* **IN THE HIGH COURT OF DELHI AT NEW DE**

\+ **Income Tax Appeal No. 899 of 2010**

Reserved on: 16th November, 2011
% Date of Decision: 24th January, 2012

T & T Motors Ltd. ....Appellant
Through Mr. Pradeep K. Bakshi and
Mr. Rajat Navet, Advocates.
Versus

Assistant Commissioner of Income Tax …Respondent
Through Mr. Kamal Sawhney, Sr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in the Digest ?

SANJIV KHANNA, J.

The present appeal under Section 260A of the Income Tax Act, 1961 (Act, for short) involves the question whether the appellant T&T Motors Pvt. Ltd. is liable to pay Fringe Benefit Tax (FBT, for short) on car accessories provided to the customers, i.e. the car buyers. Revenue submits that FBT has to be paid under Section 115WB(2)(D) as the car accessories were provided by the appellant to the car purchasers free of costs.

2. Vide order dated 26th July, 2010, following substantial question of law was framed:-

> "Whether in the facts and circumstances of the case, the Tribunal was correct in law in holding that Free of Cost (FOC) accessories provided to customers at the time of sale of a car were in the nature of sales promotion expenses and not in the nature of selling expenses?"

3. During the course of hearing on 16th November, 2011, following additional question of law was framed:-

> "Whether free of cost accessories provided to the customers are covered under Section 115WA read with Clause D of Section 115WB(2) of the Income Tax Act, 1961?"

4. The appellant is a car dealer and for the assessment year 2006-07 had filed the return of fringe benefits declaring value of the same at Rs.72,15,677/-. The Assessing Officer held that the car accessories provided free of cost to the customers, on which expenditure of Rs.30,67,696/- was incurred, was in nature of hospitality and covered under Section 115WB(2)(B) and was, therefore, taxable. He, accordingly added an amount of Rs.6,13,539/-, being 20% of the purchase value/ expenditure of Rs.30,67,696/- to the total value of Fringe Benefits as declared by the assessee. The Assessing Officer also observed that providing of free of cost accessories was a promotional scheme to boost car sales.

5. CIT (Appeals) dismissed the first appeal and confirmed the order of the Assessing Officer. He also rejected the contention of the appellant that clause (B) to Section 115WB(2) was not applicable. It

was held that this expenditure was in nature of sale promotion [illegible] generated interest amongst the potential customers.

6. The Income Tax Appellate Tribunal (tribunal, for short) by the impugned order dated 5th February, 2010, has held that the free of cost accessories were provided not after completion of sale but were agreed to by the appellant at the time when the orders were booked. Tribunal referred to the reasons recorded in various invoices which read as "regular buyer"/"up country customer", "discussed at the time of order booking"/"buying 2nd car within one year". It was held that the element of sale promotion was visible and the judgment of Madras High Court in ***Commissioner of Income Tax vs. Tuticorin Alkali Chemicals and Fertilizers***, (2003) 261 ITR 80 (Mad.), relied upon by the appellant was distinguished on the ground that in the present case expenses were incurred for providing free of cost accessories keeping in mind the sale promotion element and the issue in ***Tuticorin Alkali Chemicals*** (supra) was regarding commission and discount on sales.

7. Chapter XIIH under the heading "Income Tax on Fringe Benefits" was inserted by Finance Act, 2005, w.e.f. 1st April, 2006, and remained in the Statute book till 31st March, 2010. The term FBT is defined under and is chargeable under Section 115WA. Section 115WA reads as under:-

> "**115-WA. Charge of fringe benefit tax**.—(1) In addition to the income tax charged under this Act, there shall be charged for every assessment year commencing on or after the 1st day of April, 2006, additional income tax (in this Act referred to as 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 per cent on the value of such fringe benefits.
> (2) Notwithstanding that no income tax is payable by an employer on his total income computed in accordance with the provisions of this Act, the tax on fringe benefits shall be payable by such employer."

8. The aforesaid section is a charging section and states that tax would be chargeable on fringe benefits provided or deemed to have been provided by employers to his employees. One of the contentions raised by the appellant is that customers are not employees and are not deemed to be employees under any of the provisions of Chapter XIIH. The said contention may or may not have merit but for the purpose of present case, we do not think, we are required to go into this larger question. The expression 'fringe benefits' has been defined in Section 115 WB. Sub-section (2) incorporates deeming provisions and clauses (B) and (D) of the same read as under:-

> "**115-WB. Fringe benefits**.—
>
> xxxx
>
> (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:—

xxxx

(*B*) provision of hospitality of every kind by the employer to any person, 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;

(*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;

xxxxx

(*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 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, [billboards, 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;"

9. Clause (B) to sub-section 115WB(2) states that hospitality by an employer to any person whether by way of food or beverages or in any other manner would be deemed fringed benefit except when it is excluded in terms of clauses (i) to (iii).

10. Providing free car accessories cannot be treated as hospitality provided by the appellant to any person. The term "hospitality" as defined in Webster's New Twentieth Century means "the act, practice, or quality of receiving and entertaining strangers or guests in a friendly and generous way." In New Webster Encyclopedic Dictionary of the English language the word "hospitality" has been defined as "receiving and entertaining strangers with kindness and without reward; kind to strangers and guests; pertaining to the liberal entertainment of guests."

11. It is clear from the aforesaid dictionary meanings that in common parlance, the word "hospitality" means kind and generous reception of

strangers or guests. It postulates a quality and disposition of receiving and treating people in warm, friendly or in a generous way.

12. We do not think that in the present case giving of accessories to customers, who have purchased cars, can be regarded as hospitality provided by the appellant. It is stretching the word 'hospitality' beyond its natural meaning and as it understood in business or common parlance.

13. Clause (D) to Section 115WB(2) stipulates that sales promotion including publicity are deemed to be fringe benefit. The term 'sales promotion' and 'publicity' have to be interpreted. These terms have not been specifically defined for the purpose of this Section and, therefore, we have to read them and understand them as used in common parlance or popular sense and then interpret the words 'sale promotion' and 'publicity' with reference to the provisions and the context in which they have been used. Interpretation based upon normal day to day usage and common man understanding of the said terms has to be kept in mind. Both the terms contemplate, expenditure incurred on efforts made to promote sales which can take various forms but are not limited to mere publication or advertisements in media but would include varied activities which can be understood and treated as sales promotion or publicity expenses.

14. In ***Smith Kline and French (India) Ltd. vs. CIT,*** (1992) 193 ITR [illegible] (Karnataka), it has been held that in normal commercial sense and in common parlance sales promotion and publicity are activities to gain goodwill in market. These need not be confined to the act of media propaganda but can involve indirect approaches. In ***CIT vs. Statesman Ltd.*** (1992) 198 ITR 582 (Cal.), it was observed that the term 'sales promotion' occurring under Section 37(3A), necessarily should involve the element of publicity and advertisement to popularize or increase sales.

15. The Supreme Court in ***ESKAYEF vs. Commissioner of Income Tax, Karnataka-II, Bangalore***, (2000) 6 SCC 451, approved the view taken in ***Smith Kline and French's*** case (supra) and held that in the case of prescription drugs, the target of any sale promotion would only be the doctors and distribution of samples of drugs to doctors was to make them aware that such drugs were available in the market and they should prescribe them in appropriate cases. This would tantamount to publicity and sales promotion. The Supreme Court did not approve the view taken in ***CIT vs. Ampro Food Products,*** (1995) 215 ITR 904 (AP), wherein distinction was drawn between bare minimum expenses to carry on the trade [which was followed in ***CIT vs. J&J Dechane***

Laboratories (P) Ltd., (1996) 222 ITR 11 (AP)] and expenditure under the head advertisement and publicity or sales promotion.

16. The object and purpose behind FBT and Section 115WB(2)(D) is different from Section 37(3A). Expenditure incurred as stipulated in clause (i) to (viii) have to be excluded and not to be treated as sales promotion expenditure including publicity. Clause (vii) to Section 115WB(2)(D) expressly stipulates that expenditure on distribution of sample either free of cost or at concessional rate is not sales promotion or publicity for FBT.

17. A careful reading of clause (i), (ii), (iv), (v), (vi) and (viii) of Section 115WB(2)(D) elucidates that the legislature has excluded from FBT expenditure in form of payments to third persons. The exemption in these clauses, it is apparent, has been granted because this is not a fringe benefit which is enjoyed by the "employee/recipient" but it is an expenditure incurred for the purpose of business and the payment is income earned by the third party. In the hands of the said recipient the expenditure is taxable as income earned.

18. We may reproduce the following observations of Madras High Court in ***Tuticorin Alkali Chemicals and Fertilizers*** (supra), wherein it has been held as under:-

> "The term "sales promotion" is not to be confused with the sales actually effected. While "sales promotion" are measures taken by the assessee to promote generally the sales of the products manufactured by it, or dealt with by it, individual sales made in the normal course of business on commercial terms either directly to the customer, or through its wholesale and other dealers to whom, under the terms of trade discounts and commissions are allowed, cannot be regarded as sales promotion. This court in the case of CIT v. India Pistons Ltd. [2001] 250 ITR 279 has held that sale of a product at a discount did not amount to a sales promotion expense. It was observed in that judgment that:
>
> > "The sales promotion normally refers to an activity which is intended to promote the sale of all the products by way of advertisement or special campaigns. Offering a discount on the price in effect is only an instant of the sale of the company's product at a lower price and cannot be regarded as expenditure on sales promotion.""

19. On the basis of factual matrix on record and as found by the Assessing Officer, we are of the view that the expenditure incurred on accessories which were supplied to customers who have purchased cars cannot be treated as sale promotion including publicity expenses under clause (D). In the present case, the said expenditure cannot be categorized as expense incurred for promotion of sales with a view to gain publicity and popularize the product. The customers in the present case have purchased the cars, they have paid money or sale consideration for purchase of cars. As a sales package, the appellant has provided and given some accessories for which no independent or additional charge has been levied. The customer, however, in actual

fact has paid for the said accessories as the cost of the accessor[illegible] inbuilt in the sale consideration paid by the customer. Only when a customer pays the sale consideration, some accessories are provided and fixed in the car as per mutual agreement or on the request made by the customer. Until and unless a customer purchases a car, no accessories are provided or furnished. The customer was not given a largesse but was offered and has managed to get a better deal for the consideration paid. The customer has paid out his of pocket, but he has bargained and secured a favourable deal. The interpretation suggested by the Revenue is contrary to the interest of the customers or public interest. The interpretation as suggested by the Revenue would mean that the car dealer would have to pay FBT, if he enters into and gives a better deal to the customer who purchases a car with extra fitments and accessories. We do not think that it is the intention of the legislature to impose FBT on the car dealer who offers a better deal with fitments and accessories to a customer who is making payment for purchase of the car in question.

20. In this connection, the learned counsel for the appellant had drawn our attention to question No. 60 and the answer thereof in the

CBDT Circular No. 8 of 2005 dated 28th September, 2005, which reads as under:

> "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 Income-tax Act. Accordingly, such discounts or rebates are not liable to FBT."

21. Learned counsel for the respondent, on the other hand, relied upon on the question No. 66 and the answer given in the same circular. Reference is also made to question Nos. 97 and 98 which again for the sake of convenience are reproduced below:-

> "66. Whether expenditure on free offers (with products) such as freebies like tattoos, cricket cards or similar products, to trade or consumers (excluding employees) is liable to FBT? Further, whether expenditure incurred on the artwork or for payment of royalty charges in respect of such freebies is liable to FBT?
>
> **Ans.** Any expenditure (including expenditure on artwork and royalty charges) on free offers (with products) such as freebies like tattoos, cricket cards or similar products, to trade or consumers (excluding employees) is for the purposes of sales promotion and, publicity and accordingly, liable to FBT.

xxx

97. Whether expenditure on gifts under trade schemes or for promotion of company's products to distributors/retailers is liable to FBT?

Ans. Ordinarily, a gift is defined as anything given or presented without consideration. Therefore, expenditure on gifts under trade schemes or for promotion of company's products to distributors/retailers, falls within the scope of the provisions of clause (O) of sub -section (2) of section 115WB and, accordingly, is liable to FBT.

98. Does a gift to customer fall under 'sales promotion' or 'gift'?

Ans. In terms of the rules of interpretation of a statute, a specific provision in law overrides a general provision. Therefore, a gift to a customer, even though for the purposes of sales promotion, would fall within the scope of the specific provision of clause (O) of subsection (2) of section 115WB relating to 'gift'."

22. The contention of the appellant is that the answer to question No.66 given in the CBDT circular is very wide and, goes beyond the scope of the enactment. A purchaser or customer pays for the product including the freebie. In most of the cases to state that the freebie is not being paid for, is a myth and factually incorrect. Interpretation suggested by the appellant/Revenue is debatable. We confine ourselves to the factual matrix of the present case. We do not think that the answer to question No.66 can be applied to the present case. In the present case, it will be more appropriate to apply the answer to question No.60. Cars have a number of gadgets, fittings and accessories. Car does not consist of mere body and engine. Accessories,

fittings and gadgets are normally treated as part and parcel of the vehicle itself. Cars with same or similar body and engine have different models depending upon the features and accessories. The cost price depends upon the features and accessories. Question No.66, which has been answered, relates to tattoos, cards or similar products, which really do not have any connection or nexus with the product which is sold. The car accessories are provided for better enjoyment and utilization of the product, which is purchased. The utility of the product improves and gives more satisfaction to the purchaser, who is paying the price. In answer to question No.60, the CBDT has observed that discounts cannot be treated and regarded as sale promotion. It is a common and normal market practice, to supply upgraded products for a lower price or include extra quantity in the same price and state that the additional quantity, which is being offered, is free. Such cases will be covered by the question and answer No. 60 and not by the question and answer No. 66.

23. In the present case, the Revenue did not invoke clause (O) to sub-section (2) to Section 115WB. It was not the contention of the Revenue that the accessories given free of cost as gifts. This is rightly so as gifts are given or presented without consideration. Consideration, in the

present case is inbuilt as per person/customer is paying consideration for purchase of the car. For gift under clause (O), the same should be paid without consideration. There is no finding to this effect by the Assessing Officer or by the tribunal. The accessories given or installed in the car by the appellant were akin to providing discount or rebate, instead of said amount being paid in cash or being reduced from the sale price, accessories were provided, but no specific payment was made for the accessories installed. These cannot be classified as gifts for which no consideration has been paid by the customers.

24. In view of the aforesaid reasoning and discussion the two questions of law mentioned above are answered in negative and in favour of the appellant and against the respondent-Revenue. In the facts of the present case, there will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(R.V. EASWAR)
JUDGE

January 24th , 2012
kkb