IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE

BEFORE SHRI. CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No. 604/Bang/2013
Assessment Year : 2008-09

M/s. Wintac Ltd., No. 54/1, Boodhihal Village, Nelamangala, Bangalore – 562 123. PAN: AAACR8313H	Vs.	The Commissioner of Income tax, Bangalore – III.
APPELLANT		RESPONDENT

&

ITA No. 1164/Bang/2017
Assessment Year : 2008-09

M/s. Wintac Ltd., No. 54/1, Budihal Village, Nelamangala Taluk, Bangalore – 562 123. PAN: AAACR8313H	Vs.	The Deputy Commissioner of Income Tax, Circle – 12 (5), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri H. Anil Kumar & Shri Balram R Rao, Advocates
Revenue by	:	Dr. Manjunath Karkihalli, CIT DR

Date of Hearing	:	17-02-2022
Date of Pronouncement	:	31-03-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal arises out of order dated 28/07/2021 passed by *Hon'ble Karnataka High Court* in ITA No.90 of 2015,

2. Brief facts of the case observed by *Hon'ble Court* are as under:

2.1 The assessee is a company engaged in the business of manufacture of pharmaceutical products. It filed a return of income in respect of fringe benefit tax for assessment year 2008-09 on 19/09/2008 and declared total value of fringe benefits made under section 115WE The assessing officer accepted the return filed by assessee.

2.2 The Ld.Pr.CIT invoked section 263 of the Act, and issued notice on 11/03/2013 to assessee. The Ld.Pr.CIT by order dated 30/03/2013 held that, order passed by the Assessing Authority is erroneous and prejudicial to the interest of the revenue, as the Assessing Authority did not consider the items namely, vehicle maintenance of ₹ 24,83,836/-, travelling and conveyance amounting to ₹ 22,37,001/- and Puja expenses of ₹ 1,35,711/-. The Ld.Pr.CIT held that, these amounts attracted fringe benefit tax, under section 115WE.

2.3 Aggrieved by the order of the Ld.Pr.CIT, the assessee preferred appeal before this *Tribunal*. This *Tribunal* by order dated 31/10/2014 dismissed the appeal filed by assessee.

3. Aggrieved by the order of this *Tribunal* assessee filed the appeal before *Hon'ble High Court*. *Hon'ble High Court* observed and held as under:

> *"4. We have considered the submissions made on both sides and have perused the record. From perusal of the order passed by the Tribunal, it is evident that the Tribunal has not considered the claim of the assessee with regard to fringe benefits under Section 115WE of the Act on merits. For the facility of reference, paragraph 6.4 of the order passed by the Tribunal is reproduced below:*
>
> > *"6.4 From a perusal of the order dt:18.11.2010 passed under section 115W(2) of the Act, we do not find any*

material to establish that the Assessing Officer has investigated the issue of fringe benefits with respect to the three items of expenditure i.e., vehicle maintenance, travel and conveyance and pooja expenses and how he has applied his mind to this issue. In the course of hearings before us, the learned Authorized Representative of the assessee was required to furnish copy of the show cause notice, if any, issued by the Assessing Officer in respect of the fringe benefits of the above three items of expenditure and the reply of the assessee thereto, but no such details were available. We also find from the reply dt.19.3.2013 filed by the assessee before the learned CIT in revisionary proceedings, that the assessee has nowhere demonstrated that the Assessing Officer had issued a show cause notice or letter calling for these details and that it has filed a reply. While it is the prerogative of the Assessing Officer to pass the order of assessment in the manner he deems fit, but if discussion is not discernable there from on a particular issue, then in order to ascertain whether the Assessing Officer has applied his mind or not, the higher appellate forum can go through the show cause notice, if any, issued by him and the reply given thereto by the assessee. This would indicate that though the order of assessment is silent, the issue in question must have been discussed in the course of assessment proceedings. We find that no such material is available on record. The Hon'ble Apex Court in the case of Malabar Industries Co. V CIT (243 ITR 83) has observed that the accepting of accounting entries as it is without any enquiry being carried out by the Assessing Officer would make the assessment order erroneous and prejudicial to the interests of revenue. In the facts and circumstances of the case as discussed above, we are of the considered view that the learned CIT had rightly considered all these aspects before taking action under section 263 of the Act and therefore finding no merit in this appeal of the assessee dismiss the same."

5. It is evident from the aforesaid extract of the impugned order that the Tribunal has not dealt with the claim of the assessee on merits. The impugned order is therefore quashed and the matter is remitted to the Tribunal for decision afresh with regard to the claim of the assessee with reference to fringe benefits, on merits."

Hon'ble High Court remitted the claim of assessee back to this *Tribunal* to be decided on merits.

4. Following are the grounds raised by assessee on this issue in the present appeal:

ITA No. 604/Bang/2013:

> *"1. The order of the learned Commissioner of Income Tax in holding the order of assessment dated 18-11-2010 passed u/s 115 WE (3) as erroneous and prejudicial to the interests of Revenue and that appellant is liable to FBT is against law, facts of the case and weight of evidence.*
>
> *2. The learned CIT failed to appreciate that the context in which the circular has been issued and concluding that the pre-requisites mentioned in FAQ 1 are not all cumulative. Hence the CIT erred in concluding that the appellant is liable to FBT and holding that the order of assessment dated 18-11-2010 passed u/s 115WE (3) as erroneous and prejudicial to the interests of Revenue.*
>
> *3. The order of the CIT now passed can never be an order passed under Section 263.*
>
> *4. The appellant may be permitted to adduce further evidence at the time of hearing."*

ITA No. 1164/Bang/2017:

> *"1. The learned CIT (Appeals) erred in upholding the Order of the Assessing Officer in the manner in which he did.*
>
> *2. The learned CIT(A) erred in upholding the order of AO determining the value of fringe benefits at Rs. 9,12,535/- and corresponding tax at Rs. 5,24,362/- without appreciating the facts of the case.*
>
> *3. The learned CIT(Appeals) failed to consider Annexure-2 to the Written Submission dated15.07.2016 of the Appellant filed before him that the following expenses are not Fringe benefits subject to tax for the reason that there is no employer employee relationship or the amount is taxable in the hands of the employee or otherwise specifically exempted:*

	Expenditure	*Amount*
a)	*Sales Promotion including publicity*	*Rs. 1,65,652*

b) Local Conveyance *Rs.11,35,621*

c) Repair, running (including fuel), maintenance of motor cars and the amount of depreciation thereon

Fuel *Rs. 3,33,918*

Maintenance *Rs. 8,14,279*

Motor Car Depreciation *Rs. 4,61,654*

d) Telephones *Rs. 4,98,133*

e) Subscription to clubs *Rs. 82,729*

f) Gifts

Gifts and bouquets given to customers and accounted under sales promotion *Rs. 61,355*

Gifts given to shareholders at AGM Accounted under Meeting Expenses *Rs. 21,000*

g) Travelling & Conveyance *Rs. 10,18,380*

h) Medical expenses less than Rs. 15,000/ Per person at Factory, Marketing and Office *Rs. 2,96,272/-*

i) Interest on Car Loan *Rs. 1,25,097/-*

j) Books and Periodicals *Rs. 4,86,112/-*

4. The learned CIT (Appeals) erred in declining to consider the precedents cited in favour of the appellant in the written submission (including in Annexure-2) for the reasons mentioned in paragraph 6.5 of his order

5. The learned CIT (Appeals) erred in holding that the below mentioned expenditure would constitute to be fringe benefits deemed to have been provided under Section 115 WB (2) of the Act:

a) Medical expenses less than Rs. 15,000/ per person of factory, Marketing and Office *Rs. 2,96,272/-*

b) Interest on Car Loan *Rs. 1,25,097/-*

c) Books and Periodicals *Rs. 4,86,112/-*

6. The learned CIT (Appeals) failed to properly consider that Appellant had not provided Fringe benefits in terms of Board Circular No. 8 of 2005.

7. Granting for arguments sake that some of the expenditure incurred by the appellant would be taxable as deemed fringe benefits the learned CIT (A) has erred in concluding that appellant is an "employer" as defined under Section 115W(a)

8. The learned CIT (Appeals) erred in upholding the levy of interest U/s. 115 WJ(5) and 115WJ(3) in a re-assessment made for AY: 2008-09.

9. For these and other such grounds that may be raised at the time of hearing, the appellant prays that the appeal may be allowed in the interest of justice and equity."

The Ld.AR submitted that, all the grounds raised hereinabove relates to one issue, and therefore, need not be adjudicated separately.

5. The Ld.AR submitted that, the Finance Minister in the budget speech indicated that what is proposed to be taxed under chapter XII-H are those benefits which are usually enjoyed collectively by the employees and cannot be attributable to individual employees. They shall be taxed in the hands of the employer as fringe benefit. In respect of the benefits which are fully attributable to the employees, they will continue to be tagged in the hands of that employee as perquisite.

6. The Ld.AR may mentally argued that there do not exist employee employer relationship which is an important criteria in order to bring the disputed expenses within the ambit of fringe benefit tax. Referring to the specific expenses the Ld.AR submitted as under:

Puja expenses: it is submitted that, these expenditure was incurred towards weekly Puja in the office conducted by the assessee

Vehicle Maintenance: the Ld.AR submitted that, these expenses are incurred towards fuel expenses maintenance, includes expenditure on transportation of personnel from residents to the place of work which is otherwise exempt under section 115WB (3).

It is submitted that, these expenditures are incurred exclusively for the purposes of business and are paid to 3rd parties and not to the employees.

Travelling and conveyance: it is submitted that, these expenses include the expenses of local conveyance, foreign travels expenditure incurred during the course of business and not provided as consideration for employment to the employee.

7. In support of his contention reliance was placed on the decision of *Hon'ble Karnataka High Court* in case of *Toyota Kirloskar Motors Pvt.Ltd vs. CIT* reported in *(2021)24 taxman 118* which affirmed the decision of the *Tribunal* reported in *(2012) 24 taxman.com 149.*

The Ld.AR filed compilation of decisions and materials relating to FBT, in support of the proposition that, unless fringe benefits are extended to employees and the same are enjoyed by them, the question of levying FBT on the employer does not arise.

8. The Ld.AR placed reliance on the following decision:

- *Hewlett Packard India Sales Pvt Ltd v/s CIT, LTP unit Bangalore, reported in [2011] 43 SOT 124 (Bangalore).*
- *Bosch Ltd v/s DCIT (LTU) reported in [2011] 15 taxmann.com 187 (Bangalore).*
- *Brihan Maharashtra Sugar Syndicate Ltd. v/s DCIT reported in [2011] 15 taxmann.com 300 (Pune).*
- *DCIT, Range-1(3) v/s Kotak Mahindra Old Mutual Life Insurance Ltd, reported in [2011] 16 taxmann.com 395 (Mumbai).*
- *Toyota Kirloskar Motor Pvt Ltd. v/s ACIT, LTU, Bangalore reported in [2012] 24 taxmann.com 149 (Bang).*
- *Desai Brothers Ltd. v/s ACIT, Range - 1, Pune, reported in [2013] 32 taxmann.com 278 (Pune - Trib.).*
- *Intervalve (India) Ltd. ACIT reported in [2013] 33 taxmann.com 690 (Pune - Trib.)*
- *T V Today Network Ltd, v/s DCIT [2013] 38 taxamnn.com 409 (Delhi - Trib.).*

- *ACIT v/s Tata Consultancy Services Ltd, reported in [2013] 31 taxmann.com 129 (Mumbai).*
- *Peerless Hotels Ltd v/s DCIT reported in [2013] 39 taxmann.com 171 (Kolkata - Trib.).*
- *Tetra Pak India Pvt Ltd v/s ACIT, Range - 7, Pune reported in [2014] 48 taxmann.com 154 (Pune - Trib.).*
- *IBM India P. Ltd v/s CIT, Bangalore [2020] 121 taxmann.com 34 (Karnataka).*
- *Toyota Kirloskar Motor (P) Ltd v/s CIT, [2021] 124 taxmann.com 118 (Karnataka).*

9. On the contrary, the Ld.Sr.DR submitted that, in view of the deeming fiction under section 115WB (2), it is not permissible to segregate the employee-related and non-employee-related expenses. He placed reliance on the CBDT Circular No.8 of 2005 that clearly envisages the taxability of expenditure, even if the same is not paid to/not incurred for the benefit of employee. He thus supported the orders passed by authorities below.

We have perused the submissions advanced by both sides in light of records placed before us.

10. The requirement of employee employer relationship is a mandatory satisfaction in respect of any expenditure to come within the ambit of FBT. The memorandum explaining the provisions of FBT very clearly states that, when the benefits are fully attributable to the employee, they are taxed in the hands of the employer. The Finance Minister speech and the memorandum explaining the FBT provisions provides the same rational for levying FBT on the employer.

11. On a bare reading of the provisions of section 115 WB, subsection (1) covers those benefits which can be fully attributable to employees. Subsection (2) covers those benefit that is difficult to be personally attribute to the employee. The

deeming fiction under subsection (2) limits to such expenditure which results in a collective enjoyment of the benefits by the employee.

12. On perusal of section 115WB, we note that, the intention to bring about FBT into the statute, is to bring within its ambit, such expenditure, that results in collective enjoyment of benefits by the employees, and it is difficult to attribute the benefits personally to such employees. The legislature further clarifies that, where the benefits are fully attributable to employees the same continues to be taxable in the hands of the employees as perquisites.

We refer to the following observation by coordinate bench of this *Tribunal* in case of *Toyota Kirloskar Motors Pvt.Ltd vs. CIT* reported in *(2012) 24 taxman.com 149.* This decision stands affirmed by *Hon'ble Karnataka High Court* reported in *(2021) 24 taxman 118:*

> *11.7 In the instant case, the provisions of FBT are intended to tax collective enjoyment of benefits by employees and it is not the intention of legislature to tax a legitimate business expenditure which does not result in any benefit to employees. However, it is seen in circular No.8 of 2005 that the CBDT has opined that expenditure as a result of payment to third parties is also liable for FBT. In Answer to Q.No.14, it is stated that no segregation of expenses incurred on employees and expenses incurred on others is permissible under section 115WB(2). In Answer to Q.No.15, it is stated that there is no requirement to segregate the various expenses referred to in section 115WB, between those incurred for official purposes and personal purposes. For instance in Answer to Q.No.57, it is stated that expenditure on brand or brand ambassador or celebrity endorsement is liable to FBT. In Answer to Q.No.67, it is stated that expenditure for the purpose of boarding and lodging or travel of customers/clients would be liable for FBT. There are some of the instances where the Board has taken a view that appears to be not in tandem with legislative intention. The Hon'ble Apex Court in the case of State of Madhya Pradesh v. G.S. Dall & Flour Mills [1991] 187 ITR 478 held that executive instructions can supplement a statute or cover*

areas to which the statute does not extend but they cannot run contrary to statutory provisions or whittle down their effect.

11.8 Even otherwise, it is settled principle that circulars are not binding on the assessee, appellate authorities and the Courts. The proviso to section 119(1) states that no orders, instructions or directions shall be issued by the CBDT so as to require any income tax authority to make a particular assessment or dispose of a particular case in a particular manner so as to interfere with the discretion of the CIT(A) in the exercise of his appellate functions. The Hon'ble Apex Court in the case of CIT v. Hero Cycles (P.) Ltd. [1997] 228 ITR 463/ 94 Taxman 271has held that circulars can bind the ITO but will not bind the appellate authority or the Tribunal or the Court or even the assessee. The jurisdictional High Court in the case of East India Hotels Ltd. (supra) held that -

> *"Similarly, under section 119 of the Act a power has been reserved in favour of the Central Board of Direct Taxes (in short "the Board") to issue instructions to subordinate income tax authorities for proper administration of the Act and who are required to observe and follow such instructions. None the less, it may be made clear that such instructions which may even pertain to the interpretation of a statutory provision under the Act cannot bind the taxpayers requiring to seek any remedy against the said instructions/clarifications either statutory or constitutional. But to my utter surprise the respondent/Deputy Commissioner has come on oath before this court to take a stand that the instructions issued by the Commissioners will bind the taxpayers, unless they get rid of it by availing of remedies as suggested by him in his statement quoted above. His statement to the said effect needs to be denounced as not only legal notions. I can only trust that henceforth the income tax authorities should deter from enjoying five star comforts and dinners by accepting the hospitality of corporate people by giving an illusory and ill-conceived impression that they are the final law making and clarifying authorities. It may be clarified that the income tax authorities while discharging their quasi-judicial functions having a bearing on the rights and obligations of the tax payers under the provisions of the Act may take such views on the interpretation of a particular statutory provision as may be permissible which will be always subject to the statutory remedies under the Act. But the view so taken in the particular case cannot partake of the colour of a law of general application so as to bind a whole class of taxpayers and providing them a cause of action for coming before this court seeking interference under the writ jurisdictions."*

In view of the above discussion, we are of the opinion that the Circular No.5 of 2008 cannot be relied upon to the disadvantage of the assessee

in support of the conclusion that the expenditure in the present case is liable for FBT.

13. *Hon'ble Mumbai bench* in case of *DCIT vs Kotak Mahindra old Mutual Life Insurance Ltd.,* reported in *(2011) 16 taxman.com 395* held that, the deeming provisions of section 115 WB(2) applies only when, the expenditure is in the nature of consideration for employment. Similar proposition is laid down by coordinate bench of this *Tribunal* in case of *Bosch Ltd versus ACIT* reported in *(2011) 15 taxman.com 187* and *Vijaya Bank Ltd versus DCIT* reported in *(2011) 48 SOT 47,* wherein it is held that in the absence of collective enjoyment of benefits by the employees FBT is not leviable.

14. The Ld.Sr.DR vehemently opposed for the travelling and conveyance expenses incurred by assessee towards foreign tours etc., wherein, it is alleged that, these are liable to FBT. In our considered opinion, the foreign tours travelling and conveyance expenses incurred by the assessee towards any employee is attributable to such employees and therefore falls under the category of subsection (1) thereby making it outside the purview of FBT. In fact these expenses in case is for the benefit of the individual employee would be taxable as perquisite in the hands of such employee. The other expenses like vehicle maintenance and Puja expenses cannot be said to have been incurred collectively for the benefit of the employees, rather these are day-to-day expenditures, incurred for the purposes of fulfilment of the religious believes.

15. Based on the above analysis, we are of the opinion that the alleged expenditure incurred by assessee falls outside the

purview of FBT as has been held by the various decisions referred to hereinabove.

We therefore hold that the order passed under section 263 of the act deserves to be caused and set aside.

16. As we have quashed the order dated 30/03/2013 being the 263 order, the consequential assessment proceedings in ITA No.1164/Bang/2017 filed by assessee becomes infructuous.

In the result appeal filed by assessee in ITA No. 604/Bang/2013 stands allowed and appeal filed by assessee in ITA No. 1164/Bang/2017 stands dismissed as infructuous.

Order pronounced in open court on 31st March, 2022.

Sd/-	Sd/-
(CHANDRA POOJARI)	(BEENA PILLAI)
Accountant Member	Judicial Member

Bangalore,
Dated, the 31st March, 2022.
/MS /

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore