

**IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH
MUMBAI**

**BEFORE SHRI MAHAVIR SINGH, JM
&
SHRI M.BALAGANESH, AM**

**ITA No.755/Mum/2013
(Assessment Year :2007-08)**

M/s. The NRK Company C/O/ Karnavat & Co. 2A, Kitab Mahal 1 st Floor, 192, Dr. D.N.Road Mumbai – 400 001	Vs.	Additional Commissioner of Income Tax Range – 15(1), Mumbai
PAN/GIR No. AADFT5351L		
(Appellant)	..	(Respondent)

Assessee by	Shri M. Subramanian
Revenue by	Ms. Kavita P Kaushik
Date of Hearing	06/01/2020
Date of Pronouncement	15/01/2020

आदेश / O R D E R

PER M. BALAGANESH (A.M):

This appeal in ITA No.755/Mum/2013 for A.Y.2007-08 of the assessee arises out of the order by the Id. Commissioner of Income Tax (Appeals)-26, Mumbai in appeal No.CIT(A)-26/IT-74/JCIT 15(1)/11-12 dated 05/11/2012 (Id. CIT(A) in short) against the order passed by DCIT Circle 15(1), Mumbai (hereinafter referred to as AO) u/s.115WE(3) r.w.s. 115 WG of I.T. Act, 1961 (hereinafter referred to as Act) framing assessment in respect of fringe benefit tax.

2. The return of fringe benefit tax for A.Y.2007-08 was filed by the assessee on 02/11/2007 declaring total value of Fringe Benefit Tax (FBT) at Rs.3,73,725/-. The Id. AO on verification of return of income of the assessee for the A.Y.2007-08 observed that in respect of foreign travel expenses amounting to Rs.22,34,628/-. The assessee had considered only a sum of Rs.96,107/- for the purpose of FBT and in respect of expenses towards repairs, running and depreciation on motor car amounting to Rs.26,74,112/-, the assessee had considered only Rs.8,10,626/- for the purpose of FBT. Accordingly, he show caused the assessee as to why the remaining sum of Rs.40,02,007/- towards aforesaid two expenditures were not considered for the purpose of FBT. The assessee in response replied that out of the aforesaid two expenditures, those expenses pertaining to employees were duly considered by the assessee in its FBT return and that the remaining sums represent expenses incurred towards partners of the assessee firm and since the partners could not be considered as employees of the assessee firm, the same would be outside the ambit of levy of FBT. The Id. AO did not agree to this contention of the assessee and accordingly, brought to fringe benefit tax this differential sum of Rs.40,02,007/- towards foreign travel expenses and repairs, running and depreciation of motor car pertaining to partners. This action of the Id. AO was upheld by the Id. CIT(A).

3. Aggrieved, the assessee is in appeal before us.

4. We have heard rival submissions and perused the materials available on record including the paper book of the assessee comprising of workings of return of fringe benefit tax together with the copy of order sheet noting for the A.Y.2007-08 recorded by the Id. AO which are enclosed in pages 1-5 of the paper book. It is not in dispute that foreign travel expenses of Rs.21,38,521/- that has been subjected to FBT by the

Id. AO pertains to partners of the assessee firm which has been subjected to FBT of the Id. AO. It is not in dispute that in respect of repairs, running and depreciation on motor car in the sum of Rs.18,63,486/- pertains to partners of the assessee firm which has been subjected to FBT of the Id. AO. Now, the short point that requires to be adjudicated is whether the partners of the assessee firm could be considered as employees for the purpose of levy of FBT. We find with regard to partners in the assessee firm, there is no employer- employee relationship. Hence, they cannot be considered as employees of the assessee firm. We hold that the existence of employer-employee relationship is a pre-requisite for levy of fringe benefit tax. Reliance in this regard is placed on the decision of Hon'ble Jurisdictional High Court in the case of CIT vs. Tata Consultancy Services Ltd. reported in 374 ITR 112(Bom). We find that the issue in dispute before us had been directly addressed by the Co-ordinate Bench decision of Amritsar Tribunal in the case of GDPA Fasteners vs. Addl. CIT reported in 185 TTJ 706 dated 21/02/2017 wherein the relevant head notes are reproduced hereunder:-

“Fringe benefit—Changeability—Expenses incurred by partners—Provision of 115WA clearly lays emphasis on employer-employee relationship for the application of FBT—Only that expenditure is liable for fringe benefit tax which has been incurred by the employer for his employees—Partners cannot be said to be employees of the firm—Therefore, expenditure incurred by partners is not liable for FBT”

4.1. Respectfully following the same, we hold that the sum of Rs.40,02,007/- which has been subjected by the Id. AO to FBT deserves to be deleted. Accordingly, the ground No.3 raised by the assessee is allowed.

4.2. Since, the relief is granted to the assessee on merits, the ground Nos.1 & 2 raised by the assessee challenging the validity of reopening of FBT assessment are not adjudicated and are hereby left open.

5. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on this 15/01/2020

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 15/01/2020
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai