IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Waseem Ahmed, Accountant Member &
Shri Soundararajan K, Judicial Member

ITA No.359/Coch/2023 :Asst.Year 2006-2007

M/s.Mascot Industries Azhikode Kannur – 670 009 **PAN :AAIFM4767E.**	v.	The Deputy Commissioner of Income-tax, Circle 1(1) Kannur.
(Appellant)		(Respondent)

Appellant by :Sri.Arun Raj S, Advocate
Respondent by :Smt.Girly Albert, Sr.DR

Date of Hearing : 24.09.2024		**Date of Pronouncement : 27.09.2024**

O R D E R

Per Bench :

This is an appeal filed by the assessee challenging the order of the NFAC/CIT(A) dated 15.03.2023 in respect of the assessment year 2006-2007

2. Brief facts of the case are that the assessment was made u/s.115WE(3) of the Act by disallowing the expenses claimed by the assessee. The assessee challenged the said assessment before the CIT(A). The ld.CIT(A) also after discussing the issue in detail, had confirmed the assessment order passed by the A.O. Aggrieved by the said order, the assessee is in appeal before the Tribunal, raising the following grounds of appeal:-

"1. The appellate order passed under section 250 of the Fringe Benefit tax he against the facts and circumstance of the appellant's case and hence opposed to the provisions of the Fringe Benefit Tax Act (F B T Act).

2. The learned first appellate authority grossly erred in dismissing the appeal, without properly appreciating the provisions of the Fringe Benefit Tax and the circular No: 8/2005 dated 29/8/2005 relied by the appellant. Though the Commissioner of Income tax (Appeals) has stated that no response has been filed by the appellant in reply the notice uploaded in the web portal under section 250, the appellant has infact submitted detailed submissions together with the relevant circular, vide Acknowledgement No:845535491141222, (copy enclosed Please also refer Para - 3), Page 3. However the submissions furnished by assessee is reiterated in Para 4 of the order by the appellate authority in toto. These submissions though stated in full are not seen considered while disposing the appeal.

3. The provisions of the FBT Act, as explained by Circular No: 8/2005 dated29/8/2005 are not considered properly by the appellate authority while disposing the appeal. The appellant submit that there is no proper application of mind by the appellate authority in this regard.

4. None of the expenses considered, in addition to that submitted by the appellant, for imposing tax treating as "fringe benefits" represents fringe benefits as defined under the Act read with Circular No: 8 of 2005 dated 29/08/2005. The learned assessing officer has categorized all the expenses debited to the profit and loss account as fringe benefits, without going into details whether any of them tantamount to any privilege ,service, facility or amenity directly or indirectly provided by the employer to his employees. The appellant humbly plead that none of the additional expenses considered by the officer are in the nature of privilege, facility, amenity etc., provided to its employees and hence they could not be considered as "fringe benefits" and subjected to tax.

5. It is also submitted that the 'Travelling expenses" subject to fringe benefit tax @20%, in fact represents business tour expenses which, even if taxable, is only @ 5%.

6. The assessing officer and the first appellate authority have passed the order without considering the correct nature of expenses and the scope of the term "fringe benefits" provided or deemed to have been provided, before concluding that all

the expenses specified therein are fringe benefits, that too taxable @20%.

7. For the above and for other reasons to be adduced at the time of hearing, it is prayed that justice be done to the appellant by setting aside the order appealed against."

3. At the time of hearing, the learned AR submitted a paper book and also filed the copies of the CBDT Circular No.8 of 2005 dated 29th August, 2005 and the judgment of the Hon'ble Bombay High Court in case of Pr.CIT v. M/s.Aristo Pharmaceuticals P Ltd. ITA No.1961 of 2017 dated 23rd January, 2020 and the Karnataka High Court judgment in case of CIT v. Wipro Limited ITA No.231 of 2013 dated 11.11.2020 and contended that there is no employer employee relationship and therefore the expenses claimed will not come under the purview of the fringe benefit tax and prayed to allow the appeal.

4. On the other hand, the learned DR relied on the orders of the authorities below and prayed to dismiss the appeal.

5. We have heard both the parties and perused the available material on record. As seen from the assessment order, the assessee had claimed the expenses towards telephone charges, travelling expenses, depreciation on car, entertainment expenses and car maintenance and contended before the AO that these are all the expenses incurred to the partners and not to the employees and in fact the telephone charges are incurred for the telephone provided in the office of the assessee and similarly the travelling expenses were

incurred to the partners of the assessee for participating in the fairs conducted outside India. Similarly, the depreciation on car and maintenance are related to the vehicles of the assessee used by the partners, and therefore, there is no benefit provided by the employer to its employees in order to attract the provision of fringe benefit tax. We have also seen the objections filed by the assessee on 26.11.2008 in which the assessee had explained in detail about the various expenses incurred by them. We have also perused the CBDT Circular No.8/2005 dated 29.08.2005 in which at page 11 of the paper book there is a question and answer, which reads as follows:-

> *"2. Whether employer-employee relationship is a prerequisite for the levy of FBT?*
>
> *Answer : Yes."*

6. Therefore, the CBDT had clarified that in order to attract the provisions of fringe benefit tax, there should be an employer-employee relationship, otherwise it would not be treated as fringe benefit under the said provision. We have also gone through the judgment of the Hon'ble Bombay High Court, cited supra, wherein in paragraph 16 of the said judgment, the Hon'ble High Court has held as follows:-

> *"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."*

7. Similarly, the Hon'ble Karnataka High Court also in the judgment cited supra, had held that there should be an employer-employee relationship in order to attract the provisions of fringe benefit tax. Now we will come to the facts of the present case and we find that in the assessment order nowhere the AO had alleged that the expenses incurred by the assessee were for the employees during the course of their business or profession. Even though the assessee had explained the facts in detail that the expenses were not incurred for the welfare of the employees, the AO had not said anything about the same but confirmed the order by saying that the charge of fringe benefit tax also includes deemed fringe benefit in respect of the expenses incurred in the course of business or profession. The ld.CIT(A) also had not dealt with this issue in detail but recorded the submissions of the assessee in paragraph 4 and gave the finding at paragraph 5.6, as under:-

> *"5.6 Therefore these is seen to be no ambiguity in the provisions in dealing with such expenses under the FBT Scheme. The appellant has also stated that the AO should have determined that the expenses were incurred for employees and there should be a employer employee relationship. The argument does not hold good since the appellant has claimed these expenses in its books of accounts as being incurred for the purpose of business. Therefore it is logical that the same have been incurred for the benefit of the workforce employed by the appellant. Considering all the above facts and the legal matrix the grounds raised by the appellant are rejected."*

8. We are of the view that the findings given by the ld.CIT(A) is not a well considered one and in fact it is against the CBDT circular and also against the principles laid down in the above

judgements cited supra since the basic requirement required to attract the provision of FBT is absent and in fact no employer-employee relationship is available.In this case all the expenses were incurred not for the benefit of the employees, and therefore, the same could not be treated as fringe benefit offered by the assessee and liable to be taxed under the provisions of the Act. Even though the assessee had explained about all the expenses, they are not able to establish that the entertainment expenses of Rs.1,01,384 is not for the benefit of the employees of the assessee. In such circumstances, we are upholding the order of the lower authorities in respect of the entertainment expenses are concerned.

In fine we set aside the order of the authorities below and held that the other expenses incurred by the assessee will not come under the purview of Sec.115WB(2) of the Act. In the result we partly allowed the appeal and confirmed the assessment made on the entertainment expenses and deleted the other expenses incurred by the assessee from the levy of FBT.

9. In the result, the appeal by the assessee is partly allowed.

Order pronounced on this 27th day of September, 2024.

(Waseem Ahmed)	**(Soundararajan K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cochin ; Dated : 27th September, 2024.
Devadas G*

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT Concerned.
4. The DR, ITAT, Cochin.
5. Guard File.

Asst.Registrar/ITAT, Cochin