

IN THE INCOME TAX APPELLATE TRIBUNAL : 'A' BENCH, KOLKATA

**Before : Shri M. Balaganesh, Accountant Member and
Shri S.S. Viswanethra Ravi, Judicial Member**

ITA No. 2798/Kol/2013

A.Y : 2007-08

DMI India Pvt. Ltd
PAN: AABCD 0859L
[Appellant-Assessee]

Vs. I.T.O., Ward 12(1), Kolkata

[Department-Respondent]

Appellant by : Shri A.K. Sahu, Id.AR
Respondent by : Shri Sallong Yaden, Addl, CIT, Id.DR

Date of Hearing : 16-11-2017
Date of Pronouncement : 31-01-2018

ORDER

Shri S.S. Viswanethra Ravi, JM:

This appeal by the Assessee is against the order dt: 26-12-2012 passed by the CIT-A, XII, Kolkata for the A.Y 2007-08.

2. The only issue is to be decided as to whether the CIT-A was justified in confirming the charging of Fringe Benefit Tax hereinafter in short as FBT by the AO u/s. 115WE(3) of the Act in the fact and circumstances of the case.

3. The brief facts of the case are that the assessee is a company and engaged in the business of export and manufacturing of cloth items. The assessee filed its e-return for the A.Y under consideration on 22-03-08 declaring FBT at Rs. Nil. Under scrutiny, notice u/s. 115WE(2) of the Act was issued. In response to which, the AR of the assessee appeared and stated that no FBT was paid in this case. On perusal of the Profit & Loss A/c & Audit Report, the AO found that the assessee company has debited expenses under the heads : Sales Promotion, Foreign Tour, Telephone & Travelling & Conveyance. The AO asked the assessee vide his office letter dt. 13-10-2009 that why the FBT should not be charged on such expenses. In reply, the

assessee stated that the assessee is financially sick, loss making company and surviving by reducing its overhead expenses including staff salary. The assessee did not provide any fringe benefit to any employee or director of the assessee and the liability of fringe benefit tax does not arise.

4. According to AO, the assessee has been paying salary, bonus, exgratia and PF to its employees. The auditor has also pointed out and admitted the levability of FBT. Accordingly, the AO computed the total taxable FBT -Fringe Benefits of Rs.2,14,569/-on the various heads: Sales promotion, Foreign Tour, Telephone, Travelling & Conveyance & Clubb Bills and raised a demand of Rs.2,14,569/- vide his order dt. 30-10-09 passed u/s. 115WE(3) of the Act by stating as under:-

	Fringe Benefits on the following Expenditure are as under	Rs.
(1)	Sales Promotion of Rs.16,71,621 @ 20%	3,34,324/-
(2)	Foreign Tours of Rs. 5,36,188/- @ 5%	26,810/-
(3)	Telephone of Rs.72,260/- @ 20%	14,452/-
(4)	Travelling & Conveyance of Rs.82,028/- @ 20%	16,406/-
(5)	Clubb bills of Rs.1,17,109/- @ 50%	58,555/-
	Total Fringe Benefits	4,50,547/-
	Calculation of Fringe Benefit Tax	
	Fringe Benefit Tax @ 30% on Rs.4,50,547/-	1,35,164/-
	Surcharge @ 10%	13,516/-
		1,48,680/-
Add:	Education Cess @ 2%	2,974/-
	Total Fringe Benefit tax	1,51,654/-
Add:	Interest u/s. 115WJ(3)	Rs. 8,339
	Interest u/s. 115WJ(5)	Rs. 46,996/-
	Interest u/s.115WK	Rs. 7,580/-
	Total Interest	62,915/-
	Tax + Interest	2,14,569/-
Less:	Tax paid	Nil
	Payable	2,14,569/-

5. Aggrieved, the assessee challenged the above action of the AO in charging FBT before the CIT-A and contended that the AO without going through the details of expenditure in respect of sales promotion arbitrarily charged the FBT. The assessee incurred foreign tour expenditure relating to visit of director for obtaining export order. The said foreign tour was caused effect with the permission of RBI. The FBT cannot be charged on foreign tour expenses as there was no

benefit of the director and the AO was wrong in charging the FBT of Club bills and the said expenditure incurred to entertain the foreign buyers in a reputed club.

6. The CIT-A considering the submissions of the assessee confirmed the order of AO in charging FBT by the AO. Relevant portion of order of the CIT-A is reproduced herein below:-

4. I have considered the finding of the AO in his order dt. 30-10-2009 and the written submission made by the AR during the appellate proceeding. The main ground of appeal in this case is against the addition on the ground of FBT on expenses under heads sales promotion, foreign tour, telephone, travelling and conveyance. The AO has given his finding that the assessee was required to pay FBT on expenses on above mentioned items. The AO has also brought on record the findings of the auditors in this case where the auditor has also pointed out the Leviability of FBT to be charged on expenses on all the above heads, accordingly, the AO made addition for FBT. The assessee in its ground no. 1 has objected to the taking of the entire amount of sale promotion of Rs.1,67,621/- for FBT. Similarly, on ground no. 2 the assessee has objected to taking of the entire expenses of Rs.5,36,188/- on foreign tour. On ground no. 3 the assessee has objected taking of the entire telephone expenditure of Rs.72,260/- for FBT. Similarly, on ground no. 4 the assessee has raised objection for taking the entire traveling expenses of Rs.82,028/- for calculating FBT and lastly on ground no. 5 the assessee has appealed against taking of the entire club bills expenditure of Rs. 1,17,100/- for calculating FBT. The AO has applied different rates on expenditure under different heads as applicable in the FBT and calculated the FBT accordingly. Although, the AR has filed appeal on five grounds challenging each item of expenditure but during the appellate proceeding but during the appellate proceeding the AR did not bring anything on record to contradict the finding of the AO. Since, nothing has been brought on record to substantiate the claim of the assessee mentioned in different grounds of appeal for expenditure under different heads, therefore, assessee's appeal against FBT on ground no. 1,2,3,4 and 5 are dismissed."

7. Before us the appeal was listed for hearing on 06-11-2017. At the time of hearing, it was noted that no such details were filed by the assessee before the AO & CIT-A. The fact of which was not controverted by the Id.AR. Therefore, we directed the Id.AR to file the details of expenditure vide order sheet dt. 06-11-2017 and posted the appeal for hearing on 16-11-2017. In response to our said direction, the AR of the assessee filed a copy of document stating it to be treated as details of expenditure. He also submits that the assessee has no other details except the details as reflected in the said copy of document. Further, he submits that the assessee is in loss and tax (FBT) cannot be recovered from these employees. In support of the contention, he argued that the AO arbitrarily charged the FBT on various heads of expenditure, which was confirmed by the CIT-A without considering the submissions of the assessee.

8. The Id.DR submits that the assessee did not produce any details for his verification before the AO. The AO examined the P & L account & Audit Report and found therein that the assessee debited the amounts on different heads, on which FBT was required to be paid by the assessee. On being asked by the AO, the assessee contended that no FBT is chargeable to said expenditure. The AO also found that the audit report has rightly been mentioned the charging of the FBT on said expenditure and, therefore, the AO charged the FBT on different expenditure and it is justified. The Id.DR referred to para 4 of the order of the CIT-A and argued that the assessee failed to produce any details of expenditure before the CIT-A, which supports the view of the AO in charging the same. He relied on the orders of the AO & CIT-A.

9. Heard rival submissions and perused the material on record. It is apparent on record that non submission of such details of expenditure, the AO charged the FBT. From the order of the CIT-A, it is clear that the assessee did not bring anything on record to contradict the finding of the AO in charging the said FBT. On perusal of order sheet, we find that the Tribunal has given an opportunity to file the details of expenditure, which said to have been incurred by the assessee. We find that the details as sought by the Tribunal and filed by the assessee before us, which is only a copy of document, does not contain any details except the submission in support of the assessee's contention. For ready reference the said document is reproduced herein below:-

*"DMI India
To me, Sukumar*

*1. Sales Promotion -
In this case Sales Promotion includes Selling Expenses and After Sales Service*

Expenditure relating to sales and post-sales activities is treated as Selling expense (not liable to the FBT)

In this year majority of Export Sales was Retail Export orders received through web site www.dmi-india.com

As a result the number of buyers increased by 100 folds around Europe, USA and other parts of the world.

Since the products exported were mostly high fashion garments, there was many complaints received from the overseas buyers and therefore, several After Sales foreign trips were required to settle the complaints and discussing over samples.

As such the entire amount of Sales Promotion to be treated as Selling Expenses and After Sales Service which are not liable to FBT.

2. Foreign Tour is integrated to direct Selling Expenses, collection of payments and After Sales Service since the entire sales was export to other countries.

*3. Club Bills are for entertaining foreign buyers
During the year Aran Sweater Market Co. of Ireland and Lynx Corporation of USA visited Kolkata a couple of times. The foreign buyers were put up and entertained in Clubs*

4. Telephone Expenses were strictly for business and not spent on employees. "

10. On perusal of the above document, we find that no such details were produced before this Tribunal for adjudicating the grounds raised by the assessee questioning the charging of FBT. The assessee was so casual to file the said documents stating it to be containing the details of expenditure incurred under various heads. Thus, the Id.DR has rightly pointed out before us that the assessee has failed to produce anything on record before the AO, CIT-A and even before us. We find that the details as above, is only a simple printed statement, not showing any of the details of various expenditure stated to have been incurred by the assessee. For better understanding, we may refer to the section 115-WA of the Act, which is as under:-

*"Section - 115WA, Income-tax Act, 1961-2006
B.-Basis of charge*

Charge of fringe benefit tax.

115WA.(1) In addition to the income-tax charged under this Act, there shall be charged for every assessment year commencing on or after the 1st day of April, 2006, additional income-tax (in this Act referred to as fringe benefit tax) in respect of the fringe benefits provided or deemed to have been provided by an employer to his employees during the previous year at the rate of thirty per cent on the value of such fringe benefits.

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

11. On plain reading of above cited section, it explains that the charging of 30% value of fringe benefits provided or deemed to have been provided by an employer to his employees. Sub-section (2) explains the tax on fringe benefits are chargeable by an employer irrespective of the fact that no tax is payable on his total income

computed in accordance with the provisions of this Act. The arguments of the assessee are that the assessee company is in loss and tax/FBT on such expenditure incurred cannot be recovered from those employees, which are not acceptable in the facts and circumstances of the case. Nothing has been brought on record to substantiate the claim of assessee. We find force in the submissions of the Id. DR in pointing out the same before us. Accordingly, we uphold the impugned order of the CIT-A in confirming the order of the AO on this issue. Therefore, the grounds raised by the assessee are dismissed.

12. In the result, the appeal of the assessee ITA No. 2798/Kol/2013 for the A.Y 2007-08 is dismissed.

Order pronounced in the open court on 31 -01-2018

Sd/-
M. Balaganesh
Accountant Member

Sd/-
S.S. Viswanethra Ravi
Judicial Member

Dated : 31-01-2018

PP(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant/Assessee : M/s.DMI India (P) Ltd Shivam Chambers,
53 Syed Akmir Ali Avenue, Kolkata-19.
2. Respondent/Revenue : The ITO, Ward 12(1),Kolkata
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy,

By order

Sr.P.S,
Head of Office
ITAT Kolkata