IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH, MUMBAI

BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.1025/Mum./2013
(Assessment Year : 2006–07)

Piramal Enterprises Ltd.
(Earlier known as *“Piramal Healthcare Ltd.”*)
(Previously known as Nicholas Piramal India Ltd.) ……………. Appellant
Piramal Tower, Ganpatrao Kadam Marg
Lower Parel, Mumbai 400 013 PAN–AAACN4538P

v/s

Dy. Commissioner of Income Tax
Circle–7(1), Mumbai ....Respondent

Assessee by : Shri Ronak Doshi a/w
Shri Priyank Gala
Revenue by : Shri H.K. Bhatt

Date of Hearing – 16/01/2024	Date of Order – 20/02/2024

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned order dated 21/11/2012, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals)–12, Mumbai, [*“learned CIT(A)”*], for the assessment year 2006–07.

2. In its appeal, the assessee has raised the following grounds:–

“GROUND I:

1. On the facts and in the circumstances of the case and in law, the Commissioner of Income Tax (Appeals) - 12, Mumbai ("the CIT(A)") erred in confirming the action of the Deputy Commissioner of Income Tax 7(1),

Mumbai ("the AO") in charging Fringe Benefit Tax ("FBT") on business promotion expenses including KAM expenses, CRM expenses and conference and meeting expenses of Rs.6,53,14,002/- and gift articles of Rs.5,23,27,089/- u/s 115WB(2)(d) & 115WB(2)(o) of the Income Tax Act, 1961, ("the Act") respectively, treating the same as deemed fringe benefit accorded to the employees of the Appellant.

2. She further erred in holding that Appellant had not submitted any documents which could substantiate that expenditure was incurred on non-employees.

3. She failed to appreciate and ought to have held that since aforesaid expenditure were incurred on non-employees in course of Appellant's business, the same were not liable to FBT.

4. The Appellant, therefore, prays that the AO be directed to delete the aforesaid additions made u/s 115WB(2) (d) & 115WB(2)(o) of the Act.

GROUND II:

The Appellant craves leaves to add to, alter and / or delete the above ground of appeal."

3. The brief facts of the case, as emanating from the record, are: For the year under consideration, the assessee filed its fringe benefit return under section 115WD(1) of the Act on 21/10/2006 declaring the value of fringe benefit at Rs. 7,18,73,324. During the assessment proceedings, it was noticed that the assessee has not included the following amounts in the value of the fringe benefit, which is debited under the head "*Advertisement and Business Promotion*", and falls under section 115WD(2)(d) and 115 WD(2)(o) of the Act:-

Sl No.	*Particulars*	*Amount (in Rs.)*
1.	*Business promotion expenses*	*6,07,95,906*
2.	*Key Account Manager expenses ("KAM")*	*3,44,75,882*
3.	*Customer Relation Management ("CRM")*	*2,74,75,699*
4.	*Gift articles*	*10,46,54,178*
5.	*Conference and meeting expenses*	*78,80,515*
	Total	*23,52,82,100*

4. The Assessing Officer ("*AO*") vide order dated 31/12/2008 passed under section 115WE(3) of the Act held that the above expenditure of Rs. 23,52,82,100 is such expenditure that is routed through the CRM or KAM personal on which there is no controlled by the assessee so as to ensure that the same is allowable under section 37(1) of the Act. It was further held that the very fact that the incurring of the above expenses are not fully receipted by the beneficiaries and that the CRM/KAM personnel only submit the details, neither the assessee nor such CRM/KAM can support the claim as required by law, therefore the said expenses are to be held as forming part of the taxable fringe benefit value. As 50% of the aforesaid amount was already considered for disallowance in assessment under section 143(3) of the Act, the balance of Rs. 11,76,41,050 was determined as taxable value of fringe benefits. The learned CIT(A), vide impugned order, dismissed the appeal filed by the assessee on this issue. Being aggrieved, the assessee is in appeal before us.

5. During the hearing, the learned Authorised Representative ("*learned AR*") submitted that the AO, vide its remand report furnished before the learned CIT(A), has accepted that the advertisement expenses under the head CRM/KAM are the benefits given to the Doctors. It was further submitted that since there is no employer-employee relationship between the assessee and the Doctors, the expenditure incurred does not fall within the category of fringe benefits under the Act.

6. On the other hand, the learned DR vehemently relied upon the orders passed by the lower authorities.

7. We have considered the submissions of both sides and perused the material available on record. The only dispute raised by the assessee, in the present appeal, is against charging of Fringe Benefit Tax ("*FBT*") on business promotion expenses by treating the same as fringe benefit accorded by the assessee to its employees. As per the assessee, the expenses debited under the head "*Advertisement and Business Promotion*" and considered by the AO to be covered under section 115WB(2)(d) and section 115WB(2)(o) of the Act are not incurred on its employees and rather the same has been incurred on the Doctors. In this regard, the assessee made the following submissions during the assessment proceedings:-

> *"i) As regards the above amount of Rs. 60795906/- under the head business promotion expenditure, the assessee has merely made a statement that this is expenditure incurred on non-employees.*
>
> *ii) As regards KAM exp., it is for promotion of ICCU, Range of products i.e. Aggri block, LMWX, Dobutrex & Stromix. These type of expenses include payments made to people in the field for some promotional activities, like taking the group of doctors out for dinner, sponsoring their conference to ensure doctors spent time with our field managers and promote our brands.*
>
> *iii) As regards CRM expenses, the assessee stated that their entire business revolves around and depends on Rx generated by doctors. A doctor gives an Rx based on the widely displayed reasons. Two patents have emerged Large amount ranging from 10 thousand to 1 lakh under the banner of CRM and smaller amount of Rs.100 to Rs.5000/-. The former is a well planned calculated risk of higher level of line managers for a pre-determined time frame in order to get the result. The smaller amount could just be an engagement programme conceived and controlled by lower hierarchy and the amounts are spent on doctors.*
>
> *iv) Regarding the gift articles, it is stated that the gift are given to doctors.*
>
> *v) As for the Conference and meeting expensers also, the assessee merely stated that all the expenses are incurred on non-employees."*

8. It is also undisputed that out of the entire expenditure of Rs. 23,52,82,100, the AO considered the amount of Rs. 11,76,41,050 for determining the taxable value of fringe benefits since 50% of the aforesaid

amount was already considered for disallowance in the assessment under section 143(3) of the Act. We find that in the appellate proceedings against the order passed under section 143(3) of the Act, the learned CIT(A) called for the remand report from the AO. Vide letter dated 25/10/2012, the AO submitted its report, which is reproduced as under:-

> *"Sub : Remand report in the case of M/s. Nicholas Piramal India Ltd- 2006-07- reg:–*
>
> *Ref : CIT(A)-13/Report/2011-12 dated 11-07-2011.*
> *————————————————————————————*
> *Kindly refer to the above.*
>
> *2) In this case, during the course of assessment proceedings, the AD made a disallowance of Rs.11,76,41.050/- on account advertising and business promotion expenses. It was noticed that expenditure of Rs. 23,52,82,100/- was routed through CRM or KAM personnel on which there was no control of the assessee so as to ensure that the same is allowable u/s.37(1) of the Act. As the assesses was not able to substantiate the claim, the AO made an addition of Rs.11,76,41,050/-.*
>
> *3) At the appellate stage, the assessee requested for one more opportunity to be given to verify his claim. In this regard, assessee was given an opportunity to file detail regarding the above claim.*
>
> *4) Vide order sheet noting dated 01-08-2012, 10-08-2012 and 24-08-2012, assessee filed details of expenses, voucher, etc to substantiate its claim. The same were examined and verified on test check basis.*
>
> *It is seen from the details furnished that the expense under the head CRM/KAM are incurred by field staff for giving various gifts, travel facility etc to the doctors for promoting their products. In this regard it is stated that the above gift & other benefits given to doctors are in violation of the regulation issued by Medical Council of India. Thus the claim of any expense incurred in providing above mentioned or similar freebees in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics.) Regulations, 2002 is inadmissible under section 37/11 of the income Tax Act being an expense prohibited by the law" in this regard it is stated that the Circular No.5 of 2012 issued by CBDT clearly directs that the above disallowance shall be made in the hands of such Pharmaceutical Company.*
>
> *5) Therefore the disallowance made by the AD @ 50% is justified. Considering the voluminous data which was verifies on test check basis.*
>
> *6) Submitted for your kind consideration."*

9. From the perusal of the aforesaid report, we find that the assessee filed the details of expenses, vouchers, etc. to substantiate its claim that the Advertisement and Business Promotion expenses are recurring expenditures incurred during the normal course of the business exclusively for the purpose of business. Further, the AO after examination and verification of these details on a text check basis stated that the expenses are incurred by field staff for giving various gifts, travel facilities, etc. to the Doctors for promoting the products of the assessee. Therefore, from the aforesaid remand report, it is sufficiently evident that the Revenue has accepted that the expenses under the head CRM/KAM are incurred for the benefit of the Doctors.

10. We find that the Hon'ble jurisdictional High Court in Pr.CIT v/s Aristo Pharmaceuticals (P) Ltd., [2020] 423 ITR 295 (Bom.) after analysing the provisions of section 115WA of the Act held that for levy of FBT, the relationship of employer and employees is the *sine qua non* and the fringe benefits have to be provided by the employer to the employees in the course of such relationship. Accordingly, the Hon'ble High Court held that since there was no employer-employee relationship between the taxpayer and the Doctors, the expenditure incurred for distributing free samples to the Doctors could not be construed as fringe benefits to be brought within the additional tax net by levy of FBT. The relevant findings of the Hon'ble High Court, in the aforesaid decision, are reproduced as under:-

> *"13. Before adverting to the order passed by the Tribunal, we would once again revert back to the provisions of section 115WA of the Act. From a bare reading of the said Section, it is evident that for levy of fringe benefit tax, it is essential that there must be a relationship between an employer and employees and the fringe benefit has to be provided or deemed to be provided by the employer to his employees. As alluded to herein above, for levy of fringe benefit tax, relationship of employer and employees is the sine qua non*

and the fringe benefits has to be provided by the employer to the employees in the course of such relationship.

14. Tata Consultancy Services Lad (upra), this Court referred to Circular No. 8/2005 of CBDT which andicated that the objective of taxing perquisite of fringe benefit is both on the ground of equity and economic efficiency. Thereafter, this Court held that the basis of fringe benefit tax is the benefit or perquisite which emanates out of an employer-employee relationship which is a pre-requisite for levy of fringe benefit tax.

15. Having noticed this Court's order in Tata Consultancy Services Ltd (supra), we may now advert to the order passed by the Tribunal dated 25-1-2017, relevant portion of which is extracted here-under-

> *"7. We have carefully considered the rival submissions. The relevant facts are that the assessee is engaged in the business of manufacture of pharmaceutical products of various types. In its business, assessee distributes free samples to Doctors and others and the claim of assessee was that such expenditure is not covered within the meaning of sales promotion for the purposes of FBT. On the contrary, the lower authorities have concluded that free samples distributed by pharmaceutical companies are in the nature of sales promotion based on the judgment of the Hon'ble Supreme Court in the case of Eskayef (supra) and, therefore, the Assessing Officer included the free samples distributed to Doctors and others in the FBT. In our considered opinion, without going into any other arguments, the stand of assessee is liable to be upheld in view of judgment of Hon'ble Bombay High Court in the case of Tata Consultancy Services Ltd (supra). In the case before the Hon'ble High Court, assessee was engaged in the business of rendering technical consultancy services, marketing of software and hardware products and also export of software. Assessee had claimed expenses on account of payment to one M/s. Tata Sons towards Tata brand equity contribution. The Assessing Officer included such expenditure while computing the value of FBT as according to him it was in the nature of sales promotion. The CIT(A) held that subscription fee could not be treated as falling under the head 'sales promotion' and he allowed the claim of assessee that such amount was not includible for the purposes of FBT. The said stand of CIT(A) was upheld by the Tribunal, which has been affirmed by the Hon'ble High Court. In the said case, it was noticed that expenditure by way of subscription had been incurred in terms of contractual agreement between Tata Consultancy Services Ltd. and Tata Sons and that there was no employer-employee relationship between the two. The Hon'ble High Court observed that the basis of FBT is the benefit or perquisite which emanates out of employer-employee relationship. As a consequence, it is safe to deduce that in order to justify the levy of FBT, establishing of employer-employee relationship is a pre-requisite. In the present case, no case has been made out by the income-tax authorities that the expenditure incurred by assessee on distribution of free samples to Doctors and others involved any employer-employee relationship between the assessee and the recipients of such samples. Therefore, at the very threshold. following the ratio of judgment of the Hon'ble Bombay High Court in the case of Tata Consultancy Services Ltd (supra), action of Assessing Officer is untenable and is hereby set-aside. Thus, assessee succeeds on its plea."*

16. Tribunal recorded as a finding of fact that in the course of its business, assessee distributes free samples to the doctors and others the expenditure for which the assessee claims is not covered within the meaning of sales promotion for the purpose of fringe benefit tax. Tribunal also noted that no case was made out by the Income-tax authorities that the expenditure incurred by the assessee on distribution of free samples to doctors and others involved any employer-employee relationship.

17. Therefore, following the judgment of this Court in Tata Consultancy Services Lid (supra), we concur with the findings rendered by the Tribunal. Since there was no employer-employee relationship between the assessee on one hand and the doctors on the other hand to whom the free samples were provided, the expenditure incurred for the same cannot be construed as fringe benefits to be brought within the additional tax net by levy of fringe benefit tax.

18. Consequently, we find no merit in this appeal. Appeal is accordingly dismissed. However, there shall be no order as to cost."

11. Since, in the present case, no material has been brought on record by the Revenue to show that the Doctors were employees of the assessee, therefore, respectfully following the aforesaid decision of the Hon'ble jurisdictional High Court, the addition made by the AO under section 115WB(2)(d) and section 115WB(2)(o) of the Act is deleted. As a result, grounds raised by the assessee are allowed.

12. In the result, the appeal by the assessee is allowed.

Order pronounced in the open Court on 20/02/2024

Sd/- **OM PRAKASH KANT** **ACCOUNTANT MEMBER**	**Sd/-** **SANDEEP SINGH KARHAIL** **JUDICIAL MEMBER**

MUMBAI, DATED: 20/02/2024

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The PCIT / CIT (Judicial);

(4) The DR, ITAT, Mumbai; and

(5) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai