

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

INCOME TAX APPEAL NO. 1961 OF 2017

Pr. Commissioner of Income Tax 2 .. Appellant

Versus

M/s. Aristo Pharmaceuticals P Ltd .. Respondent

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Mr. Suresh Kumar for the Appellant
.....

CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.

DATE : JANUARY 23, 2020.

P.C.:

1. Heard Mr. Suresh Kumar, learned standing counsel, revenue for the appellant.

2. This appeal under Section 260A of the Income Tax Act, 1961 ("**the Act**" for short) has been preferred against the order dated 25.1.2017 passed by the Income Tax Appellate Tribunal, Mumbai Bench "A", Mumbai ("**Tribunal**" for short) in Income Tax Appeal No. 7899/Mum/2011 for the assessment year 2006-07.

3. The appeal has been preferred projecting the following questions as substantial questions of law:-

- (i) Whether on the facts and in the circumstances of the case and in law, Tribunal was right in setting aside the action of the AO without appreciating the fact that the fringe benefit assessment was framed after duly considering the CBDT Circular No. 8/2005 and the Explanatory Notes to the Finance Act, 2005 on the provisions relating to Fringe Benefit Tax.?
- (ii) Whether on the facts and in the circumstances of the case and in law, Tribunal was right in ignoring the fact that the Tribunal has explained considering the case of ESkayef Ltd., 245 ITR 116, of the Supreme Court that free medical samples distributed to doctors is in the nature of sales promotion and similarly, any expenditure on free samples of other products distributed to trade or consumers would be liable to FBT?

4. Matter relates to income tax on fringe benefits which was introduced in the Act by way of the Finance Act, 2005 w.e.f. 1.4.2006. Chapter XXII-H of the Act provides for income tax on fringe benefits. Fringe benefit tax has been defined under Section 115W(b) as tax chargeable under Section 115WA.

5. Section 115WA is the charging section for charge of fringe benefit tax. Sub-section (1) says that in addition to the income tax charged under the Act, there shall be

charged for every assessment year commencing on or after the 1st day of April, 2006, additional income tax (referred to as the fringe benefit 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 percent on the value of such fringe benefits.

6. Therefore, for charge or levy of fringe benefit tax, the *sine qua non* is fringe benefits being provided or deemed to be provided by an employer to his employees. In other words, there has to be a relationship of employer and employees and in the course of such relationship, the employer provides fringe benefits to the employees.

7. The term 'employer' is defined in Section 115W(a) of the Act to mean (i) a company; (ii) a firm; (iii) an association of persons or a body of individuals, whether incorporated or not; (iv) a local authority; and (v) every artificial juridical person, not falling within any of the aforesaid categories.

8. Adverting to the facts of the present case, it is seen that assessee is a company engaged in pharmaceutical business i.e., in the business of manufacturing of pharmaceutical products of various types. Assessee filed a return of fringe benefit disclosing the value of fringe benefits to the extent of Rs. 5,41,64,140/-. Initial assessment was concluded by the Assessing Officer accepting the return of fringe benefit value as disclosed by the assessee.

9. Thereafter, the case was reopened under Section 115WG of the Act. The assessment was reopened on the ground that distribution of free samples was in the nature of fringe benefit and therefore, the expenditure incurred by the assessee on the same was includible for the purpose of fringe benefit tax. Though the assessee contended that the nature of expenditure was not covered within the meaning of sales promotion for the purpose of fringe benefit tax, the Assessing Officer did not accept such contention of the assessee. Accordingly, the Assessing Officer added a sum of Rs. 4,01,40,143.00 to the value of fringe benefit for the purpose of levy of fringe benefit tax vide the Fringe Benefit

Assessment Order dated 22.11.2010.

10. On appeal by the assessee, the first appellate authority i.e Commissioner of Income Tax (Appeals)-4, Mumbai affirmed the decision of the Assessing Officer vide the order dated 9.9.2011.

11. Aggrieved, assessee preferred further appeal before the Tribunal. Tribunal referred to and relied upon a decision of this Court in **CIT Vs. Tata Consultancy Services Ltd**¹ and held that for levy of fringe benefit tax, establishment of employer-employee relationship is a pre-requisite. Following the decision in Tata Consultancy Services Ltd (supra), Tribunal vide the order dated 25.1.2017 upheld the contention of the assessee and set aside the order passed by the Assessing Officer as affirmed by the Commissioner of Income Tax (Appeals).

12. Submissions made have been considered.

¹ 374 ITR 112

13. Before advertig to the order passed by the Tribunal, we would once again revert back to the provisions of Section 115WA of the Act. From a bare reading of the said Section, it is evident that for levy of fringe benefit tax, it is essential that there must be a relationship between an employer and employees and the fringe benefit has to be provided or deemed to be provided by the employer to his employees. As alluded to herein above, for levy of fringe benefit tax, relationship of employer and employees is the *sine qua non* and the fringe benefits has to be provided by the employer to the employees in the course of such relationship.

14. In Tata Consultancy Services Ltd (supra), this Court referred to Circular No. 8/2005 of CBDT which indicated that the objective of taxing perquisite of fringe benefit is both on the ground of equity and economic efficiency. Thereafter, this Court held that the basis of fringe benefit tax is the benefit or perquisite which emanates out of an employer-employee relationship which is a pre-requisite for levy of fringe benefit tax.

15. Having noticed this Court's order in Tata Consultancy Services Ltd (*supra*), we may now advert to the order passed by the Tribunal dated 25.1.2017, relevant portion of which is extracted here-under:-

"7. We have carefully considered the rival submissions. The relevant facts are that the assessee is engaged in the business of manufacture of pharmaceutical products of various types. In its business, assessee distributes free samples to Doctors and others and the claim of assessee was that such expenditure is not covered within the meaning of sales promotion for the purposes of FBT. On the contrary, the lower authorities have concluded that free samples distributed by pharmaceutical companies are in the nature of sales promotion based on the judgment of the Hon'ble Supreme Court in the case of *Eskayef (supra)* and, therefore, the Assessing Officer included the free samples distributed to Doctors and others in the FBT. In our considered opinion, without going into any other arguments, the stand of assessee is liable to be upheld in view of judgment of Hon'ble Bombay High Court in the case of *Tata Consultancy Services Ltd. (supra)*. In the case before the Hon'ble High Court, assessee was engaged in the business of rendering technical consultancy services, marketing of software and hardware products and also export of software. Assessee had claimed expenses on account of payment to one M/s. Tata Sons towards Tata brand equity contribution. The Assessing Officer included such expenditure while computing the value of FBT as according to him it was in the nature of sales promotion. The CIT(A) held that subscription fee could not be treated as falling under the head 'sales promotion' and he allowed the claim of assessee that such amount was not includible for the purposes of FBT. The said stand of CIT(A) was upheld by the Tribunal, which has been affirmed by the Hon'ble

High Court. In the said case, it was noticed that expenditure by way of subscription had been incurred in terms of contractual agreement between Tata Consultancy Services Ltd. and Tata Sons and that there was no employer-employee relationship between the two. The Hon'ble High Court observed that the basis of FBT is the benefit or perquisite which emanates out of employer-employee relationship. As a consequence, it is safe to deduce that in order to justify the levy of FBT, establishing of employer-employee relationship is a pre-requisite. In the present case, no case has been made out by the income-tax authorities that the expenditure incurred by assessee on distribution of free samples to Doctors and others involved any employer-employee relationship between the assessee and the recipients of such samples. Therefore, at the very threshold, following the ratio of judgment of the Hon'ble Bombay High Court in the case of *Tata Consultancy Services Ltd. (supra)*, action of Assessing Officer is untenable and is hereby set-aside. Thus, assessee succeeds on its plea."

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.

17. Therefore, following the judgment of this Court in Tata Consultancy Services Ltd (supra), we concur with the findings rendered by the Tribunal. Since there was no employer-employee relationship between the assessee on one hand and the doctors on the other hand to whom the free samples were provided, the expenditure incurred for the same cannot be construed as fringe benefits to be brought within the additional tax net by levy of fringe benefit tax.

18. Consequently, we find no merit in this appeal. Appeal is accordingly dismissed. However, there shall be no order as to cost.

[MILIND N. JADHAV, J.]

[UJJAL BHUYAN, J.]