

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD BENCH

**Before: Shri Rajpal Yadav, Judicial Member
And Shri Amarjit Singh, Accountant Member**

**ITA No. 1826/Ahd/2014
Assessment Year 2006-07**

Troikaa Pharmaceutical Ltd, Commerce House, Opp: Rajvansh Apartment, Judges Bunglow Road, Ahmedabad-380015 PAN: AABCT0228K (Appellant)	Vs	The DCIT(OSD), Range-8, Ahmedabad (Respondent)
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**Revenue by: Shri Mudit Nagpal, Sr. D.R.
Assessee by: Shri Karan Shah, A.R.**

Date of hearing : 13-11-2017
Date of pronouncement : 07-12-2017

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

This assessee's appeal for A.Y. 2006-07, arises from order of the CIT(A)-I, Ahmedabad dated 14-03-2014, in proceedings under section 115WE(3) r.w.s. 115WG of the Income Tax Act, 1961; in short the Act.

2. The assessee has raised following grounds of appeal:-

"1. The Ld. CIT (A) has grossly erred in law and on facts in partly allowing the appeal. He ought to have allowed the appeal fully in accordance with the grounds of appeal raised by the appellant before him.

**1. ADDITION ON ACCOUNT OF UNDER ASSESSMENT OF FRINGE BENEFIT VALUE-
RS. 19,84,307/-**

1. The Ld. CIT(A) has erred in law and on facts in confirming the addition on account of various expenditure incurred under different heads of expenses which has been reclassified and regrouped by the Ld. A.O which is contrary to the provisions of FBT and CBDT Circular No. 8 of 2005.

2. The Ld. CIT (A) has erred in law and on facts in failing to properly consider appellant company's written submission dated 11-02-2014.

3. The Ld. CIT(A) has erred in law and on facts while not taking into consideration Circular No. 8 relied upon by the appellant company.

4. The Ld. CIT(A) has erred in law and on facts in giving direction to the A.O to verify whether the amount of Rs. 6,17,372/- was spent on the traveling of doctors or directors and if traveling expenses were that of the directors, the same has to be categorized as conveyance and traveling expenses.

5. The Ld. CIT (A) has erred in law and on facts in confirming the addition of Rs. 6,15,930/- while making an observation that " as far as the payment for other club facilities of RS. 6,15,930/- is concerned, the AR of the appellant has not filed any evidence to show that the payment was not for the use of facilities at the club. In view of the above, the action of the AO in treating the amount of Rs. 6,15,930/- as payment covered by section 115WB(2)(N) is justified". The Ld. CIT (A) has failed to consider the fact that in case of payments made for use of facilities that are not typically "Club Facilities", clause (N) is not attracted. The same view has been given in the ICAI's Views in Para 26.3 "Guidance Notes on Audit of Fringe Benefit under the IT. Act, 1961".

PRAYER

The appellant therefore respectfully prays that :-

1. The addition on account of alleged under assessment of Fringe Benefit Value of Rs. 19,84,307/- confirmed by the Ld. CIT (A) may kindly be deleted,

2. Such and further relief as the nature and circumstances of the case may justify."

3. The assessee has filed return of fringe benefit on 16th December, 2006 declaring total fringe benefit to the value of Rs. 53,54,244/-. The assessing officer has completed assessment u/s. 115WE(3) of the act on 26th December, 2008 determining the total fringe benefit of Rs. 54,02,501/-. There after the assessing officer has reopened the assessment by issuing of notice under section 115 WE(2) of the act for under assessment of fringe benefits. In the reassessment proceedings the assessing officer has taken into

consideration the CBDT Circular No.8 of 2005 dated 25th of August 2005.

In respect of travelling expenditure on doctor, the assessee had stated that doctors are not the customer and client of the assessee. Such doctors are the business delegate of the assessee. It was further submitted by the assessee that according to the language of reply to question number 67 the classification should be made according to the nature of expenditure. The assessee has also stated that as per in reply to question number 11 of the said circular the word purpose referred to the proximate purpose and not the distance purpose.

As regards, the doctors' foreign travel expenses of Rs. 6,17,372/-, the assessee has submitted that during the year under consideration, the assessee company has incurred these expenses on foreign travelling of directors and not doctors.

In respect expenditure of Rs. 1,14,396/- for giving apparatus to doctors, the assessee claimed that these are the incentive given to distributors. The assessee submitted that intention for giving this to distributor for meeting sale target are in the nature of purpose based commission.

As regards, expenditure of Rs. 6,15,930/- under the head staff welfare, the assessee has stated that this payment was made under the head other club facility for boarding and lodging and not for using club facilities. The assessing officer has not accepted the explanation of the assessee and treated the same as general in nature. After taking into consideration, the provisions of section 115WB of the act

and the CBDT circular no. 8 dated 29/08/2005, the assessing officer observed that the expenses incurred by the assessee for sale promotion availing club facility etc. were incorrectly classified as conveyance, tour and travel or employee welfare instead of the appropriate head provided under section 115WE of the act. Consequently, the assessing officer has reclassified the expenses of Rs. 10038938/- and Rs. 617372/- incurred on tour travel and conveyance on doctors as sales promotion expenses. The claim of the assessee that expenditure of Rs. 114396/- for giving apparatus to doctors as incentive to distributor was reclassified as gifts to doctors by the assessing officer. The assessing officer has reclassified the expenditure of Rs. 615930/- under the head using club facilities against the claim of the assessee that payment was made under the head other club facility for boarding and lodging.

4. Aggrieved assessee preferred appeal before the Id. CIT(A). The Id. CIT(A) has rejected the appeal of the assessee by observing as under:-

"5. I have gone through the assessment order and submissions of the A.R. of the appellant carefully. The contention of the AR of the appellant that the tour and travel expenses of the doctors had to be classified as conveyance expenses is not correct. The doctors are not employees of the appellant. The doctors only promote the sales of the appellant by prescribing the medicines made by the appellant. Any expenditure incurred for promoting the sales of medicines has to be properly classified as sale promotion expenses. In view of the above the AO was justified in reclassifying the tour and travel expenses of the doctors as sale promotion expenses. This contention of the appellant is rejected.

5.1 As far as the expenses on the travelling of directors of the company amounting to Rs.6,17,372/- is concerned, it is seen that such expenses cannot be categorized as sale promotion expenses. The mistake has occurred due to typographical mistake whereby instead of directors the words doctors was written. The AO is directed to verify whether the amount of Rs. 6,17,372/- was spent on the travelling of doctors or directors. If the

travelling expenses were that of the directors then the same has to be categorized as conveyance and travelling expenses.

5.2 As far as the expenses incurred at the club are concerned, It is seen that the expenses were incurred at clubs. In view of the above the AO was justified in treating the same as club expenses.

5.3 As far as the expenses on the provisions of apparatus to doctors are concerned, the same cannot be equated with incentives given to distributors for meeting targets. The company cannot set targets for the doctors and by not stretch of imagination can the doctors be said to be distributors of the company. Thus the contention of the appellant in this regard fails.

5.4 As far as the payment for other club facilities of Rs. 6,15,930/- is concerned, the AR of the appellant has not filed any evidence to show that the payment was not for the use of facilities at the club. In view of the above the action of the AO in treating the amount of Rs. 6,15,930/- as payment covered by section 115WB(2)(N) is justified. The contention of the appellant, in this regard, is dismissed.

6. Ground No.III *relates to charging of interest u/s 115 WJ and 115WK of the Act. The levy of interest u/s 115 WJ and 115WK of the Act is akin to the levy of interest u/s 234A, 234B and 234C of the IT Act 1961.*

The levy of interest as applicable is mandatory. The AO does not have any discretion whether to charge interest or not under the aforesaid sections. In the case of Anjum M H Ghaswala reported in 252 ITR 1 the Hon'ble Supreme Court has held that the charging of interest as applicable is mandatory. In the case of Vinod Khurana V. CIT reported in 253 ITR 578 the honorable Punjab & Haryana High Court has held that charging of interest as applicable is mandatory. The special Bench of the ITAT Delhi in the case of Motorola Inc V. DCIT reported in 95 ITD 269 has also held the same. The AO was, thus, duty bound to Levy interest as applicable. In view of the above this ground is dismissed.

7. Ground No. IV *relates to initiation of penalty proceedings under section 271(1)(d) of the I.T. Act, 1961. No appeal lies against the initiation of penalty under section 271(1)(c) of the I.T. Act. Appeal could arise only when penalty under section 271(1)(d) is levied. In view of the above this ground is dismissed."*

5. We have heard the rival contentions and perused the material on record carefully. We observed that the assessing officer has taken into consideration the CBDT Circular No.8 of 2005 dated 25th of August 2005 for reclassification of expenses for valuation of fringe benefits. FBT in respect of sales promotion expenditure, conveyance, tour and travel expenditure, Fringe Benefit Tax was introduced in the year 2005 by inserting Chapter XIIH to the Income Tax Act. Subsequent to the insertion of the new chapter, the CBDT issued an circular clarifying that the FBT is leviable on the expenses incurred by the employer in respect of entertainment; provision of hospitality; conference excluding the fee from participation by the employees in

any conference; sales promotion including publicity but excluding specified expenditure on advertisement; conveyance, tour and travel (including foreign travel); use of hotel, boarding and lodging facilities; repair, running (including fuel) and maintenance of motor cars and the amount of depreciation thereon; maintenance of any accommodation in the nature of guest house other than accommodation used for trading purposes; festival celebrations; use of any other club facilities, gifts and scholarships etc. As per section 115WB(1) of the Income Tax Act the expenses incurred by the employer, in consideration for employment, for the benefits, services etc. as mentioned under Clause (a) to (d) of his employees are liable to be subjected to the FBT. The words ~~%~~consideration for employment+, ~~%~~employer+, ~~%~~employee+, ~~%~~employees+ have been repeatedly mentioned not only in the main section (Section 115WA) but also in every clause of section 115WB(1) of the Income Tax Act. ~~%~~On perusal of entire section 115WB(2) it reveals that wherever any benefit is derived out to the employees, the word ~~%~~employees+ has been specifically used.

Whereas, the expenditure as mentioned under other heads i.e. mentioned in clauses (A) to (D) of subsection (2) of Section 115WB, the word ~~%~~employee+ has been intentionally omitted. Rather the word ~~%~~any person+ has been used.

In view of the above provision the assessing officer has reclassified the expenses In respect of Conveyance to tour and travel expenses of Rs. 1,00,38,938/- for doctors under the head of sale promotion. The assessing officer observed that the same is covered

u/s. 115(2)(D) as per classification vide answer to question no. 67 of circular no. 8 dated 29th October, 2005. We observed that generally the expenses of the nature of tour and travel are incurred by the assessee for the employees. In the case of the assessee, we find that the doctors are not the employees of the assessee, however, the assessee has claimed these expenses incurred for the purposes of its business. We observe that the doctors play an important role in promoting the sale by prescribing the medicines of the pharmaceuticals companies.

After considering the above facts and the detailed findings of the Ld.CIT(A) and the provision of clauses (A) to (D) of subsection (2) of Section 115WB, we justify the decision of reclassifying the tour and travel expenses of the doctors as sale promotion expenses. Therefore, the appeal of the assessee on this issue is dismissed. As regards, the doctors's foreign travel expenses of Rs. 6,17,372/- which was reclassified by the assessing officer under the sale promotion, the assessee has submitted that during the year under consideration, the assessee company has incurred these expenses on foreign travelling of directors and not doctors. The mistake has occurred due to typographical mistake whereby instead of directors the words doctors was written. We observed that the Ld.CIT(A) has already directed the AO to verify whether the amount of Rs. 6,17,372/- was spent on the travelling of doctors or directors. Therefore, we do not find any reason to interfere in the decision of the Ld. CIT(A). We are also inclined with the decision of the Ld. CIT(A) that expenses on the provisions of apparatus to doctors cannot be

equated with incentives given to distributors for meeting targets because the doctors are not the distributors of the company. Therefore, the appeal of the assessee is dismissed on this issue.

As regards, the reclassification of expenditure of Rs. 6,15,930/- under the head staff welfare, the assessee has stated that this payment was made under the head other club facility for boarding and lodging and not for using club facilities. We have noticed that neither the assessee has filed any evidence before the Ld. CIT(A) nor before us to demonstrate that it had incurred the aforesaid expenses for boarding and lodging and not for using club facilities. Therefore, the appeal of the assessee is dismissed on this issue.

6. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open court on 07-12-2017

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER
Ahmedabad : Dated 07/12/2017

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

आदेश क० त० म० अ० म० / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,
उप/सहायक पंजीकार
आयकर अपीलार्थ अधिकरण,
अहमदाबाद