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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.77 OF 2015

Commissioner of Income Tax-8 ...Appellant
vs.
Lionbridge Technologies Pvt.Ltd. ...Respondent

Mr.Arvind Pinto for the appellant
Mr.Girish S. Pikale for the respondent

CORAM : A.S.OKA, &
A.K.MENON,JJ.
DATE : OCTOBER 30, 2017

P.C.:

1 Heard the learned counsel for the appellant. By this appeal, the appellant-revenue has taken an exception to the order dated 24th March 2015 passed by the Income Tax Appellate Tribunal, A Bench, Mumbai (for short "the Appellate Tribunal").

2 The respondent-assessee is engaged in business of software developments. The respondent-assessee filed Fringe Benefits Tax (for short "FBT") return under section 115 WD of the Income Tax Act,1961. During the assessment proceedings, the Assessing Officer noticed that the respondent-assessee debited an amount of Rs.16,93,06,239/- as marketing and support service charges to its parent company account. Therefore, a show cause notice was issued by the Assessing Officer (AO) calling upon the assessee as to why the marketing and support service charges should not be considered for FBT. By way of

reply, the respondent-assessee submitted that its clients are located outside India and in particular in USA and therefore, there is a requirement of having software engineers posted at various locations in USA as per the contract. It was contended that the software engineers employed in USA are on the pay roll of the parent company and the said engineers are not the employees of the assessee. It was contended that though the said charges were referred as marketing and support service charges, in fact it were the salaries paid by the parent company to the said software engineers. This explanation was not accepted and therefore, the Assessing Officer made addition of 20% of the total marketing and support service charges. This part of the Assessment Order was challenged by the assessee before the First Appellate Authority. The First Appellate Authority allowed the Appeal preferred by the respondent. The First Appellate Authority recorded a finding that the intention of introducing FBT is to tax the collective benefits given by the assessee to its employees as a group where such benefits cannot be attributed to any single employee. It was observed by the First Appellate Authority that since such collective benefits were never taxed in the hands of the employer, FBT was introduced. A finding of fact was recorded that the expenditure incurred in the present case is purely business expenditure and is not covered by section 115 WB.

3 An appeal preferred by the appellant against

the order of the First Appellate Authority has been dismissed by the Appellate Tribunal by the impugned Judgment and order. In paragraph 7, the Appellate Tribunal considered the definition of fringe benefit under sub-section 1 of section 115 (WD) and in paragraph 8 following finding was recorded :

> “8 From the above it is evident that the provisions of FBT apply only to the employees and there is legal requirement of `employee and employer relationship' before the said provisions are invoked. This is the case where the payments are made to the parent company which is not the employee and therefore, the decision taken by the CIT (A) is fair and reasonable and it does not call for any interference. Accordingly, grounds raised by the Revenue are dismissed.”

4 The learned counsel for the appellant submits that the question of law as framed in paragraph 6.1 of the Memorandum of Appeal arises for consideration. His submission is that in the facts of the present case, the expenditure incurred by the respondent-assessee is on sales promotion including publicity which is covered by clause (d) of sub-section 2 of section 115 (WD). His submission is that by deeming fiction introduced by sub-section 2 of section 115 WD, the amount is taxable as Fringe benefit. When the attention of the learned counsel for the appellant was invited to the Judgment and Order dated 24th March 2015 in Income Tax Appeal

No.1132 of 2013 delivered by the Division Bench of this Court to which one of us (A.K.Menon,J.) is a party, the learned counsel for the appellant submitted that the deeming fiction under sub-section 2 of section 115 WB has not been considered by the Division Bench while deciding the said Appeal and therefore, the said decision is not a binding precedent.

5 We have given careful consideration to the submissions. Firstly, we refer to the said decision in Income Tax Appeal No.1132 of 2013. This was a case where the assessee company in its return claimed expenses on account of payment made to M/s.Tata Sons Limited. The expenses were included by the assessee company under the head of "sales promotion'. However, the assessee company submitted that the amount paid to M/s.Tata Sons Limited was not towards sales promotion and therefore, should be excluded while computing the value of Fringe benefit for the purpose of FBT. In paragraph 6 of the said Judgment, the Division Bench has observed thus:

> "6 We are of the opinion, after reading of these provisions that the Legislature always had in mind a relationship of employer-employee and by virtue of which these benefits are admissible to the employees. They could be under several heads and a nomenclature attached to it would not be decisive provided the nature thereof is

falling within the above quoted provisions. In the present case, the Tribunal made reference extensively to the provision and to the understanding of the same by the Revenue itself. While it is true that it is the duty of a Court of law to interpret and construe a provision and in construction thereof, the Court shall not be guided by any opinion or view of the Executive or Revenue, however, when the argument before us is that there is no basis for the conclusion that these benefits and which are taxable arise out of a employer-employee relationship that we were shown the requisite material and produced before the Tribunal....”

6 Ultimately, in paragraph 8 of the said Judgment, the Division Bench held thus:

> “8 We need not make a detailed reference to this circular. Suffice it to note the Budget Speech of the Minister of Finance while presenting the Budget for the year 2005-2006, the explanatory notes and the circulars have been rightly understood by the Tribunal to mean that the basis of tax is the benefits or perquisites which emanate out of an employer-employee relationship. That is a perquisite and for levy of fringe benefit tax. The Tribunal, in paragraphs 8 and 9 has concluded that in the present facts and circumstances, no such case as would enable charging fringe

tax emerges. The subscription amount has been paid as per the contractual agreement between the assessee and M/s.Tata Sons Limited. The invoices raised by M/s.Tata Sons Limited are for the services provided and there is no employer-employee relationship between the parties."

7 We may note that in paragraph 3 of the said Judgment, the Division Bench specifically noted the argument made on behalf of revenue. The argument was that if the company to which the said payment was made organizes the promotional activities and assists the group companies such as the assessee in locating buyers etc, then that is squarely falling within the scope of fringe benefits.

8 Now coming to the facts of the case, we must refer to the order of assessment under sub-section 3 of section 115 (WB). In paragraph 2 of the said order, there is a reference to show cause notice issued to the respondent-assesse calling upon it to state as to why marketing and support service charges should not be considered for FBT. The reply filed by the respondent-assessee is quoted in paragraph 2. In the reply, a stand was taken that the assessee has its parent company located in USA to which the payment of marketing and support service charges has been made. It was contended that the amount is being paid to the parent company for making payment to the technical personnel employed by the parent company in different

locations in USA. The ultimate finding recorded by the Assessing Officer is that on all expenses incurred by the group of companies, FBT has to be paid which in the present case will be the assessee. The Assessing Officer relied upon deeming fiction under sub-section 2 of section 115 WB. We find that there is no specific finding recorded by the Assessing Officer that the expenses so incurred were on sales promotion including publicity which are covered by clause (d) of sub-section 2 of section 115 WB. The Commissioner (Appeals), in the appeal preferred by the respondent-assessee came to the following conclusion:

> "6.1.6 Further the intention of the FBT is to tax the collective benefits given to employees as a group where such benefits cannot be attributed to any single employee. Since such collective benefits, earlier, were neither taxed in the hands of employee nor in the hands of employer, the FBT was introduced. At the end it is to be summarized that the expenditure incurred is purely business expenditure and is not covered by any of the sub-sections of 115 WB. Accordingly the same is not liable to tax under FBT."

9 The conclusion drawn by the Appellate Tribunal in paragraph 8 is already quoted above. There is no reason to find fault with the findings recorded by the Appellate Tribunal and Commissioner (Appeals)

which are findings of facts.

10 Moreover, the case is covered by the decision of the Division Bench in the case of Commissioner of Income Tax Vs. Tata Consultancy Limited.

11 Therefore, we find that no question of law much less a substantial question of law arises in this appeal. Accordingly, the appeal is dismissed with no order as to costs.

(A.K.MENON,J.) (A.S.OKA,J.)