IN THE INCOME TAX APPELLATE TRIBUNAL "E", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM
&
SHRI RAM LAL NEGI, JM

ITA No.3585/Mum/2016
(**Assessment Year :2011-12**)

M/s. Solvay Pharma India Ltd., Now Merged with Abbott India Ltd., 3-4 Corporate Park Sion Trombay Road Mumbai – 400 071``	Vs.	PR CIT RG-2 Aayakar Bhavan Mumbai
PAN/GIR No.AAACBV5170B		
Appellant)	..	**Respondent**)

Assessee by	Shri Madhur Agarwal
Revenue by	Shri Manjunatha Swamy
Date of Hearing	**06/11/2017**
Date of Pronouncement	**11/01/2018**

आदेश / O R D E R

***PER R.C.SHARMA (A.M)*:**

This is an appeal filed by the assessee against the order of CIT-2, Mumbai dated 30/03/2016 for A.Y.2011-12 in the matter of order passed u/s.263.

2. In this appeal, assessee is aggrieved by the order of CIT holding that order passed by the AO is erroneous and prejudicial to the interest of revenue.

3. Rival contentions have been heard and record perused.

4. In the order passed u/s.263, CIT observed that the assessee has incurred Advertisement Expenses of Rs.25,02,929/- and Publicity and

Propaganda Expenses to the tune of Rs,15,94,99,360/-. The assessee although vide letter dated 19.02.2015 in the footnote has mentioned that the Advertisement Expenses are in compliance with the CBDT Circular No.5/2012 dated 01.08.2012, but no further details have been furnished. The AO neither called for the books of accounts nor called for any evidence such as invoices, vouchers etc. The assessee was neither asked to file by the AO nor suo-motto filed any corroborative details in respect to Publicity and Propaganda Expenses amounting to Rs.15,94,99,360/-. As per CIT it is a case of ack of proper enquiry and decision. If any expenditure is incurred U/s 37 of the Act, especially those expenditure which the business entities incur on items, which may broadly be classified as 'Advertisement, Marketing and Business Promotion[7] in short AMP, the possib lity of incurring expenditure on prohibited items as per explanation below section 37(1) of the Act exists which must be ruled out by some examination of corroborative evidence called for and produced before the AO. But the AO did not make any inquiry in this matter. CIT also rejected assessee's contention that MCI regulations are not applicable to pharma companies but only to medical practitioners. CIT also rejected assessee's contention that expenditure so incurred are not in the nature of freebies to the doctors. In these circumstances, the assessment order dated 08.03.2015 was held by CIT to be erroneous and prejudicial to the interest of revenue. Assessee is in further appeal before us.

5. It was argued by learned AR Mr. Madhur Agarwal that during the course of assessment, AR of the assessee had submitted the details as required by the AO (including details of expenditure incurred on advertisement amounting to Rs 25,02,929 and publicity & propaganda amounting to Rs 15,94,99,360) vide letter dated 19 February 2015.

6. It was further submitted that the AO then analyzed various details furnished by the AR. and discussed verbally with the assessee in order to seek clarification regarding the nature o expenses incurred and accordingly passed the order dated 1st March 2015.

7. As per learned AR, in view of the above, it will be appreciated that the details of expenditure in connection with advertisement and publicity & propaganda were specifically called for and examined during the course of assessment proceedings and hence there is no question of revising the order under section 263 on the said issue. Further, there is no warrant whatsoever fo invoking the provisions of section 263 as the assessment order is neither erroneous nor prejudicial to the interest of revenue.

8. Learned AR also invited our attention to the order of Tribunal in the case of Syncom Formulations (I) Ltd., in ITA No.6429 & 6428/Mum/2012 for the A.Y.2010-11 and 2011-12 dated 23/12/2015 wherein similar expenditure was allowed by observing that CBDT Circular dated 01/08/2012 was not applicable for the assessment years under consideration, because it was introduced w.e.f. 01/08/2012 i.e. A.Y.2013-

14, whereas the relevant assessment year under consideration was 2010-11 and 2011-12.

9. Reliance was also placed on the decision of the Co-ordinate Bench in case of PHL Pharma (P) Ltd., dated 12/01/2017 wherein similar expenditure was examined threadbare by the Tribunal.

10. It was further argued by learned AR that were two views are possible and the AO has taken one of the of the possible view, the CIT has no jurisdiction u/s.263 so as to impose his opinion

11. It was also argued by learned AR tha MCI guidelines are not applicable to the pharma company but is applicable only to the professional doctors in practice and accordingly when circular itself is not applicable to the assessee company during the assessment under consideration, the assumption of jurisdiction u/s.263 by CIT was wrong. Our attention was also invited to the detailed submission filed before the AO which is placed on page 20-28 of the paper book and also to the foot note where it was clearly mentioned that these expenses were in compliance to the CBDT Circular. It was further submitted that perusal of amendment/notification in the MCI regulation, it is quite clear that same is applicable for medical practitioners only and the censure/action which has been suggested by it is only on medical practitioners and not for pharmaceutical companies or allied health sector industries. The violation of the aforesaid regulation would not only ensure a removal of a doctor from the Indian Medical Register or State Medical Register for a certain

period of time and it does not impinge upon the conduct of pharmaceutical companies. This important distinction has to be kept in mind that regulation issued by Medical Council of India is qua the doctors/medical practitioners and not for the pharmaceutical companies. As a logical corollary to it, if there is any violation or prohibition as per MCI regulation in terms of section 37(1) read with Explanation-1, then it is only meant for medical practitioners and not for pharmaceutical company (assessee company) for claiming the expenditure. Further highlighting the nature of expenses Mr. Madhur Agarwal submitted that the assessee makes endeavour to create awareness amongst certain class of key doctors about the products of the assessee and the new developments taking place in the area of medicine and providing correct diagnosis and treatment of the patien s. The said activities by the assessee are to make the doctors aware of its products and research work carried out by it for bringing the medicine in the market and its results are based on several levels of tests and approvals. Unless the pharmaceutical companies make aware of such kind of products to key doctors or medical practitioners, then only it can successfully launch its products/medicines. This kind of expenditure is definitely in the nature of sales and business promotion, which has to be allowed. With regard to the gift articles and free samples of medicines, the assessee gives various kind of articles like, diaries, pen sets, calendars, paper weights, injection boxes etc. embossed with bold logo of its brand name and the product

name so that the doctors remembers the brand of the assessee and also the name of the medicine. All the gift articles are low cast articles which bears the name of assessee and it is purely for the promotion of its product, brand reminder, etc. These articles cannot be reckoned as freebies given to the doctors. Even the free sample of medicine is only to prove the efficacy and to establish the trust of the doctors on the quality of the drugs. This again cannot be reckoned as freebies given to the doctors but for promotion of its products. The pharmaceutical company, which is engaged in manufacturing and marketing of pharmaceutical products, can promote its sale and brand only by arranging seminars, conferences and thereby creating awareness amongst doctors about the new research in the medical field and therapeutic areas, etc. Every day there are new developments taking place around the world in the area of medicine and therapeutic, hence in order to provide correct diagnosis and treatment of the patients, i is imperative that the doctors should keep themselves updated with the latest developments in the medicine and the main object of such conferences and seminars is to update the doctors of the latest developments, which is beneficial to the doctors in treating the patients as well as the pharmaceutical companies.

12. It was also argued that MCA guidelines do not apply for invoking explanation to Section 37(1). The said regulation deals with the professional conduct, etiquette and ethics for registered medical practitioners only. Chapter 6 of the said regulation/notification deals with

unethical acts, whereby a physician or medical practitioners shall not aid or abet or commit any of the acts illustrated in clauses 6.1 to 6.7 of the said regulation which shall be construed as unethical. Clause 6.8 has been added (by way of amendment dated 10/12/2009) in terms of notification published on 14/12/2009 in Gazette of India laying down the code of conduct for doctors and professional association of doctors in their relationship with pharmaceutical and allied health sector industry. It was further contended that the code of conduct enshrined therein is meant to be followed and adhered by medical practitioners/doctors alone. It illustrates the various kinds of conduct or activities which a medical practitioner should avoid while dealing with pharmaceutical companies and allied health sector industry. It provides guidelines to the medical practitioners of their ethical codes and moral conduct. Nowhere the regulation or the notification mentions that such a regulation or code of conduct will cover pharmaceutical companies or health care sector in any manner.

13. Our attention was also invited to the nature of the expenditure incurred which clearly indicate that these expenditures were for promotion of business and are not covered by the explanation to Section 37(1).

14. Reliance was also placed by learned AR on the decision of Bombay High Court in the case of Gabrial India Ltd., in support of the contention.

15. On the other hand, it was argued by learned CIT DR Mr. Manjunath Swamy that assessment order did not whisper on the huge expenditure

so claimed by the assessee which has been considered by CIT in his order u/s.263. As per learned CIT DR, AO has not formed any opinion on this issue which clearly implies that no enquiry has been made by the AO, therefore, action of the CIT in branding the order as erroneous and prejudicial to the interest of the Revenue is fully justified.

16. Reliance was placed by learned DR on the decision of Delhi High Court reported at 99 ITR 375 in the case of Horizon Investment Company reported at 187 ITR 401. Further reliance was placed on the following judicial pronouncements:

1) CIT V. Ballarpur Industries Ltd.,
ITR No. 27 of 2007 (Bombay High Court)
2) Jai Steel India V. Asstt Comm ssioner of lncome-tax
(2013) 259 CTR (Raj) 281 (High Court of Rajasthan at Jodhpur)
3) Rajmandir Estates Pvt Ltd. Vs. Pr. CIT 77 Taxmann.com 285 (Supreme Court)
4) Intas Pharmaceuticals Ltd. V. Dy, C.I.T., Cent. [2013] 33 Taxmann.com 38 (Ahmedabad - Trib.)
5) Commissioner of Income-tax V. Ashok Logani [2011] 11 Taxmann.com 28 (Delhi High Court)
6) Bassera Realtors (P.) Ltd. Vs. Commissioner of Income-tax [2015] 55 Taxmann.com 327 (Chandigarh - Trib.)
7) Subhalakshmi Vanijya (P.) Ltd. V. C.I.T. [2015] 60 Taxmann.com 60 (Kolkata - Trib.)
8) Arvee International Vs. Addl. C.I.T. ITA No. 3543/Mum/2003

17. We have considered rival contentions and carefully gone through the orders of the authorities below. We had also deliberated on the judicial pronouncements cited by learned AR and DR during the course of hearing before us as well as referred by CIT in his order passed u/s.263 of the IT Act, in the context of factual matrix of the case. In this case, we found from record that the assessee is engaged in the manufacturing of

pharmaceutical products. In the course of its business it has incurred expenditure on advertisement and publicity. While framing the assessment, AO has called for the detail of expenditure so incurred and examined the nature of expenditure and thereafter only AO has allowed the expenditure as having been incurred for the purpose of business. We had also carefully gone through the notification dated 11/03/2002 notifying the regulations issued by the Medical Council of India (MCI). The code of conduct laid down in the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 ('MC Regulations') issued with effect from 10th December 2009 applies only to doctors and not to Pharmaceutical and Medical dev ce companies. Accordingly, MCI Regulations are not applicable to assessee, the question of assessee incurring expenditure in alleged violation of the regulations does not arise.

18. On the plain and simple reading of the provision of the Indian Medical Council Act, 1956, it is apparent that the ambit of statutory provisions relating to professional conduct of registered medical practitioners under the Indian Medical Council Act, 1956 is restricted only to persons registered as medical practitioners with the State Medical Council and whose names are entered into the Indian Medical Register maintained u/s 21 of the Act. 'Under the scheme of the Act.

19. Furthermore, there is no ambiguity of any kind in the scheme of the Indian Medical Council Act, 1956 that it neither deals with nor provides for any conduct of any association / society and deals only with the conduct

of individual registered medical practitioners. There is no other interpretation, which is possible under the Act.

20. The intent of the applicability of the MCI Regulations was always to cover only individual medical practitioners, and not the pharmaceutical and medical device companies. Whether there is any contravention of the MCI Regulations or not is a matter which can be decided by the MCI itself and not by the Income-tax Department. Furthermore, the MCI has itself admitted that it has no jurisdiction whatsoever over any association/ society etc and its jurisdiction is confined only to the conduct of the registered medical practitioners. Furthermore, since the said MCI Regulations 2002 contains punitive "provisions, it has to be read strictly and consequently it can apply only to Medical Practitioners and Physicians and not to the pharmaceutical companies. Further, MCI Act, 1956 does not apply pharmaceutical companies and consequently MCI Regulations 2002 cannot apply to such companies.

21. CBDT Circular no. 5 of 2012 seeks to disallow expenditure incurred by pharmaceutical companies inter-alia in providing 'freebies' to doctors in violation of the MCI Regulations. The term "freebies' has neither been defined in the Income-tax Act nor in the MCI Regulations'. However, the expenditure so incurred by assessee does not amount to provision of 'freebies' to medical practitioners. The expenditure incurred by it is in the normal course of its business for the purpose of marketing of its products and dissemination of knowledge etc and not with a view to giving

something free of charge to the doctors. The act of giving something free of charge is incidental to the main objective of product awareness. Accordingly, it does not amount to provision of freebies. Consequently, there is no question of contravention of the MCI Regulations and applicability of Circular no. 5 of 2012 for disallowance of the expenditure.

22. The department has not brought anything on record to show that the aforesaid regulation issued by Medical Council of India is meant for pharmaceutical companies in any manner. On the contrary, the assessee has brought to the notice of the bench the judgment of the Delhi High Court in the case of Max Hospital v. MCI in [WPC 1334 of 2013, dated 10-1-2014], wherein the Medical Council of India admitted that the Indian Medical Council Regulation of 2002 has jurisdiction to take action only against the medical practitioners and not to health sector industry. From the aforesaid decision, it is ostensibly clear that the Medical Council of India has no jurisdiction to pass any order or regulation against any hospital or any health care sector under its 2002 regulation. So once the Indian Medical Council Regulation does not have any jurisdiction nor has any authority under law upon the pharmaceutical company or any allied health sector industry, then such a regulation cannot have any prohibitory effect on the pharmaceutical company like the assessee. If Medical Council regulation does not have any jurisdiction upon pharmaceutical companies and it is inapplicable upon Pharma companies like assessee then, where is the violation of any of law/regulation? Under which

provision there is any offence or violation in incurring of such kind of expenditure.

23. Now coming to the Explanation to Section 37(1) invoked by the CIT, the Explanation provides an embargo upon allowing any expenditure incurred by the assessee for any purpose which is an offence or which is prohibited by law. This means that there should be an offence by an assessee who is claiming the expenditure or there is any kind of prohibition by law which is applicable to the assessee. Here in this case, no such offence of law has been brought on record, which prohibits the pharmaceutical company not to incur any development or sales promotion expenses. A law which is applicable to different class of persons or particular category of assessee, same cannot be made applicable to all. The regulation of 2002 issued by the Medical Council of India (supra), provides limitation/curb/prohibition for medical practitioners only and not for pharmaceutical companies. Here the maxim of 'Expressio Unius Est Exclusio Alterius' is clearly applicable, that is, if a particular expression in the statute is expressly stated for particular class of assessee then by implication what has not been stated or expressed in the statute has to be excluded for other class of assessee. If the Medical Council regulation is applicable to medical practitioners then it cannot be made applicable to Pharma or allied health care companies. If section 37(1) is applicable to an assessee claiming the expense then by implication, any impairment caused by Explanation 1 will apply to that assessee only. Any impairment

or prohibition by any law/regulation on a different class of person/assessee will not impinge upon the assessee claiming the expenditure under this section.

24. We observe that the CBDT Circular dated 1-8-2012 (supra) in its clarification has enlarged the scope and applicability of 'Indian Medical Council Regulation 2002' by making it applicable to the pharmaceutical companies or allied health care sector industries. Such an enlargement of scope of MCI regulation to the pharmaceutical companies by the CBDT is without any enabling provisions either under the provisions of Income Tax Law or by any provisions under the Indian Medical Council Regulations. The CBDT cannot provide casus omissus to a statute or notification or any regulation which has not been expressly provided therein. The CBDT can tone down the rigours of law and ensure a fair enforcement of the provisions by issuing circulars and by clarifying the statutory provisions. CBDT ci cula s act like 'contemporanea expositio' in interpreting the statutory provisions and to ascertain the true meaning enunciated at the time when statute was enacted. However the CBDT in its power cannot create a new impairment adverse to an assessee or to a class of assessee without any sanction of law. The circular issued by the CBDT must confirm to tax laws and for purpose of giving administrative relief or for clarifying the provisions of law and cannot impose a burden on the assessee, leave alone creating a new burden by enlarging the scope of a different regulation issued under a different act so as to impose any kind of hardship

or liability to the assessee. In any case, it is trite law that the CBDT circular which creates a burden or liability or imposes a new kind of imparity, same cannot be reckoned retrospectively. The beneficial circular may apply retrospectively but a circular imposing a burden has to be applied prospectively only. Here in this case the CBDT has enlarged the scope of 'Indian Medical Council Regulation, 2002' and made it applicable for the pharmaceutical companies. Therefore, such a CBDT circular cannot be reckoned to have retrospective effect. The free sample of medicine is only to prove the efficacy and to establish the trust of the doctors on the quality of the drugs. This again cannot be reckoned as freebies given to the doctors but for promotion of its products. The pharmaceutical company, which is engaged in manufacturing and marketing of pharmaceutical products, can promote its sale and brand only by arranging seminars, conferences and thereby creating awareness amongst doctors about the new research in the medical field and therapeutic areas, etc. Every day there are new developments taking place around the world in the area of medicine and therapeutic, hence in order to provide correct diagnosis and treatment of the patients, it is imperative that the doctors should keep themselves updated with the latest developments in the medicine and the main object of such conferences and seminars is to update the doctors of the latest developments, which is beneficial to the doctors in treating the patients as well as the pharmaceutical companies.

25. In view of the above discussion, we do not find any merit in the order passed u/s.263.

26. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on this 11/01/2018

Sd/-	**Sd/-**
(RAM LAL NEGI)	**(R.C.SHARMA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 11/01/2018
Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai