

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI
BEFORE SMT DIVA SINGH, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

ITA No.316/Del/2016
(Assessment Year: 2007-08)

ACE Marketing P. Ltd.,
8/5, Sarvapriya Vihar,
New Delhi
PAN:AAACA1997K
(Appellant)

Vs.

DCIT
Circle-1(2),
C.R. Building,
New Delhi
(Respondent)

Assessee by :
Revenue by:
Date of Hearing
Date of pronouncement

Sh. S. K. Gupta, Adv
Sh. K. K. Jaiswal, DR
16/03/2016
13/05/2016

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This is appeal filed by the assessee against the order of the ld CIT (A)-I, New Delhi dated 01.10.2015 for the Assessment Year 2007-08.
2. The assessee has raised the following grounds of appeal:-
 - “1) That the learned CIT Appeal has erred both on facts and law by holding that the approval taken for reopening the case u/s 147 of the Income Tax Act, 1961 is valid for reopening the case u/s 115WG of the Income Tax Act, 1961.
 - 2) That the learned CIT Appeal has erred both on facts and law by sustaining the fringe benefit amounting to Rs.4,63,230/- being 20% of the expenditure on staff uniform amounting to Rs.23,16,154/- ignoring that there is no fringe benefit involved in providing uniform to staff of facility management division in terms of specific stipulation of customers in the contracts.”
3. Brief facts of the case is that the assessee is a private limited company filed its return of income on 31.10.2007 and value of fringe benefits of Rs. 585402/- for the under consideration. In the case of the assessee reassessment proceedings

were initiated on the basis that assessee did not include fringed benefit of 2803887/- in respect of expenditure incurred by the assessee for uniform expenses, medical expenses and interest on car. Assessee objected to the same during the assessment proceedings, however, Id Assessing Officer determine the fringe benefit of Rs. 2316154/- @ 20% amounting to Rs. 463230/-. Assessee preferred appeal before the Id C IT(A). On appeal before the Id CIT(A) the contention of the assessee regarding not recording the satisfaction as well as not obtaining the approval was rejected. On the merits he also confirmed the taxability of fringe benefit of Rs. 463230/-. Therefore, the assessee is in appeal before us.

4. First ground of appeal is though issuing notice u/s 115WH but recording of reasons for reopening of cases u/s 148 and also recording satisfaction of higher authorities on the same reasons despite the provision of law that reasons should have been recorded u/s 115WH and on that satisfaction of higher authority should have been recorded.
5. Ld AR submitted that the issue is now squarely covered in favour of the assessee by the order of Hon'ble Gujarat High Court in CIT V P G Foils Ltd 33 Taxmann.com 485 and further on the merits he submitted that on uniform expenses no fringe benefit tax can be levied.
6. Ld DR relied on the orders of the lower authorities and submitted that lower authorities have rightly determined the value of fringe benefit.
7. We have carefully considered the rival contentions. Here in the case of the assessee the assessment of assessee was reopened by issue of notice u/s 115WH of the Income Tax Act on 27.03.2014 after obtaining approval of Id CIT(A)-I, New Delhi. The reopening was made on recording of following reasons:-

“The assessment of fringe benefits of M/s. ACE Marketing Pvt. Ltd. for the Asstt. Year 2007-08 was processed in summary manner on March 2009 determining fringe benefits of Rs. 585402/-. A perusal of assessment record revealed that the fringe benefits so determined did not include fringe benefits of Rs. 2803887/- in respect of expenditure incurred by the assessee under uniform expenses, medical expenses and interest on car loan (fringe benefits calculated @20). The omission resulted in under assessment of fringe benefit by Rs. 2803887/-. Therefore, I have reason to

believe that the amount of fringe benefits to the tune of Rs. 2803887/- has escaped assessment.

8. The contention of the assessee was that the Assessing Officer issued notice u/s 115WH however, approval was taken for issue of notice u/s 148 of the Act. Further, the reasons recorded by the Assessing Officer were also under the heading of “approval for issue of notice u/s 148 in the case of ACE marketing Pvt. Ltd. AY 2007-08 (FBT)” In the objection raised by the assessee the Assessing Officer while disposing off the objection has stated as under:-

“The assessee’s submission has been carefully considered and found no merit in it. The assessee’s submission that before issuance of notice, prior approval has not been obtained from higher authorities is false. Prior approval has been obtained from Commissioner of Income Tax, Delhi-I, New Delhi after recording of satisfaction by AO, which is reproduced as under:-

“Proposal for issue of notice u/s 148 in the case of M/s Ace Marketing Pvt. Ltd. Asstt. Year 2007-08 (FBT)

The assessment of fringe benefits M/s Ace Marketing Pvt. Ltd for the Asstt. Year 2007-08 was processed in summary manner on March, 2009 determine fringe benefits of Rs.585402/-. A perusal of assessment record reveals that the fringe benefit so determined did not include fringe benefits of Rs.2803887/- in respect of expenditure incurred by the assessee under uniform expenses, medical expenses and interest on car loan (fringe bebenfits calculated @20. The omission resulted in under assessment of fringe benefits by Rs.2803887/-. Therefore, I have reasons to believe that the amount of fringe benefits by Rs.2803887/- has escaped assessment.

The above proposal has been sent to ld Commissioner of Income Tax, Delhi-I, New Delhi through additional CIT, Range-1, Delhi and the ld CIT(A), Delhi-I, New Delhi has accorded his approval to reopen the case, which is placed on record. The assessee submitted that approval of higher authorities has been obtained for issuance of notice u/s 148 of the Income Tax Act and not for issuance of notice u/s 148 of the Income Tax Act and not for issuance of notice u/s 115WH of Income Tax Act. In this regard, it is to inform you that the prior approval of higher authorities has been obtained u/s 151 of the Income Tax Act by virtue of section 115WL of Income Tax Act. In this regard, it is to inform you that the prior approval of higher authorities has been obtained u/s 151 of the Income Tax Act by virtue of Section 115WL of the Income Tax Act which is reproduced as under

“Save as otherwise provided in this chapter, all other provisions of this act, shall as far as may be apply in relation to fringe benefits also:. It is not out of place to mention here that notice u/s 148 of the Income Tax which is related to income escaping assessment have corresponding meaning with notice u/s 115WH of Income Tax Act, 1961 and the facts to reopening the case related with fringe benefits. It is pointed out there that notice u/s 115WH of Income Tax has been issued in relation with escapement of value of fringe benefits.

Reliance is also placed in the case of Mulchand Rampuria Vs. ITO (2001) 252 ITR 758 whrein it is held that “after the enactment of section 2962B which came in to force on 01.10.1975, no notice shall deemed to be invalid merely by reasons of any mistake, defect or omission therein if the notice is in substance and effect in conformity with or according to the intent and purpose of the Act.

In view of the above facts and circumstances, the objection regarding reopening of case and issue of notice u/s 115WG of the Income Tax Act 1961 will, therefore, be continued. Apart from this, statutory notice u/s 115WE(2) of the Income Tax Act, 1961 along with questionnaire is also annexed herewith for compliance.”

9. We have carefully perused the reasons recorded by the Assessing Officer as well as approval granted by the higher authorities. As it can be seen that the issue under appeal pertains to a validity of notice issued by the Assessing Officer u/s 115WH of the Income Tax Act, though reasons recorded were u/s 148 and also the approval sought was also u/s 148 of the Act. Hon’ble Gujarat High Court has held that provision for reopening of fringe benefits escaping assessment and escapement of income are two different provisions of the law containing separate set of conditions. In that case, Hon’ble Gujarat High Court has dismissed the tax appeal of revenue where notice u/s 148 was issued instead notice u/s 115WH of the Income Tax Act. In the present case though notice is issued u/s 115WH however, assessee has recorded the reason u/s 148 of the Act and similarly, satisfaction of higher authorities is also on the same reasons. The Hon’ble Gujarat High Court in CIT V P G Foils Limited (supra) has held as under:-

“9. The third issue included in the reasons recorded for reopening was with respect to short payment of fringe benefit tax. The Tribunal, while confirming the order of CIT (A) held that there is a separate provision under Section 115WG for reopening the assessment in respect of fringe

benefit tax escaping assessment and that therefore, notice under Section 148 of the Act cannot be issued. With this conclusion, we are in respectful agreement. Chapter XII-H pertaining to Income tax on Fringe benefits was introduced by the Finance Act 2005 with effect from 1st April 2006. Section 115W contains definition of the terms "employer" and "fringe benefit tax". Section 115WA pertains to charge of fringe benefit tax. Sub-section (1) thereof provides that in addition to the income-tax charged under the Act, there shall be charged, additional income-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 per cent on the value of such fringe benefits. Section 115WB pertains to fringe benefits which would invite such a tax. Section 115WC provides for ascertaining value of fringe benefits. Section 115WD requires every employer, who during a previous year has paid, or made provision for payment of fringe benefits to his employees to furnish a return of fringe benefits to the Assessing Officer in the prescribed form. Section 115WE pertains to the assessment of such returns of fringe benefits. Sub-section (2) of the said section authorizes the Assessing Officer to issue a notice requiring the assessee to attend to his office, or to produce or cause to be produced, any evidence on which the assessee may rely in support of the return. Section 115WG pertains to fringe benefits escaping assessment and reads as under :-

*"115WG : **Fringe benefits escaping assessment** - If the Assessing Officer has reason to believe that any fringe benefits chargeable to tax have escaped assessment for any assessment year, he may, subject to the provisions of sections 115WH, 150 and 153, assess or reassess such fringe benefits and also any other fringe benefits chargeable to tax which have escaped assessment and which come to his notice subsequently in the course of the proceedings under this section, for the assessment year concerned (hereinafter , referred to as the relevant assessment year)*

Explanation - For the purpose of this section, the following shall also be deemed to be cases where fringe benefits chargeable to tax have escaped assessment, namely :-

- (a) where no return of fringe benefits have been furnished by the assessee;*
- (b) where a return of fringe benefits have been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the value of fringe benefits in the return;*
- (c) an assessment has been made, but the fringe benefits chargeable to tax have been under-assessed."*

10. Section 115WH pertains to issuance of notice where fringe benefits have escaped assessment. Sub-section (3) thereof provides that no notice under sub-section (1) shall be issued for the relevant assessment year after the expiry of six years from the end of the relevant assessment year. Sub-section (4) further provides that no such notice shall be issued after the expiry of four years from the end of the relevant assessment year, unless the Chief Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing Officer that it is a fit case for the issue of such notice.

11. From the above provisions, it could be seen that Chapter XII-H of the Act makes detailed and specific provisions pertaining to income-tax on fringe benefits. Such provisions include those for filing of returns, assessment of such returns and re-assessment in case any tax on fringe benefit has escaped assessment. In particular, Section 115WG makes detailed provisions for assessment of the fringe benefits escaping assessment. Correspondingly, Section 115WH provides for issuance of notice for such purpose. Such provisions being special provisions, made especially for the purpose of fringe benefits tax, the Tribunal was perfectly justified in concluding that the general provisions contained in section 148 of the Act cannot be resorted to in such cases. Significantly, Section 115WH; unlike proviso to Section 147 of the Act, does not recognize any distinction between notice for reopening issued within and beyond the period of four years from the end of relevant assessment year; except for requiring that in cases of notice issued beyond four years, there has to be a satisfaction of the Commissioner or the Chief Commissioner, arrived at on the reasons recorded by the Assessing Officer that it is a fit case for issuance of the notice. In other words, the crucial requirement under proviso to Section 147 of the Act for issuing notice beyond four years from the end of relevant assessment year of income escaping the assessment due to the failure on the part of the assessee to disclose truly and fully all material facts in cases other than in case of non-filing of the returns, is absent. In view of such specific provisions, the Tribunal was correct in holding that notice under Section 148 of the Act could not have been issued for such purpose.”

10. Therefore, in view of the above facts where notice u/s 115WH is issued based on reasons recorded u/s 148 and satisfaction of the higher authorities is also obtained on such reasons recorded u/s 148 of the Income Tax Act, the reopening made by the Assessing Officer for reassessment of fringe benefit cannot be upheld. Furthermore, Id CIT(A) has applied the provisions of section 292B of the Act and held that such notice cannot be held to be invalid. We are

of view that there is no mistake in the notice but there is a mistake in recording of the reasons by the Assessing Officer and mistake in satisfaction of the higher authorities. Therefore, in our view the application of section 292B does not arise in the present case. In the present case there are no reasons recorded u/s 115WH (2) of the act and similarly no satisfaction on such reason recorded is available. In view of the above, we quash the reassessment order passed u/s 115WG/ 115WE of the Income Tax Act, 1961. Therefore we reverse the finding of the CIT (A) and allow ground no 1 of the appeal .

11. As we have already quashed the assessment in ground no 1 of the appeal, ground no 2 on merits of the fringe benefit chargeability is not adjudicated. Therefore ground no 2 of the appeal is dismissed.
12. In view of above, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 13/05/2016.

**-Sd/-
(DIVA SINGH)
JUDICIAL MEMBER**

**-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

Dated: 13/05/2016
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

**ASSISTANT REGISTRAR
ITAT, New Delhi**