra), holding it to be unsustainable. At paras 8 to 11 of this order, their Lordships held as under:-

8. We have considered the rival submissions advanced by the learned advocates. For the purpose of resolving the disputes, we would like to refer to the illustration appearing from the judgment of the apex court in the case of CIT v. Doom DOO1na India Ltd. (supra). The illustration in para- graphs 12 and 13 of the judgment reads as follows (page 397) :

"Be that as it may, we can give the following illustration(s) which will give an example of how the "written down value" needs to be computed :

ILLUSTRATION -A

	(Rs.)
Income from sale of tea	1000
Less : Expenses:	
Depreciation	(100)
Others	(300)
Business profit	600
Income subject to charge under the Income-tax Act by application of rule 8(40% of 600)	240

ILLUSTRATION -B

	(Rs.)
Income from sale of tea (40% OF 1000)	400
Less : Expenses:	
Depreciation	(40)
Others (40% OF 300)	(120)
Business profit subject to charge of Income Tax(40% of 600)	240

Analysing the above two charts, we find that at the end of computation the income' chargeable to tax by applying rule 8 comes to Rs. 240. Under illustration A, the normal depreciation is Rs. 100 which is deductible from RS:1,000~heili.g the income from sale of tea. On the other hand, under illustration B, we have' taken 40 per cent. of each of the items, namely, income 'from sale' of tea, depreciation and other expenses. Accordingly,' 'on comparison it may be noted that whereas income from sale of tea is Rs. "1,000 under illustration- A, proportion- ately it comes to Rs. 400 under illustration B. Similarly, depreciation under illustration- A which is normal depreciation is Rs. 100 whereas in illustration B at 40per cent. the pro rata depreciation is 40. What is important to 'be noted' is' that at the end of computation under both the illustrations, the income. taxable by applying rule 8 comes to Rs.240 in both the cases. The only difference is that in illustration, B we have gone by pro rata basis."

9. The question for consideration before their Lordships was whether deduction on account of depreciation is allowable from the business income arrived at after applying rule 8. This question was answered, by their Lordships in the affirmative. From illustration A, it would appear that business profit after taking into account the expenses was computed at Rs.600. Applying rule 8 taxable income on account of business was computed at Rs. 240, that is to say, 40 per cent of Rs. 600. From illustration B, it would

appear that 40 per cent. of the total income from sale of tea was Taken into account. From illustration A it would appear that total depreciation Rs. 100. For the purpose of computing business profit and loss of 40 per cent of the total depreciation was taken into account. From illustration A it would appear that other expenses were computed at Rs.300 and illustration B would show that other expenses were computed at Rs.120, in other words, 40 per cent of Rs.300 had been taken into account.

10. We shall take assistance of the illustration to resolve the issue. Let us assume that the other expenses in illustration A amounting to Rs. 300 include Rs. 100 spent by the employer on account of fringe benefits made available to its employees. In that case, 40 per cent. of the aforesaid sum of Rs. 100 would also be includible in illustration B. Therefore, the question posed before us has really been answered by the illustration given by the apex court in the aforesaid judgment. It cannot be disputed that the amount of expenditure incurred by the assessee in extending fringe benefits to its employees was not solely for the purpose of business. The expenditure incurred is both for the purpose of business and for the purpose of agriculture. The submission made by Mrs. Gutgutia that the expenditure on account of fringe benefits has already been taken into account is not correct. The net profit and loss of the business has to be arrived at after deducting all the expenses as indicated in illustration A in the case of Doom Dooma(supra). Once that is done 40 per cent. of the net profit and loss has to be worked out which shall be chargeable to tax. Once this is done the expenditure on account of fringe benefits would automatically stand reduced to 40 per cent. as would appear from illustration B in the case of Doom Dooma (supra). The Revenue is interested in contending as would appear from the impugned orders that the expenditure on account of fringe benefit cannot be reduced to 40 per cent. for the purpose of computing fringe benefit tax. If that is done, the result would be that the agricultural income itself would become liable to tax, which is not permissible under sub-section (1) of section 10 of the Income Tax Act. The provisions contained in Chapter XII-H of the Income-tax Act have to be read subject to section 10 of the Income-tax Act.

11. For the aforesaid reasons, we are of the opinion that the judgment of the learned Tribunal cannot be sustained.

6.3.5 On a perusal of the decision of the Hon'ble Calcutta High Court in the case of Apeejay Tea Ltd. (supra), and the finding rendered therein, we find that it covers the issue before us squarely in favour of the assessee in the case in hand. Respectfully, following the aforesaid decision of the Hon'ble Calcutta High Court in the case of Apeejay Tea Ltd.(2015) 370 ITR 775 (Cal.), we reverse the impugned orders of the Id.

CIT(A) for assessment years 2006-07 and 2007-08 and allow the assessee's grounds at Sl.No. 4 and 5 thereof, holding that the assessee in the case on hand is not liable for imposition of FBT, since its only income i.e., agricultural income is exempt from income tax under section 10(1) of the Act and this income does not form part of and is not to be included in total income.

7. In the result, the assessee's appeal are partly allowed as indicated above.

Order pronounced in the open court on 26/08/2016

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER
Mumbai, Dated 26 /08/2016

Sd/-
(JASON P. BOAZ)
ACCOUNTANT MEMBER

Vm, Sr. PS

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai