

IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH 'B' NEW DELHI

BEFORE :SHRI L.P. SAHU, JUDICIAL MEMBER &
SMT. BEENA A. PILLAI, ACCOUNTANT MEMBER

ITA No.5227/Del./2010
Asstt. Year :2006-07

D.C.I.T., Circle 11(1),
New Delhi.

vs.

Ericsson India Pvt. Ltd.,
4th Floor, Dhaka House,
18/17, W.E. Pusa Lane,
Karol Bagh, New Delhi.
(PAN: AAACE 0138N)
(Respondent)

(Appellant)

Appellant by : Sh. Anil Kumar Sharma, Sr. DR
Respondent by : Sh. Ravi Sharma, Advocate &
Sh. Anubhav Rastogi, Advocate

Date of hearing : 04.01.2017
Date of pronouncement : 17.01.2017

ORDER

Per L.P. Sahu, Accountant Member:

This is an appeal filed by the Revenue against the order of the ld. CIT(A)-XIII, New Delhi dated 23.09.2010 for the assessment year 2006-07 on the following ground :

- "1. The Ld. CIT(A) has erred in disallowing the difference to the value of FBT amounting to Rs.3,19,29,407/-."*
2. The brief facts of the case are that the assessee company filed its return of income of Fringe Benefit Tax (FBT) declaring total FBT of

Rs.12,49,63,853/-. Notice u/s. 115WE(2) was sent to the assessee. The assessee company is engaged in the business of manufacturing of telecom equipments and providing services namely erection, installation and commissioning of mobile telecommunication net works for various telecom operators in India and also providing technical support in relation to such telecommunication equipments and development of telecommunication software. During the year, the appellant was also engaged in construction of telecommunication infrastructure at various locations across India. For providing services to its various clients, the company undertook contracts for construction, installation and assembly of telecom net work, popularly known as GSM net works at various parts of India. During the F.Y. 2005-06, the assessee company incurred expenditure on conveyance, travel and tour of Rs.61.66 crores, out of which Rs.21.28 crores pertained to the business of implementation of GSM net works. Accordingly, the assessee company disallowed 5% expenditure for conveyance, tour & travels amounting to Rs.21.28 crores. The Assessing Officer did not agree with the disallowance of 5% of expenditure incurred on conveyance, travel and tour and he disallowed 20% instead of 5% disallowed by the assessee and accordingly enhanced the income by Rs.3,19,29,407/-. Aggrieved by the order of the AO, he appealed before the first appellate authority where the assessee also submitted detailed

written submission, which is available at paper book before us. The Id. CIT(A) after considering the submissions of the assessee and the circulars and dictionary meaning of work 'construction' allowed the appeal of the assessee. Aggrieved by the order of CIT(A), the Revenue is in appeal before the ITAT.

3. The Id. DR relied on the order of the Assessing Officer and submitted that there is no any clear definition of construction in the Act. The assessee has relied on the circulars which are not applicable due to the appellant is engaged in the business of telecommunication services as well as erection, commissioning and installation.

4. On the other hand, the Id. AR relied on the order of the Id. CIT(A) and referred to the circulars issued by the CBDT, especially question No. 106. He also referred to page No. 130 of the paper book No.1, in which various activities have been described by Reserve Bank of India under various codes and the activities like that of assessee, i.e., construction/erection & maintenance of telecommunication & transmission lines, telecom projects are described under the head 'infrastructure construction'.

5. After hearing both the parties and perusing the assessment order, submissions of the assessee and the order of Id. CIT(A), we find that the Id. CIT(A) has done a good order by discussing the word 'construction' which does not require any interference. For the sake of convenience, we reproduce the findings of the Id. CIT(A) as under :

"I have carefully gone through the submissions of the appellant as stated above alongwith paper books and documents filed during the course of appellate proceeding. I have also gone through with the assessment order passed under section 115 WE(3) of the Act. The main issue which needs to be decided in the present appeal is whether the assessee is engaged in business of the construction and whether in view of Board's circular a broader view may be adopted for defining the term 'business of construction' u/s 115WC(2)(b) of the Act.

In the submission the appellant has stated that the nature of business activity undertaken by the Appellant is duly stated in the Tax Audit Report in Column 8 wherein it has been stated that the appellant is engaged in the business of construction, assembly and installation of telecommunication products. Similarly, the appellant recognizes its revenue from the business of construction, assembly and installation of telecommunication products. Similarly, the appellant recognizes its revenue from business of construction separately under the head "Project Revenue" read with note 3 of schedule 23 of the Audited Accounts.

The agreement which are filed viz. Annexure 7.1 "Installation and Commissioning Work' also support the case that appellant is engaged in following activities while executing the contracts of developing telecom infrastructure, namely. Site Surveys and identification of appropriate site: It includes site location. Towers and antennas, suitable space for equipment in premises, modification & rearrangement of existing building if any etc., Installation Engineering which includes Identification of appropriate equipment, floor plans for equipment location, internal & external connections diagrams required of installation of equipment, etc., Structural engineering, installation of equipment and commissioning of site., Testing the equipment/site functionality and making the necessary changes to equipment,

connectivity, etc. All such activities under the instruction and contract with its customers resulted into a tangible infrastructure which in turns used by the telecom operator for their business of providing telecom services. Hence, it is not in dispute that the appellant is engaged in the business developing telecom infrastructure and said business activity is also classified under the term "infrastructure construction" in the Classification of activity/occupation - 2008 issued by Reserve Bank of India.

The case of the appellant also gets support from answer to question no. 106 of the Circular no. 8/2005 dated 29th August 2005 issued by the Central Board of Direct Taxes ('CBDT'). In the said circular, the Board is of the view of that the term 'business of construction' must be understood by giving the ordinary English language meaning to the words. Hence, all activities involving construction would be covered within the scope of the term 'business of construction' referred to in section 115WC of the Income tax Act." Moreover the word "construction" is not defined under the Act, hence to give a narrow and restrictive interpretation to the term 'construction' would not be appropriate and that keeping in view the Board Circular the general meaning of the word has to applied in the facts of present case. In the Black Law Dictionary the term Construction is defined as ' -the creation of something new, as distinguish from the repair or improvement d something already in existence. The act of fitting an object for the use or occupation is usual way, and for some distinct purpose. Similarly the word "construct" in the Black Law Dictionary is defined as - to build; erect; put together; make ready for use. To adjust and join materials or parts of so as to form a permanent whole. "Construct" is distinguishable from "maintain" which means to keep up, to preserve. From the above, it is evident an activity which resulted into creation something new would be termed as construction and the construct includes to build.

In the present case, the appellant has explained that by way constructing, assembling and installing telecom network they would create a tangible material which in itself is new and distinct, and hence the activity of constructing, assembling and installing telecom network is qualified as "business of construction" within the meaning of section 115WC(2)(b) of the Act. I am therefore of the view that the word " business of construction" should be given a broader and expansive meaning rather than a restricted interpretation, especially in face of the fact that the word "construction" has not been defined under the Act. Further, had the legislature desired to give a restricted meaning to the word " construction" there was no reason that it

should not have been accordingly so defined. Rather the fact that this word has not been defined goes on to show that legislature is aware of the various dimensions and nature of "construction" which is being undertaken in today's commercial world and therefore defining it would have resulted in avoidable controversy. It is to avoid the situation that the word "construction" has perhaps deliberately been not defined and fitted in a narrow compass.

Further the case of the appellant also covered in view of the answer to question no. 80 of the Circular no. 8/2005 dated 29th August 2005 issued by the Central Board of Direct Taxes ('CBDT') that is FBT is a tax qua employer. Therefore, the expenditure of the nature referred to in clauses (A) to (P) of sub-section (2) of section 115WB is to be taken into account with reference to nature of the business.

Accordingly, the appellant succeeds on Ground No. 2 of the appeal i.e. the AO is directed to compute Fringe Benefit tax at lower rate of 5% as against the 20% for the part of total expenditure incurred on conveyance, lour and travel. Consequently the addition made for Rs. 3,19,29,407/- is directed to be deleted."

6. The Id. Assessing Officer has not considered the circular No. 8/2006 dated 29.08.2005, especially question No. 106 for the meaning of business of construction. The assessee company is engaged for erection, commissioning and installation of infrastructure telecommunication projects also. The Board's circulars are also binding on the Revenue authorities as held by the Apex Court in the case of UCO Bank vs. CIT, 237 ITR 889 (SC) and K.P. Varghese vs. ITO, 131 ITR 597. Questions Nos. 80 & 106 of the above circular help the assessee for computing FBT at lower rate of 5% instead of 20% on conveyance, travel and tour. In view of the finding of the Id. CIT(A) as

narrated above & circulars as noted above, the appeal of the Revenue is dismissed.

7. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on 17.01.2017.

Sd/-
(BEENA A. PILLAI)
Judicial Member

Sd/-
(L.P. SAHU)
Accountant Member

Dated : 17.01.2017

*aks/-

Copy of order forwarded to:

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|--|---------------------------|
| (1) <i>The appellant</i> | (2) <i>The respondent</i> |
| (3) <i>Commissioner</i> | (4) <i>CIT(A)</i> |
| (5) <i>Departmental Representative</i> | (6) <i>Guard File</i> |

By order

*Assistant. Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi*