FBT is payable even in the absence of any taxable income

DCIT Vs M/s Mcleod Russel India Ltd (ITAT Kolkata) - Whether FBT is payable even in the absence of any taxable income – Whether provision of section 115-O & 115WA are pari-materia and hence FBT is leviable only to the extent of those expenses which are directly relatable to the Income taxable under the Income Tax Act – Whether when only 40% income of a tea company is chargeable to tax, even FBT liability arises on only 40% of expenses. – Revenue's appeal allowed.

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH: KOLKATA
I.T.A No. 2093/Kol/2010
Assessment Year: 2006-2007
Deputy Commissioner of Wealth Tax vs. M/s. McLeod Russel India Ltd.

ORDER

Per Shri B. R. Mittal, Judicial Member

The Department has filed this appeal for assessment year 2006-07 against the order of ld. Commissioner of Income Tax (Appeals)-IV, Kolkata dated 10.11.2009 alongwith an application for condonation of delay of 39 days on the following grounds :-

(1) That on the facts and circumstances of the case, ld. CIT(A.), Kolkata has erred in law in directing the AO to recomputed value of fringe benefit with reference to 40% of the expenses incurred and/or laid out in connection with business of growing and manufacturing of tea without appreciating the fact that the applicability of FBT is completely distinct with the applicability of Income Tax on the total income of the assessee and in fact no decisions on FBT of any court was cited by the assessee or considered by the ld. CIT(A.).

(2) That on the facts and circumstances of the case, the reliance placed by ld. CIT(A.) on the judgment of Hon'ble Calcutta High Court in Jayshree Tea & Industries Ltd. & Ors. –vs.- Union of India & Ors. (285 ITR 506) wherein the Hon'ble High Court adjudicated on section 115O relating to Dividend Distribution Tax is not related to Fringe Benefit Tax under section. 115WA.

2. The Department has also filed an affidavit of Deputy Commissioner of Income Tax, Shri Priyabrata Pramanik stating the reasons for the delay. At the time of hearing, ld. D.R. reiterated the contents of the affidavit and submitted that delay was due to a reasonable cause and the same should be condoned. The ld. A.R. stated that the reasons given for condonation of delay are not specific and are vague. However, at the same time, ld. A.R. submitted that he does not dispute the contents of the affidavit seriously and submitted Bench may consider the reasonableness of the delay.

3. We have considered the contents of the affidavit filed by the Department to explain the delay in filing this appeal before the Tribunal and also the submissions of the ld. representatives of the parties. Considering the contents of the affidavit, we are of the considered view that delay was due to a reasonable cause and not due to any negligence and/or because of any casualness on the part of the Department. Hence, we condone the delay of 39 days and entertain the appeal on merits.

4. The relevant facts giving rise to this appeal are that the assessee-company is engaged in the business of growing, manufacturing and sale of tea. The assessee-company filed return disclosing value of fringe benefits for an amount of Rs.1,86,52,225/-. Subsequently, the assessee filed revised return showing revised amount of fringe benefit for taxation at an amount of Rs.1,91,81,981/-. In computation of value of Fringe Benefit Tax in the revised return, the assessee-company claimed that since it is engaged in the business of growing and manufacturing of tea, its 40% of profit/loss is assessable under the CentralIncome Tax as per Rule 8 of income Tax Rules, 1962 and balance 60% is assessable under State Agricultural Tax. Accordingly, the assessee claimed that Fringe Benefit Tax is payable on the 40% of total Fringe Benefit Value.

5. The Assessing Officer after considering the submission of the assessee stated that Fringe Benefit Tax is payable by an employer in addition to income tax, if any, and it is payable on the value of fringe benefits, allowed to its employees for which exempt or taxable income is not a factor. The Assessing Officer has stated that if income of an employer is exempted from income tax under section 10, no income tax is payable, but if there are fringe benefits, the employer has to pay Fringe Benefit Tax (FBT). The Assessing Officer has stated that the chargeability of FBT for a part, i.e. @ 40%, of fringe benefits paid to the employees is neither in accordance with provisions of theIncome Tax Act nor is supported by judgment relied upon by the assessee in the case of Suman Tea & Industries Pvt. Ltd. [204 ITR 719 (Cal.)]. It is relevant to state that in the said case it was held that when 40% of income is considered for taxation purposes in view of Rule 8 ofIncome Tax Rules , it is to be considered that 40% of depreciation on written down value of block of assets is actually allowed. In view of the above, the Assessing Officer considered the value of fringe benefit for Rs.5,95,52,870/- as paid by the assessee to its employees as per books of accounts. It is relevant to state that the Assessing Officer deducted sum of Rs.61,96,721/- being contribution to superannuation fund from value of fringe benefit and accordingly computed the fringe benefit tax liability on the balance amount of Rs.5,33,56, 149/-. Being aggrieved, the assesee filed appeal before the firstappellate authority.

6. On behalf of the assessee, it was contended that as per Rule 8 of Income Tax Rules, 1962, only 40% of income from growing, manufacturing and sale of tea becomes chargeable under the Central Income Tax and remaining 60% is chargeable to Agricultural Tax by the concerned State Government, therefore, chargeability of fringe benefit tax should be @ 40% of the total expenditure, i.e. fringe benefit paid to the employees is assessable and not on entire expenses debited to Profit & Loss A/c. On behalf of the assessee, it was also contended that fringe benefit tax is in the nature of additional income-tax, which is paid by the employer with reference to value of fringe

benefit, i.e. perquisite value. The assessee placed reliance on the decision of the Hon'ble Jurisdictional High Court in the case of Jayshree Tea and Industries Ltd. & Another –vs.- Union of India & Others [285 ITR 506] and contended that fringe benefit tax could be imposed only with reference to the expenditure of 40% of the aggregate expenses and allowances incurred. The ld. CIT(Appeals) accepted the contention of the assessee that the fringe benefit tax is nothing but an additional tax levied on income, and stated that in view of provision of Rule 8 of Income Tax Rules, 1962, the expenses only to the extent of 40% would be said to have been actually incurred and/or laid out for the purpose of business whose income is chargeable to tax under CentralIncome Tax. The ld. CIT(Appeals) has also stated that decision of the Hon'ble Jurisdictional High Court in the case of Jayshree Tea and Industries Ltd. & Another (supra), which is in the context ofdividend distribution tax paid under section 115-O of the Income Tax Act applies in respect of the tax levied under section 1 15WA of the Act, i.e. levy of additional tax with reference to value of fringe benefits. Accordingly, the ld. CIT(Appeals) had directed the Assessing Officer to assess fringe benefit with reference to 40% of the expenses incurred and/or laid out in connection with business of growing and manufacturing of tea. Hence, the Department is in further appeal before the Tribunal.

7. Ld. D.R. submitted that fringe benefit tax is in relation to fringe benefits provided by an employer to its employees and it is not a tax on the income of the assessee-employer. The ld. D.R. referred to sub-section (1) and sub-section (2) of section 115WB of theIncome Tax Act and submitted that fringe benefits is in respect of the consideration for facilities provided to employees and it is leviable notwithstanding that there is no profit toan employer. Ld. D.R. submitted that the reliance placed by the ld. CIT(Appeals) on the decision of the Hon'ble Kolkata High Court in the case of Jayshree Tea & Industries Ltd. & Another (supra) is not relevant and is not applicable to the Fringe Benefit Tax payable. She submitted that the said decision is in respect of section 115-O of theIncome Tax Act and it imposes additional income-tax on dividend paying companies. The ld. D.R. submitted that the dividend is paid out of the profits, which is proposed to be distributed by an assessee-company to its shareholders. The ld. D.R. submitted that in the profit 40% is the business income chargeable to tax as per Rule 8 of theIncome Tax Rules, 1962 and, therefore, the Hon'ble Kolkata High Court decided that the additional liability of income tax payable under section 115-O of the Act would be in the same proportion, i.e. 40% of the income distributed by way of profits to the shareholders. Ld. D.R. submitted that there is no similarity between section 115-O, vis-à-vis section 115WA of theIncome Tax Act and the nature of charging fringe benefit tax is different and it is not a charge on the profit of the employer-assessee. Ld. D.R. submitted that similar issue has been considered by ITAT, Kolkata Bench vide order dated 07.01.2011 in ITA No. 556/Kol./2010 in the case of Apeejay Tea Limited –vs.- DCIT. The ld. D.R. submitted that the order of the Assessing Officer should be confirmed by allowing the appeal of the Department.

8. On the other hand, ld. A.R. justifies the order of ld. CIT(Appeals). He submitted that provisions of section 115-O and section 115WA are identical as under both sections, additional income-tax is charged. Ld. A.R. submitted that as per Rule 8 of Income Tax Rules, 1962, only 40% of the income is chargeable to Income Tax Act and the remaining

60% income of the assessee-company is agricultural income and the same is not chargeable to tax. He also referred to section 10(1) of the Income Tax Act and submitted that it specifically provides that agricultural income will not be charged to Income Tax under Income Tax Act. The ld. A.R. submitted that value of fringe benefit is assessed with reference to business expenses incurred by assessee-employer in the course of carrying on its business and, therefore, the value of fringe benefit tax should be computed only in respect of that expenses which is chargeable to Income Tax Act. The ld. A.R. submitted that the decision of the Hon'ble Jurisdictional High Court in the case of Jayshree Tea & Industries Ltd. & Another (supra) applies to the levy of fringe benefit tax as well and, therefore, only 40% of the expenditure incurred is deemed to be actually allowed in arriving at total income chargeable to Income Tax Act and the same should be considered for computing fringe benefit tax. Ld. AR also referred the decision of the Hon'ble Apex Court in the case of CIT –vs.-Doom Dooma India Ltd. [2009] 310 ITR 392 (SC) and submitted that the Hon'ble Apex Court while considering the depreciation allowable to an assessee-company whose business was of growing and manufacturing of tea held that only 40% of the composite income is brought to tax under the Income Tax Act and consequently proportionate depreciation is required to be taken into account because depreciation actually allowed to the assessee is to be considered while considering written down value as per section 43(6) of the Income Tax Act. The ld. A.R. submitted that ITAT, Kolkata Bench while deciding the case of Apeejay Tea Limited (supra) did not consider the aforesaid cases of the Hon'ble Apex Court in the case of Doom Dooma India Ltd. (supra) and decision of the Hon'ble jurisdictional High Court in the case of Jayshree Tea & Industries Ltd. & Another (supra). Hence, the earlier decision of ITAT, Kolkata Bench is not in accordance with law. He submitted that the order of ld. CIT(Appeals) should be confirmed.

9. We have carefully considered the orders of the authorities below and the submissions of the ld. representatives of the parties. We have also carefully considered the provisions of section 115-O as well as provisions of Chapter XII-H relating to income-tax fringe benefits and the cases relied upon by the ld. representatives in support of their submissions.

10. The basic issue in this appeal is as to whether Rule 8 of Income Tax Rules applies to compute taxable value of fringe benefit in the case of assessee-company, which is engaged in the business of growing, manufacturing of tea and sale thereof. There is no dispute to the fact that as per Rule 8 of Income Tax Rules in the case of a tea company, only 40% of the total net income is liable to pay tax under the Income Tax Act at the prescribed rate and the balance 60% is to be considered as agricultural income, which is not liable to be taxed under the Income Tax Act, 1961 as it is within the domain of the State. The thrust of the submission of the ld. A.R. is that fringe benefit tax is an additional tax on the assessee-company and it is in pari materia with the provisions of section 115-O of the Income Tax Act and relying on the decision of the Hon'ble Jurisdictional High Court in the case of Jayshree Tea and Industries Ltd. & Another (supra) submitted that the additional tax liability will also be to the extent of 40% of the expenditure incurred by the assessee and as such fringe benefit tax is to be computed by taking into account 40% of the expenditure claimed by the assessee. We do not find merit

in the contention of the ld. A.R. The decision of the Hon'ble High Court in the case of Jayshree Tea and Industries Ltd. & Another (supra) deals in respect of the provision of section 115-O of the Income Tax Act and it provides that when there is a declaration of dividend out of current or accumulated profit by the Company, it shall be charged to additional income-tax at the prescribed rate. Thus the said additional tax under section 115-O is leviable on distribution of the profits by a Company. Their Lordships of the Hon'ble Jurisdictional High Court has held that in the case of a Tea Company¸ the profit which is proposed to be distributed by the assessee-company to its shareholders as dividend would not only include profit from its business but also from its agricultural activity. It was held that by virtue of Rule 8 of Income Tax Rules, 1962, the net income of the tea company for the purpose of income-tax is 40% of its total income and if there is liability to pay additional tax, the company would pay it in the same manner and in the same proportion. It is evident from the above that when a tea company has its profit, this profit comprises of the profit from the agricultural activity, i.e. growing, manufacture and also from sale of tea. As per Rule 8 of Income Tax Rules, it is provided that the net income so arrived at is to be considered as 40% for the purpose of Income Tax Act; and 60% as agricultural income which is outside the purview of Income Tax Act. However, in the case of fringe benefits tax, it is leviable as per provisions contained in Chapter XII-H of the Income Tax Act. Fringe Benefit Tax, is basically the tax on the expenses incurred by the assessee to provide certain privilege, facility or amenities to its employees. Fringe Benefit Tax is payable even if no tax is payable by an employer. Therefore, FBT is not linked with the income of an employer but it is with reference to the expenditure incurred by the employer on the benefits/ privileges provided to its employees. Hence, we find merit in the contention of the ld. D.R. that there is no similarity between the provision of section 115WA, vis-à-vis section 115-O of the Income Tax Act. In view of the above, we are of the considered view that the decision of the Hon'ble Apex Court in the case of Doom Dooma India Ltd. (supra) relied on by the ld. A.R. is not relevant to the issue before us. On the other hand, the similar issue has been considered by the ITAT, Kolkata Bench vide its order dated 07.01.2011 (supra) and we consider it prudent to refer para-7 of the said order, which is as under :-

"7. We have carefully considered the submissions of the ld. Representatives of the parties and the orders of the authorities below. We have also considered the relevant provisions, i.e. Section 115WA, 115WB & 115WE of the Income Tax Act. We observe that an employer assessee is liable to pay Fringe Benefit Tax under section. 115WA of the Income Tax Act, in relation to Fringe Benefits provided by him to its employees. Sub¬section (2) of section 115WA starts with a non obstante clause and states that notwithstanding that no income-tax is payable by an employer to its total income computed in accordance with the provisions of the Act, the tax on Fringe Benefits shall be payable by such an employer. Therefore, an employer is liable to pay Fringe Benefit Tax even when no income-tax is payable by an employer on his total income computed in accordance with the provisions of the Income Tax Act. Therefore, the contention of the ld. Authorized Representative for the assessee that value of Fringe Benefit should be computed by applying Rule 8 of Income Tax Rule has no merit as Fringe Benefit Tax is not payable on the income of an assessee but only Fringe Benefits provided by an employer to its employees. In view of the above, we agree with the ld. Departmental

Representative that the contention of the ld. Authorized Representative for the assessee has no merit and accordingly, we uphold the order of the ld. CIT(A.) by rejecting grounds of appeal taken by the assessee".

Respectfully following the earlier order of the Coordinate Bench and in the light of the discussion hereinabove, we reverse the order of the ld. CIT(Appeals) and uphold the action of the Assessing Officer by allowing the grounds of appeal taken by the Department.

11. In the result, the appeal of the Department is allowed.

ORDER PRONOUNCED IN THE OPEN COURT ON 06.05.2011.