आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'डी' अहमदाबाद।
IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD

BEFORE SHRI P.M. JAGTAP, VICE-PRESIDENT
AND SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER

ITA No. 1352/Ahd/2014
Assessment Year : 2007-08

M/s. Jyoti Ltd., Nanubhai Amin Marg, Industrial Area, Vadodara-390003 PAN : AAACJ 4909 N	Vs	Dy. Commissioner of Income-tax, Circle-1(2), Baroda
अपीलार्थी/ (Appellant)		**प्रत्यर्थी/** (Respondent)

Assessee by :	Shri Manish J. Shah, Advocate
Revenue by :	Shri Mohd Usman, CIT-DR & Shri Purushottam Kumar, Sr. DR

सुनवाई की तारीख/**Date of Hearing : 09/05/2022**
घोषणा की तारीख /Date of Pronouncement: 13/05/2022

आदेश / O R D E R

PER P.M. JAGTAP, VICE-PRESIDENT :

This appeal filed by the assessee is directed against the order of learned Commissioner of Income-Tax (Appeals)-IV, Baroda ("CIT(A)" in short) dated 28.02.2014 and the solitary issue involved therein relates to the addition of Rs. 49,04,112/- made by the Assessing Officer and confirmed by the learned CIT(A) being provision towards contribution to Approved Superannuation Fund for the purpose of determining liability of the assessee on account of Fringe Benefit Tax.

2. The assessee, in the present case, is a company which is engaged in the business of manufacturing of engineering goods, resale & erection and contracts. The return of income together with Fringe Benefit was filed by the assessee for the year under consideration on 31.10.2007 declaring a total

value of Fringe Benefit at Rs.40,66,296/-. In the assessment originally completed under Section 115WE(3) of the Income-tax Act, 1961 ("the Act" in short) vide order dated 18.09.2009, the Assessing Officer determined the total value of Fringe Benefit at Rs.40,66,296/- as declared by the assessee in the return. Subsequently, the assessment was reopened by him after having noticed that the assessee had claimed expenditure of Rs.49,04,112/- on account of contribution to Approved Superannuation Fund which was not considered for determining the value of Fringe Benefit. He accordingly issued a show-cause notice to the assessee as to why an addition of Rs.49,04,112/- should not be made to the total value of Fringe Benefit. In reply, it was submitted by the assessee that even though a sum of Rs.49,04,112/- was debited to the Profit and Loss account on account of provision for Approved Superannuation Fund, the same was not paid over to the Life Insurance Corporation with whom a Trust was formed and recognized by the Commissioner of Income-tax. It was submitted that the provision made for superannuation fund was added back in the computation of total income by the assessee-company and there being no benefit extended to the employees on account of superannuation fund, there was no question of any amount which could be liable to Fringe Benefit Tax in the hands of the assessee. The Assessing Officer did not find this explanation offered by the assessee to be acceptable. According to him, the assessee would claim this expenditure as deduction in the subsequent year under Section 43B of the Act and the same would remain out of the purview of Fringe Benefit Tax. He held that the said expenditure thus was deemed to have been incurred by the assessee in the year under consideration and the same, therefore, was liable to be considered for determining Fringe Benefit Tax payable by the assessee for the year under consideration. He accordingly made an addition of Rs.49,04,112/- on account of provision for Superannuation Fund and determined the value of Fringe Benefit at

Rs.89,70,408/- in the assessment completed under Section 115WG r.w.s. 115WE(3) of the Act vide an order dated 05.12.2011.

3. Against the order passed by the Assessing Officer under Section 115WG r.w.s. 115WE(3) of the Act, an appeal was preferred by the assessee before the learned CIT(A) and after considering the submissions made by the assessee as well as the material available on record, the learned CIT(A) confirmed the addition of Rs.49,04,112/- made by the Assessing Officer on account of provision towards contribution to Superannuation Fund while determining the value of Fringe Benefit by relying on the decision of Cochin Bench of ITAT in the case of Federal Bank Limited, reported in 18 taxmann.com 145, wherein it was held as under:-

> *"The provision of a benefit, which would qualify for being considered as so, is as actually made during each previous year. The same flows from the contract of employment and/or any other supplementary arrangement made by the employer in its respect (employment). As aforenoted, all that was required to be written if the intention was to bring the actual amount of contribution as paid during a particular year to tax was to use the words 'the sum paid' or 'the sum credited to the account', etc., as was sought to be illustrated with reference to some other provisions in respect of contributions to employee welfare funds. The operative words are 'consideration …. by way of …', and what qualifies it to be a 'fringe benefit' is where it is for employment. The words are wide in scope, and would thus also include all contributions which are liable to be paid, inasmuch as any paid subsequent (to the end of the year), either on or after its due date, is only one for which the employer is liable to contribute. Secondly, the provision of benefit being made qua a contractual obligation, it can be said to have been provided during a previous year only in relation to the corresponding liability assumed by the employer or arising/accruing to it during the particular year. That is, where provided by way of contribution by an employer (to an approved superannuation fund for his employees), it is the amount that the employer is actually required to contribute in relation to the relevant year which can be said to the consideration for employment for the said year. The due date/s of contribution may not necessarily match with the financial year, and or even if they do, the contribution may not have been actually paid during the relevant year itself.*

4. Aggrieved by the order of the learned CIT(A), the assessee has preferred this appeal before the Tribunal.

5. We have heard the arguments of both the sides and also perused the relevant material available on record. The learned Counsel for the assessee has submitted that even though the decision of Cochin Bench of ITAT in the case of Federal Bank Limited (supra) relied upon by the learned CIT(A) in his impugned order is in favour of the Revenue, the Ahmedabad Bench of ITAT in the case of State Bank of Saurashtra vs. ACIT, decided vide an order dated 16.12.2010 in ITA No.3945/Ahd/2008, has decided a similar issue in favour of the assessee after considering all the relevant aspects of the matter including the relevant provisions of the Act vide paragraph Nos. 7 to 10 as under:-

> *"7. We have considered the rival submissions and material available on record. The relevant provisions dealing with the above case are reproduced as under:*
>
> *7.1- Section 115WA (charging of fringe benefit tax) -*
> *(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 percent 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.*
>
> *7.2 Section 115WB (fringe benefits)-*
>
> *(1) For the purpose of this Chapter, ''fringe benefits"; means any contribution for employment provided by way of -*
> *(a)……*
> *(b). ……*

(c) Any contribution by the employer to an approved superannuation fund for employees.

7.3 Section 115WC (value of fringe benefits) - ...

(1) For the purpose of this Chapter, the value of fringe benefits shall, be the aggregate of the following, namely-

a) …….
b) Actual amount of the contribution referred to in clause (c) of Sub-section 115WB.

7.4 The philosophy behind the enactment of FBT has been explained in the Finance Minister's speech in Para 160 as under(page 56 of 273 ITR (St.)):

"I have looked into the present system of taxing perquisites and I have found that many perquisites are disguised as fringe benefits and escape tax. Neither the employer nor the employee pays any tax on these benefits, which are certainly of considerable material value. At present, where benefits are fully attributable to the employee they are taxed in the hands of the employee; that position will continue. In addition, I now propose that where the benefits are usually enjoyed collectively by the employees and cannot be attributed to individual employee, they shall be taxed in the hands of the employer. However, transport services for workers and staff and canteen services in an office or factory will be outside the tax net."

8. When the above provisions are read together in the light of the Finance Minister's speech, it would be clear that as per Finance Act 2005, under Section-115WC(1)(b) of the IT Act what would be taxable by way of fringe benefit is the Actual amount of contribution referred to in clause (c) of Sub-section (1) of Section 115WB. Section 115WB(1) (c) includes in the fringe benefits any contribution by the employer to an approved superannuation fund for employees. The word actual is not used in section 115WB (1) (c) but it is used in Section 115WC(1)(b) which defines value of fringe benefits on which fringe benefit taxes are payable. Unless all the provisions are read together, it is difficult to levy tax on fringe benefits. Unless machinery provisions are applied to the relevant provisions, the value of fringe benefits cannot calculated and no tax could be levied as per law. When all the provisions would be read together, it would lead to irresistible conclusion that fringe benefit that fringe benefit taxes can be levied when there is actual contribution by the employer to an approved superannuation fund for the employees. It would be therefore, clear and relevant that the valuation of fringe benefits being contribution to superannuation fund becomes relevant and material only when actual amount is contributed by the employer to an

approved superannuation fund for the employees. The fringe benefit could only be such benefit which is actually and usually enjoyed by the employees. The same language is used in the speech of the Finance Minister also. The assessee pleaded that bank has not made any actual payment but has made provisions of Rs. 12.16 crores for superannuation fund but no details have been mentioned either in the assessment order or in the order of the learned CIT(A).

9. Learned Counsel for the assessee referred to definition of contribution as per Fourth Schedule Part A(supra), Sub-section (2) (c) of the above schedule provides - "contribution" means any sum credited by or on behalf of any employee out of his salary, or by an employer out of his own monies, to the individual account of an employee but does not include any sum credited as interest." The above definition of the contribution would not support the case of the assessee because the definition of the fringe benefit as provided u/s 115WB(1)(c) provides any consideration for employment provided by way of any contribution by the employer to an approved superannuation fund for employees. What is required by the above provision for taxing the fringe benefit that there should be contribution by the employer to an approved, superannuation fund for employees. But the definition of contribution referred to by the learned Counsel for the assessee provides contribution by an employer out of his own money to the individual account of an employee. There is a contradiction in both the language. Moreover, Sub-section (2) of Part A of Fourth Schedule to the Income Tax Act provides that in this part, unless the context otherwise requires ..... Since, the definition of fringe benefit is out of context as per Fourth Schedule, the contention of learned Counsel for the assessee is rejected.

10. Considering the above discussions, it is clear that fringe benefit could be taxed when the actual contribution is contributed, by the employer to an approved superannuation fund for employees. Therefore, no fringe benefit tax is leviable when there is no actual contribution is made by the assessee bank to the approved superannuation fund."

6. The learned Counsel for the assessee has submitted that different views thus were taken on the issue by Cochin Bench of ITAT in the case of Federal Bank Ltd (supra) and Ahmedabad Bench of ITAT in the case of State Bank of Saurashtra (supra) and after taking into consideration both these decisions, Chennai Bench of ITAT in the case of M/s. Bharat Overseas Bank Ltd has decided the issue in favour of the assessee vide its order dated

20.02.2013 passed in ITA No.1541/Mds/2010 for the following reasons given in its order:-

> *"Taking cue from the same, we also hold that merely by making a provision, the assessee has not made any actual contribution to the approved pension fund in question so as to attract the charging section aforesaid. So far as the case law cited by the Revenue is concerned (supra), mindful of the trite preposition of the law is that in case of two divergent judicial opinions, the one which favours the assessee has to be adopted, we hereby decide the appeal in favour of the assessee and against the Revenue. In this regard, we find support from the decision of the Hon'ble Supreme Court in the case of CIT vs. Vegetable Products Ltd. [88 ITR 192]."*

7. The Chennai Bench of ITAT thus has decided the issue in the case of M/s. Bharat Overseas Bank Ltd (supra) in favour of the assessee by adopting one of the views which is in favour of the assessee by relying on the decision of the Hon'ble Supreme Court in the case of CIT vs. Vegetable Products Ltd (supra). Moreover, the Tribunal in the said decision rendered subsequently after the decisions of the Cochin Bench of ITAT in the case of Federal Bank Ltd (supra) and Ahmedabad Bench of ITAT in the case of State Bank of Saurashtra (supra) has also expressed its independent opinion that the assessee merely by making a provision cannot be said to have made any actual contribution to the fund in question so as to attract the charging provision. Respectfully following the decision of Chennai Bench of ITAT in the case of M/s. Bharat Overseas Bank Ltd (supra) which is later in point of time and which has taken into consideration the divergent views taken by the Co-ordinate Benches, we delete the addition of Rs.49,04,112/- made by the Assessing Officer and confirmed by the learned CIT(A) on account of provision towards contribution to Approved Superannuation Fund while determining the value of Fringe Benefit. It is pertinent to note here that the assessee, in the present case, stands on a better footing than the cases decided by the Tribunal inasmuch as the assessee in the said cases had

debited the provision towards contribution to the relevant funds thereby claiming deduction for the same while the assessee in the present case has added back such provision debited in the Profit & Loss account thereby claiming no deduction for the same while computing the total income.

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

Order pronounced in the open Court on 13th May, 2022 at Ahmedabad.

Sd/- Sd/-

(SIDDHARTHA NAUTIYAL) **(P.M. JAGTAP)**
JUDICIAL MEMBER **VICE-PRESIDENT**

Ahmedabad, Dated 13/05/2022

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-
5. विभागीय प्रतिनिधिआयकर अपीलीय अधिकरण ,/DR,ITAT, Ahmedabad,
6. गार्ड फाईल /Guard file.

आदेशानुसार/ BY ORDER,

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सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण
ITAT, Ahmedabad