

IN THE INCOME TAX APPELLATE TRIBUNAL

AHMEDABAD “C” BENCH

**(BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
& SHRI MAHAVIR PRSAD, JUDICIAL MEMBER)**

**ITA. No: 2799/AHD/2013
(Assessment Year: 2007-08)**

The Sandesh Ltd. C/o. Mukesh M. Patel & Co. 3- 4, Vithalbhai Bhavan, Nr. S.P. Colony Rly. Crossing, Ahmedabad-13	V/S	ACIT, Circle-8, Ahmedabad
(Appellant)		(Respondent)

PAN: AAAC5730D

**Appellant by: Shri Mukesh M. Patel with
Shri Jigar M. Patel, AR
Respondent by: Ms. Vibha Bhalla, CIT/DR**

(आदेश)/ORDER

Date of hearing : 17-08-2016
Date of Pronouncement : 22 -08-2016

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:

1. This appeal by the Assessee is directed against the order of Ld. CIT(A)-XIV, Ahmedabad dated 03.09.2013 pertaining to A.Y. 2007-08.

2. The impugned appeal is barred by limitation by 27 days. The delay is condoned.
3. The grievance of the assessee relates to the levy of Fringe Benefits Tax (FBT) as per the following chart:-

<i>Sr. No.</i>	<i>Nature of Expenditure</i>	<i>Amount</i>	<i>% liable to FBT</i>	<i>Value of Taxable Fringe Benefits</i>
1	Travelling Expenses	2,39,978	5%	11,999
2	Entertainment/Hospitality Expenses	7,92,123	20%	1,58,425
3	Presentation Expenses (Gifts)	42,932 + 12,05,455	50%	6,24,193
4	Sales Promotion Expenses	11,57,10,912	20%	2,31,43,182
	Total Rs.			2,39,36,799

4. Having heard the rival contentions, we have carefully perused the orders of the authorities below. Briefly stated the facts of the case are that the assessee company filed its original return of Fringe Benefit declaring Fringe Benefit at Rs. 23,77,215/-. The FBT return was selected for scrutiny assessment and accordingly statutory notice u/s. 115WE(2) was issued and served upon the assessee.
5. On perusing the return of FBT, the A.O. noticed that the assessee has not paid FBT under various heads of expenditure. It was explained that a writ petition was filed by the Gujarat Chamber of Commerce and Industries and others before the Hon'ble High Court of Gujarat challenging the levy of FBT. However, out of abundant precaution, the assessee has deposited FBT in a separate account; the same have been explained by way of a note in the audited statement of accounts.

6. The A.O. was of the firm belief that since the levy of FBT has not been declared ultra virus, therefore, the assessee is liable to pay FBT. The A.O. accordingly computed the FBT on the following expenditures:-

<i>(i) Travelling Expenses</i>	<i>Rs. 239978/-</i>
<i>(ii) Entertainment/Hospitality Expenses</i>	<i>Rs. 792123/-</i>
<i>(iii) Presentation Expenses (Gifts)</i>	<i>Rs. 1248387</i>
<i>(iv) Sales promotions Expenses</i>	<i>Rs. 11,57,10,912/-</i>

7. Accordingly, the additional FBT computed by the A.O. was at Rs. 2,39,36,799/-.

8. Aggrieved by this assessment, the assessee carried the matter before the Id. CIT(A). Before the First Appellate Authority, it was strongly contended that the levy of FBT is only on those expenditures where employer-employee relationship exists. It was brought to the notice of the Id. CIT(A) that since the expenditures considered by the A.O. for the levy of FBT do not establish any employer-employee relationship are therefore, outside the purview of Section 115WE(2) of the Act.

9. The contentions/submissions of the assessee did not find any favour with the Id. CIT(A) who concurred with the view of the A.O. that provisions of Section 115WE(2) squarely apply on the impugned expenditures and, therefore, the levy of FBT is justified. The appeal was dismissed.

10. Before proceeding further, let us first understand the provisions of Section 115WB(2) which reads as under:-

“(2) The fringe benefits shall be deemed to have been provided by the employer to his employees, if the employer has, in the course of his business or profession (including any

activity whether or not such activity is carried on with the object of deriving income, profits or gains) incurred any expense on, or made any payment for the following purposes, namely:-

(A) Entertainment:

(B) Provision of hospitality of every kind by the employer to any persons, whether by way of provision of food or beverages or in any other manner whatsoever and whether or not such provision is made by reason of any express or implied contract or custom or usage of trade but does not include---

(i) any expenditure on, or payment for food or beverages provided by the employer to his employees in office or factory:

(ii) any expenditure on or payment through paid vouchers which are not transferable and usable only at eating joints or outlets;

The following sub-clause (iii) shall be inserted after sub-clause (ii) of clause (B) of sub-section (2) of section 115WB by the Finance Act, 2008, w.e.f. 1-4-2009 :

(iii) any expenditure on or payment through non-transferable pre-paid electronic meal card usable only at eating joints or outlets and which fulfils such other conditions as may be prescribed:

(C) Conference (other than fee for participation by the employees in any conference).

Explanation- For the purposes of this clause, any expenditure on conveyance, tour and travel (including foreign travel), on hotel, or boarding and lodging in connection with any conference shall be deemed to be expenditure incurred for the purposes of conference;

(D) sales promotion including publicity:

Provided that any expenditure on advertisement.

(i) being the expenditure (including rental) on advertisement of any form in any print (including journals, catalogues or price lists) or electronic media or transport system;

(ii) being the expenditure on the holding of, or the participation in, any press conference or business convention, fair or exhibition;

(iii) being the expenditure on sponsorship of any sports event or any other event organized by any Government agency or trade association or body:

(iv) being the expenditure on the publication in any print or electronic media of any notice required to be published by or under any law or by an order of a court or tribunal;

- (v) *being the expenditure on advertisement by way of signs, art work, painting, banners, awnings, direct mail, electric spectaculars, kiosks, hoardings, bill boards.*
- (vi) *being the expenditure by way of payment to any advertisement agency for the purposes of clauses (i) to (v) above;*
- (vii) *being the expenditure on distribution of samples either free of cost or at concessional rate; and*
- (viii) *being the expenditure by way of payment to any person or repute for promoting the sale of goods or services of the business of the employer,*
shall not be considered as expenditure on sales promotion including publicity;

(E) Employees' welfare.

Explanation- For the purposes of this clause, any expenditure incurred or payment made to fulfill any statutory obligation or mitigate occupational hazards or provide first aid facilities in the hospital or dispensary run by the employer shall not be considered as expenditure for employees' welfare;

The following Explanation shall be substituted for the existing Explanation to clause (E) of sub-section (2) of section 115WB by the Finance Act, 2008, w.e.f. 1-4-2009:

Explanation- For the purposes of this clause any expenditure incurred or payment made to-

- (i) Fulfil any statutory obligation ; or*
- (ii) Mitigate occupational hazards; or*
- (iii) Provide first aid facilities in the hospital or dispensary run by the employer; or*
- (iv) Provide crèche facility for the children of the employee; or*
- (v) Sponsor a sportsman, being an employee; or*
- (vi) Organize sports events for employees*

Shall not be considered as expenditure for employees' welfare:

(F) Conveyance

(G) Use of hotel, boarding and lodging facilities;

(H) Repair, running (including fuel), maintenance of motor cars and the amount of depreciation thereon;

(I) Repair, running (including fuel) and maintenance of aircrafts and the amount of depreciation thereon;

(J) Use of telephone (including mobile phone) other than expenditure on leased telephone lines;

- (K) Maintenance of any accommodation in the nature of guest house other than accommodation use for training purposes;*
- (L) Festival celebrations;*
- (M) Use of health club and similar facilities;*
- (N) Use of any other club facilities*
- (O) Gifts; and*
- (P) Scholarships;*
- (Q) Tour and travel (including foreign travel).*

11. Rationale for introduction of FBT is that it is difficult to isolate the 'personal element' if the benefits are collectively enjoyed by the employees which means that the provisions of FBT will be applicable only in respect of those expenses which contain or at least are likely to contain an element of personal benefit to employees.

12. We have considered the rival submissions and perused the orders of lower authorities and also the circular relied upon by the assessee. After going through the entire scheme of bringing FBT into statute book, we find that the tax base for the purpose of FBT is the **value of fringe benefits provided or deemed to have been provided** by an employer to his employees during the previous year. The determination of the tax base comprises three elements:

- a) The scope of the term 'fringe benefits provided,
- b) The scope of the term 'fringe benefits deemed to have been provided and
- c) The basis of valuation of the above.

13. Being an altogether new concept introduced in the statute book, a number of issues were raised by the trade and industry at different

forums after the presentation of the Financial Bill 2005 and also after its enactment. The CBDT decided to clarify the issues raised on such forum in question and answer:

Q. No. 2 Whether employer-employee relationship is a pre-requisite for the levy of FBT?

Ans. Yes

Q. No. 60 Whether 'sales promotion' includes sales discount or rebates to wholesalers or customers or bonus points given to credit card customers and, if so, whether FBT is payable thereon?

Ans. Sales discount or rebates allowed to wholesale dealers or customers from the listed retail price merely represent lesser realization of the sale price itself. The bonus points given to credit card customers are also in the nature of deferred sale discount. Therefore, discounts or rebates or bonus points allowed to customers or wholesale dealers are in the nature of selling expenses and outside the scope of the provisions of clause (D) of sub-section (2) of Section 115WB of the IT. Act. Accordingly, such discounts or rebates are not liable to FBT.

Q. No. 61 Whether expenditure on incentives given to distributors for meeting quantity targets (including free goods for achieving certain sales target like, 100 free televisions for achieving a target sale of 10,000 televisions and cash incentives adjustable against future supplies) is liable to FBT?

Ans. Incentives given to distributors for meeting sales targets (including free goods given as incentive to distributors for achieving certain sales and cash incentives adjustable against future supplies) are in the nature of performance-based commission. Such performance-based commission is in the nature of ordinary selling cost. Therefore, expenditure incurred for the purpose of providing incentives given to distributors for meeting sales targets (including free goods for achieving certain sales target and cash incentives adjustable against future supplies) do not fall within the scope of clause (D) of sub-section (2) of Sec. 115 WB and, therefore, not liable to FBT.

14. Now let us see whether the explanations of the assessee fit into the answers given by the CBDT on the questions pertaining to the facts of the case:-

<i>Nature of Expenditure</i>	<i>Amount (Rs)</i>	<i>Submission in Brief explaining that the relevant expenditure not incurred for the employees of the Appellant Company, the same was not liable to FBT</i>
<i>A Travelling Expenses</i>	<i>2,39,978</i>	<p><i>*The Appellant has incurred total expenditure of Rs.31,29,335 under the head Travelling expenses.</i></p> <p><i>*Out of the same, an amount of Rs.2,39,978 was incurred for and on behalf of professionals or business associates of the Appellant, in connection with its business and not for the employees of the Appellant Company.</i></p> <p><i>*Out of the said Rs.2,39,978, expenses of Rs. 72,568 were incurred for candidates who came for interviews held during the year for various employments in Sandesh</i></p> <p><i>*An amount of Rs. 65,414 was incurred for engineers who came for overhauling of machines.</i></p> <p><i>*An amount of Rs. 33,492 was spent on travelling expenses of the Event Management Consultant.</i></p> <p><i>*The balance amount of Rs.68,504 was spent on travelling expenses of Auditors and Advocates</i></p>

<i>B. Entertainment/ Hospitality Expenses.</i>	<i>7,92,123</i>	<p><i>*The Entertainment / Hospitality expenses were incurred by the Appellant Company on its guests and not for its employees.</i></p> <p><i>*The Appellant has to appoint various selling agents across villages, talukas and districts throughout Gujarat, who sell the newspapers to end readers. Similarly Advertisements are also collected through advertising agents.</i></p> <p><i>*These selling and advertising agents often visit Ahmedabad and during the year the Appellant has spent Rs. 7,92,123 on tea, snacks and lunches served to them, which has been debited under the head Entertainment / Hospitality expenses.</i></p>
<i>C.Presentation Expenses</i>	<i>12,48,387</i>	<p><i>*Out of Rs. 12,48,387 presentation expenses incurred for other than employees are Rs.42,932.</i></p> <p><i>*The balance of Rs. 12,05,455 represents Transport & Distribution Charges in the nature of business expenditure, which have been erroneously classified as Presentation Expenses in the Assessment Order. The correct classification is evident from the Tax Audit Report showing computation of the value of fringe benefits, relevant page of the same being attached herewith.</i></p>
<i>D. Sales Promotion Expenses</i>	<i>11,57,10,912</i>	<p><i>* Earlier there were only two major Gujarati News Papers "Sandesh" and "Gujarat Samachar". Divya Bhaskar, came to be launched around this time and to get its foothold in Gujarat, it aggressively started offering various schemes to its subscribers, under which free gifts were given on monthly basis.</i></p> <p><i>* As a competitor, the Appellant was under business compulsion to offer similar Gift Schemes to retain its subscribers and readers.</i></p> <p><i>* Moreover, in Saurashtra & Kutch, there is a general practice of subscribing to news papers on an annual basis, instead of daily purchases. It is a practice to hold Lucky Draws at the close of subscription scheme, when Prizes are given to various subscribers.</i></p> <p><i>*The Appellant has during the financial year incurred an expenditure of Rs. 11,57,10,912 for distribution of Gifts and Prizes as referred to hereinabove, which are in the nature of Sales Promotion, which not resulting in any benefit to the employees of the Appellant, is clearly not liable to FBT.</i></p>
<i>Total</i>	<i>11,79,91,400</i>	

15. After carefully considering the details filed by the assessee and the explanations given by the CBDT in its circular, we have no hesitation to hold that all these expenses hereinabove are outside the purview of FBT.

16. Our view is also fortified by the decision of the Co-ordinate Bench in the case of Cadila Healthcare in ITA No. 179/Ahd/2011 wherein the Co-ordinate Bench has considered the decision of T.V. Today Network Ltd. Vs. DCIT 38 taxmann.com 409 wherein the Co-ordinate Bench has held as under:-

"6. We have carefully considered the arguments of both the sides and perused the material placed before us. Fringe benefits tax was levied for the first time by the Finance Act, 2005 by introducing Chapter XII-H, i.e., sections 115W to 115WL to the Income-tax Act, 1961. Section 115WB(2)(D) under which the Department has covered the payment of channel-placement charges reads as under:

"115WB. (2) The fringe benefits shall be deemed to have been provided by the employer to his employees, if the employer has, in the course of his business or profession (including any activity whether or not such activity is carried on with the object of deriving income, profits or gains) incurred any expense on, or made any payment for, the following purposes, namely

(D) sales promotion including publicity :

Provided that any expenditure on advertisement,—

(i) being the expenditure (including rental) on advertisement of any form in any print (including journals, catalogues or price lists) or electronic media or transport system;

(ii) being the expenditure on the holding of, or the participation in, any press conference or business convention, fair or exhibition;

(ii) being the expenditure on sponsorship of any sports event or any other event organised by any Government agency or trade association or body ;

(iv)being the expenditure on the publication in any print or electronic media of any notice required to be published by or under any law or by an order of a court or Tribunal;

(v)being the expenditure on advertisement by way of signs, art work, painting, banners, awnings, direct mail, electric spectaculars, kiosks, hoardings, bill boards (display of products) or by way of such other medium of advertisement;

(vi)being the expenditure by way of payment to any advertising agency for the purposes of clauses (i) to (v) above;

(vii)being the expenditure on distribution of samples either free of cost or at concessional rate; and

(viii)being the expenditure by way of payment to any person of repute for promoting the sale of goods or services of the business of the employer, shall not be considered as expenditure on sales promotion including publicity;”

7. From the above, it is evident that section 115WB(2) is a deeming provision which provides that the fringe benefits shall be deemed to have been provided by the employer to his employee if the employer has incurred the expenses provided in various clauses of the above sub-section. Clause (D) of the above subsection covers sales promotion including publicity. The proviso to the above clause excludes various types of expenditure on advertisement from the purview of clause (D). The assessee has argued that neither there is an employer employee relationship nor the expenditure is in the nature of sales promotion and publicity. In contrast, the learned Commissioner of Income-tax- Departmental representative has stated that if the expenditure as provided in any of the clauses of section 115WB(2) is incurred by the assessee, the fringe benefits tax would be chargeable, whether or not there is an employer- employee relationship. In this regard, we find that the Central Board of Direct Taxes has issued Circular No. 8, dated August 29, 2005 which is published in [2005] 277ITR (St.) 20. In paragraph 2 of the Circular, objective for introduction of fringe benefits tax is explained which reads as under:

“2.Objective

2. 1 The taxation of perquisites or fringe benefits is justified both on grounds of equity and economic efficiency. When fringe benefits are undertaxed, it violates both

horizontal and vertical equity. A taxpayer receiving his entire income in cash bears a higher tax burden in comparison to another taxpayer who receives his income partly in cash and partly in kind, thereby violating horizontal equity. Further, fringe benefits are generally provided to senior executives in the organisation. Therefore, under- taxation of fringe benefits violates vertical equity. It also discriminates between companies which can provide fringe benefits and those which cannot, thereby adversely affecting market structure. However, the taxation of fringe benefits raises some problems primarily because —

- (a) all benefits cannot be individually attributed to employees, particularly in cases where the benefit is collectively enjoyed ;*
- (b) of the present widespread practice of providing perquisites, wherein many perquisites are disguised as reimbursements or other miscellaneous expenses so as to enable the employees to escape/ reduce their tax liability ; and :*
- (c) of the difficulty in the valuation of the benefits.*

2.2 In India, prior to the assessment year 1998-99, some perquisites/fringe benefits were included in salary in terms of section 17 and accordingly taxed under section 15 of the Income-tax Act in the hands of the employee and a large number of fringe benefits were taxed by the employer- based disallowance method where the quantum of the disallowance was estimated on a presumptive basis. In practice, taxation of fringe benefits by the employer- based disallowance method resulted in large-scale litigation on account of ambiguity in defining the tax base. Therefore, the taxation of fringe benefits by the employer- based disallowance method was withdrawn by the Finance Act, 1997. However, the withdrawal of the provisions relating to taxation of fringe benefits by the employer-based disallowance method resulted in significant erosion of the tax base. The Finance Act, 2005 has introduced a new levy, namely, the fringe benefits tax as a surrogate tax on employers, with the objective of resolving the problems enumerated in para. 2.1 above, expanding the tax base and maintaining equity between employers.”

8. At page 25 paragraph 11, frequently asked questions are given.

Question No. 2 thereof and reply is as under :

"2. Whether employer-employee relationship is a prerequisite for the levy of fringe benefit tax?

Answer: Yes.”

9. Thus, in the Circular issued by the Central Board of Direct Taxes explaining the newly introduced provisions of fringe benefits tax, the Central Board of Direct Taxes itself has clarified that employer-employee relationship is a prerequisite for levy of fringe benefits tax. The hon 'ble apex court has considered the above Circular in the case of *R & B Falcon (A) (P.) Ltd. (supra)* and held as under (headnote):

"The interpretation of the Central Board of Direct Taxes in its circulars being in the realm of executive construction, should primarily be held to be binding, save and except where it violates any provisions of law or is contrary to any judgment rendered by the courts. The reason for giving effect to such executive construction is not only the same as contemporaneous which would come within the purview of the maxim temporaria caste pesto, even in a certain situation a representation made by an authority like the Minister presenting the Bill before Parliament may also be found bound thereby. Where a representation is made by the maker of legislation at the time of introduction of the Bill or construction thereupon is put by the executive on its coming into force the same carries great weight."

10. That the hon'ble jurisdictional High Court has also expressed a similar view in the case of *T&T Motors Ltd. (supra)* and held as under (headnote):

"A careful reading of clauses (i), (ii), (iv), (v), (vi) and (viii) of section 115WB(2)(D) elucidates that the Legislature has excluded from fringe benefits expenditure in the form of payments to third persons because this is not a fringe benefits which is enjoyed by the 'employee/ recipient' but it is an expenditure incurred for the purpose of business and in the hands of the recipient the expenditure is taxable as income earned."

11. That in the case under appeal before us, admittedly, the expenditure was incurred by the assessee for channel placement which is made to the third persons and there is no employer-employee relationship between the assessee and the recipient. Therefore, the Circular of the Central Board of Direct Taxes as well as the decision of the hon 'ble apex court in the case of *R & B Falcon (A) (P.) Ltd. (supra)* would be squarely applicable. Moreover, the hon'ble jurisdictional High Court in the case of *T*

& T Motors Ltd. (supra) has stated that in respect of payment to third persons, fringe benefits tax is not applicable because no fringe benefit is enjoyed by the employee/recipient. The ratio of the above decision of the hon'ble jurisdictional High Court -would also be squarely applicable to the facts of the assessee's case because payment had been made for channel placement. By such payment, no fringe benefits is enjoyed by the employee/recipient. The payment is in the nature of expenditure incurred for the purpose of business by the assessee and in the hands of the recipient, the expenditure is taxable as income. Moreover, the expenditure incurred by the assessee is not in the nature of expenditure for sales promotion. The assessee has incurred the expenditure for broadcasting of its channels on the desired bands. Therefore, the expenditure is for the broadcasting of its channels and not for sales promotion or publicity."

17. Considering the facts of the case, in the light of the relevant part of the CBDT Circular (supra) and also following the decision of the Co-ordinate Bench (supra), we set aside the findings of the Id. CIT(A) and direct the A.O. to delete the FBT of Rs. 2,39,36,799/-.

18. Appeal filed by the Assessee is accordingly allowed.

Order pronounced in Open Court on	22 - 08- 2016.
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Sd/-

(MAHAVIR PRASAD)
JUDICIAL MEMBER

Ahmedabad:

Sd/-

(N. K. BILLAIYA)
ACCOUNTANT MEMBER

True Copy

Rajesh

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.